NOT DESIGNATED FOR PUBLICATION

OYSTER LANDS LEASING, INC.	*	**NO. 2001-CA-0738**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
PHILLIPS PETROLEUM CO., ET AL.	*	**STATE OF LOUISIANA**
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 37-839, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Dennis R. Bagneris, Sr., and Judge Terri F. Love)

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AFFIRMED

Phillips Petroleum Company ("Phillips') and Herman F. Bailey, Jr., (" Bailey") seek to reverse the trial court's judgment rendered in favor of Oyster Lands Leasing, Inc, (" O.L.L."). We affirm.

-STATEMENT OF THE CASE-

This preceding arises out of a dispute between O.L.L, an oyster fishing company-holding shell leases in Cyprien Bay in Plaquemines Parish and Phillips. Phillips holds mineral leases and operates oil collection activities in Cyprien Bay along side of the plaintiff.
Plaintiff/Appellant/Appellee brought suit against Phillips claiming that the defendant's negligent and roughshod operation of their oil facilities caused

extensive damage to five oyster beds to which they hold leases. Plaintiffs allege that Phillips failed to take any necessary precautions to prevent the damage to the oyster beds. The defendants argue that they were not negligent and that they took the necessary steps to prevent damage to the oyster beds. Further, defendants argue that the plaintiffs did not have a cause of action nor a right of action under Louisiana law due to the plaintiff's failure to effectively record their oyster leases and failure to obtain the consent of private co-owners. After a bench trial, the trial court found in favor of the plaintiff Oyster Lands Leasing, and awarded damages in the amount of $119,152.60 plus interest from the date of the original demand. Defendants appeal the judgment of the trial court and the plaintiffs appeal the amount awarded in damages by the trial court.

-FACTS OF THE CASE-

O. L. L. owns leases to multiple water-bottom areas including the five at issue in this case. Phillips purchased the oil fields within which these leases are located and began oil exploration activities. These activities include digging access channels for movement of eight oil rigs, barges and other equipment, the digging of a pipeline to connect to the central facility in the bay which is owned by Phillips, pipeline removal and other flow line

work.

-PARTIES' ARGUMENTS-

-A. Phillips no cause of action claims-

The appellant, Phillips Petroleum argues that the plaintiffs have no cause of action and no right of action because they failed to record two of the leases in conformity with Art. 56:423(B) of the Louisiana Revised Statues. Further, Phillips alleges that O.L.L. failed to obtain consent of private co-owners of the other three leases in question. This failure, according to Phillips, means that the plaintiff's claim to the water bottoms is in effect, subservient to Phillip's mineral rights in the water-bottoms.

Starting with the unrecorded leases, Art. 56:423(B) states:

> 56:423(B)(1) "A lessee of oyster beds or grounds who has obtained, recorded, and marked his lease in compliance with the law shall have the right to maintain an action for damages against any person, partnership, corporation or other entity causing wrongful or negligent injury or damage to the beds or grounds under lease to such lessee." **(Emphasis added)**

According to the defendant's argument under it's peremptory exception no cause of action defense, since the plaintiff has failed to record these two leases until 1988, the plaintiff is unable to bring suit for damages against Phillips for any damage whether negligently caused or otherwise. Phillips argues that the plain language of §56:426(D) makes plaintiff's

previous unrecorded leases subordinate to Phillips mineral leases, which were granted by the state in 1928. L.A. R.S. 56:426(D) states:

> "All leases of water bottoms for oyster culture previously granted and not filed and recorded as provided for in this subpart . . . shall be subordinate to the rights of the state of Louisiana, its agencies and lessees, with respect to the granting of mineral and shell leases in the exercise of rights thereunder."

In support of their argument, Phillips points to *G.I. Joe, Inc. v. Chevron USA Inc.*, 561 So. 2d. 62 (La. App. 4th Cir. 1983). In that case, which is similar to this one, Chevron attempted similar defenses against a sublessee of oyster bottoms. The court held that 56:423(B) only applied to lessees and not a sublessee where the leaseholder had previously recorded the lease as per the statutory requirement. In short, this case held that a sublessee is not required to re-record the lease in order to have a cause of action. The court noted though that the statute "explicitly requires a lessee to record a lease in the public records in order to assert a 'right' of action". *G.I. Joe, Inc. v. Chevron USA ,supra*.

Plaintiff responds that 29195 and 29186 are not new leases but are renewal leases under Art. §56:426(D) and were automatically renewed as per §56:428(B). Plaintiffs argue that because these leases were previously held leases and not new, they are free from the restraints of §56:423(B).

Phillips responds to the plaintiffs' arguments by stating that the

plaintiff misconstrues the circumstances surrounding the granting of these renewal leases. Phillips argues that there is none of the leases mention or state that they are a continuation of previous leases. Phillips argues that more than just the number of the lease changed but that there were materials changes to the acreage. Phillips lists only leases number 28141 but the wording suggests that other leases changed materially as well. According to Phillips' argument, changes such as increasing the acreage constitute the formation of a new contract not subject to the lease renewal provisions. Defendants rely on *Jurisich v Jenkins*, 749 So. 2d 597, 601 (La. 1999) for this contention.

Phillips' second contention that O.L.L. leases were actually co-owned by private parties and that upon issuance of state leases to O.L.L., the plaintiffs failed to obtain unanimous consent from the parties. Defendants urge, "If fewer than all the co-owners purport to grant a servitude over the entire estate held in common 'its execution is suspended' until the consent of all the co-owners is obtained. (quoting A. Yiannopolulos, *Louisiana Civil Law Treatise, Predial Servitudes*, §116 (1983). Defendants argue that this prevents O.L.L. from bringing this action against Phillips because the leases have no effect as to them.

As to the issue of consent, the plaintiffs respond that they have never

received any objections to their cultivation and the owners have not taken any actions to prevent this cultivation.

Phillips reiterates that plaintiff's have not received consent of the private co-owners of the water-bottoms and that contrary to the plaintiff's assertion, consent may not be gained by acquiescence but must be recorded in an instrument expressing their consent. This they claim, has not yet happened and renders the plaintiff's claims suspended as to any damage caused on their leaseholds by the defendants.

Addressing the court, the defendants argue that they do have standing to contest any imperfection or defect in the plaintiff's claim that allow them to defeat this claim. Phillips argues that the plaintiffs have no viable claim to damages because of their failure to obtain consent from all private owners and because they failed to record the leases and therefore they properly bring a no cause of action/no right of action as a defense.

- B. SUFFICIENCY OF EVIDENCE-

The appellant argues that the evidence of damage to the oyster leases put forth by the plaintiff was insufficient as a matter of law, to allow a court to rule in favor of the plaintiff. Phillips attacks the plaintiff's evidence on several grounds. First, Phillips argues that because both the plaintiffs and

Phillips has lease rights to the land in question, the burden on proof on the plaintiff is increases. Next, Phillips argues that the plaintiff failed to show that the work done by Phillips caused the damage to the fields and that they failed to show a duty of care by the defendant Phillips. Phillips argues that the expert witnesses put forth by the plaintiffs failed to meet the standards for admissibility and was simply the expert's conclusory testimony. Phillips argues that the plaintiffs failed to show that the testimony relied on sound scientific procedures or accepted economic theories.

The plaintiff counters, not surprisingly, that the evidence put forth was more than sufficient to prove liability. O.L.L. argues that it put forth both expert testimony and video footage of the defendant's operation in action showing both the manner of conduct and the damage resulting from these activities. The plaintiff argues that the experts put forth by them satisfy the *Daubert* test set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The criteria set out in this test include 1. Testability 2. Peer review 3. Rate of error, and 4.accepted methodology. Plaintiffs note the extensive experience of their experts including Jack Fowler, a geotechnical engineer with 35 years of experience with the Army Corp of Engineers. Plaintiffs point out that testimony by the defendant's experts agrees in many instances with those of the plaintiff's experts.

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The trial court rejected the plaintiff's measure of damages as incorrect and stated that current case law sets out the measure of damages as "the value of those oysters that would have been harvested less the costs of production, just as in the case of crop damage" see generally *Skansi v. Signal Petroleum*, 375 So. 2d 965 (La. App. 4 Cir. 1979). The trial court stated that it repeatedly invited the plaintiffs to address this issue of total oysters killed in relation to the amount of oysters that would have been harvested. The plaintiffs failed to do this according to the trial court.

The trial court read *Tesvich v. 3-A's Towing* (La. App. 4 Cir.) as being inconsistent with *Inabnet v. Exxon* Corp., 642 So. 2d 1243 (La. 1994), which recognized the right of the leaseholder to recover the loss of anticipated income from the production of oysters. The trial court distinguished the present case from *Tesvich* in two grounds First, unlike the plaintiffs in *Tesvich,* O.L.L. was "no mom and pop" setup. They were involved in a major production of oysters. And, secondly, the court found a distinction between those producers who rely on naturally seeded acreage to harvest their oysters and those that put time and expense into seeding the beds only to have those oysters killed by defendant's activities.

The court held that where the plaintiff has gone to the trouble to seed the beds, it is immaterial that they had other beds to pull from for that year to meet production capability. Therefore the court presumed that while they may not have harvested in the given year, the plaintiff would have harvested 100% by the end of the lifespan of the oyster bed destroyed. The court's analysis focuses on the meaning of the word "production".

As to the actual award, the court rejected the plaintiff's expert's estimate as being excessive. Based on historical data, the court noted that in prior years where figures were available, only $250,000-$300,000 was brought in due to production of all 14 leaseholds. The estimate by Brotman (plaintiff's expert) was an average of over $300,000 from the five leaseholds alone. The court gave the benefit of doubt to the plaintiffs that they would have harvested far above what they actually harvested but for the

defendant's activities. Because the court had no empirical data from which to work, the court awarded 10% of what the plaintiff requested. The court rejected any claims to restoration of the beds because plaintiff failed to offer any evidence of the cost of such restoration. Finally, the court awarded legal interest from the date of original judicial demand in 1993.Using figures collected by the defendant and making certain adjustments, the plaintiff (through his expert) came up with a figure of $1,191,526 as damages. The plaintiff relied on *Inabnet v. Exxon* Corp., *supra*. for the contention that the measure of damages is "the value of the leasehold interest before and after the dredging, and not by the cost of totally rebuilding the water bottoms to their former condition*." Id.* at 1257.
In the alternative, the Appellant, Phillips, argues that the award of damages is arbitrary and that the plaintiffs failed to provide sufficient proof of their loss for the court to come to an award decision. Phillips argues that the court had no empirical data to work from and the award should be overturned.

-ANALYSIS-

A Court of Appeal may not aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong". *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Stobart v. State through DOTD*, 617 So.2d 880 (La.1993). The Supreme Court, in Mart *v. Hill,* 505 So.2d 1120,1127 (La.1987), set forth a two-part test for the reversal of a factfinder's determinations:

(1) The appellate court must find from the record that a reasonable factual basis does not exist for the trial court's finding.

(2) The appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).

An appellate court must do more than simply review the record for some evidence, which supports or controverts the trial court's finding. > Id. Appellate courts must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. The issue to be resolved by the trial court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusions were a reasonable one. See generally, Cosse v. Allen-Bradley Co., 601 So.2d 1349, 1351 (La.1992); Housley *v. Cerise*, 579 So.2d 973 (La.1991); Sistler *v. Liberty* Insurance Company, 558 So.2d 1106,1112 (La.1990). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable inferences of fact should not be disturbed upon review, in absence of manifest error or clearly wrong. Id.

In the instant case, in the trial court's reason for judgment, the court stated that the video evidence alone gives the impression that the defendants had strip-mined the area. Further, the trial court ruled in favor of the plaintiff, O. L.L., on the basis that evidence presented including expert testimony by both parties clearly showed "direct impact" to some of the plaintiff's leases with "significant siltation-induced mortality to others."

The trial court held that while the defendant's experts disputed the claims as to damage, their testimony was clearly contrary to the evidence presented. This evidence included video taped footage of Phillips in action showing a rig that had run aground. Another instance shows rigs digging near one of the plaintiff's leases without containment equipment and other instances showing the effect of the spoil being dumped into the bay.

The trial court opined that the evidence shows that the defendant operated with "a total disregard for the environment of the bay" and in violation of regulations contained within the defendant's permits. Further, the testimony by expert witnesses showed that Phillips was "negligent in it's operations and showed a flagrant disrespect for sensitive ecology of the - area."

The trial court with regard to the conflicting expert witnesses held that those opinions put forth by experts for Phillips were in conflict with the clear implications of the evidence. The standard of review as to the admissibility of expert witnesses under La. C.E. 702 is the abuse of discretion/ clear error standard. *Ballam v. Seibels Bruce Insurance Co*., 712 So. 2d 543 (La. App. 4 Cir. 1998). This standard requires that the decision of the trier of fact should be upheld unless clearly wrong. The decision should not be overturned merely because the reviewing court would reach a

different result itself as long as a reasonable person could reach the result reached by the trial court. In this case, the plaintiff's experts have extensive experience in the field and many of the conclusions reached by the experts are supported, either by other evidence including videotape evidence, or by the opinions of the defendant's on witnesses. On this issue, the decision of the trial court should be upheld.

-STANDING AND NO CAUSE/RIGHT OF ACTION-

On the issue of defendant's standing to contest the plaintiff's ownership and perfection of title to the leased areas, the trial court rejected this defense without any reason other than that defendant lacks standing. The trial court did not elaborate as to why they lacked standing but further stated that it was convinced that the plaintiff has title with full warranty and that in any case the plaintiff is given a right to assert its claims under La C.C. art. 2315 and La. R.S. 56:423.

As noted in the arguments of the parties, the defendant, Phillips Petroleum, raised neither the defenses of no right of action nor the defense of no cause of action as to the plaintiff. The trial court erred in finding that

the defendant did not have standing to assert these claims. The right of a defendant to raise these defenses was recognized in a similar case *G.I. Joe, Inc. v. Chevron U.S.A Inc.*, *supra*. The no right of action defense "tests whether the plaintiff has any interest in judicially enforcing the right asserted." *Id.* at 63. As the owner of the leases in question, O.L.L. has a real and legitimate interest in bringing this action. The more difficult question is whether the plaintiff has a cause of action or whether that action is barred by their failure to record the leases or obtain consent from the co-owners of the water-bottoms. The court did not explicitly discuss this issue but maintained that the plaintiffs did have title to the leases.

As to the consent of the parties, the plaintiff did not obtain explicit and written consent from the co-owners to harvest oysters from the water bottoms. But as the plaintiff's point out, they obtained the leases in question previously from the very co-owners. The defendant attempts to argue that the plaintiffs did not receive consent for the present, renewed leases. But as the leases themselves contain a right of renewal, the owners must have realized that the plaintiff's would probably continued to farm beyond the present leases. To hold the plaintiffs to the standard of requiring them to obtain consent would be unfair. The purpose of this requirement is to protect the interests of property owners not to allow tortfeasors to escape liability for damage they caused. As to the failure to record two of the leases, it is unclear whether the leases are renewal leases or not from the record. But the defendants have put forth evidence that the leases have never been recorded as required under 56:423(B). The purpose of this requirement appears to be to give notice to others in the area to protect them from liability from damaging oyster beds. *Id.* at 63.

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Oyster Lands Leasing contends the trial court applied an

incorrect method of calculating damages and that the award of damages was insufficient and contrary to the evidence presented at trial. The plaintiff misinterprets *Inabnet* by arguing that the measure of loses is a measure of the leasehold interest before and after dredging. The plaintiff fails to realize that this part of the *Inabnet* decision that deals with the award of damages for the restoration of the water bottoms not the award of damages for lost production. While the trial court distinguishes the present case from *Tesvich* decided by this Court, the analysis is not inconsistent with *Tesvich*. Here, there were factors acknowledged by the trial court that required a certain adjustment of the literal interpretation of *Tesvich* in order to fit the instant case within the bounds of *Inabnet* and *Skanski*. Those factors, as mentioned previously, were the size of the plaintiff's operation and the fact that the plaintiff seeded his own beds rather than relying on natural seeding. The trial court found that this changed the meaning of anticipated production noting that the plaintiff would not be likely to exert time and money to seedbeds they didn't eventually intend to harvest. This logic seems sound. Unfortunately, as the trial court noted, the plaintiff did not establish the number of sacks harvested prior to Phillips work nor the amount that they would have harvested but for Phillips. The trial court acknowledged that a "strict adherence to *Skansi* might dictate a finding that plaintiff failed to

prove damages". However, the trial court goes on to find that the plaintiff deserves 10% of that figure. Accordingly, we find no error.

AFFIRMED