RICHARD AND CHRISTINE PERNICIARO	NO. 20-CA-62
VERSUS	FIFTH CIRCUIT
SUFIAN HAMED, HASSAN M. HASSAN, MAYAR DISCOUNT, LLC, ENTERGY LOUISIANA, LLC, AND ST. CHARLES PARISH GOVERNMENT	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 84,607, DIVISION "D"
HONORABLE ROBERT J. KLEES AND HONORABLE M. LAUREN LEMMON, JUDGE PRESIDING

December 16, 2020

FREDERICKA HOMBERG WICKER
JUDGE

Panel composed of Judges Fredericka Homberg Wicker, Stephen J. Windhorst, and John J. Molaison, Jr.

AFFIRMED

FHW
SJW
JJM

COUNSEL FOR PLAINTIFF/APPELLEE,
RICHARD AND CHRISTINE PERNICIARO
William J. Larzelere, III

COUNSEL FOR DEFENDANT/APPELLANT,
MAYAR DISCOUNT, LLC
Adam S. Lambert

WICKER, J.

This litigation arises out of an ongoing dispute between neighbors regarding the direction of parking lot security lights and the location of Habitat for Humanity collection bins. Plaintiffs-Appellees, Richard and Christine Perniciaro, reside in St. Rose, Louisiana adjacent to a major state highway, Jefferson Highway LA-48, also known as River Road. Plaintiff's property shares a border with a pre-existing neighborhood grocery store, River Discount Supermarket ("River Discount"), which is owned and operated by former-Defendants Sufian Hamed and Hassan M. Hassan through Defendant-Appellant company Mayar Discount, L.L.C.

Appellant timely appeals the trial court's October 23, 2019 judgment following a one day bench trial awarding Appellees injunctive relief and damages. Appellees have answered the appeal, assigning as error the allegedly insufficient extent of relief.

For the reasons fully discussed below, the judgment of the trial court is affirmed.

Facts and Procedural History

On May 15, 2018, Richard and Christine Perniciaro ("Appellees") filed a petition for damages and injunctive relief, against Mr. Hamed, Mr. Hassan, Entergy Louisiana, LLC ("Entergy"), St. Charles Parish Government ("SCPG") and Mayar Discount, L.L.C. (hereinafter "Mayar" or "Appellant"). In the petition, Appellees contended that the three LED parking lot security lights located on River Discount's roof, as well as a later added Entergy light, simultaneously present a serious health risk to Mr. Perniciaro and cause them both to suffer severe mental anxiety, anger, and loss of enjoyment of life, and use of their property. Appellees further asserted that Mr. Perniciaro is in remission for eye cancer and had been

instructed by his physician, Dr. Larry Caminata, to avoid bright lights as much as possible as they "create a severe health hazard for petitioner, Richard Perniciaro."

In their petition, Appellees then asserted that Appellant has refused to relocate Habitat for Humanity collection bins.[1] Appellees complained that, over the years, the location of the bins slowly drifted onto their property creating a dumpsite for items that do not make it into the bin. Appellees additionally asserted that Appellant has attached various signage and a lean-to to their backyard fence, without permission and in-spite of objection, causing physical damage to the fence. Appellees concluded with a request that the trial court grant damages for placing Mr. Perniciaro in danger of serious health risk, causing severe mental anxiety, and for the loss of use of property and damage thereof, as well as injunctive relief.

On February 25, 2019, the trial court issued a joint pre-trial Order providing parties with pre-trial instructions and a timeline in which to identify and exchange all exhibits, and witness and expert identities.[2] On July 26, 2019, Entergy filed a motion for summary judgment. In its motion, Entergy argued that the only light which it owned, that Appellees complained of in their petition for damages, was attached to a utility pole located on Bonura Drive and, significantly, had been removed *prior* to suit being filed. On September 24, 2019, the trial court denied Entergy's motion for summary judgment. Shortly thereafter, Plaintiff and Entergy settled before trial, Plaintiff dismissing Entergy from the case entirely.

[1] The Habitat for Humanity bins have been located at River Discount since at least 1992, before Appellant owned the store and before Appellees built their residence.

[2] "Counsel for all parties shall file, and exchange with each other, a list of all witnesses who they anticipate will testify within 30 days within this Order. A final witness list shall be due at least 10 days prior to the trial date. Each list shall include the names and address of all witnesses who may or will be called to testify at trial, *including experts.* The list shall also specify which experts have already been retained and which have not, and whether such expert has issued a report. The witness lists are not a substitute for a party's duty to supplement discovery responses…All counsel shall confer in person at least 5 business days prior to trial, but in no event earlier than 14 days prior to trial, to confect stipulations, discuss settlement and to mark and exchange *all* exhibits."

The matter proceeded to a bench trial on October 23, 2019. As trial began, the parties stipulated that all claims against defendants Sufian Hamed and Hassan M. Hassan, in their individual capacities, were dismissed. Parties stipulated to all but four of Appellees' exhibits, one of the four objected to exhibits was Exhibit #27 (no description). The exhibits stipulated to were offered and admitted into evidence without objection, consisting primarily of photographs of Appellees property taken by Mr. Perniciaro in 2018, screenshots of Google Maps' images of both properties as of 2016, email correspondence between Mr. Perniciaro and SCPG, and SCPG's internal records regarding Mr. Perniciaro's formal complaints and the relevant properties (River Discount and the adjacent Perniciaro property).

Appellees first called Christine Perniciaro to the stand. Mrs. Perniciaro testified that she and her husband, Richard Perniciaro, have resided at their current house for eighteen (18) years and that River Discount pre-existed her family home. She further testified that the current lights installed on top of River Discount were a bother, but that she did not know exactly when they had been installed or how often the lights were on. Nevertheless, she testified that the brightness of River Discount's rooftop LED security lights made it difficult to use her backyard, pool, or detached guesthouse. She further testified that the lights shined directly into the back half of her house, illuminating the bedroom, den area, and kitchen throughout the night, thereby impacting her ability to sleep. Mrs. Perniciaro further testified that she felt that the security lights impacted her privacy because the bright lights enabled River Discount's customers to see into her yard at night. Finally, Mrs. Perniciaro testified that she had previously attempted to alleviate some of the brightness with blackout curtains in her bedroom; however, that she declined to place curtains elsewhere in the house due to cost and incompatible décor.

Appellees next called Richard Perniciaro. Mr. Perniciaro confirmed his wife's testimony that River Discount already existed when they built their home in 2001. Mr. Perniciaro then testified that between the time when he built his home in 2001 and in 2017, when the current LED rooftop security lights were installed, River Discount never maintained any lights on its roof; rather, previous lights were only affixed to the front of the store. He testified that the store had previously installed some other bright lights in 2010, but that those lights were immediately removed upon request.

Mr. Perniciaro also testified that on December 21, 2017, he submitted a formal complaint with the St. Charles Parish Planning and Zoning Department. As reflected by the emails offered into evidence between Mr. Perniciaro and members of the Planning and Zoning Department of St. Charles Parish, as well as in SPCG's official copy of the formal complaint, Mr. Perniciaro's formal complaint alleged that River Discount's lights had "accosted" him as they had been shining directly into his yard, all day, every day since December 16, 2017 (five days prior).

In his formal complaint, Mr. Perniciaro additionally alleged that he had visited River Discount in person on two prior occasions requesting that the lights be repositioned. The formal complaint provided that on the second occasion Mr. Perniciaro was accompanied by local police officers and that the store manager allegedly told police that he would reposition the lights and put them on a timer to shut off by 10:00 p.m. According to Mr. Perniciaro, as of December 21, 2017, when he filed the complaint with the Parish, no such action had been taken.

The relevant exhibits further evidence the following: On January 2, 2018, the St. Charles Parish Planning and Zoning Department opened an investigation into the position of the parking lot lights located at River Discount. On January 16, 2018, St. Charles Parish sent a notice to River Discount finding the store to be in

violation of the St. Charles Parish Zoning Ordinance of 1981[3] as its lights were positioned in such manner so as to be a nuisance to abutting property owners, namely Appellees. On February 15, 2018, and February 19, 2018, the St. Charles Parish Code Enforcement Supervisor (CES), Ken Lorio, followed up with store personnel and re-inspected the property, finding that the lights had been repositioned to shine away from Appellees' home and that they had been placed on a timer, turning off at 10:00 p.m. each evening. On February 19 and 20, the Parish closed the initial investigation, finding the matter had been resolved. Mr. Perniciaro thereafter left a recorded voicemail confirming that the matter had been resolved and thanking Michael Albert, Director of the St. Charles Parish Planning and Zoning Department, for the Parish's assistance.

Likewise, during trial, Mr. Perniciaro testified that after the initial investigation, he confirmed with local authorities that River Discount had properly taken action. He then testified that shortly thereafter, on certain nights in the spring, River Discount would keep the lights on past 10:00 pm. Additionally, Mr. Perniciaro testified that the LED security lights had been "swiveled back" to face his property as they were again shining into his yard. He then affirmed that the lights were redirected towards his property around the same time that Appellant requested that Entergy install additional overnight directional security lighting fixtures on or around its property.

Entergy's records, as entered into evidence, indicate that they installed three security lights between February 26, 2018 and March 1, 2018; two lights were installed on utility poles in the River Discount parking lot and the other light was installed nearby on a pole on Bonura Drive, opposite from Appellees' property.

[3] The local ordinance provides: "Adequate lighting shall be provided if off-street parking spaces are to be used at night. The lighting shall be arranged as not to interfere with traffic safety or cause a nuisance to abutting properties."

The exhibits further corroborated Mr. Perniciaro's testimony that on approximately March 5, 2018, Appellees contacted Entergy complaining of the overnight directional security light on Bonura Drive, but were improperly informed by Entergy personnel that the light could not be removed.

On March 6, 2018, Mr. Perniciaro filed a second formal complaint with the St. Charles Parish Planning and Zoning Department. Mr. Perniciaro testified that in the second complaint he asserted that River Discount store had actively turned its lights back towards his property. However, the record shows that the second complaint alleged that the three lights on the utility poles were a nuisance. The relevant exhibits further provide that, in response to the second complaint, CES Lorio visited the store at 10:30 p.m. on March 6, 2018, for an inspection. He found that Entergy's new utility pole lights were significantly brighter than the previous utility pole lights. On March 16, 2018, the Planning and Zoning Department sent a notice to River Discount informing them that Entergy's utility pole lights violated the St. Charles Parish Zoning Ordinance of 1981. Shortly thereafter, Appellees re-contacted Entergy. The directional security light on Bonura Drive was subsequently removed on April 3, 2018. The other two Entergy overnight directional security lights remain in place as of this time. Mr. Perniciaro testified that Entergy's remaining lights only minimally burden his property and that "there is no bearing [on his] home at all."

Mr. Perniciaro also discussed the effects he perceived to have been caused by River Discount's rooftop LED security lights upon his property. Mr. Perniciaro first explained that the lights were so intense that they cast shadows during daylight; thus, making it extremely difficult to host parties in his backyard, sleep, and work. Mr. Perniciaro then testified about his eye-condition which, he alleged, prevented him from using his property:

Q. Can you describe your medical condition?

A. I have a potential issue in my left eye. At one point, I was told it was cancerous. At another point, they said it was potentially not cancerous but it could turn into cancer one day. I have been advised to stay away from extended exposure to bright lights, wear sunglasses during the day when I'm out and about. Just in general, get a lot of checkups. I have to go in quite often to monitor it.

Q. Have you seen a doctor for that condition?

A. Yes. I'm under regular care.

Q. Who is that doctor?

A. Dr. Robert Ross.

After identifying Dr. Ross as his medical provider, Appellees offered into evidence Exhibit #27, a medical report created by Dr. Ross. Appellant objected on the bases that the petition had identified only Dr. Caminata as Mr. Perniciaro's doctor and that the medical report was an undisclosed expert report, hearsay, and never before seen. Appellees argued that they had generally informed Appellant of Mr. Perniciaro's eye condition and that Appellees themselves had not received the medical report until they had already produced discovery. The trial court overruled Mayar's objection and admitted Dr. Ross' medical report.

With regard to the Habitat for Humanity bins, Mr. Perniciaro explained that he called Habitat for Humanity and requested the removal of the collection bins on the edge of his property, but was informed that, because Habitat had a permission slip on file naming River Discount as lessee, only Mayar could request their removal.

On cross examination, Appellant, testing Mr. Perniciaro's credibility, first queried him about his testimony that he had called the police to River Discount, pointing out that Appellees never produced a police report, witness, or any other evidence to support Mr. Perniciaro's allegations. Appellant then turned to what it observed to be the inconsistent nature of the statements regarding Entergy's lights,

pointing out that in both their Petition for Damages and Opposition to Entergy's Motion for Summary Judgment, Appellees alleged that the Entergy utility pole lights were a hazardous nuisance and severe health hazard for Mr. Perniciaro. Contradictorily, at trial, Mr. Perniciaro testified that after the Bonura Drive light was removed, Entergy's remaining utility pole lights were trivial, even though the Bonura Drive light had been removed prior to suit being filed.[4] Finally, Appellant questioned Mr. Perniciaro about Appellees' failure to hire or produce any lighting engineer or expert in support of their allegations that the strength, lumens, and location of the lights created a nuisance.

Appellees final witness was Michael Albert, Director of St. Charles Parish Planning and Zoning Department. In conformity with the relevant exhibits, Director Albert testified that following Mr. Perniciaro's initial December 2017 complaint, his department found River Discount to be in violation of a local ordinance where its lights were imposing upon a neighbors' property. He further attested that Appellees' initial complaint had been resolved amicably when River Discount willingly redirected its lights away from Appellees' property, as clearly evidenced by the voicemail he received from Mr. Perniciaro. Director Albert additionally testified that, after the Parish closed its first investigation in February of 2018, Mr. Perniciaro filed a second formal complaint in March of 2018, alleging that Entergy's utility pole lights were creating a nuisance. Director Albert attested that the second complaint was also closed amicably after Entergy removed the Bonura Drive light, as evidenced by the department's May 9, 2018 final investigation report. Finally, Director Albert clarified that after the Department assured itself that River Discount had redirected its lights away from Appellees'

[4] Appellant points out that Mr. Perniciaro's trial testimony regarding the trivial nature of the remaining utility pole lights occurred after Plaintiffs had settled with Entergy.

property in February, no further complaints from Appellees, regarding River Discount's roof top lights, were ever filed.

At the close of Appellees' case, Appellant orally moved for an involuntary dismissal. In its motion, Mayar argued that the Perniciaros could not meet their burden as Louisiana law imposes a standard of "discomfort to persons of ordinary sensibilities in a normal state of health" while Appellees' case was based on Mr. Perniciaro's status as an "eggshell plaintiff" with a medical condition that "makes him susceptible to bright lights." The trial court denied the motion.

In its case Mayar re-called Director Albert, who reiterated that, as reflected by department records, Entergy had remedied the problem its lights created such that the March 7, 2018 complaint was officially resolved and the case was closed by May 9, 2018. Director Albert concluded his testimony stating that no further complaints of any kind had ever been received from Appellees.

Appellant also called John Matassa, the former owner[5] of the River Discount property. Mr. Matassa testified that Mr. Perniciaro's sworn allegations that there were no parking lights prior to 2017 were incorrect as he installed three halogen lights on the front of the store between 1992 and 1996; further, that at that time there were also lights installed on the utility poles across the street to illuminate the River Discount parking lot in accordance with local St. Charles Parish zoning standards. Mr. Matassa also testified that he sold the property to its current owner in 2018.

The final witness, Mr. Nizar Firaj, current store manager and appointed representative of River Discount, testified that in 2017, after the old halogen lights broke, he had three new LED lights affixed to the roof of the building, acting in his

[5] According to his testimony, Mr. Matassa was the former owner of the immovable property where River Discount is located. He explained that while he owned the land and building outright, he only acted as landlord; the convenience store that is River Discount was actually operated by his former tenants.

capacity as operating manager. He testified that he only had the new LED lights installed after being informed by a certified electrician that the old halogen lights were irreparable. He testified that the old halogen lights were 1,000 watts and 110,000 lumens whereas the new LED lights were 300 watts and 42,000 lumens.

Additionally, Mr. Firaj testified that, after the Parish initially found River Discount to be in violation of the local ordinance, he personally re-positioned the lights away from Appellees' yard. He further testified that neither he, nor anyone else, has touched the lights since they were repositioned. To this end, Mr. Firaj attested that after the original parish complaint filed was resolved, neither he, nor anyone else at River Discount, has received a follow-up complaint regarding the rooftop LED security lights. Mr. Firaj's testimony concluded with a brief discussion regarding the Habitat for Humanity collections bins, during which he explicitly agreed to move the bins to a different location on River Discount's property.

At the close of the trial, on October 23, 2019, the trial court entered judgment, dismissing, with prejudice, all claims against St. Charles Parish. In its judgment, the trial court ordered Appellant to redirect or reposition the lights on top of River Discount away from Appellees' property within sixty days so as not to interfere with the use and enjoyment of their property. The trial court further ordered Appellant to refrain from placing signs or advertisements on or against Appellees' fence or property. Additionally, as agreed to, the court ordered Appellant to move the Habitat for Humanity bin at least 25 feet away from the Perniciaros' property. Finally, the trial court awarded $15,000.00 in damages to Appellees for the loss of enjoyment and use of their property, as well as their discomfort, annoyance and inability to sleep.

In his Reasons for Judgment, the trial court specified that Appellant is liable to Appellees pursuant to La. Civil Code article 667 for depriving them of the liberty of enjoying their property. The Court found that Appellant knew, or should have known with the exercise of reasonable care, that the LED lights placed on top of River Discount would cause damage to Appellees, that such damage was avoidable through the exercise of reasonable care, and that Appellant failed to exercise reasonable care or take any corrective action to redirect the lights away from Appellees' property. Furthermore, the Court found that Mayar violated local ordinances of St. Charles Parish that required it to arrange its lights as to reflect or direct light away from adjacent residential properties.

The instant suspensive appeal by Mayar followed. We now turn to Appellant's assignments of error and to Appellees' assigned errors in its Answer to the Appeal.

ASSIGNMENTS OF ERROR

In its appeal brief, Appellant first complains that "the trial court committed errors of law during trial." Specifically Mayar contends that "the trial court improperly admitted and considered hearsay medical evidence…" and that the trial court committed an error of law by denying its motion to dismiss at the close of Appellees' case. However, Appellant neither includes these issues in its assignments of error nor mentions them in its question presented for review.[6] Nevertheless, after addressing both parties' properly assigned errors, this Court will briefly address the merits of these arguments.

[6] Rule 1.3 of the Uniform Rules of the Courts of Appeal provides, and our jurisprudence generally establishes, that the courts of appeal "will review only those issues which were submitted to the trial court and which are contained in specification or assignments of error, unless the interest of justice clearly requires otherwise." La. Unif. R. Ct. App. 1-3; *see also Thompson v. Winn-Dixie Montgomery. Inc.*, 15-477 (La. 10/14/15), 181 So.3d 656, 665; *Jacobsen v. Asbestos Corp.*, 12-655 (La. App. 5 Cir. 5/30/13), 119 So.3d 770, 775.

In its first and fifth assignments of error, Appellant asserts that the trial court committed legal error and created "a very dangerous precedent" in finding that the positioning of River Discount's parking lot security lights was in violation of the St. Charles Parish municipal ordinance.

In its fourth assignment of error, Appellant asserts that the trial court's judgment ordering it to reposition River Discount's parking lot lights is "impossible to comply with" as, per Director Albert's testimony, there is no outstanding formal complaint to be addressed.

In its second, third, and sixth assignments of error, Appellant asserts that the trial court committed legal errors by applying the incorrect legal standard in its vicinage analysis, which resulted in the improper granting of damages to Appellees.

In its seventh and final assignment of error, Appellant asserts that the trial court erred in finding it responsible for the removal of the third-party-owned, Habitat for Humanity collection bins, from Appellee's property, as it does not own the bin.

Appellees, in their Answer to the Appeal request additional injunctive relief that both requires Mayar to permanently remove all lighting from River Discount's roof and enjoins it from ever replacing the removed lights. In their Answer, Appellees further contend that the trial court judge should have awarded them additional compensation and ask this Court to increase the award of damages.

Appellees conclude with a request that this Court order Appellant to pay all costs and attorney's fees associated with this appeal.

LAW AND ANALYSIS

Upon a complete review of both parties' requests and contentions, there are two distinct bodies of law that must be considered: St. Charles Parish Local

Ordinance and state vicinage law.[7] Our analysis begins with an inquiry into the construction, interpretation, and application of the local ordinance in the interest of Appellant's first and fifth assignments of error. This Court thereafter turns to Louisiana Civil Code articles 667-669, collectively the vicinage articles, in order to properly address the remainder of Appellant's and Appellees' assignments of error

I. Violation of the St. Charles Parish Ordinance

In Appellant's first assignment of error, it asserts that the trial court committed legal error in finding that the positioning of River Discount's parking lot security lights was in violation of the St. Charles Parish municipal ordinance. In support of its argument, Appellant cites Director Albert's testimony, which provided that the initial complaint, filed on December 21, 2017, was closed in February of 2019 and that the follow-up complaint filed on March 7th was entirely different because it addressed only Entergy's utility pole lights. Nevertheless, whether there was an outstanding complaint within St. Charles Parish Zoning Department is not pertinent to the current inquiry.

The statutory and jurisprudential rules for statutory construction and interpretation are equally applicable to ordinances, rules, and regulations. *Rand v. City of New Orleans*, 17-596 (La. 12/6/17) 235 So.3d 1077, 1082. When a law is clear and unambiguous and its application does not lead to absurd circumstances, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. C.C. art 9. The words of law must be given their generally prevailing meaning; words of art and technical terms must be given their technical meanings. La. C.C. art. 11. Questions of law, such as the proper interpretation of a statute or ordinance, are reviewed under the *de novo* standard of review. *Jefferson Par. Firefighters Ass'n of Louisiana Local 1374 v.*

[7] La. C.C. arts. 667-669.

Par. of Jefferson, 13-40 (La. App. 5 Cir. 5/23/13), 117 So.3d 246, 250, *writ denied*, 13-1612 (La. 11/15/13), 125 So.3d 1107.

The local ordinance at issue, St. Charles Parish Zoning Ordinance of 1981, states: "Adequate lighting shall be provided if off-street parking spaces are to be used at night. The lighting shall be arranged as not to interfere with traffic safety or cause a nuisance to abutting properties."

As a preliminary matter, we point out that the term "nuisance" itself is a common law term that lacks specific meaning under Louisiana law. Yiannopoulos & Scalise, Predial Servitudes, 4 La. Civ. L. Treatise, § 3:33 (West Aug. 2020)(discussing the infiltration of common law nuisance into civil law jurisprudence). Accordingly, we turn to Merriam Webster's dictionary for the generally prevailing meaning of the term "nuisance" in its legal sense. *See* La. C.C. art. 11. Webster's dictionary provides the technical definition of "nuisance," as it relates to law, as "something (as an act, object, or practice) that invades or interferes with another's rights or interests (as the use or enjoyment of property) by being offensive, dangerous, obstructive, or unhealthful." "Nuisance," "Legal Definition of Nuisance," *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/nuisance (last accessed 11/23/2020).

In the present situation, a proper reading of the St. Charles Parish Ordinance, in light of the generally prevailing meaning of the term "nuisance," as explored above, expresses that parking lot lighting shall be arranged as not to invade or interfere with another's use or enjoyment of property by being offensive, dangerous, obstructive, or unhealthful. We point out that the local ordinance, considering this generally prevailing meaning, lacks any qualifiers regarding egregiousness. *See* "Nuisance," *Merriam-Webster Online Dictionary*. Likewise,

Appellees' testimony[8], namely that the offensive, dangerous, and unhealthful nature of River Discount's parking lot lighting interferes with their use and enjoyment of their property, sufficiently meet this broad definition of nuisance. Further, although Director Albert testified that there were not any outstanding complaints against River Discount, that fact in and of itself does not necessitate a current finding of compliance. Because Appellees testified that River Discount's lights are positioned in such an offensive manner so as to interfere with the use and enjoyment of their property, we find that an application of the generally prevailing meaning of the words of the St. Charles Parish Ordinance is clear and unambiguous and does not lead to absurd consequences such that the trial court's conclusion that the positioning of River Discount's lights was in violation of the St. Charles Parish municipal ordinance was not manifestly erroneous.

In its fifth assignment of error, Appellant asserted that the trial court's finding that the current positioning of River Discount's lights constitutes a nuisance in violation of the local ordinance, creates "a very dangerous precedent" in light of public safety concerns. Specifically, Mayar argues that, "adequate parking lot lighting is of great utility and there is an important public interest in providing adequate lighting in a parking lot open to the public." However, having found that the trial court has properly analyzed St. Charles Parish's municipal ordinance as they apply to the instant case, this Court finds that Appellant's fifth assignment of error lacks merit.

Appellant correctly states that there is an important public safety interest in providing adequate parking lot light and that River Discount must, in compliance with the St. Charles Parish ordinance, provide adequate parking lot lighting for its

[8] It is the function of the trier of fact to assess credibility based upon all of the testimony and evidence, and where the trier of fact has made a rational decision, it should not be disturbed on appeal. *Antill v. State Farm Mutual Insurance Co.*, 20-131 (La. App. 5 Cir. 12/2/20), 2020 WL 7053021 at **16-17.

patrons. *See Pitre v. Louisiana Tech Univ.*, 95-1466 (La. 5/10/96), 673 So.2d 585, 591. However, in finding that the positioning of River Discount's lights is a nuisance in violation of the St. Charles Parish municipal ordinance, the trial court, as affirmed by this Court, held only that the current angle of the lights, as they shine directly into Appellees' yard, is a nuisance in the broadly defined legal sense as provided for by the local St. Charles Parish ordinance. Accordingly, we do not find that the trial court's specific finding, based on the relevant law and definitions, that a certain positioning of River Discount's parking lot lights violate a particular local ordinance creates "a very dangerous precedent."

II. Security Lighting at River Discount Supermarket

The next important question before this Court is whether the security lights located at River Discount Supermarket caused a mere inconvenience or real damage to the Perniciaros, and if so, to what degree. As previously stated, across various assignments of error, Appellant asserts that the trial court erred in granting both damages and injunctive relief to Appellees and, in doing so, applied the incorrect standard of proof and standard of law in its analysis. Conversely, in their Answer to the Appeal, Appellees requested additional injunctive and monetary relief for the parking lot light nuisance. In order to adequately address each of these concerns, we are compelled to engage in a detailed discussion of property rights and vicinage under Louisiana law.

While the owner of immovable property generally has the right to use the property as he or she pleases, the owner's right may be limited if the use causes damage to neighbors. The Louisiana Supreme Court has stated that these obligations of vicinage are legal servitudes imposed on landowners, which embody the balancing of rights and obligations associated with ownership of immovables. *Rodrigue v. Copeland*, 475 So.2d 1071, 1076 (La. 09/10/85). The corresponding

rights and obligations of neighboring proprietors, arising from that relationship, are principally governed by La. C.C. articles 667–669, which provide:

> Article 667:
>
> Although a proprietor may do with his estate whatever he pleases, still he can not [sic] make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives him of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care…
>
> Article 668:
>
> Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one [sic] has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.
>
> Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [sic] house, because this act occasions only an inconvenience, but not a real damage.
>
> Article 669:
>
> If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

According to the Louisiana Supreme Court, whether an activity classifies as prohibited under article 667 or as a mere inconvenience under article 668 depends on the reasonableness of the conduct in light of the circumstances based upon "a consideration of factors such as the character of the neighborhood, the degree of the intrusion and the effect of the activity on the health and safety of the neighbors." *Id.* Further, under Article 669 "excessive inconveniences caused by the emission of industrial smoke, odors, noise, dust, vapors and the like need not

be tolerated in the absence of a conventional servitude; whether an inconvenience is excessive or not is to be determined in the light of local ordinances and customs." *Inabnet v. Exxon Corp.*, 642 So.2d 1243, 1251 (La. 09/6/94)

Upon a finding of actionable damage under vicinage law, a court must then identify the proper remedy. Cumulatively, articles 667-69 and the relevant jurisprudence clearly establish a spectrum of liability based on varying standards.

As a matter of right, article 667 of the Louisiana Civil Code affords injunctive relief when acts, constructions, or activities on neighboring property deprive an owner "of the liberty of enjoying his own" property or "may be the cause of any damage to him." La. C.C. art. 667. Injunctive relief is available under article 667 even in the absence of a showing of physical discomfort, so long as the allegedly antagonizing activity constitutes an abuse of the right of ownership. Yiannopoulos & Scalise, Predial Servitudes, 4 La. Civ. L. Treatise, § 3:28 (West Aug. 2020)(citing, amongst others, *Hilliard v. Shuff*, 260 La. 384, 256 So. 2d 127 (1971); *Salter v. B. W. S. Corp.*, Inc., 290 So. 2d 821 (La. 1974)). Distinguishably, injunctive relief under Article 669 is ordinarily based on a finding that an abnormal or exceptional use of property causes damage or excessive inconvenience to persons of normal sensibilities, but is not available as a matter of right. *Id*; La. C.C. art. 669.

The Louisiana Supreme Court in *Yokum v. 615 Bourbon Street, L.L.C.*, 07-1785 (La.2/26/08), 997 So.2d 859, 872, emphasized that the 1996 amendments to article 667 shifted the absolute liability standard to a negligence standard, holding that, with the exception of ultrahazardous activities, a landowner is responsible for damages to an aggrieved neighbor *only* upon a showing that (1) he knew or, in the exercise of reasonable care, should have known that his works would cause damage, (2) that the damage could have been prevented by reasonable care, and (3)

that he failed to exercise such reasonable care. *Id*; *see also Kenner Plumbing Supply, Inc. v. Rusich Detailing, Inc.*, 14-922 (La. App. 5 Cir. 9/23/15), 175 So.3d 479, 491–92, *writ denied*, 15-2110 (La. 2/5/16), 186 So.3d 1164, and *writ denied*, 15-2112 (La. 2/5/16), 186 So.3d 1165, and *writ denied*, 15-2115 (La. 2/5/16), 186 So.3d 1165.

Damages

Appellant asserts that the trial court erred in granting Appellees damages and, in doing so, applied the incorrect law in its analysis. Rather, Mayar contends, the trial court should have held that the LED lights at River Discount constituted a mere inconvenience under article 668 such that Appellees should have been denied relief. Conversely, in their Answer to the Appeal, the Perniciaros contend that the correct law was applied but that the relief provided by the trial court under article 667 is insufficient and thus requests that this Court grant additional relief. For the following reasons we affirm the existing damages provided by the trial court and decline to alter the Judgment in favor of either party.

In all civil cases, the appropriate standard for appellate review of factual determinations is the manifest error standard. *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, 193 So.3d 1110, 1115–16 (La. 12/8/15); *see also Detraz v. Lee*, 05-1263, 950 So.2d 557, 561(La. 1/17/07). Where there are two permissible views, the fact finder's choice between them cannot be manifestly erroneous, even if the reviewing court would have decided the case differently. *See Detraz*, 950 So.2d at 561.

Whether Mayar's actions classified as actionable damage under articles 667, rather than as a mere inconvenience under article 668, necessarily depends on a series of factual inquiries focusing upon the character of the neighborhood, degree of intrusion, and the effects of the activity. *See Rodrigue v. Copeland*, 475 So.2d

at 1077. In the instant case, the record demonstrates that the area in question is zoned for commercial use. While the affected area is a single-family residential neighborhood, the state recorded survey of the area reflects that access to the neighborhood is not restricted to residential streets. Rather, the Perniciaros' property abuts a major state highway, Jefferson Highway LA-48, also known as River Road. Further, Appellees' testimony established that the River Discount pre-existed the Perniciaros' family home. Nevertheless, Appellees testified to and provided evidence establishing a high degree of intrusion that caused them to suffer the loss of enjoyment of their back yard, excessive lighting reflecting throughout various rooms within their home every evening until late at night, or on some occasions all night and during the day as well, along with sleep interference necessitating the installation of blackout curtains, work interference, and privacy intrusions. *See Rodrigue*, 475 So.2d at 1077. There is undoubtedly more than one permissible view under these circumstances. Accordingly, we do not find that the trial court committed manifest error in finding that Appellees' case was actionable under article 667, rather than a mere inconvenience under article 668.

Further, we do not find that the trial court committed manifest error in finding that Appellees were entitled to damages under article 667. Considering Mr. Perniciaro's testimony that he had orally discussed his concerns with the managers at River Discount, the formal complaint with St. Charles Parish and subsequent investigation, findings, and resolution, and the testified to swiveling of the lights back towards Appellees' property, the trial court reasonably found Appellant liable for damages under the negligence standard propounded by article 667. *See Yokum*, 997 So.2d at 872 (a landowner is responsible for damages to an aggrieved neighbor upon a showing that (1) he knew or, in the exercise of reasonable care, should have known that his works would cause damage, (2) that

the damage could have been prevented by reasonable care, and (3) that he failed to exercise such reasonable care.) Thus, we turn to the matter of quantum.

Louisiana jurisprudence has consistently held that the assessment of "quantum," or the appropriate number of damages, by a trial judge is a determination of fact entitled to great deference on review. *Jackson v. Drachenburg*, 19-345 (La. App. 5 Cir. 1/8/20), 288 So.3d 289, 293 (citing *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337, 1340 (La. 1993); *Tauzier v. Kraus*, 02-1015 (La. App. 5 Cir. 4/29/03), 845 So.2d 1208, 1211-1212, *writ denied*, 03-1475 (La. 9/26/03), 854 So.2d 367). Only when an award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances should the appellate court increase or reduce the award. *Id.* Reasonable persons often disagree about the measure of general damages in a particular case. *Id.* Appellate courts review the evidence in the light which most favorably supports the judgment to determine whether the trier of fact abused his discretion and/or was clearly wrong in his conclusions. *Burgard v. Allstate Ins. Co.*, 04-1394 (La. App. 5 Cir. 5/31/05), 904 So.2d 867, 880.

The trial court awarded Appellees a sum of $15,000.00 ($7,500.00 awarded to each plaintiff respectively) for damages sustained for loss of enjoyment and use of their property, discomfort, annoyance and inability to sleep. We do not find that the trial court's award of $7,500.00 in general damages to Appellees Richard and Christine Perniciaro, respectively, is beyond that which a reasonable trier of fact could assess based upon the high degree of intrusion that Appellees' suffered, as discussed in our analysis regarding actionable damage. *See Jackson*, 288 So.3d at 293. On the contrary, given the particular facts of this case, we find this award is reasonable and not an abuse of the vast discretion afforded the trial court in setting

an award for damages. Accordingly, this Court will not disturb the trial court's verdict or award and we neither increase nor decrease the award; rather, we affirm as is.

Injunctive Relief

Appellant-Mayar's Assignment of Error

In its fourth assignment of error, Appellant asserts that the trial court's judgment ordering it to redirect the rooftop LED lights away from Appellees' back yard is "unsustainable and is impossible to comply with." While Appellant has not specifically assigned error to the mandatory injunction[9] ordered by the trial court, in the assignment of error, it contends that because Director Albert testified that no outstanding complaint or violation exists, there is "no way for the defendant to cure the so-called violation." Upon reviewing this assignment, we affirm the trial court's judgment granting the mandatory injunction.

Appellate courts review a trial court's granting of an injunction under the manifest error standard of review. *Bourgeois v. Bazil*, 18-676 (La. App. 5 Cir. 4/24/19), 271 So.3d 341, 349 (citing *Zeringue v. St. James Par. Sch. Bd*., 13-444 (La. App. 5 Cir. 11/19/13), 130 So.3d 356, 359). In order to reverse a trial court's factual findings under the manifest error standard, an appellate court must review the record in its entirety and find that a reasonable factual basis does not exist for the finding and further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Id.* If the trial court's findings are reasonable in light of the record as a whole, an appellate court may not reverse, even if it is convinced that it would have weighed the evidence differently. *Id.*

[9] Louisiana jurisprudence recognizes a distinction between prohibitory injunctions, which enjoin certain behavior, and mandatory injunctions, which seek to order the "doing of something." *Saer v. New Orleans Reg'l Physician Hosp. Org.*, 14-856 (La. App. 5 Cir. 3/25/15), 169 So.3d 617, 620.

Based on the evidence and testimony presented at trial, we cannot say the trial court was manifestly erroneous in ordering Mayar to redirect the lights away from Appellees' yard in light of the St. Charles Parish Ordinance.

As discussed above, the trial court reasonably found the positioning of River Discount's lights to be a nuisance in violation of the St. Charles Parish Ordinance where an application of the legal definition of nuisance to the St. Charles Parish Ordinance provides that parking lot lighting shall be arranged as not to invade or interfere with another's use or enjoyment of property by being offensive, dangerous, obstructive, or unhealthful. To this end, Appellant can easily cure the violation by altering the positioning and/or re-angling the security lights so as not to invade or interfere with Appellees' use or enjoyment of property.

The trial court's ruling is both reasonable and not unduly burdensome. Mayar has already re-positioned the lights once before and that repositioning directly resulted in the resolution of the first local complaint. Accordingly, we do not find the trial court's judgment granting a mandatory injunction and ordering Appellant to redirect the rooftop LED lights away from Appellees' backyard to be manifestly erroneous, nor "impossible to comply with."

Plaintiffs-Appellees' Assignment of Error

In their Answer to the Appeal, Appellees seek additional injunctive relief that both requires Mayar to permanently remove all lighting from River Discount's roof and enjoins it from ever replacing the removed lights. For the following reasons we decline to alter the relief provided by the trial court.

The Louisiana Supreme Court has held that the party moving for injunctive relief must meet its burden under both the Civil Code vicinage articles and the Louisiana Code of Civil Procedure. *Rodrigue*, 475 So.2d at 1078; *see also Yokum v. 544 Funky, LLC*, 15-1353 (La. App. 4th Cir. 2016), 202 So.3d 1065. Thus,

because the Perniciaros seek injunctive relief, they must prove irreparable injury in addition to the necessary showing of real damage under vicinage law. *See id.* Louisiana Code of Civil Procedure article 3601 provides in pertinent part that "[a]n injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law."

A mandatory injunction may not be issued on a mere prima facie showing that the party seeking the injunction can prove the necessary elements; instead, the party must show by a preponderance of the evidence that he is entitled to the injunction. *Reasonover v. Lastrapes*, 09-1104 (La. App. 5 Cir. 5/11/10), 40 So.3d 303, 308 (quoting *City of New Orleans v. Bd. of Directors of Louisiana State Museum*, 98-1170 (La. 3/2/99), 739 So.2d 748, 756). An injunction is a harsh, drastic, and extraordinary remedy, and should issue only where the party seeking it is threatened with irreparable loss or injury without adequate remedy at law. *Zeringue v. St. James Par. Sch. Bd*., 13-444 (La. App. 5 Cir. 11/19/13), 130 So.3d 356, 359.

Based upon our review of the record, the Perniciaros failed to establish by a preponderance of the evidence that they are entitled to additional injunctive relief requiring the permanent removal of all rooftop security lighting at River Discount. *See Reasonover*, 40 So.3d at 308. Appellees were granted adequate remedy. The trial court judge not only granted Richard and Christine Perniciaro monetary relief, he also provided a permanent mandatory injunction ordering that Mayar reposition River Discount's rooftop security lights away from Appellees' backyard. Further, the record shows, and Mr. Perniciaro testified, that the interference caused by the positioning of the rooftop security lights may be resolved by the re-positioning of the lights, which has been ordered. Furthermore, in making such a request, Appellees fail to address the public policy arguments made by Appellant regarding

the necessity and utility of the rooftop security lights in ensuring the safety of its patrons in an otherwise dimly lit parking lot at night. Accordingly, Appellees' have not met their burden such that their request for a second mandatory injunction, which requires Mayar to both permanently remove all lighting from River Discount's roof and enjoins Mayar from ever replacing the removed lights, is denied.

III. Habitat for Humanity Collection Bins

In their seventh and final assignment of error, Appellant asserts that the trial court erred in ordering it to relocate the Habitat for Humanity collection bins. Appellant concedes that the bins are currently located on Appellees' property but has taken the standpoint that the bins are owned by Habitat for Humanity, a third-party, such that it lacks the authority to move the bins. Throughout trial, the parties went back and forth arguing over who had the authority to move the bins. Nevertheless, at trial, Mr. Faraj, manager of River Discount and appointed representative for Appellant-Mayar, explicitly agreed to move the bins away from Appellees' property line on to the other side of Appellant's property near the store's dumpster.

Louisiana Code of Civil Procedure Article 2085 provides:

> An appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him. Confession of or acquiescence in part of a divisible judgment or in a favorable part of an indivisible judgment does not preclude an appeal as to other parts of such judgment.

Because Appellant voluntarily acquiesced to the moving of the Habitat for Humanity collection bins, and neither parties objected to the agreement, this issue may not be raised upon appeal. As such, we affirm the trial court's judgment

ordering Appellant to move the bins at least 25 yards away from the Appellees' property.

IV. Medical Report

As previously mentioned, in its brief Appellant first contends that the trial court committed legal error by admitting Dr. Ross' medical report into evidence, thereby depriving it of its right to cross-examine witness testimony and evidence offered against it. However, Appellant neither includes this evidentiary issue in its assignments of error nor mentions them in its question presented for review such that the matter is not properly before this Court. *See* La. Unif. R. Ct. App. 1-3. Nevertheless, we find that even if Appellant had properly assigned error to the medical report's admission into evidence, such error was harmless.

Appellant makes two distinct arguments as to why Dr. Ross' medical report should have been excluded from evidence. Appellant first asserts the trial court improperly admitted Dr. Ross's medical report because Appellees did not circulate a copy of the medical report prior to trial and because they did not identify Dr. Ross, either as an expert or as Mr. Perniciaro's treating physician. Appellant avers that the admission of Dr. Ross' report was therefore in violation of the pre-trial order. Appellant next argues that the trial court improperly admitted the medical report as it constitutes hearsay without exception.

Louisiana Code of Civil Procedure art. 1551 outlines pre-trial conference procedure in Louisiana. The theory inherent behind pre-trial procedure is avoiding surprise and orderly disposition of the case. La. C.C.P. art. 1551; *Moonan v. Louisiana Med. Mut. Ins. Co.*, 16-113 (La. App. 5 Cir. 9/22/16), 202 So.3d 529, 533, *writ denied*, 16-2048 (La. 1/9/17), 214 So.3d 869. A pre-trial order controls the subsequent course of the action but can be modified at trial to prevent manifest injustice. *Id.* La. C.C.P. art 1551 provides the trial court with great discretion in

implementing pretrial orders and ensuring that the particulars are enforced. *Id.* Nevertheless, while the trial judge has great discretion in deciding whether to receive or refuse testimony objected to on the grounds of failure to abide by the pre-trial order, any doubt is resolved in favor of receiving the information. *Id.* Absent an abuse of discretion, the decision of the court will be upheld. *Id*.

In the instant case, the trial court issued a pre-trial order on February 25, 2019, which stated the following:

> Counsel for all parties shall file, and exchange with each other, a list of all witnesses who they anticipate will testify within 30 days within this Order. A final witness list shall be due at least 10 days prior to the trial date. Each list shall include the names and address of all witnesses who *may* or will be called to testify at trial, including experts. **The list shall also specify which experts have already been retained and which have not, and whether such expert has issued a report. The witness lists are not a substitute for a party's duty to supplement discovery responses**…
>
> All counsel shall confer in person at least 5 business days prior to trial, but in no event earlier than 14 days prior to trial, to confect stipulations, discuss settlement **and to mark and exchange *all* exhibits**." (Emphasis added).

Accordingly, Appellees were under a duty to identify the names and addresses of all experts, retained or not, and whether such experts had issued a report. Further, the pre-trial order unambiguously requires Appellees to provide Mayar with a copy of all exhibits, including the medical report at issue, prior to trial. Appellees contend that Appellant should have obtained the medical report during discovery; however, the record clearly indicates that the only physician identified by Appellees prior to trial was Dr. Larry Caminata. Therefore, Appellant had no rational way to discover Dr. Ross' medical report where it was unaware that Mr. Perniciaro had any relationship whatsoever with Dr. Ross. Additionally, Appellees' argument they had not received the medical report until they had already produced discovery is without legal merit. Louisiana Code Civ. Proc. art. 1428(1) clearly states:

> A party is under a duty seasonably to supplement his response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Therefore, Appellees were under a statutorily imposed duty to supplement their discovery response.

Accordingly, Appellees violated the pre-trial order in failing to adequately give notice to Appellant of the alleged change in Mr. Perniciaro's treating physician, thereby depriving Mayar of its opportunity to depose and/or cross-examine Dr. Ross, as well as in subsequently failing to supplement discovery. Nevertheless, considering the harmless nature of the admission, as discussed below, and based upon the vast discretion granted to the trial court, we do not find that the trial court abused its discretion in declining to penalize Appellees for such violations and admitting the report. *See Moonan*, 202 So.3d at 533.

We turn next to Appellant's argument that the trial court committed legal error by admitting Dr. Ross' medical report where the report constitutes inadmissible hearsay. Hearsay is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. *Trascher v. Territo*, 11-2093 (La. 5/8/12), 89 So.3d 357, 364. The Louisiana Code of Evidence defines hearsay as a statement, meaning any oral or written assertion, other than one made by the declarant while testifying that is offered into evidence to prove the truth of the matter asserted. La. C.E. art. 801. Hearsay is admissible only as provided by the Louisiana Code of Evidence or other legislation. La. C.E. art. 802.

A trial court is given vast discretion in its evidentiary rulings, and its decision to admit or exclude evidence will not be reversed on appeal in the absence of a clear abuse of discretion. *Moonan*, 202 So.3d at 534; *Finch v. ATC/Vancom*

Mgmt. Servs. Ltd. P'ship, 09-483 (La. App. 5 Cir. 1/26/10) 33 So.3d 215, 218. In reviewing a trial court's evidentiary rulings, the appellate court must first consider whether the particular ruling complained of was erroneous, and if so, whether the error prejudiced the complainant's case, with reversal warranted only if the error prejudiced the complainant's case. *Id.* The test for whether the error prejudiced the complainant's case is whether that error, when compared to the record in its totality, has a substantial effect on the outcome of the case, and it is the complainant's burden to so prove. *Id.*

Both at trial and in their briefs, Appellees contended that Dr. Ross' medical report was admissible under the hearsay exception for business records.[10] Nevertheless, when conflicting statutes are applicable, the one more specifically directed to the matter at issue trumps the more general statute. *Salathe v. Par. of Jefferson Through Dep't of Sewerage*, 19-427 (La. App. 5 Cir. 7/15/20), 300 So.3d 460, 468, *writ denied*, 20-1027 (La. 11/4/20). The general statutory authority for the admissibility of medical records[11] is located in La. R.S. 13:3714, which provides, in relevant part, as follows:

> Whenever…a copy of a bill for services rendered, medical narrative, chart, or record of any...health care provider...is offered in evidence in any court of competent jurisdiction, it shall be received in evidence by such court as prima facie proof of its contents, **provided that the party against whom the bills, medical narrative, chart, or record is sought to be used may summon and examine those making the original of the bills, medical narrative, chart, or record as witnesses under cross-examination.** (Emphasis added).

[10] We point out that our analysis would remain the same even if we had applied the business records exception under La. C.E. 803(6). *See Achary Elec. Contractors, L.L.C. v. SimplexGrinnell LP*, 15-542 (La. App. 5 Cir. 1/27/16), 185 So.3d 888, 890 ("A party who seeks to submit written hearsay evidence pursuant to La. C.E. art. 803(6) must authenticate it by a qualified witness…The custodian of the record or other qualified witness must testify as to the record-keeping procedures of the business and thus, lay the foundation for the admissibility of the records. If the foundation witness cannot vouch that the Code of Evidence requirements have been met, the evidence must be excluded.")(internal citations omitted.).

[11] Given Appellant's failure to properly assign error to this matter, we pretermit any discussion as to whether Dr. Ross' letter properly constitutes a medical narrative or record and simply analyze the trial court's evidentiary ruling under the assumption that the documents provided by Dr. Ross comprise a medical report, as asserted by both parties.

The Louisiana Supreme Court has stated that when a party can satisfy the requirements of R.S. 13:3714, then the medical records, including the blood alcohol test result, shall be admitted into evidence. *Judd v. State, Department of Transportation and Development*, 95-1052 (La. 11/27/95), 663 So.2d 690, 696; *see also Bazer ex rel. Etie v. Honda Motor Co.*, 02-1327 (La. 05/24/02) 816 So.2d 858. However, the weight given to such records will be effected by the expert testimony, which may be offered to interpret the records, or any other relevant factors that may be developed on cross-examination. *Id.*

In the instant case, Dr. Ross' medical report constitutes inadmissible hearsay where it fails to satisfy the requirements of 13:3714. *See Judd*, 663 So.2d at 696; La. C.E. art 802. While the medical report at issue was properly certified by Dr. Ross' custodian of records, neither Dr. Ross nor any other qualified representative witness was called to testify at trial. Mayar, as the party against whom the medical narrative or record is being used, was improperly deprived of any right to summon and examine Dr. Ross, or any other qualified representative witness, under cross-examination. *See* La. R.S. 13:3714. Furthermore, the lack of expert testimony, or any testimony at all, inhibited Mayar's ability to undermine the report's evidentiary weight and credibility. *Judd, 663 So.2d at 696*.

Accordingly, we find that Dr. Ross' medical report was improperly admitted into evidence; nevertheless, we consider the admission of the report into evidence to be harmless error. As previously stated, reversal of an erroneous evidentiary ruling is warranted only if the error prejudiced the complainant's case. *Moonan*, 202 So.3d at 534.

Mayar argues that the medical report in question prejudiced their case because Appellees based their claims for mental anxiety, anger, and loss of use and enjoyment of their property on Mr. Perniciaro's health. Appellees counter that

Appellant fails to show any prejudice by the erroneous admission where neither the judgment nor the reasons for judgment differentiates between Richard and Christine Perniciaro; Appellees were each awarded the same amount of money for the same disturbances despite Mrs. Perniciaro's lack of any ocular diseases. We agree. Based upon the outcome, in which the trial court awarded each plaintiff equal sums of $7,500.00, and based upon the reasons for judgment[12], in which the trial court omits any reference to the medical report, rather stating that damages were being granted for Appellees' loss of enjoyment and use of their property, annoyance, and inability to sleep, we find that the judge gave little to no weight to the medical report.

Further, considering the language of the letter from Dr. Ross, we find the report itself to be of little value to Appellees' case. The first paragraph is replete with medical jargon that remains unexplained by any medical expert; however, what is graspable is that "[t]here was no active choroidal-retinal disease." Furthermore, the second paragraph consists of Dr. Ross explaining that because "Mr. Perniciaro complains of extreme glare with bright lights… I [Dr. Ross] recommended that he [Mr. Perniciaro] avoid any disabling bright lights accordingly." Accordingly, the value of the letter appears negligible as the comprehensible portions simply provide that Mr. Perniciaro is not suffering from any disease and that his doctor essentially told him, "If it hurts, don't do it." Because Mayar failed to meet its burden in proving that the improperly admitted evidence, when compared to the record in its totality, had a substantial effect on the outcome of the case, we find the admission of Dr. Ross' medical report to be harmless and decline to reverse the trial court's ruling. *See Moonan v. Louisiana*

[12] Appeals are taken from the judgment, not the reasons for judgment; the written reasons for judgment are merely an explication of the trial court's determinations, and do not alter, amend, or affect the final judgment being appealed. *Wooley v. Lucksinger*, 09-571 (La. 4/1/11) 61 So.3d 507, 572. Nevertheless, an appellate court is entitled to glean the trial judge's determinations from the reasons for judgment. *Id.*

Med. Mut. Ins. Co., 16-11, 202 So.3d 529, 534 (La. App. 5 Cir. 9/22/16), *writ denied*, 16-2048, 214 So.3d 869 (La. 1/9/17).

V. Motion for Involuntary Dismissal

Turning to Appellant's second unassigned complaint: Appellant briefly asserts that the trial court erred as a matter of law by denying its motion for involuntary dismissal.[13] In support of its motion at trial, Mayar contended that Appellees had failed to prove any actionable damage on the basis that Louisiana law imposes a standard of "discomfort to persons of ordinary sensibilities in a normal state of health" while Appellees' case was based on Mr. Perniciaro's status as an "eggshell plaintiff" with a medical condition that "makes him susceptible to bright lights."

In a motion for involuntary dismissal, the defendant may move for a dismissal of the action against him after the close of the plaintiff's case. *Machado v. Baker Concrete Constr.*, 13-273 (La. App. 5 Cir. 10/30/13) 128 So.3d 477, 481. Upon a motion for involuntary dismissal in a bench trial, the judge must evaluate all the evidence, without any special inferences in favor of the opponent of the motion, and grant the dismissal if the plaintiff has not established proof by a preponderance of the evidence. *Ramsey's Mfg. Jewelers, Inc. v. Ramsey*, 05-307 (La. App. 5 Cir. 2/14/06), 924 So.2d 1045, 1057, *writ denied*, 06-0607 (La. 5/26/06), 930 So.2d 26; *Crowell v. City of Alexandria Through Snyder,* 558 So.2d 216, 218 (La. 3/12/1990). Proof by a preponderance of the evidence means that the evidence, taken as a whole, shows that the fact or cause sought to be proven is

[13] The "discussion" on the unassigned error of law regarding the trial court's denial of its motion for involuntary dismissal is precisely two sentences long, where Appellant restates the complaint and then says, "See arguments made at trial…" without presenting any standard of review, legal arguments, or authority for his complaints. As such, this Court could deem this "error" abandoned. *See* La. Unif. R. Ct. App. 2-12.4(b)(4)("The court may consider as abandoned any assignment of error or issue for review which has not been briefed."); *Burgess v. Sewerage & Water Bd. of New Orleans*, 16-2267 (La. 6/29/17), 225 So.3d 1020, 1030; *Shiell v. Chuan Jen Tsai*, 14-94 (La. App. 5 Cir. 8/28/14), 164 So.3d 190, 192, *writ denied*, 2014-2240 (La. 1/9/15), 157 So.3d 1110. Nevertheless, we briefly address this issue.

more probable than not. *Locke v. Sheriff, Parish of Jefferson*, 94-652 (La. App. 5 Cir. 12/28/94) 694 So.2d 257, 258-59, *writ denied*, 95-268 (La. 3/24/95), 651 So.2d 293; *Taylor v. Tommie's Gaming*, 04-2254 (La. 5/24/05) 902 So.2d 380, 384. An appellate court may not reverse a ruling on a motion for involuntary dismissal unless it is manifestly erroneous or clearly wrong. *Id.*

In order to meet their burden, Appellees needed to establish, by a preponderance of the evidence, that River Discount's parking lot lighting, the location of the Habitat for Humanity bins, and River Discount's posting of signage were unreasonable in light of the circumstances per article 667 or constituted an unjustified excessive intrusion under article 669. *See id; see also Inabnet,* 642 So.2d at 1243. The trial court judge denied Appellant's motion for involuntary dismissal upon finding that, through testimony and evidence, Appellees sufficiently made a prima facie showing of actual damage under the vicinage articles.

As previously discussed within our in-depth inquiry into Louisiana's vicinage law, the jurisprudence clearly provides that whether Mayar's actions classified as actionable damage necessarily depends on an in-depth analysis of the facts and circumstances surrounding this case. *See id; see also Inabnet*, 642 So.2d at 1243. The law states that where is more than one permissible view, the fact finder's choice between them cannot be manifestly erroneous, even if the reviewing court would have decided the case differently. See *Detraz v. Lee*, 05-1263 (La. 1/17/07), 950 So.2d 557, 561. There is undoubtedly more than one permissible view under these circumstances as to whether, by a preponderance of the evidence, Appellees met its burden. Accordingly, not only can this court not find that the trial court committed manifest error in denying Mayar's motion for involuntary dismissal, even if we did, we could not substitute our own opinion for that of the

trial court. Thus, we affirm the trial court's denial of Appellant's motion for involuntary dismissal. See *Lasyone v. Kansas City Southern R.R.*, 00-2628 (La. 4/3/01), 786 So.2d 682, 698.

VI. Attorney's Fees

In their Answer to the Appeal, the Perniciaros request attorney's fees for this appeal. Louisiana jurisprudence is clear that attorney's fees are not recoverable unless authorized by contract or statute. *Peyton Place, Condo. Assocs. Inc. v. Guastella*, 08-365 (La. App. 5 Cir. 5/29/09), 18 So.3d 132, 146. The Louisiana Code of Civil Procedure article 2164 provides:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.
>
> La. C.C.P. 2164.

There is no basis to find that this appeal was frivolous and we do not find any other basis to award attorney fees to Appellees in connection with this appeal, nor do Appellees make any arguments in support of their request. This case presented a complex set of facts and law, which was all highly contested between the parties, and does not represent the type of appeal where an award of attorney fees is merited. Accordingly, Appellees' request for costs and attorney's fees is denied.

CONCLUSION

For the aforementioned reasons, we affirm the trial court's judgment in whole.

AFFIRMED

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 16, 2020** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

20-CA-62

E-NOTIFIED
29TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE ROBERT J. KLEES (DISTRICT JUDGE)
HONORABLE M. LAUREN LEMMON (DISTRICT JUDGE)
WILLIAM J. LARZELERE, III (APPELLEE)
ADAM S. LAMBERT (APPELLANT)
MARK D. PLAISANCE (APPELLEE)
ROBERT L. RAYMOND (APPELLEE)

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