NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1657

HENRY J. RICHARD

VERSUS

JOYCE BREAUX McELROY AND CAROLYN BREAUX

Judgment Rendered: DEC 04 2013

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On Appeal from the Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 147,922

Honorable George J. Larke, Jr., Judge Presiding

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Jerry L. Hermann Houma, Louisiana and John H. Carmouche Donald T. Carmouche Baton Rouge, Louisiana	Counsel for Plaintiff/Appellant Henry J. Richard
Robert B. Butler, III Baton Rouge, Louisiana	Counsel for Defendants/Appellees Joyce Breaux McElroy and Carolyn Breaux
Jack A. Ricci New Orleans, Louisiana	Counsel for Defendants/Appellants/ Third Party Defendants/Appellants/ Appellees Bill Boyd, Faith Boudreaux, Houma's Town & County Real Estate, Inc.
John I. Goodwin Dallas, Texas and Glenn G. Goodier New Orleans, Louisiana	Counsel for Defendant/Third Party Defendant/Appellant/Appellee Continental Casualty Company

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BEFORE: McDONALD, McCLENDON, AND HIGGINBOTHAM, JJ.

Higginbotham, J., concurs.

McCLENDON, J.

This appeal involves the continuing dispute over a backup purchase agreement for the sale of an approximately 13.7-acre tract of land in Gray, Louisiana. The current judgment appealed from awarded attorney fees, interest, and costs to two of the parties. For the reasons that follow, we amend and affirm, as amended, the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation began when Henry J. Richard filed suit for damages and for specific performance of his agreement to purchase property owned by Joyce Breaux McElroy and Carolyn Breaux (sellers). Named as defendants were the sellers; the listing real estate agency, Houma's Town & Country Real Estate, Inc. (Town & Country); its insurer, Continental Casualty Company (Continental); the real estate agency's owner and broker, Bill G. Boyd; the listing agent for the property, Faith Boudreaux; the buyer of the property, West Park Partners, L.P. (West Park); and Harold and Verlyn Foley, who held a purchase agreement dated prior to Mr. Richard's.

After Mr. Richard filed suit, various incidental demands were filed. The sellers filed a reconventional demand against Mr. Richard and a third party demand against Town & Country, Mr. Boyd, and Ms. Boudreaux (realtors). Howard Trahan, Beverly Marcel, and their children, Seth Joseph Trahan and Keith John Boudreaux (intervenors), filed an intervention against Mr. Richard, the sellers, and the realtors, claiming damages from a cancelled closing on a house that was located on the sellers' property.

On the third day of the trial on the merits of the specific performance claim, and after plaintiff rested his case, the realtors moved for an involuntary dismissal of Mr. Richard's claims. The sellers also moved for dismissal, as did the Foleys and West Park. In oral reasons for granting the motions, the trial court found that there was no meeting of the minds between Mr. Richard and the sellers primarily because: (1) the parties used a form entitled a "Land" purchase agreement, (2) the price was not clear in the Richards/sellers purchase

agreement, (3) the good faith deposit check had not technically been "received" because Town & Country had not deposited the check in its escrow account, and (4) the inclusion in the counteroffer by the sellers of the date of January 31, 2006, was not a clear deadline for the Foley agreement and did not act as a waiver of the sellers' discretion to grant the Foleys extensions after that date. The trial court also found that Mr. Richard had not offered proof that the house was an immovable, rather than a movable, and, therefore the house was not a component part of the land and was not included in the purchase agreement.

By judgment dated March 14, 2007, the trial court held that the agreement to purchase between Mr. Richard and the sellers was unenforceable, that Mr. Richard had no right of ownership in the property, and that the notice of *lis pendens* was invalid. The judgment cancelled the notice in the public record and dismissed the claim for specific performance, as well as all claims for damages asserted by Mr. Richard against the Foleys, West Park, and the sellers. Additionally, by judgment dated March 21, 2007, Town & Country, Mr. Boyd, Ms. Boudreaux, and Continental (real estate defendants) were dismissed from the suit, and in a judgment dated March 26, 2007, the trial court rendered a judgment on the incidental demands, awarding damages to the sellers and intervenors.

Three related appeals arose from these judgments.[1] In one appeal,[2] we determined that the price in Mr. Richard's purchase agreement was easily discernible from the offer and that the counteroffer by the sellers raised no questions over price. We also found that the purchase agreement was not unclear about the good faith deposit necessary to complete the agreement and that it was "received" by Town & Country, although it was not deposited. Therefore, we found that the trial court erred in its findings on these particular issues. This court also held that Mr. Richard presented, at the least, minimally

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[1] For a full recitation of the facts and procedural background, see **Richard v. McElroy**, 2008 CA 0060 (La.App. 1 Cir. 10/31/08), **Richard v. McElroy**, 2008 CA 0064 (La.App. 1 Cir. 10/31/08), and **Richard v. McElroy**, 2008 CA 0065 (La.App. 1 Cir. 10/31/08), all unpublished opinions.

[2] See **Richard v. McElroy**, 2008 CA 0064 (La.App. 1 Cir. 10/31/08) (unpublished opinion).

sufficient evidence to show that, more probably than not, the house was a component part that would transfer in the sale of the land. Lastly, we concluded that the sellers clearly and unambiguously agreed in their counteroffer that the Richard contract would become the primary contract or agreement to purchase at the end of the Foley contract, with the date of January 31, 2006, specifically denoted. Therefore, we reversed the finding that Mr. Richard's purchase agreement was invalid, reversed the dismissal of the sellers from Mr. Richard's suit for damages, and remanded for the presentation of plaintiff's evidence of damages and defendants' evidence in opposition to plaintiff's case.[3] In the two other appeals,[4] we also reversed the judgment that dismissed the real estate defendants and reversed the judgment that awarded damages to the sellers and intervenors.

After the decisions of the court of appeal, the trial on the merits continued on November 16 and 17, 2009, but was continued by the trial court on the motion of the realtors, on the grounds that their attorney had a conflict of interest between his insureds and his insurer. Thereafter, trial recommenced on January 23, 2012, and continued on January 24, 25, and 26, 2012.

In oral reasons on January 26, 2012, the trial court concluded that the realtors engaged in substandard conduct that was the actual cause of Mr. Richard's belief that he had an enforceable purchase agreement on February 1, 2006. While the court found "error, negligence, [and] omissions" on the part of the realtors, it found no fraud. The trial court specifically stated that the realtors were negligent for not excluding the house from the purchase agreement and for not clarifying a date on which Mr. Richard's contract would be enforceable. The trial court, however, also determined that Mr. Richard did not prove that he suffered any damages by not purchasing the property, finding the testimony of the seller's expert real estate appraiser, Brian Larose, to be more credible than

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[3] Mr. Richard had abandoned the remedy of specific performance after the first trial and was pursuing a claim for damages only. Also, the judgment dismissing the Foleys and West Park was affirmed.

[4] See **Richard v. McElroy**, 2008 CA 0065 (La.App. 1 Cir. 10/31/08) (unpublished opinion) and **Richard v. McElroy**, 2008 CA 0060 (La.App. 1 Cir. 10/31/08) (unpublished opinion).

the testimony of Mr. Richard's expert real estate appraiser, Logan Babin, Jr. The trial court concluded that Mr. Larose's appraisal was clearly the more accurate, and, therefore, found that the value of the property at the time of the proposed sale was $244,000.00. Accordingly, the trial court found that Mr. Richard suffered no damages related to the proposed sale, since he offered $250,000.00 for the purchase price.[5] However, the trial court awarded damages to Mr. Richard and to the sellers and against the realtors for the negligently prepared purchase agreement. Additionally, the trial court found that Continental, as the realtors' insurer, was to indemnify the realtors for all sums the realtors were ordered to pay to Mr. Richard and the sellers. The court also ordered each party to pay their own expert witness fees and assessed court costs against the real estate defendants.

In accordance with its reasons, the trial court signed its judgment on March 1, 2012, in favor of Mr. Richard against the real estate defendants, awarding Mr. Richard $62,754.50 in attorney fees, together with legal interest from date of judicial demand and court costs. All other claims of Mr. Richard were dismissed. Additionally, the trial court rendered judgment in favor of the sellers against the real estate defendants in the amount of $56,536.00 in attorney fees, with interest and court costs. The trial court also dismissed all claims of the intervenors and sellers against Mr. Richard.[6]

Mr. Richard devolutively appealed and the real estate defendants filed a suspensive appeal. Additionally, the sellers answered Mr. Richard's appeal and answered the appeal of the real estate defendants, and Mr. Richard answered the appeal of the real estate defendants.

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[5] In the price section of Mr. Richard's offer, the sum of "approximately $250,000" was filled in, with the following clarification: "$17,777.78 per Acre per survey Acreage to Rule."

[6] The trial court also rendered judgment in favor of the intervenors and against the real estate defendants, awarding $26,500.00 in damages, with legal interest and court costs. These parties reached a settlement of their claims while this appeal was pending, and, therefore, any issues between the intervenors and the real estate defendants are no longer before us.

STANDARD OF REVIEW

It is well settled that a court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The issue to be resolved by the reviewing court is not whether the fact finder was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Stobart v. State through Dept. of Transp. And Dev.**, 617 So.2d 880, 882 (La. 1993).

DISCUSSION

The Real Estate Defendants' Appeal

In their appeal, the real estate defendants contend that: (1) the trial court erred in finding Mr. Richard's purchase agreement valid; (2) the trial court erred in finding that the realtors were negligent and in failing to allocate fault to all parties; (3) the trial court erred in its award and amount of attorney fees to Mr. Richard and to the sellers; and (4) the trial court erred in awarding legal interest and costs to Mr. Richard and to the sellers.[7]

Liability of the real estate defendants to the sellers

The realtors first contend that the trial court committed legal error because it incorrectly believed that, after remand by this court, it was constrained to find a valid purchase agreement between Mr. Richard and the sellers. However, our prior opinion in this matter provided at footnote 5: "Although we have determined the legally correct interpretation of the contract provisions at issue, the defendants on remand maintain their right to challenge the validity of the agreement and present their side of the story by submitting any evidence allowable under the law."[8]

Following the remand of this matter and another three days of testimony and evidence, during which time the real estate defendants had the opportunity to present whatever evidence they could to show that the backup purchase

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[7] Because of the settlement between the real estate defendants and the intervenors, we need not address the real estate defendants' remaining assignment of errors.

[8] See **Richard v. McElroy**, 2008 CA 0064 (La.App. 1 Cir. 10/31/08) (unpublished opinion).

agreement was invalid, the trial court concluded that a valid agreement between Mr. Richard and the sellers did exist. Upon our thorough review of the record, we find no manifest error in the trial court's finding of fact, after the case was remanded and the trial completed, that there was a valid purchase agreement.

The real estate defendants also aver that the trial court erred in finding that they were negligent and solely at fault in this matter.

A real estate broker is a professional who holds himself out as trained and experienced to render a specialized service in real estate transactions. The broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care, skill, and diligence in the performance of his duties. **Hughes v. Goodreau**, 01-2107 (La.App. 1 Cir. 12/31/02), 836 So.2d 649, 660, writ denied, 03-0232 (La. 4/21/03), 841 So.2d 793. A realtor has a fiduciary duty to his client, and a breach of that duty to the client is actionable under LSA-C.C. art. 2315. **Id**. See also LSA-R.S. 37:1455.

In this matter, the sellers contracted with the defendant realtors to act as their agents and handle the listing and sale of the subject property. A review of the record supports the trial court's conclusion that the defendant realtors failed to exercise reasonable care, skill, and diligence in the performance of their duties, particularly in how they responded on behalf of the sellers to the backup purchase offer, by the advice or lack of advice they gave the sellers regarding the first and second extensions to the original purchase agreement between the sellers and the Foleys, and their failure to communicate important information to the sellers. The trial court heard and saw all the witnesses and attributed all fault to the realtors. A reasonable factual basis exists for this finding, and we, therefore, find no manifest error by the trial court.

The real estate defendants also contend that they cannot be liable for attorney fees because there was no contractual provision providing for the recovery of attorney fees to the sellers from the realtors, and that no statute exists providing for such an award of attorney fees.

As a general rule, under Louisiana law, attorney fees are not allowed except where authorized by statute or by contract. **State, Dept. of Transp. and Development v. Wagner**, 10-0050 (La. 5/28/10), 38 So.3d 240, 241; **Ledbetter v. Homes by Paige, L.L.C.**, 11-0005 (La.App. 1 Cir. 3/23/12), 110 So.3d 141, 148, writ denied, 12-0899 (La. 6/1/12), 90 So.3d 445. However, the award in this case was not for an attorney fee in the traditional sense. See **Ramp v. St. Paul Fire & Marine Ins. Co.**, 263 La. 774, 790, 269 So.2d 239, 245 (1972); **Ziegler v. Pansano**, 08-1495 (La.App. 1 Cir. 6/30/09) (unpublished opinion), writs denied, 09-1787, 09-1788 (La. 11/20/09), 25 So.3d 810. A realtor's liability for a breach of the fiduciary duty owed to his or her client includes the amount the client incurred in defending the underlying litigation as well as general damages. **Hughes**, 836 So.2d at 660. See **Avegno v. Byrd**, 377 So.2d 268, 273-74 (La. 1979).

In the **Ramp** case, the Louisiana Supreme Court held in an attorney malpractice case that the plaintiff was entitled to recover from the negligent attorneys the additional attorneys fees that he would not have incurred but for the negligence of the defendant attorneys.[9] This same reasoning has been applied in other cases regarding breaches of fiduciary duties by real estate agents, including **Avegno** and **Ziegler**. Thus, in cases of professional negligence, where the professional's negligence causes the client to suffer attorney fees for correcting or defending against the results of the negligence, the attorney fees incurred are the damages the client has sustained. Because the attorney fees were the damages caused by the wrongful conduct of the realtors, we find no error in the award of attorney fees to the sellers as an item of damages.

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[9] See also **Jenkins v. St. Paul Fire & Marine Ins. Co.** 393 So.2d 851, 859 (La.App. 2 Cir. 1981), affirmed, 422 So.2d 1109 (La. 1982) ("Plaintiff is entitled to recover the loss he has sustained by reason of having to pay attorney fees to indirectly pursue his claim against the railroad.... The award of this item of loss or damage does not amount to an award of attorney fees incurred in order to pursue the malpractice action as such, but is to compensate for the additional cost, i. e., attorneys fees, incurred by plaintiff in order to have the railroad's liability to him judicially determined.")

The real estate defendants next argue that the trial court erred in assessing legal interest against them. They assert that because the sellers did not request legal interest on an award of attorney fees, they are not entitled to same.

Pursuant to LSA-C.C.P. art. 1921, "[t]he court shall award interest in the judgment as prayed for or as provided by law." Moreover, as set forth in LSA-R.S. 13:4203, legal interest shall attach from date of judicial demand, on all judgments sounding in damages *ex delicto* that may be rendered by any of the courts. The language of this statute is mandatory. **Turner v. Ostrowe**, 01-1935 (La.App. 1 Cir. 9/27/02), 828 So.2d 1212, 1223, writ denied, 02-2940 (La. 2/7/03), 836 So.2d 107. An award of legal interest in tort cases is not discretionary with the court, as the interest attaches automatically until the judgment is paid, whether prayed for in the petition or mentioned in the judgment. **Id.** Because the attorney fees awarded to the sellers were the damages sustained by them in this matter, we find no error in the award of interest, and this assignment of error is without merit.

Lastly, the real estate defendants maintain that the sellers are not entitled to court costs, and the trial court erred in awarding court costs against them. The general rule is that costs are to be paid by the party cast in judgment. LSA-C.C.P. art. 1920[10]; **Stockstill v. C.F. Industries, Inc.**, 94-2072 (La.App. 1 Cir. 12/15/95), 665 So.2d 802, 822, writ denied, 96-0149 (La. 3/15/96), 669 So.2d 428. However, the trial court is vested with great discretion to assess costs against any party in a manner deemed equitable by the trial court. **Id.** at 821. The trial court's assessment can be reversed only upon a showing of an abuse of that court's discretion. **Anglin v. Anglin**, 09-0844 (La.App. 1 Cir. 12/16/09), 30 So.3d 746, 754.

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[10] Article 1920 provides:

> Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.
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> Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.

The real estate defendants contend that the sellers were not the prevailing parties since they were not awarded damages, but were only awarded attorney fees. Because we have already found that the damages suffered by the sellers were the attorney fees incurred by them, we find no abuse of discretion in its assessment of costs.

Liability of the real estate defendants to Mr. Richard

The real estate defendants also maintain that the trial court erred in finding that they were liable to Mr. Richard, and they contest the award of attorney fees, legal interest, and costs to Mr. Richard.

A purchaser's remedy against a real estate broker is limited to damages for fraud under LSA-C.C. art. 1953, *et seq.*, or for negligent misrepresentation under LSA-C.C. art. 2315.[11] **Osborne v. Ladner**, 96-0863 (La.App. 1 Cir. 2/14/97), 691 So.2d 1245, 1257. Because the record does not support a finding of intentional misrepresentation of material facts by the realtors, Mr. Richard cannot recover under a theory of fraud.[12] Therefore, the only theory for recovery is limited to an action for negligent misrepresentation.

The action for negligent misrepresentation arises *ex delicto,* rather than from contract. In order for a plaintiff to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach. **Id.** A real estate broker or agent owes a specific duty to communicate accurate information to the seller and the purchaser and may be held liable for negligent misrepresentation. **Id.** See also **Reeves v. Weber**, 509 So.2d 158, 160 (La.App. 1 Cir. 1987). A real estate broker also has the duty to take the necessary steps to bring a signed contract for purchase of real property to act of

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[11] In his Third Supplemental and Amending Petition, Mr. Richard asserted that the realtors "engaged in a course and pattern of conduct that constitutes negligence and/or fraud in connection with their dealings involving [Mr.] Richard."

[12] Fraud is defined in LSA-C.C. art. 1953, as follows:

> Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

sale within the time period designated by the contract. See **Markovich v. Prudential Gardner Realtors**, 10-1886 (La.App. 1 Cir. 7/1/11) (unpublished opinion); **Naquin v. Robert**, 559 So.2d 18 (La.App. 4 Cir.), writ denied, 561 So.2d 118 (La. 1990).

Whether a defendant has breached a duty is a question of fact and such a factual determination of the trial court may not be reversed in the absence of manifest error or unless it is clearly wrong. **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217 (La. 4/3/02), 816 So.2d 270, 278.

In this case, the realtors did not communicate to either the sellers or to Mr. Richard complete and accurate information regarding the extensions granted to the first contract or the expiration of the first contract. Upon our review of the record, we cannot find that the trial court was manifestly erroneous in its finding that the realtors breached their duty to supply correct information to Mr. Richard. Accordingly, this assignment of error is without merit.

The real estate defendants also contend that the trial court erred in its award of attorney fees, legal interest, and costs to Mr. Richard. For the same reasons previously discussed with regard to the sellers, we find no error in these awards to Mr. Richard.

Mr. Richard's Appeal

In his appeal, Mr. Richard contends that: (1) the trial court committed legal error, requiring a *de novo* review on appeal; (2) the trial court erred in failing to award him damages other than attorney fees; (3) the trial court erred in failing to allow his expert to testify regarding certain matters, and erred in instead relying on the testimony of the sellers' expert witness; (4) the trial court erred in failing to cast judgment against the sellers, who were the parties that contracted with Mr. Richard; and (5) he is entitled to additional attorney fees on appeal and to his expert witness fees.

Mr. Richard initially argues that this case requires *de novo* review based on the trial court's legal error in excluding key portions of his expert's testimony

without conducting a **Daubert** analysis.[13] Specifically, Mr. Richard contends that the trial court erred in refusing to allow his expert to testify regarding certain real estate transactions and regarding the value of the subject property. He also asserts that *de novo* review is warranted because of the trial court's "internally inconsistent and unreasonable decision." We disagree.

Under the Louisiana Code of Evidence, a witness qualified as an expert by "knowledge, skill, experience, training, or education" should be allowed to testify if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." LSA-C.E. art. 702; **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 10-1552 (La.App. 1 Cir. 10/4/11), 77 So.3d 339, 354, writs denied, 11–2468 and 11–2430 (La. 1/13/12), 77 So.3d 972 and 973. In **Daubert**, the United States Supreme Court set forth the criteria for determining the reliability of expert scientific testimony.[14] **Robertson**, 77 So.3d at 354. However, it is important to note that there is a crucial difference between questioning the methodology employed by an expert witness and questioning the application of that methodology or the ultimate conclusions derived from that application. Only a question of the validity of the methodology employed brings **Daubert** into play. **Robertson**, 77 So.3d at 355.

Clearly, **Daubert** is not applicable in the case *sub judice*. The trial court accepted both Mr. Richard's witness, Logan Babin, Jr., and the sellers' witness, Brian Larose, as experts in the valuation of property, without any objections. Both experts utilized comparable sales to reach a conclusion as to the value of the subject property. Mr. Richard does not question the methodology used, but

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[13] **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[14] In **Kumho Tire Company, Ltd. V. Carmichael**, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999), the United States Supreme Court held that the **Daubert** standard governing the admissibility of expert evidence applied not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized knowledge." The Louisiana Supreme Court adopted the **Daubert** analysis in **State v. Foret**, 628 So.2d 1116 (La. 1993).

rather questions the conclusions reached, based on the trial court's evidentiary rulings.[15]

Mr. Richard argues that his expert showed that the property at issue was worth anywhere from $60,000.00 to $105,000.00 per acre. He contends that the value of commercial properties in the northern part of Terrebonne Parish escalated tremendously after Hurricane Katrina and that he suffered severe damages as a result of the sellers failing to sell the property to him. In connection therewith, Mr. Richard tried to introduce testimony from Mr. Babin regarding the value of property adjacent to the subject property, which sold for $105,000.00 per acre on May 22, 2008. Defense counsel objected, contending that sales long after any alleged breach of the backup contract were not relevant. The trial court sustained the objection, finding that only sales around the time the sale was supposed to happen, or between January and March of 2006, were relevant.

The measure of damages for the breach of a contract of sale is the difference between the contract price and the market price on the date of the breach. **Womack v. Sternberg**, 247 La. 556, 576, 172 So.2d 683, 686 (La. 1965). Whether evidence is relevant is within the discretion of the trial court and an appellate court will not disturb that ruling in the absence of a clear abuse of discretion. **State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.**, 04-1311 (La.App. 1 Cir. 6/15/05), 925 So.2d 1, 7. After reviewing the entire record, we can find no abuse of the trial court's discretion in excluding the testimony regarding the value of the property approximately two years after the sale of the subject property to Mr. Richard was supposed to have occurred.

Mr. Richard also maintains that the trial court erred in excluding Mr. Babin's testimony concerning the value of the subject property on May 1, 2006. The record shows that Mr. Babin was asked to determine the value of the

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[15] We also note that Mr. Richard waived his objection to a **Daubert** hearing when he failed to raise the issue at trial. See LSA-C.E. art. 103; **Leard v. Schenker**, 06-1116 (La. 6/16/06), 931 So.2d 355, 357 (per curiam).

property on January 5, 2007, close to the first scheduled date of the first trial.[16] On cross examination, he admitted he gave no testimony as to its valuation at any time in 2006 and had no opinion as to the value of the property at that time. On redirect examination, Mr. Babin was asked to give an opinion as to the value of the property on May 1, 2006. Defense counsel objected, contending that this testimony was not offered during direct examination or brought forth on cross-examination. The trial court sustained the objection.

Louisiana Code of Evidence article 611D provides that a witness who has been cross-examined is subject to redirect examination as to matters covered on cross-examination and, in the discretion of the court, as to other matters in the case.[17] Arguably, the questioning of Mr. Babin on redirect examination,

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[16] The first trial was originally scheduled for January 3 and 4, 2007.

[17] Louisiana Code of Evidence article 611 provides:

> **A. Control by court.** Except as provided by this Article and Code of Criminal Procedure Article 773, the parties to a proceeding have the primary responsibility of presenting the evidence and examining the witnesses. The court, however, shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:
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> (1) Make the interrogation and presentation effective for the ascertainment of the truth;
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> (2) Avoid needless consumption of time; and
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> (3) Protect witnesses from harassment or undue embarrassment.
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> **B. Scope of cross-examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. However, in a civil case, when a party or person identified with a party has been called as a witness by an adverse party to testify only as to particular aspects of the case, the court shall limit the scope of cross-examination to matters testified to on direct examination, unless the interests of justice otherwise require.
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> **C. Leading questions.** Generally, leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony and in examining an expert witness on his opinions and inferences. However, when a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Generally, leading questions should be permitted on cross-examination. However, the court ordinarily shall prohibit counsel for a party from using leading questions when that party or a person identified with him is examined by his counsel, even when the party or a person identified with him has been called as a witness by another party and tendered for cross-examination.
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> **D. Scope of redirect examination; recross examination.** A witness who has been cross-examined is subject to redirect examination as to matters covered on cross-examination and, in the discretion of the court, as to other matters in the case. When the court has allowed a party to bring out new matter on redirect, the other parties shall be provided an opportunity to recross on such matters.

regarding the value of the property on May 1, 2006, was covered on cross-examination when Mr. Babin was questioned on his lack of opinion as to the value of the property as of that date. However, Mr. Babin admitted he had no opinion as to the value of the property in 2006. Further, all discovery conducted by Mr. Richard prior to the latest trial, including the deposition of Mr. Babin, was based on the value of the property in 2007. Again, after a thorough review of the record, we can find no abuse of the trial court's discretion in excluding this testimony.

Having found that the trial court did not abuse its discretion on these evidentiary rulings, we now review the trial court judgment under the appropriate manifest error standard of review.

Where the fact finder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous. This rule applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony. **Ledbetter**, 110 So.3d at 146. Where expert witnesses present differing testimony, it is the responsibility of the trier of fact to determine which evidence is the most credible. **Id**.

In the instant case, we have two competing expert opinions. In reviewing the two expert opinions, the trial court employed its own judgment to determine which expert opinion should be believed over the other. The trial court, after hearing and seeing both experts testify, found one expert more reliable than the other. The trial court, recognizing that experts are used to help the trier of fact in making their determinations, and weighing the testimony of the two experts, stated that it had "no question at all that Mr. Larose's testimony and figures were much more accurate." Mr. Larose testified that the subject property is a long relatively narrow tract, typical of family tracts, which should be compared to

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E. Rebuttal evidence. The plaintiff in a civil case and the state in a criminal prosecution shall have the right to rebut evidence adduced by their opponents.

other such tracts he called "carrots," rather than "apples," tracts of land whose length and width do not vary as greatly. He testified that the uses for "carrot" properties and "apple" properties varied, and he discussed the differences. Mr. Larose's expert opinion was that the property's value on March 29, 2006, the date of the cash sale between the sellers and the Foleys' designee, was $244,000.00.[18] Mr. Babin did not testify as to the value of the property on March 29, 2006, or anytime in 2006. The trial court valued the property in March 2006 to be $244,000.00, which was less than the sales price offered by Mr. Richard, and, as such, concluded that Mr. Richard suffered no damages regarding the sale of the property.

Upon our own thorough review of the record, we find no manifest error in the trial court's finding that Mr. Richard did not suffer any damages from the loss of the sale. The trial court's conclusion that the value of the subject property was $244,000.00 was reasonably supported by the record and is not clearly wrong. Accordingly, we cannot agree with Mr. Richard's argument that he suffered damages in an amount between $578,444.42 and $1,194,944.50 for the loss of the sale. Nor do we find the trial court's factual finding that Mr. Richard did not suffer general damages was manifestly erroneous. Additionally, the trial court specifically found no bad faith on the part of the realtors. While Mr. Richard continues to argue bad faith, the record fails to support such a finding.[19]

Mr. Richard next argues that the trial court erred in failing to cast judgment against the sellers. He asserts that the breach of the purchase agreement by the sellers was caused by the negligence of their realtors. According to Mr. Richard, the trial court should have assessed the damages directly against the sellers and then have the real estate defendants indemnify the sellers for the damages assessed against them.

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[18] Mr. Larose also testified that the same $244,000.00 value was applicable in January 2006.

[19] Bad faith has been described to mean more than mere bad judgment or negligence; it implies a dishonest purpose or evil intent. See **Combetta v. Ordoyne**, 04-2347 (La.App. 1 Cir. 5/5/06), 934 So.2d 836, 842, writ denied, 06-1353 (La. 9/22/06), 937 So.2d 389.

The trial court concluded that defendant realtors "breached their duty that was owed to all parties involved," including Mr. Richard, the sellers, and the intervenors. Finding that the realtors were negligent and the only parties responsible for the damages sustained herein, the trial court assessed the damages incurred directly against the real estate defendants. Having found that Mr. Richard's action against the real estate defendants for negligence arose *ex delicto*, rather than from contract, and having found that the realtors' negligence supports the imposition of liability against the real estate defendants, we find no error in the trial court's judgment assessing damages against the only parties determined to be at fault, the real estate defendants.

Mr. Richard also asserts that the trial court erred in failing to award him Mr. Babin's expert witness fee, which was $9,925.00. The trial court is vested with great discretion to assess costs against any party as it may deem equitable, even against the party who prevails on the merits; however, the general rule is that costs are to be paid by the party cast in judgment. **Stockstill**, 665 So.2d at 821-22. Louisiana Code of Civil Procedure 2164 governs the scope of appeal and the assessment of costs and provides as follows:

> 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.

In its March 1, 2012 judgment, the trial court did not award to Mr. Richard Mr. Babin's expert witness fees. Although Mr. Richard prevailed in this matter, it was determined that he suffered no damages regarding the loss of the sale of the immovable property other than his attorney fees. Further, the trial court concluded that Mr. Richard's expert witness was less credible than the sellers' expert witness. Therefore, upon our review of the record, we find no abuse of the trial court's great discretion when it determined that each party would pay their own expert witness fees.

Answers to the Appeal

Mr. Richard filed an answer to the appeal of the real estate defendants and the sellers answered the appeal of Mr. Richard and of the real estate defendants. See LSA-C.C.P. arts. 2133.[20] In his answer to the appeal, Mr. Richard asked not only for additional damages, which has previously been discussed, but also for additional attorney fees for his appeal and for answering the appeal of the real estate defendants. Having found no merit to Mr. Richard's appeal, we decline to award the relief sought in his answer to the appeal. See LSA-C.C.P. art. 2164. The sellers also answered the appeal of the real estate defendants and answered the appeal of Mr. Richard, seeking attorney fees for defending the appeals. Because the sellers were successful on appeal, we find that an award of attorney fees of $3,000.00 is appropriate and equitable for the work necessitated by the appeals.

CONCLUSION

For all of the above and foregoing reasons, the March 1, 2012 trial court judgment is amended, to award $3,000.00 in attorney fees for work performed in defense of this appeal in favor of the sellers, Joyce Breaux McElroy and Carolyn Breaux, and against the real estate defendants, Houma's Town & Country Real Estate, Inc., Bill G. Boyd, Faith Boudreaux, and Continental Casualty Company, in solido. In all other respects, the judgment is affirmed.

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[20] LSA-C.C.P. art. 2133 provides:

> A. An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer. Additionally, however, an appellee may by answer to the appeal, demand modification, revision, or reversal of the judgment insofar as it did not allow or consider relief prayed for by an incidental action filed in the trial court. If an appellee files such an answer, all other parties to the incidental demand may file similar answers within fifteen days of the appellee's action.
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> B. A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs.

Costs of this appeal are assessed equally between Henry J. Richard and the real estate defendants.

AMENDED AND AFFIRMED, AS AMENDED.