NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1014

JAMES RICHMOND CORLEY & EDNADEEN BREAUX CORLEY

VERSUS

LEON GARY, JR. & ABC INSURANCE COMPANY

VDHW
JGW
GHM

Judgment Rendered: MAY 02 2014

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 584,512

Honorable Todd Hernandez, Judge Presiding

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Donna R. Moliere **John G. Swift** **Lafayette, LA**	**Counsel for Plaintiffs/Appellants** **James Richmond Corley and** **Ednadeen Breaux Corley**
Douglas M. Chapoton **Steven H. Watterson** **Baton Rouge, LA**	**Counsel for Defendants/Appellees** **Leon Gary, Jr. and** **AIG Insurance Company**

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BEFORE: WHIPPLE, C.J., GUIDRY, McDONALD,
WELCH, AND CRAIN, JJ.

McDonald, J. dissents for reasons assigned by Judge Crain.

Crain, J. dissents and assigns reasons

WHIPPLE, C.J.

This appeal involves a dispute between two adjoining property owners that arose after Hurricane Gustav, when one of the property owners cut down a water oak tree located on the adjoining property owners' lot. For the following reasons, we amend the judgment and affirm, as amended.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, James and Ednadeen Corley, and defendant, Leon Gary, are neighboring property owners whose backyards adjoin each other in the Lakeshore Drive area of Baton Rouge, Louisiana.

Previously, Mr. Gary owned both the residence where he continues to reside and the residence that the Corleys now own. In 2001, Mr. Gary subdivided the lots and sold the residence that the Corleys now own to a previous owner. In connection with this earlier sale, a 2001 survey subdividing the lots was filed into the public records of East Baton Rouge parish. The Corleys purchased the home on November 28, 2007, for their son to live in.

Following Hurricane Gustav, on or about November 26, 2008, Mr. Gary removed a water oak tree that he believed was on the back of his property. According to Mr. Gary, the tree was cut because there was a two to three foot split in the fork of the tree and a substantial risk that the tree would continue to split and fall on his home and garage.

Upon receiving a call from their son's roommate notifying them that the tree had been removed, Ms. Corley came to Baton Rouge and found that the backyard was "torn up" by heavy equipment that had been brought in to remove the tree "within 20 feet" of her backdoor. Using a tape measure, Ms. Corley mapped out the property lines in accordance with the 2001 recorded survey to confirm that the water oak was on her property. The Corleys then hired Phillip Thomas, a professional land surveyor, to confirm their belief that the remaining water oak

stump was located on their property. Thomas's survey confirmed that the Corleys were correct and that the water oak was, in fact, on Mr. and Mrs. Corley's property, approximately 1.6 feet from Mr. Gary's property line.

Thereafter, the Corleys sent a demand letter to Mr. Gary, requesting a payment of $13,594.00 for damages sustained as a result of his removal of the tree. Attached to the demand letter was: (1) Thomas's survey; (2) an appraisal of the water oak by arborist James Culpepper, listing the value as $7,619.00; and (3) a work quote of $5,275.00 as the amount required to grind the remaining stump, level the ground, and plant a new tree.

After Mr. Gary refused to pay the Corleys in accordance with their demand letter, the Corleys filed the instant suit. Following a bench trial, the trial court found that the tree was on the Corleys' property, but limited the damage award to $6,857.00.

The Corleys appeal, assigning the following as error committed by the trial court:

> 1. The trial court committed an error of law in failing to address whether Gary was liable for treble damages because he "should have been aware," pursuant to LSA-R.S. 3:4278.1(C), that the tree he wrongfully cut down belonged to the Corleys.
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> 2. The trial court committed an error of law and was clearly wrong and was guilty of manifest error in failing to address whether the Corleys were entitled to attorney's fees and costs and award the same, pursuant to LSA-R.S. 3:4278.1(D).
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> 3. The trial court abused its discretion in failing to award any amounts for the restoration of the property caused by Gary's trespass including the cost of removing the remaining stump and restoring the property to level grade, pursuant to LSA-C.C. art. 2315.

Mr. Gary and his insurer, AIG Insurance Company, answered the appeal, contending: (1) that the trial court erred in denying their motion in limine/*Daubert* motion regarding James Culpepper's valuation of the tree in question; and (2) that the trial court erred in awarding plaintiffs any damages for the tree removal.

DISCUSSION

The Corleys' lawsuit seeks damages pursuant to LSA-C.C. art. 2315 and LSA-R.S. 3:4278.1. While LSA-C.C. art. 2315 provides for damages arising from negligence, LSA-R.S. 3:4278.1 is a specific statute governing damages arising from the unlawful cutting of trees. Louisiana Revised Statute 3:4278.1 is commonly referred to as the "timber trespass" or "timber piracy" statute[1] and provides, in pertinent part:

> A. It shall be unlawful for any person to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agent or employee to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on the land of another, without the consent of, or in accordance with the direction of, the owner or legal possessor, or in accordance with specific terms of a legal contract or agreement.
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> B. Whoever willfully and intentionally violates the provisions of Subsection A shall be liable to the owner . . . or legal possessor of the trees for civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, plus reasonable attorney fees and costs.
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> C. Whoever violates the provisions of Subsection A in good faith shall be liable to the owner . . . or legal possessor of the trees for **three times the fair market value of the trees cut**, felled, destroyed, removed, or diverted, **if** circumstances prove that the violator **should have been aware** that his actions were without the consent or direction of the owner . . . or legal possessor of the trees.
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> D. If a **good faith violator** of Subsection A **fails to make payment** under the requirements of this Section within **thirty days after notification and demand** by the owner . . . or legal possessor, the violator shall also be **responsible for the reasonable attorney fees** of the owner . . . or legal possessor. [Emphasis added.]

We first note that the defendants have raised the argument in their answer to the appeal that plaintiffs are not entitled to any relief whatsoever under LSA-R.S. 3:4278.1 because this case does not concern timber or forest land. We find no merit to this argument. As this court recently explained:

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[1] Sullivan v. Wallace, 2010-0388 (La. 11/30/10), 51 So.3d 702, 706.

> [D]espite being commonly referred to as the "timber trespass" or "timber piracy" statute, La. R.S. 3:4278.1 clearly is entitled, "Trees, cutting without consent; penalty" and **does not distinguish in its plain language between merchantable timber or other trees and bushes.** Although La. R.S. 3:4278.1 may be interpreted to exclude cases such as the one at hand not involving "merchantable timber," the statute does not clearly make this distinction. The legislature could have made the distinction that the "timber trespass" statute, in fact, only applies to timber and/or merchantable timber. However, **the legislature did not make that distinction, and, thus, the statute as enacted applies to all persons who enter property and remove any trees without consent of the owner.** [Emphasis added.]

Mathews v. Steib, 2011-0356 (La. App. 1st Cir. 12/15/11), 82 So.3d 483, 486-487, writ denied, 2012 -0106 (La. 3/23/12), 85 So. 3d 90.

We next turn to a discussion of plaintiffs' arguments raised on appeal.

Treble Damages
(Assignment of Error No. 1)

The Corleys first contend that the trial court committed an error of law in failing to address whether Mr. Gary was liable for treble damages under LSA-R.S. 3:4278.1(C), as he "should have been aware that his actions were without the consent or direction of the owner or legal possessor of the trees." Plaintiffs contend that this court should find on *de novo* review that Mr. Gary was liable under the applicable statute as a person who "should have been aware" that his actions were without the consent of the owner or legal possessor of the tree because: (1) he previously owned both his lot and the Corleys' lot; (2) he subdivided both lots; and (3) the survey subdividing the lots was signed by him and filed into the public records. Plaintiffs argue that under these facts, they are entitled to three times the value of the tree, or an additional $20,571.00.

The trial court's reasons for judgment state, in pertinent part:

> There were no markers, landmarks, fencing, shrubbery or anything else that clearly established the boundary between the plaintiff and defendant's property. ... [T]he defendant actually believed that the tree was entirely upon his land. The plaintiffs did not prove that the defendant acted in bad faith or without justification or belief that the tree actually belonged to him as it was situated upon property he thought belonged to him.

While the written reasons do not use the specific language of whether "defendant knew or should have shown," we do not find that this establishes that the trial court committed legal error by not considering this issue. Silence of the trial court on an issue raised by the pleadings and on which evidence was offered is regarded on appeal as a rejection of that demand in the absence of an express reservation. Finwall v. Union Oil Co. of California, 551 So.2d 674, 675 (La. App. 1st Cir. 1989).

Moreover, if we were to find the trial court's failure to specifically note or address this in the reasons for judgment constituted legal error, *de novo* review of the record demonstrates that the evidence does not support plaintiffs' argument and claim for an award of treble damages. As this court has previously recognized, the treble damages provisions of LSA-R.S. 3:4278.1 are punitive in nature and must be strictly construed; it is only when a person clearly violates its provisions that he will be assessed the severe penalty of treble damages. Callison v. Livingston Timber, Inc., 2002-1323 (La. App. 1st Cir. 5/9/03), 849 So.2d 649, 656.

Also, contrary to the plaintiffs' contentions, the facts of this case are clearly distinguishable from Mathews, 82 So.3d at 487, where, prior to cutting trees, the defendant received a certified letter from the plaintiff with a survey clearly defining the property lines and photos. Nonetheless, the Corleys argue that Mr. Gary should have been aware that the tree was on their property because a survey was filed by him in the public records.

We find that plaintiffs' reliance on the recorded survey as a basis for treble damages is premised on an overly broad reading of the public records doctrine. The primary focus of the public records doctrine is the protection of third persons against unrecorded interests; thus, the rule that what is *not recorded* is not effective does not mean that what *is recorded* is effective in all events, despite any defect

contained therein. Evans v. City of Baton Rouge, 2010-1364 (La. App. 1st Cir. 2/14/11), 68 So.3d 576, 580.

The water oak tree was not delineated on the recorded survey. Further, Mr. Gary testified that at the time he had the lots subdivided, he requested that the survey include an additional fifteen feet on the back of his lot. He also stated that only after this litigation ensued did he learn that the survey did not reflect this additional fifteen feet. Moreover, there was no clear barrier, border, or fence between the plaintiffs' and Mr. Gary's property. The water oak tree was, at most, 1.6 feet from Mr. Gary's property line, and the record is unclear as to who actually maintained the part of the property where the water oak was located.[2]

The foregoing evidence does not establish that Mr. Gary "should have known" that the water oak was on plaintiffs' property. Thus, we agree with the trial court that an award of treble damages was not appropriate based on the evidence presented.

This assignment of error is without merit.

Attorney's Fees and Costs
(Assignment of Error No. 2)

The Corleys next argue that the trial court committed legal error and was clearly wrong in failing to address whether they are entitled to attorney's fees and costs, and in failing to make such an award, pursuant to LSA-R.S. 3:4278.1(D). Plaintiffs also assert that the trial court later abused its discretion in denying their motion for new trial on the issue of their entitlement to reasonable attorney's fees and costs.

In ruling on plaintiffs' partial motion for new trial, the trial court stated that its prior ruling did not address an award for attorney's fees and/or costs because

[2]Mr. Gary contends the water oak was even closer to his property line, or actually on the property line, as Thomas's survey markers demonstrate that this measurement was taken from the middle of the stump of the tree. Mr. Gary testified that the measurements that he took from his garage, in accordance with the recorded survey dimensions, came almost up to the stump of the water oak.

the court did not find sufficient evidence that plaintiffs met their burden of proof regarding the sufficient notice as required by the statute.

Subsection D of LSA-R.S. 3:4278.1 provides that a good faith violator of the "tree piracy statute" **shall** be responsible for attorney fees if he fails to make a payment within thirty days after notification and demand by the owner or legal possessor of the tree.[3] We are constrained to apply the statute as written, which requires only "notification and demand" to trigger the obligation of a good faith violator to pay attorney fees. While the statute does not state what constitutes "sufficient notice," we find that plaintiffs' letter sent to Mr. Gary on or about April 7, 2009, via certified mail, constitutes notice for purposes of LSA-R.S. 3:4278.1(D). In the letter, plaintiffs explained the facts and law giving rise to their demand. Plaintiffs also attached to the letter a survey, tree appraisal, photos, and a quote to restore their property and install another oak tree thereon.

We recognize that Mr. Gary had a reasonable defense for not paying the entire $13,594.00 as demanded by plaintiffs. However, Mr. Gary failed to tender *any* amount of money to the Corleys within thirty days after notification and demand as required by the statute in order to avoid payment of attorney's fees. Therefore, the trial court erred in not awarding reasonable attorney's fees to the Corleys.

The Corleys request $50,000.00 in attorney's fees and costs. Factors to be taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) the amount of money involved; (5) the extent and character of the work performed; (6) the legal knowledge, attainment, and skill of the attorneys; (7) the number of appearances made; (8) the intricacies of the facts involved; (9)

[3]Although plaintiffs request "attorney fees and costs," there is no specific provision in LSA-R.S. 3:4278.1(D) for an award of "costs."

the diligence and skill of counsel; (10) the court's own knowledge; and (11) the ability of the party liable to pay. Deutsch, Kerrigan & Stiles v. Fagan, 95-0811 (La. App. 1st Cir. 12/15/95), 665 So. 2d 1316, 1323, writ denied, 96-0194 (La. 3/15/96), 669 So. 2d 428. After applying these factors and carefully considering the Corleys' documentation in support of their claim for attorney's fees, we find that the amount of $6,500.00 is the appropriate amount to award as reasonable attorney's fees, in accordance with LSA-R.S. 3:4278.1(D), and the judgment will be amended accordingly. See Callison, 849 So.2d 649 (attorney fee award of $5,000.00 under tree piracy statute affirmed where defendant was in good faith and no treble damages awarded, but total damages awarded, including attorney fee award was approximately $10,000.00.)

Restoration of Property Caused by Trespass
(Assignment of Error No. 3)

In their final assignment of error, the Corleys contend that the trial court abused its discretion in failing to award costs for the restoration of their property caused by Mr. Gary's trespass. Specifically, plaintiffs seek an additional $1,775.00 for the costs of removing the stump and restoring the property to level grade.

As plaintiffs correctly note, a person injured by trespass or fault of another is entitled to full indemnification for the damages caused. Damages are recoverable even though the tort-feasor acts in good faith. Versai Management, Inc. v. Monticello Forest Products Corp., 479 So.2d 477, 484 (La. App. 1st Cir. 1985).

Plaintiffs introduced a work quote of $1,775.00 to cut, grind and remove the remaining stump and to fill the hole caused by the stump. Mr. Gary did not offer any contradictory evidence regarding these costs nor does he dispute that the water oak stump remains on plaintiffs' property. Plaintiffs introduced sufficient evidence to establish their damages, and the trial court erred in failing to award plaintiffs the

costs they have incurred or will incur to restore their property. Accordingly, the judgment will be further amended to award plaintiffs an additional $1,775.00 for removal of the stump and restoration of their property.

ANSWER TO APPEAL

In their answer to the appeal, Mr. Gary and his insurer, AIG, argue that the testimony of plaintiffs' expert arborist, James Culpepper, should have been excluded because it is not supported by the facts of the case. Specifically, defendants contend that Culpepper's valuation of the tree was based on a healthy tree, while the facts of this case show that the tree at issue was not in good condition following Hurricane Gustav.

First, we reject the defendants' argument that it was a "fact of the case" that the water oak was not in good condition. Instead, the record demonstrates that this clearly was a contested issue at the trial on the merits. Moreover, Culpepper did testify to an alternative, lower market value of the water oak if the court were to assume that the tree was split and damaged, as defendants contended. The trial court accepted Culpepper's testimony in part and awarded plaintiffs this lower amount.

It is well-settled that a trial court is accorded broad discretion in determining whether expert opinion evidence should be held admissible, and its decision will not be overturned absent an abuse of discretion. Williams v. Our Lady of the Lake Hospital, Inc., 2009-0267 (La. App. 1st Cir. 9/11/09), 22 So.3d 997, 1000. Furthermore, the trial court is free to accept or reject in whole or in part the testimony of any witness. Callison, 849 So.2d at 653–654. On review, we find no abuse of the vast discretion afforded to the trial court in allowing Culpepper's testimony in this matter.

Defendants also contend that the trial court erred in awarding damages for the water oak in the amount of $6,857.00 because there was no evidence of the fair

market value of the water oak, as required by LSA-R.S. 3:4278.1; rather Culpepper testified to the replacement value of the tree. On the record before us, we find no merit to the defendants' claim that this award was improper.

Even if we were to find that plaintiffs did not prove damages under LSA-R.S. 3:4278.1, the award is proper as plaintiffs are still entitled to damages under LSA-C.C. art. 2315. The application of LSA-R.S. 3:4278.1 does not preclude recovery for other elements of damage suffered by the owner of an immovable as a result of a trespass. Louisiana Revised Statute 3:4278.1 is not an exclusive remedy; it merely standardizes damages due for timber trespass as the fair market value of the trees cut. Callison, 849 So.2d at 652.

Upon finding that the tree was located on plaintiffs' property and that Mr. Gary entered plaintiffs' property without permission to remove the tree, the trial court had broad discretion to award plaintiffs damages incurred as a result of this trespass. A damage award in the amount of the fair market value of the removed tree was not an abuse of the trial court's broad discretion. This argument also lacks merit.

For the reasons set forth above, the answer to appeal is denied.

CONCLUSION

For the above and foregoing reasons, the August 21, 2012 judgment of the trial court is amended to include additional awards for stump removal, property restoration, and attorney's fees as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of James Richmond Corley and Ednadeen Breaux Corley and against Leon Gary, Jr. and AIG Insurance Company in the amount of $1,775.00, representing the costs of removal of the tree stump and restoration of the property; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of James Richmod Corley and Ednadeen Breaux Corley and

against Leon Gary, Jr. and AIG Insurance Company in the amount of $6,500.00 in attorney's fees pursuant to LSA-R.S. 3:4278.1(D).

In all other respects, the judgment is affirmed. Costs of this appeal are assessed one-half each to appellants, James Richmond Corley and Ednadeen Breaux Corley, and appellees, Leon Gary, Jr. and AIG Insurance Company.

JUDGMENT AMENDED, AND AFFIRMED AS AMENDED; RELIEF SOUGHT IN ANSWER TO APPEAL DENIED.

JAMES RICHMOND CORLEY &
EDNADEEN BREAUX CORLEY

VERSUS

LEON GARY, JR. & ABC
INSURANCE COMPANY

STATE OF LOUISIANA

COURT OF APPEAL

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CRAIN, J., dissenting.

The majority awards attorney fees under Louisiana Revised Statute 3:4278.1(the tree piracy statute) even though they have correctly denied all other recovery under that statute. Section 4278.1 provides for attorney fees in addition to an award of treble damages when the good faith violator "fails to make payment **under the requirements of this Section**" within 30 days of notice and demand. La. R.S. 3:4278.1D (emphasis added). This statute is penal in nature and, therefore, must be strictly construed. *Sullivan v. Wallace*, 10-0388 (La. 11/30/10), 51 So. 3d 702.

Section 4278.1 requires a good faith violator to make a payment only if it is determined that he should have been aware his actions were without the consent or direction of the owner. La. R.S. 3:4278.1C. The majority correctly affirms the trial court's decision that the defendant does not fall into this category and is not liable for treble damages. A strict construction of Section 4278.1 compels the conclusion that since the defendant is not required to make a payment of treble damages under Section 4278.1, he cannot be considered to have "fail[ed] to make a payment under the requirements of this Section." Therefore, the attorney fees provision is inapplicable.

The plaintiffs' damages are limited to those arising under Louisiana Civil Code article 2315, which does not provide for attorney fees. Interpreting Section 4278.1 to provide for attorney fees in any case in which a tree is mistakenly cut or damaged, and just because the owner demanded payment under the tree piracy

statute, has the effect of judicially creating an award of attorney fees under Article 2315. For these reasons, I respectfully dissent.