

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1722

CITY OF BATON ROUGE AND PARISH OF EAST BATON
ROUGE

VERSUS

JAY'S DONUTS, INC.

DATE OF JUDGMENT: **DEC 17 2014**

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 588,811, SEC. 25, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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Jay's Donuts, Inc.

BEFORE: WHIPPLE, KUHN, PETTIGREW, CRAIN, AND THERIOT, JJ.

J.P.P.
Pettigrew, J. Dissents for the reasons assigned by Judge
Kuhn

~~Theriot, J.~~
Kuhn, J. Dissents and Assigned Reasons

THERIOT, J.

Defendant-property owner, Jay's Donuts, Inc. (Jay's Donuts), appeals the trial court's judgment awarding it \$887,805.00 as total compensation for property expropriated for public use by plaintiff-expropriator, the City of Baton Rouge and Parish of East Baton Rouge (the City/Parish). The City/Parish answered the appeal and also appealed the amount of attorney fees the trial court awarded Jay's Donuts. We amend the judgment and, as amended, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2010, the City/Parish filed a petition to expropriate immovable property owned by Jay's Donuts to acquire the land needed for the green light plan—South Harrell's Ferry Road (segment 2) improvements. The City/Parish estimated the just compensation for Jay's Donuts would not exceed \$599,000.00 and deposited that amount in the court's registry on March 30, 2010. Jay's Donuts answered the suit, asserting that just compensation exceeded \$599,000.00. The City/Parish then deposited an additional \$283,805.00 in the court's registry on August 18, 2010. The matter proceeded to trial on August 26, 2010.¹ On August 30, 2010, the trial court issued oral reasons for judgment, awarding Jay's Donuts \$5,000.00 in addition to the amounts in the court's registry for total just compensation of \$887,805.00. After a hearing, the trial court awarded Jay's Donuts attorney's fees of \$55,915.43, with interest, and all unpaid court costs.

From the judgment signed in conformity with the trial court's rulings, the parties filed their first appeal in this matter. This Court found the trial court erred in refusing to qualify Michael Daigle as Jay's Donuts' expert

¹ The case was originally set for trial on August 18, 2010, and was continued.

witness and abused its discretion in excluding his testimony.² *City of Baton Rouge and Parish of East Baton Rouge v. Jay's Donuts, Inc.*, 2011-1005 (La. App. 1st Cir. 2/10/12), 2012 WL 601905 (unpublished opinion), writ denied, 2012-0554 (La. 4/20/12), 85 So.3d 1273. This court reversed the trial court's judgment and remanded the matter to the trial court to admit Daigle's expert testimony and to then determine the just compensation to which Jay's Donuts was entitled.

On remand, the trial court heard Daigle's testimony and received evidence connected with the testimony. The trial court found that the testimony was not "reliable" and did not change its opinion on which it based its original ruling, therefore, the trial court "reinstated" the earlier judgment. On July 15, 2013, the trial court signed a judgment awarding Jay's Donuts \$887,805.00 in just compensation,³ \$55,915.43 in attorney's fees, and \$3,089.04 in interest through the date of deposit of the excess award. From this judgment, Jay's Donuts appeals. The City/Parish has answered the appeal.

ASSIGNMENTS OF ERROR

Jay's Donuts asserts five assignments of error:

1. Jay's Donuts contends that the trial court erred in awarding just compensation based on the market value of its land and business instead of the value of discretionary cash flows to the owner generated by the business.

² In ruling that Daigle was disqualified, the trial court focused on Daigle's affirmative response to the City/Parish's inquiry of whether valuation of the business enterprise based on cash flows encompassed the land and improvements, without considering Daigle's explanation that the tangible property was included in a generic sense. The trial court was convinced that Daigle's methodology in valuation usurped the role statutorily designated to real estate appraisers to perform an appraisal. See La. R.S. 37:3393.

³ This figure is calculated by taking the City/Parish's estimated value of the business, \$599,000.00, and adding to it the additional compensation awarded by the court, \$273,805.00, and the increase in fair market value, \$15,000.00.

2. Jay's Donuts contends that the trial court erred in awarding only \$887,805.00, instead of \$1,500,000.00.
3. Jay's Donuts contends that the trial court erred in finding Daigle's testimony unreliable.
4. Jay's Donuts contends that the trial court erred in awarding attorney's fees of only \$55,915.43 and the award should be increased.
5. Jay's Donuts argues that the trial court erred in failing to award expert witness fees of \$20,966.66 for Daigle's testimony.

In its answer to the appeal, the City/Parish contends that the award of attorney's fees should have been limited to \$1,250.00, which is twenty-five percent of \$5,000.00 (the difference in the amount awarded by the court and the total amount deposited in the registry of the court prior to trial).

DISCUSSION

Louisiana Constitution Article I, section 4(B), provides, in pertinent part:

(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit....

(5) In every expropriation ..., a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.

The very purpose of this constitutional language is to compensate the owner for any loss he sustained by reason of the taking, not restricted to the market value of the property taken. *State through Dep't of Highways v. Constant*, 369 So.2d 699, 702 (La. 1979). Thus, a landowner whose

property is expropriated is to be compensated so that he remains in an equivalent financial position to that which he enjoyed before the taking. *State, Dep't of Transp. and Dev. v. Restructure Partners, L.L.C.*, 2007-1745 (La. App. 1st Cir. 3/26/08), 985 So.2d 212, 220, writ denied, 2008-1269 (La. 9/19/08), 992 So.2d 937.

When the matter was initially tried, prior to the first appeal to this Court, the City/Parish offered the expert testimony of three witnesses to value Jay's Donuts. Angela Lakvold, an expert in real estate appraisal, testified that just compensation was \$882,805.00, comprised of \$190,027.00 for the market value of the land; \$149,973.00 for the market value of the improvements; \$46,305.00 for the value of anticipated revenue from a billboard lease; and \$496,500.00 for the market value of the business based upon the valuation of Dr. Daryl Burckel, the City/Parish's business valuation expert. Ross Shuffield, an appraisal expert in "real estate and Lamar leasing" (billboard lease), stated that the just compensation was \$844,100.00, comprised of \$190,000.00 for the market value of the land taken; \$155,000.00 for the market value of the improvements taken; \$44,100.00 for the value of anticipated revenue from the billboard lease; and \$455,000.00 for the business value. Shuffield testified that the \$455,000.00 figure for business value was based on Dr. Burckel's business valuation.

Dr. Burckel testified that market value for Jay's Donuts, exclusive of real estate, was \$496,500.00. In determining the value, Dr. Burckel testified that he used three different valuation methods: an asset approach, where the value of all the individual assets is totaled; an income method, a capitalization of net cash flow; and a market method, a multiple of discretionary earnings. He based his valuations on 2007, 2008, and 2009 data, including the income tax returns. He disregarded the value derived

from the asset approach because it was the lowest value. The capitalization of earnings method yielded a value of \$485,142.00 using a 15.86 percent rate and the seller's discretionary earnings using a 3.47 rate yielded a value of \$540,315.00. Dr. Burckel ultimately valued the business at \$496,500.00, which was based on Jay's Donuts' annual sales in 2009 of \$496,446.00. In arriving at that valuation, Dr. Burckel used a "rule of thumb book", which is a guide as to what businesses sell for, and the rule of thumb for valuing a donut shop was forty-five to fifty percent of annual sales up to one hundred percent of sales for a highly successful store. He used a one hundred percent rate of Jay's Donuts' 2009 sales to determine its value.

Under questioning by counsel for Jay's Donuts, Dr. Burckel testified that Jay's Donuts was a successful, profitable business, that it was innovative and had an excellent reputation, that it did not need to advertise because it had a loyal retail customer base, and that it had no debt. He testified that the standard of value he used was "[f]air market value without any sort of discount for marketability or minority interest which translates into a fair value." Dr. Burckel admitted that fair market value assumes a voluntary sale and that, in valuing the business, expenses were normalized to find what the corporation was earning because many small businesses operate their business activities to minimize taxes. Dr. Burckel explained:

When you have an owner/operator, they receive a compensation for their labor, and for their investment. And so therefore, what we try to do in the normalization process is estimate an amount of what their labor would cost in the market place. So for Jay's we – if he had \$100,000 in salary, and the market place had an estimated wage of \$78,000 for the labor he was providing, we would actually reduce the labor that he showed on the return. And that would go to the bottom line.

Dr. Burckel stated that when normalizing, he would add back salary expense to determine total cash flows to the owner. Dr. Burckel testified

that in answer to a questionnaire, Jay Lindsey, the sole stockholder of Jay's Donuts, said he worked ten-and-a-half hours a day involved in the "day to day operations", "[a]nd that he would actually have to work two to six hours more with the green light project going through." Dr. Burckel further explained his conclusion that the value of Jay's Donuts was \$496,500.00:

That is no specific method. You see the range. They have all the way from 422 to 540. And when you look at the business handbooks, a sale of a business can go all the way up to one times revenue. Well, Jay's revenue was \$496,500, which is in that range of those figures that I developed."

At the initial trial of this matter, Jay's Donuts offered the testimony of Mr. Lindsey and unsuccessfully attempted to offer the expert testimony of Daigle. On remand, Jay's Donuts' counsel questioned Daigle on his educational background and professional work experience when the trial court stopped him based on this Court's ruling that the trial court should accept Daigle as an expert. As stated in our earlier opinion, Daigle testified that he was certified as a public accountant and also certified in financial forensics (CPA/CFF).

The trial court accepted Daigle as an expert on the valuation of the full extent of Jay's Donuts' loss. According to Daigle, the full extent of the owner's loss is the value of the owner's pecuniary position in the business enterprise on the date of taking plus any additional compensation necessary to the full extent of his or her losses. Daigle was asked to explain how he calculated the owner's loss. He testified that he first clearly defined the owner's pecuniary position, then went through a valuation methodology to determine the value of the pecuniary position as of the date of the taking. Daigle stated that for an owner-occupied business enterprise, the pecuniary position of the owner is the sole beneficiary of all the discretionary cash

flows created by that entity. Daigle said he had to calculate what the cash flows were and then capitalize them by using an appropriate risk rate.

Daigle explained that fair market value was not an appropriate valuation method in this case because it was better suited where a cash price would be paid in an open market transaction between a willing buyer and a willing seller when neither party was under compulsion to act. Daigle testified that with fair market value, the expert might be making normalization adjustments where he or she actually adjusted the actual results of the business to mimic an average typical business.

Daigle testified that he determined the cash flow by using the filed tax returns for the business for 2007, 2008, and 2009, because they were prepared, certified, and signed by the owner, making them the most credible place to start the determination of discretionary cash flow to the owner. He explained that he then made adjustments to what was in the tax returns because they were not created to determine the discretionary cash flow to the owner. Counsel then offered Daigle's schedule, Exhibit D-12, into evidence. It summarized the reported revenues and expenses of Jay's Donuts for 2007, 2008, and six months of 2009. Daigle testified that he started with the taxable income, which had been arbitrarily reduced for the tax return by the owner's distributions in the form of compensation, bonuses, personal expenses, and other items. He said that those things had to be added back to taxable income to arrive at the appropriate discretionary cash flow to the owner. Daigle projected the short-term discretionary cash flow that Jay's Donuts would create for 2010, 2011, and 2012. In this case, Daigle testified that he believed the owner would receive \$230,925.00 per year in discretionary cash flows.

Daigle testified that the next step was to use a risk-appropriate capitalization rate to convert the discretionary cash flows into a value as of the date of the taking. To determine the capitalization rate, he used the build-up method, which starts with a completely risk free rate to which risk premiums are added because this was a small business equity investment. He divided the discretionary cash flow of \$230,925.00 by a rate of 15.41 percent, which yielded \$1,500,000.00 as a full extent of Jay's Donuts' loss.⁴

Daigle was then questioned by counsel for the City/Parish. He testified that the owner of the property was Jay's Donuts and that Jay Lindsey owned all of the stock in that corporation. Daigle testified that when he added back the owner's compensation to determine discretionary cash flow, he added back the amounts paid to Lindsey and his wife, Ann Lindsey. Daigle explained that whether the Lindseys paid themselves and how much was totally discretionary because the corporation's owners decide how they want to distribute earnings, whether as bonuses, dividends, salaries, or personal expense items. He explained that the Lindseys chose to distribute the cash as earnings to themselves for tax purposes because Jay's Donuts was a C-corporation, a corporate entity in existence before limited liability companies were established. Because a corporation is subject to taxation, and then the earnings when distributed to the owner are subject to taxation, small businesses try to create a "zeroed taxable event for the C-corporation." From that point, all the earnings flow through to the owner as taxable income.

⁴ The City/Parish reurged its objection to Daigle's testimony raised in the first trial, pursuant to La. R.S. 37:3393, that Daigle could not testify as a CPA without an appraiser. However, in the original hearing of August 26, 2010, Daigle informed the court that he was provided with land values provided by the City/Parish's real estate appraisers and used them in his calculations. Since the trial court subsequently rejected Daigle's expert testimony in favor of what was offered by the City/Parish, we need not consider whether Daigle's testimony is in violation of La. R.S. 37:3393.

The City/Parish counsel asked Daigle if, in order to receive retirement and tax benefits and to limit personal liability, Lindsey was considered separate from Jay's Donuts, to which Daigle replied affirmatively. Daigle explained that the tax return structure did not impact the determination of Lindsey's pecuniary position as owner. He testified that if Lindsey owned one hundred percent of many subsidiary corporations that owned the land at issue in this case, Lindsey would ultimately be the owner.

In an attempt to impeach Daigle, counsel for the City/Parish questioned him extensively about other valuation work he had done for the State of Louisiana in expropriation cases in 2009 and 2010. The City/Parish counsel asked Daigle about the use of the phrase "fair market value" in these reports and also about discrepancies in the capitalization rates. Daigle replied that the rates should be the same but he occasionally could make an error. Daigle added that the overall capitalization rate was the "critical number" and the individual components were less important. Daigle said the calculation was still the discretionary cash flow of the owner capitalized at a market rate. He also said that his use of the phrase "fair market value" could have been a typographical error because he did twenty valuations in a compressed schedule over a three-month period, cutting and pasting reports. Daigle testified, "But they do not – those typos do not undermine the fundamental opinions offered in these reports. And they have no impact on the reports that I did for Jay's Donuts here, where I'm using a 15.1 capitalization rate, which is consistent with your own expert's capitalization rates in this matter."

When questioned by Jay's Donuts' counsel, Daigle testified that the \$25,000.00 projected owner personal expenses figure on Exhibit D-12 used in determining discretionary cash flow came from a detailed analysis of

expense reports, which were not in evidence.⁵ As to Dr. Burckel's valuation, Daigle commented that Dr. Burckel was capitalizing earnings that had been normalized under the fair market value approach.

The trial court questioned Daigle about discretionary cash flow, asking him why he only included the Lindseys' income in the discretionary cash flow and did not include the rest of the employees' income. Daigle repeated that for tax reasons, the owner "has to create expenses like compensation, dividends, bonuses, personal expenses to try and distribute his earnings, his discretionary cash flow to himself in a manner that's tax deductible so that the corporation does not end up paying taxes, and only he as an individual pays taxes on those earnings."

The trial court asked Daigle how he calculated \$135,000.00 in projected taxable income for 2009, to which Daigle responded, "I got that number by adding about a three percent increase to the actual amount [of income] in 2008, 2007."⁶ In response to further questioning by the trial court, Daigle explained that his final column containing \$230,925.00, was not supposed to be the actual discretionary cash flow for 2009, but was a projected cash flow based on 2007, 2008, and 2009 data generally.⁷

In ruling that Daigle's testimony was not reliable, the trial court noted the errors in the documents with which the City/Parish attempted to impeach Daigle. The trial court then stated that Daigle could not explain why he added Lindsey's income from Jay's Donuts to determine the pecuniary loss

⁵ An expert may base his opinion upon data known to him before trial. La. C.E. art. 703. See also *State, Dep't of Transp. and Dev. v. Dietrich*, 555 So.2d 1355, 1359 n.11 (La. 1990).

⁶ We note that Jay Lindsey testified that, his wife, Ann Lindsey was allocated a salary of \$36,000.00 to \$37,000.00 per year, but she did not perform a regular function relative to business operations. He explained that the salaries that he and his wife were paid were for tax purposes and had no relationship to how much work they did.

⁷ The court then asked Daigle if he did the valuation on March 30, 2010, the valuation date shown on Exhibit D-12. Daigle testified that he originally did the valuation in the late part of 2009, but he said the valuation was dated March 2010 because he believed the projection was still accurate.

because Jay's Donuts was a corporation and Lindsey was an individual. The trial court mentioned that Daigle did not include the income from other employees in his valuation.

In its first, second, and third assignments of error, Jay's Donuts contends that Daigle's valuation of its loss was the appropriate measure of its damage, relying on *Constant, City of Baton Rouge/Parish of East Baton Rouge v. Broussard*, 2002-0166 (La. App. 1st Cir. 12/31/02), 834 So.2d 665, writ denied, 2003-0652 (La. 5/30/03), 845 So.2d 1056, and *State, Dep't of Transp. and Dev. v. Dietrich*, 555 So.2d 1355 (La. 1990).⁸ As the Louisiana Supreme Court stated in *Constant*, income figures of a defendant's business from which the capitalized value of its economic operations might be found and from which the capitalized value of the percentage of (or entire) loss of business income might be ascertained (or, rather, estimated), afford an appropriate basis for a pecuniary award for a business's loss occasioned through the taking of immovable property indispensable to defendant's business activities. 369 So.2d at 704-05.

The question of what damages will appropriately compensate the landowner is necessarily dependent on evidence presented by expert witnesses; however, the fact finder is not obligated to accept an expert's opinion in expropriation cases, since those opinions are not binding and are merely advisory in nature. *Restructure*, 985 So.2d at 220. In an expropriation proceeding, a fact finder's factual determinations as to the value of property and entitlement to other types of damages are subject to the manifest error standard of review, while the amount of damages awarded is subject to the abuse of discretion standard of review. See *City of Baton*

⁸ In *Dietrich*, the Louisiana Supreme Court affirmed an award to property owners for past and future lost profits sustained by their cattle slaughterhouse business and their cattle-raising operation due to the expropriation of part of the land used to raise the cattle. 555 So.2d at 1359.

Rouge v. Johnca Properties, L.L.C., 2003-0632 (La. App. 1st Cir. 2/23/04), 873 So.2d 693, 699, writ denied, 2004-0696 (La. 5/7/04), 872 So.2d 1083. In an expropriation proceeding, the trial court is not required to accept or reject the testimony of any particular witness, but may give whatever weight it considers appropriate to the testimony of any and all witnesses in making its factual determination of the value of the property taken. *Restructure*, 985 So.2d at 221. Because the trial court was presented with the expert testimony of other witnesses who disagreed with Daigle's view of the evidence, the trial court's choice between the two contrasting views of the evidence cannot be manifestly erroneous or clearly wrong. See *Stobart v. State, Dept. of Trans. and Dev.*, 617 So.2d 880, 883 (La. 1993).

The trial court did not accept Daigle's testimony partly because it was not satisfied with Daigle's explanation of why the owner's salary should be added back to the corporation but the salaries of the other employees should not. The City/Parish claims that Daigle erred in adding back the salaries of the Lindseys to determine the value because they are not the owners of the business; arguing instead that the corporation owns itself. It points out that for tax and liability purposes, Lindsey wanted to be separate from Jay's Donuts, unlike the situation in valuing the corporation for expropriation purposes. The trial court also rejected Daigle's testimony because the City/Parish presented evidence of discrepancies in his capitalization rate Daigle used in other expropriation cases, and Daigle used the phrase "fair market value" in some of the reports. The trial court rejected Daigle's explanation that he made typographical errors.

In remanding this matter, this Court instructed the trial court to determine just compensation based on the full extent of Jay's Donuts' loss, which included the loss of business income based on the business's cash

flows. It should be noted that the Louisiana Supreme Court expressly rejected the contention that a trial court is obligated to fix damages in an expropriation proceeding using the appellant's proffered valuation formula. Jay's Donuts uses *Constant* in support of the legal proposition that income figures of a defendant's business afford an appropriate basis for a pecuniary award for a business's loss occasioned through the taking of immovable property indispensable to the defendant's business activities. While it is true that *Constant* does indicate that the appellant's proffered valuation formula *might* afford an appropriate basis for fixing an award to the owner of an expropriated business, a trial court is not *required* to fix its compensation award based upon such a formula. See *Constant*, 369 So.2d at 704-705.

The Louisiana Supreme Court stated in *Constant*, "We are unwilling to deny the landowners recovery, on some theory that their business losses may be compensated only by a capitalized-income approach to valuation. The constitution does not so require; but it does require that the landowners be fully compensated, without specifying any method by which to determine such compensation." *Id.* at 705. There, the supreme court reasoned that the landowners had "produce[d] evidence of a [d]ifferent method by which to calculate an amount to fully compensate them from their loss, *i.e.*, the replacement costs of a new loading area," concluding that this was "an appropriate method of compensation under the constitutional mandate to repair fully the loss occasioned by [the] taking." *Id.*

In the instant case, the City/Parish presented evidence by which to calculate an amount to fully compensate the business for the expropriation of its property; therefore, it cannot be said that the trial court's decision to credit the City/Parish's proffered valuation formula was manifestly erroneous. See *Huddleston v. Ronald Adams Contractor, Inc.*, 95-0987

(La. App. 1st Cir. 2/23/96), 671 So.2d 533, 536. Thus, the trial court's judgment in this regard must be upheld.

In its fourth assignment of error, Jay's Donuts contends that the attorney's fees award of \$55,915.43 should be increased to \$99,833.98, plus fees for post-trial pleadings, motions, and this appeal, subject to the cap in La. R.S. 48:453(E). The City/Parish answered the appeal, contending the cap in La. R.S. 48:453(E) limits the award to twenty-five percent of \$5,000.00 (\$1,250.00), which is the difference between the compensation awarded by the trial court and the total amount deposited into the registry of the court.

The prevailing party in litigation is not entitled to an award of attorney's fees unless it is authorized by statute or contract. *State, Dept. of Transp. and Development v. Tynes*, 433 So.2d 809, 818 (La. App. 1st Cir. 1983), writ denied, 437 So.2d 1153 (La. 1983). Louisiana Revised Statutes 48:453(E) states:

Reasonable attorney fees may be awarded by the court **if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment.** Such attorney fees in no event shall exceed twenty-five percent of the difference between the award and the amount deposited in the registry of the court. [emphasis added.]

Because expropriation proceedings are in derogation of the right of individuals to own property, the law governing these proceedings must be strictly construed against the expropriating authority. *State through Dep't of Transp. and Dev. v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990); *St. Tammany Parish Hosp. Service Dist. No. 2 v. Schneider*, 2000-0247 (La. App. 1st Cir. 5/11/01), 808 So.2d 576, 582. Jay's Donuts contends that the reference in La. R.S. 48:453(E) to the "amount of the compensation deposited," means the original deposit, not multiple deposits, relying on

Restructure, 985 So.2d at 232, and La. R.S. 48:453(A).⁹ The City/Parish mainly relies on *Johnca* to support its contention that the attorney's fee award should be based on the total amount deposited before trial. *Johnca*, 873 So.2d at 700.¹⁰

The City/Parish initially deposited \$599,000.00 in the registry of the court on March 25, 2010, when it filed suit. On August 18, 2010, the day the case was originally set for trial, the City/Parish deposited an additional \$283,805.00. The trial court's total award was \$887,805.00. The difference between the total award and the total deposit in the trial court's registry is \$5,000.00. Applying the twenty-five percent cap to that amount, the highest amount Jay's Donuts could receive for attorney's fees is \$1,250.00. We reject Jay's Donuts' contention under *Restructure* that only the initial deposit should be considered. *Restructure* is factually distinct from the instant case. In *Restructure*, a subsequent deposit was made into the trial court's registry after a jury verdict was rendered. In the instant case, all deposits were made prior to the rendering of judgment. We find the instant case better follows *Johnca*, in that the trial court considered a total amount that had been deposited in the registry at the time of trial, following the twenty-five per cent cap of La. R.S. 48:453(E). See *Johnca*, 873 So.2d at 701. We find the maximum attorney's fee allowable in the instant case is \$1,250.00, and we amend the judgment to award that amount.

⁹ In *Restructure*, the initial deposit of \$342,364.00 was made on November 15, 2001; on April 28, 2004, the jury returned a verdict in favor of Restructure for \$700,000.00. *Restructure*, 985 So.2d at 218-219. DOTD made additional deposits of \$41,298.75 on December 7, 2005, and \$418,376.94 on October 18, 2006. *Restructure*, 985 So.2d at 227. The trial court then awarded Restructure attorney's fees of \$60,000.00. *Restructure*, 985 So.2d at 219. On appeal, this court amended the jury's award of just compensation to \$496,583.00 and computed attorney's fees by deducting the initial deposit from that amount. *Restructure*, 985 So.2d at 232. See also *Estate of Davis*, 572 So.2d at 45 n. 15; *State through Dep't of Highways v. Enserch Corp.*, 559 So.2d 787, 792 (La. App. 1st Cir.), writ denied, 567 So.2d 85 (La. 1990); *State, Dep't of Transp. and Dev. v. Richardson*, 453 So.2d 572, 578 (La. App. 1st Cir. 1984).

¹⁰ In *Johnca*, the supplemental deposit of \$54,000.00 was made approximately twenty-six months after the initial deposit of \$454,000.00. *Johnca*, 873 So.2d at 696. The trial court in *Johnca* awarded \$546,000.00 in just compensation, a difference of \$38,000.00 from the total deposit. *Johnca*, 873 So.2d at 701. The trial court then awarded twenty-five percent of that amount, or \$9,500.00, as attorney's fees. *Id.*

In its fifth assignment of error, Jay's Donuts contends that the trial court erred in failing to award it expert witness fees of \$20,900.66 charged by Daigle, relying on La. R.S. 48:456(A)(4), which authorizes an award to the landowner for its expert witness fees. A trial court has great discretion in fixing expert witness fees. *Restructure*, 985 So.2d at 233. Relevant factors to be considered by the trial court in fixing expert witness fees include the time spent testifying at trial, time spent in preparation for trial, time spent away from regular duties while waiting to testify, the extent and nature of the work performed, and the knowledge, attainments, and skill of the experts. *Id.* Additional considerations include helpfulness of the expert's report and testimony to the trial court, the amount in controversy, the complexity of the problem addressed by the expert, and awards to experts in similar cases. *Id.*

The trial court did not award Daigle's expert witness fees because the trial court did not rely on his testimony. Simply because the trial court did not rely on Daigle's testimony does not prove, in and of itself, that the expert did not earn a fee for his services. There was a substantive judgment in favor of Jay's Donuts against the City/Parish, and the opinion of Daigle was reasonably necessary to the presentation of Jay's Donuts's case. See *Restructure*, 985 So.2d at 233. In addition, this case was remanded for the specific purpose of having the trial court allow the testimony of Daigle as the expert witness for Jay's Donuts. While Jay's Donuts seeks an award of \$20,900.66, the invoice for Daigle's expert witness fees and the amount sought in the trial court was \$20,899.66. Therefore, we amend the judgment to award \$20,899.66 to Jay's Donuts as expert witness fees.

DECREE

For these reasons, the trial court's judgment is amended to award attorney's fees to Jay's Donuts, Inc. in the amount of \$1,250.00. The judgment is further amended to award Jay's Donuts, Inc. expert witness fees in the amount of \$20,899.66. The remainder of the judgment is affirmed. All costs of this appeal are assessed to the appellant, Jay's Donuts, Inc.

AMENDED, AND AS AMENDED, AFFIRMED.

**CITY OF BATON ROUGE
AND PARISH OF EAST
BATON ROUGE**


**FIRST CIRCUIT
COURT OF APPEAL**

VERSUS

STATE OF LOUISIANA

JAY'S DONUTS, INC.NO.

2013 CA 1722

 KUH N, J., dissenting.

I must dissent from those portions of the majority opinion which uphold the trial court's valuation of Jay's Donuts' loss and which reduce the attorney's fee award. Under the Louisiana Constitution of 1974, the measure of damages in expropriation cases was broadened so that an owner of property that is expropriated by the state "shall be compensated to the full extent of his loss." La. Const. Art. 1, sec. 4. The purpose of Louisiana Constitution Article I, section 4(B), is to compensate property owners for any loss they sustain by reason of the taking, not restricted to the market value of the property taken. *State through Dep't of Highways v. Constant*, 369 So.2d 699, 702 (La. 1979).

In remanding this matter, this Court instructed the trial court to determine just compensation based on the full extent of Jay's Donuts' loss, which included the loss of business income based on the business's cash flows. To fully compensate Jay's Donuts for its loss, the court should have considered the discretionary cash flows the business would have generated but for the taking, as explained by Michael Daigle. By rejecting Daigle's valuation, the trial court once again failed to consider the full extent of Jay's Donuts' loss. Unlike Daigle, the City/Parish experts relied on fair market value, which was not an appropriate valuation in this case. The trial court abused its discretion in rejecting Daigle's valuation because Daigle was the only expert qualified to determine Jay's Donuts' loss of its pecuniary position in its assets based on the cash flows those assets produced.

A trial court may not substitute its opinion for that of an expert witness who

testified at the trial when such testimony is based on correct facts and good reasoning. *State, Dep't of Transp. & Dev. v. Tynes*, 433 So.2d 809, 817 (La. App. 1st Cir.), writ denied, 437 So.2d 1153 (La. 1983). The trial court erred in rejecting Daigle's testimony partly because it was not satisfied with Daigle's explanation of why the owner's salary should be added back to the corporation but the salaries of the other employees should not. Daigle explained that the income that must be valued is the discretionary cash flow to the owner generated by the business; the owner has complete discretion as to whether, when, and how to pay that income, whereas as to regular employees' salaries, the owner has no discretion whether to pay them. Additionally, Daigle testified that the cash flow from the business should be used as a basis of value and that its characterization on an income tax return did not change the fact that it was actually owned by the business, and through the business it was owned by Lindsey, the business's sole shareholder. The legal separateness of a corporation from its owners is irrelevant to whether the portion of its cash flow that it chooses to pay its owners is in fact cash flow that the business lost due to the taking. While the cash flows are measured according to the payments made to the Lindseys, this money was added back to taxable income because Jay's Donuts paid this money from its discretionary cash flow, not because it was ultimately received by the Lindseys. In the expropriation suit of *Naquin v. Dep't of Transp. and Dev.*, 604 So.2d 62, 68 (La. App. 1st Cir.), writ denied, 608 So.2d 169 (La. 1992), in amending an award of future gross profits to a lessee-corporation and its two principal shareholders, this Court commented that the expert economist used the work life of the principals to project lost profits because "the corporation is the principals."

Moreover, the City/Parish's own expert, Dr. Daryl Burckel, also added back owner compensation and benefits to determine the income figure, but he did not add back as much of these benefits as Daigle did because he was looking at the fair

market value of the business. As Daigle testified, a fair market valuation does not reflect the actual cash flow the business would have generated and is not an appropriate valuation method in this case.

The trial court also rejected Daigle's testimony because the City/Parish presented his reports for the state in other expropriation cases and it argued there were discrepancies in his capitalization rate and Daigle used the phrase "fair market value" in some of the reports. The court rejected Daigle's explanation that he made typographical errors. However, the trial court erred in discrediting Daigle's testimony based on these reports because they concern acquisitions by the state of other properties and are irrelevant to this case. Moreover, the reports the City/Parish was using to impeach Daigle were two draft reports (out of fourteen), not the final copies, and Daigle used the same methodology as used in the instant case to calculate the owner's pecuniary position in all versions of the reports.

Daigle's expert opinion was based on correct facts and good reasoning such that the trial court erred in rejecting his testimony. Because there was no evidence to dispute Daigle's valuation, the just compensation award should have been amended to the amount that Daigle testified would fully compensate Jay's Donuts for its loss, which is \$1,500,000.00. Daigle's valuation satisfies the constitutional requirement that property owners be fully compensated and made whole when their property is expropriated, unlike the valuations of the City/Parish's experts.

While the majority correctly comments that *Constant* did not require that a trial court fix just compensation based upon a capitalized-income approach to valuation, the Louisiana Supreme Court did hold that Louisiana Constitution Article I, Section 4, requiring that the owner be compensated for the full extent of his loss, allows an award in excess of the market value for compensation. 369 So.2d at 701. In *Constant*, the court did not have available to it evidence establishing the value of the business through capitalization of income but had

evidence of the replacement costs of a new loading area to replace that which was taken. *Id.* This evidence produced a value greater than the market value of the expropriated land and the court found that the landowners were entitled to this value so as to put them in as good a pecuniary position as they enjoyed prior to the taking. *Id.*, 369 So.2d at 702. The court noted that the replacement cost evidence was the only method which put the owners in as good a pecuniary position. *Id.* Likewise, in this case, the valuation by Daigle is the only valuation which puts Jay's Donuts in as good a pecuniary position as it enjoyed before the taking. In affirming the trial court's award based on fair market value, the majority forces Jay's Donuts to suffer financially due to the subordination of its rights of private ownership of property to the paramount right of the City/Parish to expropriate for the public good, contrary to the Louisiana Constitution. Therefore, I disagree with the majority's opinion, which upholds the trial court's reliance on those valuations based on fair market value.

I also disagree with the majority's award of attorney's fees, finding that it erred in basing the award on the difference between the total deposit in the registry of the court and the amount awarded at trial.¹ La. R.S. 48:453(E), which authorizes attorney's fees, refers to the "amount of the compensation deposited," which has been interpreted to mean the original deposit, not multiple deposits. Moreover, La. R.S. 48:453(A) states, "The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improvement for which the property is taken." Because

¹ Initially I note that because Jay's Donuts should have been awarded \$1,500,000.00 in just compensation, the cap of twenty-five percent of the difference between that award and the initial deposit or the total deposits would be lower than the amount of attorney's fees Jay's Donuts seeks on appeal. Therefore, I would pretermite the issue of which amount should be used in calculating the limit set forth in La. R.S. 48:453(E).

the amount of compensation is determined as of the time the estimated compensation is deposited into the court's registry, the amount deposited at that time should also be what is considered in determining attorney's fees. The reduction of the attorney's fee award based on supplemental deposits is inconsistent with the purpose of awarding attorney's fees in expropriation proceedings. After Jay's Donuts hired counsel to establish the insufficiency of the original deposit, take depositions, and prepare for and attend trial, then the City/Parish made an additional deposit of \$283,805.00 on the day trial was originally scheduled.

I find the majority's reliance on *City of Baton Rouge v. Johnca Properties, L.L.C.*, 2003-0632 (La. App. 1st Cir. 2/23/04), 873 So.2d 693, 699, writ denied, 2004-0696 (La. 5/7/04), 872 So.2d 1083, misplaced. To support its use of the total amount deposited, contrary to earlier case law from this Court, the *Johnca* opinion simply states, "Johnca argues no basis for the use of the earlier, lower deposit as a basis for awarding attorney fees other than that even the larger sum does not cover its legal expense in this matter." *Johnca*, 873 So.2d at 700.

The more recent case of *State, Dep't of Transp. and Dev. v. Restructure Partners, L.L.C.*, 2007-1745 (La. App. 1st Cir. 3/26/08), 985 So.2d 212, 232, writ denied, 2008-1269 (La. 9/19/08), 992 So.2d 937, should control, wherein this Court stated:

Since the **original** deposit in this matter was \$342,364.00, the excess judgment for compensation over the **initial** deposit is \$154,219.00.... La. R.S. 48:453(E) limits the attorney fees that may be awarded in an expropriation proceeding to 25% of the excess of the award of just compensation above the amount **originally** deposited. (Emphasis added.)

This Court in *Restructure* did not base its use of the initial deposit on the fact that the subsequent deposit was made after a jury verdict was rendered, as the majority suggests, but on the statutory language authorizing attorney's fees. The majority

fails to note the conflict in the statutory interpretation of La. R.S. 48:453(E) between the two cases from this Court. The *Restructure* case is in line with earlier jurisprudence from this Court and the Louisiana Supreme Court. In *State through Dep't of Transp. and Dev. v. Estate of Davis*, 572 So.2d 39 n.15 (La. 1990), in calculating an attorney's fee award pursuant to La. R.S. 48:453(E), the Supreme Court calculated the twenty-five percent cap on the "difference between the award and the amount deposited in the registry of the court **initially**...." (Emphasis added.) The court did not add the subsequent deposit to calculate the amount of attorney's fees. In *State, Dep't of Transp. and Dev. v. Richardson*, 453 So.2d 572, 578 (La. App. 1st Cir. 1984), this Court stated that the attorney's fee award authorized by La. R.S. 48:453(E) was calculated by "subtracting the amount of the **initial** deposits ... from the amount of the final award." (Emphasis added.)² See also *State through Dep't of Highways v. Enserch Corp.*, 559 So.2d 787, 792 (La. App. 1st Cir.), writ denied, 567 So.2d 85 (La. 1990), where, in upholding the trial court's award, this Court stated, "The trial court awarded attorney's fees of 25% of the difference between the total award and the **original** deposit." (Emphasis added.)

Lastly, in reducing this attorney's fee award, the majority ignores the principle that because expropriation proceedings are in derogation of the right of individuals to own property, the law governing these proceedings must be strictly construed against the expropriating authority. *Estate of Davis*, 572 So.2d at 42; *St. Tammany Parish Hosp. Service Dist. No. 2 v. Schneider*, 2000-0247 (La. App. 1st Cir. 5/11/01), 808 So.2d 576, 582. The attorney's fee of \$55,915.43 awarded by the trial court should be increased at least to \$72,201.25. Although this amount is less than the \$99,833.98 plus fees for post-trial motions and this appeal requested

² In *Richardson*, the court referred to "deposits" because the case involved the initial deposits in two separate expropriation suits which were consolidated for trial. 453 So.2d at 573.

by counsel for Jay's Donuts, it is the maximum allowed by La. R.S. 48:453(E), that is, twenty-five per cent of the difference between the just compensation award of \$887,805.00 and the initial deposit, \$599,000.00. A review of the factors to be taken into consideration in determining the reasonableness of attorney's fees indicates that the trial court did not abuse its discretion in its attorney's fee award. See *Restructure*, 985 So.2d at 231. The majority clearly errs in reducing the attorney's fees based on one case from this Court which, in its statutory interpretation, conflicts with this Court's other cases, a Louisiana Supreme Court case, and the principle that laws governing expropriation proceedings are strictly construed against the expropriating authority.³

For these reasons, I dissent in part.

³ Because the First Circuit has conflicting opinions, this case should have been heard *en banc* to resolve the conflict.