NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0613

BRANDON WADE HIRSTIUS

VERSUS

CLECO CORPORATION, BELLSOUTH TELECOMMUNICATIONS, L.L.C., CHARTER COMMUNICATIONS, L.L.C.

DATE OF JUDGMENT: DEC 2 2 2016

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2013-12105, DIVISION J, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

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Brandon W. Hirstius
Lacombe, Louisiana

Plaintiff-Appellant
In Proper Person

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BEFORE: HIGGINBOTHAM, THERIOT, AND CHUTZ, JJ.

Disposition: APPEAL MAINTAINED; AMENDED JUDGMENT AFFIRMED.

CHUTZ, J.

In this action for trespass, plaintiff, Brandon W. Hirstius, appeals a trial court judgment dismissing his claims against defendant, Bellsouth Telecommunications, L.L.C. d/b/a AT&T Louisiana (AT&T). We affirm.

FACTS AND PROCEDURAL BACKGROUND

Mr. Hirstius owns a tract of immovable property located in St. Tammany Parish. The northern boundary of the property is bordered by a right-of-way owned by the State of Louisiana that runs along U.S. Hwy. 190.

On May 6, 2011, Mr. Hirstius filed his original suit against AT&T complaining of the unauthorized presence of a utility pole, aerial lines, and other equipment on his property. Following a bench trial, the trial court concluded the placement by AT&T of a pedestal and aerial cables on Mr. Hirstius' property outside of the state right-of-way constituted a trespass for which AT&T was liable in damages. That judgment was affirmed on appeal. See ***Hirstius v. BellSouth Telecommunications, Inc.***, 12-2104 (La. App. 1st Cir. 8/14/13), 123 So.3d 276, 278, writ denied, 13-2709 (La. 2/7/14), 131 So.3d 868.

Before the decision in the original suit was final, Mr. Hirstius filed the present suit on May 6, 2013, against AT&T, Cleco Power L.L.C., and Renaissance Media, L.L.C.[1] (Renaissance), asserting numerous causes of action for trespass concerning the utility pole and equipment, and seeking declaratory relief quieting title and declaring him to be the owner of the utility pole. On August 15, 2013, Mr. Hirstius filed a supplemental and amending petition in which he raised two new, separate claims of alleged trespass upon his property by AT&T. (prior appeal, R 144) In response, AT&T filed a peremptory exception raising the objection of res judicata and a dilatory exception raising the objection of improper cumulation of actions. By judgment dated

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[1] Mr. Hirstius actually named Charter Communications, L.L.C. as defendant, but Renaissance, a cable provider, answered the suit stating it was the proper party defendant.

November 6, 2013, the trial court sustained the exception of *res judicata* and dismissed all of Mr. Hirstius' claims against AT&T with the exception of the "two separate and discrete alleged acts of trespass" raised in Mr. Hirstius' amending petition. The trial court also sustained the exception of improper cumulation of actions and ordered a separate trial on Mr. Hirstius' two remaining claims of trespass against AT&T.[2]

The first alleged trespass occurred on August 28, 2012, as Hurricane Isaac approached landfall in Louisiana. On that date, AT&T personnel cut down a banner belonging to Mr. Hirstius that was hanging from an AT&T fiber optic cable located along U.S. Hwy. 190. The second trespass claim arose from an incident on August 30, 2012, when a tree service company contracted by AT&T trimmed and/or topped several trees in order to retrieve and repair a fiber optic cable downed by Hurricane Isaac.

Following a bench trial, the trial court signed a judgment on December 17, 2015, that stated the court was granting AT&T's oral motion to dismiss Mr. Hirstius' trespass claims. The judgment also dismissed a reconventional demand filed by AT&T seeking recovery for expenses and damages it allegedly incurred as a result of Mr. Hirstius attaching his banner to AT&T's fiber optic cable. In its written reasons for judgment, the trial court concluded Mr. Hirstius failed to carry his burden of proving the alleged trespasses and any resulting damages. Mr. Hirstius has now appealed the trial court's judgment.

SHOW CAUSE ORDER

This court *ex proprio motu* issued a rule to show cause why this appeal should or should not be dismissed. The apparent defects noted in the show cause order were: (1) the December 17, 2015 judgment appeared to lack decretal language dismissing or

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[2] See ***Hirstius v. Cleco Corporation***, 14-1456 (La. App. 1st Cir. 6/5/15) (unpublished) and ***Hirstius v. Cleco Corporation***, 14-1457 (La. App. 1st Cir. 6/5/15) (unpublished), writ denied, 15-1282 (La. 9/25/15), 178 So.3d 571, for the disposition of Mr. Hirstius' claims against Renaissance and Cleco Power L.L.C., respectively.

disposing of Mr. Hirstius' trespass claims; and (2) the judgment appeared to be a partial final judgment lacking the designation of finality required by La. C.C.P. art. 1915(B)(1). This matter was remanded to the trial court for the limited purpose of allowing that court, if it chose to do so, to sign an amended judgment addressing these apparent defects.

On remand, the trial court signed an amended judgment on May 25, 2016, ordering that Mr. Hirstius' trespass claims against AT&T be dismissed with prejudice. Thus, the amended judgment corrected the defect of insufficient decretal language. The amended judgment also included a designation that the judgment was a final appealable judgment with no cause for delay under Article 1915(B).

On the same date, the trial court issued a *per curiam* setting forth its reasons for designating the judgment as final under Article 1915(B). The trial court noted this suit originally involved multiple claims against three defendants, including AT&T. However, as previously noted, the trial court sustained AT&T's exception of improper cumulation of actions and ordered a separate trial on Mr. Hirstius' remaining trespass claims against AT&T. Moreover, pursuant to AT&T's peremptory exception of *res judicata*, the trial court also dismissed all of Mr. Hirstius' claims against AT&T with the exception of "two separate and discrete alleged acts of trespass" raised in Mr. Hirstius' amending petition. The amended judgment before us on appeal disposed of these two trespass claims against AT&T, which were the only remaining claims against AT&T in this matter. Because the amended judgment dismissed AT&T entirely from this suit, with prejudice, that judgment is a final judgment immediately appealable under La. C.C.P. art. 1915(A)(1).[3] No designation of finality under Article 1915(B)

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[3] Louisiana Code of Civil Procedure article 1915(A)(1) provides, in pertinent part that:

> A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court ... **[d]ismisses the suit as to less than all of the parties, defendants**, third party plaintiffs, third party defendants, or intervenors. [Emphasis added.]

was required. See ***Motorola, Inc. v. Associated Indemnity Corporation***, 02-0716 (La. App. 1st Cir. 4/30/03), 867 So.2d 715, 721. Accordingly, this appeal will be maintained.

DISCUSSION

In his *pro se* appellate brief, Mr. Hirstius argues he should have prevailed on his trespass claims against AT&T and complains the trial court erred in granting AT&T's oral motion to dismiss. He contends AT&T had no right to enter his property and cut his trees since it did not have a right-of-way. Mr. Hirstius suggests the trial court did not give due weight to his testimony. He further suggests the trial court may not have even reviewed the entire record, particularly Mr. Hirstius' petition and his testimony, and may have erred in remembering "the facts of the [prior] judgment of trespassing [sic] against AT&T."

Initially, we observe that Mr. Hirstius offers no support for his suggestion that the trial court failed to review and consider the entire record of this matter, including the prior judgment of trespass against AT&T.[4] Nor does the record in any way support such a conclusion. In fact, when Mr. Hirstius inquired at trial whether the trial court had "read everything," the trial court responded affirmatively. Moreover, the trial court's written reasons indicate consideration of all evidence presented at trial.

Our review of the record also indicates the trial court did not, in fact, grant an oral motion to dismiss Mr. Hirstius' trespass claims despite the statement in the trial court's original December 17, 2015 judgment that it did so. On remand of this matter, the trial court explained in its *per curiam* that this statement in the original judgment was a misstatement of its action. Further, the record reflects that while AT&T made an oral motion for directed verdict at the conclusion of Mr. Hirstius' case-in-chief, the

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[4] This reference presumably refers to the trial court judgment mentioned earlier in this opinion that found the placement by AT&T of a pedestal and aerial cables on Mr. Hirstius' property outside of the state right-of-way constituted a trespass for which AT&T was liable in damages. See ***Hirstius***, 123 So.3d at 278.

motion was not granted. The trial court stated it would reserve judgment on the trespass claims until the conclusion of the case. The trial court explained in its *per curiam* that the reference to AT&T's oral motion to dismiss actually referred to AT&T's reconventional demand, which AT&T orally moved to dismiss at trial. The trial court's written reasons for judgment make it clear that the dismissal of Mr. Hirstius' trespass claims on the main demand was based on the court's evaluation of all evidence presented at trial, including Mr. Hirstius' testimony.

Mr. Hirstius' remaining arguments concern the trial court's findings that he failed to sustain his burden of proving the two alleged trespasses on his property. Each of these claims will be considered separately.

August 28, 2012 Incident:

In rejecting the trespass claim based on the August 28, 2012 incident, the trial court concluded Mr. Hirstius failed to demonstrate "a trespass occurred or that he suffered damages as a result of the removal of the banner." The trial court specifically found there was no evidence the fiber optic cable in question was located on Mr. Hirstius' property.

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. Under the manifest error standard, in order to reverse a trial court's determination of fact, an appellate court must review the record in its entirety and conclude (1) a reasonable factual basis does not exist for the finding, and (2) the trial court's finding is clearly wrong or manifestly erroneous. ***Stobart v. State through Department of Transportation and Development***, 617 So.2d 880, 882 (La. 1993).

With regard to the August 28, 2012 incident, the record reveals that Gary Long, an area manager for AT&T, received a report on that date of a large banner hanging from an AT&T fiber optic cable located at the U.S. Hwy. 190 and La. Hwy. 434 roundabout located in front of Mr. Hirstius' property. Mr. Long was concerned the

banner might be caught in high winds generated by Hurricane Isaac, which was approaching the area, and act in the manner of a "kite, [or] a sail" and tear down the fiber optic cable and cause a disruption of telecommunication services.

Because Mr. Long was advised that based on past history a confrontation with Mr. Hirstius was possible, he called the sheriff's office and requested deputies meet him at the location, which they did. However, no encounter with Mr. Hirstius occurred. AT&T personnel, without physically entering onto the surface of Mr. Hirstius' property, used a bucket truck parked on the shoulder of U.S. Hwy. 190 to swing over the state right-of-way with a boom arm and cut the two pieces of string that attached the banner to the fiber optic cable. No other part of the banner was cut. The banner fell to the ground where it lay flat on Mr. Hirstius' driveway. The entire procedure lasted only three to four minutes.

The tort of trespass is defined as the unlawful physical invasion of the property or possession of another. ***Versai Management., Inc. v. Monticello Forest Products Corporation***, 479 So.2d 477, 482 (La. App. 1st Cir. 1985). Based on the unique circumstances present, we find no manifest error in the trial court's conclusion that Mr. Hirstius failed to sustain his burden of proof, regardless of whether or not the fiber optic cable in question was located over Mr. Hirstius' property. See Restatement (Second) of Torts § 197(2); ***City of Des Moines v. Webster***, 861 N.W.2d 878, 885 (Iowa App. 2014) ("The defense of necessity allows an individual to enter and remain on another's property without permission in an emergency situation when such entry is reasonably necessary to prevent serious harm."); ***People v. Roberts***, 47 Cal.2d 374, 377, 303 P.2d 721, 723 (1956) ("Necessity often justifies an action which would otherwise constitute a trespass....").

Mr. Hirstius created the emergency situation that AT&T confronted on August 28, 2012, first by hanging the banner from AT&T fiber optic cable, and then by failing to remove it as Hurricane Isaac approached the area. Mr. Long testified he "absolutely"

perceived the banner as presenting a hazard. Mr. Hirstius' actions made it necessary for AT&T to remove the banner in an attempt to avoid potential damage to the fiber optic cable itself, as well as a possible disruption in telecommunication services to an unknown number of subscribers.

Moreover, AT&T performed the task of removing the banner in an eminently reasonable manner. No entry was made onto the surface of Mr. Hirstius' property. A bucket truck with a boom arm was used to swing over the state right-of-way and cut two strings on the banner. Although Mr. Hirstius testified the banner was ruined and could not be used for its intended purpose, the trial court obviously rejected this testimony since it concluded Mr. Hirstius proved no damages. In its reasons for judgment, the trial court specifically accepted Mr. Long's testimony that only two strings on the banner were cut. In view of the fact that Mr. Hirstius failed to present either the banner or pictures of it, we are unable to say the trial court's finding was clearly wrong, particularly since that finding was based upon a credibility determination. See ***Sullivan v. City of Baton Rouge***, 14-0964 (La. App. 1st Cir. 1/27/15), 170 So.3d 186, 196-97 (great deference is owed to the factfinder's credibility determinations). A reasonable factual basis existed for the trial's court's findings and those findings were not clearly wrong with respect to Mr. Hirstius' trespass claim based on the August 28, 2012 incident. Therefore, the trial court did not err in dismissing this trespass claim.

August 30, 2012 Incident:

On August 30, 2012, Mr. Long received a report that a fiber optic cable was down on U.S. Hwy. 190, partially blocking the roadway in front of Mr. Hirstius' property. The fiber optic cable was knocked down by a falling tree during Hurricane Isaac. Although the fiber optic cable was still operating, it was in danger of losing service according to Mr. Long. Therefore, retrieval and repair of the fiber optic cable was a top priority for AT&T since, in addition to partially blocking U.S. Hwy. 190, the

cable provided telephone service to most of the east side of the city of Mandeville, including Southeast Hospital, the Mandeville Sherriff's Office, and the Mandeville Police Department.

Upon arrival at the location, Mr. Long parked on the shoulder of U.S. Hwy. 190. He was confronted by Mr. Hirstius, who demanded to know why he was there. Mr. Long responded he was there to pick up the fiber optic cable, to which Mr. Hirstius replied Mr. Long would not do so because the cable belonged to Mr. Hirstius. Mr. Long requested permission to enter Mr. Hirstius' property to facilitate retrieval of the cable from the trees into which it had become entangled. Mr. Hirstius refused consent. Accordingly, Mr. Long decided to utilize a bucket truck with a boom arm to swing over and cut the tree off of the fiber optic cable with a chain saw. As AT&T personnel proceeded to do so, the linesman situated in the bucket was jolted when the fiber optic cable, which was "on a tension," flew up and hit the bucket from underneath. Mr. Long testified that Mr. Hirstius approached him at that point and consented to AT&T personnel entering his property, stating he did not want anyone to get hurt. At trial, Mr. Hirstius denied giving such consent.

On that same date, AT&T utilized the services of Foster Tree Care to trim the trees in question. The fallen tree situated on top of the fiber optic cable was removed and several nearby trees were either trimmed or topped to allow retrieval of the cable by AT&T. Mr. Jay Foster, a supervisor for Foster Tree Care, testified at trial that he talked to Mr. Hirstius before his crew began its work, and Mr. Hirstius merely said for them to be safe and that he did not want anyone to get hurt.

Upon cross-examination at trial, Mr. Long admitted that rather than retrieving the fiber optic cable from the trees and setting it back up as they did, AT&T personnel could have cut the cable at the first pole and then spliced a new piece of cable between that pole and the next to correct the problem. If this method had been utilized, it would have been unnecessary to cut the trees into which the fiber optic cable was entangled.

However, according to Mr. Long, cutting and splicing the fiber optic cable would have interrupted vital telecommunication services to a large part of the Mandeville area for six hours. Mr. Long further testified he would never cut a fiber optic cable with live service. In rejecting Mr. Hirstius' second trespass claim, the trial court gave the following reasons:

> The Court finds that Mr. Hirstius has failed to prove by a preponderance of the evidence that the actions of AT&T constituted a trespass under the circumstances of this case. Based on the evidence and testimony given at trial, the Court finds that defendant AT&T was acting in good faith to minimize the damage or harm occasioned by the recent hurricane and as such is not liable for the alleged trespass and damage to Mr. Hirstius' trees pursuant to [La.] R.S. 3:4278.1. Further, Mr. Hirstius once again failed to introduce any evidence whatsoever as to property lines and whether he in fact owned the property where the [trimmed] trees were located.

Based on our review, we find no error in the trial court's rejection of the claim of trespass allegedly occurring on August 30, 2012. We note that under La. R.S. 3:4278.1, a person who cuts another's trees without the owner's consent is subject to harsh penalties for timber trespass. This provision provides in pertinent part:

> A. (1) It shall be unlawful for any person to cut ... 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 of this Section shall be liable to the owner, co-owner, co-heir, or legal possessor of the trees for civil damages in the amount of three times the fair market value of the trees cut ... plus reasonable attorney fees and costs.
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> C. Whoever violates the provisions of Subsection A of this Section in good faith shall be liable to the owner, co-owner, co-heir, or legal possessor of the trees for three times the fair market value of the trees cut ... if circumstances prove that the violator should have been aware that his actions were without the consent or direction of the owner, co-owner, co-heir, or legal possessor of the trees.
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> E. **The provisions of this Section shall not apply ... to utility service situations where a utility is acting in good faith to minimize the damage or harm occasioned by an act of God. ...**

[Emphasis added.]

Because we find no manifest error in the trial court's finding that "AT&T was acting in good faith [on August 30, 2012,] to minimize the damage or harm occasioned by the recent hurricane," we agree with the trial court that AT&T's actions did not constitute a violation of the timber trespass statute. Hurricane Isaac was an act of God that created a situation making it necessary for AT&T to trim and/or top the trees into which its fiber optic cable became entangled during the storm. AT&T pursued this course of action in order to retrieve and repair the cable without disrupting vital telecommunication services in the Mandeville area. If it had not done so, telecommunication services to numerous subscribers, including an area hospital and two police agencies, could potentially have been interrupted for up to six hours. Under such circumstances, Paragraph E of La. R.S. 3:1478.1 rendered the provisions of that statute inapplicable to AT&T's actions on August 30, 2012.

Nor do we find manifest error in the trial court's finding that Mr. Hirstius also failed to prove the trees in question were located on his property rather than on the state right-of-way adjacent to his property. Although Mr. Hirstius asserted the trees AT&T trimmed and/or cut were located on his property, he presented absolutely no evidence as to the property line between his property and the state right-of-way, e.g., plats or survey maps. Moreover, there were no visible markers delineating Mr. Hirstius' property line from the state right-of-way. Based on these facts, we are unable to say the trial court's finding was clearly wrong. Accordingly, having failed to prove the trees in question were located on his property, Mr. Hirstius is not entitled to any recovery for the alleged trespass of August 30, 2012. We find no manifest error in the trial court's dismissal of this trespass claim.

CONCLUSION

For the above reasons, the appeal is maintained and the amended judgment of the trial court dated May 25, 2016, dismissing plaintiff, Brandon W. Hirstius', trespass claims against defendant, BellSouth d/b/a AT&T Louisiana, is affirmed. Mr. Hirstius is to pay all costs of this appeal.

APPEAL MAINTAINED; AMENDED JUDGMENT AFFIRMED.