STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 0197

BOB WELCH AND DANIEL HOOVER

VERSUS

PLANNING AND ZONING COMMISSION OF EAST BATON ROUGE PARISH AND 2590 ASSOCIATES, LLC

Judgment Rendered: MAY 09 2019

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge,
State of Louisiana
Docket Number C608569

Honorable Janice Clark, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, and HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

This matter, arising from the development of the Rouzan Traditional Neighborhood Development ("the Rouzan TND") in Baton Rouge, has come before this court on numerous prior occasions. The current appeal challenges the trial court's judgment rendered after this court remanded the matter to the trial court in the matters of Welch v. Planning and Zoning Commission of East Baton Rouge Parish, 2016-0253 (La. App. 1st Cir. 4/26/17), 220 So. 3d 60 ("Welch I") and Welch v. Planning and Zoning Commission of East Baton Rouge Parish, 2016-0751 (La. App. 1st Cir. 4/26/17), 220 So. 3d 74 ("Welch III"). For the following reasons, we vacate the September 11, 2018 amended judgment, amend the September 28, 2017 judgment, and render.

FACTUAL PROCEDURAL BACKGROUND

In the matters referred to as Welch I and Welch III, this court reversed the portions of the trial court's judgments that dismissed plaintiffs Bob Welch and Daniel Hoover's possessory action against defendant, 2590 Associates, LLC, and granted declaratory relief to intervenor, Glasgow Partners, LLC, as to the relocation of plaintiffs' private servitude of passage. This court found that the actions of 2590 Associates and Glasgow Partners while developing the Rouzan TND had diminished the servitude in violation of LSA-C.C. art. 748.[1] Accordingly, this court rendered judgment in favor of plaintiffs, granting their requests for injunctive relief and damages. Specifically, this court issued a mandatory injunction ordering 2590 Associates or its successor(s) in interest to

[1]Louisiana Civil Code article 748 provides:

The owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude.

If the original location has become more burdensome for the owner of the servient estate, or if it prevents him from making useful improvements on his estate, he may provide another equally convenient location for the exercise of the servitude which the owner of the dominant estate is bound to accept. All expenses of relocation are borne by the owner of the servient estate.

restore plaintiffs' rights to the servitude running from their property to Glasgow Avenue to the same extent and mode as specified in the title establishing the servitude, and remanded the matter to the trial court with instructions to expeditiously determine and fix the specific amount of damages due to plaintiffs. Welch, 220 So. 3d at 69; Welch, 220 So. 3d at 78-79.

2590 Associates and Glasgow Partners did not seek review of this court's rulings in Welch I and Welch III. However, the City of Baton Rouge/Parish of East Baton Rouge ("the City/Parish") sought review of this court's ruling in the matter referred to as Welch II, wherein this court reversed a separate judgment of the trial court that dismissed plaintiffs' claims against the City/Parish. Welch v. Planning and Zoning Commission of East Baton Rouge Parish, 2016-0735 (La. App. 1st Cir. 4/26/17), 220 So. 3d 70, writ denied, 2017-0885 (La. 9/29/17), 227 So. 3d 288 ("Welch II").[2]

Following this court's decisions in Welch I, Welch II, and Welch III, the trial court stayed all proceedings because of the pending writ application filed by the City/Parish with the Louisiana Supreme Court seeking review of this court's decision in Welch II. However, plaintiffs filed an application for supervisory writs of review with this court, challenging the trial court's purportedly improper stay of the claims involving 2590 Associates and Glasgow Partners. This court granted plaintiffs' writ application and ordered that, pursuant to Welch I and Welch III, the trial court was to determine and fix the amount of damages due to plaintiffs on or before September 21, 2017, and was likewise to determine, on or before September 21, 2017, the expeditious time period within which plaintiffs' possession and rights to a thirty-foot conventional servitude of passage were to be restored.

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[2]In Welch II, this court found that the trial court committed legal error, but that the record was insufficient to conduct a proper *de novo* review. Thus, this court remanded the matter to the trial court to expeditiously determine whether the approval of the Rouzan TND by the City/Parish was factually and legally correct or was arbitrary and capricious and to fix the amount of damages, if any, owed to plaintiffs by the City/Parish.

Thereafter, the trial court set a trial date of September 20, 2017. Prior to the scheduled trial date, 2590 Associates filed motions in limine, seeking to exclude testimony regarding any alleged damages to plaintiffs' utilities and to exclude testimony regarding the alleged liability of the City/Parish. The trial court granted the motion in limine to exclude evidence regarding utilities and deferred the motion in limine to exclude evidence regarding the liability of the City/Parish to the trial on the merits.

Pursuant to this court's remand orders in Welch I and Welch III, and following a bench trial on September 20 and 21, 2017, the trial court signed a judgment on September 28, 2017, addressing the claims of the parties, which judgment provides as follows:

> When after hearing the testimony of the witnesses, the exhibits admitted into evidence, the stipulation of counsel, the proposed findings of fact and conclusions of law, together with the argument of counsel, the Court being firmly of the opinion that the law and evidence preponderate in favor of the plaintiffs in the following particulars: Diminution of the value of the 30 foot servitude.
>
> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiffs and against the defendants in the full and true sum of $96,000.[00.]
>
> IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants and against plaintiffs restoring a 30 foot servitude of passage in accordance with proposed accessed [sic] servitude Exhibit D-24, sketch dated June 15, 2017 drafted by SJB Group, LLC.
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> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said restoration shall be accomplished by and restored to plaintiffs on or before January 21, 2018 all at defendants' expense.

Plaintiffs then filed the instant appeal from the September 28, 2017 judgment, raising the following as assignments of error:

(1) The trial court failed to restore the plaintiffs' rights and possession to the servitude of passage in violation of this court's previous rulings.

(2) The trial court erred in not awarding sufficient damages to the plaintiffs.

2590 Associates and Glasgow filed an answer to appeal, contending:

(1) The trial court erred in awarding damages against 2590 Associates, LLC because 2590 Associates, LLC did not cause any of the plaintiffs' damages.

(2) The trial court erred in awarding damages against 2590 Associates and Glasgow Partners, LLC because plaintiffs' claims amounted to no more than, by their testimony, inconvenience caused by construction in the neighborhood.

(3) The trial court erred in ordering the creation of a servitude, when plaintiffs' witness testified that it was not Mrs. Ford's intent to create a servitude in her will and no servitude was created; and the evidence shows that the purported servitude was not, and still is not, recorded in the public records so as to impact third parties such as 2590 Associates, Glasgow Partners, or any third party purchaser. Further, no notice of *lis pendens* was ever filed.

(4) The trial court erred in awarding damages, when, as a matter of law, the servitude did not exist on the face of the public records as to 2590 Associates, LLC, Glasgow Partners, LLC or any subsequent purchaser.[3]

RULE TO SHOW CAUSE

As a preliminary matter, we must first address whether this court has jurisdiction over the instant appeal. On February 16, 2018, this court issued a rule to show cause ordering the parties to show cause whether or not the trial court's September 28, 2017 judgment was a final judgment subject to appeal. This court also remanded the appeal for the limited purpose of inviting the trial court to advise this court in writing why the September 28, 2017 judgment did not require a

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[3]Additionally, in the answer to appeal, 2590 Associates and Glasgow Partners contended:
(1) The trial court erred in ordering the creation of a servitude when 2590 Associates, LLC did not own the property and it was impossible to establish a servitude.
(2) The trial court erred in entering judgment against 2590 Associates, LLC when at the time suit was filed 2590 Associates, LLC did not own the property.
However, 2590 Associates and Glasgow Partners did not brief these arguments, and therefore, we will not consider the merits of these arguments. See Uniform Rules, Courts of Appeal, Rule 2-12.4(B)(4).

LSA-C.C.P. art. 1915(B) designation or to sign a judgment with a LSA-C.C.P. art. 1915(B) designation and provide reasons for such designation. This court received a response from plaintiffs only regarding the show cause order.

Nevertheless, upon further review of this record in these proceedings, it is evident that the judgment addresses all disputed aspects of the plaintiffs' claims against 2590 Associates and the intervention of Glasgow Partners, and therefore, a LSA-C.C.P. art. 1915(B) designation ultimately is not necessary. See LSA-C.C.P. art. 1915(A)(1).

This court's rule-to-show-cause order also noted that the judgment may not constitute a final appealable judgment because (1) it appeared to lack specificity regarding the particular parties against whom and in favor of whom the ruling was rendered, and (2) the judgment referred to extrinsic documents, namely, the proposed access servitude on the sketch dated June 15, 2017 by SJB Group, LLC. Accordingly, on September 7, 2018, this court issued an interim order, remanding the matter for the limited purpose of having the trial court sign an amended judgment addressing these two perceived defects in the judgment and ordering the trial court to supplement the record with an amended judgment by September 17, 2018.

The record was supplemented on September 20, 2018, with an amended judgment signed by the trial court on September 11, 2018. However, the amended judgment does not address the potential defects in the judgment that were noted by this court in the interim order. Specifically, the amended judgment again refers to the proposed access servitude on the sketch dated June 15, 2017 by SJB Group, LLC, but the judgment does not attach the sketch. Moreover, the amended judgment made substantive changes to the September 28, 2017 judgment that went beyond the scope of this court's order on remand, as it included an additional

provision that "each party shall bear their own costs." To the extent that the court granted relief beyond the scope of the order of remand, the court erred. See Peters v. Livingston Wood Products, 486 So. 2d 813, 814-815 (La. App. 1st Cir.1986), and MTU of North America, Inc. v. Raven Marine, Ince., 499 So. 2d 289, 291 (La. App. 1st Cir. 1986), writs denied, 501 So. 2d 773, 776 (La. 1987); also see generally In re Belle Co., LLC, 2006-1077 (La. App. 1st Cir. 12/28/07), 978 So. 2d 977, 985-986, writs denied, 2008-0220, 2008-0229 (La. 3/24/08), 977 So. 2d 957, 958. Accordingly, because the September 20, 2018 judgment did not address the two perceived deficiencies that were to be addressed pursuant to the remand order and, further, because the judgment rendered a substantive award that was beyond the scope of the remand order, this court will set aside the September 11, 2018 amended judgment.

Nonetheless, upon further review of the September 28, 2017 judgment, we find that the judgment was sufficiently definite in that it does specify the parties that the judgment was rendered in favor of or against. From reading the judgment as a whole, we can discern the parties against whom the ruling is ordered as the judgment lists the counsel of record who were present and their respective clients at the beginning of the judgment. See Conley v. Plantation Management Co., L.L.C., 2012-1510 (La. App. 1st Cir. 5/6/13), 117 So. 3d 542, 547, writ denied, 2013-1300 (La. 9/20/13), 123 So. 3d 178. Additionally, because the record contains a copy of the sketch of the proposed servitude, we amend the judgment to attach the sketch of the proposed access servitude, dated June 15, 2017, and drafted by SJB Group. See LSA-C.C.P. art. 1919; George M. Murrell Planting & Manufacturing Company v. Dennis, 2006-1341 (La. App. 1st Cir. 9/21/07), 970 So. 2d 1075, 1088.

For the foregoing reasons, we set aside the September 11, 2018 amended judgment, amend the September 28, 2017 judgment to specifically attach the sketch of the proposed access servitude, dated June 15, 2017, and drafted by SJB Group, which we attach hereto as Appendix A and make a part hereof. Thus, we will maintain the appeal and address the merits.

DISCUSSION OF THE MERITS

Existence of a Servitude

For ease of discussion, we first address 2590 Associates and Glasgow Partners' third and fourth arguments as raised in the answer to appeal. They contend that the trial court erred in ordering the creation of a servitude and awarding damages when the servitude was not recorded in the public records and a notice of *lis pendens* was not filed.

It is undisputed herein that plaintiffs acquired their interest in the servitude pursuant to a judgment of possession rendered in the Succession of Mary Lillian Bordelon Ford. The judgment of possession grants plaintiff Bob D. Welch ownership of 3.714 acres, known as Tract A in East Baton Rouge, and a one-half ownership interest in adjoining property identified as Tract C. Likewise, the judgment of possession grants plaintiff Daniel T. Hoover ownership of .7065 acres, known as Tract B, and a one-half ownership interest in the property identified as Tract C. The judgment of possession further declares that Tracts A, B, and C include the benefit of an apparent servitude, as shown on a map and survey that was paraphed for identification with the will of Mrs. Ford.

It is further undisputed that the judgment of possession was filed in the public records, whereas the map depicting the servitude was not attached to the judgment. Accordingly, 2590 Associates and Glasgow Partners argue in their answer to appeal that because the map was never recorded, the servitude alleged by

the plaintiffs can have no effect on third parties, including 2590 Associates and Glasgow Partners. They further contend that since the servitude did not exist on the face of the public records, the trial court erred in awarding damages.

However, the issues of 2590 Associates and Glasgow Partners' failure to properly relocate and obligations to restore the private servitude of passage and the related issue of plaintiffs' entitlement to damages due to the disturbance and improper relocation of the servitude have previously been decided by this court, and, thus, we decline to address these arguments. As set forth above, in Welch I, this court determined: that plaintiffs obtained rights to a conventional servitude of passage pursuant to the judgment of possession rendered in the Succession of Ford; that the "relocation" of the private access servitude had diminished the use and extent of the servitude as provided for in the "title" establishing the servitude in violation of LSA-C.C. art. 748, thus disturbing plaintiffs' rights thereto; and that 2590 Associates executed and recorded documents that disturbed the servitude. Welch, 220 So. 3d at 64-69. Accordingly, this court rendered judgment "recognizing and restoring plaintiffs' rights to the thirty-foot conventional servitude of passage, as provided for in the title establishing the servitude." Welch, 220 So. 3d at 69-70. This court also issued a mandatory injunction, "ordering 2590 [Associates] or its successor(s) in title to restore plaintiffs' rights to the servitude to the same extent and mode as specified in the title establishing the servitude, i.e., the judgment of possession in Ford's succession referencing the will and paraphed map" and specifically ordered that the servitude be restored "running

from [plaintiffs'] property to Glasgow Avenue."[4] Welch, 220 So. 3d at 69. Finally, in Welch I and Welch III, we remanded this matter to the trial court with instructions, **for the limited purposes** of having the trial court determine and fix the specific amount of damages due to plaintiffs and determine an expeditious time period within which restoration of the servitude shall be accomplished. Welch, 220 So. 3d at 70; Welch, 220 So. 3d at 79.

As further detailed above, **neither 2590 Associates nor Glasgow Partners sought review of this court's rulings in Welch I and Welch III**. Accordingly, the issues of the existence of the servitude, the disturbance of plaintiffs' rights to the servitude, 2590 Associates and Glasgow Partners' responsibilities to restore the servitude, and plaintiffs' entitlement to damages have already been determined and will not be revisited herein. See State Division of Administration, Office of Risk Management v. National Union Fire Insurance Company of Louisiana, 2013-0375 (La. App. 1st Cir. 1/8/14), 146 So. 3d 556, 562-563.

Restored Servitude

Turning next to a discussion of plaintiffs' assignments of error, plaintiffs contend in their first assignment of error that the trial court failed to restore plaintiffs' rights and possession to the servitude of passage in violation of this court's previous rulings. Thus, they request that this court order the restoration of

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[4]We further note that through its petition of intervention in the matter, Glasgow Partners acknowledged that plaintiffs were the owners of dominant estates and that it owned the servient estate over which the servitude of passage in favor of those dominant estates crossed. Glasgow Partners asserted that, in accordance with LSA-C.C. art. 748, it had a right to relocate and **shorten** the servitude of passage running across the property it acquired on April 5, 2012, and that plaintiffs were bound to accept it, and further sought a declaration that it was so entitled to relocate the servitude. Thus, Glasgow Partners acknowledged an obligation to plaintiffs with regard to the servitude and with regard to its duty to properly relocate the servitude in accordance with LSA-C.C. art. 748. An admission by a party in a pleading constitutes a judicial confession and is full proof against the party making it. LSA-C.C. art. 1853; C.T. Traina, Inc. v. Sunshine Plaza, Inc., 2003-1003 (La. 12/3/03), 861 So. 2d 156, 159. A judicial confession has the effect of waiving evidence as to the subject of the admission. C.T. Traina, Inc., 861 So. 2d at 159; Wells Fargo, N.A. v. Settoon, 2012-1980 (La. App. 1st Cir. 6/7/13), 120 So. 3d 757, 762. Moreover, in testifying on behalf of both 2590 Associates and Glasgow Partners, Glenn Jarrell acknowledged plaintiffs' rights to a servitude of passage across Glasgow Partners's property and the obligation to "give passage" to plaintiffs.

their rights and possession to the specific **original** servitude as referenced in the judgment of possession and depicted on the map paraphed for identification with the will of Mrs. Ford.

As stated above, in Welch I, this court, found that defendant 2590 Associates had disturbed plaintiffs' rights by diminishing the servitude in violation of LSA-C.C. art. 748; accordingly, we issued a mandatory injunction ordering 2590 Associates or it successor(s) in interest to restore plaintiffs' rights to the "**thirty-foot** conventional servitude of passage **running from their property to Glasgow Avenue**," "to the **same extent and mode** as specified in the title establishing the servitude." Welch, 220 So. 3d at 68-70 (emphasis added). Additionally, in Welch III, this court concluded that intervenor Glasgow Partners was not entitled to the relief granted by the trial court on its intervention, declaring that Glasgow Partners had permanently relocated the servitude by providing access from their properties to a publicly dedicated street. Welch, 220 So. 3d at 77-78. In reversing the judgment on plaintiffs' possessory action in Welch I and reversing in part the judgment on Glasgow Partners's intervention in Welch III, this court remanded the matter on both of these claims for further proceedings. Welch, 220 So. 3d at 69-70; Welch, 220 So. 3d at 79.

On remand, Jarrell testified as to Glasgow Partners's new proposal to relocate plaintiffs' servitude, and in rendering the September 28, 2017 judgment on remand, the trial court again granted intervenor Glasgow Partners's relief in declaring that the newly proposed relocation was proper. (R. 1087-1089, 1099). Specifically, in the September 28, 2017 judgment before us on appeal, the trial court granted judgment **in favor of Glasgow Partners**, restoring the thirty-foot servitude "in accordance with proposed accessed [sic] servitude Exhibit D-24,

sketch dated June 15, 2017 drafted by SJB Group, LLC."[5] On appeal, however, plaintiffs raise several arguments in support of their contentions that their rights to and possession of the servitude of passage as provided in the title establishing the servitude have not been restored as ordered by this court.

First, they note that the relocated servitude, as depicted by the June 15, 2017 sketch drafted by SJB Group, LLC and referenced in the trial court's judgment, does not run from their property to Glasgow Avenue, as did the original conventional servitude and as this court ordered in Welch I. Rather, the relocated servitude requires plaintiffs to travel from their property across Lot 38 of the Rouzan TND, then onto Arrowhead Street, and then onto Glasgow Avenue. Additionally, and more importantly, plaintiffs contend that their rights to and possession of a thirty-foot servitude have not been restored because Arrowhead Street is only twenty-eight feet wide.[6] Moreover, as to the servitude across Lot 38, plaintiffs contend that, while the proposed servitude is depicted as thirty-feet wide, the evidence of record did not clearly establish that plaintiffs would have the full thirty feet available for their use. Plaintiffs further assert that there is no evidence in the record to demonstrate that the new location of the "restored" servitude is equally convenient for the dominant estate, and the trial court made no finding of fact that the new location was equally convenient.

Accordingly, plaintiffs aver that because the requirements of LSA-C.C. art. 748 were not met herein, the trial court's judgment on remand, purporting to "restore" plaintiffs' rights to and possession of a thirty-foot servitude of passage by

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[5]In the trial court's September 28, 2017 judgment, both 2590 Associates and Glasgow Partners are referred to as "defendants," rather than as defendant and intervenor. This portion of the judgment, ordering relocation of the servitude in accordance with Glasgow Partners's newly proposed location, provided that it was rendered in favor of "defendants," thus apparently referring to 2590 Associates, as well as Glasgow Partners.

[6]While plaintiffs acknowledge that the right-of way on which Arrowhead Street was built is 47 to 50 feet wide, they note that the street itself is actually only 28 feet wide.

ordering the relocation of the servitude as proposed by 2590 Associates and Glasgow Partners was improper. We agree.

With regard to the extent and mode of the servitude as specified in the title establishing it, the map that is paraphed for identification with Mrs. Ford's will and referenced in the judgment of possession depicts and dedicates a "**30' Private Access Servitude**" running from Glasgow Avenue to Tracts A and B and then continuing along the boundaries of Tract A and Tracts B and C, and specifically describes the servitude as a "**private means of access**" to Tracts A, B, and C. (Emphasis added). Moreover, the dimensions of the servitude are set forth therein as thirty feet in width and 472.36 feet in length from Glasgow Avenue to the borders of Tracts A and B and an additional 399.90 feet in length running between Tract A and Tracts B and C.[7] Additionally, the map specifically states that "[n]o trees, shrubs, or plants may be planted, nor shall any buildings, fences or other improvements be constructed, within or over the servitude so as to prevent or unreasonably interfere" with its purpose.

However, in apparent disregard of the mandatory injunction issued by this court ordering 2590 Associates or it successor(s) in interest to restore plaintiffs' rights to the "**thirty-foot** conventional servitude of passage **running from their property to Glasgow Avenue**," "to the **same extent and mode** as specified in the title establishing the servitude," Glasgow Partners and 2590 Associates proposed a relocated servitude, which was approved by the trial court in its September 28, 2017 judgment, that unquestionably does not comport with the **extent** or **mode** of the servitude as specified in the title establishing it. First, the route plaintiffs must now travel to access Glasgow Avenue is, at points, of a diminished width than that

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[7]According to the map depicting the servitude, the exact length of the 15-foot portion of the 30-foot servitude located along the border Tract A is depicted as 399.90, whereas the exact length of the 15-foot portion of the 30-foot servitude running through Tracts B and C is depicted as 409.51 feet.

of the original servitude as specified in the title establishing it, and it does not provide a private means of access to Lots A, B, and C from Glasgow Avenue.

As stated above, the route plaintiffs would have to take from their property to Glasgow Avenue, as proposed by Glasgow Partners and 2590 Associates and approved by the trial court, would require plaintiffs to turn left off of their properties to access and traverse the servitude across Lot 38 and to then turn right onto and traverse Arrowhead Street to reach Glasgow Avenue. While the proposed servitude across Lot 38 is depicted in the June 15, 2017 sketch as thirty-feet wide, Arrowhead Street is only twenty-eight feet wide. Thus, as we similarly determined in Welch I, the **extent** of the conventional servitude of passage as provided for in the title establishing the servitude, rather than being "restored," once again has been diminished in that plaintiffs no longer have a thirty-foot wide access to Tracts A, B, and C from Glasgow Avenue. Welch, 220 So. 3d at 66-68.

Moreover, because the map paraphed for identification with Mrs. Ford's will and referenced in the judgment of possession depicts and dedicates a "**30' Private Access Servitude**" from Glasgow Avenue to Tracts A, B, and C, which the dedication thereon specifically describes as a "**private means of access**" to Tracts A, B, and C," plaintiffs are entitled to the restoration of their rights to and possession of a thirty-foot private access servitude, providing them with a "**private means of access**" from Glasgow Avenue to their property. See Ventura v. McCune, 2014-95 (La. App. 5th Cir. 10/15/14), 184 So. 3d 46, 50-51, writ denied, 2014-2576 (La. 2/27/15), 160 So. 3d 985 (act creating servitude provided for an exclusive "servitude of passage as a private lane," thus granting the owners of Lots 1-A and 1-B "equal rights to the **exclusive use** of the servitude of passage as a **private lane**" (emphasis added)); see also Vogel v. Chappuis, 95-863 (La. App. 5th Cir. 2/14/96), 670 So. 2d 1312, 1313.

Regarding plaintiffs' use of the original private access servitude prior to the interruption of plaintiffs' rights and use thereof by 2590 Associates and Glasgow Partners herein, the record reflects that there were metal gates both at the entrance of the original servitude from Glasgow Avenue and at the entrance to plaintiffs' properties. Welch testified that plaintiffs had utilized these gates for their security in that the gates limited access to the private access servitude as well as to plaintiffs' property.

In contrast, while the June 15, 2017 sketch drafted by SJB Group, LLC labels the newly proposed servitude of passage over Lot 38 simply as "Proposed 30' Access Servitude," Jarrell, testifying as a representative of both 2590 Associates and Glasgow Partners, very clearly testified that the proposed servitude over Lot 38 "is going to be a servitude of passage **for anybody to use**," contending that the plaintiffs were not entitled to a servitude of private use. (Emphasis added). Indeed, although not entirely clear from the record, Jarrell's testimony seems to indicate that the servitude across Lot 38 may be intended to be a **public road**. If so, clearly, plaintiffs would not be able to reconstruct metal gates at the entrance of the public servitude across Lot 38 where it intersects with Arrowhead Street (or with any other public street within the Rouzan TND).

Thus, the "servitude" now proposed by Glasgow Partners and 2590 Associates will not grant plaintiffs **private access** to their property. Moreover, the servitude would not extend to Glasgow Avenue, as did the original Private Access Servitude and as this court previously ordered. Under these facts, if the proposed servitude across Lot 38 would be eventually established as a **public** servitude, Glasgow Partners and 2590 Associates will have been allowed to entirely change the **mode** of the Private Access Servitude as a private means of access to Tracts A, B, and C, and plaintiffs will have lost their rights to a conventional servitude of

private access to their property to and from Glasgow Avenue. See Ventura, 184 So. 3d at 50-51; also see generally Cheatham v. Melton, 593 S.W.2d 900, 903-904 (Mo. App. E.D. 1980) (wherein the Missouri Court of Appeals determined that a party's attempt to expand the use of a private driveway into a public thoroughfare constituted a change in the quality and nature of the traffic utilizing the drive and, thus, constituted an impermissible attempt to materially alter the character of the original servitude). Accordingly, to the extent that the servitude of use over Lot 38 is to be established as a **public** servitude, and possibly as a **public road** (as is Arrowhead), the "Private Access Servitude" from Tracts A, B, and C to Glasgow Avenue that was dedicated to Tracts A, B, and C "as a private means of access" has still not been restored or relocated.[8]

Considering the foregoing and the record as a whole, we conclude that the newly proposed servitude, adopted by the trial court in its judgment, does not, as a matter of fact or law, comport with the requirements of LSA-C.C. art. 748, which provides that the owner of the servient estate "may do nothing tending to diminish or make more inconvenient the use of the servitude." Instead, despite this court's directive in Welch I that 2590 Associates or it successor(s) in interest restore plaintiffs' rights to the "**thirty-foot** conventional servitude of passage **running from their property to Glasgow Avenue**," "to the **same extent and mode** as specified in the title establishing the servitude," and despite this court's reversal in

[8]As such, the **length** of plaintiffs' private access servitude is also diminished by the newly proposed servitude location over Lot 38. As set forth above, the map paraphed with Mrs. Ford's will that depicts and dedicates the Private Access Servitude indicates that the length of the Private Access Servitude that has been disturbed (from the point where Tracts A and B abut with the property now constituting Rouzan TND) is depicted as 472.36 feet. However, Jarrell testified at the latest hearing that the length of that portion of the servitude is now "**three feet**." He explained that there is now three feet of servitude from plaintiffs' property "to [get] them to a public road," explaining that they were bringing "a public road to their property." They then have to traverse "a series of public roads" to get to Glasgow Avenue. Again, however, any portion of the newly proposed "servitude" that consists of a **public servitude or public road** is obviously not a "Private Access Servitude." See Ventura, 184 So. 3d at 50-51; see generally Cheatham, 593 S.W.2d at 903-904. Thus, plaintiffs' "Private Access Servitude," if not completely destroyed, appears also to have been greatly diminished in length.

Welch III of the declaratory relief previously granted to intervenor Glasgow Partners declaring that Glasgow Partners had properly relocated the servitude, the trial court's judgment, in adopting intervenor Glasgow Partners's newly proposed servitude, has served to diminish or destroy the Private Access Servitude as established by title such that there has been no restoration or relocation.

While the obvious remedy on appeal may seem to be for this court to **once again** order that plaintiffs' rights and possession of the thirty-foot conventional servitude of passage running from their property to Glasgow Avenue as specified in the title establishing the servitude be restored, unfortunately, 2590 Associates and Glasgow Partners have systematically divested themselves of ownership of the land over which the servitude was originally located and over which it could have been relocated through the sale of lots and the construction of homes, in complete disregard of plaintiffs' rights as the owners of Tracts A, B, and C. Indeed, Jarrell's testimony at the hearing on remand indicates that there is now no way for 2590 Associates or its successors to provide a servitude of passage from Tracts A, B, and C to Glasgow Avenue, as established by title.

Accordingly, this court will amend the trial court's judgment to specifically provide that the proposed servitude of access across Lot 38 is to be designated as a "**Private Access Servitude**," and dedicated as a **private** means of access to Tracts A, B and C, in accordance with Exhibit D-24, the June 15, 2017 sketch drafted by SJB Group, LLC, attached hereto as "Appendix A." To the extent that the newly created Private Access Servitude will not provide the owners of Tracts A, B, and C with private access from those tracts all the way to Glasgow (but, instead, only to Arrowhead Street, which, in turn, intersects with Glasgow), the servitude has still been diminished, as discussed below, and, to a certain extent, is apparently more inconvenient. This permanent diminishment, resulting from 2590 Associates and

Glasgow Partners' actions in disregard of plaintiffs' rights, will be addressed by this court in the award of damages.

DAMAGES

In their second assignment of error, plaintiffs contend that the trial court's damage award of $96,000.00 is excessively low. In response, 2590 Associates and Glasgow Partners contend that the damage award of $96,000.00 is excessively high, arguing that plaintiffs have suffered nothing more than occasional inconvenience during construction. They further contend in their answer to the appeal that the trial court erred in awarding any damages against 2590 Associates at all because there is no evidence that 2590 Associates caused plaintiffs' alleged damages.

In Welch I, this court concluded that in addition to injunctive relief, plaintiffs are entitled to damages, pursuant to the laws governing obligations, as this was a conventional servitude of passage and the terms, i.e., the use and extent as set forth in the "title document," were breached by the actions of 2590 Associates. Welch, 220 So. 3d at 69. As this court previously explained:

> In addition to injunctive relief, the owner of the servient estate may be liable to the owner of the dominant estate under the laws of property as well as under the laws governing obligations when the dominant estate has been aggravated. Yiannopoulos, A.N., Louisiana Civil Law Treatise, Predial Servitudes § 7:9 (4th ed. 2013); See also Petchak v. Bossier Parish Police Jury, 45,705 (La. App. 2nd Cir. 11/24/10), 55 So.3d 840, 853, writ denied, 2011-0165 (La. 4/29/11), 62 So.3d 112. ("In this case, the pre-existing relationship between these parties before the damage to plaintiffs' home was that of the owner of the right of use servitude and the owner of the servient estate. This gave rise to the possibility of the breach of the real obligations identified above and an indemnity which might then be due from either the owner of the personal servitude or the owner of the servient estate concerning the use or misuse of the servitude.")

Welch, 220 So. 3d at 65.

Accordingly, in Welch I, this court remanded the matter to the trial court with instructions for a limited purpose, namely, the expeditious determination and

fixing of the specific amount of damages owed by 2590 Associates to plaintiffs.[9] Welch, 220 So. 3d at 69.

With regard to the damages owed herein, under the law of obligations, it is well established that an obligor is liable for the damages caused by his failure to perform a conventional obligation. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived. LSA- C.C. art. 1995. An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made. LSA-C.C. art. 1996. However, an obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform. LSA-C.C. art. 1997.

Here, the trial court awarded plaintiffs $96,000.00 in damages for "[d]iminution of the value of the 30 foot servitude," without offering any explanation as to how this particular amount was determined. However, plaintiffs are entitled to an award both for the diminution of the servitude, as well as for the damages they have suffered as a result of the many years of interference with and disturbance of plaintiffs' rights of use and possession of the servitude, and a review of the record before clearly demonstrates that this award, which appears to encompass only the diminution of the value of the servitude, was abusively low.[10]

[9]In Welch III, this court also remanded the matter for a determination of damages due to plaintiffs by Glasgow Partners insofar as Glasgow Partners may have been subject to such liability. Welch, 220 So. 3d at 78. However, on remand, plaintiffs failed to establish their entitlement to an award of monetary damages against intervenor Glasgow Partners. A review of the record before us does not demonstrate that plaintiffs ever amended their petition to name Glasgow Partners as defendant and assert such a claim against it. Thus, the trial court's judgment will also be amended to render judgment for monetary damages against only defendant 2590 Associates.

[10]To the extent that the $96,000.00 award could be construed as encompassing an award for diminution of value of the servitude and an award for damages for the interference with and disturbance of plaintiffs' possession of the servitude as to **both** plaintiffs, we likewise conclude that the damage award is abusively low.

Moreover, the trial court apparently failed to consider or address the issue of whether the parties were in good or bad faith.[11] In failing to do so, the trial court erred. However, because this court has all of the facts before it, we will consider LSA-C.C. art. 1996 and LSA-C.C. art. 1997 and the amount of just compensation due to plaintiffs under these articles, rather than remand to the trial court. See St. Bernard Port, Harbor & Terminal District v. Violet Dock Port, Inc., LLC, 2017-0434 (La. 1/30/18), 239 So. 3d 243, 254-255; Weeks v. T.L. James & Co., Inc., 626 So. 2d 420, 425 (La. App. 3rd Cir. 1993), writs denied, 93-2909, 93-2936 (La. 1/28/94), 630 So. 2d 794.

In addressing whether 2590 Associates was in good or bad faith, we find that the record overwhelmingly supports a finding that it was in bad faith when it disturbed plaintiffs' possession of the Private Access Servitude and took actions in complete disregard for plaintiffs' rights and this court's prior mandatory injunction, ultimately forcing the diminishment of the servitude. The lengthy procedural history of this case supports this finding. Thus, its bad faith renders it liable to plaintiffs for **all** resulting damages, whether foreseeable or not.

On January 23, 2012, plaintiffs initially filed a petition for possessory action, with requests for injunctive relief and damages, seeking to prohibit further disturbances of their possession of the servitude and restoring them to undisturbed possession of the servitude. As set forth in Welch I, several interim judgments were rendered by the trial court, and several of these were reversed by this court pursuant to applications for supervisory writs filed by plaintiffs. Welch, 220 So. 3d at 62-63. A trial on plaintiffs' petition for possessory action and request for

[11]In rendering the damage award, the trial court stated only as follows:

> [T]he Court, being firmly of the opinion that the law and evidence preponderates in favor of the plaintiffs in the following particulars: Diminution of the value of the thirty-foot servitude. It is, therefore, ordered, adjudged, and decreed that there be judgment herein in favor of the plaintiffs and against the defendants in the full and true sum of ninety-six thousand dollars.

injunctive relief and damages was conducted on August 20 and 21, 2013. On October 1, 2015, the trial court rendered judgments dismissing plaintiffs' claims. In the matters referred to as Welch I, Welch II, and Welch III, this court reversed the October 1, 2015 judgments of the trial court and remanded the matter to the trial court.

Accordingly, for reasons beyond plaintiffs' control, this litigation has been pending for six plus years with no final resolution. As noted in Welch I, 2590 Associates filed an application for Phase 3B of Rouzan on November 3, 2011, listing itself as the owner and developer of the property, and in that application, it noted the location of the servitude of passage, but proposed to replace it with green space, residential lots, and residential streets, completely disregarding and with a conscious indifference to plaintiffs' rights. Moreover, the record herein demonstrates that those actions by 2590 Associates set into motion a prolonged period of continued, ongoing disturbances of plaintiffs' rights to possession and use of the thirty-foot Private Access Servitude.[12] For instance, gates and bridges on the servitude were removed, and the top surface of the servitude was removed,

[12] Also during the pendency of this litigation, and before any final determination could be made as to 2590 Associates's obligations to plaintiffs' herein with regard to the servitude, 2590 Associates sold Tract 3B, the tract over which the servitude ran, to Glasgow Partners and thereafter attempted to shield itself by contending that it was not the "disturbing party." See Welch, 220 So. 3d at 68. As noted in Welch I, 2590 Associates and Glasgow Partners have the same registered domicile address, the same registered agent, and the same registered officer. Welch, 220 So. 3d at 68 n.9. Moreover, the act transferring Tract 3B from 2590 Associates to Glasgow Partners is executed by **only one individual**, who signed the documents in two capacities, both as manager of 2590 Associates and as manager of Glasgow Partners.

Additionally, approximately one month **after** transferring Tract 3B to Glasgow Partners, 2590 Associates recorded in the public records for East Baton Rouge Parish a "Temporary Servitude of Passage," purporting to relocate the servitude and to declare that the temporary servitude would "terminate ipso facto" when permanent access was provided consistent with the approved Rouzan TND Concept Plan. However, that "Temporary Servitude of Passage" ran only from Tract A to Perkins Road and did not provide access to Tract B. See Welch, 220 So. 3d at 63 & n.2. Then again, approximately seven months **after** 2590 Associates transferred Tract 3B to Glasgow Partners, 2590 Associates filed another Temporary Servitude of Passage into the public records, for Tracts B and C. However, that purported temporary servitude of passage likewise only provided access from Perkins Road and was not usable because it ran through a steep ditch. See Welch, 220 So. 3d at 63 n.2.

resulting in the road becoming impassable. The removal of existing bridges necessitated the installation of culverts for plaintiffs to access their property. Additionally, plans were drawn and submitted to the City/Parish that provided for home sites to be located on the servitude, and homes were actually built on the specific original location of plaintiffs' servitude. Moreover, various homes have now been sold to third parties, and 2590 Associates (as well as Glasgow Partners) has divested itself of ownership of the remaining tracts upon which the Private Access Servitude from Tracts A, B, and C to Glasgow Avenue could have been relocated.

The record overwhelmingly demonstrates that plaintiffs have been damaged by 2590 Associates's conscious indifference to plaintiffs' rights and by its conduct in proceeding on the project and divesting itself of property without a legal determination of the dispute. However, it is equally clear that the assessment of plaintiffs' damages is difficult, as the law does not provide any real or concrete guidepost for the imposition of a damages award for such a breach and usurpation of plaintiffs' vested real rights in this incorporeal immovable. Thus, under these circumstances, we are required to exercise our reasonable discretion and fix the amount of damages as best we can. See LSA-C.C. art. 1999; Weeks, 626 So. 2d at 426.

First, regarding damages for 2590 Associates's interference with and disturbance of plaintiffs' possession of the servitude, the judgment before us does not indicate that the trial court made any award for this element of plaintiffs' damages and did not take into account the interruption to plaintiffs' various utility services. As previously discussed, the trial court improperly excluded plaintiffs' testimony as related to the interruption of utilities based on its conclusion that the servitude did not provide for or affect their utilities, a clearly erroneous conclusion

by the trial court. Accordingly, plaintiffs' deposition testimony as related to this element of their claim for damages was proffered before a court reporter after the trial.[13] For purposes of this appeal, we have considered this proffered testimony, which we deem to be highly relevant to the issues before us. Moreover, as discussed above, 2590 Associates acted in bad faith, and therefore, is liable for all damages, foreseeable or not. See LSA-C.C. art. 1997. This includes damages for interference with plaintiffs' enjoyment of the use of the servitude and their own property by the disruption of plaintiffs' various utility services.

Plaintiff Welch testified that he had underground gas and water lines and overhead electricity and cable service poles running down the length of the original servitude. He testified that his gas line that ran the length of the servitude was pulled out by a bulldozer and his family was without gas service for **fourteen months**, spanning over two winters. He further explained that this deprivation had a significant impact on their daily lives, particularly as he has a gas heater and stove in his home. Welch further testified that in addition to various **temporary** interruptions to his electrical service and water, his cable and telephone services have been **permanently disrupted.** Although plaintiff Hoover does not use gas for cooking or to heat his home, his use of his property also was disturbed by this conduct. He likewise testified that there were temporary disconnections of his water and electrical service over time, but also permanent losses, noting that one loss that greatly affected his household was the permanent loss of his home telephone landline.

As to plaintiffs' claims for damages for their mental anguish, we again note that the trial court's September 28, 2017 judgment, awarding $96,000.00 for

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[13]Subsequently, the trial court granted a motion to strike this proffered testimony, and accordingly, this testimony was not originally included in the record of this appeal. However, plaintiffs filed a motion with this court, seeking to supplement the record with this testimony, which was granted on May 29, 2018.

"[d]iminution of the value of the 30 foot servitude" does not appear to include or take into account damages for plaintiffs' mental anguish, and it is unclear whether the trial court considered this element of damages. After reviewing the record herein, we find that a mental anguish award is clearly warranted under the facts of this case. See Eubanks v. State, Department of Transportation and Development, 620 So. 2d 954, 958 (La. App. 3rd Cir.), writs denied, 629 So. 2d 351, 353 (La. 1993) (In improving a state highway, the Department of Transportation and Development interfered with plaintiffs' servitude of natural drainage, resulting in a nearby creek overflowing and flooding plaintiffs' property on three different occasions during the course of nine years. The court upheld a damage award of $50,000.00 to the plaintiff who still owned the property, noting that the trial judge was faced with a situation where no exact estimate of damages was available, and thus, he felt that equitable relief required him to include mental anguish in the damage award and the record supported a finding that the plaintiff suffered mental anguish.)

Plaintiff Welch testified that he moved onto this property in 1974, when he was a college student and he began working on the Fords' farm, which previously existed on this property, in exchange for housing. He got married in 1985, and he and his wife have lived on this property since their marriage.[14] Welch further testified that as the servitude was being gradually taken away, he was continuously taking actions to restore the servitude so they could use it, often doing repairs in the evening and nighttime after coming home from work, and stressing about whether he and his family were going to be able to continue to live in their family home, particularly due to lack of access resulting from the repeated disturbances of their servitude. He testified that he has had to fight continuously for his rights and

[14]He further testified that after this litigation was initiated, he developed rheumatoid arthritis that he believes is stress related, as he has no family medical history of this condition.

has had to respond to questions, inquiries, and developments throughout this lengthy litigation, causing him further anxiety, stress, and lack of sleep. As he poignantly stated, his family's home has been rendered "more a house than a home because of all of these issues." Mrs. Welch testified that knowing that someone was trying to take away what was rightfully given to them, and having to respond to these assaults on their rights was painful, bothersome, and stressful.

Plaintiff Hoover testified that he moved onto this property in 1978, and he and his wife have raised their large family on this property since that time. He testified than since the gates were removed from the servitude, people now come through his property, drastically changing both the nature of the property and their use and enjoyment of it. He further explained that throughout this lengthy litigation, he has been stressed and concerned, as he felt that his home and his peaceful use of it were being threatened. Mrs. Hoover also testified that they went from having a quiet, secure home environment to having people driving up and down their private driveway, as the developers arbitrarily placed storage sheds on the opposite end of their property and, thus, workers would use plaintiffs' private driveway to get to the sheds. She further explained that their home was a legacy they had intended to leave to their children to further develop as they so desired, but that this was threatened, causing undue stress to her and her husband throughout this litigation.

While somewhat difficult to determine the exact amount of appropriate damages for plaintiffs' mental anguish, Williams v. City of Baton Rouge, 98-1981 (La. 4/13/99), 731 So. 2d 240, provides guidance. In Williams, the plaintiffs brought an action against the City/Parish, seeking damages for the city's unlawful entry onto their property. The City/Parish dug canals on plaintiffs' property in order to maintain an alleged natural drainage channel. The City/Parish's

interference with plaintiffs' property, characterized by the trial court as a trespass and by the Supreme Court as an intentional and wrongful act, took place for **one to two months**. Williams, 731 So. 2d at 245. The Supreme Court reduced the trial court's mental anguish damage award to the "Class I" plaintiffs, ranging from $12,500.00 to $35,000.00 each.[15] Williams, 731 So. 2d at 252.

In the instant case, the cavalier interference with plaintiffs' servitude rights was far more extensive and took place over a period of time far in excess of one to two months, as the disruption of utility service alone lasted in excess of a year. Moreover, the plaintiffs were left without any reasonable access to their property by emergency vehicles in the event an emergency arose, which obviously and understandably caused plaintiffs great concern. Further, plaintiffs have been forced to deal with these interferences with their rights to the servitude for approximately the last **seven years**, since the filing of their petition on January 23, 2012. Thus, in considering the particularly egregious facts of this case, the length of time plaintiffs have suffered a disturbance of their rights, 2590 Associates's willfulness and indifference to plaintiffs' rights and bad faith, plaintiffs' documented losses, mental anguish, inconvenience and disruption of access to their property, as well as the interruption of electrical services and use of their private access servitude, we find that the minimum that plaintiff Bob Welch is entitled to for his damages is the amount of $85,000.00. We further find that the minimum amount that plaintiff Daniel Hoover is entitled to for his damages is the amount of $70,000.00. Thus, we amend the trial court's September 28, 2017 judgment accordingly.

[15]The Class I plaintiffs testified that their families had worked hard to buy this property which was now broken up into three pieces. The presence of armed police officers and security guards scared them. Family reunions which took place frequently were discontinued because of the condition of the property. They testified that the property was now dangerous because of the open ditches and because of the increased amount of rats, snakes and other vermin that inhabited the property as a result of the open ditches, which caused them to curtail their outdoor activities. Williams, 731 So. 2d at 251.

With regard to the diminution in value of the Private Access Servitude, we likewise find the trial court's award of $96,000.00 for this element of plaintiffs' damages to be abusively low. As discussed above, the record establishes that plaintiffs' original servitude was a **private access servitude** to provide them with a **private means for access** to and from their properties to Glasgow Avenue.

The trial court failed to recognize that the relocated servitude as ordered in its September 28, 2017 judgment is a **public** access servitude, whereas plaintiffs' original servitude was a **private** access servitude. As discussed above, the representative of 2590 Associates and Glasgow Partners testified that the restored servitude on Lot 38 is a servitude of passage for anyone to use. Indeed, their representative is clearly mistaken in his assertion and testimony that this arrangement is proper because "there is nothing anywhere" that talks about "giving private use."

While this court has taken the measures available at this point in time to restore a Private Access Servitude to plaintiffs as a private means of access to their property by ordering that the newly located servitude approved by the trial court is hereby recognized and dedicated as a **private** access servitude, ultimately, the servitude now extends to Arrowhead Street (a public street which is less than thirty feet wide) rather than to Glasgow Avenue, thereby depriving plaintiffs of the rights to and possession of a "**30' Private Access Servitude**" as a "**private** means of access" from Glasgow Avenue to their properties, as dedicated to plaintiffs in the map paraphed for identification with Mrs. Ford's will. However, we are unable to restore the original thirty-foot conventional Private Access servitude extending from Tracts A, B, and C to Glasgow Avenue at a width of thirty feet, given the systematic actions herein taken in complete disregard to plaintiffs' rights and given

that the lots on which the original servitude was located are now owned by third parties who have built homes thereon.

It is well established that courts have discretion to award compensatory damages in lieu of injunctive relief. See Dyer & Moody, Inc. v. Dynamic Constructors, Inc., 357 So. 2d 615, 617 (La. App. 1st Cir. 1978); J. Weingarten, Inc. v. Northgate Mall, Inc., 404 So. 2d 896, 902 (La. 1981); Gaharan v. State Department of Transportation and Development, 579 So. 2d 420, 423 (La. 1991). Given what appears to be the impossibility of restoring the Private Access Servitude to plaintiffs without significantly impacting homes now owned by third parties, and the resulting diminishment of the plaintiffs' conventional servitude, we are constrained to find that an award of monetary damages is appropriate herein. In lieu of granting injunctive relief to plaintiffs, monetary compensation addresses the damages suffered by plaintiffs due to the diminution in value of the servitude as a result of the differences between the original and the relocated servitude and the resulting diminishment in the extent and mode of the Private Access Servitude.

Based on the record before us, we conclude that the trial court abused its discretion in awarding plaintiffs $96,000.00 for the "[d]iminution of the value of the 30 foot servitude." We further conclude that the lowest amount that could be awarded to plaintiffs herein is $325,000.00. Accordingly, we amend the portion of the September 28, 2017 judgment awarding plaintiffs $96,000.00 for diminution of value of the servitude to provide that plaintiffs are each entitled to judgment in their favor and against 2590 Associates in the amount of $162,500.00, representing an award of one-half of $325,000.00 to each plaintiff for the permanent diminution of their private access servitude.[16]

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[16]This award is premised upon the timely relocation of the servitude to Tracts A, B, and C, in accordance with the sketch dated June 15, 2017, and drafted by SJB Group, proposed by 2590 Associates and Glasgow Partners on remand, as a **Private Access Servitude** providing **a means of private access** to Tracts A, B, and C, as ordered herein.

Answer to Appeal

Finally, we find no merit to the argument of 2590 Associates and Glasgow Partners in their answer to appeal that the trial court erred in awarding damages against 2590 Associates because 2590 Associates did not cause any of the plaintiffs' damages. As this court stated in Welch I:

> [A] "disturbance" can be "in fact" or "in law." A "disturbance in law" is defined as the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership or to the possession of immovable property or of a real right therein. LSA–C.C. art. 3659.
>
> The application for Phase 3B of Rouzan was filed by 2590 Associates on November 3, 2011. The application lists 2590 as the owner and developer of the property. The "subject property map" attached to the application depicts the "existing" thirty-foot wide private servitude of passage. However, the "final development plan map" attached to the application "replaces" the thirty-foot private servitude of passage running from plaintiffs' property to Glasgow Avenue with green space, residential lots, and several rights of ways within the development, including Mirabeau Drive and Prieur Avenue, which are identified as twenty-foot right-of-ways. Additionally, the final plat of Rouzan, as submitted to the Planning and Zoning Commission, states that it was submitted "for 2590 Associates." The final plat again demonstrates that the thirty-foot wide servitude of passage to Glasgow Avenue has been replaced with twenty-foot wide right-of-ways and residential lots.
>
> Accordingly, while the record may not clearly establish who actually performed the construction activities that "diminished" the subject servitude of passage, the record does clearly establish that 2590 executed and recorded documents that "disturbed" the servitude by diminishing the width of the servitude, as provided for in plaintiffs' "title."

Welch, 220 So. 3d at 68-69. Accordingly, we reject the arguments set forth in the answer to the appeal.

CONCLUSION

For the above and foregoing reasons, we vacate and set aside the trial court's September 11, 2018 amended judgment. The September 28, 2017 judgment of the trial court is hereby amended, **in part**, to award plaintiffs additional damages as set

forth below, but with the award of damages against defendant 2590 Associates only, and judgment is hereby rendered as follows:

> IT IS ORDERED, ADJUDGED AND DECREED that there be judgment on the main demand of plaintiffs, Bob Welch and Daniel Hoover, against defendant, 2590 Associates, LLC, seeking restoration of their undisturbed possession of the servitude, and on the intervention of Glasgow Partners, LLC, seeking declaratory judgment relief, declaring that plaintiffs' thirty-foot-wide **Private Servitude of Passage as a means of private access** to Tracts A, B, and C, is to be restored **in part** in accordance with the sketch dated June 15, 2017, and drafted by SJB Group, as attached hereto as Appendix A, no later than thirty days from the finality of this judgment and all at the expense of Glasgow Partners and 2590 Associates.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, 2590 Associates, LLC, and intervenor, Glasgow Partners, LLC, shall prepare and deliver to plaintiffs, Bob Welch and Daniel Hoover, a formal act of dedication of the thirty-foot-wide **Private Servitude of Passage as a means of private access** to Tracts A, B, and C, in accordance with the sketch dated June 15, 2017, and drafted by SJB Group, attached hereto as Appendix A, with a full and complete legal description of the properties and an attached plat, and shall file such formal dedication in the public records of the Parish of East Baton Rouge no later than thirty days from the finality of this judgment, all at the expense of 2590 Associates, LLC and Glasgow Partners, LLC.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of plaintiff Bob Welch, and against defendant, 2590 Associates, LLC, in the amount of $162,500.00, representing one-half of the diminution of the value of the 30-foot Private Access Servitude.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of plaintiff Daniel Hoover, and against defendant, 2590 Associates, LLC, in the amount of $162,500.00, representing one-half of the diminution of the value of the 30-foot Private Access Servitude.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of plaintiff, Bob Welch, and against defendant, 2590 Associates, LLC, for damages caused by defendant's interference with and disturbance of plaintiff's possession of the servitude in the full and true sum of $85,000.00.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in herein in favor of plaintiff, Daniel Hoover, and against defendant, 2590 Associates, LLC, for damages caused by

defendant's interference with and disturbance of plaintiff's possession of the servitude in the full and true sum of $70,000.00.

In all other respects, the September 28, 2017 judgment is affirmed.

Further, the relief requested in the answer to appeal is denied. Costs of this appeal are assessed against defendant, 2590 Associates, LLC, and intervenor, Glasgow Partners, LLC.

SEPTEMBER 11, 2018 AMENDED JUDGMENT VACATED AND SET ASIDE; SEPTEMBER 28, 2017 JUDGMENT AMENDED IN PART, AND AFFIRMED AS AMENDED; JUDGMENT RENDERED; RELIEF SOUGHT IN ANSWER TO APPEAL DENIED.

Appendix A