

**RITA H. HOLZENTHAL WIFE  
OF/AND HENRY  
HOLZENTHAL, III, GRETTEL  
HOLZENTHAL, CECELIA M.  
HOLZENTHAL WIFE OF/AND  
HENRY W. HOLZENTHAL,  
PATRICIA A. STANLEY WIFE  
OF/AND GEORGE E.  
THOMAS, AND MONICA S.  
ESPINEL WIFE OF/AND LUIS  
F. ESPINEL**

**\* NO. 2006-CA-0796  
\* COURT OF APPEAL  
\* FOURTH CIRCUIT  
\* STATE OF LOUISIANA  
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\* \* \* \* \***

**VERSUS**

**SEWERAGE & WATER  
BOARD OF NEW ORLEANS**

**CONSOLIDATED WITH:**

**CARLO R. GALAN, M.D.,  
GWENDOLYN D. REDUS,  
BILLYE B. BER AND MAXINE  
MILLER**

**VERSUS**

**SEWERAGE & WATER  
BOARD OF NEW ORLEANS**

**CONSOLIDATED WITH:**

**JEAN FERAN WIFE OF/AND  
FRED FERAN, MARY SUSAN  
HUNT, MARY SHARETT  
WIFE OF/AND FREDDIE  
SHARETT, PENELOPE  
SHEFFIELD, ELISE A. BOYER  
AND CHERYL L. SQUIRE**

**VERSUS**

**SEWERAGE & WATER  
BOARD OF NEW ORLEANS**

**CONSOLIDATED WITH:**

**NO. 2006-CA-0797**

**CONSOLIDATED WITH:**

**NO. 2006-CA-0798**

**TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.**

I respectfully concur in the result.

As stated by the Louisiana Supreme Court in *Avenal v. State*, 03-3521 (La. 10/19/04), 886 So. 2d 1085:

We find it unnecessary to conduct the full [*State Through Dept. of Transp. and Development v. Chambers* analysis, which seeks to determine whether a plaintiff is entitled to eminent domain compensation because his private property has been taken or damaged for public use. In this case, the relevant consideration is whether plaintiffs' property was "taken" for a public purpose, or whether it was "damaged" for a public purpose. A distinction between a taking and a damaging is necessary because of the existence of two relevant prescription statutes, La. R.S. 13:5111 and La. R.S. 9:5624. Section 5111 of Title 13 is entitled

"Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription" and provides in pertinent part: "[A] proceeding brought against the state of Louisiana ... or other political subdivision ..., for compensation for the taking of property by the defendant, other than through an expropriation proceeding, ... shall prescribe three years from the date of such taking." Section 5624 of Title 9 provides: "When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works." Thus, although the Louisiana Constitution provides that just compensation shall be paid when property is taken or damaged, La. R.S. 13:5111 provides a three-year prescriptive period for **takings** and La. R.S. 9:5624 provides a two-year prescriptive period for **damage**. *A.K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District*, 237 La. 541, 547-48, 111 So.2d 765, 767 (1959) (Prescriptive period of La. R.S. 9:5624 applies only when private property is damaged for public purposes, but not actions for recovery of private property taken for public purposes).

The distinction between a taking and a damage claim was made in a case in which a holder of a predial lease invoked property rights pursuant to the 1921 Constitution. *Columbia Gulf Transmission Co. v. Hoyt*, 252 La. 921, 215 So.2d 114 (1968). In that case, the Court found the lessee's rights under a predial lease fell under the constitutional designation of "private property" in Art. I, § 2 of the 1921 Constitution and required just compensation to the lessee before the lease rights were damaged, even though Louisiana codal law classified a lessee's rights as personal rights. However, as particularly relevant to this case, the Court distinguished the terms "taken" and

"damaged" in Art. I, § 2. The Court stated that "property is 'taken' when the public authority acquires the right of ownership or one of its recognized dismemberments." 215 So.2d at 120. "Property is considered 'damaged' when the action of the public authority results in the diminution of the value of the property." *Id.*

03-3521 at pp. 27-29, 886 So. 2d at 1104-05.

From the foregoing, it appears that the majority's analysis of the case at bar as one in inverse condemnation (appropriation) is incorrect; the case is one of damages subject to the provisions of La. R.S. 9:5624. The distinction between the two concepts is, in my view, immaterial in this case because the result is the same, to-wit, the plaintiffs suffered damages as a result of a public work.

With respect to the issue of damages, I cannot say that the majority erred in its awards. However, I reiterate my opinion, expressed in *Grefer v. Alpha Technical*, 02-1237, pp. 3-5 (La. App. 4 Cir. 3/31/05), 901 So. 2d 1117, 1155-56 (Tobias, J., concurring on rehearing), *writ denied*, 05-1590 (La. 3/31/06), 925 So.

2d 1248, that there exists a tension between the Supreme Court cases of *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So.2d 874 (La.1993) and *Corbello v. Iowa Production*, 02-0826 (La.2/25/03), 850 So.2d 686, which ought to be resolved by the

Supreme Court. The case at bar presents a vehicle through which the  
Supreme Court might clarify the matter.