ELIZABETH SEWELL, WIFE OF/AND WILLIAM SEWELL, ELSEBETH FENNER, WIFE OF/AND JAMES FENNER AND BETH DUESSING, WIFE OF/AND GEORGE DUESSING	*	**NO. 2018-CA-0996**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
SEWERAGE AND WATER BOARD OF NEW ORLEANS	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-04501, DIVISION "D"
Honorable Nakisha Ervin-Knott, JUDGE
* * * * * *
Judge Roland L. Belsome
* * * * * *
(Court composed of Judge Edwin A. Lombard, Judge Roland L. Belsome, Judge Tiffany G. Chase)

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AMENDED; AFFIRMED AS AMENDED
MAY 29, 2019

The Defendant, the Sewerage and Water Board of New Orleans, appeals the trial court's judgment awarding damages, attorney fees and costs to the Plaintiffs: George and Beth Deussing, David Epstein, Faye Lieder, Thomas Ryan and Judith Jurisich, and Dorothy White. For the reasons that follow, we amend the trial court's judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

This case involves several groups of homeowners, who claimed their homes were damaged during the course of construction of the Southeast Louisiana Urban Drainage Project (SELA Project).[1] The United States Army Corps of Engineers (USACE) partnered with the Sewerage and Water Board of New Orleans (SWB) for the Orleans Parish portion of the SELA Project. There were seven phases involving the uptown area: Claiborne I, Claiborne II, Jefferson I, Jefferson II, Napoleon II, Napoleon III, and Louisiana I.

[1] The purpose of the project was to increase drainage capacity in order to withstand ten-year rainfall events.

In May of 2015, a lawsuit was filed against the SWB.[2] The Plaintiffs claimed that their homes were damaged as a result of pile driving, the operation of heavy equipment, and other activities related to the SELA Project. As a result, they brought numerous claims against the SWB under strict liability for timber pile driving activities, custodial liability for ownership of defective things, negligence, and inverse condemnation. In response, the SWB filed an answer including third-party indemnity demands against the contractors hired by the USACE to construct the SELA project. Consequently, the case was removed to federal court in July of 2015. After the federal trial court granted the contractors' motions for summary judgment based on immunity, the case was remanded back to Civil District Court in January of 2017.[3]

The Plaintiffs in the instant appeal (Residential Trial Group A) were set for priority trial due to their ages, pursuant to La. C.C.P. art. 1573.[4] After a four-day bench trial in March of 2018, the trial court rendered a judgment in favor of the Plaintiffs in the amount of $518,653.08. In addition, it awarded the Plaintiffs reasonable attorney fees and costs. The trial court later denied the SWB's motion for new trial. After a hearing on the Plaintiffs' Motion to Tax Attorneys' Fees and

[2] The lawsuit was later amended to include new plaintiffs. In addition, separate lawsuits were subsequently filed and consolidated with the instant lawsuit. In total, nearly three hundred property owners were joined.

[3] The federal trial court refused to exercise supplemental jurisdiction over the remaining claims.

[4] La. C.C.P. art. 1573 states:

> The court shall give preference in scheduling upon the motion of any party to the action who presents to the court documentation to establish that the party has reached the age of seventy years or who presents to the court medical documentation that the party suffers from an illness or condition because of which he is not likely to survive beyond six months, if the court finds that the interests of justice will be served by granting such preference.

Costs, the trial court rendered a second judgment awarding the Plaintiffs $400,000.00 in attorney fees and $145,000.00 in expert costs. The SWB appeals both judgments.

STANDARD OF REVIEW

In reviewing a trial court's findings of fact, appellate courts employ a "manifest error" or "clearly wrong" standard of review. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989) (citations omitted). Regarding issues of law, the standard of review of an appellate court is simply whether the court's interpretive decision is legally correct. *Glass v. Alton Ochsner Medical Foundation*, 02-412, p. 3 (La. App. 4 Cir. 11/6/02), 832 So.2d 403, 405. Accordingly, if the decision of the trial court is based upon an erroneous application of law rather than on a valid exercise of discretion, the decision is not entitled to deference by the reviewing court. *Ohm Lounge, L.L.C. v. Royal St. Charles Hotel, L.L.C.*, 10-1303, p. 4 (La. App. 4 Cir. 9/21/11), 75 So.3d 471, 474.

DISCUSSION

On appeal, the SWB asserts nine assignments of error related to the trial court's conclusions on three key issues: liability, damages, and attorney fees and costs.

LIABILITY

First, the SWB challenges the trial court's liability rulings, raising four errors concerning: 1) inverse condemnation, 2) custodial liability for defective things, 3) strict liability for timber pile driving, and 4) comparative fault. On the

liability issues, the trial court concluded that the SWB was the owner of the SELA Project and the SELA project caused the Plaintiffs to suffer damages. As such, the trial court found the SWB solely liable to the Plaintiffs for inverse condemnation, hazardous pile driving activities and ownership of a defective thing arising from the SELA Project construction activities.

INVERSE CONDEMNATION

Relative to inverse condemnation, the SWB argues that the trial court's finding against the SWB was clearly wrong. Specifically, the SWB contends that the SELA Project was a federal project, not a state project. Thus, it suggests that the USACE, not the SWB, was liable for the damages on the inverse condemnation claim.

La. Const. art. I, §4 provides that the State or its subdivisions may not take or damage a person's private property without paying just compensation.[5] An action for inverse condemnation allows property owners to seek compensation for

[5] La. Const. art. I, §4 states, in pertinent part:

> (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> (B)(1)Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.
>
> ***
>
> (4)Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.
>
> (5)In every expropriation, … a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss....

land already taken or damaged from a governmental entity or private entity having powers of eminent domain where no expropriation has commenced. *State Through Dep't of Transp. & Dev. v. Chambers Inv. Co.*, 595 So.2d 598, 602 (La. 1992)(citation omitted). However, the state and its political subdivisions cannot be held liable for the taking and damaging of private property under circumstances in which the federal government carries out the taking and damaging of the private property as part of a federal project. *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 06-796, p. 15 (La. App. 4 Cir. 1/10/07), 950 So.2d 55, 66.[6]

In support of its argument that the SELA Project was a federal project operated by the USACE, the SWB cites to *Cooper v. City of Bogalusa*, 195 La. 1097,198 So. 510 (La. 1940); *Vuljan v. Bd. of Com'rs of Port of New Orleans*, 170 So.2d 910, 912 (La. App. 4th Cir. 1965); and *Petrovich v. State of Louisiana*, 181 So.2d 811 (La. App. 4th Cir. 1966). However, this Court rejected that argument in *Holzenthal*, *supra*, which is factually analogous to the instant case.

In *Hozenthal*, this Court reviewed the facts in *Vuljan*, finding in that case the State's participation in the project was limited to its agreement to furnish the necessary lands, servitudes and rights-of-way, and to use its inherent power of eminent domain to hold the United States harmless against claims arising out of the

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[6] [T]he issue of whether a particular entity has taken property within the meaning of the Constitution is to be decided on the facts of the individual case. There simply is no bright line by which it can be determined that an entity did or did not cause an inverse condemnation of property.... whether an action will lie under the Louisiana eminent domain provision or the Fifth Amendment to the United States Constitution depends entirely upon whether the public project is state or federal, and which government was acting under its power of eminent domain in carrying out the public project.

Holzenthal, 06-796, p. 15, 950 So.2d at 66.

Mississippi River-Gulf Outlet's construction, maintenance, and operation. *Id*. 06-796, p. 16, 950 So.2d at 67. There was no evidence that the State had any contribution in project design, monitoring, financing or otherwise. *Id*.

In contrast, the *Holzenthal* Court distinguished its facts finding that the facts of its case established that the Cooperation Agreement between the federal government and the Sewerage & Water Board called for continued input, consultation, and shared responsibilities for the project. *Id*., 06-796, p. 17 950 So.2d at 67. The Sewerage & Water Board co-chaired a coordination team that oversaw issues related to design, planning, scheduling, contract awards, costs, inspections, and more. *Id*. Finally, the Sewerage & Water Board was responsible to contribute a minimum of twenty-five percent but not more than fifty percent of the costs of the total project. *Id*. The *Hozenthal* Court further found these facts distinguishable from *Vuljan*, and from *Petrovich*, wherein the United States exercised exclusive jurisdiction and control over a federal project. *Id*., 06-796, pp. 18-19, 950 So.2d at 68.

Similar to *Hozenthal*, the record in the instant case reveals that the SWB was the non-federal SELA Project sponsor. As such, it was part of the SELA Project Coordination Team. As a member of the Coordination Team, the SWB participated in monthly meetings concerning the SELA Project construction. While USACE was responsible for administering the SELA Project, the SWB granted USACE the necessary access for the SELA Project construction and was responsible to pay thirty-five percent of the SELA Project costs.

As the owner of the SELA drainage systems, the SWB was tasked with the project design and responsible for the operation, maintenance, repair and replacement of the SELA drainage system. In addition, the SWB fielded complaints through a hotline and agreed to indemnify USACE from damages arising from the SELA Project.

Under these facts and circumstances, the record supports the conclusion that the SELA Project was a state project, wherein the SWB was acting under its power of eminent domain in carrying out the project. Thus, we cannot say that the trial court was manifestly erroneous in finding that the SWB was liable to the Plaintiffs on the inverse condemnation claim.

CUSTODIAL LIABILITY

Turning to custodial liability, the SWB claims that the trial court was manifestly erroneous in finding it owned and controlled the SELA Project, for purposes of La. C.C. art. 2317. In addition, it contends the trial court legally erred when it failed to apply La. R.S. 9:2800, which is the applicable statute for public entities.

In its judgment, the trial court found the SWB strictly liable to the Plaintiffs under La. C.C. arts. 2317 and 2317.1.[7] La. C.C. art. 2317 creates a cause of action for damages caused by things in our custody. La. C.C. art. 2317 states:

[7] Notably, "traditionally notions of strict liability have been nearly entirely abrogated" by amendments to the Civil Code. *Fontanille v. Levy*, 11-0882 at *4 (La. App. 4 Cir. 1/25/12), 2012 WL 4754154. The effect of the amendment to La. R.S. 9:2800 is to eliminate the distinction between strict liability and negligence claims against public entities by requiring proof of either actual or constructive notice of a defect before a public entity can be held liable for damages caused by the defect. *Jones v. Hawkins*, 98-1259, 98-1288, pp. 3-4 (La. 03/19/99), 731 So.2d 216, 218. Thus, the requirements under both negligence and strict liability theories are the same. *Id.*

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

La. C.C. art. 2317.1 generally modifies custodial liability under Article 2317 by requiring proof that: 1) the owner or custodian of a defective thing has knowledge of the defect, 2) the damage could have been prevented by the exercise of reasonable care, and 3) the failure to exercise reasonable care. *See Moffitt v. Sewerage & Water Bd. of New Orleans*, 09-1596, p. 5 (La. App. 4 Cir. 5/19/10), 40 So.3d 336, 339 (holding Article 2317 was qualified generally by Article 2317.1). Specifically, Article 2317.1 provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

Further, custodial liability under Article 2317 is specifically limited as to public entities by La. R.S. 9:2800, which requires additional proof that the public entity had notice and opportunity to repair the defect.[8] *See id*., 15-1596, pp. 5-6, 40 So.3d at 340 (holding Article 2317 is also qualified particularly to public entities by entities such as the SWB by La. R.S. 9:2800). As such, in order to

[8] La. R.S. 9:2800 provides in pertinent part:

A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.
B. Where other constructions are placed upon state property by someone other than the state, and the right to keep the improvements on the property has expired, the state shall not be responsible for any damages caused thereby unless the state affirmatively takes control of and utilizes the improvement for the state's benefit and use.
C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
D. Constructive notice shall mean the existence of facts which infer actual knowledge.

impose custodial liability against a public entity, the plaintiff must prove that: (1) the thing which caused the damage was owned or in the custody of the public entity; (2) the thing was defective due to a condition creating an unreasonable risk of harm; (3) the entity had actual or constructive notice of the defective condition yet failed to take corrective action within a reasonable period of time; and (4) the defect was the cause of the plaintiff's harm. *See* La. C.C. arts. 2317 and 2317.1; La. R.S. 9:2800. *See also Bridgewater v. New Orleans Regional Transit Auth.*, 15-0922, p. 8 (La. App. 4 Cir. 3/9/16), 190 So.3d 408, 413 (citation omitted).

Here the SWB challenged the first and third elements. First, the SWB argues that the trial court was manifestly erroneous in finding that it was the owner of the SELA Project, who exercised custody or *garde* over the SELA Project. Custody or *garde* is a broader concept than ownership. *Dupree v. City of New Orleans*, 99-3651, p. 7 (La. 8/31/00), 765 So.2d 1002, 1009 (citation omitted). "[I]n determining whether a thing is in one's custody or *garde*, courts should consider (1) whether the person bears such a relationship as to have the right of direction and control over the thing; and (2) what, if any, kind of benefit the person derives from the thing." *Dupree*, 99-3651, p. 8, 765 So.2d at 1009. (citations omitted). Determining custody or *garde* of the thing is a fact driven determination. *Dupree*, 99-3651, p. 7, 765 So.2d at 1009 (citation omitted). "Although there is a presumption that an owner has custody or *garde* of its property, this presumption is rebuttable. One way to rebut the presumption is by establishing a contractual undertaking by another to maintain and control the property." *Gallina v. Hero Lands Co.*, 03-331, p. 5 (La.App. 4 Cir. 10/7/03), 859 So.2d 758, 762.

On the first issue relative to the right of direction and control, a review of the record reveals that SWB owned and maintained direction and control over the

SELA Project. As discussed, the SWB owned the SELA drainage systems and was responsible for the design, operation, maintenance, repair and replacement of the SELA drainage system. The SWB also participated in monthly meetings concerning SELA construction, as well as received complaints from property owners.

The SWB suggests that USACE had custody and control over the SELA Project. However, more than one party may have custody or *garde* of a thing under Article 2317. *Dupree*, 99-3651, p. 7, 765 So.2d at 1009. While the USACE was the project administrator, there was no evidence produced to rebut the presumption the SWB, as the owner of the SELA drainage system, also maintained custody or *garde* over the construction, or otherwise entered into a contract to give the USACE exclusive control over the project.

As to the second issue, there is no dispute that the SWB, as the entity responsible for public drainage in New Orleans, derived a substantial benefit from the SELA Project. Given that the record supports the trial court's conclusion, we cannot say that the trial court manifestly erred in finding that the SWB was the owner and custodian of SELA Project.

Next, the SWB argues that the trial court erred when it made a liability determination pursuant to La. C.C. art. 2317 and 2317.1 instead of La. R.S. 9:2800, which requires additional proof of notice and an opportunity to remedy the defect in order to find custodial liability against a public entity. It points to the trial court's reasons for judgment to support its argument that the trial court did not conduct the proper legal analysis. However, it is well-settled that a trial court's "oral or written reasons for judgment form no part of the judgment and that

appellate courts review judgments, not reasons for judgment." *Wooley v. Lucksinger*, 09-0571, p. 77 (La. 4/1/11), 61 So.3d 507, 572.

As discussed, a public entity may not be found liable under Article 2317 unless it is also shown that the entity had actual or constructive notice of the defect yet failed to correct it within a reasonable period. La. R.S. 9:2800(C). As such, a finding of liability under Article 2317 is legally correct provided the Plaintiffs established that the SWB was given notice and opportunity to correct the defect as set forth in La. R.S. 9:2800. Actual notice is given under La. R.S. 9:2800 by "reporting the defect to a governmental employee who has a duty 'either to keep the property involved in good repair or to report dangerous conditions to the proper authorities.' " *Hanson v. Benelli*, 97-1467, p. 15 (La. App. 4 Cir. 9/30/98), 719 So.2d 627, 636. (quoting *Fortune v. City of New Orleans*, 623 So.2d 701, 704 (La. App. 4th Cir. 1993)).

Here, the record reflects that this project lasted for well over two years. Prior to construction, the SWB was aware of the risk and anticipated damages to surrounding property caused from vibrations throughout SELA Project construction. During construction, the SWB received reports that the construction vibrations were regularly exceeding a peak particle velocity of .25 inches per second, which was a significant factor in causing property damage. The property owners also reported the issues directly to the SWB through its hotline. Furthermore, there is nothing to indicate that the SWB took any corrective measures in the two to four-and-a-half years this project continued. Since the Plaintiffs established that the SWB failed to timely correct the defect after receiving actual notice pursuant to La. R.S. 9:2800, the trial court did not err in finding the SWB liable under Article 2317 and 2317.1.

STRICT LIABILITY

As it pertains to strict liability for timber pile driving, the SWB claims that the trial court was manifestly erroneous in finding the SWB strictly liable to Plaintiff, Dorothy White, for timber pile driving raising two claims: 1) the SWB was not the responsible party, and 2) the evidence did not establish that timber pile driving was the cause of any particular damage to Ms. White's home.

La. C.C. art. 667 states:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

First, the SWB argues that it did not conduct any timber pile driving activities, suggesting it is not the proprietor under La. C.C. art. 667. However, the SWB does not cite to any legal authority in support of its contention. Conversely, a review of the jurisprudence indicates that the SWB is the proprietor under the facts of this case, where the public drainage system to which the SELA Project construction extends is owned, constructed, maintained and operated by the SWB. *See Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So.2d 905, 914 (La. 1973)(citing La. R.S. 33:4071) (SWB, against which suit was brought by property owners seeking to recover for residential damage allegedly caused by the installation of an underground, concrete drainage canal, were "proprietors.");

Hozenthal, 06-796, p. 24, 950 So.2d at 71 (SWB was liable to homeowners for damage done to homes from drainage construction project under the strict liability and negligence provisions of La. C.C. art. 667).

Second, the SWB argues that the Plaintiffs failed to meet their burden in proving that timber pile driving was the cause of any particular damage to Ms. White's home. In support of its position, it points to the inability of Ms. White's expert witnesses to specifically attribute pile driving as the cause of damage in her home.

To be actionable, the cause need not be the sole cause, but it must be a cause in fact, and to be a cause in fact it must have a proximate relation to the harm which occurs and it must be substantial in nature. *Chanthasalo v. Deshotel*, 17-0521, p. 9 (La. App. 4 Cir. 12/27/17), 234 So.3d 1103, 1109 (citation omitted). If, as in this case, circumstantial evidence is relied upon, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty. *Benjamin ex rel. Benjamin v. Hous. Auth. of New Orleans*, 04-1058, p. 5 (La. 12/1/04), 893 So.2d 1, 5. In a strict liability action for timber pile driving, proof of the causative factor is subject to the same standard as proof of negligence in a delictual action. Damage and causation are the necessary prerequisites for recovery, and they must be affirmatively shown by a preponderance of the evidence. *Reymond v. State Through Dep't of Highways*, 255 La. 425, 451, 231 So. 2d 375, 384 (1970).

A review of the record reveals that timber pile driving occurred directly outside of Ms. White's home, causing her home shift, shake and crack. In particular, she testified that she observed pile driving that would shake her out of her bed. She also testified that she had cracks in her fireplace, and floors.

The Plaintiffs' geotechnical engineering expert, Dr. Rune Storesund, testified that during a two-year period, various timber pile driving activities occurred directly in front of Ms. White's home. In particular, he noted that piles were driven within seventy-five feet of her home. Additionally, his report reflects that the seismograph, which measured and recorded the timber pile driving vibrations, revealed that the vibration threshold was exceeded at Ms. White's home on several occasions.

Further, Fritz Gurtler, a civil engineering expert, testified that excessive ground vibrations from the SELA construction caused Ms. White's property damages. Finally, Michael Gurtler, an expert in home building and general contractor inspection, testified that damage could occur every time the vibration threshold is exceeded. Considering the totality of the evidence, Ms. White has established, by a preponderance of the evidence, that timber pile driving caused damages to her property. Thus, Ms. White has met her burden in establishing causation. Given the foregoing, the trial court was not manifestly erroneous in finding the SWB strictly liable to Ms. White for damages to her home caused by timber pile driving activities pursuant to La. C.C. art. 667.

COMPARATIVE FAULT

Finally, the SWB claims the trial court erred in failing to assign comparative fault against the USACE and its contractors. In any action for damages, the trier-of-fact must determine the percentage of fault of all persons causing or contributing to the damage, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, or whether that person's identity is not known or reasonably ascertainable. La. C.C. art. 2323(A). The allocation of fault among all negligent

parties applies to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability. La. C.C. art. 2323(B). The trier-of-fact is owed great deference in its allocation of fault. Even if the reviewing court would have decided the case differently had it been the original trier of fact, the trial court's judgment should be affirmed unless manifestly erroneous or clearly wrong. *Clement v. Frey*, 95-1119, 95-1163, p. 7 (La. 1/16/96), 666 So.2d 607, 610.

We have reviewed the record and conclude that the trial court was not manifestly erroneous in failing to attribute comparative fault. As the trial court explained, there was no evidence introduced at trial that would warrant the allocation of third party fault.

The relationship between the SWB, USACE and the contractors was contractual. Thus, in order to apportion comparative fault for negligence, it was incumbent upon the SWB to establish a standard of care and a breach in the standard of care that caused Plaintiffs' damages. *See Holzenthal v. Sewerage & Water Board*, 08-493, p. 7 (La. App. 4 Cir. 12/3/08), 999 So.2d 1191, 119. There is no evidence that any of the contractors breached their contracts, negligently or otherwise.

Accordingly, the evidence does not support the apportionment fault against the USACE or the contractors for any negligence in performing obligations as anticipated under the contracts. Nevertheless, the SWB, being the only state government entity, is solely responsible for damages associated with inverse condemnation. This further supports the trial court's apportionment of fault against the SWB alone. Under these circumstances, the trial court's failure to assign comparative fault was not manifestly erroneous.

DAMAGES

Next, the SWB challenges the damages award on three grounds: 1) just compensation, 2) loss of use and quiet enjoyment, 3) specific damages awarded to Thomas Ryan and Judith Jurisich, as well as Faye Lieder. The standard of review for damage awards requires a showing that the trier of fact abused the great discretion accorded in awarding damages. *Davis v. Hoffman*, 00-2326, pp. 3-4 (La. App. 4 Cir. 10/24/01), 800 So.2d 1028, 1030-31. In effect, the award must be so high or so low in proportion to the injury that it "shocks the conscience." *Id*. (quotation omitted). Where dealing with specific awards made for specific reasons spelled out by the trial court, we must consider whether each specific item is recoverable as a matter of law. *Mistich v. Volkswagen of Germany, Inc.*, 94-226, p. 4 (La.App. 4 Cir. 6/25/97), 698 So.2d 47, 50.

Special damages are defined as "those which either must be specially pled or have a 'ready market value,' *i.e.* the amount of damages supposedly can be determined with relative certainty." *Wainwright v. Fontenot*, 00-492, p. 5 (La. 10/17/00), 774 So.2d 70, 74. Certain types of special damages are easily measured. *Smith v. Escalon*, 48,129, p. 10 (La. App. 2 Cir. 6/26/13), 117 So.3d 576, 583. The standard of review applicable to an award of special damages is the manifest error standard. *Kaiser v. Hardin*, 06-2092, pp. 11–12 (La. 4/11/07), 953 So.2d 802, 810.

First, the SWB contends that the trial court erred in awarding the Plaintiffs just compensation to the full extent of their loss. It argues that the La. Const. Art. I, §4 and La. R.S. 49:214.5.6 and 214.6.5 restrict recovery to that required by the Fifth Amendment of the United States Constitution. Therefore, the SWB

concludes that the Plaintiffs' recovery for extraneous damages such as loss of use and enjoyment was precluded.

The Louisiana Constitution explains that "[i]n every expropriation or action to take property pursuant to the provisions of this Section ... the owner shall be compensated to the full extent of his loss." La. Const. art. I, § 4(B)(5). Article I, §4[9] restricts just compensation for the taking of, or loss or damage to, property rights necessary for hurricane protection projects to that required by the Fifth Amendment. *S. Lafourche Levee Dist. v. Jarreau*, 16-0788, p. 11 (La. 3/31/17), 217 So.3d 298, 306, *cert. denied*, 138 S. Ct. 381, 199 L. Ed. 2d 279 (2017). Thus, an owner of private property taken for use in hurricane protection projects is no longer entitled to just compensation to the full extent of his loss. *Id*. Similarly, La. R.S. 49:214.5.6 and 214.6.5 include similar limitations on damages for hurricane protection projects and coastal wetland conservation and restoration activities.[10] Thus, the sole issue is whether the SELA Project is a hurricane protection project.

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[9] Article I, §4(G) states:

> **Compensation paid for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects**, including mitigation related thereto, **shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America.** However, this Paragraph shall not apply to compensation paid for a building or structure that was destroyed or damaged by an event for which a presidential declaration of major disaster or emergency was issued, if the taking occurs within three years of such event. The legislature by law may provide procedures and definitions for the provisions of this Paragraph (emphasis supplied).

[10] La. R.S. 49:214.5.6(D) states:

> The full police power of the state shall be exercised to address the loss and devastation to the state and individuals arising from hurricanes, storm surges and flooding. To devote the maximum resources of the state to meet these immediate and compelling public necessities, **compensation paid for the taking of, or loss or damage to, property rights necessary for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall be limited to the compensation required by the Fifth Amendment of the Constitution of the United States of America** unless an exception as provided in Article I, Section 4(G) of the Constitution of Louisiana is applicable (emphasis supplied).

While the SWB argues that the SELA Project is a hurricane protection project, the record does not support this view. In particular, the SELA project documents, as well as the testimony elicited from the SWB, evidences that the SELA project did not involve hurricane protection. Rather, it was designed to increase capacity for ten-year rainfall events.

In addition, citing to La. R.S. 49:214.5.6 and 214.6.5, the SWB posits that the restrictions on just compensation equally apply to flood control measures. It further suggests that the Louisiana Supreme Court affirmed this position in *Jarreau, supra*. A plain reading of the statutes reveals that the limitation on just compensation only applies to hurricane protection projects. Moreover, *Jarreau*, is distinguishable in that it involved a levee servitude issue and there was no dispute that the levee servitude involved was used in a hurricane protection project. *Id*., 16-788, pp. 17-20, 217 So3d 298, 310-11. Given that the limitations on just compensation are not applicable to the instant case, the Plaintiffs were entitled to just compensation to the full extent of their loss. Accordingly, the trial court did not err in fully compensating the Plaintiffs to the full extent of their loss.

Second, the SWB asserts that the trial court was clearly wrong in awarding the Plaintiffs damages for the loss of use and quiet enjoyment of their properties. In particular, it asserts that property owners must tolerate inconveniences for the

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La. R.S. 49:214.6.5(A) states:

> Pursuant to Article I, Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, **compensation paid for the taking of, or loss or damage to, property rights affected by the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America** (emphasis supplied).

public good. Therefore, the loss of use of their property, driveways and streets are necessary inconveniences, which are not compensable.

In support of its position, the SWB cites to several cases, which applied an old version of La. Const. art. I, § 4, prior to the 2006 amendments. The prior version did not define the types of damages to be included as just compensation for the full extent of the loss. The current version of La. Const. art. I, § 4(B)(5), as amended in 2006, specifically explains: "[T]he full extent of the loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, **inconvenience, and any other damages actually incurred by the owner**... ." (emphasis supplied). Given that the current constitutional article includes just compensation damages for "inconvenience and other damages actually incurred," the trial court did not err in awarding damages for loss of use and enjoyment of their properties when awarding just compensation.[11]

Third, the SWB takes issue with specific damages awarded to Thomas Ryan and Judith Jurisich, as well as Faye Lieder. Relative to Thomas Ryan and Judith Jurisich,[12] the SWB avers that the trial court inadvertently awarded them relocation and moving expenses contrary to its judgment, which specifically denied recovery for such expenses. We agree.

The trial court's judgment specifically denied damages associated with moving and storage. However, unlike the other Plaintiffs, costs for moving and storage were not deducted from Mr. Ryan and Ms. Jurisich's award. Given that the trial court manifestly erred, the judgment is amended to reflect a reduction in the

[11] Moreover, the Plaintiffs are entitled to such damages pursuant to their tort claims as well.
[12] Mr. Ryan and Ms. Jurisich are married and co-own property located at 1106 Napoleon Ave.

amount of $20,051.44 for moving expenses. In particular, the judgment is amended as follows:

> **Thomas Ryan and Judith Jurisich – 1106 Napoleon**
>
> | | |
> |---|---|
> | Property Damage: | $71,043.11 |
> | Loss of Use and Enjoyment: | $23,751.75 |
> | Total: | $94,794.86 |
>
> ***
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that pursuant to the above calculations, plaintiffs in Residential Trial Group A are hereby awarded a money judgment against SWB in the amount of FOUR HUNDRED AND NINETY-EIGHT THOUSAND, SIX HUNDRED AND ONE DOLLARS AND SIXTY-FOUR CENTS ($498,601.64).

Next, as it pertains to Faye Lieder, the SWB argues that the trial court erred in awarding Ms. Lieder $42,263.39 for damages to repair her porch when she testified that she already made repairs in the amount of $4,000.00 to $5,000.00. However, the relief requested by the SWB is unclear.

Nevertheless, Ms. Lieder was entitled to be compensated to the full extent of her loss, including reimbursement for those repairs already made. The record reflects that the repair estimates, submitted into evidence by the Gurtler experts, identify $42,263.39 in repairs to Ms. Lieder's porch. While Ms. Lieder testified that she performed approximately $4,000.00 - $5,000.00 worth of repairs, she indicated that the remaining porch repairs could not be completed. Her testimony in no way controverts the experts' repair estimate. Even assuming there were two permissible views of the evidence, the trial court adopted the experts' valuations. This view of the evidence cannot be manifestly erroneous.[13]

[13] When there were two permissible views of the evidence, the trial court's credibility choice cannot be manifestly erroneous. *Rosell*, 549 So.2d at 844. (citations omitted).

Considering the foregoing, Mr. Ryan and Ms. Jurisich's damages award is amended to reduce the judgment by $20,051.44, thus reducing the total award to $498,601.64.

ATTORNEY FEES AND COSTS

Finally, the last two issues raised by the SWB concern the attorney and expert fees. First, the SWB asserts that the $400,000.00 attorney fee was excessive and not supported by timesheets and bills. The trial court is authorized to assess attorney fees pursuant to La. R.S. 13:5111(A). [14] The trial court's award of attorney fees is reviewed under the abuse of discretion standard. *Covington v. McNeese State Univ.*, 12-2182, p. 6 (La. 5/7/13), 118 So.3d 343, 348. In *Covington*, the Louisiana Supreme Court stated that in applying that standard, "the role of the reviewing court is not to determine what it considers to be an appropriate award, but rather it is to review the exercise of discretion by the trier of fact." *Id.*, 12-2182, p. 11, 118 So.3d at 351. Still, we review the trial court's factual findings in reaching the award at issue pursuant to the manifest error/clearly wrong standard. *Stobart v. State, Dep't of Trans. & Dev.*, 617 So.2d 880, 882 (La. 1993).

Additionally, the trial court has discretion in determining the amount of an attorney fee based upon its own knowledge, the evidence, and its observation of the case and the record. *Stanley v. Crowell & Owens, LLC*, 15-395, p. 4 (La. App. 3 Cir. 10/7/15), 175 So.3d 1204, 1207-08 (citation omitted). In fact, a court does not have to hear evidence concerning the time spent or hourly rates charged in

[14]La. R.S. 13:5111(A) states in pertinent part: "Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding."

order to make an award since the record will reflect much of the services rendered. *Id*. When the nature and extent of the services of an attorney are shown by the record, it is the duty of the court to bring to bear its knowledge of the value of the services of counsel and to fix the value even in the absence of expert testimony. *Id*.

Factors to be taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge.[15] *State, Dep't of Transp. & Dev. v. Williamson*, 597 So. 2d 439, 442 (La. 1992)

The transcript from the hearing on the motion to tax attorney fees and costs reflects that the trial court thoroughly considered the ten factors in setting the attorney fees. In particular, it found:

> The Court believes counsel for plaintiff proved to be both skilled and diligent. Ultimately, they achieved a positive result for their client receiving judgments ranging from $66,000 to $164,000 per property. I believe the work required a large amount of time and dedication from the attorneys. Counsel bounced between state court and federal court multiple times, and as I mentioned earlier, has appeared before this Court in excess of 20 times over the last year. Leading up to trial, the attorneys appeared before the Court on a biweekly basis for status conferences and motion hearings. … Counsel for plaintiffs undertook a big responsibility for this litigation as they represent approximately 300 homeowners who seek relief from this massive SELA project; albeit, the matters that were before the Court that we are here for today involve five of the plaintiffs. Moreover, the importance of the group A

[15] These factors are derived from Rule 1.5 of the Rules of Professional Conduct.

> residential trial should be noted as it undoubtedly represents a Bellwether-type trial for the remaining residential plaintiffs.

After noting that the Plaintiffs were requesting more than $1,000,000.00, the trial court awarded $400,000.00 to the Plaintiffs for attorney fees.

Our task on review is not to determine what we believe to be an appropriate judgment but to review the trial court's exercise of discretion. *Covington*, 12-2182, p. 11, 118 So.3d 351. Given that the record substantiates the trial court's determination, we do not find that the trial court abused its discretion in setting attorney fees in this matter.

Next, the SWB asserts that the trial court erred in assessing expert fees for the Plaintiffs' experts. The award of costs, which encompasses the award of expert fees, is authorized by overlapping statutory and codal provisions: La. R.S. 13:5112, which provides for the discretionary award of costs in favor of the successful party in a suit against the state or a political subdivision; and La. C.C.P. art.1920, which provides that costs are paid by the party cast in judgment unless the court, in equity, rules otherwise. *Vela v. Plaquemines Parish Government*, 00-2221 to 00-2224, p. 29 (La. App. 4 Cir. 3/13/02), 811 So.2d 1263, 1282. Items that may be taxed as costs are governed by La. R.S. 13:4533, which covers general costs, and La. R.S. 13:3666, which covers expert witness fees. *Id*.

A trial court has great discretion in awarding costs (including expert witness fees) and can only be reversed on appeal upon a showing of an abuse of that discretion. *Pelleteri v. Caspian Group Inc.*, 02-2141, p. 19 (La. App. 4 Cir. 7/02/03), 851 So.2d 1230, 1241 (citing *Mossy Motors, Inc. v. Sewerage & Water Bd. of City of New Orleans*, 01-486 (La. App. 4 Cir. 9/19/01), 797 So.2d 133).

On appellate review, a trial court's assessment of costs will not be disturbed "unless the record on appeal reveals serious abuse of discretion." *Saden v. Kirby*, 01-2253, p. 2 (La. App. 4 Cir. 8/7/02), 826 So.2d 558, 560 (citation omitted).

Similar to their argument on attorney fees, the SWB argues that the expert fees were not supported by the invoices and other documentary evidence. Expert witnesses are entitled to reasonable compensation for their time in court and for preparatory work done. *Reynolds v. Louisiana Dep't of Transp.*, 2015-1304, p. 5 (La. App. 1 Cir. 4/13/16), 194 So.3d 56, 60 (citation omitted). A district court can fix expert witness fees based upon its own observations and evidence presented at trial. *Id*.

Courts have identified multiple factors to consider in determining a reasonable expert fee award, including the following: (1) the amount of time consumed by the expert in compiling his or her report; (2) the amount charged to the client; (3) the amount of time spent in preparing for trial; (4) the amount of time spent in court; (5) the expert's expertise; (6) the difficulty of the expert's work; (7) the amount of the award; and (8) the degree to which the expert witness's opinions aided the court in its decision. *Bayou Fleet, Inc. v. Bollinger Shipyards, Inc.*, 15-0487, p. 22 (La. App. 4 Cir. 7/21/16), 197 So.3d 797, 811 (citation omitted).

The Plaintiffs requested the following in expert fees: 1) Gurtler Bros. ($102,978.11), 2) Dr. Rune Storesund ($98,116.76), 3) Wade Ragas ($54,498.00). A review of the transcript reveals that the trial court considered the hours spent for trial preparation, the time spent in court, the experts' experience, work difficulty, and the assistance the experts offered to the court before awarding expert fees. After considering the relevant factors, the trial court rendered the following award:

Michael and Fritz Gurtler ($50,000.00), Dr. Rune Storesund ($75,000.00) and Wade Ragas ($20,000.00). Given that the record supports the expert fees, the trial court's award was not unreasonable. Accordingly, the trial court did not abuse its discretion in awarding the Plaintiffs' expert fees.

CONCLUSION

For the foregoing reasons, the trial court's judgment is amended to reduce Mr. Ryan and Ms. Jurisich's damages award by $20,051.44, thus reducing the Plaintiffs' total damages award to $498,601.64. Accordingly, the appeal is affirmed as amended.

AMENDED; AFFIRMED AS AMENDED