Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **30th day of June, 2021** are as follows:

BY McCallum, J.:

2020-C-00685 *STATE OF LOUISIANA, ET AL. VS. LOUISIANA LAND & EXPLORATION CO., ET AL. (Parish of Vermilion)*

AFFIRMED AND REMANDED. SEE OPINION.

Retired Judge Michael E. Kirby, appointed Justice ad hoc, sitting for Genovese, J., recused in case number 2020-C-00685 only.

Weimer, C.J., dissents in part and assigns reasons.

Crichton, J., dissents.

Crain, J., dissents in part and assigns reasons.

Griffin, J., concurs in part, dissents in part for the reasons assigned by Chief Justice Weimer.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2020-C-00685

STATE OF LOUISIANA, ET AL.

VS.

LOUISIANA LAND & EXPLORATION CO., ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Vermilion

McCALLUM, J.[*]

Arising under the 2006 version of La. R.S. 30:29, referred to as Act 312, this oilfield remediation case involves the Vermilion Parish School Board ("VPSB"), individually and on behalf of the State of Louisiana, as petitioner, and Union Oil Company of California, Union Exploration Partners (collectively, "UNOCAL"), Chevron U.S.A., Inc., Chevron Midcontinent LP, and Carrollton Resources, LLC as defendants. UNOCAL seeks reversal of the lower courts' finding that VPSB's strict liability claim was not prescribed. UNOCAL also contests the court of appeal's ruling that the jury verdict was inconsistent and its remand for a new trial.

Finding UNOCAL failed to prove that VPSB's strict liability cause of action was factually prescribed, we affirm the court of appeal's ruling on prescription; however, we do so on other grounds. Finding the jury was improperly allowed to decide issues reserved solely for the trial court, and cognizant the extraneous instructions and verdict interrogatories permeated the jury's consideration of the verdict as a whole, we vacate the trial court's judgment and affirm the court of appeal's remand for new trial.

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[*] Retired Judge Michael Kirby, appointed Justice *ad hoc*, sitting for Justice James T. Genovese, recused.

FACTS AND PROCEDURAL HISTORY

VPSB controls certain lands known as Section Sixteen lands, the sections numbered 16 in each township of Louisiana set aside for the purpose of supporting public schools. Pursuant to a 1935 mineral lease and a 1994 surface lease, UNOCAL conducted oil exploration and oilfield production on the VPSB land for several decades.

Although the exact date of VPSB's knowledge of contamination to the land is disputed, it is clear that VPSB became aware of such sometime in 2003 or 2004. On September 2, 2004, VPSB filed a petition, urging causes of action for negligence, strict liability, unjust enrichment, trespass, breach of contract, and violations of Louisiana environmental laws. VPSB sought damages to cover the cost of evaluating and remediating the alleged damage and contamination to the property. It also sought damages for diminution of the property value, mental anguish, inconvenience, punitive damages, and stigma damages.

After numerous VPSB Supplemental and Amending Petitions for Damages, the latest of which were filed after the effective date of Act 312, neither party disputed that the 2006 version of the statute was applicable to this case. *See* La. R.S. 30:29 (2006). The legislature's intent in passing Act 312 was to ensure that funds awarded for remediation of contaminated property would indeed be spent to remediate the property and bring the land up to current environmental standards. *See* La. R.S. 30:29(A), (G) (2006); *See also, State of Louisiana v. Louisiana Land and Exploration Co.*, 12-0884, p. 15-16 (La. 1/30/13); 110 So. 3d 1038, 1049.[1] During discovery, pursuant to provision (C) of La. R.S. 30:29 (2006), UNOCAL admitted responsibility for environmental damage, as defined by Act 312. This was ostensibly done for the sole purpose of ensuring mitigation of the property could begin

[1] Henceforth, we refer to this Court's previous decision in *State of Louisiana v. Louisiana Land and Exploration Co.*, 12-0884 (La. 1/30/13); 110 So. 3d 1038, as "*La. Land & Expl. I*."

efficiently and promptly, once approved by the Louisiana Department of Natural Resources ("LDNR"). UNOCAL's admission was not an admission of any of VPSB's private causes of action.

UNOCAL filed an exception of prescription alleging VPSB's strict liability cause of action was prescribed. UNOCAL urged that more than one year had passed from when VPSB retained counsel to investigate the board's interests in the matter to when VPSB filed its petition. VPSB countered that prescription did not commence when it hired counsel. Additionally, VPSB asserted its action was imprescriptible as it had not only filed suit on its own behalf, but also in the name of the State of Louisiana, which is vested with immunity pursuant to La. Const. XII, § 13. Following a hearing, the trial court denied UNOCAL's exception of prescription.

Trial was held in 2015. At the conclusion of the fourteen-day trial, the jury returned a verdict awarding VPSB $3,500,000.00 for remediation of the land in compliance with applicable state standards and regulations pursuant to Act 312. Additionally, the jury awarded $1,500,000.00 in damages for VPSB's private strict liability action. The jury denied all other VPSB causes of action. VPSB filed a motion for new trial, alleging that the jury verdict was inconsistent because the jury awarded damages for remediation and strict liability but awarded no damages for its contract actions. The trial court denied the motion.

VPSB and UNOCAL each appealed the judgment of the trial court. The court of appeal affirmed the trial court's ruling on prescription. Pursuant to La. Const. XII, § 13, and based on its novel reasons set forth during its examination of the public trust doctrine, the court of appeal found VPSB's strict liability action was imprescriptible. Additionally, the court of appeal found the jury's verdict to be inconsistent. It therefore vacated the trial court's judgment and remanded the matter for a new trial.

LAW and DISCUSSION

First, we address whether VPSB's strict liability cause of action is prescribed. Second, we will consider whether the jury's verdict was inconsistent.

PRESCRIPTION

UNOCAL filed an exception of prescription as to VPSB's strict liability action. Following a hearing, the trial court denied UNOCAL's exception. Subsequently, the jury rendered a verdict on VPSB's strict liability action, finding UNOCAL liable and awarding VPSB $1,500,000.00.

The court of appeal found VPSB's strict liability cause of action was not prescribed because VPSB not only filed on its own behalf, but also filed in the name of the State of Louisiana, thereby cloaking itself with the immunity from prescription granted by La. Const. art. XII, § 13.[2] The court of appeal reached this holding through an application of the public trust doctrine. UNOCAL contends La. R.S. 41:961[3] narrowly restricts a school board bringing suit in the state's name to two specific instances: actions for trespass; and actions to recover title. Therefore, UNOCAL urges VPSB may not file on behalf of the state for its strict liability action. UNOCAL further asserts the strict liability cause of action is prescribed because it was filed over a year after VPSB had knowledge of the alleged injury. VPSB argues in favor of the merits of both arguments: (1) their strict liability cause of action was factually not prescribed; or (2) the cause of action is immune from prescription.

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[2] La. Const. art. XII, § 13, titled "Prescription Against State," provides:

> Prescription shall not run against the state in any civil matter, unless otherwise provided in the constitution or expressly by law.

[3] La. R.S. 41:961, titled "Actions for recovery of title and damages for trespass," provides:

> The school boards of the various parishes of the state may contract with and employ on the part of the State of Louisiana, attorneys at law, to recover for the state, damages for trespass to the sixteenth section known as school lands the title to which is still in the state. Each of the boards may make these contracts for the lands situated in its own parish and no others. The school boards may also sue for and recover the sixteenth section known as school lands.

We find it is appropriate for us to first decide whether VPSB's action was prescribed by the passage of more than one year. If this resolves the question, then it will render our consideration of the applicability of La. R.S. 41:961 and the court of appeal's reasons unnecessary.

The party pleading an exception of prescription bears the burden of proving that the action has prescribed. However, if the face of the petition shows that the cause of action is prescribed, then the petitioner must make a showing of timeliness. *Hogg v. Chevron USA, Inc.*, 09-2632, p. 7 (La. 7/6/10); 45 So. 3d 991, 998. There are no allegations or factual assertions indicating the VPSB petition was facially prescribed. Thus, UNOCAL correctly bore the burden of proving its exception of prescription at the hearing.

"When prescription is raised by peremptory exception, with evidence being introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review." *London Towne Condominium Homeowner's Ass'n v. London Towne Co.*, 06-401, p. 4 (La. 10/17/06); 939 So. 2d 1227, 1231. The trial judge held a hearing and considered evidence provided by UNOCAL's counsel. Specifically, UNOCAL introduced the testimony of Superintendent Jerome Puyua and the minutes of the VPSB meeting for the trial court's consideration on the issue of prescription.

Neither party disputes prescription would commence at the time VPSB acquired, or should have acquired, knowledge of the injury. The applicable prescriptive period is one year. La. C.C. art. 3493.[4] UNOCAL must prove its exception of prescription by showing VPSB acquired actual or constructive

[4] La. C.C. art. 3493, titled "Damage to immovable property; commencement and accrual of prescription," provides:

> When damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.

knowledge of the alleged injury more than one year prior to filing its petition. UNOCAL asserts that VPSB had constructive knowledge when it hired counsel.

This Court addressed the issue of constructive knowledge in *Hogg* when we stated the following:

> In assessing whether an injured party possessed constructive knowledge sufficient to commence the running of prescription, this court's ultimate consideration is the reasonableness of the injured party's action or inaction in light of the surrounding circumstances. *Id*.; *Griffin v. Kinberger*, 507 So.2d 821, 824 n. 2 (La.1987).
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> …
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> While prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong, and should not be used to force a person who believes he may have been damaged in some way to rush to file suit, a plaintiff is responsible to seek out those whom he believes may be responsible for a specific injury. *Jordan v. Employee Transfer Corporation*, 509 So. 2d 420, 423 (La. 1987). In a case involving constructive knowledge, the time when prescription begins to run depends on the reasonableness of a plaintiff's action or inaction. *Id.*

Hogg, 09-2632, p. 7, p. 13-14; 45 So. 3d at 997-98, 1001.

The *Hogg* court found the petitioner had constructive knowledge, based on its specific facts. However, *Hogg* recognized that mere investigation may not warrant a factual finding of actual or constructive knowledge of an injury. *Id.*, 09-2632, p. 12; 45 So. 3d at 1000-01.

UNOCAL contends Louisiana jurisprudence is well-settled that when a party hires an attorney, such an event is dispositive proof of the party's knowledge of the injury and cites two cases in support: *In re Medical Review Panel Proceeding of Emmer Williams v. Janet E. Lewis, M.D.*, 08-2223 (La. App. 1 Cir. 05/13/09); 17 So. 3d 26; and *Willard C. Clofer, Sr. v. Celotex Corporation, et al.*, 528 So. 2d 1074 (La. App. 5 Cir. 06/28/88). However, each of those cases cite Supreme Court authority, which reveals that this Court has not pronounced a strict, bright-line rule as UNOCAL asserts. The hiring of an attorney is evidence, within an entire evidentiary record, which a trial court considers when making a factual

determination of when a party had actual or constructive knowledge of their injury. In each case referenced, the courts examined the entirety of the evidence in making the factual determination of when the tolling of prescription commenced.

After a review of the evidence in the instant case, we do not find that the trial court was manifestly erroneous or clearly wrong in overruling the exception of prescription. UNOCAL offered the testimony of Superintendent Puyua and the minutes of a VPSB meeting as proof of VPSB's knowledge of the alleged injury.

Asked if he had any knowledge of the discussion in a private meeting about the possibility of hiring a law firm for "potential litigation," Superintendent Puyua replied, "I was not in that meeting, sir." Additionally, Superintendent Puyua testified he was not aware of any school board member visiting the property in question. He further stated that the first time the school board became aware the property might be dangerous to people was on advice from counsel in 2004 and that the school board had never complained to UNOCAL about the property at any time prior to filing its petition.

The minutes of an August 03, 2003 VPSB meeting reflect that VPSB entertained a motion to enter an executive session to discuss "potential litigation." Although later in the minutes VPSB does authorize the hiring of a law firm, the minutes do not indicate any facts, evidence, or land reports, that would confirm VPSB had actual or constructive knowledge of any injuries.

Whether VPSB has actual or constructive knowledge is a decision of fact found by the trial court. *London Towne,* 06-401, p. 4; 939 So. 2d at 1231. We review such determinations under the manifest error standard of review and will not disturb them unless we find the trial court was clearly wrong. *Id.* Under the specific facts submitted on the issue of prescription, we cannot find the trial court was manifestly erroneous or clearly wrong in finding that UNOCAL failed to carry its burden of proof.

Were we to rule other than we do herein, parties would be encouraged to engage in scattergun litigation in which every possible defendant, real or imagined, would be hastily sued without deliberative consideration. Parties should not be dissuaded from seeking expert assistance to determine if indeed they have been harmed before they file suit. To the contrary, individuals should be encouraged to investigate before they litigate.

Having found the trial court was not manifestly wrong in overruling UNOCAL's exception of prescription based on the one-year prescriptive period, it is unnecessary for this court to explore any alternative basis to find VPSB's strict liability action timely, such as reliance on La. Const. art. XII, § 13 or the public trust doctrine, or to consider the applicability of La. R.S. 41:961. Thus, although we affirm the judgment of the court of appeal on the issue of prescription, its analysis of these other issues was superfluous.

INCONSISTENT VERDICT

UNOCAL contends the court of appeal erred in finding the jury's verdict inconsistent and remanding for a new trial. UNOCAL takes particular issue with the court of appeal's determination that the jury's verdict finding liability for remediation damages was inconsistent with its verdict finding no liability for contract violations. UNOCAL argues the court of appeal improperly stepped into the role of the jury when the court found the jury's verdict to be inconsistent with the evidence and testimony produced at trial.

In our review, we find no inconsistency by the jury in its admirable attempt to decide a verdict after a two-week trial that included over seventeen expert witnesses. Instead, it is a legal error made by this Court in *La. Land & Expl. I* in 2013 that has caused a legal inconsistency between the jury's role in this case and the actual, statutorily permitted role of the jury in Act 312 remediation lawsuits. In the instant case, the jury's verdict was not inconsistent, when viewed in light of the improper

jury instructions given to them. Essentially, they were told to find UNOCAL liable for remediation damages. They were told to assess and find the amount of damages necessary to remediate the land. They were properly instructed on the law as regards strict liability, contract claims, and the other various private causes brought by VPSB. This was all done in light of this Court's 2013 *La. Land & Expl I.* decision, which we now see with clarity, was made in error.

La. Land & Expl. I included two critical errors that now make up the implicit arguments by UNOCAL. More importantly, that previous decision gave rise to the complete confusion noted by the court of appeal and by VPSB as to what the Legislature's intended proper role for the jury in remediation decisions exactly entails, and the confusion caused by the jury's seemingly consistent verdict in this case. The *La. Land & Expl I.* Court incorrectly held that excess remediation damages were allowed under Act 312. *La. Land & Expl. I*, 12-0884, p. 22; 110 So. 3d at 1054. Essentially, the misguided decision allowed the following: (1) juries to decide the amount of damages necessary to remediate land to department standards; and (2) juries could award to the petitioner-landowners damages in excess of actual costs to remediate the land. We need look no further than the plain language of Act 312 itself to recognize this Court's prior error. We also note the Legislature cured this Court's error by amendment in 2014 to La. R.S. 30:29(M) (2014).[5]

First, however, we must take note of the arguments laid out by the dissent on this issue. The dissent argues the law of the case doctrine requires we honor this Court's previous decision within the same case. That is, that we must now honor the error this Court previously made in 2013 because it falls within the same issues, between the same parties, and arises within the same case. However, law of the case

[5] We acknowledge that the Legislature did not make this change retroactive for trials already set prior to its enactment. However, that does not prevent us from reexamining this Court's previous interpretation of Act 312, especially in light of our finding of palpable error in the 2013 interpretation announced by the *La. Land & Expl. I* Court, as discussed *infra*.

doctrine is a policy derived from common law jurisdictions, not a mandate. We acknowledge the doctrine's significant value within legal jurisprudence, both in common law and civil law jurisdictions. However, it is not rigidly applied, and in fact has exceptions to its application. One such exception is that it may be disregarded when palpable error is found. *See Petition of Sewerage and Water Bd. Of New Orleans*, 278 So. 2d 81, 83 (1973); *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 256 So. 2d 105 (1971). It is clear, through both the arguments presented before us, and through the confused decisions by the jury, in its verdict, and the court of appeal, in its opinion, that *La. Land & Expl. I*'s findings were palpable error.

Furthermore, owing its legal history to its time as both a French and Spanish colony, Louisiana was born into and stringently holds onto its legal tradition, unique among its sister states, that of the civil law tradition. Whereas common law may look to jurisprudence as its primary source of law, civil law looks to the statutes and codes provided by the people, through their duly elected representatives, as its primary source of law. *See Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331, 1334-36 (1978). For us to so blindly adhere to this Court's previous, incorrect interpretation of the plain language and intent of Act 312, would certainly disregard our civil law tradition by elevating our own jurisprudence to equal footing with the laws enacted by our Legislature.

Instead, we find that adhering to our civil tradition requires we first look to our primary source of law for the matters now before us, Act 312 itself. In so doing, we find Act 312 did not allow for juries to determine the amount of damages necessary to fund remediation of land to government standards. It also did not allow for petitioner-landowners to obtain an award for remediation damages in excess of the amount necessary to fund the remediation plan, except in specific and expressly allowed exceptions.

Act 312 provides, in part:

A. … The provisions of this Section shall not be construed to impede or limit provisions under private contracts imposing remediation obligations ***in excess of the requirements of the department*** or limit the right of a party to a private contract to enforce any contract provision in a court of proper jurisdiction.

C. (1) If at any time during the proceeding a party admits liability for environmental damage …, the court shall order the party or parties who admit responsibility … to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage.

C. (5) ... The court shall enter a judgment adopting a plan with written reasons assigned***. Upon adoption of a plan, the court shall order the party or parties admitting responsibility or the party or parties found legally responsible by the court to fund the implementation of the plan.***

D. (1) ***… all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up.***

D. (3) ***The court shall issue such orders as may be necessary to ensure that any such funds are actually expended in a manner consistent with the adopted plan for the evaluation or remediation of the environmental damage for which the award or payment is made.***

D. (4) ***The court shall retain jurisdiction over the funds deposited*** and the party or parties admitting responsibility or party or parties found legally responsible by the court until such time as the evaluation or remediation is completed. If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court***. Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the court to be returned to the depositor.*** The department and the parties shall notify the court of the completion of any evaluation or remediation.

G. ***The provisions of this Section are intended to ensure evaluation or remediation of environmental damage.***

H. ***This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section.*** Nor shall it preclude a judgment ordering damages for or implementation of additional remediation ***in excess of the requirements of the plan adopted by the court pursuant to this***

> ***Section as may be required in accordance with the terms of an express contractual provision. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court.*** This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.

La. R.S. 30:29 (2006)(emphasis added).

The rules of statutory construction provide that when the words of a statute are clear and unambiguous, and the application of the law does not lead to absurd consequences, the statute should be applied as written and no further effort should be made to determine the legislature's intent. La. C.C. art. 9; La. R.S. 1:4. We agree with the dissenting opinion of Justice Victory that the majority in *La. Land & Expl. I* "ignored these basic rules in their interpretation of La. R.S. 30:29." *La. Land & Expl. I*, 12-0884, p. 2; 110 So. 3d at 1063 (Victory, J. dissenting). In review of the decision pronounced in *La. Land & Expl. I*, and in looking to the plain, unambiguous language of Act 312, it is clear the 2013 decision meets the exception of palpable error.

Act 312 is clear and unambiguous: (1) outside of an express contractual provision, Act 312 does not allow for remediation damages in excess of those required to fund the court adopted remediation plan; (2) the plan is left to the sole judgment of the trial court itself, not the jury; and therefore, (3) Act 312 provides no intent for the jury to decide the amount of remediation damages that meet Act 312 compliance. Act 312 only allows the jury to award excess remediation damages when an express contractual provision providing for such an award exist. Outside of any express contractual provision being present, it is error to have the jury consider any damages related to Act 312 remediation of the property. The jury's sole role is to consider liability and damages for private causes of action, as well as for contractual causes of action where an express provision allows for remediation and damages in excess of governmental standards.

Outside of these two exceptions, "all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up." La. R.S. 30:29(D)(1) (2006). Thereafter, if the trial court determines additional funds are necessary to implement the court adopted remediation plan, it may order the responsible party or parties to deposit additional funds into the registry of the court. La. R.S. 30:29(D)(4) (2006). Otherwise, any excess funds remaining in the registry after the completion of the remediation plan shall be returned to the depositor upon court order. *Id.*

In light of the above, it is then evident the jurors, through no fault of their own, improperly considered the amount of damages necessary for Act 312 compliance. In the end, the jury awarded an amount that exceeded the necessary costs to fund the court adopted remediation plan. This occurred in a case where it is undisputed the contracts do not contain express provisions demanding remediation in excess of Act 312 requirements. The jury's verdict ultimately spawned the confusion anchoring the appeal before us.

We are cognizant that these extraneous instructions and considerations permeated the jury's decisions on the entirety of its verdict. Therefore, we find it is appropriate to remand to the trial court for a new trial. This will allow the jury to make a sound verdict, without the confusion of extraneous instructions caused by this Court's previous, incorrect decision in *La. Land & Expl. I.*

Accordingly, we reverse and vacate the $3,500,000.00 judgment for remediation damages, finding there is not, and never was, statutory support for the award. Rather, specific performance of remediation, *i.e.* the cost of actual clean-up, is appropriate. The feasible plan developed with input of the parties and the LDNR, and adopted by the trial court, is the sole remedy for UNOCAL's limited admission

of liability for environmental damage. The remainder of any non-remediation, private causes of action are remanded to the trial court for a new trial.

DECREE

For the reasons aforementioned, we affirm the court of appeal's judgment on prescription, we affirm the court of appeal reversing and vacating the judgment awarded in conjunction with the jury's verdict, and we affirm the court of appeal's remand for a new trial.

AFFIRMED and REMANDED.

SUPREME COURT OF LOUISIANA

No. 2020-C-00685

STATE OF LOUISIANA, ET AL.

VS.

LOUISIANA LAND & EXPLORATION CO., ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Vermilion

WEIMER, C.J., dissenting in part.

Considering the unique facts and current procedural posture of this case, I must respectfully dissent from the majority's wholesale rejection of this court's opinion in this same case, **State v. Louisiana Land and Expl. Co.**, 12-0884 (La. 1/30/13), 110 So.3d 1038 (**Louisiana Land I**), and its related finding that it is necessary to remand this case to the district court for a new trial.

In **Louisiana Land I**, the majority of this court held that 2006 La. Act 312 (La. R.S. 30:29) did not cap damages at the amount necessary to fund the statutory remediation plan. This court explained:

> The procedure under [Act 312] does not prohibit the award of remediation damages for more than the amount necessary to fund the statutorily mandated feasible plan, nor does the procedure described in the Act intrude into the manner in which remediation damages are determined. The Act makes no changes to the normal trial procedures established by the Code of Civil Procedure. The only change accomplished by Act 312 is how the damages to remediate property are spent. Under Act 312, landowners do not receive that portion of the remediation damages award needed to fund the statutorily mandated feasible plan; these funds must be deposited into the registry of the court.

Id. at 16, at 1049. I agreed with the majority opinion in **Louisiana Land I**, which clearly rejected the position of the dissenting and concurring Justices–the position now adopted by the majority of this court. Presumably in response to **Louisiana**

Land I, the legislature amended La. R.S. 30:29 in 2014 to provide that remediation damages were limited to the cost of funding the feasible plan adopted by the court, unless additional remediation was required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard. However, the legislature specifically provided that the amendment "shall not apply to any case in which the court, on or before May 15, 2014, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued." 2014 La. Act 400, § 3. Our civil law tradition requires this court to apply the statutory law as enacted by the legislature.

Thus, the issue of the extent of remediation damages was litigated by these same parties in this same case more than eight years ago, and the parties and lower courts operated under this court's holding since that time. Neither party has asserted as error this court's holding in **Louisiana Land I** or has briefed the issue. Respectfully, while the majority's position is essentially in line with the current law (following the 2014 amendment), given the legislature's express declaration limiting retroactive application of the amendment, I find it inherently inappropriate for this court to now unilaterally abandon its decision in **Louisiana Land I** and change the law these parties have been operating under for years based on mere speculation that this court's 2013 opinion was a source of confusion for the parties, the jury, and the court of appeal. In its writ application to this court, UNOCAL did not object to payment of the $3.5 million in remediation damages awarded by the jury and asserted no error relative to that award. Considering all of these circumstances, it cannot be said that **Louisiana Land I** creates "a grave injustice" warranting application of a "palpable error exception" to the law of the case doctrine. See **Louisiana Land & Expl. Co. v. Verdin**, 95-2579, p. 4 (La.App. 1 Cir. 9/27/96), 681 So.2d 63, 65 ("the

court's disposition on the issue considered usually becomes the law of the case, foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. However, where a prior disposition is clearly erroneous and will create a grave injustice, it should be reconsidered."). (Footnote omitted.) Institutionally, there is much to be said for finality and resolution of a dispute.

I do not find it necessary to remand the remaining private claims for a new trial. Rather, I would reinstate the jury's verdict finding UNOCAL was not liable for breach of contract/lease. Remediation damages and damages for breach of the mineral lease are two separate matters. The parties do not dispute that the jury was properly instructed regarding the breach of contract claims, specifically regarding whether the mineral lessee (UNOCAL) was negligent, unreasonable, or engaged in excessive use of the property. Further, the jury's decision on this issue is clearly supported by the record evidence. In my opinion, it is not apparent that there was any confusion on the part of the jury which would require a retrial of this issue.

SUPREME COURT OF LOUISIANA

No. 2020-C-00685

STATE OF LOUISIANA, ET AL.

VS.

LOUISIANA LAND & EXPLORATION CO., ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Vermilion

CRAIN, J., dissents in part and assigns reasons.

I dissent from the finding that VPSB's strict liability cause of action did not "factually prescribe." Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. *Campo v. Correa*, 2001-2707 (La. 6/21/02), 828 So. 2d 502, 510–11. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription. *Id.*

I find VPSB had sufficient knowledge to commence prescription when it hired counsel on August 21, 2003. The written minutes of an executive meeting held that day confirm that VPSB discussed hiring legal counsel for "potential litigation." At trial, Superintendent Puyau testified that the "potential litigation" referred to this case. Later that same day, VPSB reconvened for a public meeting and voted to retain counsel "to represent the Board in mitigation efforts of damaged sixteenth section properties." The conclusion is inescapable for me that VPSB, at a minimum, had constructive knowledge of this claim. Hiring counsel to address damaged properties is certainly "notice enough to excite attention and put the injured party on guard and call for inquiry." In fact, the more compelling inference from these facts is VPSB

had actual knowledge "of facts that would entitle [it] to bring suit" or that "it was the victim of a tort." *Id. See Guitreau v. Kucharchuk*, 99-2570 (La. 5/16/00), 763 So. 2d 575, 580 ("plaintiff discovered that he had a cause of action . . . when he consulted with an attorney"); *Gore v. Snider*, 590 So. 2d 677, 680 (La. App. 3 Cir. 1991) (cause of action began to prescribe when "plaintiff consulted with her attorney for consideration of a possible malpractice claim"); *Phelps v. Donaldson*, 243 La. 1118, 1122; 150 So. 2d 35 (1963) (attorney's letter to defendant demonstrated plaintiff learned of allegedly defective work); *Medical Review Panel Proceeding of Williams v. Lewis*, 08-2223 (La. App. 1 Cir. 5/13/09), 17 So. 3d 26 (plaintiff "had knowledge sufficient to start the running of prescription . . . when she consulted with an attorney"); *Boyd v. B.B.C. Brown Boveri, Inc*., 26,889 (La. App. 2 Cir. 5/10/95), 656 So. 2d 683, 688-89, *writ not considered*, 95-2387 (La. 12/8/95), 664 So. 2d 417 (plaintiff "had constructive knowledge when he first consulted an attorney"); *Clofer v. Celotex Corp*., 528 So. 2d 1074, 1076 (La. App. 5 Cir. 1988) ("the act of hiring an attorney has been found to evidence the plaintiff's awareness of an injury"); *Harlan v. Roberts*, 565 So.2d 482, 478 (La.Ct.App.1990) (prescription period began to run when plaintiff indicated she would consult an attorney); *see also McLaughlin v. GlaxoSmithKline, L.L.C*., 601 Fed. Appx. 312, 315 (5th Cir. 2015) (under Louisiana law, prescription began to run, at latest, when consumer retained attorney); *Yates v. Sw. Life Ins. Co.*, CIV. A. 97-3204, 1998 WL 61033, at *5 (E.D. La. 2/12/1998) (plaintiff's written threat to pursue legal remedies was sufficient to begin the one-year prescriptive period); *Nw. Mut. Life Ins. Co. v. Hart*, CIV.A. 95-1042, 1996WL419804, at *2 (E.D. La. 7/25/96) (the act of hiring an attorney constitutes awareness of plaintiff's injury).

Thus, I find prescription began running on August 21, 2003, making the September 2, 2004 filing of the strict liability claim untimely. The trial court's finding to the contrary is manifestly in error.

Finding the claim prescribed on its face, I believe the issue of constitutional immunity from prescription should have been reached. *See* Louisiana Constitution art. XII, § 13 ("Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law.")

I agree with the majority's analysis that error was injected into the proceeding by the misapplication of Act 312; thus, I would remand for a new trial relative only to the contractual claim.