Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **1st day of June, 2022** are as follows:

PER CURIAM:

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

AFFIRMED. SEE PER CURIAM.

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

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

Hughes, J., dissents in part and concurs in part and assigns reasons.

Crichton, J., additionally concurs in part and dissents in part and assigns reasons.

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

McCallum, J., additionally concurs and assigns reasons.

Griffin, J., concurs in part, dissents in part and assigns reasons.

Kirby, J., dissents in part for the reasons assigned by Crain, J.

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

On Rehearing

PER CURIAM[*]

We granted rehearing to reconsider our prior decision in *State v. Louisiana Land and Exploration Co.*, 20-00685 (La. 6/30/21), _So.3d_. The case presents two main issues, the proper interpretation of Act 312 relative to the award of damages for the evaluation or remediation of environmental damage and whether the strict liability tort claim prescribed. *See* La. R.S. 30:29.[1] With the benefit of additional oral argument and briefing, we affirm our original decree.

FACTS AND PROCEDURAL HISTORY

Vermilion Parish School Board ("VPSB") filed suit in 2004, alleging oil and gas operations conducted pursuant to a 1935 mineral lease and a 1994 surface lease damaged Section 16 land.[2] VPSB asserted causes of action for negligence, strict liability, unjust enrichment, trespass, breach of contract, and violations of Louisiana environmental laws.

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[*] Retired Judge Michael Kirby appointed Justice ad hoc, sitting for Genovese, J., recused in this case.

[1] We are tasked only with interpreting the 2006 version of Act 312 and do not opine regarding the 2014 amendments to that Act.

[2] "Section 16 land" refers to land set aside by Congress for the exclusive use of public education in the Land Ordinance of 1785. *See* 1 Laws of the U.S. 565. These properties are governed by an extensive statutory scheme in Louisiana. *See* La. R.S. 41:631-981. Here, the Section 16 land is owned by the State of Louisiana but administered and used by VPSB for purposes of education.

Union Oil Company of California and Union Exploration Partners ("UNOCAL") admitted responsibility for environmental damage to the land. La. R.S. 30:29(C)(1)(2006). Act 312 sets forth an administrative procedure where, upon an admission of responsibility, the trial court orders the development of a plan to evaluate and remediate the environmental damage. The plan ultimately adopted by the court in accordance with this administrative process is the "feasible plan." La. R.S. 30:29(I)(3)(2006).

UNOCAL filed an exception of prescription alleging VPSB knew of its strict liability tort claim more than one year before filing suit, as evidenced by it consulting an attorney regarding the damaged land. VPSB argued hiring counsel did not commence prescription and, further, the claim is imprescriptible because the suit is on behalf of the State of Louisiana, which has immunity to prescription pursuant to Louisiana Constitution Article XII, Section 13. The trial court denied the exception of prescription, eventually stating:

> This lawsuit is a civil action for property damages based on tort, property law, and mineral law. The damaged property is a 16th Section of Vermilion Parish. Section 16 lands are owned by the State but managed by various school boards for the benefit of public education. When a claim for property damage is brought by a school board in the name of the State, the claim cannot be prescribed. La. Constitution Art. 12 § 13 provides, "Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law."

A jury trial was held in April and May of 2015. The jury awarded $3,500,000 for remediation damages pursuant to Act 312. Additionally, after the trial court found the strict liability claim did not prescribe, the jury awarded $1,500,000 for that claim. According to the judgment, the strict liability award was for "damage to the property" and "to restore the property." The jury found no liability for breach of contract, negligence, or trespass.[3]

[3] In August 2015, pursuant to Act 312, the trial court referred the case to the Louisiana Department of Natural Resources to determine the feasible plan to remediate environmental damage to the

VPSB and UNOCAL appealed. The court of appeal affirmed the prescription ruling, finding the strict liability claim imprescriptible because VPSB "functions as the State in the State's capacity of trustee for the benefit of public education." The court of appeal also found the verdict inconsistent, primarily reasoning that the jury's finding of environmental damage necessarily meant UNOCAL breached its lease obligations, which conflicted with the jury's finding of no breach of contract. The trial court judgment was vacated and the case was remanded for a new trial. *State v. Louisiana Land and Exploration Co.*, 19-0248 (La. App. 3 Cir. 5/6/20), 298 So.3d 296.

We granted writs in *State v. Louisiana Land and Exploration Co.*, 20-00685 (La. 6/30/21), _So.3d_ ("*Louisiana Land II*) and affirmed the court of appeal's ruling on prescription, but found the claim not factually prescribed, making it unnecessary to decide if it was imprescriptible. Additionally, we found error in the jury deciding Act 312 issues that, following the admission of responsibility, should have been reserved solely for the trial court. That error resulted in improper jury instructions and interrogatories that tainted the entire jury verdict. We affirmed the court of appeal vacating the trial court's judgment and remanding for a new trial, but with additional guidance on the application of Act 312. Both VPSB and UNOCAL requested rehearing, which we granted. *State v. Louisiana Land and Exploration Co.*, 20-00685 (La. 10/19/21), 326 So.3d 257.

DISCUSSION

Act 312

After considering the arguments raised on rehearing, we affirm our holding in *Louisiana Land II* that the plain language of Act 312 only allows recovery of excess remediation damages when expressly provided by contract.

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land. The trial court later adopted the feasible plan recommended by LDNR. That plan was affirmed in a separate appeal and is currently being implemented.

Since the enactment of Act 312, a struggle has ensued to determine the amount of remediation damages that must be deposited into the registry of the court and used solely to evaluate or remediate environmental damage, as opposed to being awarded to the landowner without the obligation to clean up the environmental damage. Until Act 312, unless the landowner only sought specific performance, there was no legal compulsion to use money awarded to remediate environmental damage to actually clean up the property. *See Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So.2d 686.

Act 312 changed the process for recovering remediation damages by requiring that all damages awarded for the evaluation or remediation of environmental damage shall be paid into the registry of the court and used for cleanup. La. R.S. 30:29(D).[4] Act 312 broadly defines the scope of those damages. "Environmental damage" is defined as "any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. Environmental media shall include but not be limited to soil, surface water, ground water, or sediment." La. R.S. 30:29(I)(1). "Evaluation or remediation shall include but not be limited to investigation, testing, monitoring, containment, prevention, or abatement." La. R.S. 30:29(I)(2). According to the statutory scheme, any amount awarded for evaluation or remediation of environmental damage, but not needed for cleanup, is returned to the responsible party, not to the landowner. La. R.S. 30:29(D)(4). The question presented in this case is whether, in the absence of an express contractual provision, Act 312 allows a landowner to recover an award for remediation damages that exceeds the cost for the feasible plan. We again find it does not.

[4] This all-inclusive mandate is subject to one exception for an "express contractual provision" discussed hereinafter.

Resolution of the question before us turns on the language of the statute. The 2006 version of Act 312 provides in pertinent part:

> Subsection (D)(1): Whether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, 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 cleanup.
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> Subsection(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.

Subsection (D) states "*except as provided in Subsection (H) of this Section*, *all damages* or payments in any civil action . . . awarded for the *evaluation or remediation of environmental damage* shall be paid exclusively into the registry of the court . . . for cleanup." (emphasis added). Therefore, the starting point for recovery for "evaluation or remediation of environmental damage" is that "all" such damages must be deposited into the registry of the court. Significantly, this requirement is limited to one element of damages, "evaluation or remediation of environmental damage," which, as specifically defined terms in Act 312, are essentially oil field cleanup costs.

Subsection (H) recognizes the statute does not preclude "a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section." The legislature did not define "private claims suffered as a result of environmental damage." Consequently, we have no statutory listing of

these "private claims." However, because of the definition of "environmental damage," we know that the term "private claims" broadly relates to "any actual or potential impact, damage, or injury to environmental media. . . ." The statute also clearly and unambiguously says what "private claims" are not. Subsection (H) says they are not "as otherwise provided in this Section." This statutory directive reincorporates subsection (D)(1), which says these private claims *are not* for the "evaluation or remediation of environmental damage."[5] Subsection (D)(1) mandates that evaluation or remediation damages be recovered through the feasible plan, regardless of the cause of action sued upon or the legal theory of recovery. The application of subsection (D)(1) is triggered by the nature of the damage, that is, whether it is evaluation or remediation of environmental damage as defined in Act 312, not the legal theory that determines the defendant's liability. Summarizing, all private claims for environmental damage to environmental media are reserved to the landowner, except damages for evaluation or remediation of environmental damage, which is the feasible plan and must be deposited into the registry of the court.

VPSB contends the feasible plan is only a minimal state standard that protects the public interest, leaving some excess remediation award owed to the landowner as "private claims suffered as a result of environmental damage." First, that is not what the statute says. In fact, the statute says excess remediation awards are returned to the responsible party. La. R.S.30:29(D)(4). But, if we did interpret it as VPSB suggests, the exception in subsection (H) for "additional remediation" contractually provided for would be superfluous. Those damages would be included in the broader category of "private claims suffered as a result of environmental damage," because a breach of contract claim is a private claim. The legislature surely intended the

[5] As evidenced by Act 312's title, "Remediation of oilfield sites and production sites," the statute addresses *remediation* damages. By excepting "private claims" from Act 312's applicability, "private claims" refers to non-remediation claims, which the parties indicate may include, but not be limited to, loss of income, loss of enjoyment or use of property, diminution in value, stigma, mental anguish.

exception for express contractual provisions to be something other than the exception for "private claims." The exception for "additional remediation in excess of the requirements of the plan adopted by this court" expresses when a landowner can recover more remediation damages than the feasible plan: when it is contractually provided for. In those instances, "any award in connection with the judgment for additional remediation is not required to be paid into the registry of the court."

In *Marin v. Exxon Mobil Corp*., 09-2368 (La. 10/19/10), 48 So.3d 234, this court clarified the landowner's remedy under the implied obligations of the Civil Code. The court found when a lessee acts excessively and unreasonably, it has "additional obligations, *e.g.*, the obligation to correct the damage due to the unreasonable or excessive operations." *Marin*, 48 So.3d at 260. When considering what standard of remediation will "correct the damage due to the unreasonable or excessive operations," the *Marin* court found the lessee "does not necessarily . . . [have] a duty to restore the land to its pre-lease condition." *Id.* Rather, where the soil is contaminated, the additional duty of the lessee is "to correct the contamination." *Id.* Given the definitions of "environmental damage," "evaluation or remediation," and "environmental media," correcting the contamination is the same as remediating environmental damage through the feasible plan.[6]

Both Act 312 and *Marin* provide that actual cleanup of the environmental damage is the remediation remedy for breaching implied obligations. In reaching this conclusion, we reject VPSB's argument that *Marin* merely stands for the proposition that statewide 29(B) standards were sufficient under those facts but that

[6] If the landowner is dissatisfied with the feasible plan and believes the amount deposited into the registry of the court to fund that plan is insufficient, the remedy is not an excess award; rather, his remedy is to appeal the judgment adopting the plan. La. R.S. 30:29(C)(6)(a) ("Any judgment adopting a plan of evaluation or remediation . . . shall be considered a final judgment pursuant to the code of Civil Procedure Article 2081 et seq., for purposes of appeal.")

each situation should be determined on a case-by-case basis.[7] While the feasible plan may reflect changing state standards, in every case the remediation remedy is "correct[ing] the contamination," which is statutorily directed to be accomplished through the feasible plan.

Our conclusion that Act 312 requires the full recovery of evaluation or remediation damages to be through the feasible plan does not impinge substantive rights. *See M.J. Farms v. Exxon Mobil Corp.*, 07-2371, 11 p. 31 (L. 7/1/08), 998 So. 2d 16. Act 312 is a *procedural* statute. It neither creates nor divests causes of action. La. R.S. 30:29(A). A claim for full remediation of environmental damage existed before and exists after Act 312. However, there was never a right to receive duplicate awards, which would result if a private money judgment for restoration is recoverable in addition to remediation required under Act 312.[8] Again, *all* remediation damages for "any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production" are *exclusively* paid into the registry of the court for cleanup. La. R.S. 30:29(D) and (I)(1).

While our law allows and encourages the joinder of multiple causes of action to recover full damages, it does not allow the recovery of duplicate elements of damages. Neither did the law before Act 312 allow recovery of remediation damages in excess of the actual cost to remediate. What was lacking before Act 312, in the absence of a request for specific performance, was the legal compulsion to spend the "remediation" damage award on remediation. A "remediation" award

[7] Statewide Order No. 29-B standards refer to regulatory standards established by the Office of Conservation and set forth in the Louisiana Administrative Code.

[8] The judgment in this case awarding strict liability damages indicates that all or part of that award is "to restore the property." By awarding money to restore the property, *i.e.* remediate, *and* allowing remediation damages through the feasible plan, the judgment made a duplicate award.

beyond the actual cost to remediate is not remediation. It is a windfall. The purpose of our tort system is to make the victim whole, not generate windfall awards.

Our interpretation of Act 312 and the holding of *Marin* do not represent a departure from our jurisprudence. Rather, they are consistent with case law that pre-dates Act 312. When property damage is involved, the remedy has historically been to repair the damage. *See Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 04-968 (La. 1/19/05), 893 So.2d 789 (rejecting the argument that an implied obligation gives the landowner more than restoration to property's pre-lease condition, minus wear and tear.) *See also Roman Cath. Church of Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So. 2d 874, 876 (La. 1993) ("'[w]hen property is damaged through the legal fault of another, the primary objective is to restore the property as nearly as possible to the state it was in immediately preceding the damage....' *Coleman v. Victor*, [326 So.2d 344, 346 (La. 1976)]. Accordingly, 'the measure of damages is the cost of restoring the property to its former condition.'") When a person sustains property damage due to the fault of another, he is entitled to recover, among other damages, the cost of restoration that has been *or may be reasonably incurred*. *Roman Cath. Church*, 618 So. 2d at 879. That was the law before Act 312 and is the law after Act 312. The only change by Act 312 is the procedure for determining restoration costs that "may be reasonably incurred." Those are now fixed by LDNR, with input from the parties and subject to approval by the trial court. La. R.S. 30:29(C).

In *M.J. Farms*, 998 So. 2d 16, we upheld the constitutionality of Act 312 and acknowledged "it changed the remedy available." The plaintiffs in *M.J. Farms* argued that Act 312 "represents a substantive amendment of the law because a landowner can no longer recover damages for a contamination on his land that also constitutes a public law violation." *Id.* at p. 34. In rejecting that contention, this court found Act 312 "attaches a procedure for judicial resolution of claims for

environmental damages" to "ensure that damage to the environment is remediated to a standard that protects the public interest" in accord with Louisiana Constitution Article I, Section 4. *Id.* at 36. Interpreting Act 312 "remediation damages" to mean only the cost necessary to fund the feasible plan does not alter that statutory scheme.

Before Act 312, parties who contracted to return property to its pre-lease condition were obligated to do so. Thus, express contractual rights were available before Act 312's enactment. *See Corbello,* 850 So.2d 686. An express contractual right to have property restored to its original condition remains under Act 312 (*see* Subsection (H), sentence 2). Before Act 312, leases silent as to the remediation obligation were supplemented by the Civil Code with an implied obligation to restore the property to its pre-lease condition, minus ordinary wear and tear. That cause of action remains (*see* Subsection (D)(1)). Landowners could always bring tort claims. Tort claims and other non-remediation claims remain (see Subsection (H), sentence 1). Act 312 changes none of those rights. Importantly, though, none of the theories of recovery predating Act 312, including the implied obligations of the Civil Code, allowed a landowner to recover duplicate awards for the evaluation or remediation of environmental damage.

We maintain that the holding in *Louisiana Land I* was in error. The error was not in recognizing implied obligations, as those obligations existed before Act 312 and remain. Rather, we erred in finding that recovery of remediation damage resulting from the breach of implied obligations is not governed by Subsection (D), with the remediation award being the feasible plan.[9] That was palpable error.

[9] Our holding moots any discussion about the jury verdict being internally inconsistent with regard to the breach of contract claim. The principal basis of the contract claim was that UNOCAL breached the implied duty not to conduct its operations in an unreasonable or excessive manner. Because the exclusive remediation remedy for breaching this implied obligation is through the feasible plan, the remediation award would be the same even if the jury had found UNOCAL's operations were "unreasonable or excessive." Thus, under our interpretation of Act 312, UNOCAL's limited admission of liability for environmental damage includes responsibility for any unreasonable or excessive operations, and the corresponding remedy is specific performance of cleanup, *i.e.*, the feasible plan.

On rehearing, VPSB again asserts constitutional challenges to Act 312 based on our current interpretation. Specifically, VPSB asserts we are imposing a retroactive cap on remediation damages measured by the cost of the feasible plan and depriving VPSB of a vested right in its cause of action. The argument is that VPSB has a vested right to sue for breach of implied obligations that is protected by the guarantee of due process.

VPSB's argument resurrects the constitutional challenge considered and rejected in *M.J. Farms,* 998 So.2d 16. The identical causes of action pled in *M.J. Farms* (negligence, failure to act as a reasonably prudent operator, strict liability, breach of contract, and trespass) are pled here. In *M.J. Farms* we found, "Act 312 does not divest plaintiff of any of these causes of action." *Id.* at 34. Rather, "the provisions of Act 312" are "reasonable statutory restrictions and reasonable exercise of the police power." *Id.* at 35. As stated above, the causes of action that pre-date the enactment of Act 312 remain; only the procedure for recovery of a single element of damage was modified. Stated differently, the remediation or restoration remedy has not changed, only who determines it. "Act 312 adopts a procedure and simply seeks to ensure that the property that is environmentally damaged is actually remediated." The remedy of specific performance requiring cleanup of environmental damage existed before Act 312. Specific performance is a preferred remedy when available. *Olympia Mins., LLC v. HS Res., Inc.*, 13-2637, p. 37 (La. 10/15/14), 171 So.3d 878, 901 ("For breach of contract, specific performance is the preferred remedy.") Act 312 achieves specific performance through the funding of the feasible plan. Additionally, it provides for private, non-remediation claims, express contract claims, and recovery of expert and attorney fees. La. R.S. 30:29(E)(1). Act 312 does not divest the landowner of any remedy he had before its enactment. We find Act 312 constitutional as written and applied.

Exception of Prescription

On the issue of prescription, this court correctly held previously that this court has not pronounced a strict, bright-line rule stating that, when a party hires an attorney, such an event is dispositive proof of the party's knowledge that he has sustained a legally compensable injury. *State v. Louisiana Land and Exploration Co.*, 20-00685 (La. 6/30/21), _So.3d_ . Louisiana Code of Civil Procedure article La. 863(B), which requires an attorney to conduct a "reasonable inquiry" into "[e]ach claim, defense, or other legal assertion" in the pleading to be filed to determine that it is "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law." In addition, Article 863(B) compels an attorney to ensure that "[e]ach allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." To attribute to a litigant all of the knowledge that is required to be aware that he has a legally compensable claim on the day that he consults an attorney to ascertain this knowledge would require the attorney to forgo his duties under Article 863(B), in favor of filing a lawsuit that he cannot validly certify under Article 863, in order to protect the potential litigant from a claim of prescription.

As we noted in our prior opinion, no evidence was submitted to the trial court that could have imputed knowledge to the school board, when legal counsel was sought, that they had been damaged by UNOCAL's actions; VPSB had received no facts, evidence, or land reports that would confirm it had actual or constructive knowledge of any injuries and no school board representative had visited the property. Therefore, we previously concluded based on the facts before the trial court, it did not manifestly err in denying the exception of prescription. Our prior ruling is maintained.

CONCLUSION

We affirm our original decree. The matter is remanded for a new trial on any private causes of action that seek non-remediation damages, including the strict liability claim, which is not prescribed.

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

ON REHEARING

WEIMER, C.J., dissenting in part.

I voted to grant rehearing in this matter, agreeing that a reexamination of all issues in this case was appropriate. In my dissent on original hearing, I explained a particular concern I found with the majority opinion, believing the opinion erred by considering and ruling on the issue of the correctness of this court's earlier 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**"), when the issue was not raised as error and was understood to be law of the case. **State v. Louisiana Land and Expl. Co.**, 20-0685 (La. 6/30/21), ___ So.3d ___ (Weimer, C.J., dissenting in part). However, on rehearing, the majority affirms their holding that the ruling in **Louisiana Land I** was palpable error. Thus, I must once again respectfully dissent.

A determination of how to interpret Act 312 has already been made. In **Louisiana Land I**, this court held that 2006 La. Acts 312 (La. R.S. 30:29) did not cap damages at the amount necessary to fund the statutory remediation plan, and I continue to believe that decision was correct. The purpose of Act 312 was to create an obligation that plaintiffs who were awarded remediation damages were required

to perform remediation work. **Louisiana Land & Expl. Co.**, 12-0884 at 15; 110 So.3d at 1049. Act 312 was not a substantive amendment of the law and does not divest plaintiffs any of causes of action. **Id**., 12-0884 at 25; 110 So.3d at 1056; **M.J. Farms, Ltd. v. Exxon Mobil Corp**., 07-2371, pp. 27-30 (La. 7/1/08), 998 So.2d 16, 34-35. Act 312 did not prohibit the award of remediation damages for more than the amount necessary to fund the statutorily mandated feasible plan. Rather, procedurally, Act 312 changed how damages to remediate property can be applied–in remediation of the property for the benefit of the landowner, the public, and the environment. 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 for remediation of the property. **Louisiana Land & Expl. Co.**, 12-0884 at 16; 110 So.3d at 1049.

I am troubled by this court's unilateral rejection of **Louisiana Land I**, considering the parties, and lower courts, have operated under this court's holding for more than nine years. Neither party initially asserted as error this court's holding in **Louisiana Land I**, nor was the issue briefed on original hearing. In fact, 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, did not assert error relative to that award, and argued the jury's verdict should be reinstated. Rather, this court raised the issue *sua sponte* in the opinion on original hearing. Under the particular facts and circumstances of this case, I again find no justification for applying the 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. Institutionally, there is much to be said for finality and resolution of a dispute.

Considering the specific and unique facts of this case, I maintain my original dissent on this issue. I further find the jury's verdict is supported by the record. Thus, I would reverse the judgment of the court of appeal and reinstate the verdict.[1]

[1] I agree with the majority that the trial court did not manifestly err in overruling the exception of prescription and our prior ruling on that issue should be maintained.

SUPREME COURT OF LOUISIANA

No. 2020-C-00685

STATE OF LOUISIANA, ET AL.

VERSUS

LOUISIANA LAND & EXPLORATION CO., ET AL.

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

HUGHES, J., dissents in part and concurs in part.

I respectfully dissent.

The law provides, in Subsection A (effective 2006):

> The legislature hereby finds and declares that Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources and the environment of the state, including ground water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people and further mandates that the legislature enact laws to implement this policy. It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest. To this end, this Section provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the Department of Natural Resources, office of conservation. The provisions of this Section shall be implemented upon receipt of timely notice as required by Paragraph (B)(1) of this Section. 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.

in Subsection H (effective 2006 (amended 2014)):

> 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.

and in Subsection M (effective 2014):

> (1) In an action governed by the provisions of this Section, damages may be awarded only for the following:
> (a) The cost of funding the feasible plan adopted by the court.
> (b) The cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard.
> (c) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of, provided that such damage is not duplicative of damages awarded under Subparagraph (a) or (b) of this Paragraph.
> (d) The cost of nonremediation damages.
> (2) The provisions of this Subsection shall not be construed to alter the traditional burden of proof or to imply the existence or extent of damages in any action, nor shall it affect an award of reasonable attorney fees or costs under this Section.

The per curiam and concurrences propose that plaintiffs are not entitled to any damages for remediation in excess of the feasible plan unless required by the terms of express contractual provision. The Legislature could have simply provided that "damages for excess or additional remediation beyond the cost of the feasible plan are precluded unless provided for by express contractual provision." This it did not do.

Instead, the majority legislates from the bench to reach its conclusion that substantively changes the law that has been in effect over the last 16 years.

This apparently results from a shallow reading of Subsection H, which on the surface suggests that since one thing is not precluded, others must be. This conclusion is erroneous for two reasons. First, the logic is faulty. If A is not precluded, it does not follow that B or C is precluded. If the First Amendment does not preclude free speech, it does not mean that freedom of religion and assembly are.

Second, a close reading of Subsection H shows that two categories are not precluded: 1) the right of a landowner to receive a *judicial award* for private claims, except for the cost of the feasible plan ("except as otherwise provided in this

Section") which is not received by the landowner but rather is set aside and placed in the registry of the court. But nowhere does the law say that the cost of the feasible plan limits a private claim, or that the feasible plan "is" or "becomes" the private claim; 2) Subsection H also does not preclude the *implementation* of additional remediation in excess of the requirements of the feasible plan. Thus, pursuant to express contractual provision, a *judgment* can *order implementation* of excess remediation which might not otherwise be available. Trees, flowers, crops, and contaminated soil might have to be actually replaced, instead of the landowner merely receiving a monetary award, if the parties have so contracted.

The fact that the Legislature does not preclude specific performance when supported by express contractual provision does not somehow preclude or limit the recovery for a judicial award for private claims. In either event, the cost of the public claim, the feasible plan, is placed in the registry of the court, while "additional remediation," the amount that may be awarded in excess of the requirements of the public claim, is not.

The majority fails to give proper weight to Subsection H. All damages as referenced in Subsection D does not mean "all damages." It means all damages *except* those addressed in Subsection H, which are the private claims less the cost to fund the feasible plan. Subsection H is an **exception** to Subsection D.

The law provides that "[u]pon 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," Subsection (C)(5). These are the damages referred to in Subsection D, the cost to fund the feasible plan.

The per curiam misstates the law: "in fact, the statute says excess remediation awards are returned to the responsible party. La. R.S. 30:29 (D)(4)." But Subsection (D)(4) does not mention "excess remediation awards." Instead it deals with the "initial deposit" and the "depositor." The initial deposit to fund the plan, which may

or may not be sufficient, is confused by the per curiam with the damages excepted in Subsection H which do not go into the registry of the court if they exceed the cost of the feasible plan. The phrase "except as otherwise provided in this Section" in Subsection H refers back to the feasible plan and initial deposit in Subsection D. The public claim is funded first. If the landowner receives no damages from the jury, the plan is still funded if there has been an admission of responsibility. If the initial deposit is insufficient, the responsible party is required to come up with additional funds. If the initial deposit is more than sufficient, the difference is returned to the responsible party. This calculation to remediate environmental damage to the standard that protects the public interest does not negate a judicial award for damages. If judge or jury awards damages greater than the cost of the feasible plan, any excess goes to the landowner. It does not simply disappear into thin air. There is never any chance of duplicative damages or a windfall because the public claim is funded first and only the excess, if any, is recoverable by the landowner.

And an award by a judge or jury may exceed the cost of the feasible plan. For instance, a jury might award damages for topsoil with growing crops contaminated by unreasonable operations, while the feasible plan might only require the site to be covered by clay sufficient to protect the public. The "excess" or "additional" damages awarded by a jury to remediate the property do not simply disappear because they exceed the cost of the feasible plan for the public safety. The intent of the law is not to limit recovery, but to ensure the public is protected. This is made clear in the most important part of the law, the preamble, Subsection A, with which the majority seems curiously unfamiliar. It is not even mentioned in the per curiam. The law should be read as a whole, not cherry picked.

The majority also ignores Subsection A in attempting to define private claims in a convoluted reductionist analysis by arguing what private claims are not.

Compare Subsection A, which clearly states that remediation to a standard that protects the public interest (the public claim accomplished through the feasible plan) shall not impede or limit provisions under private contracts imposing remediation obligations in excess of the requirements of the department. Damages based on implied contractual obligations are not excluded by Subsection A.

This intent of the Legislature is confirmed by Subsection M, found in the 2014 amendment of the law, for which the per curiam again chooses an ostrich-like approach. Under Subsection M, damages for implied lease obligations are clearly separate from, but may not duplicate, the cost of the feasible plan. Are we to believe that the Legislature has changed the law twice since 2006? Once to take away the right of a jury to determine damages based on implied lease obligations, and then to restore it in 2014?

The public claim is that portion of private claims necessary to fund the feasible plan. The public claim is the government's interest in protecting the public via the feasible plan. Private claims are those outside the scope of the feasible plan. They are not swallowed whole by the "feasible" plan, thus rendering the award by a jury or judge meaningless. Limiting the amount of damages by the cost of the feasible plan and to take away the right to have a jury determine damages is a double substantive change to the law as it existed before the enactment of Act 312, ignoring the Legislature's intent expressed in Subsection A which remains today unchanged from its original version from 2006.

Again, if the Legislature wished to outlaw damages based on implied lease obligations beyond the cost of the feasible plan, they could have done so without the backflips. In any event, the problem disappears after August 1, 2014.

As for the prescriptive issue, I concur.

SUPREME COURT OF LOUISIANA

No. 2020-C-00685

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VS.

LOUISIANA LAND & EXPLORATION CO., ET AL.

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

On Rehearing

Crichton, J., dissents in part and additionally concurs in part and assigns reasons:

For reasons set forth in the per curiam, I agree plaintiffs are not entitled to any remediation damages in excess of the feasible plan unless required by the terms of an express contractual provision. *See* La. R.S. 30:29(H). I dissent in part because I would find VPSB's strict liability claim prescribed and/or is immaterial.

In addition to adopting Justice Crain's well-reasoned analysis with minor exception,[1] I further highlight that to recognize VPSB's strict liability claims have prescribed would not eliminate an attorney's requirement to conduct a reasonable inquiry into the claims pleaded in a petition under La. C.C.P. art. 863(B). Such concern expressed by the majority is particularly speculative in the present case, where no one argues VPSB's counsel violated its obligations under La. C.C.P. art. 863(B), including the duty to certify that "[e]ach claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." La. C.C.P. art. 863(B)(2).

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[1] I would not go so far as to say that a cause of action "need not be fully ***extant*** to start prescription." *State v. La. Land Exploration, Co.*, 20-0685 (La. 6/1/22), __ So. 3d __ (Crain, J., dissenting in part and assigning reasons) (emphasis added). I agree with Justice Crain that damages need not be fully realized for prescription to commence. However, in my view, I disagree with the foregoing statement to the extent it implies that causes of action could accrue in the absence of all elements of the legal claim being met.

Assuming a scenario where, unlike here, an attorney takes on a client for representation but after reasonable inquiry finds that he or she cannot certify the necessary pleading under La. C.C.P. art. 863(B)(2), the attorney is not required to pursue the client's proposed action. Where a reasonable inquiry would reveal such claims are unwarranted under the law and the facts, the plaintiff's "claims" would surely not prescribe because a claim cannot prescribe if it does not exist. Justice Crain's recognition that hiring counsel "is typically part of an investigatory process and indicates a sufficient level of awareness that the law requires action" does not somehow change the attorney's rights and duties in such cases, and, again, such facts are not present. *State v. La. Land Exploration, Co.*, 20-0685 (La. 6/1/22), __ So. 3d __ (Crain, J., dissenting in part and assigning reasons). More importantly, because both parties indicated in their closing arguments that the strict liability claims were for environmental remediation, those claims are remedied solely through the feasible plan under Act 312.

"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***." La. C.C. art. 3493 (emphasis added). VPSB's actual or constructive knowledge of its strict liability claims is evidenced, *inter alia*, by the board's public vote to move forward with "potential litigation" by hiring counsel to represent them in "recovery efforts of ***damaged*** section properties." (Emphasis added.) The use of the word "damaged" is significant because it demonstrates the board's understanding that there was an injury, and the moment in time when VPSB acquired such knowledge is the point from which prescription commenced.

While I agree with the per curiam that Act 312 limits the amounts plaintiffs may personally recover, I additionally concur to emphasize how Act 312 nonetheless protects landowners. Beyond the restoration of their property resulting from funding

and implementation of the feasible plan, plaintiffs maintain rights under Act 312 to recover costs of litigation such as expert witness fees and reasonable attorneys fees:

> ***In any civil action in which a party is responsible for damages or payments for the evaluation or remediation of environmental damage, a party providing evidence,*** in whole or in part, upon which the judgment is based ***shall be entitled to recover*** from the party or parties admitting responsibility or the party or parties found legally responsible by the court, in addition to any other amounts to which the party may be entitled, ***all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage, including, but not limited to, expert witness fees, environmental evaluation, investigation, and testing, the cost of developing a plan of remediation, and reasonable attorney fees incurred in the trial court and the department.***

La. R.S. 30:29(E) (emphasis added). Landowners seeking redress for environmental damage are thus empowered to obtain legal representation and build their case, and their counsel may recover reasonable fees where, as here, years of litigation preceded the remediation judgment. This is true regardless of whether the landowners personally receive a separate monetary award for their remediation claims.

For the foregoing reasons, I additionally concur with the majority ruling affirming our original decree and remanding for new trial on any claims related to non-remediation damages, and I dissent as to the strict liability claim, as I would find it prescribed.

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On Rehearing

CRAIN, J. dissents in part and assigns reasons.

I dissent only from the finding that VPSB's strict liability cause of action did not prescribe.

UNOCAL's prescription exception is premised upon VPSB's strict liability tort claim being filed more than one year after VPSB consulted an attorney regarding possible environmental damage. Pre-trial, the trial court deferred the exception to the trial and did not provide reasons. At trial, the trial court denied the exception, but again did not provide reasons. Then, after trial, when ruling on UNOCAL's motions for judgment notwithstanding the verdict and for new trial, which included the prescription issue, the trial court for the first time articulated its reasoning for denying the prescription exception, concluding "a claim for property damages [] brought by a school board in the name of the State []cannot be prescribed." The court of appeal affirmed.[1]

First, it is necessary to determine whether prescription can run against VPSB at all, before looking at whether the claim factually prescribed. The trial court's imprescriptibility conclusion hinged on VPSB being the "state" relative to its management of Section 16 land. The argument is that because VPSB is the state, it

[1] The court of appeal held the public trust doctrine grants a school board immunity from prescription when it unilaterally elects to represent the State on *any* claim relating to Section 16 land. Having considered this jurisprudentially-created doctrine, I find it inapplicable here, where there is express statutory language addressing when a school board can sue on behalf of the State.

is cloaked with the state's immunity from prescription. "Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law." La. Const. Art. XII, sec. 13. To resolve this issue, the relationship between VPSB and the State relative to the Section 16 land must be examined.

The federal government granted a fixed proportion of lands within the borders of each state for the support of public education. *Andrus v. Utah*, 446 U.S. 500, 522-23, 100 S. Ct. 1803, 1814-15, 64 L.Ed.2d 458 (1980). In Louisiana, these properties are governed by an extensive statutory scheme. *See* La. R.S. 41:631-981. Relevant here, the state granted school boards the right to "administer and use the property for public school purposes." La. R.S. 41:638.[2] In connection with that grant, the legislature expressly limited authority for school boards to represent the state relative to Section 16 land.[3] Specifically, Louisiana Revised Statutes 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

[2] Louisiana Revised Statutes 41:638 provides:

> Whenever any real property has been acquired by the state of Louisiana, any municipality, parish school board, or any other subdivision or agency of the state of Louisiana by virtue of a deed, act of sale, donation, or other form of transfer [federal land grant], which contains a stipulation that such property is to be used for public school or public educational purposes, said deed, act of sale, donation, or other form of transfer, shall constitute a dedication of such property to the public for such purposes and *the school board in whose district the property lies shall have the right to administer and use the property for public school purposes.*" (emphasis added).

[3] VPSB is a political subdivision of the state. La. Const. art. VI, § 44, ("Political subdivision" means a parish, municipality, and any other unit of local government, including *a school board* and a special district, authorized by law to perform governmental functions.)(emphasis added). Louisiana Revised Statutes 17:51 provides, "There shall be a parish school board for each of the parishes, and these several parish school boards are constituted bodies corporate with power to sue." Thus, a school board is empowered to sue on its own behalf. As a juridical person, then, VPSB has no more legal capacity than the law expressly grants it. Cmt. C to La. Civ. Code art. 24. To expand its legal capacity to sue on behalf of anyone other than itself, authority must be expressly granted. *See Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury,* 371 So.2d 1127, 1131 (La.1979) ("a political subdivision only possesses those powers conferred by the State's Constitution and statutes.")

> and no others. The school boards *may also sue for and recover the sixteenth section known as school lands*. (emphasis added).

Louisiana Revised Statutes 41:963, titled, "Suit in the name of state; scope," confirms the school board's limited authority to pursue claims on behalf of the state:

> Suit in all cases shall be brought in the name of the State of Louisiana, and the attorneys employed shall sue for the value of all timber cut and removed from any such lands, as well as any and all other legal damages *caused by any trespass.* (emphasis added).

When application of a clear and unambiguous statute does not lead to absurd results, the law shall be applied as written, with no further interpretation made in search of the intent of the legislature. La. Civ. Code art. 9; La. R.S. 1:4; *Cleco Evangeline, LLC v. Louisiana Tax Commission*, 01-2162, p. 5 (La. 4/3/02), 813 So.2d 351, 354. Pursuant to the plain language of these statutes relating to Section 16 land, a school board is only authorized to sue on behalf of the state to recover damages for trespass or to recover title.[4] Otherwise, VPSB, as a political subdivision of the state, is a separate juridical person and sues or is sued in its own capacity. VPSB's strict liability claim to recover for environmental damage is outside the scope of the actions for which a school board is authorized to sue on behalf of the state. Therefore, VPSB cannot invoke the state's constitutional immunity from prescription.

The next inquiry is whether VPSB's strict liability claim factually prescribed. The parties argue over the applicable standard of review. VPSB argues the prescription issue involves factual findings that are subject to manifest error review. UNOCAL contends the finding that the tort claim is imprescriptible is legal error that interdicted the fact-finding process, requiring *de novo* review. After further

[4] *See relatedly State v. City of Pineville*, 403 So.2d 49, 52 (La. 1981) (finding DOTD, a state agency, lacked specific statutory authority to sue in the state's name for repayment of costs associated with highway improvements and, thus, could not invoke the state's constitutional immunity from prescription).

review, it is clear the lower courts based their prescription decisions upon VPSB's relationship to the state, finding the claims imprescriptible. While the majority applies a manifest error standard of review, imprescriptibility in this context involves a legal, not factual, conclusion. Therefore, rather than giving the trial court deference for factual conclusions it did not make, the facts relative to prescription should be reviewed *de novo*. *See Catahoula Par. Sch. Bd. v. Louisiana Mach. Rentals, LLC*, 12-2504 (La. 10/15/13), 124 So.3d 1065, 1071.

Louisiana Civil Code article 3493 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." 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*, 01-2707 (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.*

A cause of action need not be fully extant to start prescription. For claims related to property damage, "[p]rescription runs from the date on which [the plaintiff] first suffers actual and appreciable damage, even though he may thereafter come to a more precise realization of the damages he has incurred or incur further damage as a result of the completed tortious act." *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10), 45 So. 3d 991, 1001. In *Hogg*, the defendants claimed the plaintiffs acquired knowledge of damage to their property more than one year prior to the filing of suit based on the plaintiffs' receipt of "Environmental Contamination Notification" letters sent from LDEQ informing them that environmental [gasoline] contamination had been detected around their property and "due to the direction of

groundwater flow, there [was] a possibility that gasoline may have migrated to their property." The plaintiffs responded the letters did not put them on notice that their property was damaged; rather, the letters merely advised they would be contacted "some time in the future" if access to their land was necessary to determine the extent of the contamination. They asserted the first notice of actual contamination was a later letter requesting access to their property to conduct remediation. This court found the first letters to the plaintiffs provided sufficient information to excite attention and put the plaintiffs on notice that they had a reasonable basis to pursue a claim, even though they did not specifically inform them of contaminated soil and groundwater on their property.[5]

In *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10), 48 So.3d 234, this court held the plaintiffs' knowledge that sugarcane would not grow in an area that was historically productive and its knowledge that an oil company had been dumping oil in pits on its property for years was sufficient to excite attention and put plaintiffs on guard, thereby triggering the commencement of prescription. The need for an expert to determine the extent of the contamination did not prolong the prescriptive period until an expert was hired. Thus, *Marin* makes clear plaintiffs have a burden to investigate potential claims for property damage upon notice of even less concrete knowledge of contamination than that in *Hogg*. The cause of action need only be

[5] The following law journal excerpt captures the importance of investigating potential property damage in this context:

> This decision [*Hogg*] sends a message to landowners that they have a burden to investigate possible claims when they receive information that their property might be contaminated. Landowners who ignore signs of contamination and then claim that they waited to file suit until they knew the extent of the damage or had definitive evidence of damage will face a challenge in successfully defeating an exception of prescription.

Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits Since Act 312*, 1 LSU J. Energy L. & Resources 93, 99-100 (2012).

sufficiently developed so as to draw attention to its possible existence and warrant further investigation.

While *Campo* cautions that mere apprehension does not trigger prescription, one must be equally aware that information sufficient to prompt an investigation does. That is why seeking legal counsel has historically been a consistent delineator for starting prescription.[6] While not always determinative, retaining an attorney is typically part of an investigatory process and indicates a sufficient level of awareness that the law requires action. While some exceptions may exist, hiring counsel is a manifestation of a person's knowledge that he has suffered damage.

On August 21, 2003, VPSB hired counsel to file this claim. VPSB held an executive meeting that day, with an attorney invited and present. The minutes reflect the agenda item was listed as "Potential litigation," and Superintendent Puyau testified the litigation referred to the instant case. Later the same day, the School Board publicly voted to retain counsel "to represent the Board in mitigation recovery efforts of *damaged* sixteenth section properties."

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[6] *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).

A *de novo* review leads to the conclusion that VPSB had, at least, constructive notice of this claim on August 21, 2003. Retaining counsel to mitigate and pursue recovery efforts related to property damage, with an eye toward "potential litigation," is "notice enough to excite attention and put the injured party on guard and call for inquiry." *Campo*, 828 So.2d at 510-511. "Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead." *Id.*

VPSB contends retaining an attorney was not knowledge of "actual and appreciable damage[,]" but merely a step in investigating whether there was actionable contamination on the property. *Harvey v. Dixie Graphics, Inc.*, 593 So.2d 351, 354 (La. 1992). First, the argument concedes that retaining counsel was a step in the investigation process. That is "a call for inquiry," thus starting prescription. Second, VPSB's argument that hiring counsel did not start prescription is undermined by the admission that counsel was retained "to represent the Board in mitigation recovery efforts of *damaged* sixteenth section properties." VPSB cites no "actual and appreciable damage" that developed after it hired counsel. The damage to the land existed on August 21, 2003. Thus, suit was filed on the knowledge VPSB possessed when it hired counsel on August 21, 2003, or at least upon whatever knowledge reasonable inquiry would have revealed.[7] *See Marin*, 48 So.3d at 250 (it is "important to note that the allegations of [plaintiffs'] petition are based on the same facts that they could have discovered had they investigated in 1991 or 1995.") *See also Hogg*, 45 So.3d at 1001 ("The facts that form the basis of

[7] Superintendent Puyau testified VPSB hired no one to visit the property before suit was filed and no testing was done before suit was filed. He stated the decision to sue in 2004 "was on advice of our legal counsel" and was based on a "concern" due to "the high levels of drilling." Again, that knowledge existed when counsel was hired. The record does not reflect that anything changed regarding the condition of the land after counsel was hired. VPSB is imputed with notice of everything that would have been revealed by an investigation following counsel being hired. *See Campo*, 828 So.2d at 510-511 ("Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead.").

the claims asserted in the petition are the same facts contained in the 2001 and 2002 letters.")

Calling for inquiry or investigation does not mean suit must be filed the next day. The applicable prescriptive period only *begins* on the date of actual or constructive notice. La. Civ. Code art. 3493. But, I reject the notion that "attention" can be sufficiently "excited" to hire an attorney to investigate environmental damage, yet insufficient to start the prescriptive period to sue for that damage. VPSB had one year to advance their investigation and file suit, at the latest, from the day counsel was consulted relative to possible environmental damage.

VPSB had actual or constructive knowledge of damage to its Section 16 land more than one year before suit was filed. I find the strict liability tort claim prescribed.[8] I would reverse the denial of the exception of prescription, grant the exception and dismiss the strict liability tort claims.

[8] Relative to the strict liability award, the judgment awards $1,500,000 for "damage to the property" and "to restore the property." To the extent this award includes damages other than "for the evaluation and remediation of . . . the contamination that resulted in the environmental damage" under La. R.S. 30:29(D), I find it is prescribed. Otherwise, as explained in our Act 312 analysis, if the award is for remediation of environmental damage, the sole remedy is the feasible plan.

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On Rehearing

McCALLUM, J., additionally concurs with reasons.

I write separately to underscore the importance of the Court's decision on prescription. I do so not because I necessarily believe such actions are imprescriptible, but because it is unnecessary to reach that point. In my view, we correctly uphold the original findings that we should first review whether the action was prescribed by the passage of more than one year, and that the trial court made a factual finding with regard to prescription. *State v. Louisiana Land & Exploration Co.*, 20-00685 (La. 6/30/21), --- So. 3d ---, 2021 WL 2678913.

In addition to the reasons set forth in the original opinion, I believe it is important to highlight the actions of UNOCAL at the time the trial court ruled on the exception of prescription. The trial court held a hearing on May 1, 2015, at which time, counsel for VPSB and UNOCAL argued prescription, both on a factual basis and on the basis of legal imprescriptibility, with UNOCAL specifically introducing evidence pertaining to the one-year prescriptive period. The trial court overruled UNOCAL's exception of prescription. Before the close of the hearing, UNOCAL requested that the jury specifically decide "whether the one-year prescription has elapsed." In seeking permission to allow the jury to decide that fact instead, it was

thus clear that even UNOCAL tacitly agreed that the trial court's decision was based on a factual finding. The trial court denied UNOCAL's request.

Three years later, in providing reasons for denying UNOCAL's post-trial motions of judgment notwithstanding the verdict and for new trial, the trial court reasoned, for the first time, that VPSB's action was imprescriptible. By all accounts, the reasons were not given to address its previous ruling on prescription, but instead to address the two aforementioned motions which were before it at that time. Indeed, but for the post-trial motions filed by UNOCAL, the trial court would not have provided such additional reasons in the first place. Thus, it seems clear that the reasons announced by the trial court at that time were made to address UNOCAL's attempt to retry its case and the prescription issue, and thus, the reasons were a second, additional set of reasons to buttress the court's previous denial of UNOCAL's exception of prescription.

The majority correctly maintains its previous holding that "we cannot find the trial court was manifestly erroneous or clearly wrong in finding that UNOCAL failed to carry its burden of proof." *Id.* at 20-00685, p. 7, --- So. 3d at ---, 2021 WL 2678913 at *4. I respectfully disagree with Justice Crain's dissenting analysis, and in particular, footnote 6, which ultimately suggests a near bright line rule that "seeking legal counsel has historically been a consistent delineator for starting prescription." I find that such has never been announced by this Court. Indeed, a closer inspection of the jurisprudence shows that each decision considered the entire context of the evidence, using the hiring of counsel as only part, albeit a weighty portion, of its findings and reasoning. Furthermore, in most, if not all cases, the courts did not necessarily find that the hiring of a lawyer was the sole delineating factor. Instead, the reviewing courts simply could not find manifest error in the lower courts' decisions.

In looking to the jurisprudence of this Court, there is no single, delineating factor. In *Phelps v. Donaldson*, 243 La. 1118, 150 So. 2d 35, (1963), for example, this Court noted that it was an attorney's letter sent to the defendant regarding the petitioner's complaints that began the tolling of prescription. As the hiring of an attorney would necessarily predate the attorney writing a letter on behalf of the client, it would seem clear that hiring an attorney was not a delineating factor to begin the tolling of prescription. In *Guitrea v. Kucharchuk*, 99-2570 (La. 5/16/00), 763 So. 2d 575, this Court looked to the entire factual record that indicated the petitioner had consulted an attorney and, at that same time, specifically signed a medical authorization form, clearly aware of the injuries upon which suit was later filed. In *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So. 2d 502, this Court found the petitioner's actions were not prescribed, focusing not on a singular event but on the entire slate of evidence presented, including the original surgery date, subsequent check-up dates, and even the date that an expert notified petitioner's counsel of his review of the medical records, which itself suggests that counsel had already been hired. Thus, in my view, this Court is correct to affirm its previous decision, and its conclusion that to rule otherwise, "parties would be encouraged to engage in scattergun litigation," when "[t]o the contrary, people should be encouraged to investigate before they litigate." *State v. La. Land & Expl.*, 20-00685, p. 8, --- So. 3d at ---, 2021 WL 2678913.

Ultimately, I find the matter of prescription to be straightforward. The trial court was presented with evidence of the school board minutes and testimony by the superintendent, who, even in light of the minutes, placed into doubt the actual and constructive knowledge of the school board. The trial court overruled UNOCAL's exception of prescription, evidently finding UNOCAL failed to meet its burden. Even though we may have ruled differently, we cannot find manifest error in the factual ruling of the trial court.

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ON REHEARING

GRIFFIN J., concurs in part, dissents in part and assigns reasons.

I concur with the opinion of the Court to the extent it maintains our prior ruling that the strict liability claim is not prescribed. However, I dissent as to the Act 312 issue and find no reason to revisit this Court's decision in *State v. Louisiana Land and Exploration Co*., 12-0884 (La. 1/30/13), 110 So.3d 1038 ("*La Land I*"). The legislative response to *La Land I* made clear that changes in the relevant law would not apply to cases that were set for trial before May 15, 2014. *See* 2014 La. Acts 400, § 3. Respectfully, this Court offers resolutions to issues neither party originally raised, upending over a decade of litigation in the process.