

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0198

CLARK C. CENAC, JR. & EILEEN C. CENAC

VERSUS

**EVANGELINE BUSINESS PARK, LLC & NATIONAL
BUILDING & CONTRACTING, CO., INC.**

Judgment Rendered: MAY 27 2016

* * * * *

On Appeal from the Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 154073

Honorable Timothy C. Ellender, Judge Presiding

* * * * *

J. Arthur Smith, III
Adrienne D. Rachel
Baton Rouge, Louisiana

Counsel for Plaintiffs/Appellants
Clark C. Cenac, Jr., & Eileen C. Cenac

J. Christopher Erny
Houma, Louisiana

Counsel for Defendants/Appellees
Evangeline Business Park, LLC,
National Building & Contracting,
Co., Inc., & Ronnie Theriot

* * * * *

Theriot, J. concurs

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

Landowners seek review of a trial court judgment that, among other things, denied their claim for lost or damaged trees. For the foregoing reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Clark Cenac, Jr. and Eileen Cenac, and defendant, Ronnie J. Theriot as sole owner of Evangeline Business Park, L.L.C., own adjacent properties in Houma, Louisiana. The common boundary between the two properties is approximately 935 feet. The Evangeline Business Park property consists of roughly 173 acres and was a wooded area before the events at issue.

At some point prior to 2007, Mr. Theriot began developing the Evangeline Business Park property. Evangeline Business Park contracted National Building and Contracting Company, Inc., which is also owned solely by Mr. Theriot, to be the general contractor for the project. Mr. Theriot employed David Waitz to engineer the project. In June of 2006, Mr. Waitz's survey crew began surveying the entire Evangeline Business Park property, including its border with the Cenac property.

Dennis LeBlanc was then hired to clear the Evangeline Business Park property up to the Cenac property line. The clearing of this section began in early 2007 and continued for several months, but the clearing of the common border took only about a week. Mr. LeBlanc was paid by National Building and Contracting Company, Inc. for the work.

Prior to clearing the border, the Cenac property line was allegedly marked with stakes. Additionally, a barbed-wired fence, which was in disrepair, ran near the property line on the Cenacs' property. A few posts remained standing and portions of the wire had been tacked to trees. During the clearing, all remnants of the barbed-wire fence were removed, with the exception of four posts. The four posts were all on the Cenac property, and varied in deviation from a maximum of 2.2 feet to a minimum of 6 inches from the property line.

On April 1, 2008, the Cenacs filed suit against Evangeline Business Park, LLC and National Building and Contracting Co., Inc., claiming that the defendants

entered their property; cut, removed and/or destroyed a number of trees; and removed their fence.¹ In an amended petition, the Cenacs sought treble damages for the loss of trees; attorney's fees under LSA-R.S. 3:4278.1;² and damages for the loss of the fence, trespass, expert witness fees, mental anguish, court costs, and other relief.

After a six-day bench trial, the trial court awarded the Cenacs \$1,500.00 damages for trespass, \$500.00 for "pain, suffering, and inconvenience" from the trespass, and \$2,500.00 to replace the barbed-wired fence. However, the trial court found that the Cenacs failed to satisfy their burden of proving that any trees were cut or removed from their property.

The court awarded the defendants \$5,000.00 in expert fees for the testimony of their arborist, but did not tax the costs of the Cenacs' two arborists.

¹ The Cenacs later amended their petition to name Mr. Theriot as an additional defendant.

² Louisiana Revised Statutes 3:4278.1 provides, in pertinent part:

A. (1) It shall be unlawful for any person to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agent or employee to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on the land of another, without the consent of, or in accordance with the direction of, the owner or legal possessor, or in accordance with specific terms of a legal contract or agreement.

(2) It shall be unlawful for any co-owner or co-heir to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agent or employee to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on co-owned land, without the consent of, or in accordance with the direction of, the other co-owners or co-heirs, or in accordance with specific terms of a legal contract or agreement. The provisions of this Paragraph shall not apply to the sale of an undivided timber interest pursuant to R.S. 3:4278.2.

B. Whoever willfully and intentionally violates the provisions of Subsection A of this Section shall be liable to the owner, co-owner, co-heir, or legal possessor of the trees for civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, plus reasonable attorney fees and costs.

C. Whoever violates the provisions of Subsection A of this Section in good faith shall be liable to the owner, co-owner, co-heir, or legal possessor of the trees for three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, if circumstances prove that the violator should have been aware that his actions were without the consent or direction of the owner, co-owner, co-heir, or legal possessor of the trees.

D. If a good faith violator of Subsection A of this Section fails to make payment under the requirements of this Section within thirty days after notification and demand by the owner, co-owner, co-heir, or legal possessor, the violator shall also be responsible for the reasonable attorney fees and costs of the owner, co-owner, co-heir, or legal possessor.

With the exception of the expert fees awarded to the defendants, each party was ordered to bear their own costs.

The Cenacs have appealed, assigning the following as error:

1. It was manifestly erroneous for the trial court to determine that no trees on the Cenacs' property were cut, fallen, destroyed, or removed when the fence was intertwined with the trees and the court determined that the fence was removed by the defendants-appellees.
2. It was an abuse of discretion for the trial court not to award plaintiff-appellants' expert witness fees, damages for the trees cut, fallen, destroyed, or removed from the Cenacs' property, treble damages and attorneys' fees.
3. The trial court abused its discretion in awarding expert witness fees to the defendants-appellees when the plaintiff[s]-appellants prevailed on several aspects of their claim.
4. The trial court abused its discretion in assigning costs to both parties when plaintiffs-appellants prevailed on several aspects of their claim.

Defendants have answered the appeal, contending that they were not the parties responsible for the Cenacs' alleged damages and that the Cenacs failed to prove that they suffered any damages whatsoever.

DISCUSSION

In their first assignment of error, the Cenacs contend that the trial court manifestly erred in determining that no trees on their property were cut, fallen, destroyed, or removed when the fence was destroyed by the defendants. The Cenacs aver that the barbed-wired fence was solely on their side of the property line, and Mr. Cenac testified that he had maintained the fence by stapling the barbed wire to the trees and fence posts on his property. Mr. Cenac testified that the trees were intertwined with the barbed wire, and in some places, the trees had grown over the barbed wire.

Because the fence was solely on the Cenacs' property, the Cenacs contend that the trial court's finding that no trees were destroyed is clearly wrong. The Cenacs claim that if the fence itself was removed, then any trees intertwined with the fence were likewise destroyed. The Cenacs insist that the trial court's findings on this issue are inconsistent and should be reversed.

The Cenacs had the burden of proof at trial to show that the defendants, more probably than not, cut trees on their property. See **Isdale v. Carman**, 96-1435 (La.App. 3 Cir. 4/2/97) 692 So.2d 687, 690. Either direct or circumstantial evidence will satisfy this burden. **Id.** Circumstantial evidence alone will satisfy the burden if it excludes other reasonable hypotheses with a fair amount of certainty. **Id.**

A court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The Louisiana Supreme Court has announced a two-part test for the reversal of a factfinder's determinations:

- 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
- 2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).

Stobart v. State through Dep't of Transp. and Dev., 617 So.2d 880, 882 (citing **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987)). This test dictates that a reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's finding. **Stobart**, 617 So.2d at 882. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. **Id.** Accordingly, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Id.**

Following our review of the record, we are unable to conclude that the trial court was clearly wrong in concluding that the Cenacs failed to meet their burden of proof to establish that trees solely on the Cenac property were destroyed. Although the Cenacs produced multiple fact witnesses, none of the witnesses were able to identify any trees that had been removed from the Cenac property. For instance, Ms. Cenac, when asked whether any tree that was solely on her property was destroyed, testified that "taking it into context, that there is an entire tree line

and there is absolutely nothing there now, I believe there is a good possibility.” Mr. Cenac similarly testified that while he heard the defendants’ equipment knocking trees down and saw many trees solely on the Evangeline Business Park property that were destroyed, he did not see the defendants destroy any tree solely on his property. Further, Mr. Cenac acknowledged that in his first deposition given in 2008 and in a deposition given four months prior to trial, he testified that no trees that were solely on his property were destroyed. At trial, Mr. Cenac, in explaining his prior answers, testified that he misspoke about the property line and fence line when giving those depositions. Nevertheless, at trial he agreed with counsel that while he believed to the best of his knowledge that some trees solely on his property were taken, he could not state so with certainty.

Three arborists also testified at trial—Robert Thibodeaux and Malcolm Guidry on behalf of the Cenacs, and James Culpepper on behalf of the defendants. Although Mr. Guidry extrapolated that approximately 41 trees on the Cenac property were destroyed based on a comparative analysis with another property, he could not specify any trees that had been cut. On the other hand, Mr. Thibodeaux, the Cenacs’ other expert, testified that “[he didn’t] know that trees were taken off” the Cenac property.³ Similar to the testimony of Mr. Thibodeaux, Mr. Culpepper opined that he “could not find any evidence of any trees that were taken off of” the Cenac property. In addition to a site inspection, Mr. Culpepper relied on aerial photographs that showed the Cenac property both before and after the clearing operations. Mr. Culpepper opined that the post-clearing photographs did not reveal any reduction of trees or foliage solely on the Cenac property. Mr. Culpepper also indicated that if forty trees had been removed from the Cenac property there would be “a significant void that would show up on that [aerial] photograph after the clearing had been done.”

³ Mr. Thibodeaux also opined that multiple trees had been damaged and would eventually be lost because of defendants’ clearing operations that caused roots to be exposed and compacted the soil, but Mr. Guidry opined that the trees appeared to be healthy and that the soil was not compacted.

Mr. Theriot, although he conceded that remnants of the barbed-wire fence and trees that straddled the property line were removed, testified that no trees that were solely on the Cenac property were removed. See LSA-C.C. art. 687.⁴

While the record may establish that underbrush and saplings entangled in the fence that were solely on the Cenac property were likely destroyed, this undergrowth is not covered under LSA-R.S. 3:427.1, and there was no additional testimony to establish the value, if any, of such taking.

Even though we may have found differently and while it would seem logical that some trees connected to the barbed-wire fence were destroyed, on the record before us we are constrained to conclude that the trial court's finding that the Cenacs failed to meet their burden of proving their trees were destroyed is not clearly wrong. The trial court was free to accept or reject the testimony of the experts.⁵ Assignment of error number one is without merit.⁶

In related assignments of error numbers two, three, and four, the Cenacs contend that the trial court abused its discretion in failing to award them their expert witness fees and in casting court costs equally between the parties. The Cenacs note that they prevailed on several aspects of their claims, including awards for damages to their fence, for trespass, and for pain, suffering, and inconvenience. As such, the Cenacs aver that their expert witness fees should have been taxed as court costs and that the defendants should have been cast with all court costs.

⁴ Louisiana Civil Code article 687 provides:

Trees, bushes, and plants on the boundary are presumed to be common unless there be proof to the contrary.

An adjoining owner has the right to demand the removal of trees, bushes, or plants on the boundary that interfere with the enjoyment of his estate, but he must bear the expense of removal.

⁵ Clearly, the trial court rejected the testimony of the Cenacs' expert arborists. Specifically, with regard to Mr. Thibodeaux, the trial court indicated that "his testimony to me was not that impressive, compaction." With regard to Mr. Guidry, the trial court indicated that "he did the best with what he had, [but] you can't turn a pig's ear into a silk purse."

⁶ Similarly, we find no merit in assignment of error number two to the extent it seeks damages for tree loss, attorney's fees, and costs under LSA-R.S. 3:4278.1.

While the general rule is that the party cast in judgment should be assessed with court costs, the trial court may assess costs in any equitable manner and against any party in any proportion it deems equitable, even against the party prevailing on the merits. See LSA-C.C.P. art. 1920 and **Bourg v. Cajun Cutters, Inc.**, 14-0210 (La.App. 1 Cir. 5/7/15), 174 So.3d 56, 73, writs denied, 15-1253 (La. 4/4/16), ___ So.3d ___, and 15-1306 (La. 4/4/16), ___ So.3d ___. Reasonable expert witness fees are permissible costs for which a party may be cast. **Washington v. Lyons Specialty Co.**, 96-0263 (La.App. 1 Cir. 11/8/96), 683 So.2d 367, 381, writ denied, 96-2944 (La. 1/31/97), 687 So.2d 408. Upon review, an appellate court will not disturb the trial court's fixing of costs absent an abuse of the sound discretion afforded the trial court. **Bourg**, 174 So.3d at 74.

In ordering each party to bear their own costs, the trial court indicated that while the Cenacs may have been successful on their trespass and fence claims, they only "tokenly won" insofar as the main issue at trial was the purported destruction of trees on the Cenacs' property. Because the Cenacs were not successful on their primary issue of lost trees, we find no abuse of the trial court's discretion in ordering each party to bear their own costs. See e.g. Vega v. State Farm Mut. Auto. Ins. Co., 08-152 (La.App. 5 Cir. 10/28/08), 996 So.2d 1164, 1172 ("Therefore, because plaintiffs prevailed on some issues but did not prevail on other issues, they are not entitled to an order requiring State Farm to pay all costs.")

In declining to tax the fees of the Cenacs' expert arborists as costs, the trial court indicated that the Cenacs "failed to prove their case" to show that any trees on their property had been destroyed. Whether a party should be awarded fees when the expert's opinion is not accepted by the court and the party presenting the evidence does not prevail on the issue is a matter in which the trial court has some discretion. **Baker v. Marcello**, 533 So.2d 1057, 1059 (La.App. 4 Cir. 1988). We also note that one of the relevant considerations in fixing expert witness fees is the helpfulness of the expert's report and testimony to the trial court. See State, Department of Transp. and Development v. Restructure Partners,

L.L.C., 07-1745 (La.App. 1 Cir. 3/26/08), 985 So.2d 212, 233, writ denied, 08-1269 (La. 9/19/08), 992 So.2d 937. In light of the foregoing, while we may have been inclined to tax the Cenacs' expert witness fees as costs to be divided between the parties, we cannot conclude that the trial court abused its discretion in failing to do so. The Cenacs' assignments of error numbers 2, 3, and 4 are without merit.

Although not specifically assigned as error,⁷ the Cenacs argue in their brief that Mr. Theriot failed to disclose the names of employees performing work on the Evangeline Business Park property until his direct examination at trial. The Cenacs contend that this late disclosure severely prejudiced their ability to prepare and present their case. The Cenacs assert, in connection with Mr. Theriot's LSA-C.C.P. art. 1442 corporate deposition,⁸ that they had previously requested the names of any individuals who performed work on the property. At trial, Mr. Theriot testified that he had previously provided the Cenacs the names of the companies that performed work on the property, but he could not recall whether he had provided the names of any specific individuals. The Cenacs, however, did not follow-up with additional questioning to show that Mr. Theriot failed to provide this information at his deposition, nor did they introduce Mr. Theriot's deposition into evidence to show that he failed to provide the requested information. Moreover, the Cenacs did not seek any specific relief from the trial court when this issue was raised at trial. In light of the foregoing, as well as the fact that the Cenacs were aware of all companies that performed work on the property, we cannot conclude that the Cenacs were prejudiced.

ANSWER TO APPEAL

In their answer, the defendants contend that they were not vicariously responsible for the individual who performed the clearing operations. The defendants note that Dennis LeBlanc was the professional equipment operator

⁷ Louisiana Code of Civil Procedure article 2129 provides that "[a]n assignment of errors is not necessary in any appeal."

⁸ The Cenacs also assert that Theriot was served with a subpoena duces tecum specifically seeking this information in connection with his 1442 deposition. However, defendants assert that Mr. Theriot was never served with the subpoena, and aver that plaintiffs only introduced the notice of the 1442 deposition that referred to a subpoena duces tecum.

who operated the bulldozer used in the clearing operation near the Cenac property. Mr. LeBlanc testified that he worked as an independent contractor for Mr. Theriot and was paid a daily rate of \$950.00. Mr. LeBlanc also testified that he had previously worked for Mr. Theriot on one prior occasion about fifteen years earlier when he cleared some storm-damaged trees on a golf course. Similarly, Mr. Theriot testified that Mr. LeBlanc was not a paid employee of National Building or Evangeline Business Park; that Mr. LeBlanc worked on a time and material basis; and that Mr. LeBlanc furnished his own bulldozer, fuel, and insurance. Defendants conclude that Mr. LeBlanc was an independent contractor for whom they are not responsible.

Under Louisiana law, a principal is generally not liable for the offenses committed by an independent contractor while performing its contractual duties. **Sandbom v. BASF Wyandotte, Corp.**, 95-0335 (La.App. 1 Cir. 4/30/96), 674 So.2d 349, 353. However, one exception arises when the principal reserves the right to supervise or control the work of the independent contractor. **Id.** at 354. Even if work is done by another, the party supervising and/or directing the work and ordering the trespass is liable. **Richard v. Richard**, 09-539 (La.App. 3 Cir. 11/04/09), 24 So.3d 292, 296.

Mr. Theriot acknowledged that he oversaw the entire clearing operation. The record reflects that when the clearing began near the Cenac property line, there was confusion regarding the fence line and property line. Mr. Theriot instructed Mr. LeBlanc to clear the Evangeline Park property up to the property line. According to Mr. LeBlanc, Mr. Theriot gave him instructions on how to clear the line and Mr. Theriot told him to simply follow the line. Mr. LeBlanc testified that he did so, according to pieces of ribbon that had been tied to stakes along the purported line, as well as pieces of fence along the line. Mr. LeBlanc indicated that he simply followed the line that had been previously marked by the flags. In light of the foregoing, we cannot conclude that the trial court was clearly wrong in finding that Mr. Theriot controlled the work and instructed Mr. LeBlanc as to the location of the property line. See **Cheramie v. Johnson**, 12-731 (La.App. 5 Cir.

5/23/13), 119 So.3d 676, 682 (Because property owners instructed their independent contractor where to construct a camp, the property owners can be held liable for damage to the neighboring property if the independent contractor's actions caused damage to neighboring property.) Accordingly, we find no merit in defendants' argument that they were not responsible for damages to the Cenac property.

Defendants also assert that the trial court erred in awarding \$2,500.00 to the Cenacs to replace their fence. Defendants aver that a barbed-wire fence cannot be used for privacy, and given the condition as testified to by witnesses, the fence had no function or value.

Although the fence was originally constructed in the mid-1900s, Mr. Cenac testified that he maintained the fence as needed prior to its destruction. Ms. Cenac also testified that although the fence was originally constructed to confine cattle and horses, the Cenacs preserved the fence to "take care of [their] property," even though there was no longer livestock on the property. In addition, Ms. Cenac indicated that they also maintained the fence due to the trees growing along the fence line, which included very thick brush overgrown with herbaceous species of plants. In his testimony, Mr. Theriot acknowledged that the Cenacs' fence was removed and that in her initial contact with him, one of Ms. Cenac's main concerns was that defendants were destroying her fence. Additionally, Mr. Guidry opined that a "conservative estimate" for a replacement fence would be approximately \$2,000.00. The trial court noted that defendants offered no testimony regarding depreciation. Considering the foregoing, we cannot conclude that the trial court abused its discretion in awarding the Cenacs \$2,500.00 to replace their fence.⁹

Defendants also contend that the trial court erred in awarding \$500.00 for mental anguish damages because the Cenacs did not seek any type of medical treatment nor did they suffer any psychic harm. See Callison v. Livingston Timber, Inc., 02-1323 (La.App. 1 Cir. 5/9/03), 849 So.2d 649, 654 ("The owner

⁹ On appeal, defendants do not challenge that the specific amount awarded by the trial court exceeds Mr. Guidry's estimate by \$500.00, but only assert that the fence had no value at all.

of the damaged property may not recover for mental anguish unless he or she proves a psychic trauma in the nature of or similar to physical injury, directly resulting from the property damage.”) Defendants also contend that the trial court erred in awarding \$1,500.00 in damages for trespass. Defendants submit that because no costs for repair of the trespass was illustrated, the award was most likely a general damage award. Defendant urge that without any psychic injury, this general damage award for trespass must also be reversed.

In an action for trespass, it is incumbent upon the plaintiff to show damages based on the result or consequence of an injury flowing from the act of trespass. **Booth v. Madison River Communications**, 02-0288 (La.App. 1 Cir. 6/27/03), 851 So.2d 1185, 1188, writ denied, 03-2661 (La. 12/12/03), 860 So.2d 1161. The damages must be proved by a preponderance of the evidence, and this burden may be met by either direct or circumstantial evidence. **Id.** This court, quoting **Britt Builders, Inc. v. Brister**, 618 So.2d 899, 903 (La.App. 1 Cir.1993), also noted:

A person injured by trespass is entitled to full indemnification for the damages caused. Where there is a legal right to recovery, but the damages cannot be exactly estimated, the courts have reasonable discretion to assess same based upon all of the facts and circumstances. Damages are recoverable even though the tortfeasor acts in good faith.

Damages for dispossession are regarded as an award of compensatory damages for violation of a recognized property right and are not confined to proof of actual pecuniary loss. Anguish, humiliation, and embarrassment are appropriate considerations. Damages are recoverable for unconsented activities performed on the property of another, based on physical property damage, invasion of privacy, inconvenience, and mental and physical suffering.

Booth v. Madison River Communications, 851 So.2d at 1188.

In **Booth**, the defendant improperly laid fiber optic cable and conduit on plaintiffs’ property rather than on the servitude upon which the defendant had been granted a right of way. The defendant later removed the cable and conduit, restored plaintiffs’ property, and left no evidence of physical damage on plaintiffs’ property. **Id.** at 1189. In addition to seeking removal of the cable and conduit, the plaintiffs sought damages for invasion, trespass, destruction of property, and

mental anguish. **Id.** at 1888. Following trial, the trial court awarded the two groups of property owner plaintiffs lump awards of \$90,000.00 and \$9,000.00, respectively. On appeal, this court recognized that although the record was devoid of any evidence to establish that the plaintiffs suffered any mental anguish, they were nevertheless entitled to damages for inconvenience or invasion of property as a result of the trespass. **Id.** at 1189. However, this court found that the trial court abused its discretion in the amounts it awarded. Under the circumstances, this court concluded that the highest amounts that could be awarded to the respective plaintiffs were \$1,500.00 and \$750.00, and this court reduced the award accordingly. **Id.**

It is undisputed that defendants trespassed onto the Cenac property, destroyed their fence, and removed shrubs intertwined within the fence. There was additional testimony that the trespass left ruts on the Cenacs' property. Although defendants assert that the \$500.00 awarded by the trial court was solely for mental anguish, the judgment itself reflects that the \$500.00 award was to compensate the Cenacs for "[p]ain, suffering, and inconvenience." Considering the award *in toto*, we conclude that the trial court did not abuse its discretion in awarding the Cenacs general damages totaling \$2,000.00.

CONCLUSION

For the foregoing reasons, the trial court's February 7, 2014 judgment is affirmed. Costs of this appeal are to be split equally between the parties.

AFFIRMED.