NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

RHP by JKW
JKW

2008 CA 2135

ANDREW B. DARAY AND JUDITH A. DARAY

VERSUS

ST. TAMMANY PARISH

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2000-15539, Division "B"
Honorable Elaine W. Dimiceli, Judge Presiding

Andrew B. Daray
Judith A. Daray
Mandeville, LA

Plaintiffs-Appellees
In Proper Person

Walter P. Reed
District Attorney
Bernard S. Smith
Lane A. Carson
Assistant District Attorneys
Covington, LA

Attorneys for
Defendant-Appellant
St. Tammany Parish

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered OCT 0 9 2009

McClendon J. concurs and assigns reasons. by JKW

PARRO, J.

St. Tammany Parish appeals a judgment in favor of Andrew and Judith Daray, awarding them a total of $60,510 for damages they incurred as a result of parish employees entering and damaging their property on two occasions while working on a drainage ditch located along, but not adjacent to, the northern boundary of their land. We amend the judgment in part and affirm as amended.

FACTUAL AND PROCEDURAL BACKGROUND

The Darays own over seventy acres of heavily wooded property in St. Tammany Parish (Parish) that they have maintained in its natural state since their purchase of the property in December 1976 (the Daray property). Running along the northern boundary of Tract 1 of their property is a forty-foot drainage servitude in the Heritage Heights subdivision, which was developed in 1984. At some time on or after December 15, 1999, Parish employees entered the Daray property without notice in order to work on the drainage ditch within the Heritage Heights servitude. While using heavy equipment to clear, widen, and deepen the drainage ditch, the workers cleared about ten feet beyond the servitude area, removing two iron survey posts marking the boundary of the Daray property and damaging the Darays' land, trees, and bushes. Spoil banks containing dirt and debris from this work were pushed into the wooded area, further encroaching on the Daray property. The Darays filed a petition for damages on December 7, 2000, seeking the costs of removal of mounds of waste material left on their property, the replacement value of trees and shrubs, the replacement cost of top soil, a penalty for the irreparable destruction of the natural environment, mental anguish damages, lost wages, legal expenses, attorney fees, court costs, and legal interest.[1] While the suit was pending, in the summer of 2006, a Parish work crew again entered the Daray property, without notice, to work on the same drainage ditch, causing additional damage and again leaving huge piles of debris on their property. During this work, the iron survey posts were again bulldozed, along with

[1] After this incident, the Parish replaced the iron survey posts, and Mr. Daray erected a large "No Trespassing" sign at the border of his property.

the "No Trespassing" sign erected by Mr. Daray after the first incident. The Darays amended their petition on March 13, 2007, to add allegations concerning this second incursion.

A bench trial was held on June 20, 2007, after which the court allowed the record to remain open for a current survey to be made of the Daray property. That survey, the Bonneau survey, was filed into the record on February 12, 2008, and was accepted by both parties at a post-trial status conference. On May 5, 2008, the court issued a judgment with reasons, finding the Parish did not have a servitude on or over the Daray property for access to the drainage ditch and had committed the tort of trespass on two occasions, damaging their property while cleaning, widening, and deepening the drainage ditch. The court further found that the Darays were entitled to an award of the costs to restore their property to its pre-trespass condition, as well as general damages for the loss of the esoteric and enjoyment value of their property. The visible damages to the property were enumerated as: destruction of trees, shrubbery, and vegetation, including some trees up to eighteen inches in diameter; piling excavation material, debris, and a spoils bank on the Daray property; digging up and removing two northern permanent boundary/survey markers; scraping top soil, shrubs, and trees from the property; burying shrubs and trees under the excavation material and waste mounds and leaving same on the property; and damaging the natural state of the property, including native shrubs such as bays, hollies, and yaupon. Damages were awarded as follows:

Removal of excavation material, waste mounds, and debris, including cost of access road required to accomplish same	$29,550.00
Stump grinding	1,000.00
Replacement of trees and shrubs	4,960.00
General damages, including interference with peaceful possession, invasion of privacy, loss of enjoyment, mental anguish and suffering, inconvenience, emotional distress, aggravation, annoyance, and damage to property's natural state	
For the first trespass	15,000.00
For the second trespass	10,000.00

Legal interest was awarded on $50,510.00 from December 7, 2000, and on $10,000.00 from March 13, 2007. All court costs were assessed against the Parish.

In this appeal, the Parish assigns the following as errors: (1) finding that the Parish committed a trespass on the Daray property and failing to find that the Parish was authorized by inherent police power and by statute to use the area; (2) failing to find that the Parish was immune from liability pursuant to LSA-R.S. 9:2798.1; (3) assessing special damages incorrectly; (4) assessing damages for the replacement value of trees without expert testimony for such values; (5) assessing excessive general damages; (6) failing to fix a specific dollar amount for court costs; and (7) assessing legal interest on the general damage award, contrary to LSA-R.S. 13:5112.

DISCUSSION

Trespass/Lawful Authority

A civil trespass is the unlawful physical invasion of the property or possession of another. Dickie's Sportsman's Centers, Inc. v. Department of Transp. & Dev., 477 So.2d 744, 750 (La. App. 1st Cir.), writ denied, 478 So.2d 530 (La. 1985). A trespasser is one who goes upon the property of another without the other's consent. Pepper v. Triplet, 03-0619 (La. 1/21/04), 864 So.2d 181, 197. Citing Williams v. City of Baton Rouge, 98-2024 (La. 4/13/99), 731 So.2d 240, the Parish claims that in order to find a trespass, the court must find that the actions were intentional and in bad faith. However, although the Williams court did find that the governing authority's actions in that case were intentional and in bad faith, it did not state that these were necessary elements for the tort of trespass. In this case, the evidence clearly shows that Parish employees went on the Daray property without their consent or knowledge on two occasions, both times causing damage to their property. The evidence also establishes that the clearing activity, as well as the spoil banks created by the clearing activity and deposited on the Daray property, went well beyond the fifteen-foot area that the Parish believed was within the servitude. The Bonneau survey indicates that spoil banks extend up to twenty-five feet onto the Daray property. Therefore, the Parish knew that it was clearing and pushing trash and debris onto property that was not included within

the Heritage Heights servitude, and thus, must belong to an adjoining landowner. The question raised in the first assignment of error is whether these incursions were unlawful or were undertaken pursuant to some lawful authority. The Parish argues that its entry onto the Daray property was authorized pursuant to its inherent police powers under LSA-Const. art. I, § 4, as well as statutory authority under LSA-R.S. 48:481, 48:482, 33:1236, and 38:113.[2]

The constitutional provision subjects private property rights of ownership, use, and enjoyment to the "reasonable exercise of the police power." LSA-Const. art. I, § 4. The police power is the plenary power of the State of Louisiana to do what is necessary to protect the people's health, safety, welfare, and morals. Carbo v. City of Slidell, 01-0170 (La. App. 1st Cir. 1/8/03), 844 So.2d 1, 11, writ denied, 03-0392 (La. 4/25/03), 842 So.2d 400. Louisiana Revised Statutes 48:481 and 482 have generally been applied to construction of roadways and associated ditches and bridges, rather than to

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[2] Louisiana Revised Statute 48:481 states: "Parish governing authorities may pass all ordinances which they think necessary relative to roads, bridges, and ditches, and may impose such penalties to enforce them as they think proper." According to LSA-R.S. 48:482, "Parish governing authorities may let out contracts for opening and repairing roads, making and repairing bridges, on the terms and conditions that they think most conducive to the public interest." Louisiana Revised Statute 33:1236 provides, in pertinent part:

> The police juries and other parish governing authorities shall have the following powers:
>
> * * *
>
> (13) To construct and maintain drainage, drainage ditches, and drainage canals; to open any and all drains which they may deem necessary and to do and perform all work in connection therewith; to cut and open new drains, ditches and canals, to acquire lands for necessary public purposes, including rights of way, canals and ditches by expropriation, purchase, prescription or by donation; to enter into contracts for the construction of such drainage works, ... and to construct any works and do any and all things necessary to effect proper drainage and carry this Paragraph into effect ... . Police juries shall open all natural drains which they deem necessary in their respective parishes and shall perform all work connected therewith, which they may deem necessary to make the opening of natural drains effective. They may perform all other acts necessary to fully drain all the land in their respective parishes and maintain such drainage when established. This Paragraph is intended to furnish additional means whereby parishes in the State of Louisiana may accomplish the objects and purposes herein referred to, and shall be liberally interpreted.

Louisiana Revised Statute 38:113 states, in pertinent part:

> The various levee and drainage districts shall have control over all public drainage channels or outfall canals within the limits of their districts which are selected by the district, and for a space of one hundred feet on both sides of the banks of such channels or outfall canals, ... whether the drainage channels or outfall canals have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or extensions to improved drainage channels or outfall canals, and may adopt rules and regulations for preserving the efficiency of the drainage channels or outfall canals.

the type of drainage ditch at issue in this case. Therefore, we do not consider these statutes as authorizing the type of activity conducted by the Parish in this instance.

Based on the evidence in this case, we also conclude that the Parish has not established that LSA-R.S. 38:113 is applicable. While this statute gives levee and drainage districts control over all public channels and a space of one hundred feet on both sides of the banks of such channels, arguably a legal servitude of use over such space, there is no levee district involved in this case, and the evidence provided by the Parish does not establish that it serves as a "drainage district" or that the area involved in this case is part of a "drainage district." The trial court noted this, commenting during Andrew Daray's testimony, "I'm not sure that [LSA-R.S. 38:113] even applies, because we don't have a drainage district or a levee district." The only testimony concerning this was from Doyle Paul Carroll, the drainage engineer for the Parish, who responded to a question from the Parish attorney as follows:

> Q. But specifically, the Parish Department of Public Works drainage, does it not have individual drainage districts? Isn't that correct?
>
> A. Correct for the most part. In St. Tammany Parish, it's Public Works. The only drainage districts are for new projects, and they only cover a very small portion of the Parish.

He did not state that the Heritage Heights drainage area constituted a drainage district or that its drainage ditch was within a drainage district. Also, although Carroll testified further that the Parish Public Works Department had maintained this drainage ditch since it was dug in connection with the development of Heritage Heights subdivision in 1984, he never equated the Parish to a "drainage district," which would have the control granted by LSA-R.S. 38:113. In one of the earliest cases interpreting this statute, the court stated, "It is not shown here that the work is that of a levee or drainage district. Accordingly, the provisions of that law do not apply to this case." Chargois v. Grimmett & James, 36 So.2d 390, 392 (La. App. 1st Cir. 1948). Likewise, we conclude that the Parish did not establish that the provisions of LSA-R.S. 38:113 apply to the matter before us. The trial court correctly determined that the Parish did not have a servitude over the Daray property.

Finally, under LSA-R.S. 33:1236, parish governing authorities are authorized to construct and maintain drainage, drainage ditches, and drainage canals where needed to fully drain all of the land in their respective parishes. This statute is clearly applicable to the maintenance activity conducted by the Parish on the Heritage Heights drainage ditch, but the statute does not authorize the use of private property on which the Parish does not have a servitude to accomplish this activity. Also, neither this statute nor LSA-R.S. 38:113 authorize the damaging of private property without just compensation. See Ortego v. First American Title Ins. Co., 569 So.2d 101, 105 (La. App. 4th Cir. 1990). Nor do they authorize the dumping of spoil and debris onto a private landowner's property. Jones v. Ouachita Parish Police Jury, 36,552 (La. App. 2nd Cir. 12/11/02), 833 So.2d 1094, writ denied, 03-0082 (La. 3/21/03), 840 So.2d 553. We conclude that the activities conducted by the Parish on the Daray property were not authorized by constitutional or statutory provisions. Accordingly, the trial court correctly determined that the two incursions by the Parish onto the Daray property without their consent constituted trespasses.

Immunity

Louisiana Revised Statute 9:2798.1 states, in pertinent part:

> A. As used in this Section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.
>
> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Parish contends its forays onto the Daray property to work on the drainage ditch

were discretionary acts within the course and scope of its lawful powers and duties. However, the record belies that contention. Carroll testified that the forty-foot drainage servitude within the Heritage Heights subdivision was for both the drainage ditch and for access to get to it to maintain it. Therefore, there should have been no need to trespass beyond the servitude area in order to accomplish the work on the drainage ditch. Moreover, there were two iron survey posts sticking out of the ground, marking the northern boundaries of the Daray property. On both occasions when the Parish work crews came onto the property, they bulldozed over the iron posts, pulling them from the ground and leaving them with other debris. During the 2006 work, they also destroyed the large "No Trespassing" sign that Daray had erected at his property line. The Parish employees who performed the work testified that they were instructed to clear fifteen feet along the southern bank of the Heritage Heights drainage ditch. Yet, the Bonneau survey clearly shows that along 664 feet of the northern boundary of the Daray property, the spoil banks from the Parish work are piled within the Daray property, well beyond the servitude on the southern rim of the drainage ditch. According to Gerald Long, the field coordinator for John E. Bonneau & Associates, Inc., the field notes from a survey completed in 2000 to re-set the iron posts after the first incident show that there were approximately twenty feet from the northern boundary of the Daray property to the back of the dirt piled on the Daray property by the Parish. Malcolm Guidry, an arborist who testified on behalf of the Parish, stated that the damaged area measured fifteen feet by 664 feet. Therefore, while the Parish was within its lawful powers and duties in performing maintenance work on the drainage ditch, it went beyond its lawful authority in conducting the work past the legal servitude and onto the Daray property.

In Mitter v. St. John the Baptist Parish, 05-375 (La. App. 5th Cir. 12/27/05), 920 So.2d 263, 266, writ denied, 06-0254 (La. 5/26/06), 930 So.2d 21, the court quoted with approval the trial court's reasons for judgment, which stated, "It is unthinkable that a governmental authority could be protected from liability in a case such as this where improvements to the drainage system relieving the problems of certain citizens ...

causes [sic] problems to other citizens ... ." Although the matter before us does not involve such extreme problems as were caused in the Mitter case, the same rationale can be applied. John Hagood testified that the Daray property does not drain into the Heritage Heights drainage ditch; rather, it drains in a southerly direction into Chinchuba Creek, which traverses the Daray property further south. Therefore, the work done by the Parish on the Heritage Heights drainage ditch benefitted only the residents of the subdivision, while damaging the Daray property. The Parish did not act within the course and scope of its lawful powers and duties when it ignored the visible boundary markers and servitude, instead clearing a strip of the Daray property and shoving spoil banks into the wooded area on the Daray property adjoining the cleared strip. Therefore, the immunity provision of LSA-R.S 9:2798.1(B) does not shield the Parish's actions in this case.

Damages

Under LSA-C.C. art. 2315, a person may recover damages for injuries caused by a wrongful act of another. A person injured by trespass or fault of another is entitled to full indemnification for the damages caused. Callison v. Livingston Timber, Inc., 02-1323 (La. App. 1st Cir. 5/9/03), 849 So.2d 649, 652. General damages are those which may not be measured with any degree of pecuniary exactitude, but which involve mental or physical pain or suffering, inconvenience, the loss of gratification or intellectual or physical enjoyment, or other losses of life or lifestyle, which cannot be measured definitively in terms of money. McGee v. A C and S, Inc., 05-1036 (La. 7/10/06), 933 So.2d 770, 774. On the other hand, special damages are those which have a ready market value, such that the amount may theoretically be determined with relative certainty. Id.

Where there is a legal right to recovery, but the damages cannot be exactly estimated, the courts have reasonable discretion to assess same based on all of the facts and circumstances. Callison, 849 So.2d at 652. Damages are recoverable even though the tortfeasor acts in good faith. Versai Mgmt., Inc. v. Monticello Forest Products Corp., 479 So.2d 477, 484 (La. App. 1st Cir. 1985). When 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. Hornsby v. Bayou Jack Logging, 04-1297 (La. 5/6/05), 902 So.2d 361, 365. Damages are recoverable, if supported by the record, for the costs of: removing stumps and clearing the land, Versai, 479 So.2d at 484; reforestation, Isdale v. Carman, 96-1435 (La. App. 3rd Cir. 4/2/97), 692 So.2d 687, 695; loss of aesthetic value/buffer zone, Howes v. Rocquin, 457 So.2d 1220, 1223 (La. App. 1st Cir. 1984); and mental anguish, Olsen v. Johnson, 99-783 (La. App. 3rd Cir. 11/3/99), 746 So.2d 740, 745. 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. Britt Builders, Inc. v. Brister, 618 So.2d 899, 903 (La. App. 1st Cir. 1993). Each case must rest on its own facts and circumstances as supported by proof in the record. Hornsby, 902 So.2d at 367; Frisby v. Mugnier, 06-2288 (La. App. 1st Cir. 9/14/07), 971 So.2d 1045, 1048, writ denied, 07-2021 (La. 12/7/07), 969 So.2d 638.

With regard to the amount of damages to be assessed against a trespasser, both for the invasion of the plaintiffs' property right and the resulting mental anguish, humiliation, and embarrassment, the trial court is afforded much discretion. Beasley v. Mouton, 408 So.2d 446, 448 (La. App. 1st Cir. 1981). The role of an appellate court in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. It is only when the damage award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or decrease the award. Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1260-61 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); Booth v. Madison River Communications, 02-0288 (La. App. 1st Cir. 6/27/03), 851 So.2d 1185, 1188-89,

writ denied, 03-2661 (La. 12/12/03), 860 So.2d 1161. Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. Coco v. Winston Indus., Inc., 341 So.2d 332, 335 (La. 1976); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 704, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

The Parish argues that the trial court erred in awarding the Darays amounts sufficient to restore the property to its original condition, when it did not determine whether those costs were disproportionate to the value of the property. We disagree. As cited by the Parish, this court reviewed the criteria for damages for persons injured by trespass, stating in Frisby, 971 So.2d at 1047-48:

> A person injured by trespass or fault of another is entitled to full indemnification for the damages caused. As a general rule, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may reasonably be incurred, or, at his election, the difference between the value of the property before and after the harm. If, however, the cost of restoring the property to its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition, or there is reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm. However, each case must rest on its own facts and circumstances as supported by proof in the record. (Citations omitted).

As noted by the Parish in its brief to this court, the Darays elected to receive the cost of restoring their property to its former natural condition. Moreover, there is evidence supporting the court's conclusion that they had personal reasons to restore it. Mr. Daray testified that he and his wife did not ever want their property disturbed and had no intentions of developing it. He stated, "We want to keep our property just the way it is. We think it's beautiful in its natural state." A damage award under LSA-C.C. art. 2315 that exceeds the value of the property is not impermissibly excessive where the owner is able to articulate "personal reasons" which justify the higher award. Hornsby, 902 So.2d at 365. Accordingly, the court did not err in awarding restoration costs to the Darays under the facts and circumstances of this case.

The Parish also contends the court erred in the amount awarded to remove the spoil banks and other debris, because the estimates provided by the Darays were not expert opinions and were overstated guesses of the time, labor, and equipment needed to clean up the property. The Darays presented testimony from two independent contractors who had advertised their services in the newspaper. Each of them had walked the site and viewed the amount of debris and waste materials. They did not confer with each other, and each submitted separate estimates of the total amount needed to do the job. Each estimate included the cost of building an access road to the site, because the only access to it was through one of the Parish servitudes in Heritage Heights—and even if allowed to use that servitude, a temporary culvert would have to be installed to get to the Daray property and removed at the completion of the work. One estimate was for $25,550, plus $4,000 to prepare the access road. The other estimate was for $28,700.25, plus $1500 per day to prepare an access road. In contrast, a Parish employee with the Department of Public Works testified it would only take two dump trucks two days to remove the debris, at a total cost of $6,000.

Obviously, the court had wildly divergent estimates of the amount of debris on the Daray property and the cost to remove it. However, the court was very likely influenced in its decision by two sets of photographs of the property, one set taken after the first work and the other taken after the second. The first set showed a wide swath of land south of the drainage ditch completely stripped of vegetation, with all the dirt, tree stumps, and branches shoved into the woods on the Daray property. The second set showed huge piles of dirt, trees, branches, and debris mounded up on the previously cleared area. Both sets of photographs show large trees and stumps within the spoil banks. These visual representations of the damage support the trial court's conclusion that the higher estimates to remove the debris were more probably accurate. Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Williams v. City of Baton Rouge, 02-0682 (La. App. 1st Cir. 3/28/03), 844 So.2d 360, 366. Therefore, the court's award of $29,550 for the cleanup costs was supported by the record and was not clearly

wrong.

However, the additional award of $1,000 for stump grinding was not supported by the evidence. In his closing argument, Mr. Daray mentioned his estimate to grind stumps and recondition or replace top soil, stating that he "just threw a figure in there to say it's going to take a $1,000 to go ahead and make it re-seeded or do whatever I'm going to do out there to it ... ." There was no testimony that such additional work would be needed or that it would cost $1,000. Therefore, the judgment will be amended to eliminate this item of damages.

The Parish also questions the court's award of $4,960 for replacement of trees and shrubs, when the Darays did not present any expert testimony concerning those costs. Mr. Daray's evidence on this item of damages was based on his own estimate and that of his friend, Hagood, who had walked the property with Mr. Daray, counted the vegetation in three representative sample areas twenty feet by twenty feet, and extrapolated from that count the number of trees and shrubs that had been destroyed in the cleared strip. Using the lowest sample area, they estimated that about 500 trees and shrubs had been destroyed, either by being stripped off the cleared area or by being covered by the dirt and debris shoved into them. Mr. Daray's estimate assigned a value of $10 each for 400 small shrubs and trees, $50 each for 75 larger trees, and $200 each for 25 very large trees, for a total of $12,750. Hagood testified that these were conservative estimates, because in his experience, it would cost more than $10 to buy even a "small, small tree in a can" at WalMart. The court was free to accept or reject this testimony, as with that of any other witness, and to assign whatever weight it considered appropriate.

The estimate provided on behalf of the Parish by the arborist was considerably lower. Guidry had made six site visits in 2007 and had counted the actual number of trees in an area 400 feet long and twenty-five feet wide. His inventory showed 78 pine trees, 62 hardwoods (55 of them under five inches), and 56 small shrubs. He grouped them into market value groups based on their size and estimated pulp value at $43.74, chip and saw value at $378.97, and saw timber at $465.30. Using Mr. Daray's estimate

of $10 each for small trees and shrubs, he added $1,110 for the 111 small trees and shrubs in his count, arriving at a total loss of $1,998.01. Interestingly, this method of valuation assigns a much higher value to the smallest trees and shrubs than to the eleven largest trees, which are valued only as saw timber. Guidry explained his valuation, stating:

> Look, this is woods. This is not the perimeter of someone's house yard. It's surely not maintained. It's raw woods that I can't see that other than just raw woods being out there that – if you look at the --- the benefits and attributes of trees are many and they're unlimited, but when you look at the benefits and attributes of trees in wild land, particularly where you can't see that there're any particular recreational areas that interface with it, it doesn't have much value.

The court discussed Guidry's evaluation, commenting that the award in this case would not be for "after-damage only." The amount of $4,960 for replacement of the trees and shrubs was computed using Guidry's count, as follows:

> Mr. Guidry's inventory showed 10 hardwood trees of 4" or greater diameter, and 40 pine trees of 10" or greater diameter. There was no expert testimony of the replacement cost of the trees. The petitioner testified as to his opinion of the cost of replacement trees. The Court in its opinion has determined to award $150. replacement cost for each of the hardwood trees [$1500.] and $ 50 replacement cost for each pine tree [$2000.]. Mr. Guidry's survey estimated 38 smaller pine, 52 smaller hardwood, and 56 yaupon, for which the Court will award $10. each [$1460.].

Obviously, the court discounted Mr. Daray's valuations and, while accepting Guidry's count, did not accept his valuation method. Although this replacement cost is not as precise as this court might like it to be, it is within the range indicated by the estimates put forward by the parties. Therefore, this court will not disturb this portion of the award.

The Parish also disputes the court's award of $25,000 in general damages, which included "interference with peaceful possession, invasion of privacy, loss of enjoyment, mental anguish and suffering, inconvenience, emotional distress, aggravation, annoyance, and damage to property's natural state." We agree that this award is not supported by the record and is an abuse of the court's discretion. Obviously, the fact that the Darays pursued this litigation shows that they felt wronged by the Parish and were distressed by its actions. However, Mrs. Daray did not testify at all, and other

than general statements by Mr. Daray about their reactions, there is no evidence that she experienced the type of problems described by the trial court in the general damage award. Moreover, the Daray residence is not located anywhere near the damaged portion of their property, so their physical privacy was not invaded, and they have not had to view the unsightly mess on a daily basis. Yet, there was serious damage to the natural state of the property, and despite any attempt to replace the damaged trees and shrubs, it will be decades before the trees reach full growth and the wild habitat is restored. As this court noted in Howes, 457 So.2d at 1223, "[t]he beauty of such a natural boundary will not be completely restored for many years." After reviewing awards in other cases involving trespass and associated property damage, we conclude that the highest general damage award within the court's discretion is $8,000 for the two incidents. The judgment will be amended accordingly.

Finally, the Parish points out that the court erred by not fixing a specific dollar amount of court costs, as required by LSA-R.S. 13:5112, and in assessing the Parish with excessive legal interest on the general damage award, contrary to that statute.[3] The Parish is correct concerning both points. This matter will be remanded to the district court to assess such costs in a dollar amount, in accordance with the statute. See Gordon v. Louisiana State Bd. of Nursing, 00-0164 (La. App. 1st Cir. 6/22/01), 804 So.2d 34, 41, writ denied, 01-2130 (La. 11/16/01), 802 So.2d 607. Costs of this appeal, in the amount of $1,318.79 , are split equally between the parties. In addition,

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[3] Louisiana Revised Statute 13:5112 states, in pertinent part:

> A. In any suit against the state or any department, board, commission, agency, or political subdivision thereof, the trial or appellate court, after taking into account any equitable considerations as it would under Article 1920 or Article 2164 of the Code of Civil Procedure, as applicable, may grant in favor of the successful party and against the state, department, board, commission, agency, or political subdivision against which judgment is rendered, an award of such successful party's court costs under R.S. 13:4533 and other applicable law as the court deems proper but, if awarded, shall express such costs in a dollar amount in a judgment of the trial court or decree of the appellate court.
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> * * *
>
> C. Legal interest on any claim for personal injury or wrongful death shall accrue at six percent per annum from the date service is requested following judicial demand until the judgment thereon is signed by the trial judge in accordance with Code of Civil Procedure Article 1911. Legal interest accruing subsequent to the signing of the judgment shall be at the rate fixed by R.S. 9:3500.

the judgment will be amended to provide that legal interest is to be paid in accord with LSA-R.S. 13:5112.

CONCLUSION

For the foregoing reasons, we amend the judgment to award $34,510 in special damages and $8,000 in general damages to the Darays. The Parish is ordered to pay legal interest in accord with LSA-R.S. 13:5112. We remand this matter to the district court to fix court costs in a dollar amount, as required by LSA-R.S. 13:5112. The Parish is ordered to pay one-half the court costs for this appeal, in the amount of $659.39.

AMENDED IN PART, AFFIRMED AS AMENDED. REMANDED FOR ASSESSMENT OF COURT COSTS.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 2135

ANDREW B. DARAY AND JUDITH A. DARAY

VERSUS

ST. TAMMANY PARISH

****

McCLENDON, J., concurs and assigns reasons.

I agree with the majority opinion and concur only to set forth my disagreement with the reduction of general damages from $25,000 to $8,000. I would have reduced the general damage amount by no more than $12,500. Therefore, I respectfully concur.