NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0749

LORETTA BLAHUT PARDUE AND HOBART O. PARDUE, JR.

VERSUS

LIVINGSTON PARISH SCHOOL BOARD

CONSOLIDATED WITH

2010 CA 0750

LORETTA B. PARDUE

VERSUS

LIVINGSTON PARISH SCHOOL BOARD

On Appeal from the 21st Judicial District Court
Parish of Livingston, Louisiana
Docket Nos. 23,798 and 19,922, Division "A"
Honorable Wayne Ray Chutz, Judge Presiding

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BEFORE: PARRO, GUIDRY, McDONALD, WELCH, AND HIGGINBOTHAM, JJ.

Judgment rendered FEB 14 2011

Farrell J. dissents with reasons
Higginbotham, J. dissents for the reasons assigned by J. Welch.

PARRO, J.

In this matter involving a violation of the teacher tenure laws, the Livingston Parish School Board (School Board) appeals a judgment in favor of Loretta Blahut Pardue, ordering the School Board to pay her $57,344, which included $40,383 in wages, attorney fees in the amount of $13,461, and $3,500 for emotional distress, and to pay her husband, Hobart O. Pardue, Jr., $2,500 for loss of consortium, plus legal interest on both awards from date of judicial demand. The Pardues also appealed, seeking additional salary and retirement benefits, as well as penalties pursuant to LSA-RS. 23:632. For the following reasons, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Loretta Blahut Pardue was employed as a tenured teacher at Springfield High School in Livingston Parish, serving as an English teacher and part-time guidance counselor from the fall of 1966 to the end of the 1969-70 school year. Immediately before the start of the 1970-71 school year, Mrs. Pardue's assignment was changed in response to an August 1970 federal court order in the school desegregation case of Dunn v. Livingston Parish Sch. Bd., bearing docket number 65-CA-3197 in the United States District Court for the Eastern District of Louisiana. An African-American teacher replaced her as guidance counselor, but she continued in the position of English teacher during that school year with no reduction in pay.

The Pardues sought injunctive relief against the School Board for this reassignment,[1] and the decision to change Mrs. Pardue's position was examined by this court in Pardue v. Livingston Parish Sch. Bd., 251 So.2d 833 (La. App. 1st Cir. 1971) (Pardue I). Although the district court had dismissed the Pardues' suit, this court concluded that the reassignment from guidance counselor to teacher involved a lowering of professional standing and was forbidden by law, unless carried out under

[1] The petition for writ of injunction was filed in the 21st Judicial District Court on August 25, 1970, and was assigned docket number 19,922.

the then-applicable provisions of LSA-R.S. 17:442 or 443. Pardue, 251 So.2d at 835. Since those provisions had not been followed, this court enjoined the School Board from transferring Mrs. Pardue "from the position of guidance counselor to any position of lesser professional standing." Id.

In June 1972, the Pardues filed a rule for contempt for the School Board's failure to reinstate her to the position as guidance counselor at Springfield High School. The School Board opposed the motion, contending it had offered Mrs. Pardue a comparable position as guidance counselor and English teacher at another school in the district. After a hearing on the motion, the district court ordered her reinstated to her previous position at Springfield High School. However, this court reversed that decision on appeal in Pardue v. Livingston Parish Sch. Bd., 276 So.2d 901 (La. App. 1st Cir. 1973) (Pardue II), finding that the district court had exceeded its authority, because a rule for contempt was not the appropriate procedure for determining whether this court's earlier decision required Mrs. Pardue's reinstatement to a specific school, or merely to a position with equal or greater professional standing.

This suit was filed in August 1973,[2] alleging that the School Board had been required by this court's decision to hire Mrs. Pardue as a guidance counselor at Springfield High School for the 1972-73 school year and seeking wages "since the beginning of the pay period which commenced on August 20, 1972," plus damages, penalties under LSA-R.S. 23:631 and 632, and attorney fees. The School Board denied that it was required by this court's 1971 decision to reinstate her to the position of guidance counselor at Springfield High School and claimed again that she had been offered and declined a position as English teacher and guidance counselor with the same pay at another high school in the district. In 1976, this lawsuit was stayed by an order from the federal district court in the Dunn suit; the stay continued until that litigation terminated in November 2001.

In May 2003, the Pardues filed a motion for summary judgment on the issue of

[2] Although the petition showed docket number 19,922, the clerk's office struck through that number and filed the petition as a new proceeding under docket number 23,798 of the 21st Judicial District Court.

liability for the violation of the teacher tenure laws that had occurred in August 1970, when the School Board removed Mrs. Pardue from her position as guidance counselor without following the appropriate procedures, and for its continued refusal to reinstate her as a guidance counselor at Springfield High School. The School Board responded with documentation concerning the offer it had made to her for a similar position at Holden High School, contending any tenure violation in 1970 was resolved by that offer and her refusal to accept that position. The district court granted the motion for summary judgment in favor of the Pardues, finding that the School Board's failure to hold a tenure hearing before demoting Mrs. Pardue in 1970 constituted fault on the part of the School Board, rendering it liable for damages sustained by the Pardues as a result of the School Board's actions.

On appeal of that decision, in Pardue v. Livingston Parish Sch. Bd., 04-0486 (La. App. 1st Cir. 12/22/05) (unpublished), writ denied, 06-1002 (La. 6/14/06), 929 So.2d 1271 (Pardue III), this court reversed the judgment, noting that the School Board had submitted evidence in opposition to the motion, demonstrating that it could support its claim that it had offered Mrs. Pardue a comparable position with no loss of professional standing or pay in another high school within the district for the 1972-73 school year. This evidence demonstrated the existence of a genuine issue of material fact that could affect the School Board's liability for the damages claimed by the Pardues. Therefore, this court concluded that the trial court erred as a matter of law in granting summary judgment based on a factual finding that the School Board was liable for a violation of the teacher tenure laws in connection with its actions commencing with the 1972-73 school year.[3] The case was remanded to the trial court for further proceedings.

Eventually, the matter went to a bench trial, and in written reasons for judgment, the district court stated that the School Board had wrongfully demoted Mrs. Pardue when it offered her the position of English teacher, but not guidance counselor,

[3] Since this court in Pardue I had already determined the School Board's liability for its 1970 action in assigning her to a position of lesser professional standing without following the procedures of the Teacher Tenure Law, our decision on the motion for summary judgment did not re-address that liability, but only whether summary judgment on liability was appropriate for the School Board's actions during and following the 1972-73 school year.

for the 1970-71 school year, and was therefore liable for damages caused by the wrongful demotion. The district court further concluded that the School Board had not proven that it had offered Mrs. Pardue a position as guidance counselor/teacher at another school for the 1972-73 school year. Nevertheless, the court found that she had a duty to mitigate her damages, and had not done so. Further, since under LSA-R.S. 17:444, the maximum period for a contract was four years, the court opined that any continued employment beyond that period would be speculative and wages for such period were not recoverable. Therefore, the court awarded her wages in the amount of $40,383 for the 1972-73 school year through the 1975-76 school year. It also awarded attorney fees based on 33-1/3% of the unpaid salary, in the amount of $13,461, plus $3,500 in damages for emotional distress. Mr. Pardue was awarded $2,500 in damages for loss of consortium. Both parties have appealed the judgment.

The School Board assigns the following as errors on the part of the district court: (1) failing to recognize that this court's reversal of the summary judgment on the School Board's liability constitutes the law of the case; (2) consolidating after trial the suits bearing docket numbers 19,922 and 23,798; (3) concluding that Mrs. Pardue did not know that the position of English teacher/guidance counselor was available to her at Holden School for the 1972-73 school year; (4) awarding back pay with no basis in the record for calculating the amounts and in view of the fact that the "demotion" was without any loss of pay; (5) awarding general damages and attorney fees in favor of Mrs. Pardue; (6) failing to offset Mrs. Pardue's post-1972 earnings for work performed in her husband's law office; and (7) awarding damages to Mr. Pardue.

The Pardues assign as error the trial court's failure to order payment of wages to Mrs. Pardue from the time of her last pay check until August 2002 when she filed for retirement, its failure to order the School Board to pay her retirement contributions for that period into the Louisiana Teachers' Retirement System, its failure to award penalties pursuant to LSA-R.S. 23:632, its award of only $3,500 for Mrs. Pardue's emotional distress, and its award of only $2,500 to Mr. Pardue for his mental anguish.

STANDARD OF REVIEW

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. The Louisiana Supreme Court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092. If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Smegal v. Gettys, 10-0648 (La. App. 1st Cir. 10/29/10), 48 So.3d 431, 435.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. Hidalgo v. Wilson Certified Exp., Inc., 94-1322 (La. App. 1st Cir. 5/14/96), 676 So.2d 114, 116. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. In re Mashburn Marital Trust, 04-1678 (La. App. 1st Cir. 12/29/05), 924 So.2d 242, 246, writ denied, 06-1034 (La. 9/22/06), 937 So.2d 384.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. Boudreaux v. Farmer, 604 So.2d 641, 654 (La. App. 1st Cir.), writs denied, 605 So.2d 1373, 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. Jenkins v. State ex rel. Dep't of Transp. and Dev., 06-1804 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 767, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133. Much discretion is left to the judge or jury in the assessment of general damages. LSA-C.C. art. 2324.1. In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. Smith v. Goetzman, 97-0968 (La. App. 1st Cir. 9/25/98), 720 So.2d 39, 48.

EVIDENCE

Because authentication of evidence is a condition precedent to admissibility, an exhibit that is not authenticated does not constitute competent evidence. Price v. Roy O. Martin Lumber Co., 04-0227 (La. App. 1st Cir. 4/27/05), 915 So.2d 816, 822. "Authentication" is a process whereby something is shown to be what it purports to be. Evidence must either be authenticated as provided in LSA-C.E. art. 901, or it must be self-authenticating. Id. See LSA-C.E. art. 902. Louisiana Code of Evidence article 901(B) includes a non-exclusive list of methods that may be utilized to authenticate evidence, including testimony of a witness with knowledge and any method of authentication or identification provided by an act of Congress or by an act of the Louisiana legislature. Nikolaus v. City of Baton Rouge/Parish of East Baton Rouge, 09-2090 (La. App. 1st Cir. 6/11/10), 40 So.3d 1244, 1246-47, writ not considered, 10-1638 (La. 10/8/10), 46 So.3d 1256. Article 901(B)(7) provides that public records or reports can be authenticated by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this

nature are kept."

ANALYSIS

Before addressing the merits of this appeal, we turn to a procedural matter—the consolidation of docket numbers 19,922 and 23,798 after the trial was held in docket number 23,798 on December 17, 2008. The motion to consolidate was filed by the Pardues on February 2, 2009, and after a contradictory hearing, the district court ordered the consolidation of the two actions. Louisiana Code of Civil Procedure article 1561(A) is the authority for consolidation of cases. It states that when two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions **for trial** after a contradictory hearing, and upon a finding that common issues of fact and law predominate. We have found no authority for consolidation of two pending matters **after trial**. In the matter before us, the issues in Pardue I, the injunction suit bearing docket number 19,922, were finally decided by this court's judgment in 1971. Pardue, 251 So.2d 833. A new docket number was assigned to the suit for damages when it was filed in August 1973. If either party believed the new docket number had been assigned in error and that the two suits needed to be consolidated, there was plenty of time to do so before the trial. The pre-trial order set only docket number 23,798 for trial, and only the issues in that matter were tried. Therefore, the district court erred in consolidating the two suits after the trial had been held.[4]

We also address the School Board's contention that our 2005 judgment in Pardue III constitutes the "law of the case," foreclosing re-litigation of the issue of whether a tenure violation occurred in this matter. That is an overly broad reading of the opinion. Since the judgment appealed in that case was from a motion for summary judgment, this court's decision was based on the fact that there was some evidence in opposition to the motion that created a genuine issue of material fact concerning whether the School Board's actions in 1972-73 constituted a tenure violation. Therefore, the

[4] As a practical matter, however, the docket of this court currently shows two docket numbers due to the consolidation of these cases. In order to avoid confusion in the clerk's office, we will continue to show these cases as consolidated matters on this court's records.

judgment merely left that issue open for trial on the merits.

With reference to that issue, the district court found that, considering the evidence introduced at trial, the School Board never offered Mrs. Pardue a position as guidance counselor/teacher, and therefore, the court awarded her back wages for a four-year period. The School Board contends Mrs. Pardue did not discharge her burden of proof on this issue; the Pardues claim the district court should have awarded her wages and retirement benefits from 1972 through 2002, when she formally "retired" from the school system.

After reviewing the record in this case, we conclude that the district court's award of $40,383 for four years' wages was based on inadmissible evidence; consequently, the award was manifestly erroneous. The district court apparently based its calculations of Mrs. Pardue's wages on a compilation proffered by the Pardues that purports to show the annual salary and retirement contributions that would have been paid to Mrs. Pardue from the 1970-71 school year through the 2001-02 school year. This document has a heading entitled "Livingston Parish School Board," with the School Board's address, and a sub-heading entitled, "Loretta Blahut Pardue." It also has fax information across the top of the page, showing that it was faxed from Carey T. Jones, the School Board's attorney, on April 5, 2002. It was offered into evidence in connection with Mrs. Pardue's testimony when her counsel showed her the document and asked her whether it was "a true and accurate copy of what you have reviewed as a calculation of your damages in this case[.]" Counsel for the School Board objected, because there was no foundation for the document. The district court sustained the objection, but allowed the proffer of the document, noting, "I am not saying you cannot get it in, but I mean, if it is part of their records then I think at some point in this proceeding you would be able to lay the foundation for it." Unfortunately, that was never accomplished. No one was called as a witness to identify the document, to testify concerning its preparation, to explain the calculations, or to verify the accuracy of the information reflected in the columns of numbers on the page. There is no way to

determine whether the document is what its proponents claim, as required by LSA-C.E. art. 901(A). Nor does it meet any of the criteria for self-authentication, as set out in Article 902. Having not been authenticated, the document was inadmissible and could not serve as the basis for an award of wages and/or benefits. See First Nat. Bank of Jefferson Parish v. Keyworth, 95-809 (La. App. 5th Cir. 2/14/96), 670 So.2d 1288, 1293. The only other evidence in the record concerning Mrs. Pardue's wages was a copy of her compensation record for the school years 1966-67 through 1972-73, which was admitted without objection. Although this document shows what she was paid in the past, it does not provide a basis for projecting into the future. Because there is no evidence supporting the district court's award of four years' wages, that portion of the judgment must be reversed, along with the attorney fees that were based on that award.

Additionally, we note that the compensation records show that Mrs. Pardue was still being carried on the School Board's records as a teacher for the 1972-73 school year. According to Merlin St. Cyr, the former principal of Springfield High School, there was no difference in wages between a teacher and a teacher/guidance counselor at this time. Therefore, even if the School Board did violate this court's order by failing to offer Mrs. Pardue a position as teacher/guidance counselor in Springfield or elsewhere in the district, that failure would not result in any lost wages as long as she was still a teacher. The School Board's records show her as a teacher for the 1972-73 school year. Mrs. Pardue testified that at the beginning of that school year, she went to Springfield High School each day, but was not assigned any duties or a classroom. Therefore, at some point in 1972, she simply quit going to the school and began working in her husband's law office. She could not recall exactly when she left and did not indicate that she was owed any wages for the time she had been there. Mr. St. Cyr said that school year was "probably the most miserable year" of his life, because he "didn't have anything to do basically but sit around with no responsibilities," having been assigned a nominal position as "supervising principal" when an African-American

principal was assigned as principal of Springfield High School to satisfy a court order. Unlike Mrs. Pardue, however, Mr. St. Cyr did not quit going to work, and he eventually was assigned to visit other schools and provide some supervision for other principals. After considering the factual circumstances described by Mrs. Pardue herself, we conclude that it was not only the School Board's actions or inactions in 1972 that caused Mrs. Pardue's loss of her teaching position, but was also due to her own decision to quit showing up at school and to wait for her lawsuit to be resolved.

The Pardues assign as error the district court's failure to award "penalty wages" pursuant to LSA-R.S. 23:631 and 632. Before its amendment in 1977, LSA-R.S. 23:631 stated:

> It shall be the duty of every person, employing laborers or other employees of any kind whatever when discharging any laborer or other employee, or when any such laborer or employee has resigned, within twenty-four hours after such discharge or resignation, to pay the laborer or employee the amount due under the terms of employment whether the employment is by the day, week or month, upon demand being made upon the employer by the discharged or resigned laborer or employee at the place where the employee or laborer is usually paid.

The penalty for non-compliance was provided in LSA-R.S. 23:632, which, before amendment in 1977, stated:

> Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorneys' fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after twenty-four hours shall have elapsed from time of making the first demand following discharge or resignation.

There is no evidence that Mrs. Pardue was not paid in full for the time she worked for the School Board. She did not testify that she was not paid for the period of time in 1972 that she went to the school, nor was there any evidence concerning the exact length of time she continued going to the school. Therefore, there is insufficient evidence upon which an award of back wages or penalties could be made. Also, because the "penalty wage" statutes provide the only authority for an award of attorney

fees in a case such as this, there is no basis for that award, and it will be reversed.

However, the issue of whether the School Board violated the Teacher Tenure Laws, LSA-R.S. 17:441, *et seq.*, was settled in Pardue I when this court found those provisions were violated by the School Board's assignment of Mrs. Pardue to a position of lower professional standing without following the statutory procedures. Therefore, the district court did not err in awarding her damages for negligent infliction of emotional distress. See Smith v. Ouachita Parish Sch. Bd., 29,873 (La. App. 2nd Cir. 9/24/97), 702 So.2d 727, 738, writ denied, 97-2721 (La. 1/16/98), 706 So.2d 978. She and several other witnesses testified that her self image was marred, she withdrew somewhat from social activities, and she seemed depressed. However, there is no evidence that she sought professional help or took medications for her depression. Based on the record, we do not find that the court's award of $3,500 to Mrs. Pardue for her emotional distress was an abuse of discretion.

The same cannot be said for the award to Mr. Pardue. There was no evidence that he suffered any loss of consortium, nor is there any legal basis for an award of damages for emotional distress to a bystander under this factual situation. Therefore, the award of $2,500 to Mr. Pardue was legal error.

CONCLUSION

For the above reasons, we affirm the award of $3,500 to Mrs. Pardue. All other awards in the judgment of October 27, 2009, are reversed. All costs of this appeal are assessed to the Pardues.

AFFIRMED IN PART; REVERSED IN PART.

LORETTA BLAHUT PARDUE AND HOBART O. PARDUE, JR.

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WELCH, J. DISSENTS.

While I agree that the document relied on by the trial court did not support the amount of the trial court's wage award, I believe the trial court acted within its discretion in entering an award for unpaid wages for the school years 1972-1973 through 1975-1976. Accordingly, I respectfully dissent from that portion of the opinion reversing the trial court's wage award and attorney fees based on that award *in toto*.

It is undisputed that the School Board was enjoined by this court in 1971 from removing Mrs. Pardue from the position of guidance counselor without complying with the procedural requirements of the Teacher Tenure Law. It is also undisputed that despite this court's order, the School Board never complied with the procedural mandates of the Teacher Tenure Law and continued to withhold the guidance counselor position from Mrs. Pardue. The record reflects that Mrs. Pardue taught English only for the 1970-1971 school year and that she received a salary for the 1971-1972 school year. Mrs. Pardue testified that she reported to work for part of the 1972-1973 school year and was ultimately told that she did not have a job at Springfield High School. (R 616). She stated that she continued to

report to work during that year and sat in an office in the gymnasium. (R 621). Mrs. Pardue acknowledged that she finally gave up her teaching position when the principal of Springfield High School told her that he had been instructed not to give her anything to do. (R 622)

Under these circumstances, I believe the School Board violated Mrs. Pardue's rights as a tenured employee and that the actions and inactions of the School Board contributed to Mrs. Pardue's decision to give up her teaching position at Springfield High School. Therefore, I find that the trial court did not abuse its discretion in awarding her unpaid wages for the school years 1972-1973 through 1975-1976. Although I agree that the trial court erred in relying on an inadmissible document to set the award, I would set the award based on the last reported salary on the School Board's compensation records, which were admitted into evidence without objection. Mrs. Pardue's last reported monthly salary was $700.00, which she also received over the summer months. On the basis of this evidence, I would find that Mrs. Pardue is entitled to recover unpaid salary in the amount of $8,400.00 per year for the school years 1973-1974, 1974-1975, and 1975-1976. There is some discrepancy in the evidence regarding whether Ms. Pardue was paid for a portion of the 1972-1973 school year. The School Board's employment records indicate that Mrs. Pardue was paid $5,600.00 for the 1972-1973 school year; therefore, I would award her $2,800.00 in unpaid salary for that school term.

For these reasons, I would vacate the amount of the trial court's wage award and enter an award of $28,000.00, and I would adjust the attorney fees accordingly. In all other respects, I agree with the majority opinion.