NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 2002

NANCY SUE GREGORIE, DAVID KALINKA, & SUSAN KALINKA

VERSUS

SHARON L. CULLOP-WITHERSPOON

Judgment Rendered: May 2, 2012

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 527,589

The Honorable Wilson Fields, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Guidry, J. concurs.

WHIPPLE, J.

This matter is before us on appeal by defendant, Sharon L. Cullop-Witherspoon, from a judgment of the trial court in favor of plaintiff, Nancy Sue Gregorie.[1] For the following reasons, the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant reside in Jefferson Place Subdivision on lots 129 and 121 respectively. Based on the natural slope of the land, the neighborhood drainage runs from north to south. Defendant's lot is situated one lot to the rear and one lot north of plaintiff's lot. The rear five feet of each lot is dedicated to the Parish of East Baton Rouge for a utility and drainage servitude.

The essential facts giving rise to this litigation are that in August of 2004, plaintiff began to notice standing water in her back yard. Plaintiff had lived at that particular residence for sixteen years and contended that she had never before experienced continuous standing water in that part of her yard.[2] Plaintiff subsequently discovered that the defendant had installed an in-ground swimming pool, landscaping, and a drainage system in defendant's back yard. The drainage system consisted of three catch basins that were routed to one outflow pipe, which ultimately directed water onto plaintiff's property.

On December 20, 2004, plaintiff filed a petition for damages and injunctive relief. Therein, she contended that she was experiencing significant flooding in her backyard as a direct result of defendant's newly installed drainage system. Plaintiff further contended that defendant's drainage system altered the natural

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[1]The judgment also ordered that the claims of plaintiffs David and Susan Kalinka be dismissed with prejudice. However, the propriety of the dismissal of the Kalinkas' claims is not before us in this appeal, which was filed on behalf of Gregorie.

[2]Plaintiff testified that with the exception of the years 1985-1988, she had lived in three adjacent houses in the neighborhood for her entire life. In particular, her parents built the Kalinkas' home in the 1950's, where she lived until she was three years old. At that time, in 1963, her parents built the home now owned by the defendant. And in 1988, plaintiff bought the home in which she currently resides.

drainage of her property causing plaintiffs' property to be the servient estate solely due to defendants' actions. Plaintiff averred that she sustained damages consisting of mental pain and suffering, past, present and future loss of liberty of enjoying her own property, and other actual damages to her property.

A hearing on the preliminary injunction was held on May 24, 2005. At the conclusion of the hearing the trial court issued written reasons, finding that after visiting the property, the court was "not in a position to say" that the defendant's actions were the sole cause of the standing water on plaintiff's property. Thus, the trial court denied the request for preliminary injunction. However, the court further noted that a "trial on this matter will be necessary to determine the exact cause of the standing water."

Trial on the merits was held on December 16, 2010.[3] The trial judge also visited the property for a visual inspection before ruling in the matter. On December 21, 2010, the trial court issued oral reasons, finding in favor of plaintiff and awarding damages. A written judgment was signed by the trial court on January 18, 2011, ordering as follows: (1) that defendant pay plaintiff $2,836.00 representing one-half of the costs plaintiff spent on dirt work, drainage, and the replacement of eight ligustrum plants; (2) that defendant remove her old wooden fence along the rear of her property and clear the ground of all shrubbery five feet from the rear property line, to keep the servitude clear, by January 31, 2001; (3) that plaintiff also keep her five-foot servitude area clear; and (4) that each party bear their costs.[4]

Defendant filed the instant suspensive appeal, assigning the following as error:

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[3]The trial judge who heard the preliminary injunction was no longer on the bench at the time the matter proceeded to a trial on the merits. Thus, the trial on the merits was heard by a different judge.

[4]Defendant filed a motion for new trial, which was subsequently dismissed by order of the trial court at defendant's costs.

1. The trial court erred in determining that defendant's pool and backyard landscaping caused damage to plaintiff's property.

2. All of the parties needed for a just adjudication were not joined in this case.

3. The awarding of monetary damages to plaintiff was improper and forbidden by Louisiana Civil Code Article 667 because there was no showing that defendant knew or should have known that her work would cause damage to plaintiff.

DISCUSSION

Assignment of Error Number One

In defendant's first assignment of error, she argues that the trial court erred in determining that her newly installed pool, landscaping, and drainage system caused damage to plaintiff's property. In its reasons for judgment, the trial court specifically found that plaintiff's water/flooding problems were caused "as a result of a pool and drainage that the defendant put in."

It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and: (1) find that a reasonable factual basis does not exist for the finding; and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. Stobart v. State, through the Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). If the trial court's 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. Boyd v. Boyd, 2010-1369 (La. App. 1st Cir. 2/11/11), 57 So. 3d 1169, 1174.

On appeal, the defendant relies on the testimony of Neal Bezet, an employee of the Department of Public Works, who works in the area of code enforcements and who testified that he had an opportunity to observe and inspect the property and servitude at issue from defendant's property. Bezet testified that based upon his observation, if the drainage servitude were cleared of flower beds, fences, and turf that has grown up through the years, the water would flow better and the standing water problem would be corrected. He further testified that he had seen nothing that defendant had done wrong to her property to damage to plaintiff's property. Citing this testimony, defendant contends that the trial court erred in its findings as plaintiff failed to present any expert testimony to rebut Bezet's testimony.

At the outset, we note that Bezet was neither offered nor qualified as an expert at trial. Nonetheless, even if he had been qualified as an expert at trial, the trial court was free to accept or reject his testimony.[5]

Further, the trial court was also presented with the testimony of plaintiff, who had lived in that particular block virtually her entire life, and who testified that she had lived at that particular home for sixteen years, and that prior to 2004, when the defendant installed a new pool and drainage system, she had never had a problem with standing water in her back yard. Plaintiff testified that since then, she has been forced to endure standing water in her back yard even when it is not raining.

Plaintiff explained that defendant's three catch basins were routed into one large pipe that drained defendant's entire yard into the Kalinkas' and the plaintiff's back yards. In plaintiff's yard, the water extended from both corners of

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[5]A trial court is not required to give any extra credence to the testimony of experts. It is well settled in Louisiana that the fact finder is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. The fact finder may accept or reject in whole or in part the opinion expressed by an expert. The effect and weight to be given expert testimony is within the trial court's broad discretion. Givens v. Givens, 2010-0680 (La. App. 1st Cir. 12/22/10), 53 So. 3d 720, 729.

her yard across the width of the property, which is 100 feet wide, and twelve feet into plaintiff's yard, far beyond the five-foot drainage and utility servitude. Plaintiff testified that she is basically "evicted" from use of a considerable part of her yard. In addition, plaintiff testified that because of the standing water from defendant's property, she is unable to have that portion of the yard mowed, has experienced problems with mosquitoes, lost eight ligustrum shrubs, has been forced to add drains to her property, and has been forced to have two loads of dirt brought into her yard and graded.

Prior to ruling, the trial court was able to inspect the property first hand to determine the facts herein. Further, the trial court obviously made its determinations after weighing the witnesses' testimony, credibility, and demeanor herein. On review, considering the overwhelming evidence of record herein, including the testimony, photographs, videos, documentary evidence and the neighborhood plat, we find no error in the trial court's determination that the conditions complained of by plaintiff and the damages she sustained were caused by the installation of defendant's pool and drainage system.

Accordingly, we find no merit to this assignment of error.

Assignment of Error Number Two

Defendant next contends that the judgment is improper because all of the parties needed for a just adjudication were not joined in this case pursuant to LSA-C.C.P. art. 641.

Louisiana Code of Civil Procedure article 641 entitled, "Joinder of parties needed for just adjudication," provides as follows:

> A person shall be joined as a party in the action when either:
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> (1) In his absence complete relief cannot be accorded among those already parties.
> (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:

(a) As a practical matter, impair or impede his ability to protect that interest.
(b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

Specifically, defendant complaints that "many of plaintiff's neighbors, uphill, downhill, and behind plaintiff, put fences and vegetation in the drainage servitude," and that the trial court split the liability for monetary damages between defendant and Charles Abboud, a neighbor behind plaintiff who is not a party in this matter.[6] We find no merit to this argument.

Although the trial court noted in its oral reasons for judgment that "[w]hen the court visited the property, the court noticed that the plaintiff's neighbor, Mr. Abboud, had a fence that **appeared** to be built in the center of the drainage servitude that **may** contribute to the water that is flowing on the plaintiff's property," (emphasis added) the written judgment does not name Charles Abboud, any other neighbor, or even the Parish of East Baton Rouge as being responsible for the other half of plaintiff's damages. Instead, the judgment merely casts defendant in judgment for her half of the damages sustained by plaintiff. Moreover, in finding that plaintiff's damages directly resulted from the pool and drainage system installed by the defendant, although the trial court ordered defendant and plaintiff to keep their five-foot servitude areas clear so "water can easily flow through the defendant's property onto the plaintiff's property in the drainage servitude, and out of the plaintiff's property," the trial court made no

[6]On September 28, 2010, defendant filed a peremptory exception of no right of action, and alternatively, a peremptory exception of non-joinder of a party under LSA-C.C.P. art. 641, wherein she sought to join the Parish of East Baton Rouge as a party in this matter. Specifically, defendant contended that because defendant's drainage plan was approved by the parish when she installed it and the five-foot drainage and utility servitude is dedicated to the parish, complete relief cannot be accorded among the parties without joinder of the parish. Defendant's exceptions of no right of action and non-joinder of a party were denied by the trial court by judgment dated December 7, 2010.

Defendant's argument concerning the nonjoinder of Abboud was set forth in her motion for new trial and was rejected by the trial court.

finding that the damages sustained by plaintiff directly resulted from fences and vegetation in the drainage area of other lot owners.

We further note that the defendant did not file any third party demand against Abboud, the Parish of East Baton Rouge, or any other potential party despite her allegation on appeal that others contributed to the water problem on plaintiff's property. Nonetheless, we find the trial court properly made its determination and ruled only as to the specific claims and defenses asserted by plaintiff and defendant, i.e., the parties to the action before it, and rendered judgment accordingly. In doing so, the trial court did not adjudicate the rights of any other potential parties. Thus, on the record before us, no joinder was necessary and there is no error in the judgment on this basis. Thus, we reject defendant's claim that the trial court's assessment of one half of the damage award herein to her somehow establishes error for failure to join potential parties.

This assignment of error also lacks merit.

Assignment of Error Number Three

Defendant further contends that the award of monetary damages to plaintiff was error under LSA-C.C. art. 667, where there was no showing that defendant knew or should have known that the installation of her three catch basins and drainage system would cause damage to plaintiff.[7]

It is a general principle of law, that owners may use their property as they please, with the exception that they do no injury to others. Yokum v. 615 Bourbon Street, L.L.C., 2007-1785 (La. 2/26/08), 977 So. 2d 859, 872. Louisiana

[7]In her brief on appeal, plaintiff notes that after the hearing on the preliminary injunction was held in May of 2005, the defendant installed a gutter system, which drained to a fourth catch basin that was connected to the other three catch basins, thereby adding to the volume of water directed at plaintiff's home. Plaintiff argues that certainly at this point, defendant was clearly on notice that a problem existed, yet chose to take action that further exacerbated the situation.

Civil Code article 667 entitled, "Limitations on use of property," provides as follows:[8]

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

Plaintiff testified that when she realized that the standing water in her yard and the resulting problems were caused by the defendant's conduct in grading her lot and installing a pool and drainage system, she went to see the defendant and discuss it. Moreover, the defendant admitted at trial that she was aware that all three catch basins in her back yard drained through the end of the pipe onto plaintiff's property, that she only did what the contractor suggested she do, and that she had permits for all actions taken by the contractor.

With reference to defendant's assertion as a defense that she "relied on her pool contractor to properly drain her yard," we note that a landowner is responsible not only for his own activity, but also for that carried on by his agents, contractors, and representatives with his consent and permission. Yokum v. 615 Bourbon Street, L.L.C., 977 So. 2d at 875. Thus, to the extent defendant suggests that she is shielded from liability for the plaintiff's damages resulting from her

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[8]The 1996 amendments to article 667 incorporating the knowledge requirement shifted the absolute liability standard to a negligence standard similar to that set forth in LSA-C.C. art. 2317.1 and the 1996 amendments to articles 2321 and 2322. See Yokum v. 615 Bourbon Street, L.L.C., 977 So. 2d at 874.

drainage system because she hired contractors to install the drainage system, this argument likewise is meritless.

On the record before us, we find ample support for the trial court's conclusion that defendant knew or should have known that her actions or those of her contractors would cause damage to plaintiff. As such, we likewise find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the January 18, 2011 judgment of the trial court is affirmed. Costs of this appeal are assessed against defendant-appellant, Sharon L. Cullop-Witherspoon.

AFFIRMED.