No. _____

In The
Supreme Court of the United States

CHAD M. JARREAU AND BAYOU CONSTRUCTION & TRUCKING, L.L.C.,

Petitioners,

v.

SOUTH LAFOURCHE LEVEE DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government must pay compensation under the Just Compensation Clause of the Fifth Amendment when the condemnation of real property inevitably destroys the value of a business as a going concern (as the high courts of Minnesota, Nevada, New Mexico, and Pennsylvania have held) or whether property owners are entitled to such compensation only if the government directly takes the business itself (as the court below held, joining the Federal Circuit and the highest courts of the District of Columbia, Montana, and Wisconsin).

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Chad M. Jarreau is a natural person. Petitioner Bayou Construction & Trucking, L.L.C., is a Louisiana limited-liability company of which Petitioner Jarreau is the sole member.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court, App. 1, is reported at 217 So.3d 298. The opinion of the Louisiana Court of Appeal, App. 38, is reported at 192 So. 3d 214. The trial court's judgment, App. 80, is unreported and was based on a written Supplemental Reasons for Judgment, App. 83, and an oral explanation given in open court, App. 88, both of which are also unreported.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on March 31, 2017. On May 19, 2017, petitioners submitted to Justice Thomas an application for an extension of time to file a petition for certiorari up to and including July 31, 2017. Justice Thomas granted the application on May 25, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims in this case arise under the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner Chad Jarreau is (or was) a dirt farmer: Through months of hard work, he converted the dirt on property he owned in Louisiana into fine-grained sandy dirt suitable for construction projects. But when the South Lafourche Levee District condemned his property to use the dirt in levee construction, Jarreau lost not just his land, but also the prepared sandy dirt, some of which he had already contracted to sell. After trial, a judge concluded that losing the dirt-farming business cost Jarreau more than $100,000 above and beyond the loss of the underlying land. The question presented by this case, in essence, is whether the U.S. Constitution entitles Jarreau to be made whole.

The Fifth Amendment, of course, provides that "private property [shall not] be taken for public use, without just compensation." And in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), this Court held that under the Fifth Amendment "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value

of his business is a compensable 'taking' of property." *Id.* at 13.

But the Louisiana Supreme Court nonetheless held that Jarreau's business losses are categorically noncompensable because, while the Levee District took his dirt, it "did not take Jarreau's business." App. 31. In reaching this result, the court adopted an untenably narrow reading of this Court's *Kimball Laundry* decision, deepening an existing split on the scope of that case and holding that it applies only to circumstances in which the government takes a property owner's business for the purpose of running that business itself, rather than cases in which the government's taking "inevitably destroys" a business.

The decision below warrants this Court's review. There is a longstanding and deepening split of authority regarding when the Fifth Amendment requires compensation for business losses. This Court has not squarely addressed the issue since 1949, and the consequences of the lower courts' confusion are severe. By failing to account for eminent domain's permanent destruction of economically productive businesses, courts in many parts of the country have fostered a regime of systematic under-compensation. This puts a thumb on the scale in favor of eminent domain, leading to economically inefficient outcomes. Worse, it forces individuals to bear burdens that "in fairness ought to be borne by society as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

This case illustrates the problem perfectly. The Levee District wanted to acquire a fungible commodity: Jarreau's dirt. But because it acquired the underlying land instead of taking the dirt directly, the decision below allows it to pay Jarreau less than $12,000—even though the Levee District itself argued *in the same proceeding* that Jarreau had caused it more than $16,000 in damages by removing some of that same dirt from the property after it was acquired. There is no question that the dirt on Jarreau's property was quite valuable; the only question is whether the Levee District can take that value away from Jarreau without paying him for it. As the dissenting Justice Hughes succinctly put it:

> This court affirms an award of $11,869 despite evidence in the record that the dirt taken from the land has a value in excess of $100,000. Even if the most restrictive measure of compensation is applied, this value should be considered in determining the award to defendant. When the government can take private property without paying the landowner, something is wrong.

App. 36-37.

A. Background

The facts of this case are simple: Petitioner Chad Jarreau owns real property in Southern Louisiana that he used as a dirt farm—originally in his personal capacity and eventually through his business Bayou Construction & Trucking, L.L.C. App. 5; *see also* App.

92-93. Dirt farming as practiced by Jarreau is labor-intensive, requiring the farmer to excavate, drain, and then churn pits of dirt in order to create and then remove fine-grained, sandy dirt for use in the construction industry. Jarreau operated that business successfully for nearly a decade. App. 92-93. But on January 10, 2011, the South Lafourche Levee District adopted a resolution "appropriating" a permanent servitude over a strip of land that included Jarreau's dirt farm.[1] App. 4.

Jarreau soon received a letter in the mail notifying him of the appropriation, instructing him to "cease and desist performing any and all activities upon the property as appropriated," and informing him that the Levee District would soon begin excavating dirt from the property. App. 4. The Levee District soon thereafter tendered Jarreau a check for $1,326.69 as compensation for the appropriation. App. 5.

After receiving the letter, though, Jarreau continued business as usual for a time—he had contracts to fulfill, and he needed his dirt in order to make good on them. *Id.* In response, on May 19, 2011, the Levee District filed suit against Jarreau, seeking an injunction to prevent him from excavating any more dirt and

[1] The permanent servitude granted the levee district certain rights, including the right to cut away, dredge, or remove any soil and earth it needed from the land, but as the parties consistently litigated this case (and as the trial court below specifically found) these rights were so extensive that the servitude was the equivalent of a complete taking. App. 96.

demanding damages for his "wrongful excavation." App. 5.

Jarreau eventually stipulated to the injunction (leaving at least one contract unfulfilled), but he rejected the Levee District's measure of compensation, filing counterclaims alleging (among other things) that "[p]ursuant to the * * * Fifth Amendment of the United States Constitution, defendant Jarreau is entitled to be compensated to the full extent of his loss as a result of the actions of the Plaintiffs referenced herein."

This litigation followed.

B. State Court Proceedings

1. Louisiana Trial Court

The state trial court conducted a two-day bench trial at which both parties offered testimony about the value of the appropriated tract of land. Jarreau's appraiser testified that the value of the surface estate of the appropriated land, based on the per-acre value of other land in the area, was $11,869. App. 94-96. Jarreau also offered another expert witness who testified about the value of the subsurface dirt. App. 97-98. Jarreau himself testified about the quality of the dirt on the appropriated land and that, as a result of the appropriation, his business had lost a contract to supply 23,000 cubic yards of dirt to a third party. App. 93-94; App. 97.

The Levee District offered two appraisers of its own and also offered testimony regarding the damages

it had allegedly sustained when Jarreau continued to excavate dirt from the appropriated land. App. 94; App. 100-01.

Ruling from the bench, the trial court undertook a detailed examination of the evidence in the case. It rejected the testimony of the Levee District's appraisers with respect to the per-acre value of the land, accepting the valuation of Jarreau's appraiser and awarding $11,869. App. 96.

The court also awarded Jarreau $164,705.40 as compensation for the business losses caused by the taking. App. 100. The court arrived at this number after reviewing testimony concerning (1) the particular quality of the dirt taken and the existence of a contract to sell some of that dirt, (2) the total quantity of dirt available for excavation on the property, (3) the cost of excavating and selling it, and (4) the price at which it could be sold. App. 97-100. The court also noted that it was avoiding "duplication of damages" and that the value of the land was distinct from the value of the dirt that could be mined on that land. App. 96-97.

In addition, the court awarded the Levee District $16,956 as compensation for the value of dirt that Jarreau excavated from the land, without permission, after the District had appropriated it. The court explained that it arrived at this number by assigning the dirt the same value that it had used in its business-losses calculation. App. 102.

Separately, the court also awarded Jarreau attorneys' and expert witness fees along with some costs. App. 83-86.

2. Louisiana Court of Appeal

The parties cross-appealed. The court of appeal affirmed the $11,869 award, agreeing with the methodology of Jarreau's appraisal expert, but the court reversed the $164,705.40 award because, the court explained, the law "does not allow compensation for lost profit damages associated with the value of the dirt in the Jarreau tract." App. 63. The court of appeal also vacated the $16,956 award to the Levee District because the Levee District had not actually been harmed: It had taken the land for the purpose of excavating dirt for levee construction, and the record showed that there was still plenty of dirt to complete its project. App. 69-70 ("Since Mr. Angelette estimated that Mr. Jarreau had only removed 2,862 cubic yards of dirt after the appropriation, it follows that there was a surplus of dirt still available in the Jarreau tract for the Levee District to exercise its right to use the dirt that it estimated was necessary for constructing the levee."). Finally, the court also increased the award of attorneys' fees. App. 71-75.

3. Louisiana Supreme Court

The parties cross-petitioned the Louisiana Supreme Court for review, and the court granted the petitions. App. 9. The Levee District's chief argument was

that Jarreau was not entitled to *any* compensation because, supposedly, recent changes in Louisiana law eliminated all compensation for property "appropriated for hurricane protection purposes." App. 11. Jarreau disagreed, maintaining that he was entitled to full compensation as a matter of both state and federal law. App. 18.

The court rejected the Levee District's argument. It held instead that the relevant statutory language—which says that compensation for land taken for hurricane protection purposes "shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States," Louisiana Revised Statutes section 38:281(4)—was intended to treat all property owners equally, regardless of the purpose of a condemnation, by assuring that their compensation would be governed by the Fifth Amendment's just-compensation standard. App. 26. Because the Louisiana Supreme Court held that Jarreau was entitled under state law to compensation that met the standards of the Fifth Amendment, it did not distinguish between Jarreau's state-law arguments and his Fifth Amendment arguments. *Id.*

As a result, the court affirmed Jarreau's award of $11,869.00, accepting his expert's testimony about the value of the land. But it also held that Jarreau was not entitled to any compensation for business losses under the Just Compensation Clause, rejecting Jarreau's argument that compensation was owed under this Court's decision in *Kimball Laundry*. App. 29-31.

In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), the federal government took possession of a commercial laundry facility and used it to wash military uniforms during World War II. The taking was temporary, and the government offered compensation for the purported rental value of the facility during the time the owner was displaced. The property owner argued, however, that it was also entitled to compensation for the "diminution in the value of its business due to the destruction of its 'trade routes' * * * [*i.e.*,] the lists of customers built up by solicitation over the years and * * * the continued hold of the Laundry upon their patronage." *Id.* at 9. In other words, the laundry had been a valuable going concern before the taking, but afterwards it had to start over building its business from scratch.

This Court agreed with the property owner, acknowledging that although compensation is not required for the going-concern value of a business when the business can be successfully relocated, the rule is different when "an exercise of the power of eminent domain * * * has the inevitable effect of depriving the owner of the going-concern value of his business." *Id.* at 13. In such cases, the destruction of "going-concern value * * * is a compensable 'taking' of property * * * whether or not [the government] chooses to avail itself of" the value of the business. *Ibid.*

Notwithstanding that the Levee District had destroyed Jarreau's business, and that the factual findings regarding Jarreau's losses were uncontested, the Louisiana Supreme Court held that *Kimball Laundry*

was inapplicable because "the Levee District did not take Jarreau's business." App. 31.

Justice Hughes dissented:

> Defendant is in the dirt business and owns land from which he digs and sells dirt. The government is entitled to "appropriate" defendant's land, but must pay him fair compensation mandated by the Constitution. This court affirms an award of $11,869 despite evidence in the record that the dirt taken from the land has a value in excess of $100,000. Even if the most restrictive measure of compensation is applied, this value should be considered in determining the award to defendant. When the government can take private property without paying the landowner, something is wrong.

App. 36-37.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decision in *Kimball Laundry*.

While (as discussed more fully below) the intervening years have led to disagreement in the lower courts about when businesses are entitled to compensation under the Fifth Amendment, the logic of this Court's actual opinion in *Kimball Laundry* is clear—and clearly at odds with the holding below. The key holding of *Kimball Laundry* was that "an exercise of

the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property." 338 U.S. at 13. Under this rule, pecuniary business losses are fully compensable. The only caveat is that the losses must be demonstrable rather than speculative or purely subjective. *See id.* at 14-15 ("[T]he amount of compensation payable should not include speculative losses * * * [but] it would be unfair to deny compensation for a demonstrable loss of going concern value upon the assumption that an even more remote possibility * * * might have been realized."). This caveat, however, is not a special rule for business losses. It is just the rule for all damages in all cases.

Nevertheless, the Louisiana Supreme Court erroneously concluded that *Kimball Laundry* was inapplicable because "the Levee District did not take Jarreau's business." App. 31. That is the exact same argument that the lower court made in *Kimball Laundry* itself. The Eighth Circuit had denied the laundry's claim for compensation because "[t]he Government did not take or intend to take * * * the Company's business[.] * * * No doubt the Government[ ] * * * disrupted and damaged the Company's business, although it could hardly have * * * disabled the Company from ever re-establishing its business." *Kimball Laundry Co.* v. *United States*, 166 F.2d 856, 860 (8th Cir. 1948).

This Court rejected that argument. The entire point of *Kimball Laundry* was that *even though* the government did not literally take the laundry business, and *even though* the business was not completely

destroyed going forward, the government had nevertheless harmed the business by taking property that was integral to its operation. *See Kimball Laundry*, 338 U.S. at 13 ("'the question is what has the owner lost, not what has the taker gained'" (quoting *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910))). It was the provable damage to the business that entitled the property owner to compensation.

It is worth noting that this Court's subsequent treatment of *Kimball Laundry*—all of which, admittedly, is *dicta*—agrees with this reading of the opinion. *See, e.g.*, *Brown* v. *Wash. Legal Found.*, 538 U.S. 216, 237 (2003) ("In *Kimball Laundry* * * * it was common ground [within the Court] that the government should pay 'not for what it gets but for what the owner loses.'"). This Court has consistently focused—as the trial court did—on ensuring that condemnation awards replace the full measure of what was actually lost by a condemnee, disallowing awards only where they would constitute a "windfall" for the condemnee. *Cf. United States* v. *50 Acres of Land*, 469 U.S. 24, 35 (1984) (noting that the mere fact that a replacement facility would cost more than the existing facility did not justify a higher compensation award because the more expensive facility "presumably is more valuable" than the condemned one); *see also id.* at 37 (O'Connor, J., concurring) (noting that condemnee in that case had failed to show factually that an award of the fair-market value of its property "deviate[d] significantly from the make-whole remedy intended by the Just Compensation Clause"). The Louisiana Supreme Court's holding below, which treats "business damages" as

categorically excluded from the Just Compensation Clause, cannot be squared with these cases and should therefore be reversed.

II. There is a deep split of authority regarding when compensation is required for takings that cause business losses.

Kimball Laundry was this Court's last word on the compensability of business losses under the Fifth Amendment. Over the course of the ensuing sixty years, many courts have abandoned the logic of this Court's decision and cabined *Kimball Laundry* to its facts, creating a deep split over the proper scope of compensation for condemnations of businesses. Some courts, like the court below, limit *Kimball Laundry* to its facts, applying it only to temporary takings or only to situations in which government takes a business for the purpose of running that business. But many other courts apply *Kimball Laundry* to its full extent, requiring compensation whenever a taking "inevitably destroys" a business's value.

A. Some courts have rejected the rationale of *Kimball Laundry*, limiting the case to its facts.

The Federal Circuit. Most takings claims against the federal government are confined to the United States Court of Federal Claims by operation of the Tucker Act, 28 U.S.C. § 1491. And the Federal Circuit, which hears the appeals from the Court of

Federal Claims, has limited *Kimball Laundry* to its facts, holding that a business can recover going-concern damages in temporary takings but can never do so in the context of a permanent taking. *E.g.*, *Huntleigh USA Corp.* v. *United States*, 525 F.3d 1370, 1382 n.3 (Fed. Cir. 2008) ("[G]oing concern value is a property interest that has been held to be compensable in the context of a temporary, but not a permanent, taking."); *accord Cooper* v. *United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) ("[D]amages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking occurred." (citing *Kimball Laundry*)).

The District of Columbia Court of Appeals. In *Mamo* v. *District of Columbia*, the District of Columbia Court of Appeals addressed the compensation due to the owner of a gas station franchise whose property was condemned by the District of Columbia to construct a municipal office building. 934 A.2d 376, 379 (D.C. 2007). The property owner argued that he should be compensated for the value of his franchise because it was non-transferrable. The court, however, held that the loss of the valuable franchise was merely an uncompensable business loss. The court distinguished *Kimball Laundry* as applying only to temporary takings. *Id.* at 383 ("Mr. Mamo also relies on *Kimball*

Laundry, but that case, unlike the one before us, involved a temporary taking of the property and business.") (internal citation omitted).[2]

The Supreme Court of Wisconsin. In *City of Janesville* v. *CC Midwest, Inc.*, 734 N.W.2d 428 (Wis. 2007), the Supreme Court of Wisconsin interpreted a statute that required that a condemnor provide relocation assistance to a business displaced by eminent domain. Before interpreting the statute, the Court satisfied itself that that relocation assistance has no constitutional "just compensation" component. In reaching this conclusion, the court found it necessary to distinguish *Kimball Laundry*:

> [T]o fall within the rule set out in *Kimball Laundry*, the condemnor must take over the business opportunity, at least on a temporary basis, as well as taking the real property, such that the business owner could not move his business to a new location and may be required to renew his business at a location temporarily taken if the government quits the condemned site before the expiration of the condemnee's lease term.

Id. at 437.

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[2] As illustrated by *Mamo*, the problem of under-compensation for condemned franchises is particularly severe. Franchisees invest substantial amounts of money up-front to pay for the franchise fee, they cannot have their franchises terminated except for cause, and they can even sell their franchises. Limiting compensation to the value of the land thus leads to severe under-compensation.

The Supreme Court of Montana. In the year 2000, Montana effectively outlawed certain types of hunting farms. The owners of several such farms brought an inverse-condemnation suit for the destruction of their businesses, and the Montana Supreme Court ultimately rejected their claims. *Kafka* v. *Montana Dep't of Fish, Wildlife & Parks*, 201 P.3d 8 (Mont. 2008). In its decision, the court distinguished *Kimball Laundry* as applying "only in those rare circumstances where the government actually intends to take over the claimant's business and thereby appropriate the goodwill and going-concern value for its own use." *Id.* at 23. Notably, the court explicitly followed the Federal Circuit's erroneous analysis in *Huntleigh*, supra. The dissenting justices, however, interpreted *Kimball Laundry* as applying whenever a "business was destroyed or made otherwise unusable as a result of the governmental action." *Kafka*, 201 P.3d at 61 (Nelson, J., dissenting).[3]

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[3] A number of trial courts and state intermediate appellate courts have likewise limited *Kimball Laundry*. *See, e.g.*, *City of Blue Mound* v. *Sw. Water Co.*, 449 S.W.3d 678, 685 n.6 (Tex. App. 2014) ("As set forth in the quote above from the *Kimball Laundry Co.* case, the distinctive feature of a taking that entitles the property owner to an award of going-concern value is that the condemnor takes over the business of the property owner to run it for itself on the real property it condemns."); *AVM-HOU, Ltd*. v. *Capital Metro. Transp. Auth*., 262 S.W.3d 574, 584 (Tex. App. 2008) (expressly disagreeing with the Minnesota Supreme Court and holding that *Kimball Laundry* applies only to temporary takings); *State ex rel. Com'r of Transp.* v. *Arifee*, 2009 WL 2612367 (N.J. App. 2009) (limiting *Kimball Laundry* to temporary takings); *Heir* v. *Delaware River Port Auth.*, 218 F. Supp. 2d 627 (D.N.J. 2002) ("According to Plaintiffs * * * the destruction of their franchise was

B. Other jurisdictions follow *Kimball Laundry* to its full extent, and in any of these jurisdictions, Mr. Jarreau would have prevailed in his claim for business losses.

The Supreme Court of Pennsylvania. In *Redevelopment Authority of City of Philadelphia* v. *Lieberman*, the city of Philadelphia condemned a tavern. The owner "found it impossible to find a suitable new building for his bar business," and he "unsuccessfully tried to sell the liquor license through several license brokers." 336 A.2d 249, 251 (Pa. 1975). He ultimately surrendered the license to the city, and it was canceled. Citing *Kimball Laundry* for the proposition that "going concern value" is compensable, the Pennsylvania Supreme Court held that the tavern owner was also entitled to be compensated for the value of the liquor license—a property interest under Pennsylvania law that had been rendered valueless by the taking. *Id.* In so holding, the court explained that the property owner had sufficiently proven that he had suffered a loss as a direct result of the taking of his property, and that "[t]o hold otherwise would be to ignore reality." *Id.* at 259.

The Supreme Court of Minnesota. In *City of Minneapolis* v. *Schutt*, the Minnesota Supreme Court considered a claim for business losses by the lessor of

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the 'inevitable effect' of the DRPA's actions. * * * [T]hose exceptional cases * * * such as *Kimball* * * * are inapposite, as the DRPA did not take Plaintiffs' franchise as a going concern[.]"); *United States* v. *70.39 Acres of Land*, 164 F. Supp. 451, 479 (S.D. Cal. 1958) (limiting *Kimball Laundry* to temporary takings).

a private parking garage. 256 N.W.2d 260, 265 (Minn. 1977). The city of Minneapolis seized 20% of the property to build a public parking ramp. Although the court held that the property owner had failed to prove a loss of going-concern value, in doing so, the court cited *Kimball Laundry* and articulated a test for when business losses are compensable: "[T]he holder of the interest to be lost by condemnation [must] show (1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest." *Id.*; *see also State by Mattson* v. *Saugen*, 169 N.W.2d 37, 44 (Minn. 1969) (the "intangible character of going-concern value does not preclude compensation for its taking") (citing *Kimball Laundry*, 338 U.S. at 5).[4]

The Supreme Court of New Mexico. In *Primetime Hospitality, Inc.* v. *City of Albuquerque*, a property owner was constructing a hotel when a waterline ruptured, substantially delaying the completion of the project. 206 P.3d 112 (N.M. 2009). The city of Albuquerque stipulated that the rupture caused a temporary taking. At issue was whether the property owner could

[4] The *Schutt* court also relied on the Michigan Court of Appeals decision in *Michigan State Highway Comm'n* v. *L & L Concession Co.*, 187 N.W.2d 465, 471 (Mich. App. 1971), where the court explained that: "The efforts to limit *Kimball* to temporary takings elides the central meaning of that case. The Federal government was not required to pay for the route lists because the plant was only temporarily taken or because they represented customer goodwill but because their value was destroyed by the taking."

obtain damages for the lost profits caused by the delay in opening the hotel. In a lengthy discussion, relying heavily on *Kimball Laundry*, the New Mexico Supreme Court explained that the touchstone was "loss to the condemnee." *Id.* at 119. The court went on to hold that lost profits are uncompensable when they are speculative, but where they are proven with reasonable certainty, the property owner is entitled to recover. *Id.* at 120-21. Because the city had stipulated to the lost profits, the court held that they had been properly awarded.[5]

If Mr. Jarreau's appeal had been heard by the supreme courts of Pennsylvania, Minnesota, or New Mexico, then the trial court's award of business losses would have been affirmed. The trial court made detailed factual findings concerning the value of the dirt that remained to be excavated on the appropriated property. App. 97-100. That value accounted for the cost of extracting the dirt from the ground. App. 97 ("Mr. Theriot * * * also used information on the cost of

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[5] The brief discussion of the cases above actually understates the degree of confusion regarding the proper measure of just compensation in business condemnations. There are still more courts that have taken various stances on the *Kimball Laundry* question, without actually citing the case itself. *Compare, e.g.*, *Nat'l Advert. Co.* v. *State, Dep't of Transp.*, 993 P.2d 62, 67 (Nev. 2000) ("The evidence in this case, however, clearly establishes that these billboards were in valuable, unique locations, and that the billboards could not be relocated to a comparable site within the market area."); *with, e.g.*, *Com.* v. *R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 496 (Ky. 2003) ("injuries to a business and loss of profits are non-compensable measures of value in eminent domain proceedings").

operating the business" to ensure that Jarreau's claim was for profit, not revenue.). The court also noted that it was avoiding any "duplication of damages" in its award. App. 96-97. In other words, Jarreau's business losses were not speculative. They were precisely quantified, they were proven, and they were directly attributable to the Levee District's taking. In a court that follows *Kimball Laundry* to its full extent, that would be sufficient. *See Kimball Laundry*, 338 U.S. at 14-15 ("[T]he amount of compensation payable should not include speculative losses * * * [but] it would be unfair to deny compensation for a demonstrable loss.").

III. The question presented is important.

Whether business losses are compensable under the Fifth Amendment is a frequently recurring question of great national importance. Local, state, and federal entities seize thousands or tens of thousands of properties (many of which are business properties) every year. And, of course, there is no way of finding out how many property owners, bargaining in the shadow of the law, have sold their properties for sums that did not include business losses that could have been easily proven.[6]

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[6] A study by the Institute for Justice documented, in the one year period immediately following this Court's decision in *Kelo* v. *City of New London*, 549 U.S. 469 (2005), at least 5,783 instances of local governments exercising or threatening to exercise eminent domain, with the intention of subsequently transferring the seized property to another private party. The total number of properties seized is of course far greater than that because that

The stakes of this case, which presents a question that surely affects thousands of individuals and controls the disposition of many millions of dollars, contrast sharply with the paucity of guidance offered by this Court. As discussed above, courts evaluate this important modern question of economics and property rights by relying on a World War II-era decision about a temporary taking. Unsurprisingly, the lack of modern guidance has yielded a diversity of approaches in the state and lower federal courts—with the inevitable result that property owners in some states enjoy vastly greater federal protections than do owners in other states (and, conversely, condemnors in some places face far greater financial burdens than those in other places). The undeniably massive consequences of the ongoing division in the lower courts justify this Court's review.

IV. This case is a good vehicle for deciding the question presented.

The petition should also be granted because there are neither legal nor factual obstacles to reaching and resolving the question presented in this case.

There are no legal obstacles to resolving the question presented because the federal Just Compensation Clause question was preserved by Jarreau at every

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study excludes instances of eminent domain in which the government keeps the property it takes. *See* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World* (2006), http://ij.org/wp-content/uploads/2015/04/floodgates-report.pdf.

stage of the proceedings and actually decided by the Louisiana Supreme Court. To be sure, the Louisiana Supreme Court engages in a lengthy discussion of state law, including an in-depth history of the State's historical levee servitudes, and, concededly, if Jarreau's property were subject to such a preexisting servitude, it might call into question his right to compensation under the Fifth Amendment.[7] But nothing in the Louisiana Supreme Court's discussion suggests or holds that Jarreau's property is actually subject to such a servitude: Instead, it discusses these ancient servitudes in the course of rejecting the Levee District's argument that Louisiana law allows land subject to these servitudes to be condemned without any compensation at all. App. 19-26. And in rejecting this argument, the Louisiana Supreme Court holds that Louisiana law entitles even property owners whose land is already subject to a servitude to the "'just compensation' measure required by the Fifth Amendment[.]" App. 3. As such, the existence or nonexistence of a preexisting servitude was irrelevant under state law and therefore not resolved by the court below.

In any event, Jarreau's land is not subject to a preexisting servitude as a matter of state law. These

[7] Some property in Louisiana—though not Jarreau's—is subject to longstanding levee servitudes that date back to the original French and Spanish land grants. *See DeSambourg* v. *Bd. of Comm'rs*, 621 So.2d 602, 606-07 (La. 1993) (stating that "title to riparian lands fronting on navigable rivers is subject to the superior right of the public's legal servitude" but making clear that this riparian servitude only "applies to those lands that were riparian when separated from the public domain").

servitudes only burden land that was riparian in nature at the time the property was originally granted to private owners. *See, e.g.*, *Delaune* v. *Bd. of Comm'rs for Pontchartrain Levee Dist.*, 87 So.2d 749, 754 (La. 1956) ("Accordingly, in order to ascertain whether a particular property appropriated for levee purposes is subject to a servitude, it is essential to trace the title to the original grant when the land itself does not actually front on the stream."). If the government wants to claim the existence of such a servitude, it bears the burden of proof. *See Grayson* v. *Comm'rs of Bossier Levee Dist.*, 229 So.2d 139, 142 (La. App. 2 Cir. 1969). And, in the trial court, the Levee District never alleged, much less proved, that Jarreau's land fronts on an ancient body of water that could give rise to such a servitude.[8] To the contrary, the testimony at trial revealed that the only water Jarreau's property bordered was a "borrow canal" used to move dirt in the course of building levees, and the Levee District's own employee testified that this canal "was started 30 years ago." Because the Louisiana Supreme Court did not address the state-law question of whether a preexisting servitude existed—and because it would have found no support for such a holding had it inquired—there is no

[8] The existence of such a preexisting servitude was not a necessary element of the Levee District's proof that it was entitled to appropriate Jarreau's land, and so the District did not allege or prove its existence at trial. To take Jarreau's property, the District needed only to show that the property being appropriated was "used or destroyed for levees or levee drainage purposes." La. Const. art. VI, § 42(A). That much was uncontested below.

state-law obstacle to this Court's addressing the Just Compensation Clause question actually decided below.

Neither are there any factual obstacles to resolving the question presented. The trial court made specific factual findings, not challenged on appeal, that Jarreau suffered business losses as a direct consequence of the taking of his land, that those damages had been proven as non-speculative, and that those damages were not duplicative of the value of the underlying land being taken. There is no question whether Jarreau was damaged or what quantum of proof would be needed to show those damages because a fact-finder has conclusively resolved those questions.[9]

The Louisiana Supreme Court did not question the trial court's fact-finding but instead held that these facts were insufficient to justify compensation under its understanding of *Kimball Laundry*:

> Here, unlike in *Kimball Laundry*, the Levee District did not take Jarreau's business. The

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[9] Even if these findings had been challenged on appeal, Louisiana courts (like courts elsewhere) afford substantial deference to trial-court factual findings absent extraordinary error. *See Rosell* v. *ESCO*, 549 So. 2d 840, 844 (La. 1989) ("It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable."); *accord Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

> dirt's value in this case is subsumed in the value of the surface, and it is only after extraction and delivery to another location that the dirt has additional value. Moreover, no evidence in the record indicates that the dirt from Jarreau's property is of such high quality or has remarkable attributes that once he is compensated for the surface, he cannot find another site to extract dirt and undertake his dirt hauling operations.

App. 31.

In other words, the Louisiana Supreme Court viewed *Kimball Laundry* as barring compensation for business losses as long as it is theoretically possible for a property owner to rebuild a business in a new location. Applying this rule, the Louisiana Supreme Court did not need to displace any of the trial court's findings that Jarreau had suffered damages above and beyond the per-acre value of the land taken—such as its finding that the dirt on Jarreau's former property was of particularly high quality, App. 97, or that there was an unfulfilled contract to sell some of it, App. 93-94—because the trial court had not made the only finding that would entitle Jarreau to compensation: that Jarreau would never be able to farm dirt anywhere else, ever again. And, of course, Jarreau theoretically *could* farm other dirt somewhere else—but he can never recover *this* valuable dirt, never recoup his investment in preparing this dirt, and never make good on the broken contractual agreement he had to sell it. In many jurisdictions, those facts would entitle him to compensation as a matter of federal law; in Louisiana, they do

not. This case allows this Court to resolve that split of authority.

Jarreau's business was selling dirt. And it was a valuable business that had contracts with third parties for the sale of dirt. The state took Jarreau's dirt away from him to use it for its own purposes, which deprived him of the value of his business and prevented him from fulfilling at least one contract. His business losses were not speculative; they were proven at trial and never subsequently challenged on appeal. The only question before the Court, then, is the question clearly presented: whether those facts are enough to entitle him to compensation under the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2017

2017 WL 1193191
Supreme Court of Louisiana.

SOUTH LAFOURCHE LEVEE DISTRICT
v.
Chad M. JARREAU

No. 2016-C-0788, No. 2016-C-0904
|
03/31/2017

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF LAFOURCHE

Attorneys and Law Firms

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Opinion

CLARK, Justice*, **

Following Hurricanes Katrina and Rita, the Louisiana legislature in 2006 passed Act 853[1] and Act 567[2] which amended the laws governing compensation for levee servitude appropriations with a particular focus on appropriations for use in hurricane protection projects. We granted certiorari in this *res nova* matter for three purposes: 1) to interpret specific provisions of the 2006 amendments to La. Const. art. I, § 4, La. Const.

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* Judge James T. Genovese, assigned as Justice ad hoc, sitting for Knoll, J., for oral argument. He now sits as an elected Justice at the time this opinion is rendered.

** Retired Judge James L. Cannella assigned as Justice pro tempore, sitting for Guidry, J., who was recused.

[1] Acts 2006, No. 853, effective October 31, 2006, among other things, amended La. Const. art. I, § 4 to add § 4(G), and also amended La. Const. art. VI, § 42(A) to limit compensation for the appropriation of property for levee purposes to the amount required by the Fifth Amendment to the United States Constitution.

[2] Acts 2006, No.567, effective October 31, 2006, among other things, amended La. R.S. 38:281(3) and (4) and enacted La. R.S. 38:249 and La. R.S. 49:213.10(D) to tie the definitions of "fair market value" and "full extent of the loss" to La. Const. art. I, § 4(G), thereby limiting compensation for appropriations of property for hurricane protection projects to that required by the Fifth Amendment to the United States Constitution. Louisiana R.S. 38:249 and La. R.S. 49:213.10(D) were later repealed by Acts 2009, No. 523, § 7 and § 8, respectively, effective July 10, 2009. The substance of former La. R.S. 49:213.10(D) is now found in La. R.S. 49:214.5.6, which was added by Acts 2009, No. 523, § 3, effective July 10, 2009, and provides for "[m]easure of compensation; property taken for public purposes; venue."

art. VI, § 42, and La. R.S. 38:281(3) and (4); 2) to determine the amount of compensation that is due a property owner whose property is appropriated by a levee district pursuant to a permanent levee servitude for use in a hurricane protection project; and 3) to determine whether La. R.S. 38:301(C)(2)(f) or La. R.S. 13:5111 governs an award for attorneys' fees in a levee servitude appropriation dispute.[3]

For the reasons that follow, we conclude the 2006 amendments to La. Const. art. I, § 4, La. Const. art. VI, § 42 and 38:281(3) and (4) reduced, rather than eliminated, the measure of damages to be paid to a property owner for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of hurricane protection projects from "full extent of the loss" to the more restrictive "just compensation" measure required by the Fifth Amendment to the United States Constitution, which is the fair market value of the property at the time of the appropriation, based on the current use of the property, before the proposed appropriated use, and without allowing for any change in value caused by levee construction. We further hold that La. R.S. 38:301(C)(2)(f) governs an award for attorneys' fees in a levee appropriation dispute. Thus, we affirm the court of appeal judgment, in part, reverse, in part, and render.

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[3] *South Lafourche Levee District v. Jarreau*, 2016-00904 (La. 9/6/16), 204 So.3d 998 and *South Lafourche Levee District v. Jarreau*, 2016-0788 (La. 9/6/16), 205 So.3d 919.

FACTS AND PROCEDURAL HISTORY

On January 10, 2011, the Board of Commissioners of the South Lafourche Levee District ("Levee District') adopted Resolution 11-01 (the "Resolution"), appropriating a permanent levee servitude affecting certain tracts of land located on the west bank of Bayou Lafourche, an area the Levee District had determined was susceptible to storm surge and flooding. The express purpose of the appropriation was to upgrade and increase the size of the existing permanent levee servitude for flood protection in the Larose to Golden Meadow, Louisiana, Hurricane Protection Levee Project area. The Resolution gave the Levee District the right to "construct, operate and maintain levees, berms, drainage or borrow canals or ditches and other flood control works including the right to cut away, dredge or remove soil or earth therefrom and for the deposit of same as may be necessary[.]"

Landowners that were affected by the appropriation of the permanent servitude were notified by letter dated the same date the Resolution was passed. In the letter, the Levee District advised the landowners that soon it would begin "removing earthen material" from the appropriated property and demanded that they "immediately cease and desist performing any and all activities upon the property as appropriated." The letter further explained that state law required the Levee District to pay each affected landowner the fair market value for the appropriated property.

Chad M. Jarreau, a Lafourche Parish resident who owns a 17.1 acre tract of land ("Jarreau tract") located partially within the appropriated area, received the letter. Jarreau's home is situated on the front portion of the tract near Highway 3235, and he operates Bayou Construction & Trucking Co., L.L.C. ("Bayou Construction"), a dirt excavation and hauling business, over the remainder of the tract. Only the rear portion of the Jarreau tract, which measures .913 acres and backs up to a canal, was within the Levee District's appropriated permanent servitude.

Despite receiving the letter, Jarreau continued to excavate dirt from the appropriated area to satisfy contractual obligations for Bayou Construction. On May 19, 2011, the Levee District filed a petition to enjoin Jarreau from excavating and removing any more dirt from the appropriated servitude and sought monetary damages for the "wrongful" excavation. Shortly thereafter, Jarreau received a check from the Levee District in the amount of $1,326.69 as compensation for the full market value of appropriated property; he rejected the tender. In response to the Levee District's petition, Jarreau filed an answer and reconventional demand, seeking compensation for the appropriated land, severance damages to the land, buildings, and improvements; economic and business losses; and general damages for mental anguish, loss of use, inconvenience, and loss of enjoyment; costs and statutory attorney fees. Bayou Construction later intervened in the

suit as a plaintiff-in-reconvention, seeking compensation for lost profits, legal interest, and costs arising from the appropriation.

Jarreau eventually stipulated to the Levee District's request for a permanent injunction, and with his consent, the trial court entered an order prohibiting him from removing dirt "from the property subject to the Levee Servitude appropriated by way of [the Levee District's resolution]." Following a bench trial on the remaining issues, the trial court rendered a judgment awarding the Levee District damages of $16,956.00 for the dirt excavated from the appropriated property. The trial court awarded Jarreau $11,869.00 as just compensation for the appropriated tract pursuant to La. R.S. 38:301(C)(1)(a)[4] and Jarreau and Bayou Construction, *in globo*, $164,705.40 for economic and business losses, as well as attorneys' fees pursuant to La. R.S. 38:301(C)(2)(f) in the amount of $43,811.85, expert witness fees of $26,490.95, costs of $2,350.00 and interest.

The Levee District appealed, asserting for the first time that the 2006 amendments that added § 4(G) to La. Const. I and amended art. VI, § 42(A) eliminated a property owner's right to compensation whenever property is taken for hurricane protection projects. Alternatively, the Levee District argued the 2006 amendments prohibited the trial court from including

[4] The trial court gave the Levee District credit for the $1,326.99 it previously tendered to Jarreau, for a total award of $10,542.01 for the Jarreau tract.

economic and business losses in an award for just compensation for property appropriated for hurricane protection levees. *See* La. R.S. 38:281(3) and (4). Jarreau and Bayou Construction answered the appeal, seeking reversal of the wrongful excavation award and an increase in attorneys' fees.

On appeal, the First Circuit, noting the 2006 amendments were never considered at trial, found the lower court erred, as a matter of law, in awarding Jarreau and Bayou Construction economic and business losses. *South Lafourche Levee District v. Jarreau*, 2015-0328, p. 15 (La.App. 1 Cir. 3/30/16), 192 So.3d 214, 226 & n.4.. It then reviewed the record *de novo*, in light of the 2006 amendments, and determined the Levee District's use of dirt from the Jarreau tract was a constitutional "taking" that required just compensation at fair market value.[5] *Id.*, 2015-0328 at 14, 192 So.3d at 225. Based on the evidence, the court found the fair market value of the property at the time of appropriation was $11,869.00. *Id.*, 2015-0328 at 17, 192 So.3d at 228. The court of appeal reversed the portion of the judgment awarding Jarreau and Bayou Construction $164,705.40 in damages for economic and business losses associated with the appropriation. *Id.*,

[5] Judge Crain disagreed with the majority's interpretation of the 2006 amendments that landowners are owed no compensation for the State's appropriation of their land for levee purposes, unless the appropriation is also a constitutional taking. He interpreted the amendments as simply changing the measure of damages from "full extent of the loss" to the more restrictive "just compensation" required by the Fifth Amendment. *See Jarreau*, 2015-0328, 192 So.3d 214, 234-35 (Crain, J., concurring in part).

2015-0328 at 18, 192 So.3d at 228. The court of appeal also reversed the award of $16,956.00 to the Levee District for Jarreau's wrongful excavation of the dirt, finding the evidence insufficient to support the loss.[6] *Id.*, 2015-0328 at 23, 192 So.3d at 232.

Last, the court of appeal found the trial court erred in applying the 25% cap on attorneys' fees award under La. R.S. 38:301(C)(2)(f) rather than awarding reasonable attorneys' fees actually incurred under La. R.S. 13:5111(A). *Jarreau*, 2015-0328 at 24, 192 So.3d at 232. A majority of the court of appeal held that La. R.S. 13:5111(A) was the more specific statute.[7] *Id.* Utilizing factors established by this Court,[8] the court of appeal concluded that $142,551.50 was a reasonable amount for attorney fees actually incurred and added $5,000

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[6] The Levee District did not seek review of the part of court of appeal judgment reversing the damage award for Jarreau's wrongful excavation of dirt from the appropriated property.

[7] Judges Guidry and Crain dissented, finding R.S. 38:301(C)(2)(f) was applicable as the more specific statute for awarding attorneys' fees in an appropriation for levee purposes. *See Jarreau*, 2015-0328, 192 So.3d 214, 234-35 (Guidry, J., dissenting in part and Crain, J., dissenting in part).

[8] *See State, Dep't of Transp. and Development v. Williamson*, 597 So.2d 439, 442 (La. 1992) (determining the reasonableness of attorneys' fees award include: (1) ultimate result obtained; (2) responsibility incurred; (3) importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) court's own knowledge).

for the appellate work. *Id.*, 2015-0328 at 25-26, 192 So.3d at 233.

The Levee Board and Jarreau and Bayou Construction filed these consolidated writs seeking our review of the court of appeal's judgment. The Levee Board raises two assignments of error: 1) the court of appeal erred by concluding the Levee District owes any compensation for the appropriation of the levee servitude, given the 2006 amendments; and 2) the court of appeal erred in awarding attorney's fees based on La. R.S. 13:5111 rather than La. R.S. 38:301(C)(2)(f). Jarreau and Bayou Construction, on the other hand, argue the court of appeal erred in determining the fair market value of the property and reversing the trial court's award of $164,705.40 for the value of the appropriated dirt.

LAW AND DISCUSSION

"Legislation is the solemn expression of the legislative will; thus, the interpretation of legislation is primarily the search for the legislative intent." *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 2015-0785, p. 6 (La. 5/3/16), 190 So.3d 298, 303 (citations omitted). When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the legislative intent. La. Civ. Code art. 9; La. Rev. Stat. 1:4; *Succession of Boyter*, 99-0761, p. 9 (La. 1/7/00), 756 So.2d 1122, 1128-29. However, when a statute is susceptible of

more than one interpretation, the court must apply the one that achieves the legislature's intent and best comports with the principles of reason and justice. *Pierce Foundations*, 2015-0785 at 7, 190 So.3d at 303; *Freechou v. Thomas W. Hooley, Inc*., 383 So.2d 337 (La. 1980). "The starting point for interpretation of any statute is the language itself." *Pierce Foundations*, 2015-0785 at 7, 190 So.3d at 303 (citations omitted). Also, "'all laws pertaining to the same subject matter must be interpreted *in pari materia*, or in reference to each other.'" *Id.*, quoting *State v. Williams*, 10-1514 (La. 3/15/11), 60 So.3d 1189, 1191; La. Civ. Code art. 13.

A helpful guide in ascertaining the intent of the legislature is the legislative history of the statute and related legislation. *Theriot v. Midland Risk Ins. Co.*, 95-2895, p. 4 (La. 5/20/97), 694 So.2d 184, 186. The Legislature is presumed to have enacted a statute in light of the preceding statutes involving the same subject matter and court decisions construing those statutes, and where the new statute is worded differently from the preceding statute, the Legislature is presumed to have intended to change the law. *Fontenot v. Reddell Vidrine Water* Dist., 2002-0439, 2002-0442, 2002-0478, pp. 13-14 (La. 1/14/03), 836 So.2d 14, 24 (citing *Folse v. Folse*, 98-1976 (La. 6/29/99), 738 So.2d 1040 and *New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans*, 94-2223 (La. 4/10/95), 653 So.2d 538).

Furthermore, where two statutes deal with the same subject matter, they should be harmonized if possible, as it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws. *Oubre v.*

Louisiana Citizens Fair Plan, 2011-0097 (La. 12/16/11), 79 So.3d 987, 997, *cert. denied*, ___ U.S. ___, 133 S.Ct. 30, 183 L.Ed.2d 677 (2012). However, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Id.*

Whether Jarreau is owed compensation for property appropriated for hurricane protection purposes pursuant to La. R.S. 38:301, in light of the 2006 amendments to La. Const. art. I, § 4, La. Const. VI, § 42, and La. R.S. 38:281 (3) and (4), presents only a question of law; therefore, our review is *de novo*. *See Pierce Foundations*, 2015-0785 at 7, 190 So.3d at 303.

We turn now to language of the constitutional and statutory provisions at issue.

2006 Amendments

The limitations placed upon governmental takings of property are found in both the federal and state constitutions. The Fifth Amendment of the United States Constitution, made applicable to the states pursuant to the Fourteenth Amendment, provides: "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." The definition of "just compensation" required by the Fifth Amendment has repeatedly been held to be measured by "the market value of the property at the time of the taking." *Horne v. Department of Agriculture*, ___ U.S. ___, 135 S.Ct. 2419, 2432, 192 L.Ed.2d 388 (2015)

(quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S.Ct. 451, 454, 83 L.Ed.2d 376 (1984)).

The Louisiana Constitution of 1974 provides for governmental takings of property in both article I, § 4, "Right to Property," and article VI, § 42, "Compensation for Property Used or Destroyed; Tax." Article I, § 4 provides for the expropriation of private property for public purposes while article VI, § 42 provides specifically for the appropriation of private property necessary for levee or levee drainage purposes. The difference between a Louisiana landowner's protection against "appropriation of property necessary for levee and levee drainage purposes," which is excepted from the protections of article I, § 4, and expropriation for any lawful purpose, arises from the particular nature of the levee servitude and the way in which it was traditionally exercised by public bodies:

> The ownership of the lands used or destroyed for levee purposes remained in the riparian landowner, because the lands were not 'expropriated' but merely 'appropriated' for levee construction and the payment (authorized under the Constitution of 1921) was an indemnity for the public use.

Yiannopoulus, *Civil Law Treatise (Property)*, V. 2, Section 88, P. 190 (3d ed. 1991). Appropriation, as opposed to expropriation, is carried out by a resolution of the appropriating authority, without the need for a judicial proceeding. *See Richardson & Bass v. Board of Levee Commissioners*, 226 La. 761, 77 So.2d 32 1954). Furthermore, "[a]ppropriation involves the taking of a

servitude, whereas expropriation may involve the taking of ownership." Yiannopoulus, *supra*, at 190 n. 20. *See also Delaune v. City of Kenner*, 550 So.2d 1386 (La. App. 5 Cir.1989), *writ denied,* 553 So.2d 475 (La.1989). While compensation is mandated by the U.S. Fifth Amendment for expropriations, no compensation is required for levee appropriations. *See Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896).

Prior to the effective date of the 2006 amendments, article I, § 4(B) provided:

> Property shall not be taken or damaged by the state or its political subdivisions *except for public purposes and with just compensation* paid to the owner or into court for his benefit. . . . In every expropriation, a party has the right to trial by jury to determine compensation, and *the owner shall be compensated to the full extent of his loss.*" (Emphasis added.)

The phrase "compensated to the full extent of his loss" was a change in the law when it was added to the 1974 Constitution. It broadened the measure of damages in expropriation cases by requiring that an owner be compensated not only for the fair market value of the property taken and severance damages to the remainder, but also to be placed in an equivalent financial position to that which he enjoyed before the taking. *See West Jefferson Levee District v. Coast Quality Const. Corp.*, 93-1718, p. 13, 640 So.2d 1258, 1271 n.20 (La. 1994). Full compensation pursuant to the 1974 Constitution included things like inconvenience and loss of profits from the takings of business premises so that

landowners were compensated for their loss, not merely the loss of their land. *Id.*

In 2006, Act 853 amended La. Const. article I, § 4 to add § 4(G) to provide:

> (G) Compensation paid for *the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto*, *shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America.* However, this Paragraph shall not apply to compensation paid for a building or structure that was destroyed or damaged by an event for which a presidential declaration of major disaster or emergency was issued, if the taking occurs within three years of such event. *The legislature by law may provide procedures and definitions for the provisions of this Paragraph.* (Emphasis added.)

The addition of § 4(G) to Article I restricts compensation for the taking of, or loss or damage to, property rights necessary for hurricane protection projects to that required by the Fifth Amendment. Thus, an owner of private property taken for use in hurricane protection projects is no longer entitled to just compensation to the full extent of his loss.

Act 853 also amended La. Const. art. VI, § 42(A), governing the rights and obligations of levee districts, to impose the same restriction:

> (A) Compensation. Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. *With respect to lands and improvements actually used or destroyed in the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, such payment shall not exceed the amount of compensation authorized under Article I, Section 4(G) of this constitution.* However, nothing contained in this Paragraph with respect to compensation for lands and improvements shall apply to batture or to property the control of which is vested in the state or any political subdivision for the purpose of commerce. If the district has no other funds or resources from which the payment can be made, it shall levy on all taxable property within the district a tax sufficient to pay for property used or destroyed to be used solely in the district where collected. (Emphasis added.)

Louisiana R.S. 38:301, governing compensation for levee district appropriations, contains the following provision applicable when property is taken by way of a permanent levee servitude:

> C. (1)(h) The measure of compensation for lands and improvements taken or destroyed for levee or levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the

> property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities.

Therefore, for land taken by way of a permanent levee servitude, as in Jarreau's case, compensation is fair market value of the property taken or destroyed before the proposed use.[9] *See* La. R.S. 38:301(C)(1)(h). The compensation for a permanent levee servitude applies to all lands, exclusive of batture, and improvements appropriated, taken, used, damaged, or destroyed for levee purposes. *See* La. R.S. 38:301(C)(1)(i).

The terms "fair market value" and "full extent of the loss," as they pertain to levee districts, are defined in La. R.S. 38:281. Act 567 of 2006 amended and reenacted La. R.S. 38:281(3) and (4), to provide the following:

> (3) "Fair market value" means the value of the lands or improvements actually taken, used, damaged, or destroyed for levees or levee drainage purposes as determined in accordance with the uniform criteria for determining fair market value as defined in R.S.

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[9] In his opposition to the Levee District's writ application, Jarreau claims the Levee District did not prove the riparian nature of the appropriated property. However, Jarreau failed to contest the validity of the appropriation by filing a verified petition in the Seventeenth Judicial District Court of Lafourche Parish within sixty (60) days after the adoption of the appropriating resolution as required; thus, he is barred from asserting any right or claim contesting the appropriation, except for a claim for compensation in accord with La. R.S. 38:301(C)(2)(h)(ii). *See* La. R.S. 38:301(C)(4)(a).

> 47:2321 *et seq.Pursuant to Article 1, Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, such determination of fair market value shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America unless an exception as provided in Article I, Section 4(G) of the Constitution of Louisiana is applicable.* (Emphasis added.)
>
> (4) "Full extent of the loss" shall not be construed to include payment for uses which are remote, speculative, or contrary to law; uses for which the property is still suitable; or elements of property ownership which are not actually taken, used, damaged, or destroyed for levees or drainage purposes. *Further, pursuant to Article 1, Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, payment for the full extent of the loss shall not exceed fair market value and shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America unless an exception as provided in Article I, Section 4(G) of the Constitution of Louisiana is applicable.* (Emphasis added.)

The second sentence in each of the above definitions was added by Act 567 and directs the court to look to La. Const. art. I, § 4(G) and La. Const. art. VI, § 42. Those two constitutional provisions now limit compensation to property owners whose land is taken, damaged, or destroyed for construction, enlargement,

improvement, or modification of hurricane protection projects, to what is required by the Fifth Amendment.

The Levee District maintains that Jarreau is not entitled to any compensation because the Fifth Amendment does not require compensation for an appropriation of a permanent levee servitude.[10] Jarreau, on the other hand, contends that the 2006 amendments require the Levee District to compensate him, at the very least, the amount required by the Fifth Amendment or the fair market value of the property at the time of the taking for public use, *i.e.* the date of the appropriating resolution. *See* La. R.S. 38:301(C)(1)(g).

After examining the 2006 amendments to La. Const. art. I, § 4, La. Const. art. VI, § 42, and La. R.S. 38:281(3) and (4), we find the terms "fair market value" and "full extent of the loss" in reference to "the compensation required by the Fifth Amendment" must be reconciled. Therefore, we will look to the legislative history of the laws governing levee servitudes to ascertain which of the following arguments is correct: the legislature intended to limit the compensation due a property owner whose property is appropriated by way of a permanent levee servitude for use in a hurricane protection project to the amount allowed by the Fifth Amendment, *i.e*. the fair market value of the property at the time of the taking; or instead, the legislature intended to limit compensation to the amount allowed by

[10] The Levee District neither raised this issue nor challenged the constitutionality of the 2006 amendments in the district court.

the Fifth Amendment for an appropriation, *i.e.* nothing.

History of the Louisiana Levee Servitude

Prior to the Louisiana Purchase, the sovereign governments of France and Spain included in their land grants both reservations of public servitudes over riparian land and onerous levee obligations requiring such owners to build levees and keep them in repair at their own expense under penalty of forfeiture. *Dickson v. Board of Com'rs*, 210 La. 121, 131-35, 26 So.2d 474, 477-80 (1946) (citing *Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 347, 40 L.Ed. 490 (1896)). Under this regime, the riparian landowner bore the burden and expense of protecting all people and property from flooding. *Dickson*, 210 La. at 133, 26 So.2d at 478. The imposition of this obligation on private parties persisted even after the Louisiana Purchase. *DeSambourg v. Board of Commissioners*, 621 So.2d 602, 607 (La. 1993), *cert. denied*, 510 U.S. 1093, 114 S.Ct. 925, 127 L.Ed.2d 218 (1994). It was not until the mid-19th century that the practice changed due to the need for an efficient and cohesive state-wide plan for flood protection. *Id.*; John W. Jewell, *Civil Law Property – Levee Servitude – Civil Code Article 665*, 27 La. L. Rev. 321, 328 (1967). The obligation to build and maintain levees was then shifted from the private landowner to the state government. The first levee district was formed in 1852, and since 1878, the construction, maintenance and supervision of the levee system has been a function of the government. *Id.*; 27 La. L. Rev. at 327.

Despite the shift in responsibility, riparian land remained burdened by a levee servitude. *DeSambourg*, 621 So.2d at 607. When the state assumed responsibility for levees, no right of action for compensation existed for lands appropriated pursuant to the levee servitude. *Id.* Recognizing the state's existing right, the United States Supreme Court in *Eldridge* noted "the riparian owner enjoys his property *sub modo*, i.e., subject to the right of the public to reserve space enough for levees, public roads and the like" and "never acquires complete dominion." *Eldridge*, 16 S.Ct. at 347.

In 1898, the Louisiana legislature, for the first time, provided compensation to riparian landowners whose property was appropriated under the levee servitude. *Id.*; *see also* La. Const. of 1898, art. 312. However, the effect of this constitutional provision was limited to the jurisdiction of the Orleans Levee District and specifically exempted batture. *See* La. Const. of 1898, art. 312; *Dickson*, 210 La. at 135, 26 So.2d at 479. The Louisiana Constitution of 1921 provided compensation for the first time on a statewide basis to property owners whose lands, excluding batture, and improvements were used or destroyed for levee or levee drainage purposes. *See* La. Const. of 1921 art. XVI, § 6; *see also* John A. Lovett, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 Tul. L. Rev. 561, 562 n.2 (1994). This provision entitled riparian landowners to receive up to "the assessed value of the preceding year" of the land taken and, for many years, was considered a "mere gratuity." *DeSambourg*, 621 So.2d at 608 (citing *Delaune v. Board of Comm'rs*, 230 La.

117, 124, 87 So.2d 749, 753 (1956); *see also* 69 Tul. L. Rev. 561, 562 n.2.

The Louisiana Constitution of 1974 reaffirmed the levee servitude as a constitutional, legal servitude. *See* La. Const. art. VI, §§ 38-42. The new Constitution altered the measure of the riparian landowner's compensation from the property's "assessed value of the preceding year" to providing that for "lands and improvements . . . actually used or destroyed for levees or levee drainage purposes [compensation] shall be paid as provided by law." La. Const. art. VI, § 42(A). Implementing the 1974 constitutional provision, the legislature increased compensation from "assessed value" to "fair market value to the full extent of the loss" for the actual taking of improvements and all lands, excluding batture. *See* La. R.S. 38:301, as amended by Acts 1985, No. 785; *see also* Acts 1978, No. 314 and Acts 1979, No. 676.

Although the Louisiana Constitution and state statutes require gratuitous compensation for levee servitude appropriations, courts have maintained that the Fifth Amendment does not mandate compensation. *See*, *e.g.*, *General Box Co. v. United States*, 351 U.S. 159, 166-67, 76 S.Ct. 728, 100 L.Ed. 1055 1055 (1956) (appropriation of levee servitude did not constitute a taking within the meaning of the Fifth Amendment); *DeSambourg*, 621 So.2d at 606-08 (compensation is not constitutionally mandated in appropriation cases); *Dickson*, 26 So.2d at 477, 479 (constitutional due process requirements apply to expropriations but not to appropriations for levee purposes); *Peart v. Meeker*, 45

La.Ann. 421, 12 So. 490, 490 (1893) (no compensation is owed for appropriations for levee purposes); *Vela v. Plaquemines Parish Government*, 97-2608-97-2611, p. 3 (La. App. 4 Cir. 3/10/99), 729 So.2d 178, 181 ("there is no historical Fifth Amendment imperative to provide compensation in appropriation situations as opposed to expropriations").

In 2006, Act 853 originated in the Senate as S.B. 27. The author of S.B. 27 testified before the Senate Judiciary Committee, Section A, that the substance and purpose of the bill was to propose constitutional amendments to limit compensation for the taking of property for use in hurricane protection and flood control projects and for levees and levee drainage purposes to that required by the Fifth Amendment to the U.S. Constitution. *See Minutes of Meeting*, pp. 5-7, Senate Committee on Judiciary, Section A, 2006 Regular Session, April 11, 2006, S.B. 27 (statement by Sen. R. Dupre). Also, the proposed legislation was in response to the recent decisions in *Kelo v. City of New London, Connecticut*[11] and *State, Pontchartrain Levee District v. St. Charles Airline Lands, Inc.*[12] *Id.* The proposed

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[11] *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (Supreme Court held that the city of New London's proposed development plan to revitalize an economically distressed city, including its downtown and waterfront areas, qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.).

[12] *See State, Pontchartrain Levee District v. St. Charles Airline Lands, Inc.*, 03-1292, 03-1293, 04-20 (La.App. 5 Cir. 4/27/04), 871 So.2d 674, *writ denied* 2004-1552 (La. 10/1/04), 883 So.2d 992 (landowner was awarded a total of $3,068,420.50 in compensation

amendments were necessary to allow the state and local levee districts to obtain property for hurricane protection and flood control projects at reasonable costs in order to qualify for federal funding on those projects. *Id.* The proposed constitutional amendments were similar to those passed in 2003 in response to the exorbitant awards to oyster farmers and lessees for damages sustained as a result of coastal restoration projects.[13] *Id.*

House Bill 450, the duplicate bill to S.B. 27, was presented to the House Committee on Transportation, Highways, and Public Works as a measure to provide for compensation for property taken for levee projects to conform to that allowed for then existing coastal restoration projects. The committee was informed that landowners were not in favor of the measure. One committee member asked whether treating property owners differently would be a deprivation of due process.

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for wetlands property expropriated for use in a hurricane protection project despite the property having a total fair market value of only $66,830.00 when expropriated).

[13] *See* Acts 2003, No. 652 (amended and reenacted R.S. 49:214.5, requiring the State to be held harmless for coastal restoration projects); *see also* Acts 2003, No.1295 (Joint resolution submitting an amendment to La. Const. article I, § 4 for popular vote; the amendment allowed the legislature to limit the extent of recovery for "takings" or damages due to coastal restoration projects.); *see also* Acts 2003, No. 583 (enacting La. R.S. 49:213.9 to limit the recovery for property taken or affected by coastal restoration activities).

The committee was assured landowners were not being treated differently.[14]

On May 1, 2006, H.B. 450 was presented to the House Civil and Procedure Committee for review of the proposed ballot language. The committee chairman emphasized the substance of the proposed constitutional amendments was to provide some relief to governmental entities that have to acquire levee right-of-ways to get them at more reasonable costs.[15]

Act 567 of 2006 originated as S.B. 64. Its duplicate, H.B. 451, was presented to the House Committee on Transportation, Highways, and Public Works as a measure related to compensation for property taken for levees. An amendment was offered to add the language "hurricane protection and flood control projects, including" to the bill; the amendment passed. After the vote, a committee member commented that the legislation would reduce property owners' then existing rights under the state constitution.[16]

When viewed from the historical perspective of the law and jurisprudence pertaining to levee servitudes, we conclude the 2006 amendments to La. Const. art. I,

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[14] *See Minutes of Meeting*, pp. 3-4, House Committee on Transportation, Highways, and Public Works, 2006 Regular Session, April 25, 2006, H.B. 450.

[15] *See* House Civil Law and Procedure Committee, May 1, 2006, 2006 Regular Session (La. 2006); http://house.louisiana.gov/Hse Video Requested.aspx.

[16] *See Minutes of Meeting*, p. 5, House Committee on Transportation, Highways, and Public Works, 2006 Regular Session, April 25, 2006, H.B. 451.

§ 4, La. Const. art. VI, § 42, and La. R.S. 38:281(3) and (4) reduced, rather than eliminated, the measure of damages to be paid to the owner of property for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of hurricane protection projects from "full extent of the loss" to the more restrictive "just compensation" measure required by the Fifth Amendment, which is the fair market value of the property at the time of the appropriation, based on the current use of the property, before the proposed appropriated use, and without allowing for any change in value caused by levee construction.

Following the devastation caused by Hurricanes Katrina and Rita to Louisiana citizens and property, the legislature wanted to take all measures necessary to repair and restore the Louisiana coast, and to protect the State and its citizens from future hurricane and flood events. The ability of the state and local levee districts to protect life and property is directly impacted by its right-of-way acquisition costs, a major component of a hurricane and flood protection project's overall cost. Given the "full extent of loss" provisions of the 1974 Constitution, the state and levee districts were faced with daunting expropriation or appropriation costs. The legislature had to take steps to contain those costs for Louisiana to qualify for federal funds for hurricane protection and flood control projects. While the legislature wanted to significantly reduce acquisition costs, it also sought to protect an owner's right to compensation for the taking, loss or damage to,

his property for use in hurricane protection projects. We find by amending La. Const. art. VI, § 42 to limit compensation for the appropriation of property for levee purposes to the amount required by the Fifth Amendment, and amending La. R.S. 38:281(3) and (4) to tie to the definitions of "fair market value" and "full extent of the loss" to La. Const. art. I, § 4(G), the legislature intended to preserve, yet restrict, the "gratuitous compensation" allowed for the appropriation of a levee servitude. If the legislature had intended to eliminate all compensation for an appropriation of a permanent levee servitude for a hurricane protection project, then it would have amended La. Const. art. VI, § 42 and La. R.S. 38:301 to do so. The fact that it did not suggests the legislature intended to treat property owners the same, allowing them compensation for the fair market value of their property whether it was expropriated or appropriated for a hurricane protection project.

Compensation

Based on our conclusion that the 2006 amendments entitle Jarreau to compensation for the taking of, loss or damage to, his property by way of a permanent levee servitude for a hurricane protection project, his compensation is limited to that required by the Fifth Amendment, which is the fair market value of the property at the time of the appropriation, which does not include loss profits and other severance damages.

The fair market value of property taken for public purposes is the price a buyer is willing to pay after he has considered all of the uses to which the property may be put, where such uses are not speculative, remote, or contrary to law. *See West Jefferson Levee District*, 93-1718 at 17, 640 So.2d at 1273. The current use of the property is presumed to be the highest and best use. *Id.* at 20, 640 So.2d at 1275.

The record indicates that at the time of the appropriation in January 2011, Jarreau was using the Jarreau tract for excavating dirt for Bayou Construction's contracts. Bennet Oubre, Jarreau's expert real estate appraiser, determined the fair market value of the appropriated portion of the Jarreau tract on the January 10, 2011, was $11,869.00, without any consideration for loss profits related to the value of the dirt. Oubre concluded that the highest and best use of the appropriated portion, as well as the entire 17.1 acres, was the current use as a "dirt pit" operation. He classified the property as a mixed-use tract on the date of appropriation, for both commercial/industrial and residential purposes. Oubre also determined that the Levee District's appropriation of the permanent levee servitude was paramount to a complete deprivation of any use of the remaining Jarreau tract, concluding that there was no reasonable use left for the tract after the appropriation.

Martin Glynn, the Levee District's expert real estate appraiser, testified the Jarreau tract had a fair market value of $1,820.00. Glynn used a standard mathematical approach to get the contributory value

of the Jarreau tract, concluding that the rear part of Jarreau's property was not as valuable as the front portion along the highway. He stated that there was no sales data on which to base a valuation for the rear acre of property, and the appropriated portion of the Jarreau tract had no real value as a stand-alone tract since it was cut off from highway access. Glynn also found that the highest and best use of the property was multi-use, combining residential, pastureland, and commercial. He determined that the front two acres of the Jarreau tract were the most marketable and the overall value of the entire tract was $11,500.00 per acre.

William J. Pousson, the Levee District's other expert real estate appraiser, appraised the appropriated part of the Jarreau tract at $1,301.00 to $1,425.00, based on comparable properties. Pousson estimated the entire Jarreau tract to be worth $13,000.00 per acre, but he testified that the appropriated rear portion was not as valuable as the remaining tract due to the lack of highway and utility access. Pousson determined the appropriated portion had a different highest and best use (dirt pit) than the remainder of the Jarreau tract (residential/commercial).

When further questioned, Oubre explained the difference in his valuation analysis and why he did not separate the rear portion of the Jarreau tract when he valued the property. He looked at the property as a whole, and disagreed with the approach taken by the other appraisers, because the Jarreau tract was not cut

off from highway and utility access until after the appropriation and there were no comparable sales where the rear portion of the tract had been cut off. Oubre maintained that his valuation of the entire property at $13,000.00 per acre was very similar to the other appraisals, and opined the amount was correct based on comparable data for sales of the whole property.

After reviewing the record, we find the value of Jarreau's property to be $13,000.00 per acre. We also find that Oubre's method of valuing the entire property without allowing for any change in value caused by
the appropriation was correct in light of the statutory measure of compensation for land taken by way of a permanent levee servitude. *See* La. R.S. 38:301(C)(1)(h). Since the appropriated portion was less than an acre, we accept Oubre's valuation of $11,869.00, as of the date of the appropriation. We will affirm the court of appeal judgment insofar as it awarded Jarreau $11,869.00, less the amount previously tendered by the Levee District, plus interest from the date of the appropriation.

Jarreau relies on the cases of *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) and *National Food & Beverage Co.*, *Inc. v. United States*, 105 Fed.Cl. 679 (Fed. Cl. 2012) to argue that the Levee District owes him compensation for the

value of his excavating business.[17] We find no merit to this argument.

In *Kimball Laundry*, the federal government took temporary possession of the Kimball laundry facility to clean military uniforms during World War II, and, as a result, the laundry could not service its customers for the duration of the taking, three and one-half years. 338 U.S. at 3, 69 S.Ct. 1434. The Supreme Court found the taking of the laundry facility "completely . . . appropriated the laundry's opportunity to profit" from its established customer base for the duration of the occupation, leaving the laundry with far fewer customers when the property was eventually returned. *Id.* at. 14, 69 S.Ct. 1434. Because the goal of the Takings Clause is to make the dispossessed property owner whole, the Court held the government had to compensate Kimball Laundry for damage to its earning power, customer base and goodwill. *Id.* at 16, 69 S.Ct. 1434.

In *National Food*, the issue was whether the plaintiff had a compensable property interest in the borrow material (clay) located on its Louisiana property taken for levee purposes by the U.S. Army Corps of Engineers. 105 Fed.Cl. at 700. The court determined that where the highest and best use of the property is as a borrow pit, the fair market value for that property may include the price per cubic yard of the clay removed from the landowner's property for hurricane levee

[17] The Pacific Legal Foundation and the National Federation of Independent Business Small Business Legal Center filed an amici curiae brief in support of Jarreau on this issue.

repair. *Id.* (citing *United States v. 22.80 Acres of Land, More or Less*, 839 F.2d 1362, 1364 n.2 (9th Cir. 1988) (approving a cubic-yard basis of compensation where "the government is taken the [material] itself, [and] not the overlying parcel of land")).

Jarreau's case is distinguishable from *Kimball Laundry* and *National Food*. Here, unlike in *Kimball Laundry*, the Levee District did not take Jarreau's business. The dirt's value in this case is subsumed in the value of the surface, and it is only after extraction and delivery to another location that the dirt has additional value. Moreover, no evidence in the record indicates that the dirt from Jarreau's property is of such high quality or has remarkable attributes that once he is compensated for surface, he cannot find another site to extract dirt and undertake his dirt hauling operations. *National Food* did not involve a levee servitude appropriation where the government had a pre-existing right to the landowner's property. Rather the property was taken via a commandeering order issued by the Plaquemines Parish president under the authority of the Louisiana Homeland Security and Emergency Assistance and Disaster Act, and the "taking" occurred in 2006 before the effective date of the amendments. Thus, we agree with the First Circuit's reversal of the damages award to Jarreau and Bayou Construction for economic and business losses, and will affirm its judgment in that regard.

Attorneys' Fees

We now consider whether the court of appealed erred in reversing the trial court and awarding Jarreau attorneys' fees pursuant to La. R.S. 13:5111. Both the trial court and court of appeal acknowledged two statutes address attorneys' fees in appropriation cases. La. R.S. 13:5111, provides:

> A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.

Additionally, La. R.S. 38:301(C)(2)(f) provides:

> Reasonable attorneys' fees may be awarded by the court if the amount of the compensation found to be due by the state, the levee board,

> or the federal government is less than the amount of compensation awarded in any judgment seeking additional compensation. The attorneys' fees shall not exceed twenty-five percent of the difference between the award and the amount found to be due by the state, the levee board, or the federal government.

Although La. R.S. 13:5111 applies generally to all cases where property is "taken" for any purpose by any method other than expropriation, La. R.S. 38:301(C)(2)(f) is tailored specifically to matters involving the taking, use, damage, or destruction of property *for levee purposes* pursuant to La. R.S. 38:301, as in this case. The rules of statutory construction dictate that La. R.S. 38:301(C)(2)(f) should prevail as the exception to the general rule provided by La. R.S. 13:5111.

Finally, we find no merit to Jarreau's argument that if a conflict does exist, the statutes can be read *in pari materia* to mean that La. R.S. 13:5111 merely adds to the amount of attorneys' fees recoverable. Such an interpretation would render the explicit legislative cap found in La. R.S. 38:301(C)(2)(f) meaningless. We find the court of appeal erred in awarding attorneys' fees based on La. R.S. 13:5111 and, thus, reverse that part of the judgment. Applying La. R.S. 38:301(C)(2)(f), we find Jarreau is entitled to attorneys' fees in the amount of $2,635.57.[18]

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[18] ($11,869.00-$1,326.69) x .25 = $2,635.57.

DECREE

Accordingly, for the above reasons, the judgment of the court of appeal is reversed, in part, insofar as it awarded Jarreau and Bayou Construction attorneys' fees of $142,551.50. All other portions of the court of appeal judgment are affirmed. We hereby render judgment in favor of Jarreau and Bayou Construction and against the Levee District for attorneys' fees in the amount of $2,635.57.

AFFIRMED IN PART; REVERSED IN PART AND RENDERED.

WEIMER, Justice, additionally concurs and assigns reasons.

HUGHES, Justice, dissents and assigns reasons.

CANNELLA, Justice pro tempore, additionally concurs with the reasons of Justice Weimer.

WEIMER, J., additionally concurring.

I write to emphasize that this case illustrates the infinitely delicate and difficult balance that the citizens and legislature have confected between providing levee protection and recognizing private landowner rights.

The levee system in the southern portion of Lafourche Parish exists for storm protection and to

limit salt water intrusion from the Gulf of Mexico.[1] South Lafourche and the surrounding areas are at the epicenter of some of the most significant losses of land in the world. As the people of South Lafourche long ago recognized, much of their land was disappearing at an alarming rate and waters from the gulf were increasingly intruding on the land that remained. Where crops were grown, cattle grazed, and loved ones were buried only a generation or so ago, the land is now covered by water. If nothing was done, their homesteads, businesses, and the incredibly unique culture and way of life in South Lafourche would all be lost. The resilient citizens of South Lafourche boldly took steps to tax themselves and construct a levee system to preserve what was precious to them from being lost to the encroaching waters.

The rights of landowners in the southern portion of Lafourche Parish, as in the entire state, are afforded legal protections. The 2006 constitutional and statutory amendments described in the majority opinion are designed to allow the construction and maintenance of levee systems in a way that provides the protection levees afford, while limiting intrusion on landowners' rights. As the situation here demonstrates, a portion of the landowner's property is being used for levee

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[1] According to the levee district's website: "Our Goal is . . . to provide, within our district, the highest possible level of protection from flooding due to high tides, heavy rain falls, tropical storms and hurricanes for the safety and well[-]being of the community of South Lafourche." http://www.slld.org/ (last visited 3/23/17).

maintenance, and although historically it could be argued no compensation was owed for such a project even dating back to the time before Louisiana became a state, under the 2006 statutes, the levee district must now compensate the landowner in the amount of fair market value.

Without such levee projects in the southern part of Lafourche Parish, if the trend of coastal land loss continues, there would eventually be little or no private land to protect.[2] While the public policy of this state is ultimately established by its citizens and legislature, the manner in which the 2006 constitutional and statutory amendments have operated in this case suggests that a balance now exists between the public's need for levee protection and the protection of landowners' rights.

Hughes, J., dissents and assigns reasons.

Defendant is in the dirt business and owns land from which he digs and sells dirt. The government is entitled to "appropriate" defendant's land, but must pay him fair compensation mandated by the Constitution. This court affirms an award of $11,869 despite evidence in the record that the dirt taken from the land has a value in excess of $100,000. Even if the most restrictive measure of compensation is applied, this

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[2] *See* USGS map: 100+ Years of Land Change for Coastal Louisiana (Sept. 28, 2015) at https://lacoast.gov/new/Pubs/Map_data/2003*l*andloss11X17.pdf.

value should be considered in determining the award to defendant. When the government can take private property without paying the landowner, something is wrong.

192 So.3d 214
Court of Appeal of Louisiana,
First Circuit.

SOUTH LAFOURCHE LEVEE DISTRICT
v.
Chad M. JARREAU.

No. 2015 CA 0328.
|
March 30, 2016.

Attorneys and Law Firms

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Before GUIDRY, PETTIGREW, HIGGINBOTHAM, CRAIN, and DRAKE, JJ.

Opinion

HIGGINBOTHAM, J.

The issue to be resolved in this case is the amount of compensation due to a Louisiana landowner and business when a portion of property, including soil from beneath the surface of the property, is effectively

appropriated pursuant to a permanent levee servitude for the purpose of constructing, operating, and maintaining a levee for a hurricane protection project. The issue involves a *res nova* application of the limiting effects, if any, of the 2006 constitutional amendments to La. Const. art. VI, § 42, and La. Const. art. I, § 4, purportedly conforming Louisiana takings law with federal law when property is taken for levee and hurricane protection purposes.

FACTS AND PROCEDURAL HISTORY

The parties do not dispute that on January 10, 2011, the Board of Commissioners of the South Lafourche Levee District ("Levee District") adopted Resolution 11-01 (the "Resolution"), appropriating a permanent levee servitude affecting certain tracts of land located on the west bank of Bayou Lafourche, which the Levee District had determined was an area that was susceptible to storm surge and flooding events. The purpose of the appropriation was to upgrade and increase the size of the existing permanent levee servitude for flood protection in the Larose to Golden Meadow, Louisiana, Hurricane Protection Project area. The Resolution gave the Levee District the right to "construct, operate and maintain levees, berms, drainage or borrow canals or ditches and other flood control works including the right to cut away, dredge or remove spoil or earth therefrom and for the deposit of same as may be necessary[.]"

Landowners that were affected by the appropriation of the permanent servitude were notified by letter dated the same date that the Levee District passed the Resolution. In the letter, the landowners were advised that the Levee District would soon begin the process of "removing earthen material" from the appropriated property and demanded that all landowners "immediately cease and desist performing any and all activities upon the property appropriated." The letter further explained that, as required by state law, the Levee District would pay each affected landowner the fair market value for the appropriated property, as soon as that amount was determined.

One of the landowners to receive the Levee District's letter was Chad M. Jarreau, from Cutoff, Louisiana. Mr. Jarreau owns a 17.1 acre tract of land (Tract 288, hereafter referred to as the "Jarreau tract") that was located partially within the Levee District's permanent servitude that had been appropriated pursuant to the Resolution. Mr. Jarreau and his wife live in a residence near Highway 3235 at the front portion of the Jarreau tract. He operates a dirt excavation and hauling business known as Bayou Construction & Trucking Co., L.L.C. ("Bayou Construction") over the remainder of the Jarreau tract, which backs up to an industrial water canal. Only the rear portion of the Jarreau tract, adjacent to the canal and measuring slightly under one acre at .913 acres, was within the Levee District's appropriated permanent servitude.

It is undisputed that in order to fulfill contract obligations for Bayou Construction, Mr. Jarreau excavated dirt from the appropriated area both *before and after* he received the Levee District's letter. It is also undisputed that when the Levee District tendered a check totaling $1,326.69 for the appropriated Jarreau tract, Mr. Jarreau and his wife rejected the offer. Because Mr. Jarreau did not cease his excavating activities on the appropriated land, the Levee District filed a petition on May 19, 2011, seeking to enjoin Mr. Jarreau from further excavation or removal of dirt from the appropriated permanent servitude on the Jarreau tract. The Levee District also sought monetary damages for Mr. Jarreau's "wrongful" excavation. Mr. Jarreau answered the lawsuit and filed a reconventional demand against the Levee District, seeking just compensation for the full extent of his loss of the Jarreau tract that had been taken by the Levee District. While Mr. Jarreau never disputed the Levee District's authority to appropriate the Jarreau tract, he specifically sought compensation for severance damages, economic/business losses, general damages for mental anguish, loss of use, inconvenience, and loss of enjoyment, costs, and statutory attorney fees. Bayou Construction intervened in the lawsuit, joining in Mr. Jarreau's reconventional demand against the Levee District.[1]

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[1] We are aware of another pending appeal, concerning a class action filed by some owners of the other 355 tracts of land appropriated by the Levee District in connection with the same levee project at issue in this case. *See Adams v. South Lafourche Levee*

The trial court signed an order on June 27, 2011, issuing a preliminary injunction that prohibited Mr. Jarreau from further removal of dirt on the appropriated levee servitude across the Jarreau tract.[2] On September 9 and 10, 2014, a bench trial was held on the merits of the Levee District's main demand for damages, as well as Mr. Jarreau and Bayou Construction's reconventional demand for just compensation and damages. Several expert witnesses testified regarding the value of the Jarreau tract and the value of the dirt taken from the Jarreau tract. After the parties submitted post-trial briefs, the trial court rendered judgment on December 1, 2014. As to the main demand, the trial court awarded damages to the Levee District in the amount of $16,956.00 for the dirt that Mr. Jarreau excavated after the Jarreau tract had been appropriated. The trial court awarded Mr. Jarreau $11,869.00 as just compensation for the Jarreau tract taken by the Levee District's permanent levee servitude.[3] The trial court further awarded Mr. Jarreau and Bayou Construction $164,705.40 for economic and business losses related to the taken Jarreau tract, along with attorney fees of $43,811.85, expert witness fees, costs, and interest.

District, 2015-0507 (La.App. 1st Cir.6/27/16). However, Mr. Jarreau and Bayou Construction seemingly have opted out of the aforementioned class action.

[2] The record does not contain a copy of the permanent injunction that was apparently issued pursuant to a consent judgment signed on September 20, 2011.

[3] The trial court gave a credit for the $1,326.99 amount previously tendered by the Levee District to Mr. Jarreau, for a total award of $10,542.01 for the Jarreau tract.

The Levee District appealed, maintaining that the trial court erred in concluding that *any* compensation was owed for appropriation of property needed for a hurricane protection project, citing the 2006 amendments to La. Const. art. I, § 4(G). Alternatively, the Levee District argues that the trial court erred in failing to apply the current statutory definitions of "fair market value" and "full extent of the loss" pursuant to La. R.S. 38:301 and 38:281(3) and (4), asserting that just compensation does not include economic loss. The Levee District also urges, for the first time in this court, a peremptory exception raising the objection of no cause of action, submitting that the law extends no remedy to Mr. Jarreau or Bayou Construction for the appropriated property. Mr. Jarreau and Bayou Construction answered the Levee District's appeal, seeking reversal of the damage award to the Levee District, as well as an increase in the attorney fees awarded by the trial court and additional attorney fees for this appeal.

PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION

Under La.Code Civ. P. art. 2163, an appellate court has the discretion to decide whether to consider a peremptory exception filed for the first time at the appellate level, as long as the exception is pleaded prior to submission of the case for a decision and proof of the ground of the exception appears of record. Furthermore, an appellate court may notice *sua sponte*, on its own motion, that a party has failed to state a cause of

action. La.Code Civ. P. art. 927(B). However, our review of the Levee District's exception of no cause of action filed in this court reveals that it presents the very same question of law as raised on the merits of the Levee District's appeal – *i.e.*, whether the law extends a remedy for compensation when a landowner's property is appropriated pursuant to a permanent levee servitude for the purpose of a hurricane protection project. Because the exception involves the same issue as presented on the merits, it is unnecessary to discuss the exception separately. *See Allen v. Shreveport Theatre Corp.*, 218 La. 1008, 51 So.2d 607, 609 (1951).

STANDARD OF REVIEW

In this action regarding just compensation for appropriated property and for damages, the trial court's factual determinations as to the value of property and entitlement to any type of damages will not be disturbed on review in the absence of manifest error. *West Jefferson Levee District v. Coast Quality Const. Corp.*, 93-1718 (La.5/23/94), 640 So.2d 1258, 1277, *cert. denied*, 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639. Similarly, where the testimony of experts and witnesses is contradictory and the trial court decides to give more or less weight to the testimony of certain experts and witnesses, the trial court's findings cannot be overturned unless manifest error appears in the record. *Id.* Opinions of experts regarding valuation are advisory and are used only to assist the trial court in determining the amount of compensation due. The weight to be given to expert testimony is determined

by the trier of fact based on the professional qualifications and experience of the expert, the facts and studies upon which the opinion is based, the familiarity with the locality of the property involved, and the possible bias of the witness in favor of the side for whom he testifies. *Id.* Where the experts disagree as to the value of the land taken, the trial court has much discretion in evaluating and determining the weight to be given to each expert. *Id.*

Furthermore, those factual findings made by the trial court that do not directly involve the valuation of the property or the credibility of the appraisers are also entitled to deference, in accordance with the jurisprudential rules regarding the standard of review of factual findings. *See Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La.1993). A court of appeal, after reviewing the entire record, may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. *Id.* Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Id.*, 617 So.2d at 882-83. However, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the

witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Id.* Moreover, an appellate court will conduct a *de novo* review of the facts and not give deference to a trial court's findings of fact where the trial court has made erroneous conclusions of law. *West Jefferson Levee District*, 640 So.2d at 1278.

STATUTORY ANALYSIS

The Levee District's primary argument in this case is one of statutory construction. In order to resolve the question of what "just compensation" is due in this case involving appropriated property for levee/hurricane protection purposes, we must look at our primary source of law – the legislation. The Levee District maintains that the trial court failed to take into consideration the difference between an "appropriation" and an "expropriation," as well as changes in the constitutional provisions concerning private property taken for the public purpose of a permanent levee servitude.[4]

[4] Our review of the parties' arguments at trial and post-trial memoranda filed prior to the trial court's ruling on the merits reveals that neither the parties nor the trial court considered the impact of the 2006 amendments to La. Const. arts. I and VI, which went into effect prior to the Levee District's appropriation pursuant to the Resolution in this case.

When we are called upon to review constitutional changes to legislative provisions, we must follow certain guidelines for statutory interpretation, as outlined by the Louisiana Supreme Court in *Louisiana Municipal Association v. State*, 2004-0227 (La.1/19/05), 893 So.2d 809, 836-37:

> Questions of law, such as the proper interpretation of a statute, are reviewed by this court under the *de novo* standard of review. After our review, we "render judgment on the record, without deference to the legal conclusions of the tribunals below." . . .
>
> "Legislation is the solemn expression of legislative will, and therefore, the interpretation of a law involves primarily the search for the legislature's intent." The interpretation of a statute starts with the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature.
>
> The laws of statutory construction require that laws on the same subject matter must be interpreted in reference to each other. The legislature is presumed to have acted with deliberation and to have enacted a statute in light of the preceding statutes involving the same subject matter. . . .
>
> A statute must be "applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the

> Legislature had in enacting it." In addition, "courts are bound to give effect to all parts of a statute and cannot give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided." [Internal citations omitted.]

Moreover, where two statutes deal with the same subject matter, they should be harmonized if possible, as it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws. *Oubre v. Louisiana Citizens Fair Plan*, 2011-0097 (La.12/16/11), 79 So.3d 987, 997, *cert. denied*, ___ U.S. ___, 133 S.Ct. 30, 183 L.Ed.2d 677 (2012). However, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Id.* In accord with these rules on statutory analysis, we start with the language of the constitutional and statutory provisions at issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS

After the devastation wrought by major hurricanes in 2005, the Louisiana Legislature proposed amendments to the state's constitution regarding, among other things, property rights for land that is used or destroyed in the "construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects," La. Const. art. I, § 4(G) and La. Const. art. VI, § 42(A). Pursuant to 2006 La. Acts, No. 851, § 1, 2006 La. Acts, No. 853, §§ 1 and 2, and 2006 La. Acts, No. 859, § 1, the proposal to amend

articles I and VI of the Louisiana Constitution was submitted to the electors of the State of Louisiana and was ratified by them at a statewide election held on September 30, 2006. The governor proclaimed the adoption of the amendments on October 10, 2006. The amended versions of articles I and VI became effective on October 31, 2006, well before the Resolution at issue in this case was passed. *See* La. Const. arts. I, § 4, and VI, § 42, "Historical Notes."

The thrust of the constitutional amendments was to retain the law on just compensation for property taken or damaged by the state or its political subdivisions for public purposes. However, the amendments added an additional requirement that compensation paid for the taking of, or loss or damage to, property rights affected by hurricane protection or flood control activities, including but not limited to levees and canals, *shall be limited* to and governed by the amount and circumstances required by the Fifth Amendment of the Constitution of the United States of America. *See* Louisiana Bill Digest, Amendment Summary, 2006 Reg. Sess. S.B. 27.

The prohibition against governmental takings of property is found in both the federal and state constitutions. The Fifth Amendment of the U.S. Constitution, made applicable to the states pursuant to the Fourteenth Amendment, provides: "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." The definition of "just compensation" required by the Fifth Amendment has

repeatedly been held to be measured by "the market value of the property at the time of the taking." *Horne v. Department of Agriculture*, ___ U.S. ___, ___, 135 S.Ct. 2419, 2432, 192 L.Ed.2d 388 (2015) (*quoting United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S.Ct. 451, 454, 83 L.Ed.2d 376 (1984)).

The pertinent provisions in the Louisiana Constitution regarding governmental takings of property are found in article I, § 4, entitled "Right to Property," and article VI, § 42, entitled "Compensation for Property Used or Destroyed; Tax." Pursuant to the current version of article I, § 4(B)(1), incorporating the 2006 amendments, "[p]roperty shall not be taken or damaged by the state or its political subdivisions *except for public purposes and with just compensation* paid to the owner or into the court for his benefit."[5] (Emphasis added.) "[P]ublic purposes" is limited to an exclusive list in the article, but includes "[d]rainage, flood control, *levees*, coastal and navigational protection and

[5] Louisiana Revised Statute 13:5102(B)(1) defines a "political subdivision" as any "parish, municipality, special district, . . . district, . . . agency, . . . of any kind which is not a state agency." As a "special district" of the state, the South Lafourche Levee District is a political subdivision. *See Wynat Development Co. v. Board of Levee Com'rs For Parish of Orleans*, 97-2121 (La.4/14/98), 710 So.2d 783, 789-90, *cert. denied.* 525 U.S. 1017, 119 S.Ct. 542, 142 L.Ed.2d 451 (1998). *See also* La. R.S. 38:281(6) defining "Levee district" as "a political subdivision of this state organized for the purpose and charged with the duty of constructing and maintaining levees, and all other things incidental thereto within its territorial limits."

reclamation for the benefit of the public generally." La. Const. art. I, § 4(B)(2)(iii) (emphasis added).

Prior to the 2006 amendments, article I, § 4(B) further provided, "[i]n every expropriation, a party has the right to trial by jury to determine compensation, and *the owner shall be compensated to the full extent of his loss.*" (Emphasis added.) The phrase "compensated to the full extent of his loss" was a change in the law when it was added to the 1974 Constitution, thereby broadening the measure of damages and allowing landowners to remain in an equivalent financial position to that which they enjoyed before the taking. *See West Jefferson Levee District*, 640 So.2d at 1271, n. 20. Thus, full compensation pursuant to the 1974 Constitution included things like inconvenience and loss of profits from the takings of business premises so that landowners were compensated for their loss, not merely the loss of their land. *Id.* But the re-wording of article I, § 4(B) in the 2006 constitutional amendments resulted in the removal of the phrase, "compensated to the full extent of his loss." We view this as an intentional return to the previous law providing that a landowner could receive only the fair market value and any severance damages for property that had been taken by the government.

We note, however, that La. Const. art. I, § 4(E) additionally provides that "[t]his Section *shall not apply to appropriation of property necessary for levee* and levee drainage *purposes.*" (Emphasis added.) This is significant because this case clearly deals with an "appropriation of property" through the adoption of the

Resolution giving the Levee District the "rights to construct, operate and maintain levees." We therefore find that La. Const. art. I, § 4 does not specifically apply to this case.

Rather, for compensation in cases of property appropriated for levees, we must look to La. Const. art. VI, § 42, which, after its amendment in 2006, provides in pertinent part and with emphasis added:

> **(A) Compensation.** Notwithstanding any contrary provision of this constitution, *lands* and improvements thereon hereafter *actually used or destroyed for* ***levees*** *or levee drainage purposes shall be paid for* ***as provided by law.*** With respect to *lands* and improvements *actually used or destroyed in the construction, enlargement, improvement, or modification of* federal or non-federal ***hurricane protection projects,*** *. . . such* ***payment shall not exceed the amount of compensation authorized under Article I, Section 4(G)*** *of this constitution.*

The legislature has provided statutory law in La. R.S. 38:301, regarding the amount of compensation due when land has been taken, used, damaged, or destroyed for levee purposes. The measure of compensation in those instances is "fair market value to the full extent of the loss[,]" *but* if the land is taken for levee purposes by way of a "*permanent levee servitude*" then the measure of compensation is "*fair market value of the property* taken or destroyed *before the proposed*

use . . . , without allowing any change in value caused by the construction of the levee [.]" *See* La. R.S. 38:301.[6] (Emphasis added.) However, when we examine the statutory definitions of "fair market value" and "full extent of the loss," we are again brought back to the limit of compensation authorized by La. Const. art. I, § 4(G), which references the Fifth Amendment of the U.S. Constitution. *See* La. R.S. 38:281(3) and (4).[7]

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[6] Louisiana Revised Statutes 38:301 provides, in pertinent part, with emphasis added:

> A. (1) The levee boards . . . may construct and maintain levees . . . and do all other things incidental thereto.
>
> * * *
>
> C. (1)(a) *All lands*, exclusive of batture, and improvements hereafter *actually taken, used, damaged, or destroyed for levee* or levee drainage *purposes shall be paid for at fair market value to the full extent of the loss.*
>
> * * *
>
> (h) The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a ***permanent levee servitude shall be the fair market value of the property*** *taken or destroyed* **before the proposed** use of the property or construction of the levee facilities, ***without allowing any change in value caused by the construction of the levee*** *facilities. . . .*
>
> (i) *The compensation for a permanent levee servitude* defined herein *shall apply to all lands*, exclusive of batture, *and improvements appropriated*, taken, used, damaged, or destroyed *for levee purposes* after the effective date of this Act.

[7] Louisiana Revised Statutes 38:281(3) defines "fair market value" as: "the value of the lands or improvements actually taken, used, damaged or destroyed for levees. . . . Pursuant to Article 1,

Additionally, because the Resolution at issue in this case specifically addresses the taking of property for a hurricane protection project, we are once again directed by La. Const. art. VI, § 42, to consider the mandate of the amount of compensation authorized under La. Const. art. I, § 4(G). Louisiana Constitution article I, § 4(G) provides, in pertinent part and with emphasis added:

> **Compensation paid** for the taking of, or loss or damage to, property rights **for the construction, enlargement, improvement, or modification of** federal or non-federal **hurricane protection projects,** . . . ***shall not exceed*** **the compensation required by the Fifth Amendment** of the Constitution of the United States of America.

Thus, it is readily apparent that every statutory and constitutional reference regarding the proper measure of "just compensation" for property taken or damaged pursuant to a permanent levee servitude for

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Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, **such determination of fair market value shall not exceed the compensation required by the Fifth Amendment** of the Constitution of the United States of America[.]" (Emphasis added.)

> Similarly, the definition for "full extent of the loss" in La. R.S. 38:281(4) also refers to the constitutional provision for compensation, stating in pertinent part, that "**payment for the full extent of the loss shall not exceed fair market value and shall not exceed the compensation required by the Fifth Amendment** of the Constitution of the United States of America[.]" (Emphasis added.)

a hurricane protection project, as was done by the Levee District in this case, has been legislatively restricted and shall not exceed that which is required by the Fifth Amendment. As we previously noted, compensation required by the Fifth Amendment is the fair market value of the property at the time of the taking for public use (in this case, when the property was appropriated). *See Horne*, 135 S.Ct. at 2432. *See also Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194, 81 L.Ed.2d 1 (1984); *United States v. Land, 62.50 Acres of Land More or Less, Situated in Jefferson Parish, State of La.*, 953 F.2d 886, 890 (5th Cir.1992). We will now discuss the impact of this limitation on the amounts awarded for just compensation in this case.

JUST COMPENSATION

When property is needed for levee purposes, the levee districts of this state can either appropriate or expropriate the necessary property. *Wynat Development Co. v. Board of Levee Com'rs For Parish of Orleans*, 97-2121 (La.4/14/98), 710 So.2d 783, 785, *cert. denied*, 525 U.S. 1017, 119 S.Ct. 542, 142 L.Ed.2d 451 (1998). Historically, riparian lands needed for levee purposes could be "taken" without formal expropriation procedures because such lands are subject to a servitude under La. Civ.Code art. 665.[8] *Id.* The right of

[8] Louisiana Civil Code article 665 provides, as amended and reenacted by Acts 2006, No. 776, § 1:

> Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by

appropriation has been characterized as the right to act first and talk later. *Dickson v. Board of Com'rs of Caddo Levee Dist.*, 210 La. 121, 26 So.2d 474, 478 (1946). When a landowner suffers a taking or damage in the absence of a judicial expropriation proceeding, he may seek compensation through an inverse condemnation action. *See Constance v. State Through Dept. of Transp. and Development Office of Highways*, 626 So.2d 1151, 1156 (La.1993), *cert. denied*, 512 U.S. 1219, 114 S.Ct. 2706, 129 L.Ed.2d 834 (1994). Mr. Jarreau's reconventional demand against the Levee District is such an action for just compensation regarding the taking of his property's soil for use in construction of the levee.

The trial court in this case discussed the difference between expropriation and appropriation in oral reasons and concluded that the Resolution adopted by the Levee District on January 10, 2011, effected an *appropriation* of the Jarreau tract for levee purposes. We agree that the Jarreau tract was appropriated. *See Wynat Development Co.*, 710 So.2d at 786. *See also Vela v. Plaquemines Parish Government*, 2000-2221

> the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. *Such servitudes also exist on property necessary for the building of levees* and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, *including the repairing of hurricane protection levees.*
>
> All that relates to this kind of servitude is determined by laws or particular regulations. [Emphasis added.]

(La.App. 4th Cir.3/13/02), 811 So.2d 1263, 1268, *writs denied*, 2002-1350 (La.6/21/02), 819 So.2d 337 and 2002-1224, 819 So.2d 343 ("Appropriation is the exercise of a pre-existing but previously unexercised public right (the levee servitude in this case) to property, whereas expropriation is the effort to acquire new public rights to property possessed by a private owner." *Quoting Vela v. Plaquemines Parish Government*, 97-2608 (La.App. 4th Cir.3/10/99), 729 So.2d 178, 181.)

We also find that the Levee District's use of the dirt from the Jarreau tract was, in effect, a constitutional "taking" of the property that requires just compensation to be paid to the landowner.[9] *See Borgnemouth Realty Co., Ltd. v. Parish of St. Bernard*, 2013-1651 (La.App. 4th Cir.5/21/14), 141 So.3d 891, 897, *writs denied*, 2014-1285 (La.9/26/14), 149 So.3d 266 and 2014-1351, 149 So.3d 269 ("if property such as the soil itself . . . is taken by a political subdivision, such

[9] The Louisiana Supreme Court in *State, Through Dept. of Transp. and Development v. Chambers Inv. Co., Inc.*, 595 So.2d 598, 602-03 (La.1992), defined a "taking" as "*any* substantial interference with the free use and enjoyment of property," and set forth a three-prong test to assist in establishing whether a constitutional taking has occurred. The factors for the court to decide are as follows: (1) whether a person's legal right with respect to a thing or an object has been affected; (2) whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense; and (3) whether the taking or damaging was for a public purpose. It is clear that Mr. Jarreau's right to excavate the dirt on his tract has been severely affected by the Levee District's appropriation of a permanent levee servitude (public purpose) and the injunction prohibiting him from further excavation on a portion of his property that has been used exclusively in Mr. Jarreau's dirt pit business.

as the . . . Levee Board, for public purposes, such as the construction of a levee, just compensation must be paid to the owner.")[10] (Footnote omitted.) It is clear that Mr. Jarreau is the owner of the dirt under his tract of land, and he is entitled to just compensation for the taking of his dirt by the Levee District.[11] *See Borgnemouth Realty Co.*, 141 So.3d at 897. We are mindful, however, that because this is an appropriation case, not an expropriation case, title to the appropriated property (the Jarreau tract) does not change. *See Delaune v. City of Kenner*, 550 So.2d 1386, 1389 (La.App. 5th Cir.), *writ denied*, 553 So.2d 475 (La.1989).

The Levee District argues that the trial court erred in concluding that *any* compensation was owed to Mr. Jarreau and Bayou Construction for the appropriation, or alternatively, that the trial court erred in awarding more than what the law requires for just compensation. Based on our exhaustive review of the

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[10] The *Borgnemouth Realty Co.* case is distinguishable from the case *sub judice* in two important respects: (1) at the time that the property was taken in *Borgnemouth Realty Co.*, La. Const. art. 1, § 4(G) had not been added; thus, the landowner was entitled to be compensated to the full extent of his loss as provided prior to the effective date of the 2006 constitutional amendments; and (2) the appropriating documents in *Borgnemouth Realty Co.* made no specific mention about using the appropriated land for soil to construct the levee. *See Borgnemouth Realty Co.*, 141 So.3d at 897, n. 5, and at 898-99.

[11] Thus, we deny the Levee District's exception of no cause of action that was filed in this court, because the law clearly extends a remedy to Mr. Jarreau for the taking of his dirt.

2006 constitutional amendments and the implementing statutes, we find merit in the Levee District's alternative argument. The trial court determined that just compensation for the Jarreau tract included the fair market value of the property *plus* economic/business losses for lost profits associated with the value of the excavated dirt. However, the only amount of compensation that is authorized under current constitutional and statutory law for property taken pursuant to a permanent levee servitude is the fair market value of the property at the time of the appropriation – before the proposed use and without allowing any change in value caused by levee construction. Therefore, we find that the trial court legally erred in awarding economic/business losses to Mr. Jarreau and Bayou Construction on their reconventional demand. *See* La. R.S. 38:301(C)(1)(h).[12] Due to the legal error, we will conduct a *de novo* review of the facts and not give deference to the trial court's findings of fact on valuation. *See West Jefferson Levee District*, 640 So.2d at 1278.

The fair market value of property taken for public purposes is the price a buyer is willing to pay after he has considered all of the uses to which the property may be put, where such uses are not speculative, remote, or contrary to law. *See West Jefferson Levee District*, 640 So.2d at 1273. The Louisiana Supreme Court

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[12] As we discussed *supra*, the policy of compensating those whose property is adversely affected by appropriation is embodied in article VI, § 42 of the Louisiana Constitution, and the statute that implements this policy is La. R.S. 38:301. *See Vela*, 811 So.2d at 1269.

has held that "market value means the worth of the land considered in the light of its best and highest use." *State Through Dept. of Highways v. Rapier*, 246 La. 150, 164 So.2d 280, 282 (1964); *see also, Borgnemouth Realty Co.*, 141 So.3d at 901. The current use of the property is presumed to be the highest and best use. *West Jefferson Levee District*, 640 So.2d at 1275; *see also Land, 62.50 Acres*, 953 F.2d at 890.

In this case, there is no dispute that at the time of the appropriation in January 2011, Mr. Jarreau was actively using the Jarreau tract for excavating dirt to fulfill contracts connected with his business, Bayou Construction. Mr. Jarreau testified that he purchased the property in 2002 for the specific purpose of operating a dirt excavation business, and he and his wife moved their home to the property in 2005. An expert real estate appraiser, Bennet Oubre, testified at trial on behalf of Mr. Jarreau. Mr. Oubre determined the fair market value of the Jarreau tract on the date of appropriation in January 2011 was $11,869.00, without any consideration for lost profits related to the value of the dirt in the Jareau tract.[13] Mr. Oubre concluded that the highest and best use of the appropriated Jarreau tract, as well as the entire 17.1 acres, was the current use as a "dirt pit" operation. He classified the property as a mixed-use tract on the date of appropriation, for both

[13] After comparing multiple similar-sized properties, Mr. Oubre concluded that the value of Mr. Jarreau's property was $13,000.00 per acre; however, the valuation of $11,869.00 resulted because the appropriated portion of Mr. Jarreau's property was a little less than an acre.

commercial/industrial and residential purposes. Mr. Oubre also determined that the Levee District's appropriation for a permanent levee servitude was paramount to a complete deprivation of any use of the remaining .913 acre Jarreau tract, concluding that there was no reasonable use left for the Jarreau tract after the appropriation.

The Levee District's expert real estate appraiser, Martin Glynn, testified that the Jarreau tract had a fair market value of $1,820.00. Mr. Glynn used a standard mathematical approach to get the contributory value of the Jarreau tract, concluding that the rear part of Mr. Jarreau's property was not as valuable as the front portion along the highway. He stated that there was no sales data on which to base a valuation for the rear acre of property, and the appropriated Jarreau tract had no real value as a stand-alone tract since it was cut off from highway access. Mr. Glynn also found that the highest and best use of the property was multi-use, combining residential, pastureland, and commercial. He determined that the front two acres of Mr. Jarreau's property were the most marketable and the overall value of the entire tract was $11,500.00 per acre.

Another expert real estate appraiser hired by the Levee District was William J. Pousson, Sr. Mr. Pousson appraised the Jarreau tract to be valued at $1,301.00 to $1,425.00, based on comparable properties. Mr. Pousson valued Mr. Jarreau's entire property to be worth $13,000.00 per acre, but he testified that the rear Jarreau tract that was appropriated was not

worth as much as the remaining parent tract due to the lack of highway and utility access. Mr. Pousson also found that the Jarreau tract had a different highest and best use (dirt pit) than the remainder of Mr. Jarreau's property (residential/commercial).

When further questioned, Mr. Jarreau's expert, Mr. Oubre, explained the difference in his valuation analysis and why he did not separate the rear portion of Mr. Jarreau's property when he valued the property. He looked at the property as a whole. He disagreed with the approach of the other appraisers, because he said the Jarreau tract was not cut off from highway and utility access until after the appropriation and there were no comparable sales where the rear portion of the tract had been cut off. Mr. Oubre testified that his valuation of the entire property at $13,000.00 per acre was very similar to the other appraisals, and in his opinion, that amount was correct based on comparable market data for sales of the whole property.

Based on the evidence in the record and the testimony of all three experts, we find the valuation of Mr. Jarreau's property at $13,000.00 per acre to be reasonably supported. We also find that Mr. Oubre's method of valuing the entire property without allowing for any change in value caused by the appropriation (cutting the property off from highway access) was correct in light of the statutory measure of compensation for land taken by way of a permanent levee servitude. *See* La. R.S. 38:301(C)(1)(h) (fair market value of the property taken or destroyed *without allowing any change in value* caused by construction of the levee). Since the

appropriated portion was less than an acre, we accept the valuation of Mr. Oubre for the Jarreau tract to be $11,869.00. The trial court also found the Jarreau tract to be worth $11,869.00 as of the date of the appropriation on January 10, 2011. Thus, we affirm that portion of the trial court's judgment regarding the reconventional demand, awarding Mr. Jarreau $11,869.00, less the amount previously tendered by the Levee District, plus interest from the date of the appropriation.

However, as for the portion of the trial court's judgment awarding Mr. Jarreau and Bayou Construction damages for economic and business losses associated with the appropriation, we must reverse the award of $164,705.40 against the Levee District. The current law under our amended constitution does not support any award for just compensation beyond the fair market value of the property on the date of the appropriation, which clearly does not allow compensation for lost profit damages associated with the value of the dirt in the Jarreau tract.

DAMAGES FOR "WRONGFUL" EXCAVATION

We turn now to a discussion regarding the propriety of the $16,956.00 damage award in favor of the Levee District on the main demand. That amount represented the value of the dirt excavated by Mr. Jarreau after the date of the appropriation. Mr. Jarreau and Bayou Construction answered the Levee District's appeal, contending that the trial court erred in awarding

any damages to the Levee District for Mr. Jarreau's excavation of dirt from the Jareau tract after he received notice of the appropriation.

At issue is the right to dispose of the dirt on the appropriated Jarreau tract after the appropriation and whether Mr. Jarreau interfered with or diminished the use of the Levee District's servitude. Both Mr. Jarreau and the Levee District claim ownership of the dirt from the appropriated property; Mr. Jarreau because he owns the underlying dirt on his property, and the Levee District because it owns the right to a permanent levee servitude on the Jarreau tract pursuant to the Resolution. It is undisputed that Mr. Jarreau excavated dirt from the Jarreau tract after the appropriation. It is also undisputed that Mr. Jarreau stopped his excavations in the area after the trial court issued a permanent injunction on September 20, 2011, prohibiting further removal of dirt from the appropriated levee servitude area.

The Resolution dated January 10, 2011, states that the permanent levee servitude appropriated "*shall vest in the [Levee District] the rights* to construct, operate and maintain levees, . . . *including the right to cut away, dredge or remove spoil or earth* therefrom . . . ***as may be necessary*** *in the construction*, operation and maintenance of said levees . . . for the . . . Hurricane Protection Project." (Emphasis added.) There was testimony at trial by the general manager and executive secretary for the Levee District, Windell A. Curole, that the Levee District needed the dirt for construction of the levee in order to increase flood protection for the

area. Mr. Curole further testified that the "main reason" for the appropriation was to take the dirt from the properties. Neil Angelette, a civil engineer and surveyor for the Levee District, was accepted as an expert witness by the trial court. Mr. Angelette testified that the Levee District had planned to excavate 9,500 cubic yards of dirt at a depth of six-to-eight feet across the Jarreau tract for use in constructing the levee.

Mr. Angelette stated that he was asked to survey the excavation activities on the Jarreau tract several times, first in mid-January 2011, and then again in June and July 2011. In January 2011, it was observed that an estimated 185 cubic yards of dirt was stockpiled on the Jarreau tract, but Mr. Angelette did not know the exact origin of the stockpiled dirt. A few months later in June, Mr. Angelette estimated that 2,800 cubic yards had been excavated from the appropriated area, and a new hole/pond was observed in the area. In July 2011, a third survey was conducted, resulting in an updated estimate – the total amount of dirt removed from the appropriated area since January was approximately 2,826 cubic yards.

Mr. Jarreau testified that there was a pond in the appropriated area that actually existed before the appropriation in January 2011, and was the result of his excavation work prior to the appropriation. He further stated that he dug the top two feet of dirt from the area before the appropriation. Additionally, Mr. Jareau testified that he commonly dug his dirt pits to a depth of 15 to 20 feet. Mr. Jarreau stated that he had "no idea on the quantity" of dirt he had excavated prior to the

appropriation, and that he often stockpiled dirt all along his 17.1 acres of land to allow the dirt to dry before delivery to a customer. Mr. Jarreau claimed that he misunderstood the meaning of the letter he had received from the Levee District, and he believed that he could continue to perform his excavation work since he refused the check tendered by the Levee District and did not want to donate his property. Mr. Jarreau estimated that he could have excavated 23,000 cubic yards of dirt from the Jarreau tract, which was enough to meet the obligations of one of his outstanding contracts for Bayou Construction.

The permanent levee servitude that burdened Mr. Jarreau's property was not only a legal public servitude, but a predial servitude. *See* La. Civ.Code art. 646 ("A predial servitude is a charge on a servient estate for the benefit of a dominant estate.") *See also* La. Civ.Code art. 654 ("Predial servitudes may be natural, legal, and voluntary or conventional. . . . [L]egal servitudes are imposed by law.") Legal servitudes are limitations on ownership established by law for the benefit of the general public. La. Civ.Code art. 659.

The legal servitude at issue was appropriated through the Resolution and vested the Levee District with the right to use soil from the Jarreau tract "*as may be necessary* in the construction, operation and maintenance" of the levee for the purpose of a hurricane protection project. Mr. Jarreau retained the title to his appropriated land. Jurisprudence requires that any limitations on the use of appropriated land must be expressed, and in this case, the expression would

necessarily have been in the Resolution. *See Plaquemines Parish Commission Council v. Hero Lands Co.*, 388 So.2d 790, 792 (La.1980). A review of the actual appropriating language of the Resolution reveals nothing that limits Mr. Jarreau's use of his land, including the dirt beneath the surface of his land. However, there is a reference at the end of the Resolution concerning the notification to be mailed by the Levee District to all of the landowners. In that regard, the Resolution directs that the notice should demand that the landowners "immediately cease and desist performing any and all activities upon the property appropriated." It is this language that presumably led the trial court to issue the permanent injunction preventing Mr. Jarreau from further excavation work.

Mr. Jarreau does not contest the validity of the injunction issued by the trial court; instead, he seeks reversal of the damage award for the alleged "wrongful excavation" of dirt from the appropriated property. Mr. Jarreau's primary argument is that the Levee District failed to establish the amount of dirt that Mr. Jarreau actually removed after the appropriation in January 2011. We agree there is no definitive amount established as to the *actual* amount of dirt excavated after the appropriation, but the Levee District's expert witness, Mr. Angelette, *estimated* that approximately 2,826 cubic yards of dirt had been removed from the Jarreau tract between January and July 2011. This testimony was uncontroverted.

The more pertinent issue, however, is whether Mr. Jarreau's excavation of approximately 2,826 cubic

yards of dirt after the appropriation actually interfered with the exercise of the Levee District's permanent levee servitude. In connection with legal servitudes, the law obligates the owner of the servient estate (Mr. Jarreau in this case) to keep his estate fit for the purposes of the servitude, which in this case involved the use of the dirt that was necessary for construction of a levee. *See* Comment (b) of the 1977 Revision Comments for La. Civ.Code art. 651, providing in part:

> The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it. He may be required by convention or by law to *keep his estate in suitable condition for the exercise of the servitude* due to the dominant estate. [Emphasis added.]

Further, the "owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude." La. Civ.Code art. 748. The very essence of a predial servitude is that the dominant estate has a right to do something which may limit the use of the servient estate. *Dautreuil v. Degeyter*, 436 So.2d 614, 618 (La.App. 3d Cir.1983). As explained in *Comby v. White*, 98-1437 (La.App. 3d Cir.3/3/99), 737 So.2d 94, 97, "[i]nterference with the use and enjoyment of a servitude by the owner of the servient estate entitles the owner of the dominant estate to damages." Further relief in the form of an injunction may also be available. *Buckhorn Ranch, L.L.C. v. Holt*, 2008-1509 (La.App. 3d Cir.5/6/09), 10

So.3d 367, 372, *writ denied*, 2009-1263 (La.9/18/09), 17 So.3d 977.

Thus, a determination must be made as to whether Mr. Jarreau's removal of dirt after the appropriation took place rendered the Jarreau tract unsuitable for the Levee District's exercise of the servitude or somehow diminished or made the use of the servitude more inconvenient for the Levee District. While we recognize that evaluation of the underlying facts upon which a damage award is based is the manifest error standard of review, the evaluation of the amount awarded is subject to the abuse of discretion standard. *See Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La.1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Our review of the record does not reveal any evidence tending to show that the Levee District was deprived of the necessary amount of dirt needed from the Jarreau tract or suffered any inconvenience connected with the use of the levee servitude on the Jarreau tract.

The only testimony regarding the amount of dirt the Levee District planned to excavate from the Jarreau tract was offered by Mr. Angelette, who testified that the Levee District's plan was to dig to a depth of six-to-eight feet across the Jarreau tract for a total of 9,500 cubic yards of dirt. Further, Mr. Jarreau's uncontradicted testimony was that he could have excavated 23,000 cubic yards of dirt from the appropriated area and he commonly dug his dirt pits anywhere from 15

to 20 feet.[14] Since Mr. Angelette estimated that Mr. Jarreau had only removed 2,862 cubic yards of dirt after the appropriation, it follows that there was a surplus of dirt still available in the Jarreau tract for the Levee District to exercise its right to use the dirt that it estimated was *necessary* for constructing the levee.

Therefore, we find the trial court erred in determining that the Levee District's servitude was interfered with or diminished in any way by Mr. Jarreau's actions after the Jarreau tract was appropriated. The record reveals that no losses were sustained by the Levee District. Consequently, we conclude that monetary damages in favor of the Levee District for Mr. Jarreau's wrongful excavation after the appropriation took place was improper, not reasonably supported by the record, and a clear abuse of the trial court's discretion.[15] The injunctive relief was the only remedy available to the Levee District under these particular facts.

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[14] A certified public accountant, Charles C. Theriot, testified as an expert witness on behalf of Mr. Jarreau and Bayou Construction. Mr. Theriot referenced a report of a civil and environmental engineer, Danny J. Hebert, when he estimated that 23,614 to 28,380 cubic yards of dirt could have been excavated from the appropriated property within a year's time, at a depth of 15 to 20 feet respectively. This evidence was not refuted.

[15] The trier of fact is given great discretion in determining damage awards. *See* La. Civ.Code art. 2324.1. There is no mechanical rule for determining general damages. The facts and circumstances of each case must control. The initial inquiry is whether the award for the injuries and their effects under the particular circumstance of the injured party is a clear abuse of the great discretion of the trier of fact. *Brown v. Williams*, 36,863 (La.App.2d Cir.7/31/03), 850 So.2d 1116, 1124, *writ denied*, 2003-2445

We therefore reverse the $16,956.00 damage award to the Levee District.

ATTORNEY FEES

In their answer to the Levee District's appeal, Mr. Jarreau and Bayou Construction maintain that the trial court erred in awarding attorney fees pursuant to La. R.S. 38:301(C)(2)(f) (reasonable attorney fees shall not exceed 25% of the difference between the compensation awarded in a judgment and the amount found to be due by the Levee District), rather than La. R.S. 13:5111 (reasonable attorney fees actually incurred in a proceeding, other than an expropriation, for compensation resulting from the taking of property). Also, Mr. Jarreau and Bayou Construction seek an additional award of attorney fees incurred as a result of this appeal. An appellate court reviews an award of attorney fees for an abuse of discretion. *Covington v. McNeese State University*, 2012-2182 (La.5/7/13), 118 So.3d 343, 348, *writ denied*, 2012-2231 (La.1/17/14), 130 So.3d 338.

It is well settled that attorney fees are not allowed for the prevailing party except where authorized by statute or contract. *State, Dept., of Transp. and Development v. Wagner*, 2010-0050 (La.5/28/10), 38 So.3d 240, 241. In a similar inverse condemnation case involving the use of soil and dirt borrowed from property that had been appropriated for construction of a levee

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(La.11/21/03), 860 So.2d 555; *Summarell v. Ross*, 27,160 (La.App.2d Cir.8/23/95), 660 So.2d 112, 116.

(but prior to the 2006 constitutional amendments), it was determined that the governing statute providing for attorney fees is La. R.S. 13:5111. *Olivier Plantation, L.L.C. v. Parish of St. Bernard*, 2013-0497 (La.App. 4th Cir.10/30/14), 151 So.3d 965, 969-970, *writs denied.* 2014-2496 and 2014-2573 (La.2/27/15), 160 So.3d 173 (relying on the same holding as in *Borgnemouth Realty Co.*, 141 So.3d at 902-03). Louisiana Revised Statutes 13:5111 provides, in pertinent part:

> A. **A court** of Louisiana **rendering a judgment** for the plaintiff, **in a proceeding brought** against the state of Louisiana . . . or other political subdivision . . . **for compensation for the taking of property** by the defendant, **other than through an expropriation proceeding, shall determine and award** to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for **reasonable attorney fees actually incurred** because of such proceeding. [Emphasis added.]

Thus, the attorney fees awarded to Mr. Jarreau and Bayou Construction in this case are mandated by statute to be those reasonable fees that are actually incurred because of the proceeding, in this case the reconventional demand, brought for compensation for the taking of property by means of an appropriation. We conclude that the trial court erred in applying the statute that applies to expropriation proceedings (La. R.S. 38:301) rather than R.S. 13:5111 that applies to

proceedings *other than* expropriation, such as appropriation or inverse condemnation. *See St. Tammany Parish Hosp. Service, Dist. No. 2 v. Schneider*, 2000-0247 (La.App. 1st Cir.5/11/01), 808 So.2d 576, 582-83 ("the legislature has addressed the inverse condemnation situation by statutorily providing for the award of attorney fees in such cases . . . *See* LSA-R.S. 13:5111"). This holding is in accord with the rules on statutory analysis outlined *supra*, where we noted that the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Oubre*, 79 So.3d at 997. Therefore, we must amend the trial court's attorney fees award to Mr. Jarreau and Bayou Construction.

At trial, Mr. Jarreau and Bayou Construction introduced evidence through their counsel of record showing that the actual amount of attorney fees incurred was $142,551.50. That amount was not contradicted by the Levee District and the trial court did not find it to be unreasonable before incorrectly applying a cap on the fees. Because of the trial court's error of law, we must determine *de novo* whether attorney fees in the amount of $142,551.50 are reasonable under these circumstances. The Louisiana Supreme Court has set out factors to be considered by a court in determining the reasonableness of an award of attorney fees: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made;

(8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge. *See State, Dept., of Transp. and Development v. Williamson*, 597 So.2d 439, 442 (La.1992).

Considering the factors for reasonableness that are particular to this case, we are impressed with the time, diligence, and skill of the attorneys pursuing just compensation for Mr. Jarreau and Bayou Construction in the face of unyielding resistance on the part of the Levee District. The case is difficult in that it involves a *res nova* application of constitutional amendments and specialized knowledge on expropriation and appropriation procedures. The result obtained was a very good one at the trial court level in that Mr. Jarreau was awarded compensation for the taking of his property. Based on our review of the record and the facts and circumstances of this case, we conclude that $142,551.50 is a reasonable amount for an attorney fees award.

Additionally, given that La. R.S. 13:5111 envisions reimbursement to the landowner for reasonable attorney fees actually incurred as a result of the proceeding seeking compensation for the taking of property, and this appeal is clearly a part of the proceeding, we find that Mr. Jarreau and Bayou Construction are entitled to additional attorney fees for their appeal. *See Town of Walker v. Stafford*, 2001-2188 (La.App. 1st Cir.10/18/02), 833 So.2d 349, 355, *writs denied.* *2003-0441 (La.4/25/03), 842 So.2d 400 and 2003-0524, 842 So.2d 405; *State, Dept. of Transp. and Development v.*

Illinois Cent. Gulf R. Co., 464 So.2d 401, 404 (La.App. 1st Cir.1985).

Further, an increase in attorney fees is generally granted when a party who was awarded attorney fees in the trial court is forced to and successfully defends against an appeal. *Bergeron v. Watkins*, 98-0717 (La.App. 1st Cir.3/2/99), 731 So.2d 399, 405. This court can evaluate the work of counsel and make an award of attorney fees for work at the appellate level. The appeal perfected by the Levee District necessitated additional work for Mr. Jarreau and Bayou Construction's attorneys, including the preparation of an answer to the appeal, preparation of appellate briefs on the appeal and an exception filed in this court by the Levee District, as well as preparation for oral argument before this court. Under the circumstances, we find that $5,000.00 is a reasonable attorney fee award for appellate work in this case; thus, we amend the judgment to award Mr. Jarreau and Bayou Construction an additional $5,000.00 in attorney fees for the appeal of this case.

CONCLUSION

For the assigned reasons, we affirm the trial court's judgment in part as to the award of $11,869.00 in favor of Mr. Jarreau and against the Levee District; we reverse in part as to the $164,705.40 award to Mr. Jarreau and Bayou Construction for economic and business losses; and we reverse in part as to the damage award of $16,956.00 in favor of the Levee District.

As for the attorney fees award, we affirm the judgment as amended to reflect the actual attorney fees incurred in the trial court in the amount of $142,551.50, plus an additional $5,000.00 for attorney fees incurred on appeal, all to be awarded to Mr. Jarreau and Bayou Construction, plus legal interest from the date of this judgment until paid. All other portions of the trial court judgment are affirmed. Considering our decision on the merits, we hereby deny the Levee District's peremptory exception of no cause of action. Costs of this appeal in the amount of $6,001.10 are assessed equally between plaintiff/defendant-in-reconvention, South Lafourche Levee District, and defendants/plaintiffs-in-reconvention, Chad M. Jarreau and Bayou Construction & Trucking, L.L.C.

PERMPTORY EXCEPTION OF NO CAUSE OF ACTION DENIED; TRIAL COURT JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AFFIRMED AS AMENDED IN PART, AND RENDERED.

PETTIGREW, J. concurs.

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

DRAKE, J., concurs in the result.

CRAIN, J., agrees in part concurs in part, dissents in part, and assigns reasons.

GUIDRY, J., dissenting in part.

I respectfully dissent from that portion of the opinion finding that attorney fees should be awarded in accordance with La. R.S. 13:5111 rather than La. R.S. 38:301(C)(2)(f). None of the jurisprudential authority relied on in the opinion directly deal with the application of La. R.S. 38:301(C)(2)(f) vis-à-vis La. R.S. 13:5111. Instead, the cited "levee" cases from the Fourth Circuit are based on takings made under La. R.S. 38:387 E (under the Part V, titled "Expropriation by Declaration of Taking") and La. R.S. 29:721 *et seq*. (the "Louisiana Homeland Security and Emergency Assistance and Disaster Act").

Moreover, the First Circuit case cited as authority for applying La. R.S. 13:5111 is a case that does not involve a levee. And finally, I disagree with the majority's apparent conclusion that La. R.S. 13:5111 is more specifically directed to the matter than La. R.S. 38:301, which inarguably applies in this case as it is applied to decide the issue of the just compensation due to the property owner. I believe that La. R.S. 38:301(C)(2)(f) is the statute more specifically directed to the matter, as this matter, as noted in the opinion, specifically involves land taken for levee purposes. Whereas, La. R.S. 13:5111 appears to be the more general statute in this instance as it is directed to any appropriation by a governmental entity and not just appropriations for levee purposes. Thus, for the foregoing reasons, I dissent

from that portion of the opinion regarding the award of attorney fees in this matter.

CRAIN, J. agreeing in part, concurring in part, and dissenting in part.

The majority interprets the 2006 constitutional amendments to mean that Louisiana landowners are owed no compensation for the State's appropriation of their land for levee purposes, unless the appropriation is also a constitutional "taking." I do not believe, when the constitutional amendments were confected and voted on, that either the legislature or the citizens of Louisiana intended to eliminate all measure of compensation for an appropriation, when some measure of compensation has been allowed for nearly one hundred years.

I interpret the 2006 amendments as simply changing the measure of compensation from "full extent of the loss" to the more restrictive "just compensation" measure required by the Fifth Amendment to the United States Constitution. By reducing, but not eliminating, the measure of compensation for appropriations, the amendments achieved a balance between the interests of landowners burdened by riparian servitudes in being compensated for the interference with the use of their property and the State's need to construct hurricane protection projects.

Since I interpret the constitutional amendments to require payment of just compensation to the landowner for the appropriation of his land, which does not include damages for economic and business loss, I agree with reversing the $164,705.40 award to the landowner. I find no manifest error in the trial court's award of $11,869 for the fair market value of the land (which was separately itemized and reviewable), and therefore concur in affirming it. Additionally, I agree with reversing the $16,956 award to the Levee District based upon its failure to prove its damages.

Finally, I disagree with amending the award of attorney fees. For the reasons assigned by Judge Guidry in dissent, the trial court correctly awarded attorney fees pursuant to the more specific statute, Louisiana Revised Statute 38:301, which applies a 25% cap. I would affirm the trial court's award in this respect.

17th JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFOURCHE

STATE OF LOUISIANA

No. 117693 Division "B"

SOUTH LAFOURCHE LEVEE DISTRICT

VERSUS

CHAD M. JARREAU

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

(Filed Dec. 2, 2014)

This matter came on for trial on September 9 and 10, 2014, and for closing arguments (after submission of post-trial briefs) on October 17, 2014:

PRESENT:

Donald F. Harang, Jr., of Harang Law Firm, on behalf of the South Lafourche Levee District; and

Randall A. Smith and Mary Nell Bennett, of Smith & Fawer, LLC, on behalf of Chad M. Jarreau and Bayou Construction and Trucking LLC.

For the reasons assigned orally by this Court on October 17, 2014, and those issued by this Court in its Supplemental Reasons for Judgment dated November 5, 2014:

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered in favor of South Lafourche Levee District and against Chad M. Jarreau as to the main demand in the amount of $16,956.00, plus interest at the Louisiana legal rate from the date of judicial demand on May 19, 2011, until paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered in favor of Chad M. Jarreau and against the South Lafourche Levee District, awarding just compensation for the land taken on January 10, 2011, in the amount of $11,869.00, less credit for the amount already tendered by the South Lafourche Levee District of $1,326.99, for a total award of $10,542.01, plus interest from the date of taking on January 10, 2011, until paid;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered in favor of Chad M. Jarreau and Bayou Construction & Trucking, LLC, *in globo,* and against the South Lafourche Levee District, awarding just compensation for economic and business losses related to the land taken on January 10, 2011, in the amount of $164,705.40 plus interest from the date of taking on January 10, 2011, until paid;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered in favor of Chad M. Jarreau and Bayou Construction & Trucking, LLC, *in globo,* and against the South Lafourche Levee District, awarding attorney's fees in

the sum of $43,811.85, plus 25% of legal interest paid on the aggregate award of $175,247.41;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered in favor of Chad M. Jarreau and Bayou Construction & Trucking, LLC, *in globo*, and against the South Lafourche Levee District, for expert witness fees in the amount of $26,490.95 (Mr. Hebert: $1,320.00; Oubre: $6,000.00; and Mr. Theriot: $19,170.95), and costs Litigation in the amount of $2,350.00, for a total award of $28,840.95, plus interest from the date of this Judgment until paid; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Judgment be and it is hereby rendered against the South Lafourche Levee District for 80% of the court costs, in the amount of $2,093.42, plus interest from the date of this Judgment, until paid.

JUDGMENT READ AND SIGNED at Thibodaux, Louisiana, this 1st day of December, 2014.

/s/ [Illegible]
JUDGE

SOUTH LAFOURCHE LEVEE DISTRICT	***17TH JUDICIAL DISTRICT COURT**
VS NO: 117,693	***PARISH OF LAFOURCHE**
CHAD M. JARREAU	***STATE OF LOUISIANA**

SUPPLEMENTAL REASONS FOR JUDGMENT

(Filed Nov. 6, 2014)

This matter came for closing argument on October 17, 2014, and the Court granted judgment for the plaintiff on the main demand. The Court also granted judgment for the defendant and plaintiff-in-reconvention, Chad M. Jarreau and for the intervenor, Bayou Construction and Trucking, LLC.

After the Court rendered oral reasons for judgment, the defendant and the intervenor presented evidence to support their claim for costs and attorney's fees. The Court received the evidence and took the matter under advisement.

Landowners and lessees who are successful in litigation against political subdivisions over the value of property taken for public purposes are entitled to an award for costs of litigation, expert witness fees and attorney's fees in addition to the value of the property taken. The statutory authority for the award of these items include Article 1920 of the *LA Code of Civil Procedure* (court costs), *LA R.S.* 13, section 5112 (court costs), *LA R.S.* 13, section 3666 (expert witness fees), *LA R.S.* 38 section 301(C)(2)(f) (attorney's fees), and

LA R.S. 13, section 4533 (all other costs allowed by the Court).

The Courts of Louisiana in the many cases decided involving expropriation and appropriation of property have included in the definition of "costs of litigation" items such as the cost of demonstrative evidence for trial, travel expenses, and other cost reasonably associated with the presentation of the case.

In most cases, the party cast in judgment is required to pay the costs of court as charged by the Clerk of Court. The Court does have some discretion, as stated in Article 1920, LA Code of Civil Procedure, to apportion the costs between the parties, as the Court may consider equitable. Each side of the case was granted judgment against the other, but the judgment against the Levee District was in the major portion of the case. Therefore, the Levee District will be ordered to pay 80% of the costs, the sum of $2,093.42.

Regarding attorneys fees, there is a maximum amount dictated by LA R.S. 38, section 301(C)(2)(f), twenty five percent of the difference between the amount actually paid or tendered by the appropriating agency and the amount awarded by the Court in this case, considering the amount of work actually done by the lawyers for the landowner/lessee, the number of court appearances, and the level of skill and diligence of the lawyers, the maximum amount prescribed by law is certainly appropriate. Therefore, the claimants, Chad M. Jarreau and Bayou Construction & Trucking, LLC, awarded attorneys' fees in the sum of $43,811.85,

plus twenty five percent of legal interest paid on the award for the value of the property taken in excess of the amount tendered by the Levee District. The claimants are also awarded other costs of litigation, $1,980 for the demonstrative exhibits used at trial, and $370 for the trial transcript. The other items of legal expenses submitted by the claimants are denied.

The claimants submitted invoices for charges from several expert witnesses, Bennet Oubre, real estate appraiser, Charles C. Theriot, CPA, and Danny Hebert, Engineer. Mr. Oubre testified about the value of the property taken, and his testimony about his method of valuation differed from the opinions of the experts for the Levee District. His statement shows a fee of $3,750 for the appraisal report, and a second charge for trial preparation and attending the trial of $7,425. The second charge shows 33 hours billed at $225 per hour.

In determining the appropriate fee for expert witnesses, the Court should consider the value of the time employed and the degree of learning or skill. It is also well established in the jurisprudence that the amount charged by the expert to the party is not determinative of the reasonableness of the charge. The determination of what is reasonable considers the facts and circumstances of the case. *Board of Supervisors of Louisiana State University and A&M College vs. 1732 Canal Street, LLC et al*, 2013 CA 0976 (La.Court of App. 4th Cir. 1/15/2014), 133 So3d 109. In the case before the Court, Mr. Oubre valued the property, not the dirt part of the case, and he wrote a report. He came to testify, and he apparently sat through much of the testimony of the

other appraisers. His fee for the appraisal is reasonable, but the charge for the rest of his services is not. It is hard to understand why he needed to spend 17 plus hours preparing for his testimony and value of a very small tract of land, and he had, before trial, the opinion of the other appraisers. The issues of the value of the land were not complicated and did not require any special applications or computations. It is also interesting to note that his hourly rate, $225, for trial prep and sitting in the courtroom, is the same as Ms. Bennett's, one of the trial lawyers for the claimants. The award for the rest of Mr. Oubre's services will be $2,250, making the total award for his services $6,000.

The statements from engineer Danny Hebert are reasonable and reflect an appropriate amount for his services in providing Charles C. Theriot CPA with the data that he needed to make his computations and recommendations. The claimants will be awarded the sum of $1,320 for Mr. Hebert's expert report.

The last item, the statement of Charles C. Theriot CPA, for the sum of $19,170.95, is reasonable considering that services were rendered over a period of years rather than months, and because the preparation for trial was extensive. The claimants will be awarded that amount.

Judgment will be rendered accordingly.

Thibodaux, Louisiana, this 5th day of November, 2014.

/s/ Jerome J. Barbera
JEROME J. BARBERA III
JUDGE, 17TH JUDICIAL
DISTRICT COURT

17TH JUDICIAL DISTRICT COURT

PARISH OF LAFOURCHE

STATE OF LOUISIANA

HONORABLE JEROME J. BARBERA, III

PRESIDING JUDGE, DIVISION B

SOUTH LAFOURCHE LEVEE DISTRICT

VERSUS

CHAD M. JARREAU &
BAYOU CONSTRUCTION & TRUCKING, LLC

DOCKET NUMBER 117693

OCTOBER 17, 2014

THIBODAUX, LOUISIANA

RENDITION OF JUDGMENT
& HEARING ON MOTION

APPEARANCES:

DONALD F. HARANG, JR., ESQ.,

Counsel representing,

South Lafourche Levee District,

RANDALL SMITH, ESQ., & MARY NELL BENNETT, ESQ.,

Counsel representing,

Chad M. Jarreau & Bayou Construction & Trucking, LLC.

* * *

[5] Your Honor might have.

THE COURT: I don't think I have any. Y'all each had claims. So Mr. Narang talked first and then Mr. Smith. Mr. Harang, you have anything else to say?

MR. MARANO: No. No, sir.

THE COURT: Mr. Smith?

MR. SMITH: No, sir.

THE COURT: All right. Well, let me make a comment about something that I learned in the course of preparing for today. And I'm sure, counsel, both of you, because you do more of this than I do are aware of the history of these matters and how this stuff has come about over the past years. In the beginning – that's not a good way to start. That goes back too far. Expropriation has always been a separate animal from appropriation and there's attempts in some of these cases, the *Vela* case – *Vela* case *v. Plaquemines Parish*, they attempt to define appropriation and we all know that appropriation is different from expropriation in several ways. No. 1, they're spelled differently, No. 2, there's a different legal structure for them and over the years that has evolved. In 1985 the legislature completely revamped, reenacted all of the Title – all of Chapter 4 of Title 38 and which had to do with levee boards and levee and drainage boards and levee districts and that was [6] the beginning of the statute that I believe governs these proceedings of Title 38, Section 301. That all arose. And then I was trying to find, looking in the green books, trying to find the original

statute but of course that's impossible, you know, so I call the Louisiana State Law Library and I said could you fax me Act 785 of 1985. So they fax me 75 pages of – that was the overhaul. And what has happened since that time, and as I learned also not only in this case but also in preparing for the judgment that I rendered in the case that Mr. Smith mentioned, *N. Lafourche Del-Mar* case, is that the law of expropriation and appropriation with regard to remedy are almost on the same track now. That over the period of years since 1985 and the insertion of the language in 38:301 about market value and full extent of the loss, this was language that was basically identified with expropriation because at some point, a long time ago, appropriation basically referred to the taking of a right that government thought they already had and didn't have to pay for it. The legislature by that overhaul in 1985 has changed the whole structure. And I believe based on the jurisprudence, basically, these two concepts from a compensation standpoint are on the same level and that's mentioned in some of the cases, some of the more recent cases. There's a lot of discussion of that in the *Vela v. Plaquemines Parish* case which has some things that I don't exactly agree with, but there's some discussion in [7] that case and I'll quote on Page 1271 of their decision. On Page 1271 not – that's not how long the decision is but on page 1271. I'm reading from a printout from Westlaw Next, but it says that plaintiffs contend that the legislature's use of the term full extent of the loss with reference to appropriation in Revised Statutes 38:301 is significant because that same term has been considered by numerous Courts in

expropriation cases and has repeatedly been held to include compensation for business losses.

And they cite a *Mandeville* case, *City of Mandeville* case from 1993, First Circuit case. And it says, On the other hand Plaquemines Parish Government, without citing any authority, argues that the legislature intended for the measure of compensation in appropriation cases to be different from that in expropriation cases. Neither the statutory law nor the jurisprudence supports the Plaquemines Parish Government's viewpoint. So I think that basically sets the stage that we basically are dealing now with the same legal issues and the same viewpoint of the Courts in Louisiana of compensation in appropriation.

So I'll go into my judgment in the case. On January 10, 2011, the Levee District – and I'll refer to the South Lafourche Levee District as the Levee District. I will never refer to the Levee District as the defendant. [Sic] I will refer to the defendants, sometimes just Mr. Jarreau, sometimes both Mr. Jarreau and Bayou Construction [8] although Bayou Construction is technically not a defendant. They're actually a plaintiff, they're an intervenor and a plaintiff. But I'll refer to them so don't be confused when you hear – you will not hear plaintiff, you will either hear Levee District or defendant.

So the Levee District passed the resolution appropriating several hundred tracts of land in the South Lafourche area to establish and maintain hurricane protection and flood control. The resolution provided

that the Levee District would have a permanent levee servitude to construct, operate, and maintain levees, berms – and that's spelled b-e-r-m-s – drainage, borrow canals, ditches, and other flood works.

And the servitude includes the right to cut away, dredge, or remove soil or earth therefrom and the deposit of that soil or earth in the construction operation and maintenance of levee, berms, and other flood control works. And that language basically comes from the resolution that was issued by the Levee District.

Chad Jarreau owns one of the strips of land on L.A. Highway 3235 that was affected by the servitude. There was a large canal in the rear of Mr. Jarreau's property and the area of his property taken by the servitude is in the rear on the borrow canal and the property taken is .913 acres, basically nine-tenths and a little bit more of an acre of land.

His property, total property, that fronts on 3235 extends back to the borrow canal totals 17.1 [9] acres including the part taken. Mr. Jarreau has two dump trucks, he also is the sole owner of a corporation called Bayou Construction & Trucking, LLC. And he has operated a dirt business and a trucking business through that Corporation for several years. Mr. Jarreau testified that he bought this property, the large tract, the parent tract, in 2002 with the intent to excavate and sell dirt. After Hurricane Katrina he stated that he moved a residence on the property and he resided there at the time of the trial.

Bayou Construction was excavating and trucking dirt off the property when the servitude was appropriated in January, 2011, and that activity, the excavating and trucking, had gone on – off and on for several years. Mr. Jarreau continued to operate that enterprise even after the appropriation until the Levee District discovered that he was removing soil on the tract in the rear. That part covered by the servitude.

The Levee District filed suit against Mr. Jarreau on May 19, 2011, to enjoin him from excavating any more dirt from the tract and he eventually agreed to an injunction which is now in place. The Levee District also demanded compensation for the dirt that was removed after the appropriation.

On June 16, 2011, the Levee District sent Mr. Jarreau a check for the property taken, the sum of $1,326.99. Mr. Jarreau acknowledged receipt, but did not negotiate or deposit the check. On August the 5th, 2011, Mr. Jarreau filed a reconventional [10] demand asking for just compensation for the property taken and the lost profits from the interrupted dirt business. On November 10, 2011, the Corporation, Bayou Construction & Trucking, LLC, intervened in the case for lost profits arising out of that company not being able to continue excavating and selling dirt from the tract that was taken.

Mr. Jarreau also testified at the trial that he had entered into a verbal, oral contract with Phylway Construction where he had agreed to supply that company with approximately 23,000 cubic yards of dirt. And his

testimony was that as a result of the taking, he was not able to complete or to perform under that contract. The testimony given by Mr. Jarreau about the contract with Phylway was not rebutted and there was no contradiction to those statements.

There were three appraisers involved in the case. Mr. Glynn and Mr. Pousson who were retained by the Levee District at the time of the taking, they rendered reports and gave testimony in the case. The third appraiser, Mr. Oubre was retained by the defendants, by Mr. Jarreau and Bayou Construction. Mr. Oubre also rendered a report and gave testimony on the value. The appraisers discussed or at the trial or mentioned that they were aware of the claim about the dirt and lost profits but none of that was included in their reports or their appraisal.

There was a lot of discussion about highest and best use. And the appraisers, although they used different language and sometimes had something more to say than the other, basically it was a mixed use of residential and commercial. There was comment on the rear tract in the excavation. Mr. Pousson also used the word pastureland in talking about highest and best use.

Mr. Glynn appraised the entire tract, the entire 17.1 acres at 11,500 an acre. Mr. Pousson used the value of 13,000 per acre and that was the same number used by Mr. Oubre. Mr. Glynn and Mr. Pousson, however, determined that the tract taken in this case in the rear should not be valued at the per acre value and

they gave some reasons for that including the fact that there was some separation from the rest of the tract that there would be no utilities, no access to the front. They also used some comparable sales of the front two acres or smaller tracts that were sold off and some other tracts in the area for quite a sum larger than the per acre value that was given by all of the appraisers on the whole tract.

There was actually some value on the front part in the square footage language rather than by the acre. Mr. Glynn and Mr. Pousson using that methodology were then forced to come up with some way to value the back end so what they said was well, if that's the value for the front two acres, then they subtracted that from the value for the whole thing, divided it up, and then came up with a value. By math on the back end Mr. Glynn said that the tract taken, the .913 acres, he believed was worth $1,820. Mr. Pousson put the value of [12] $1,320. Mr. Oubre disagreed with their methodology and stuck to a value of the back .9 acres with the same number that was applied to every acre in the 17-acre tract.

Title 38, Section 301 says that the owner is to be compensated for land taken, used, damaged, or destroyed for levee purposes at fair market value to the full extent of his loss. And the Defendants, both Mr. Jarreau and the Corporation, take the approach that the Levee District appraisers are not correct and what they have done is contrary to Louisiana law and jurisprudence. And after a review of that, the Court agrees that their approach, the dividing approach, is not

correct. That with a tract of this nature where there was no evidence presented of divided uses, the proper method of appraisal is to use the per unit value of the parent tract to the value of the tract taken.

Therefore, the Court will award to Mr. Jarreau in this case the sum of $11,869 for the tract taken. And I keep saying the tract taken. Even though the taking was only of a servitude, I don't think there was any dispute at the trial from any of the appraisers or from the parties in the case that the type of servitude and the nature of the taking really amounted to a fee simple taking, taking – therefore Mr. Jarreau was basically deprived of ever having use of the property for his own purposes again.

And as I mentioned earlier, certainly I believe under the law in Louisiana today, being [13] compensated to the full extent of a loss includes lost profits from a business enterprise, the Courts have also recognized lessees as having a right to make a claim for lost profits from a business enterprise, and that's the position of Bayou Construction & Trucking in this case.

The Levee District in its posttrial memo argues that the Corporation does not have a lessor/lessee relationship with Mr. Jarreau and should not have a claim for damages. The Levee District points out that the Corporation paid rent one year but not other years, that there was no paperwork establishing their relationship. I have not expended a great deal of effort on that point because I think it is immaterial, significantly immaterial, in this case. As long as there is no

duplication of damages I don't think it really makes too much difference in this case whether the lost business enterprise is that of Mr. Jarreau or the Corporation. And I've also taken into consideration the fact that basically he and the Corporation are one in the same.

The defendants retained C.P.A., Charles Theriot, who with some data from the engineer involved on the Jarreau's side of the case did extensive calculations of lost profits considering that because of the taking the defendants were no longer able to dig and sell dirt from this particular tract. The Court also made note of the fact that Mr. Jarreau stated, without contradiction, that the quality of the dirt in the rear tract that was taken was the best soil on his [14] whole 17 acres.

Mr. Theriot computed and described several scenarios based on digging from to 15 feet or 20 feet digging over a period of years or just one year. He also used information on the cost of operating the business to determine what profit the company was earning so that the claim that the company and Mr. Jarreau are actually making is not for a loss of gross revenue but a loss only of net profit.

Mr. Theriot, in his conclusions, stated that the most logical and reasonable scenario would be No. 6 found in Trial Exhibit L-17(b). Mr. Theriot included in his calculations the testimony about the Phylway contract, he considered Mr. Jarreau's equipment, Mr. Jarreau's testimony about the capacity of his company, and Mr. Theriot concluded that the Phylway job could have easily been completed within a year at the

amount of dirt that was the subject of that contract. He also concluded, based on Mr. Jarreau's testimony, that excavation to 20 feet was reasonable for the Court to consider.

The Court accepts Mr. Theriot's report and his reasoning on Scenario 6 with some modification. When the Levee District learned that Mr. Jarreau was removing dirt, it sent its engineer, Mr. Angelette, and then we had testimony from Mr. Angelette that a member of his staff went to the site in 2011 to make an inspection. They had already been out there in January earlier, but as a result of the complaint that Mr. Jarreau was [15] taking dirt, they sent him back out.

The staff member from the Angelette firm made a sketch, made some calculations. The document that was introduced, I think it was Levee District No. 2, was the matter of some controversy at the trial. The Court ruled that it was admissible. The staff member stated that there was a pond – the report stated and Mr. Angelette testified that there was a pond on the tract in June of 2011 but not in January of 2011.

The measurement of the pond was used to calculate cubic yards of dirt that were removed. The pond is what was the result of the digging and I don't know if it's rainwater, groundwater, or where it came from but there was a pond. Mr. Jarreau testified that before the taking – and I read the transcript several times. I read my notes several times. There was some dispute about this during the trial and I'm glad we had the transcript to verify it. Mr. Jarreau's testimony, very clear, that he

had removed all of the fill dirt from the tract before the taking in January. The top two feet. And he had also removed some top soil after the taking but he didn't remember exactly how much.

Mr. Jarreau testified that he put piles of dirt on various parts of his property so that it would dry before he would haul it. Mr. Jarreau testified that he thought the pond that Mr. Angelette talked about was actually there in January but there was no corroboration of that nor was there any rebuttal to the conclusion that the [16] pond reflected excavation of 2,826 cubic yards of dirt. Mr. Jarreau testified in answer to Mr. Harang's questions and to my questions on Pages 83 and 84 of the trial transcript that he has, and in his language, he said "pretty much dug up everything." Referring to the fact that he had excavated almost all of his entire tract including the area near his home and the sheds that were located on his property. He also said on Page 84 and I quote, "I mean, there's not much land right there left."

So the evidence from the testimony of Mr. Jarreau is that all of the fill dirt, the top two feet, was removed from the tract taken before January 2011. Therefore, Mr. Jarreau – neither Mr. Jarreau nor the Corporation should be compensated for that material since it was already removed and likely sold before the taking. That quantity which from Mr. Theriot's report 2,838 yards at $13.11 per yard for a total of $37,198 should be subtracted from Mr. Theriot's equation in Exhibit L-17(b). Mr. Jarreau admitted that he removed top soil

as well from the tract after the taking but he did not know how much.

The Court is going to accept the evidence about the pond as stated by the engineer and my conclusion is that it is more probable than not that it was not there in January but was there in June, suggesting to the Court that the excavation that created the pond is more probable than not the removal of top soil by Mr. Jarreau after January 2011. Therefore, that amount, 2,826 cubic [17] yards should be deducted from the top soil number in Mr. Theriot's equation reducing the loss of sales for top soil from 25,542 yards to 22,716 cubic yards since that top soil was also likely sold, it had already been dug, and was likely sold. So with these adjustments, Mr. Theriot's equation would then be modified to show a net loss to Mr. Jarreau and the Corporation of $164,705.40 which the Court determines to be the loss suffered by these parties from the taking.

The final matter for consideration is the claim by the Levee District against Mr. Jarreau for his removal of dirt from the servitude area after the taking in January 2011. The defendant contends that the Levee District has not suffered any damage and this assertion is based on the fact that the engineer, Mr. Angelette, said that the intent of the District was to take 9,567 yards from the tract for levee construction and maintenance and the other flood prevention works that were being made.

The defendant further says that even though there was already dirt removed from the tract before and after the taking that there's still sufficient dirt on the site for the District to get what they plan to get. This conclusion is based on the findings of Mr. Theriot and the testimony of Mr. Jarreau about how much fill is available from this tract by excavating to a depth of 20 feet.

So according to the testimony, I don't think there's any question that there's certainly enough [18] dirt left at the time on this tract for the District to get 9,567 yards. So Mr. Jarreau's position is "You have all the dirt you need so I don't have to pay for what I removed even though I had no right to dig on the site after the taking in January 2011."

In the defendant's posttrial memorandum, counsel very astutely points out how inconsistent the District position is in the case. The District sues Mr. Jarreau for dirt that he took off the site but then in the same memorandum, later on, the District says Mr. Jarreau doesn't have the right to be compensated for dirt. So in the defendant's memorandum, they point out that that's an inconsistent position and it is. But I think that the defendant's position is also inconsistent. So saying that the Levee District is not damaged by the defendant removing dirt after the taking because there's enough left for its purposes is also inconsistent considering the fact that the District has the exclusive right to cut away, remove, and dredge soil and dirt. That's just as inconsistent as what Mr. Jarreau argues. What the District planned to remove as stated by their

engineer is just that, a plan. And there's no restriction on what can be taken in the appropriation resolution.

So my finding is that the District did suffer loss and that the soil removed by Mr. Jarreau is no longer available for use by the District. The measure of that damage, the value of the dirt in place at the value given by Mr. Jarreau in his [19] testimony is six dollars per cubic yard.

The quantity is based only – is based on the only calculation that was presented in this case and that's the 2,826 yards calculated by measurement of the pond, so there should be judgment in favor of the District and against Mr. Jarreau for the sum of $16,956. Interest on the sum due to Mr. Jarreau and Bayou Construction, I believe, is from the date of the taking. I believe that's what the law says.

MR. SMITH: Yes, Judge.

THE COURT: And then the interest on the amount due by Mr. Jarreau I think would be from the date of judicial demand. It's just a regular tort claim. And, counsel, I believe that we've agreed or that y'all stipulated to do attorney's fees and costs at a later date?

MR. SMITH: No, we agreed to do it today.

THE COURT: Oh, you agreed to do it today? All right.

MR. HARANG: I thought it was to be submitted today?

MR. SMITH: No, you specifically stated that we would have the hearing today.

THE COURT: Oh, okay. You want to have the hearing today? You want to present the evidence today?

MR. SMITH:

* * *