IN THE FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO. 2018-CA-0996

ELIZABETH SEWELLL, ET AL.

Plaintiffs/Appellees

VERSUS

SEWERAGE AND WATER BOARD OF NEW ORLEANS

Defendant/Appellant

On Appeal from the Civil District Court,
Parish of Orleans, State of Louisiana
No. 2015-4501, Div. D, Sec. 12
Hon. Nakisha Ervin-Knott
(A Civil Proceeding)

ORIGINAL BRIEF ON BEHALF OF APPELLEES, GEORGE AND BETH DEUSSING, DAVID EPSTEIN, FAYE LIEDER, THOMAS RYAN AND JUDITH JURISICH, AND DOROTHY WHITE

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ORIGINAL BRIEF ON BEHALF OF APPELLEES, GEORGE AND BETH DEUSSING, DAVID EPSTEIN, FAYE LIEDER, THOMAS RYAN AND JUDITH JURISICH, AND DOROTHY WHITE

MAY IT PLEASE THE COURT:

This Original Brief is respectfully submitted by Appellees, George and Beth Deussing, David Epstein, Faye Lieder, Thomas Ryan and Judith Jurisich, and Dorothy White.

I. ASSIGNMENT OF ERRORS

(1) The Trial Court properly determined that that Appellant Sewerage and Water Board of New Orleans ("SWB") failed to prove comparative fault for Appellees' strict liability and negligence claims.

(2) The Trial Court properly determined that the Appellant SWB is strictly liable to Appellee Dorothy White, pursuant to Louisiana Civil Code article 667, for ultra-hazardous pile driving.

(3) The Trial Court properly applied the law of Louisiana Civil Code articles 2317 and 2317.1 to find the Appellant SWB strictly liable to Appellees.

(4) The Trial Court properly determined that the Appellant SWB is liable to Appellees for inverse condemnation.

(5) The Trial Court properly awarded cost of repair damages to Appellees Thomas Ryan, Judith Jurisich, and Faye Lieder.

(6) The Trial Court properly awarded Appellees just compensation for their inverse condemnation claims.

(7) The Trial Court properly awarded damages to Appellees for loss of use and quiet enjoyment of their properties.

(8) The Trial Court properly awarded reasonable attorneys' fees to Appellees.

(9) The Trial Court properly awarded costs of expert fees to Appellees.

II. STATEMENT OF FACTS

A. The SWB's "Statement of Facts" Lacks Evidentiary Support

Most of the SWB's "Statement of Facts" should be disregarded on appeal for failure to cite to Record evidence. Rule 2-12.4. of the Louisiana Uniform Rules of the Courts of Appeal provides at Section A. (7) that the "brief of the appellant shall contain…. a statement of facts relevant to the assignments of error and issues for review, with reference to the specific page numbers of the record." (emphasis added). Indeed, it is black letter law that an appellate court may only consider evidence in the record. *See* La. Code Civ. P. art. 2164; *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So. 2d 661, 666; *Bd. of Dirs. of Indus. Dev. Bd. of City of New Orleans v. All Taxpayers*, 2003-0826 (La. App. 4 Cir. 5/29/03); 848 So. 2d 740, 744.

Contrary to Rule 2-12.4.A.(7), the SWB sets forth 21 purported statements of fact, yet only six of these statements contain citations to the Record.[1] This Court should disregard the 15 "statements of fact" without Record support, leaving six factual statements for the Court to consider for purposes of this Appeal, many of which contain inaccurate or partial descriptions of the Record evidence.

B. Statement of Facts – Corrected, With Evidentiary Support

1. Relevant SELA Background

Appellees' claims against the SWB arise from the extensive drainage project known as the South Louisiana Urban Drainage Project or Southeast Louisiana Urban Flood Control Program, and commonly referred to as "SELA."[2] The SWB has legal jurisdiction and authority over the internal drainage system of New Orleans.[3] SELA is a modification to this system in furtherance of the SWB's master drainage plan to provide flood risk reduction at a level associated with a ten-year rainfall event.[4] The SWB has implemented SELA in various phases in New Orleans over the last

[1] *See* Appellant Br. at pp. 4-6.
[2] *See* 7.R.1523, 1526; 8.R.1476; 23.R.4995, 4998.
[3] 23.R.4885.
[4] *See id.*; 23.R.4843, 4997-99.

few decades.[5] The SELA phases at issue in this Appeal are located in the Uptown and Carrollton Historic Districts of New Orleans on large portions of South Claiborne Ave., Jefferson Ave., Napoleon Ave., and Prytania St.[6] These SELA phases are formally identified as: Claiborne I, Jefferson II, and Napoleon III.[7]

2. The SWB's Role and Responsibilities for SELA

The SWB is the owner and *de facto* non-federal sponsor of SELA.[8] The SWB has significant contractual obligations for SELA, including but not limited to: carrying out the responsibilities of the Non-Federal Sponsor for SELA as set forth in the Project Partnership Agreement ("PPA"); carrying out the design and construction for SELA; conducting the operation, maintenance, repair, replacement, and rehabilitation of SELA; financing the 35 percent of cost-share obligations for SELA; participating in the SELA Project Coordination Team; furnishing the rights-of-way and lands for SELA; and agreeing to hold harmless and indemnify the government for any claims arising from SELA, except those due to the fault or negligence of the government or its contractors.[9]

One of these contracts, the Cooperative Endeavor Agreement ("CEA") provides that SWB is to directly partner with the U.S. Army Corps of Engineers ("USACE") for "carrying out the design and construction" of SELA.[10] In furtherance of this partnership, SWB undertook all of the engineering and design responsibilities for SELA,[11] while USACE operated as the construction administrator to ensure that the SWB's designs were implemented in the construction of SELA.[12]

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[5] *See Holzenthal v. Sewerage & Water Board of New Orleans*, 2006-0796 (La. App. 4 Cir. 8/11/10), 950 So. 2d 55; 23.R.4883, 4885.
[6] 7.R.1526, 1536; 24.R.5088.
[7] 22.R.4756; 23.R.4888.
[8] 23.R.4885, 4890, 4998, 5012-13.
[9] 22.R.4844; 23.R.4867-68, 4885, 4889-90, 4892, 4894; see 22.R.4755.
[10] 23.R.4885.
[11] 23.R.4997-98, 5005 (SWB Dep. Tr.); 20.R.4203, 4355-56, 4358; 21.R.4446, 4483 (USACE Dep. Tr.).
[12] 20.R.4202, 4281, 4380; 21.R.4449 (USACE Dep. Tr.); 23.R.5015.

The SWB hired "designers of record" to assist the SWB in developing the designs, plans, and specifications for SELA.[13] The SWB's SELA designs, plans, and specifications were then directly incorporated into contracts issued to contractors (collectively the "Federal Contractors"), who constructed SELA in accordance with the SWB's designs, plans, and specifications.[14]

SELA is within the SWB's territorial jurisdiction.[15] Thus, before construction could commence on SELA, the SWB issued Authorizations and Rights of Entry to USACE to allow for the SELA construction activities.[16] The SWB managed the SELA construction activities through its Network and Drainage Engineering Department, as well as through its contractor BCG/Ardurra.[17] The SWB regularly coordinated with USACE regarding the construction of SELA and provided input on the construction, both directly and through USACE.[18] The SWB regularly visited the SELA construction sites and even directly carried out construction activities on these sites.[19] The SWB participated in the Project Coordination Team with USACE and Federal Contractors, which met regularly to address the progress, future, and issues arising from SELA, received related information.[20]

3. Appellees' SELA Damages

The SELA construction on the Claiborne I, Jefferson II, and Napoleon II phases similarly involved the installation of drainage box culverts in the middle of

[13] 23.R.4997, 5007, 5011 (SWB Dep. Tr.).
[14] 19.R.3978, 3985-3988, 4002, 4006, 4098, 4013-14, 4018, 4028 (Dep. Tr. Cajun Constructors, LLC); 20.R.4303-04, 4311-12, 4313-14, 4315-18, 4325-26, 4329-30, 4338-40, 4344-45 (Dep. Tr. Boh Bros. Constr. Co., LLC); 20.R.4202-03, 4206-08, 4212, 4216-4217, 4227, 4246, 4281, 4391 (Dep. Tr. USACE – Jefferson II); 21.R.4441, 4445-49, 4455-59, 4463-64, 4466, 4469, 4471, 4483-85, 4488, 4489, 4504, 4537 (Dep. Tr. USACE – Napoleon III); 20.R.4355-58, 4366-67, 4375-76, 4380, 4382, 4391, 4395-96 (Dep. Tr. USACE – Claiborne I); 23.R.4996-98, 5001-02, 5005, 5007-11, 5013-15, 5019-20, 5023, 5028, 5030, 5033, 5037-38, 5043-44, 5056-59, 5065-66 (Dep. Tr. SWB).
[15] 23.R.4884.
[16] 23.R.5013; 24.R.5136-5167.
[17] 23.R.4997, 5007-08, 5032-33, 5037.
[18] 23.R.5008, 5010, 5020, 5028-29, 5038, 5050-51, 5053-54, 5058-59 (SWB Dep. Tr.); 20.R.4204-06, 4382; 21.R.4484, 4515, 4520, 4537 (USACE Dep. Tr.).
[19] 23.R.4427-28; 23.R.5004, 5010, 5015, 5050, 5058-60, 5067-68 (SWB Dep. Tr.); 20.R.4373-74, 4376-78; 21.R.4430 (USACE Dep. Tr.).
[20] 21.R.4410-15, 4510; 23.R.5015, 5054.

the streets directly fronting Appellees' properties, entailing, among other activities, demolition, excavation, pile driving, jet grouting, and back-fill.[21] Oversized construction equipment and trucks and numerous construction workers, were needed to construct the SWB's drainage box culvert.[22] Appellees endured the SELA construction activities for approximately three years, with the exception of Dorothy White who suffered the effects of SELA for approximately five years.[23]

Even though SELA construction was carried out in accordance with the SWB's plans,[24] the construction caused property damages and disturbances to the Appellees, who regularly experienced excessive vibrations, noise, dust, and obstructed property access over the course of the SELA construction.[25] After the start of SELA, Appellees' properties developed widespread physical damages, damages that were not present prior to construction or were exacerbated after construction.[26] These damages were caused by SELA construction activities.[27]

4. The SWB Anticipated and Had Notice of Appellees' SELA Damages

The SWB was aware, prior to the SELA construction, that Appellees' properties would likely suffer damages and disturbances from SELA.[28] The SWB knew that property damages and disturbances were caused to neighboring property owners as the result of earlier phases of SELA.[29] In anticipation of additional SELA-related property damages, SWB hired Leonard Quick & Associates to conduct pre-

[21] *See* 23.R.5002; 26.R.5661-65, 5584-91; 27.R.5764-70, 5787-95; 36.R.58-59, 194; 38.R.128.
[22] *See id*.; 23.R.5016, 5049; 36.R.194.
[23] 36.R.66, 191; 38.R.66; 38.R.126.
[24] 19.R.3978, 3985-3988, 4002, 4006, 4098, 4013-14, 4018, 4028 (Dep. Tr. Cajun Constructors, LLC); 20.R.4303-04, 4311-12, 4313-14, 4315-18, 4325-26, 4329-30, 4338-40, 4344-45 (Dep. Tr. Boh Bros. Constr. Co., LLC); 20.R.4202-03, 4206-08, 4212, 4216-4217, 4227, 4246, 4281 (Dep. Tr. USACE – Jefferson II); 21.R.4441, 4445-49, 4455-59, 4463-64, 4466, 4469, 4483-84, 4488, 4489, 4504, 4537 (Dep. Tr. USACE – Napoleon III); 20.R.4355-58, 4366-67, 4375-76, 4380, 4382, 4391, 4395-96 (Dep. Tr. USACE – Claiborne I); 23.R.4996-98, 5001-02, 5005, 5007-11, 5013-15, 5019-20, 5023, 5028, 5030, 5033, 5037-38, 5043-44, 5056-59, 5065-66 (Dep. Tr. SWB).
[25] 23.R.5036, 5048; 36.R.59-61, 65-66, 191-194, 198; 38.R.9, 12, 38-39, 127-29.
[26] 36.R.221-249; 37.R.3-18.
[27] *Id*.; 26.R.5556, 5658; 27.R.5761; 37.R.97-101.
[28] *See* 20.R.4281, 4355, 4358, 4410; 21.R.4434, 4457, 4483, 4489, 4510-11, 4537 (Dep. Tr. USACE); 23.R.5004, 5016-18, 5026, 5028; .
[29] 7.R.1532; 23.R.4995, 5028; *see also Holzenthal*, 950 So. 2d 55.

construction property inspections and data monitoring.[30] SWB even set up a claims process for SELA damage claims.[31]

The SWB was an Invited Signatory to the Programmatic Agreement ("PA"), which expressly recognized, prior to the start of SELA, the potential for damages to historic properties near the SELA construction sites.[32] The PA implemented a threshold of 0.25 ppv for vibrations emitted by SELA construction activities in an effort to prevent property damages.[33] The SWB publicly disseminated the SELA "Vibration Monitoring" brochure which acknowledged the potential for damages to nearby properties due to the vibrations emitted by the SELA construction.[34]

After the SELA construction started, the SWB was notified that the construction activities were causing damages and disturbances to nearby property owners, including Appellees. For example, the SWB was responsible for operating the SELA Hotline where all complaints of SELA-caused damages and disturbances were directed to SWB.[35] Appellees made complaints of property damages and disturbances to the SELA Hotline during construction.[36] The SWB also hosted public meetings to discuss SELA, during which the SWB directly received complaints of property damages and disturbances.[37] All SELA damage complaints were sent to the SWB's Legal Department for investigation and resolution.[38]

In addition, the SWB received copies of vibration monitoring reports from the daily SELA construction activities; these reports demonstrated that the SELA construction activities were exceeding the 0.25 ppv vibration threshold set for

[30] *See* 22.R.4753-54*; see e.g.* 22.R.4723-52; 23.R.4999-5000, 5006, 5034.
[31] 22.R.4753-54.
[32] 24.R.5088-5128.
[33] *See* 7.R.1534-35; *see also* 23.R.5004, 5005.
[34] *See* 7.R.1542-43; 23.R.5044; 24.R.5209-10.
[35] 23.R.5019, 5035, 5062-3.
[36] *See* 24.R.5130-5135; 36.R.36.
[37] 23.R.5060.
[38] 23.R.5061, 5063.

SELA.[39] In fact, the vibration monitoring reports showed that excessive vibrations from SELA were emitted near Appellees' properties.[40]

Even with this wealth of information demonstrating that SELA was causing property damages and disturbances, the SWB took no action whatsoever to prevent or minimize these damages and disturbances, despite being the owner and non-federal sponsor of SELA.[41]

III. SUMMARY OF ARGUMENT

The Trial Court's Judgment on the Appellees' claims against the Appellant SWB should be affirmed on Appeal. The SWB's factual challenges to the Judgment are largely devoid of support from the Record evidence. The SWB's legal challenges to the Judgment are likewise unfounded or at most demonstrate harmless error. Most egregious is the SWB's failure to address, let alone cite, this Honorable Court's decision in *Holzenthal v. Sewerage and Water Board of New Orleans*,[42] which previously held SWB liable to property owners for damages caused by SELA, and upon which the Trial Court's Judgment is largely based.

As the Trial Court properly determined, the applicable law and Record evidence demonstrates that the SWB is the liable entity for Appellees' claims for inverse condemnation, strict liability, and negligence. The SWB fails to identify a sufficient legal or factual basis for displacing fault to any non-parties for Appellees' claims. Indeed, the SWB is the owner, custodian, and proprietor of SELA, and SELA caused Appellees' property damages and disturbances. Notably, with the exception of Appellee Dorothy White's strict liability damages from ultra-hazardous pile-driving, the SWB does <u>not</u> challenge on appeal that SELA caused the Appellees' damages. With regard to the Trial Court's award of damages to

[39] 23.R.5005, 5044.
[40] 26.R.5542-44, 5567, 5640-45, 5669, 5743-46; 27.R.5747-48, 5822-26.
[41] *See* 23.R.5018, 5028, 5044.
[42] 950 So. 2d 55.

Appellees, including attorneys' fees and expert costs, the SWB has failed to demonstrate any instance of manifest error.

IV. STANDARD OF REVIEW

The SWB's Appeal raises both factual and legal challenges to the Trial Court's Judgment. Appellate courts are to review findings of fact with the manifest error or clearly wrong standard of review. *Detraz v. Lee*, 2005-1263 (La. 1/17/07), 950 So. 2d 557, 561. The Louisiana Supreme Court has addressed this standard of review as follows:

> In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous.
>
> The appellate court must not re-weigh the evidence or substitute its own factual finding because it would have decided the case differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong, even if the reviewing court would have decided the case differently. *Id*. (internal citations omitted).

Mixed question of law and fact are accorded great deference and also reviewed under the manifestly erroneous standard. *Ursin v. Bd. of Levee Comm'rs of Orleans Levee Dist. of State*, 2011-1105 (La. App. 4 Cir. 9/26/12), 104 So. 3d 534, 538 (quoting *Moore v. Dep't of Police*, 06-1217 (La. App. 4 Cir. 1/17/07), 950 So. 2d 96, 98). "'The standard of review of an appellate court in reviewing a question of law is simply whether the lower court's interpretive decision is correct.'" *Ursin* 104 So. 3d at 538 (quoting *Olavarrieta v. St. Pierre*, 04-1566 (La. App. 4 Cir. 5/11/05), 902 So. 2d 566, 568). This entails a *de novo* review of the trial court's decision. *See id*.

V. ARGUMENT

A. The Trial Court Properly Determined There was No Comparative Fault for Appellees' Strict Liability and Negligence Claims

The SWB raises two challenges to the Trial Court's finding that SWB failed to establish comparative fault for the Appellees' negligence and strict liability claims: (1) the Trial Court failed to apply current Louisiana law in reaching its decision on comparative fault, and (2) fault for Appellees' strict liability and negligence claims should be apportioned 1/9 between SWB and non-parties. As addressed in turn below, neither challenge has merit.

1. The Trial Court Applied Proper Law to Find No Comparative Fault

The SWB argues that the Trial Court failed to apply current Louisiana law in determining there is no comparative fault for Appellees' strict liability and negligence claims. A review of the Reasons for Judgment, however, reveals that the Trial Court did apply the current and proper law. The Trial Court recognized Louisiana Civil Code articles 2323 and 2324, the statutory authority for comparative fault.[43] The Trial Court then cited two cases, *Holzenthal* and *Pruitt v. Nale*,[44] as well as Louisiana Revised Statute § 9:2771. Contrary to the SWB's argument, all of these legal sources are "current Louisiana law." Tellingly, the SWB does not challenge, let alone address, the actual legal sources cited by the Trial Court.[45]

Instead of addressing the law actually relied upon by the Trial Court, SWB argues that the Trial Court "misapplied the ruling of *Yearly (sic) v. W.A. Ross Construction, Co*.,"[46] a case that the Trial Court did not directly cite.[47] *Yearsley* was merely included as a parenthetical to the Trial Court's citation to the *Holzenthal* case,[48] a case, which finds the SWB solely liable for property damages caused by SELA, that SWB fails to address at any point in its Brief.[49] Thus, the SWB's legal challenge to the Trial Court's finding of no comparative fault fails.

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[43] 27.R.5966.
[44] 950 So. 2d 55; 46 So. 3d 780 (La. App. 2 Cir. 8/11/10),
[45] *See* Appellant Br. at p. 10.
[46] Appellant Br. at p. 10.
[47] 27.R.5966.
[48] 27.R.5966.
[49] *See generally* Appellant Br.

2. The Trial Court Properly Concluded There was Insufficient Evidence of Comparative Fault

The Trial Court properly determined that the SWB failed to overcome its burden of proving comparative fault for Appellees' strict liability and negligence claims. As recognized by the Trial Court,[50] the SWB, as the party asserting comparative fault, "bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause in fact of the damage complained of." *Pruitt*, 46 So. 3d at 783 (citing authorities). SWB failed to provide sufficient evidence of comparative fault at trial.

The SWB cites to just two sources of the Record to support its contention that fault for Appellees' strict liability and negligence claims should be reapportioned among the SWB and eight non-parties, at 1/9 percentage each. All other statements made by SWB in support of comparative fault lack citations to the Record or are mere conjecture, and should be disregarded on appeal.[51]

The SWB's first citation to the Record states: "Appellees' expert simply testified that all of the construction activities combined to create vibrations sufficient enough to cause Appellees' property damages."[52] This characterization of Record evidence, even if true, fails to satisfy SWB's burden of proving comparative fault. There is no mention of which non-parties the SWB identifies to be at fault, what actions or omissions these non-parties carried out that caused the fault, how any such actions or omissions caused the fault, or what damages resulted from them.

Instead, the undisputed Record evidence demonstrates that: the SWB was responsible for the plans and specifications for SELA, and this construction was conducted in accordance with the SWB's plans and specifications. The SWB only called two live witnesses at trial—engineering experts, Dr. David Sykora and Dr.

[50] 27.R.5966.
[51] *See* Appellant Br. at pp. 8-11.
[52] Appellant Br. at p. 9, n. 33.

Bob Bailey—neither of whom testified that any non-parties were at fault for Appellees' damages.[53] Deposition testimony from USACE, SWB, and the Federal Contractors overwhelmingly shows that SELA was administered and constructed by USACE and the Federal Contractors in compliance with the SWB's SELA plans and specifications.[54] SWB testified it was not aware of any instances where a Federal Contractor failed to comply with the SWB's plans and specifications for SELA.[55] As recognized by the Trial Court, there was no showing that USACE or the Federal Contractors were at fault for Appellees' negligence and strict liability claims.

The second Record source cited by SWB in support of its comparative fault argument is a quotation from a transcript of a hearing before the Federal Court on the Federal Rule of Civil Procedure 12(b)(6) motions to dismiss the SWB's third-party claims against the Federal Contractors.[56] This portion of the Record also fails to provide a basis for comparative fault.

The quoted language from the Federal Court hearing merely states that liability against the SWB for damages caused by SELA would be based upon negligence and that Louisiana has a comparative fault system.[57] There is no dispute by Appellees or the Trial Court that Appellees' negligence claims may be subject to an affirmative defense under Louisiana's comparative fault law. The dispute lies in the SWB's utter failure to present evidence of comparative fault, particularly when it is the SWB's burden to do so. For these reasons, the Trial Court's finding of no comparative fault was reasonable and proper.

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[53] *See* 30.R.11-163.
[54] 19.R.3978, 3985-3988, 4002, 4006, 4098, 4013-14, 4018, 4028 (Dep. Tr. Cajun Constructors, LLC); 20.R.4303-04, 4311-12, 4313-14, 4315-18, 4325-26, 4329-30, 4338-40, 4344-45 (Dep. Tr. Boh Bros. Constr. Co., LLC); 20.R.4202-03, 4206-08, 4212, 4216-4217, 4227, 4246, 4281 (Dep. Tr. USACE – Jefferson II); 21.R.4441, 4445-49, 4455-59, 4463-64, 4466, 4469, 4483-84, 4488, 4489, 4504, 4537 (Dep. Tr. USACE – Napoleon III); 20.R.4355-58, 4366-67, 4375-76, 4380, 4382, 4391, 4395-96 (Dep. Tr. USACE – Claiborne I); 23.R.4996-98, 5001-02, 5005, 5007-11, 5013-15, 5019-20, 5023, 5028, 5030, 5033, 5037-38, 5043-44, 5056-59, 5065-66 (Dep. Tr. SWB).
[55] *See* 23.R.5058-59.
[56] Appellant Br. at p.9, n. 34; 17 R. R. 3735, 3739.
[57] 17 R. 3739.

B. The Trial Court Properly Concluded That the SWB is Strictly Liable to Appellee Dorothy White for Damages Caused by Ultra-hazardous Timber Pile Driving

SWB raises two objections to the Trial Court's finding that the SWB is strictly liable to Appellee Dorothy White for damages caused by ultra-hazardous timber pile driving: (1) the SWB is not the liable party for White's strict liability claims, and (2) the evidence did not prove that timber pile driving caused White's damages. Neither objection is supported by the applicable law and Record evidence.

1. The SWB is the Liable "Proprietor" for White's Strict Liability Claims

The SWB fails to cite any law, other than a recitation of Louisiana Civil Code article 667, to support its claim that it is not the liable proprietor for White's strict liability claims.[58] Article 667 specifically provides that "the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity." (emphasis added). Both the Louisiana Supreme Court in *Lombard v. Sewerage and Water Board of New Orleans*,[59] and this Honorable Court in *Holzenthal*,[60] have concluded that the SWB is the proprietor in context of Article 667 where pile driving on the public drainage system in the City of New Orleans causes property damages. The SWB fails to address these cases or present any cases that have reached contrary decisions.[61]

According to SWB, simply because it did not physically drive the timber piles outside White's property, it cannot be strictly liable to White.[62] *Lombard* and *Holzenthal* dictate otherwise. In both *Lombard* and *Holzenthal*, the SWB did not physically drive timber piles, which were driven by contractors, yet both courts held the SWB strictly liable under Article 667 based upon: the SWB's responsibilities for

[58] *See* Appellant Br. at pp. 11-12.
[59] 284 So. 2d 905, 914-15 (La. 1973).
[60] 950 So. 2d at 61-62.
[61] *See* Appellant Br. at p. 11-12.
[62] *See* Appellant Br. at pp. 11-12.

the public drainage system and construction thereon, the SWB's responsibilities to plaintiffs who were damaged by the construction on the public drainage system, and the SWB's extensive involvement in the construction.[63] These same facts exist for the present case.[64] In addition, the SWB's designs for SELA specifically provided for driving timber piles on Claiborne I.[65] Thus, the Record evidence demonstrates that the SWB is the "proprietor" for Appellee Dorothy White's strict liability claims.

2. Appellee Dorothy White's Damages Were Caused by SELA Ultra-Hazardous Timber Pile Driving

The SWB's second challenge to Appellee White's strict liability claim is that "no witness at trial associated any particular damage to the White residence to pile driving," and "Mrs. White's expert witnesses were unable to state that pile driving was the cause of any particular damage in her home."[66] The SWB fails to cite any law for its purported standard of causation,[67] which the Trial Court and this Honorable Court in *Holzenthal* stated does not require a "crack-by-crack" or "vibration-by-vibration" analysis.[68] The Record evidence demonstrates that White's property damages were caused by the timber pile driving on SELA phase Claiborne I. Notably, the SWB does not dispute that timber pile driving occurred on Claiborne I directly outside of and in proximity to the White property.[69]

Appellees' geotechnical engineering expert, Dr. Rune Storesund, testified that from 2012 to 2014, two rounds of timber pile driving, as well as test timber pile driving occurred in front of the White property.[70] The timber piles were driven less than 71 feet from the White property.[71] According to Dr. Storesund, the limited

[63] *See* 284 So. 2d at 912-15; 950 So. 2d at 61-62, 70.
[64] *See infra* Sec. II.B.
[65] 23.R.5002.
[66] Appellant Br. at p. 12.
[67] *See* Appellant Br. at p. 12.
[68] 27.R.5952; *Holzenthal*, 950 So. 2d at 76-78.
[69] *See* Appellant Br. at pp. 11-12; 23.R.5002.
[70] 37.R.173-75; *see also* 27.R.5765-67, 5792.
[71] 27.R.5774.

vibration monitoring data for Claiborne I shows that the timber pile driving in front of the White property exceeded the vibration threshold limits for SELA.[72]

Dr. Storesund opined that "but for the SELA construction activities," which include timber piling driving, the White property would not have construction-induced damages.[73] Dr. Storesund compared pre-construction and post-construction photographs of the White property to determine that the White property suffered physical damages from the SELA construction activities.[74]

Appellees' expert in civil engineering and home inspections, Fritz Gurtler, likewise testified that the White property suffered damages from the excessive ground vibrations emitted by the SELA construction activities, which include timber pile driving.[75] Appellees' expert contractor, Michael Gurtler, testified that the White property was physically damaged by the adjacent SELA construction activities, which include timber pile driving, noting the property has "cracking in virtually every room of her house."[76]

Dorothy White's testimony confirms that her property suffered damages from the timber pile driving on SELA phase Claiborne I. White testified that there was timber pile driving outside her house and that vibrations from the pile driving would "shake you out of bed."[77] In addition, White's neighbor who lives two houses away, Brenda Lackings, testified that the timber pile driving "went on constantly."[78] Thus, as the Trial Court correctly concluded, the Record evidence demonstrates that the timber pile driving activities on SELA phase Claiborne I caused physical damages to Dorothy White's property.

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[72] 27.R.5767.
[73] 37.R.144, 170; *see also* 27.R.5761 ("Therefore, it is my opinion that SELA 24a construction activities were a substantial factor of harm to the subject property.").
[74] 37.R.146, 171-72.
[75] 37.R.93, 97, 101-02.
[76] 37.R.13-19.
[77] 38.R.128.
[78] 38.R.107.

C. The Trial Court Properly Applied the Law to Determine that the SWB is Strictly Liable to Appellees

The SWB's challenge to the Trial Court's finding that the SWB is strictly liable to Appellees is two-fold. First, the SWB claims that the Trial Court failed to consider Louisiana Revised Statute § 9:2800 in conducting its analysis of strict liability. Second, the SWB claims that the Trial Court erred in finding it the liable entity because the SWB lacked the requisite custody over SELA. As addressed below, neither challenge has merit.

1. The Trial Court Properly Applied Law to Find the SWB's Strictly Liable

The SWB claims that the Trial Court erred in failing to apply Louisiana Revised Statute § 9:2800 in determining whether the SWB is strictly liable to Appellees. Although the Trial Court did not directly cite to § 9:2900 in the Reasons for Judgment, the Trial Court did cite to Louisiana Civil Code article 2317.1, which provides essentially the same requirements as § 9:2900 for imposing strict liability. *See Moffitt v. Sewerage and Water Bd. of New Orleans*, 2009-1596 (La. App. 4 Cir. 5/19/10), 40 So. 3d 336, 340. The very case cited by SWB, *Moffitt*, recognizes this parallel between Article 2317.1 and § 9:2900.[79]

Contrary to the SWB's allegation,[80] the Trial Court did indeed conduct a full analysis of the additional requirements of Article 2317.1 and § 9:2900, specifically: (1) whether the SWB "had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence," and (2) whether the SWB has had a reasonable opportunity to remedy the defect and failed to do so. Based upon evidence at trial, the Trial Court answered both questions in the affirmative.[81]

Indeed, the Record evidence confirms that the SWB knew years before construction even started that SELA posed the risk of property damages and

[79] *See* Appellant Br. at p. 12; *Moffett*, 40 So. 3d at 340.
[80] *See* Appellant Br. at p. 13.
[81] 27.R.5959-60.

disturbances to Appellees, the SWB received confirmation of these damages and disturbances, and yet took no action to prevent or even minimize Appellees' damages.[82] Thus, the Trial Court's failure to directly cite to Louisiana Revised Statute § 9:2900 is harmless error at most.

2. The Trial Court Properly Identified the SWB as the Custodian for Appellees' Strict Liability Claims

SWB's second challenge to the Trial Court's finding of strict liability is that it lacks custody of SELA and is not the liable entity for Appellees' strict liability claims. SWB fails to rebut the presumption that as the owner of SELA, it also is the custodian of SELA for liability purposes under La. C.C. arts. 2317 and 2317.1.

As the Trial Court recognized,[83] the Louisiana Supreme Court defines custody in the context of strict liability based upon garde. *See Doughty v. Insured Lloyds Ins. Co.*, 576 So. 2d 461, 464-65 (La. 1991). "Under most circumstances ownership alone establishes garde." *Id*. at 464. To rebut this presumption, Courts consider whether: (1) the owner derives a substantial benefit from the thing, and (2) the owner has authority or control over the thing. *Id*.; *see also Dupree v. City of New Orleans*, 1999-3651 (La. 8/31/00); 765 So. 2d 1002, 1009. Regarding control, the Supreme Court and this Honorable Court have considered: whether an owner has the right to grant a right of use to others or to authorize alterations or repairs, and whether the owner has unfettered access to the thing.[84]

The SWB is presumed to be the custodian of SELA because it is the owner of SELA. The SWB unequivocally testified: "The SELA projects, the large drainage systems are owned and maintained by the Sewerage and Water Board of New

[82] *See* 20.R.4281, 4355, 4358, 4410; 21.R.4434, 4457, 4483, 4489, 4510-11, 4537 (Dep. Tr. USACE); 22.R.4723-53 (Quick & Associates Contracts); 22.R.4753-54 (SELA Claims Brochure); 23.R.4997, 5005, 5007-08, 5011, 5015, 5018-19, 5026, 5044, 5060 (Dep. Tr. SWB); 24.R.5088-5129 (Programmatic Agreement); 24.R.5209-11 (SELA Vibration Monitoring Program Brochure); 24.R.5130-35 (Appellee SELA Hotline Complaints).

[83] 27.R.5959.

[84] *See Doughty*, 576 So. 2d at 464-65; *Butler v. Re/Max New Orleans*, 2001-2349 (La. App. 4 Cir. 9/11/02), 828 So. 2d 43, 47; *Bethea v. Great Atl. & Pac. Tea Co.*, 2007-1385 (La. App. 4 Cir. 9/30/09), 22 So. 3d 1114, 1116.

Orleans."[85] In order to rebut this presumption of custody, the SWB must demonstrate that: (1) it does not derive a substantial benefit from SELA, and (2) it lacks authority and control over SELA. SWB fails to do so.

Tellingly, the SWB entirely fails to address the first factor – whether it derives a substantial benefit from SELA. The SWB testified that the benefit it derives from SELA is "[a] reduction in flooding" and that it would describe this benefit as "substantial."[86] The SWB attempts to identify USACE and/or the Federal Contractors as the custodian(s) of SELA but makes no attempt to demonstrate what substantial benefit these entities may derive from SELA, if any.[87] With regard to the second factor to consider for custody, the Record demonstrates that the SWB had authority and control over SELA. Not only is SWB the owner of SELA, but it is also the *de facto* local sponsor of SELA with jurisdiction over the project.[88] SWB entered into contracts, specifically the PPA and CEA, which engaged USACE to assist SWB with the design, construction, and funding of SELA.[89]

SWB was solely responsible for the engineering, design, and specifications for SELA.[90] SWB directly contracted with and paid "designers of record" to assist with these SELA responsibilities.[91]

The SWB's SELA designs and specifications were input into the construction contracts awarded to the Federal Contractors and dictated the construction of SELA.[92] For example, the SWB's designs and specifications controlled the construction sequence and the precise features for construction of the: box culvert, pile driving, dewatering, unwatering, jet grouting, foundation, retaining structure,

[85] 23.R.4998 (SWB Dep. Tr.); *see also* 23.R.5012-13, 5055 (SWB Dep. Tr.).
[86] 23.R.5057 (SWB Dep. Tr.).
[87] *See* Appellate Br. at pp. 14-15.
[88] 23.R.4885, 4890, 4998, 5012-13.
[89] *Id.*
[90] 23.R.4997, 5005 (SWB Dep. Tr.); 20.R.4203, 4355-56, 4358; 21.R.4446, 4483 (USACE Dep. Tr.).
[91] 23.R.4997, 5007, 5011 (SWB Dep. Tr.).
[92] 20.R.4206, 4281, 4391; 21.R.4483, 4471, 4485 (USACE Dep. Tr.)

excavation, back fill, vibration monitoring, traffic control, tying SELA into existing drainage system, and installation of piezometers and inclinometers.[93]

USACE's role on SELA was to administer the construction contracts to ensure that the SWB's designs and specifications were carried out by the Federal Contractors.[94] However, in order for USACE to administer these contracts for construction within the SWB's territorial jurisdiction, the SWB issued authorizations and rights-of-entry to USACE.[95] These authorizations and right of entry specifically recognize that the SWB "is vested with sufficient ownership interests in or control of [SELA]."[96]

The SWB worked with USACE to implement the SELA construction.[97] The SWB managed SELA through its Network and Engineering Department and its contractor BCG/Ardurra.[98] SWB regularly accessed, conducted work, and inspected the SELA construction sites.[99] SWB made recommendations and modifications to the SELA work both directly and through its SELA administrator, USACE.[100]

The SWB was a part of the Project Coordination Team for SELA.[101] This Team met regularly to review the progress of SELA, upcoming SELA work, the daily construction logs, vibration reports, including exceedances, complaints about SELA, and to address and resolve any issues that arise with SELA.[102]

The SWB's attempt to identify USACE and/or the Federal Contractors as the custodian(s) of SELA fails for lack of Record evidence. SWB makes several

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[93] 20.R.4212-17, 4220, 4227, 4246, 4264, 4366-67, 4375, 4380, 4391, 4395-96, 4397-98; 21.R.4445, 4447, 4451, 4455-56, 4457-58, 4463-64, 4481, 4488-89, 4501
[94] 20.R.4202, 4281, 4380; 21.R.4449 (USACE Dep. Tr.).
[95] 24.R.5136-67 (Authorizations and Rights-of-Entry); 23.R.5013 (SWB Dep. Tr.);
[96] 24.R.5136-67.
[97] 23.R.5008, 5037, 5043 (SWB Dep. Tr.)
[98] 23.R.4997, 5007, 5032-33, 5058, 5029 (SWB Dep. Tr.)
[99] 23.R.4427-28; 23.R.5004, 5010, 5015, 5050, 5058-60, 5067-68 (SWB Dep. Tr.); 20.R.4373-74, 4376-78; 21.R.4430 (USACE Dep. Tr.).
[100] 23.R.5008, 5010, 5020, 5028-29, 5038, 5050-51, 5053-54, 5058-59 (SWB Dep. Tr.); 20.R.4204-06, 4382; 21.R.4484, 4515, 4520, 4537 (USACE Dep. Tr.)
[101] 22.R.4835-23.R.4881 (PPA); 23.R.4882-4905 (CEA); 23.R.5054 (SWB Dep. Tr.).
[102] 21.R.4410-4415, 4510 (USACE Dep. Tr.); 23.R.5015, 5054 (SWB Dep. Tr.).

statements to support its argument, but few of these statements contain citations to the Record, while the rest are unsubstantiated and should be disregarded on appeal.

A closer examination of the SWB's citations to the Record reveals the following facts: (1) USACE administers the construction contracts for SELA, (2) USACE ensures that construction on SELA is in compliance with the SWB's plans and specifications for SELA, (3) the Federal Contractors had some discretion as to where to set up the jet grout plants for SELA, (4) the SWB has authority to tell the Federal Contractors to limit noise from SELA construction, (5) the SWB could enter the SELA construction sites and conducted work on these sites, and (6) the Federal Contractors set up safety fencing for the SELA construction sites.[103] None of this evidence demonstrates the requisite level of authority or control for imposing strict liability on USACE or the Federal Contractors. For these reasons, the Trial Court's imposition of strict liability on SWB should not be disturbed.

D. The SWB is Liable for Appellees' Inverse Condemnation Claims

Notably, the SWB does not challenge the Trial Court's conclusion that Appellees suffered an inverse condemnation as a result of SELA.[104] Rather, the SWB challenges the Trial Court's identification of SWB as the entity liable for inverse condemnation. The SWB contends that USACE is the liable entity, but in doing so omits any mention of this Honorable Court's decision in *Holzenthal*, the very case relied upon by the Trial Court,[105] which identifies SWB as the proper, liable entity for inverse condemnation involving SELA property damages.

Holzenthal dictates that the SWB is the liable entity for Appellees' inverse condemnation claims. In *Holzenthal*, the SWB made the exact same argument – that USACE is liable for inverse condemnation caused by SELA – rejected by this

[103] 20.R.4207-08, 4224, 4254; 21.R.4427, 4430, 4447-48, 4482, 4511.
[104] *See generally* Appellant Br.
[105] 27.R.5955.

Honorable Court.[106] Rather than ask this Court to reconsider or distinguish its decision in *Holzenthal*, SWB omits any mention of the case and again cites the same case law from the 1960s that *Holzenthal* distinguished.[107]

Holzenthal concluded that the SWB, and not USACE, was the liable entity for inverse condemnation because of SWB's continuing "input and consultation" for SELA and the absence of evidence showing that USACE had "exclusivity of jurisdiction and control" over SELA. 950 So. 2d at 67-69. In determining the SWB had sufficient input and consultation on SELA, the Court noted the following obligations of SWB for SELA: (1) the SWB's opportunity to review and comment on SELA contracts, designs, specifications, and modifications; (2) the SWB's consultation with USACE to determine lands, easements, and rights of way for SELA; (3) the SWB's contribution of 25 to 50 percent of total SELA project costs; (4) the SWB's participation on the Project Coordination Team with USACE, which was to meet regularly, oversee SELA, and make recommendations to USACE; and (5) the SWB's agreement to hold USACE free from all damages arising from SELA. *Id*. at 67-68. All of these factors and more exist in the present case.[108]

The Record evidence supports the conclusion under the *Holzenthal* analysis that SWB is the liable entity for the Appellees' inverse condemnation caused by SELA. The SWB was responsible for the plans and specifications for SELA, incorporated into the construction contracts, and was involved in modifications to these plans and specifications.[109] The SWB was responsible for and did issue the authorizations and rights-of-entry to USACE for construction of SELA.[110] The

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[106] *See* Appellant Br. at pp. 15-17; *Holzenthal*, 950 So. 2d at 66-69.
[107] Appellant Br. at pp. 16-17.
[108] 27.R.5955.
[109] 20.R.4206, 4281, 4391; 21.R.4483, 4471, 4485 (USACE Dep. Tr.); 20.R.4212-17, 4220, 4227, 4246, 4264, 4366-67, 4375, 4380, 4391, 4395-96, 4397-98; 21.R.4445, 4447, 4451, 4455-56, 4457-58, 4463-64, 4481, 4488-89, 4501; 20.R.4202, 4281, 4380; 21.R.4449 (USACE Dep. Tr.); 21.R.4410-4415, 4510 (USACE Dep. Tr.); 23.R.5015, 5054 (SWB Dep. Tr.).
[110] 23.R.5008, 5037, 5043 (SWB Dep. Tr.)

SWB is responsible for 35 percent of the SELA construction costs, as well as all costs for utility relocations required by SELA.[111] The SWB is a member of the SELA Project Coordination Team and met and participated regularly in meetings of this Team.[112] The SWB contractually agreed to hold and save USACE from damages arising from SELA.[113]

The SWB's recitation of "facts" in support of its argument that USACE is the liable government entity contains no citations to the Record[114] and thus, should be disregarded by the Court. Even if these "facts" were substantiated, there is no showing that USACE had exclusive control of SELA, as is required to impose liability for inverse condemnation under *Holzenthal*.

E. The Trial Court's Award of Cost of Repair Damages to Appellees Ryan, Jurisich, and Lieder was Proper

The SWB contends, without any legal basis or Record citation, that the Trial Court "mistakenly" awarded damages to Appellees Thomas Ryan and Judy Jurisich for "relocation" and "moving" expenses and to Appellee Faye Lieder for porch and foundation repairs.[115] Louisiana Civil Code article 2324.1 provides that "much discretion must be left to the judge" in assessing damages.

With regard to the Ryan/Jurisich damages at issue, contrary to the SWB's claim, the Gurtler Bros.' estimate does not even address "relocation" damages; any relocation damages were addressed by Dr. Wade Ragas and already deducted by the Trial Court.[116] SWB asks this Court to reduce the Ryan/Jurisich damages by the entire amount of "General Items," in the Gurtler Bros.' estimate when this amount covers categories of compensable damage beyond just "moving" expenses.[117]

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[111] 7.R.1476; 22.R.4755, 4840, 4844-47, 23.R.4890, 5021, 5032.
[112] 20.R.4207-08, 4224, 4254; 21.R.4427, 4430, 4447-48, 4482, 4511; 22.R.4835-23.R.4881 (PPA); 23.R.4882-4905 (CEA); 23.R.5054 (SWB Dep. Tr.).
[113] 22.R.4837, 23.R.4867-68, 4894.
[114] *See* Appellant Br. at pp. 16-17.
[115] *See* Appellant Br. at pp. 17-18, nn. 69-71.
[116] *See* 25.R.5393-5413 (Gurtler Bros.' Estimate – Ryan/Jurisich); 27.R.5845. 27.R.5961.
[117] 25.R.5399.

Indeed, the Trial Court did not discount any other Appellees' damages for amounts for landscaping, cleaning air conditioning condenser, lead tests, temporary toilets, or packing materials.[118] It is unclear exactly what damage deductions that SWB seeks for the Ryan/Jurisich claims, and it has not established manifest error.

With regard to the SWB's argument that Appellee Faye Lieder's damages should be reduced by $42,263.39 for porch and foundation repairs already conducted by Lieder, this argument too contains no citation to the Record for the deduction sought by SWB.[119] The SWB also mischaracterizes Lieder's testimony regarding the repairs at issue. Lieder testified that while she had recently undertaken some repairs to the SELA damages on her porch, she was unable to do the "entire porch," and instead she "did what could be done. There's one area that can't be fixed."[120] Thus, the Trial Court's award of damages to repair Lieder's porch, in order to bring the porch back to the condition prior to the SELA damages, is not manifest error.

F. The Trial Court Properly Awarded Just Compensation to Appellees

While SWB does not challenge on appeal that Appellees suffered inverse condemnation as a result of SELA,[121] SWB attempts to limit Appellees' recovery of just compensation for inverse condemnation by arguing: (1) that the purpose of SELA is hurricane protection, and (2) even if the purpose of SELA is flooding and drainage control, the limitations on just compensation apply. As set forth below, these arguments directly contradict the Record evidence and applicable law.

1. Appellees are Entitled to the Full Extent of Just Compensation

As the Trial Court determined, Appellees are entitled to recover just compensation for their inverse condemnation.[122] Indeed, the Louisiana Constitution

[118] *See* 27.R.5961-75 (Reasons for Judgment).
[119] Appellant Br. at p. 18.
[120] 38.R.20.
[121] *See generally* Appellant Br.
[122] 27.R.5966 (Reasons for Judgment).

provides for recovery of "just compensation" for inverse condemnation, which "shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation." La. Const. art. 1, § 4 (B). Louisiana Revised Statute § 13:5111(A) adds to recoverable just compensation, "reasonable attorney fees," and "engineering, and appraisal fees" which "are actually incurred because of such proceeding." Because the Trial Court determined Appellees suffered inverse condemnation from SELA, which SWB does not challenge on appeal, Appellees are entitled to recover the foregoing just compensation damages from SWB.

2. Just Compensation is Only Limited for "Hurricane Protection Projects," and SELA is Unrelated to Hurricane Protection

The SWB seeks to limit Appellees' recovery of just compensation based upon Section 4(G) of the Louisiana Constitution and related Louisiana Revised Statutes §§ 49:214.5.6 and 49:214.6.5. This attempt fails, however, because the clear and unambiguous language of these laws only applies to "hurricane protection projects," and the undisputed Record evidence, including sworn testimony from SWB, demonstrates that SELA is in fact not a hurricane protection project.

The Louisiana Supreme Court requires that when a constitutional provision or statute is clear and unambiguous, the law must be applied as written and no further interpretation made be made in search of legislative intent. *City of New Orleans v. La. Assessors' Ret. & Relief Fund*, 2005-2548 (La. 10/1/07), 986 So. 2d 1, 22. Thus, the first step in this analysis is a review of the relevant laws.

Section 4(G) of the Louisiana Constitution states:

> 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. La. Const. art. 1, § 4 (G) (emphasis added).

Similarly, Louisiana Revised Statute § 49:214.5.6 (D), states:

> [C]ompensation paid for the taking of, or loss or damage to, property rights necessary for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall be limited to the compensation required by the Fifth Amended 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).

Third and finally, Louisiana Revised Statute § 49:214.6.5 provides:

> Pursuant to Article I, Section 4(G) and Article Vi, Section 42(A) of the Constitution of Louisiana, compensation paid for the taking of, or loss or damage to, property rights affected by 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 Amended of the Constitution of the United States of America. (emphasis added).

Under the clear, unambiguous language of these laws, as enacted by the Louisiana Legislature, the SWB's argument for limiting just compensation damages hinges on whether SELA is a "hurricane protection project." This argument fails because the SWB has testified that SELA is unrelated to hurricane protection, and this testimony supported by the Record evidence.

The SWB testified that: "The SELA Projects – I would say no, they don't have anything to do with hurricane protection."[123] The SWB then clarified that instead of hurricane protection, "[t]he SELA [P]roject is designed to improve the drainage within, I would say the uptown drainage basin, in accordance with the drainage master plan….it is to increase the conveyance system and to minimize flooding."[124] The Louisiana Constitution specifically identifies "[d]rainage, flood control…for the benefit of the public generally," the very purpose of SELA, as a basis for inverse condemnation that warrants just compensation. La. Const. art. 1, § 4 (B)(2)(b)(iii).

The Public Law cited by SWB in support of its argument actually confirms that SELA is a flooding and drainage project. It can be no coincidence that SWB failed to quote the portion of Public Law 110-252 specifically addressing SELA,

[123] 23.R.4998 (SWB Dep. Tr.) (emphasis added).
[124] 23.R.4997-98; *see also* 23.R.5057 ("the purpose of the [SELA] [P]roject is to minimize flooding and improve the drainage system.").

which provides: "That, in addition, $838,000,000 of the funds provided herein shall be for elements of Southeast Louisiana Drainage project [SELA]…to provide for interior drainage of runoff from rainfall with a ten percent annual exceedance probability."[125] Indeed, a representative from USACE has confirmed that SELA's purpose is to reduce "the risk of flood damages due to rainfall flooding" in support of the "master drainage plans."[126]

Likewise, the governing contracts for SELA uniformly describe SELA as a flooding and drainage project, with no mention of hurricane protection. The Project Partnership Agreement ("PPA") specifically defines SELA's purpose as "to provide flood damage reduction and interior drainage for Orleans and Jefferson Parishes."[127] The PPA also recognizes that the SELA Project aims to provide "interior drainage of runoff from rainfall with a ten percent annual exceedance probability."[128]

Likewise, the Cooperative Endeavor Agreement ("CEA") recognizes the purpose of the SELA Project to provide "interior drainage of runoff from rainfall with a ten percent annual exceedance probability."[129] The CEA describes the scope of the SELA Project as "to provide flood damage reduction and interior drainage."[130]

The Programmatic Agreement describes the purpose of SELA as "to improve drainage and to provide flood damage reduction benefits in Orleans Parish, Louisiana."[131] Not one of these governing contracts for SELA describes SELA as a hurricane protection project, and all describe SELA as a flood reduction and drainage improvement project. For these reasons, the limitations on just compensation for an inverse condemnation caused by a hurricane protection project do not apply to the inverse condemnation suffered by Appellees due to SELA.

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[125] 8 R.1476 (P.L. 110-252, 122 STAT. 2349 (June 30, 2008) (emphasis added)).
[126] 7.R.1526.
[127] 22.R.4838.
[128] 22.R.4836.
[129] 23.R.4883.
[130] 23.R.4886.
[131] 24.R.5088.

3. The Louisiana Supreme Court's Decision in *Jarreau* is Irrelevant to Appellees' Recovery for Just Compensation

SWB cites *South Lafourche Levee District v. Jarreau*, 2016-0788 (La. 3/31/17), 217 So. 3d 298, in support of its argument for limiting just compensation. The Trial Court recognized *Jarreau* is clearly distinguishable.[132] The entire portion of *Jarreau* cited by SWB comes from the Supreme Courts' review of the legislative history of the "Louisiana Levee Servitude," 217 So. 3d at 308-11, an issue entirely irrelevant to the present case. The reason that the Supreme Court reviewed the legislative history was because it found that:

> 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 doe to 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 the Fifth Amendment for an appropriation, *i.e.* nothing. 217 So. 3d at 308.

None of the issues raised in the above quoted language are at issue in the present case. Furthermore, as discussed above, the language of Section 4(G) of the Louisiana Constitution and Louisiana Revised Statutes §§ 49:214.5.6 and 49:214.6.5 is clear and unambiguous, requiring this Honorable Court to apply the laws as written and not delve into the legislature history. Accordingly, *Jarreau* offers no assistance to the Court in resolving the SWB's argument and should be disregarded.

G. The Trial Court Properly Awarded Appellees Damages for Loss of Use and Quiet Enjoyment

SWB argues that Appellees were not entitled to recover damages for loss of use and quiet enjoyment because: (1) Appellees' loss of use and enjoyment claims

[132] 27.R.5966.

are "not peculiar," and (2) Appellees are not entitled to recover loss of use and enjoyment damages from SWB for loss of public and private parking. For the reasons below, neither argument has merit.

1. Appellees are Entitled to Recover Damages for Loss of Use and Quiet Enjoyment of Their Properties Due to SELA

Contrary to the SWB's argument, the law is clear that damages for loss of use and enjoyment are recoverable for both inverse condemnation and strict liability claims. The Louisiana Supreme Court case cited by SWB, *Constance v. State*,[133] provides that for inverse condemnation and strict liability claims, where there is evidence of physical damages to a property, general damages are recoverable.[134] Even where there is no showing of physical damages, *Constance* allows for recovery of general damages where there is a showing "of some type of excessive or abusive conduct."[135] The only time a showing of "special damage peculiar to a particular property" is required for an award of general damages is when no physical damages have occurred and there is no showing of excessive or abusive conduct.[136]

Because the SWB does not challenge that Appellees suffered physical damages from SELA,[137] the law is clear that Appellees are entitled to recovery of general damages for loss of use and enjoyment of their properties caused by SELA. The Louisiana Constitution specifically recognizes that damages for "inconvenience," as well as "any other damages actually incurred" are recoverable for inverse condemnation. *See* La. Const. art. I, § 4 (B). Similarly, La. C.C. art. 667 provides a damages award for deprivation of enjoyment of property.

The cases cited by SWB to support its claim that no general damages for loss of use and enjoyment are recoverable involve instances where no physical damage

[133] 626 So. 2d 1151 (La. 1993).
[134] *Id*. at 1157-58.
[135] *Id*.
[136] *Id*. at 1158.
[137] *See generally* Appellant Br.

occurred and no abusive or excessive conduct occurred.[138] Thus, these cases are inapplicable to the Appellees' claims. Likewise, SWB's challenges to the testimony of Appellees' real estate expert, Dr. Wade Ragas, that Appellees suffered from similar losses of use and enjoyment of their properties due to SELA, are unwarranted because Appellees are not required to show their damages are peculiar, given the undisputed evidence that Appellees suffered physical damages to their properties.

2. The Trial Court's Award of Damages for Loss of Parking and Street Access was Proper

Appellees are entitled to recover damages from SWB for loss of public parking and street access to their properties caused by SELA. The Louisiana Supreme Court in *State v. Chambers*,[139] has recognized that governmental interference with a property owner's public street access constitutes a taking. Even *Coliseum Square Association v. City of New Orleans*,[140] cited by SWB, which pertains to the unrelated issue of leasing a public street, recognizes that private property owners who enjoy a public street suffer a violation when that street is removed from public use.

The Record evidence shows that during SELA, all Appellees suffered from public street closures that prevented off-street parking and obstructed access to their properties.[141] Appellees are entitled to recover damages for these losses. The cases cited by SWB are factually distinguishable from this case. Both *Constance* and *Department of Highways v. Capone*[142] involved construction that did not close down any streets and did not impede, obstruct or impair access to the properties at issue.

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[138] *See Constance*, 626 So. 2d at 1157 ("There is proof neither of physical damage to property nor excessive or abusive conduct by the DOTD."); *State v. Chambers*, 595 So. 2d 598, 606 (La. 1992) ("The record does not contain any concrete evidence tending to show that damage to the claimant's right to develop resulted from ultrahazardous activities, abusive or excessive conduct, or acts causing physical property damage or personal injury."); *Lodestro Co. v. City of Shreveport*, 33,901 (La. App. 2 Cir. 9/27/00), 768 So. 2d 724, 727 ("In this instance, there is no evidence of personal injury or physical damage to property.").

[139] 595 So. 2d at 602.

[140] 544 So. 2d 351, 353 (La. 1989).

[141] 23.R.5036, 5048; 36.R.65-66, 191-92; 38.R.10-11, 38, 129.

[142] 626 So. 2d at 1157; 298 So. 2d 94, 97 (La. 1974).

SWB also argues that lost or obstructed driveway access by SELA was not the fault of SWB, but of the Federal Contractors. SWB presented no evidence to support this claim.[143] The undisputed evidence proves the SWB's designs and specifications for SELA required street closures, as well as blocked driveway access.[144] Thus, the SWB is also liable for damages related to loss of private driveway use due to SELA, as awarded by the Trial Court.

H. The Trial Court's Award of Reasonable Attorneys' Fees was Correct

SWB argues that the Trial Court was not justified in awarding attorneys' fees above the contingency fee agreement but concedes in its Appellant Brief that attorneys' fees of $207,261.23 should be awarded. Because this "Group A" trial functioned as a bellwether for a much larger group of joined plaintiffs, an extraordinary degree of motion practice, preparation, and attorney labor was involved. The Record reveals extensive motion practice by the SWB (including numerous dispositive exceptions and motions), for which all plaintiffs—not merely the five plaintiff Appellees at issue—will eventually be the beneficiary.

The Trial Court Judge conducted a lengthy hearing analyzing each item of costs and support for attorneys' fees.[145] Appellees presented documentation supporting each participating counsel's attorney fees,[146] totaling $1,016,866.31 in compensable attorneys' fees based on hourly billing and rates of counsel.[147] At the hearing, SWB counsel waived the opportunity to question Appellees' counsel on the stand regarding their time.[148]

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[143] *See* Appellant Br. at p. 24.
[144] 23.R.5019-20.
[145] 39 R 1 – 48.
[146] 28 R. 120 – 130.
[147] 28 R. 125.
[148] 39 R. 42 – 43.

The Trial Court determined that the "time/effort that has gone into this case warrants me modifying the contingency fee agreement."[149] awarding $400,000.00 attorneys' fees—less than half of the attorneys' fees sought by Appellees. The Trial Court's award is based, not only on declarations of counsel and the Record, but also the Trial Court's observation of the time and effort of counsel, including working in multiple jurisdictions to reach trial, and appearing in court over 20 times in just the last year leading up to trial.[150] Because the Trial Court is uniquely well situated to determine the reasonableness of an attorney fee award based on the multi-year bellwether trial occurring before it, and because Record evidence supports the Trial Court's findings of fact, the Trial Court's award of attorneys' fees is not clearly wrong and should be affirmed.

I. The Trial Court's Award of Expert Costs was Correct

SWB seeks to reduce the Trial Court's award of expert fees and costs to: $5,300 for Dr. Ragas; $19,600 for Dr. Storesund; and $18,200 for Gurtler Bros. SWB only allows costs for the experts' appearance and immediate pre-trial preparation, excluding the experts' extensive and vital: investigations, review of voluminous records, and preparation of expert reports.

The trial court has great discretion in awarding costs for expert witness fees. *In re Lorraine*, 2015-0085 (La. App. 1 Cir. 9/1/16), 2016 WL 4586047, at *2. A trial court has discretion to tax the costs of an expert's preparatory, non-testifying expenses. *Vela v. Plaquemines Par. Gov't*, 2000-2221 (La. App. 4 Cir. 3/13/02), 811 So. 2d 1263, 1282. The Record reflects a specific, quantifiable amount of costs expended for each expert for the Appellees' Group A bellwether trial.[151] SWB does not contest the Trial Court's authority to award expert costs in this context, only the amount. Because the Trial Court has vast discretion in awarding expert costs and

[149] 39 R. 48 (l. 7 – 15).
[150] 39 R. 46.
[151] 28 R. 136 – 137 (Decl. of Whitaker); 39 R. 42 – 43.

the Record supports this award, the Trial Court's award of expert costs is not clearly wrong and should be affirmed.

VI. CONCLUSION

Based upon the foregoing arguments and Record evidence, Appellees respectfully request that this Honorable Court affirm the findings of fact and conclusions of law of the Trial Court. The Appellant SWB has failed to demonstrate any manifest errors or incorrect findings or conclusions by the Trial Court. Appellants further seek an award of reasonable attorneys' fees and costs against Appellant SWB for the filing of this appeal as is allowed under Louisiana Code of Civil Procedure article 2164.

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VERIFICATION AND CERTIFICATE OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

Before me, undersigned authority, personally came and appeared:

DANIEL A. MEYER

who, after being duly sworn, stated that he is an attorney for Plaintiffs/Appellees GEORGE AND BETH DEUSSING, DAVID EPSTEIN, FAYE LIEDER, THOMAS RYAN AND JUDITH JURISICH, AND DOROTHY WHITE, and that the allegations in the foregoing brief are true and correct to the best of his knowledge, information and belief. Affiant further certifies that he has served a copy of the foregoing pleadings to the following:

The Honorable Nakisha Ervin-Knott
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DANIEL A. MEYER

Sworn to and subscribed before me, undersigned notary, on this February 4, 2019.

NOTARY PUBLIC

Donald D. Reichert, Jr.
Notary Public # 136750
Lifetime Commission