Judgment rendered August 21, 2013.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 47,749-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

TOMMY HARP — Plaintiff-Appellee

Versus

WILLIAM AUTREY AND AUTREY INVESTMENT PROPERTIES, L.L.C. — Defendant-Appellants

* * * * *

Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 53,905

Honorable Jay B. McCallum, Judge

* * * * *

W. KYLE GREEN, L.L.C.
By: W. Kyle Green — Counsel for Appellant

WILLIAM A. JONES, JR. — Counsel for Appellee

* * * * *

Before BROWN, WILLIAMS, CARAWAY,
DREW and MOORE, JJ.

WILLIAMS, J., dissents with written reasons.

DREW, J., dissents for the reasons assigned by Judge Williams.

MOORE, J.

William Autrey and Autrey Investment Properties LLC appeal a judgment finding that they violated the Louisiana Unfair Trade Practices Act ("LUTPA"), La. R.S. 51:1401 et seq., by discontinuing water and sewer service to Tommy Harp's unoccupied mobile home park lots, and awarding damages of $3,000 and attorney fees of $5,000. Harp answers the appeal, seeking an increase of damages and attorney fees. For the reasons expressed, we reverse the finding of the LUTPA violation and vacate the award of attorney fees, but affirm the damages of $3,000 as reasonable under La. C.C. art. 2024.

Factual Background

In 1969, Harp's mother purchased Lot 14 in Suburban Acres Mobile Home Estates ("the park") outside of Ruston in Lincoln Parish. Some three years later, she also bought the adjacent Lot 15; in 1978 she placed a mobile home on the lots and began living there. At some point, the water well dried up and the existing water lines fell into ill repair; no running water was available to Ms. Harp or the other residents of the park. Some began buying their own water or getting it from family and friends; eventually, the Louisiana National Guard placed large tanks of water nearby for the residents' use. Most of the residents moved out because of the water problems, but Ms. Harp was one of the few to remain.

In 2004, Autrey (with his wife and his LLC) purchased over 20 lots in the park, including the water well and a sewage treatment lagoon. By the time of trial, they had bought 35 of the park's 45 lots. Autrey repaired the water lines and began providing water and sewer services to the remaining

residents. No written agreement for water and sewer was ever executed, but Autrey sent the following letter to "All residents of Suburban Trailer Park," with emphasis in original:

> WATER
> Due to the shift from well water to City water[,] there has been a significant increase in the cost of water. This is due to the city charging double for property located outside the city limits. It is possible that this rate will increase in the near future. These are circumstances beyond my control.
>
> Beginning April 1st the monthly rate for water will be $45.00. This is due the 1st and late after the 5th. There will be a $10.00 late fee. Water services will be turned off on the 10th. * * *
>
> It is critical that all water leaks are repaired. This means faucet leaks, drips, running toilets, water heater drains, etc. If you see puddles on the ground when it should be dry[,] this could mean a leak. Please let me know because you will be the one paying for these leaks in the long run. Private property owners can expect a water inspection in the near future. If you have leaks you will be responsible for immediate repairs or will have your water shut off until those repairs are completed[.] Your leak will cost everyone.
>
> SEWAGE
> More bad news concerns the sewage system. Due to requirements by the public health system additional expenses are being incurred to maintain the system. This means that in the near future a sewage fee will be added to the water fee[,] probably in the amount of $20 per month. Again[,] these are additional expenses which are out of my control. * * *

Ms. Harp began paying $45 per month for water and sewer service, and did so until she died in July 2008.

After Ms. Harp's death, Tommy Harp ("Harp") became owner of an undivided one-third interest in his mother's property; he later purchased the remaining two-thirds interest for $6,000. Although Harp never lived in the park or had a tenant in the mobile home, he continued to pay the $45 monthly fee for water and sewer.

As noted, Autrey owned most of the land surrounding Harp's two lots. Prior to her death, he had offered to buy her out; afterward, he made several such offers to Harp. At trial, Autrey admitted he wanted to acquire the remaining lots in the park. By late 2008, only one resident remained in the park, a Ms. Prewitt, who also refused to sell her lot to Autrey.

In early or mid-December 2008, Autrey used a backhoe and severed the water line to the park. He testified that he ran a water hose across the street to supply water to Ms. Prewitt until she was able to "relocate and find another place." He "heard" that the hose froze "one or twice," disrupting Ms. Prewitt's water supply. She eventually moved out of the park.

Harp asked Autrey to restore the water service, but he refused to do so. According to Harp, he met with Autrey, suggesting that they share the expense of repairing the water line, and even offering to obtain water service from Ruston. However, Autrey rejected both options, advising Harp that if he got water elsewhere, he would not be able to use the sewer system.

By letter dated January 26, 2009, Autrey notified Harp that water services were permanently terminated:

> This letter is to inform you that I will no longer be able to provide water services to your lots[.] I have attempted to maintain these services long enough to allow the few residents who were living there to move out. Were it not for your mother living there, I probably would never have attempted to do even that[,] but I am glad that she didn't have to move[.] * * *
>
> Even though I own most of the lots, the shared cost of maintaining the system is more than I am willing to pay. Should you so desire, my offer to purchase your lots still stands if we can reach a price that is acceptable to both of us.

On October 7, 2009, Harp filed this suit for damages against Autrey, his wife and his LLC, alleging that terminating water and sewer services constituted a bad faith breach of the defendants' obligation to supply those services to the park as well as a violation of LUTPA.[1]

Autrey filed exceptions of no right and no cause of action, urging that Harp had no viable breach of contract claim. He also contended that there was no claim under LUTPA because Harp was neither a business competitor nor a consumer. The court overruled the exceptions.

At trial in August 2011, in addition to the testimony summarized above, two experts testified regarding the value of Harp's lots. Harp's expert, Richard Gene Nealy, a licensed real estate broker, testified that the property had a rental value of $500 per month; using the "income approach," he capitalized the value of the lots, with utilities, at $58,714. Autrey's expert, Mark S. Taylor, a real estate appraiser, used the "fair market value" approach, projecting a low-end value of $16,800 and a high-end of $39,700 for the lots. Both agreed the property had no income value without water and sewer service. Although nobody had lived in the mobile home since his mother's death, Harp testified that he had a tenant for it; however, he did not corroborate this by testimony or documentation.

Action of the District Court

By oral reasons rendered in March 2012, the court found that Autrey assumed the responsibility of providing water and sewer service to the subject lot, doing so by sending the letter to the residents, but that he then

[1]Ms. Autrey was later dismissed as a defendant by joint stipulation.

terminated the water supply without prior warning. Admitting it was a "close call," the court found a violation of LUTPA: even though Autrey had no obligation to assume the duty of providing water and sewer, he did so. Further, Autrey's actions were "egregious," taken in an effort to acquire the entire park: "There's no requirement that Mr. Harp or any other person in that subdivision be required to sell their property." The court also found Autrey in bad faith for failing to provide, despite "many opportunities," notice of termination of water services. The court conceded that Autrey's agreement to provide water was terminable at will, but stated,

> The damages in this case flow not from the termination of the contract but from the inappropriate termination of the contract.

Nevertheless, the court declined to award Harp the full appraised value, as this would amount to unjust enrichment. The court awarded $3,000, representing rental for "six months [that] would be more than appropriate and reasonable under the circumstances to have provided notice to Mr. Harp and any other tenant that water service provision was being terminated."

Finally, the court stated that attorney fees were authorized under LUTPA, R.S. 51:1409 A. By subsequent oral reasons, the court awarded Harp attorney fees of $5,000. As noted, Autrey has appealed and Harp has answered the appeal.

Discussion: LUTPA Violation

By his first assignment of error, Autrey urges the court erred in finding liability under LUTPA, La. R.S. 51:1401 et seq. He shows that LUTPA is penal in nature and strictly construed. *Coffey v. Peoples*

Mortgage & Loan of Shreveport, 408 So. 2d 1153 (La. App. 2 Cir. 1981). He contends that Harp failed to prove either essential element, that Autrey's conduct offended established public policy, or that his conduct was immoral, unethical, oppressive, unscrupulous and substantially injurious. *Id.* He also contends that LUTPA permits the exercise of sound business practices, permissible business judgment and appropriate free enterprise. *SDT Indus. Inc. v. Leeper*, 34,655 (La. App. 2 Cir. 6/22/01), 793 So. 2d 327, *writ denied*, 2001-2558 (La. 12/7/01), 803 So. 2d 973. He concludes that there was no factual basis for the court to hold, in essence, that he must continue to provide, at his own expense, water services to Harp.

Harp responds that the findings are not plainly wrong. He suggests that virtually every act of Autrey's was part of a calculated scheme to drive Harp out of the park, that his explanations for terminating water service were pretextual, and that his conduct was in bad faith.

LUTPA declares it unlawful to engage in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La. R.S. 51:1405 A. LUTPA also authorizes private actions under R.S. 51:1409 A:

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use of employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. * * * In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. * * *

This section creates a right of action for any person who suffers any ascertainable loss for a violation of the statute. *Cheramie Servs. Inc. v. Shell Deepwater Production Inc.*, 2009-1633 (La. 4/23/10), 35 So. 3d 1053. Acts constituting unfair or deceptive trade practices are not specifically defined but are determined on a case-by-case basis. *Johnson Const. Co. v. Shaffer*, 46,999 (La. App. 2 Cir. 2/29/12), 87 So. 3d 203; *Tyler v. Rapid Cash LLC*, 40,656 (La. App. 2 Cir. 5/17/06), 930 So. 2d 1135. The statute applies to any "consumer transaction," which is defined as "any transaction involving trade or commerce to a natural person, the subject of which transaction is primarily intended for personal, family, or household use." R.S. 51:1402 (3).

To prevail on a LUTPA claim, the plaintiff must show that the alleged conduct "offends established public policy and * * * is immoral, unethical, oppressive, unscrupulous, or substantially injurious." *Cheramie Servs. v. Shell Deepwater*, *supra* at 10, 35 So. 3d at 1059, and citations therein; *Coffey v. Peoples Mortgage & Loan*, *supra*. LUTPA is essentially penal in nature and as such is subject to reasonably strict construction. *Coffee v. Peoples Mortgage & Loan*, *supra*; *Glod v. Baker*, 2004-1483 (La. App. 3 Cir. 3/23/05), 899 So. 2d 642, *writ denied*, 2005-1574 (La. 1/13/06), 920 So. 2d 238. The supreme court recently explained:

> LUTPA does not prohibit sound business practices, the exercise of permissible business judgment or appropriate free enterprise transactions. The statute does not forbid a business to do what everyone knows a business must do: make money. * * * Finally, the statute does not provide an alternate remedy for simple breaches of contract. There is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes.

Cheramie Servs. v. Shell Deepwater Production, *supra* at 11, 35 So. 3d at 1053, quoting *Turner v. Purina Mills Inc.*, 989 F. 2d 1419, 1422 (5 Cir. 1993); *Hardy v. Easterling*, 47,950 (La. App. 2 Cir. 4/10/13), 113 So. 3d 1178; *SDT Indus. v. Leeper*, *supra*.

On close review, this record does not support a finding that Autrey's conduct was immoral, unethical, oppressive, unscrupulous, or substantially injurious. The district court aptly noted that Autrey was under no obligation to provide water services to residents of the park, but he voluntarily assumed this duty, upon the payment of a monthly fee. His letter to all residents warned that rates were subject to "circumstances beyond my control," that leaky plumbing in individual trailers put strain on the system, and that he would turn off plumbing if repairs were not made. Residents like Ms. Harp were on full notice that the park's water and sewer system were on tenuous footing. An experienced plumber, Autrey testified without contradiction that in late 2008 he worked a week trying to find a massive leak in the system, but was unsuccessful. Notably, he disconnected the water months after Ms. Harp died and nobody was living in the mobile home. While the district court diplomatically referred to this as a "close call," we do not see anything immoral, unethical, oppressive, unscrupulous or substantially injurious in disconnecting the water to an unoccupied mobile home. The court's finding of a LUTPA violation is a manifest abuse of discretion.

Moreover, Autrey's profit-and-loss statement showed losses of $11,268.26, not including his own time and labor, in trying to repair the

system. He testified without contradiction that he received monthly water bills over $200, reflecting a volume of water usage consistent only with major problems in the system. In light of these losses, and the subsequent written notice to Harp, we find that the decision to disconnect water to the park was the exercise of permissible business judgment. The district court's finding to the contrary is a manifest abuse of discretion.

Harp strenuously argues that regardless of everything else, Autrey's conduct was a bald attempt to force him to sell his lots. "After informing Harp that all water and sewage services were being permanently terminated, *Autrey offered to buy his lots*. It does not get much clearer than this." (Emphasis in original.) However, the fact of massive water system failure permeates this record, and discontinuing the water services was a reasonable business response. LUTPA does not prohibit the profit motive. *Cheramie Servs. v. Shell Deepwater Production*, *supra*. Moreover, after cutting off the water, Autrey did not purchase any additional lots. Autrey's admitted ambition to acquire the entire park did not transform his justifiable conduct into unfair trade practices. The finding of a LUTPA violation is reversed.

Contract Termination and Damages

By his second assignment of error, Autrey urges the court erred in finding he improperly terminated water services to Harp; by his third assignment, he urges the court erred in awarding $3,000 in damages. He argues that in lieu of LUTPA, the proper measure of damages is La. C.C. art. 2024, under which a contract of unspecified duration may be terminated at the will of either party by giving notice, *reasonable in time and form*, to

the other party. He suggests that because Harp still owns the lots and failed to prove any actual loss of rental, no damages are due.

By answer to appeal, Harp contends the court erred in not accepting the expert opinion of his real estate broker, Nealy, who set the loss at $49,714, or at least accepting the expert opinion of Autrey's expert real estate appraiser, Taylor, who set the loss at $22,900.

For the reasons already discussed, the finding of a LUTPA violation was manifestly erroneous; hence, R.S. 51:1409 A cannot form the basis for damages. We agree with Autrey's contention that the proper measure of damages is La. C.C. art. 2024:

> A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

Notice of modification of a contract that is reasonable in time and form is a basic right of any party. *Stegall v. Orr Motors of Little Rock Inc.*, 48,241 (La. App. 2 Cir. 6/26/13), ___ So. 3d ___. Notice of termination of a contract must be in good faith. La. C.C. art. 1770; *Volentine v. Raeford Farms of La.*, 48,219 (La. App. 2 Cir. 7/24/13), ___ So. 3d ___. Damages arising from a contract are measured by the loss sustained by the obligee and the profit of which he has been deprived. La. C.C. art. 1995. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages. La. C.C. art. 1999. The trial court has great discretion to accept or reject expert testimony. *Hamel's Farm LLC v. Muslow*, 43,475 (La. App. 2 Cir. 8/13/08), 988 So. 2d 882, *writ denied*, 2008-2431 (La. 1/30/09), 999 So. 2d 754. In

fact, the court may even substitute its own common sense and judgment for that of an expert witness when the evidence as a whole warrants such a substitution. *Lake D'Arbonne Properties LLC v. Digco Utility Const. Inc.*, 41,671 (La. App. 2 Cir. 1/31/07), 949 So. 2d 590, and citations therein.

Before the letter to all residents, Autrey had no obligation to provide water and sewer services to residents of the park. That letter, however, constituted a contract to provide these services, subject to "circumstances beyond my control" and the warning that he would terminate services in the event of a major leak. After extensive work to repair the system in late 2008, Autrey severed the water line, cutting off service to Harp's mobile home. The district court properly found that Autrey provided no advance notice of this action. This breached his duty of providing notice, reasonable in time and form, of his intent to terminate the contract. Damages are appropriate under C.C. art. 2024.

After careful review, we find no abuse of discretion in the award of damages. The court was entitled to find that a proper notice of termination, reasonable in time and form under Art. 2024, would have given Harp six months' notice. Both experts agreed that the mobile home had a rental value of $500 a month. This justifies the award of $3,000 damages.

We find no merit in Harp's claim for additional damages. The district court apparently felt that both experts' projections of capitalized losses, ranging from $16,800 to $58,714, were based on untenable assumptions. Notably, Harp did not show that he could lease the 35-year-old mobile home on a long-term, continuous basis; aside from his own self-serving testimony,

he offered no evidence that he had even attempted to lease it. Also, Harp had previously paid his relatives $6,000 to buy out their two-third interest in the lots, suggesting a fair value of $9,000; the experts' projected loss of use – not loss of the property itself – amounting to nearly five times that amount borders on the absurd. The district court was completely within its discretion to reject the experts' estimates and to substitute its own common-sense approach to Harp's loss.

These assignments of error lack merit.

Attorney Fees

By his third assignment of error, Autrey contests the award of $5,000 in attorney fees; by his answer to appeal, Harp seeks an increase in attorney fees to $10,890, with additional fees for defending this appeal.

Attorney fees are not allowed except where authorized by contract or statute. *State v. Wagner*, 2010-0050 (La. 5/28/10), 38 So. 3d 240; *Hollenshead Oil & Gas LLC v. Gemini Explorations Inc.*, 45,389 (La. App. 2 Cir. 7/21/10), 44 So. 3d 809, *writ denied*, 2010-2046 (La. 11/12/10), 49 So. 3d 892.

For the reasons already expressed, we have reversed the finding of a LUTPA violation; thus, the attorney fee provision of R.S. 51:1409 A does not apply. Autrey's letter to all residents, which constituted the agreement between the parties, made no provision for attorney fees, and Harp has shown no other contract or agreement addressing the subject. The award of the attorney fee is not supported by statute or contract; it will be reversed. This assignment of error has merit.

Conclusion

For the reasons expressed, we reverse the finding of a LUTPA violation and vacate the award of attorney fees. However, we affirm the award of damages of $3,000 as reasonable under La. C.C. art. 2024. All costs, trial and appellate, are assessed 50% to Autrey and 50% to Harp.

REVERSED IN PART, AFFIRMED IN PART.

WILLIAMS, J., dissents.

Because the trial court was not manifestly erroneous in concluding that defendants violated LUTPA, I respectfully dissent. Moreover, I would modify the trial court's judgment to increase the award of damages to $20,000 and the amount of attorney's fees to $10,887.50.

LSA-R.S. 51:1405(A) grants a right of action to any person who suffers any ascertainable loss for a violation of the statute. *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 2009-1633 (La. 4/23/10), 35 So. 3d 1053. Acts which constitute unfair or deceptive practices are not specifically defined, but are determined on a case-by-case basis. *Johnson Const. Co. v. Shaffer*, 46,999 (La. App. 2d Cir. 2/29/12), 87 So. 3d 203; *Tyler v. Rapid Cash, LLC*, 40,656 (La. App. 2d Cir. 5/17/06), 930 So. 2d 1135. Conduct is deemed unlawful if it involves fraud, misrepresentation, deception, breach of fiduciary duty or other unethical conduct. A practice is unfair when it either offends established public policy or the practice is unethical, oppressive, unscrupulous, or substantially injurious to *consumers*, including business competitors. *Shaffer*, *supra*; *A & W Sheet Metal, Inc. v. Berg Mechanical, Inc.*, 26,799 (La. App. 2d Cir. 4/5/95), 653 So. 2d 158.

In the instant case, defendants voluntarily assumed the task of offering for sale and/or distribution water and sewerage services for the benefit of plaintiff's property. Additionally, plaintiff is a person who used and paid for goods or services, *i.e.*, water and sewerage services, provided by defendants. Therefore, under the clear language of LUPTA, plaintiff is a "consumer." Consequently, the trial court did not err in concluding that

LUTPA is applicable.

The trial court also concluded that defendants violated LUTPA when the water service to plaintiff's property was terminated without notice. The court specifically found that Mr. Autrey acted in bad faith and that his actions were egregious and were motivated by his desire to own the entire parcel of land on which the mobile home park sits.

The evidence of record supports the trial court's conclusion. When defendants purchased the property in 2004, they began voluntarily supplying water and sewerage services to the residents of the mobile home park. When plaintiff assumed ownership of his properties, the water and sewerage services were available. Thereafter, in December 2008, Mr. Autrey severed the water line, thereby terminating the water services, without providing notice to the property owners. Mr. Autrey admitted that plaintiff asked him to restore the water services and that he led plaintiff to believe that he would do so. However, rather than restoring the services, on January 26, 2009, Mr. Autrey notified plaintiff that the water and sewerage services were permanently terminated. It is noteworthy that Mr. Autrey continued to supply water and sewerage services to his other properties adjacent to the mobile home park. Mr. Autrey admitted that those properties shared the same water line as the mobile home park. I also note that prior to terminating the water services, Mr. Autrey had made numerous offers to purchase plaintiff's property, first to plaintiff's mother, then to plaintiff. In fact, when Mr. Autrey notified plaintiff that the water services had been terminated permanently, that notice was accompanied by another offer to

purchase plaintiff's property.

Additionally, Regina Prewitt testified that she and her three young children were residents of the mobile home park when Mr. Autrey disconnected the water. She stated that Mr. Autrey did not notify her of his intent to disconnect the water. She also stated that she asked him to reconnect the water services; he refused to do so. Ms. Prewitt stated that Mr. Autrey informed her that "he was never turning it back on." She also testified that after Mr. Autrey disconnected the water, he ran a water hose across the street for "a few days" and later offered her $20 to purchase bottled water for her family's use. Ms. Prewitt further testified that she offered to furnish her own water supply by either placing a tank on top of her mobile home or by having a well installed. She stated that Mr. Autrey informed her that if she placed a well or tank on the property, he would not allow her to use the sewerage. Additionally, Ms. Prewitt testified that she owned two lots in the mobile home park, and defendant had offered to purchase her lots "a few times," both before and after he terminated the water services.

Plaintiff testified that after Mr. Autrey disconnected the water, he met with him and attempted to resolve the issues pertaining to the water lines. According to plaintiff, he suggested sharing the expenses of repairing the water line. Plaintiff testified that he also offered to obtain water services from the city of Ruston. However, Autrey rejected both alternatives. Like Ms. Prewitt, plaintiff testified that Mr. Autrey informed him that he would not be allowed to use the sewerage even if he managed to obtain water

services elsewhere.

Defendants' contention that they terminated water and sewerage services to the mobile home park for financial reasons due to a "massive water leak" was contradicted by Mr. Autrey's testimony. Mr. Autrey testified, and the evidence confirmed, that in the three years prior to terminating the water services, he paid only approximately $208 in costs for maintaining the water line; $198 of that cost was for the annual Department of Environmental Quality permits. Mr. Autrey also testified that he was unable to locate the "massive leak" in the water line leading to the trailer park. However, he admitted that he never hired a plumber to attempt to locate and repair the leak because he "didn't want to spend the money."

Additionally, the water bills for the mobile home park were introduced into evidence. The water bills for the months leading up to the termination of water services ranged from $198-$221. The evidence also showed that in prior years, the water bills exceeded $800 per month at times, which indicated water leaks. Each time, Mr. Autrey merely repaired the leaks and paid the water bills; he never disconnected the water. However, in this instance, rather than locating and repairing the water leak or hiring a plumber to do so, Mr. Autrey chose to permanently terminate water services to the mobile home park.

For these reasons, the trial court did not err in finding defendants violated LUTPA by engaging in unfair practices. Mr. Autrey's testimony revealed that he owned over 22 acres of land adjacent to the mobile home park. He candidly admitted that he wanted to own the additional five acres

which comprised the mobile home park so that he could control the property "in any way that [he] saw fit." Based on this record, defendants' actions were unethical and unscrupulous, and, as such, in violation of LUTPA.

Moreover, plaintiff answered the appeal, contending the trial court abused its discretion in awarding damages. He argued that he cannot use or rent the mobile home without water services; therefore, he is entitled to be compensated for the decrease in the value of his property.

Any person who suffers an ascertainable loss as a result of an unfair or deceptive act may bring an action to recover actual damages. LSA-R.S. 51:1409(A). The assessment of damages is a determination of fact, one entitled to great deference on review. *See v. Entergy Corp.*, 2010-0065 (La. 6/4/10), 35 So. 3d 1081; *Wainwright v. Fontenot*, 2000-0492 (La. 10/17/00), 774 So. 2d 70. Accordingly, a reviewing court's role in examining damages is not to decide what it considers to be an appropriate award, but rather, to review the exercise of discretion by the trier of fact. *See v. Entergy Corp.*, *supra*; *Youn v Maritime Overseas Corp.*, 623 So. 2d 1257 (La. 1993), *cert. denied*, 510 U.S. 1114, 114 S. Ct. 1059, 127 L .Ed. 2d 379 (1994). If an appellate court finds that the trier of fact clearly abused its discretion, it can only disturb the award to the extent of lowering it (or raising it) to the lowest (or highest) point which is reasonably within the discretion given to that court. See, *See v. Entergy Corp.*, *supra*; *Coco v. Winston Indus., Inc.*, 341 So. 2d 332 (La. 1977).

In the instant case, Mr. Autrey testified that plaintiff informed him that he wanted him to continue the water and sewerage services to his

mobile home. However, Mr. Autrey denied having knowledge that plaintiff planned to rent the trailer to a tenant. Mr. Autrey testified that plaintiff told him that he planned to use the trailer as a "guest cottage when he had friends that came in."

Plaintiff testified that he continued to pay the water and sewerage bill after he assumed ownership of the property; he also maintained the other utilities in the mobile home. He stated that he did so because he intended to rent the property "as an income string" [sic]. Plaintiff also testified that after the water and sewerage services were terminated, he met with Mr. Autrey and informed him that he had a prospective tenant and could not rent the mobile home without water and sewerage services. Plaintiff also testified that he had reached an agreement with Marion Faulkner to rent the mobile home for $500 per month.

Richard Gene Nealy, a licensed real estate broker, was accepted by the court as an expert "in evaluation of residential rental property in the Lincoln Parish area." Mr. Nealy submitted an appraisal for the mobile home in question as follows:

***

> Rental of $500 per month for this unit size and condition would be typical in this market and is used to capitalize value as depicted below[:]
>
> Capitalization of Income:
> Rental @ $500 per month, annualized to $6,000
>
> Less projected expenses:
> Taxes: -90.00
> Insurance (estimated): -300.00
> Maintenance: -300.00
> Vacancy: -600.00
> Depreciation: -600.00

Net Estimated Income: $4,110.00

Capitalization: 7% cap rate ($4,110/.07) = $58,714.00

[I]t is my opinion that the value of this property, as of July 29, 2011, would be:

Value and lots and mobile home, without utilities $9,000.00

Value and lots and mobile home, with utilities capitalized @ 7% $58,714.00

***

Mr. Nealy testified that he used the "income approach," which uses the prospective income of a property to determine the value of the property. He also explained that the "cap rate", in this case 7%, is "a reasonable anticipated rate of return on your invested dollar." Mr. Nealy further testified that if a rental mobile home lacks the proper utilities, it cannot be rented, and, therefore, could only either be sold as salvage or moved to a place where rental is possible. He stated that the $9,000 figure is the value of plaintiff's mobile home as listed in the National Automotive Dealers Association ("NADA").

On cross-examination, Mr. Nealy admitted that plaintiff's property is located in a "B4" zone. Mr. Nealy also admitted that he did not know all of the restrictions of B4 zoning and was uncertain whether or not the mobile home could be rented as a residence because of the zoning. However, on redirect, he testified that the zoning of the mobile home park did not result in the revocation of the subdivision restrictions. Mr. Nealy stated that a residential classification was a lower classification than B4. Therefore, the property could be used for a lower classification, *i.e.*, residential, but it

could not be used for higher a classification.

Mark S. Taylor, a real estate appraiser, testified as an expert for the defense. He was accepted by the court as an expert in real estate appraisal. Mr. Taylor described the "B4" zoning classification as a "highway district, which is commercial zoning basically along the interstate highway in Ruston." According to Mr. Taylor, plaintiff's mobile home could not be used as a residential rental due to the zoning.

Mr. Taylor also prepared an appraisal of plaintiff's property, using the fair market value approach. The appraisal provided:

> ***
>
> By reasons of my investigation and analysis, data contained in this report, other information in my files, and my experience in the Market, it is my opinion that the formulated opinion of the *Market Value* of the subject property as of August 2, 2011, is as follows:
>
> Scenario 1
>
> | | |
> |---|---|
> | Land Value | $ 7,400 |
> | Income Approach to Value | $39,700 |
> | Direct Sales Comparison Approach | $36,000 |
>
> Scenario 2
>
> | | |
> |---|---|
> | Land Value | $ 7,900 |
> | Income Approach to Value | $39,700 |
> | Direct Sales Comparison Approach | $21,000 |
>
> Scenario 3
>
> | | |
> |---|---|
> | Land Value | $ 3,700 |
> | Direct Sales Comparison Approach | $16,800 |

(Emphasis in original).

Mr. Taylor determined the "Land Value" by finding the prices of parcels of land which had been sold in the area (one parcel sold for $13,000 ($0.99/Ac); one sold for $8,000 ($0.73/Ac); the other sold for $8,000 ($0.42/Ac)). In determining the "Income Approach to Value," Mr. Taylor

testified that he found six other mobile homes in the area and the monthly rental for those units ranged from $350 per month to $700 per month. Thereafter, he approximated the monthly rent of plaintiff's mobile home as $450 per month. In determining the "Direct Sales Comparison Approach," Mr. Taylor stated that he utilized the sales price of similar mobile homes in the area.

In explaining the three different scenarios, Mr. Taylor testified that he assumed that plaintiff's lots and mobile home were real property and that they could be used as residential property. In Scenario 1, Mr. Taylor stated that he assumed that the mobile home was immobilized, habitable and is considered real property.

In Scenario 2, he testified that he assumed that the mobile home had not been immobilized. Therefore, he valued the mobile home as chattel, rather than as real property. He also testified that the market or direct sales comparison with the mobile home as chattel, rather than as real property, substantially decreased the direct sales comparison, while increasing the land value.

In Scenario 3, Mr. Taylor testified that he assumed that the property could not be used as residential and that the mobile home was inhabitable. Therefore, the land would be valued at a no-cost approach based on commercial use; the direct sales was based on the NADA value of the mobile home.

On cross-examination, Mr. Taylor testified that $500 per month rent for plaintiff's mobile home would not be unreasonable because that amount

is within the range of other rental units in the area. He also stated that if plaintiff self-managed the property, the net annual rental income would amount to $4,473. Using a capitalization rate of .0936, the capitalized rental value of the property is approximately $47,788. According to Mr. Taylor, the value of the mobile home with no utilities is approximately $13,000. However, if the mobile home was sold and had to be removed from the lot, the cost of moving it would have to be deducted from its value.

Mr. Taylor also admitted the value of Mr. Autrey's interest in the mobile home subdivision would increase if he obtained ownership of the entire parcel of land which comprised the mobile home park. He agreed that 27 acres of service road, whether zoned as residential or commercial, is worth much more than the mobile home subdivision.

Additionally, Mr. Taylor testified that plaintiff's lots are too small to accommodate a sewerage plant. He stated that plaintiff was totally dependent on the sewerage system that defendants had in place.

Mr. Taylor also testified with regard to the city of Ruston's annexation of the property which resulted in the zone change from residential to B4. He admitted that, in his experience in real estate, when the city annexes an area, the existing uses of the property are "grandfathered." Therefore, if property was designated a residential subdivision prior to the annexation, it was unlikely that the city would force property owners to change the uses of their property. Mr. Taylor also admitted that since the zone change, residences and mobile homes continue to exist throughout the area.

In awarding damages, the trial court took into account the monthly rental plaintiff's property could garner, if utilities, including water and sewerage, were available. The court then multiplied that amount – $500 – by six months, and awarded $3,000 in damages. In so doing, the trial court abused its discretion.

Both experts agreed that the mobile home had no rental value if no water and sewerage services were available. Mr. Nealy, plaintiff's expert, opined that the mobile home and lots, without utilities, was only worth $9,000. Mr. Taylor, defendants' expert, valued the mobile home and lots, without utilities, at $13,000, minus the cost of moving the mobile home to another location.

While the estimates of the rental income of the property, with utilities, varied, both experts agreed that the rental value of the property was worth considerably more than the $3,000 awarded by the trial court. Defendants' own expert, assuming that the mobile home was immobilized and habitable,[1] appraised the property at $36,000-$39,000 (using the direct sales comparison approach and income approach to value, respectively).

Consequently, based on this record, an award of $20,000 is appropriate. The expert testimony clearly established that plaintiff's property has essentially no rental value without water and sewerage services. Mr. Autrey's testimony established that he has no intention of supplying water or sewerage to the property. Even if plaintiff somehow contracted with the city of Ruston for water services, Mr. Autrey has made

[1]Plaintiff's testimony that the mobile home was immobilized and habitable was uncontroverted.

it clear that he is unwilling to allow plaintiff to use the sewage lagoon.

Furthermore, the trial court abused its discretion in awarding $5,000 in attorney fees; plaintiff was entitled to attorney fees in the amount of $10,887.50.

Reasonableness of attorney fees is determined by the factors set forth in Rule 1.5(a) of the Rules of Professional Conduct. These factors include: (1) the time and labor required, the novelty or difficulty of the issues, and the skill required to properly perform the legal services; (2) the likelihood, if apparent to the client, that the matter will preclude other employment; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and results obtained; (5) the time limitations imposed by the client or circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer; and, (8) whether the fee is fixed or contingent. Additionally, when an issue of attorney fees is present in the case, it is within the appellate court's discretion to award or increase attorney fees for the expense of the appeal. LSA-C.C.P. art. 2164;[2] *Smith v. Pilgrim's Pride Corp.*, 44,080 (La. App. 2d Cir. 2/25/09), 4 So. 3d 983, *writ denied*, 2009-0961 (La. 6/19/09), 10 So. 3d 739.

During the hearing to fix attorney fees, plaintiff's counsel stated that his hourly rate for attorney fees was $130 and that he had expended 83.75

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[2]LSA-C.C.P. art. 2164 provides:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

hours in pursuing this matter. The record supports the substantial time and labor expended by plaintiff's counsel. Thus, I would modify the trial court's award of attorney fees, increasing the award to $10,887.50.