NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1724

DONALD MARIN, SR., ENGSFELD F. MARIN, III, CLYDE J. BREAUX AND VERONICA MARIN BREAUX

VERSUS

EXXON MOBIL CORPORATION, FORMERLY KNOWN AS AND SUCCESSOR IN INTEREST TO EXXON CORPORATION AND HUMBLE OIL & REFINING COMPANY, ATLANTIC RICHFIELD COMPANY, LEGACY RESOURCES CO., L.P., MJF PROPERTY MANAGEMENT, L.L.C. AND MIKE BOURGEOIS

Judgment Rendered: September 30, 2009

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Appealed from the
Sixteenth Judicial District Court in and for the
Parish of St. Mary, State of Louisiana
Docket Number 112,908
Honorable Keith Comeaux, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

This matter is before us on appeal by defendants from a judgment in favor of plaintiffs, Donald Marin, Sr., Engsfeld F. Marin, III, Clyde J. Breaux and Veronica Marin Breaux ("Plaintiffs"), and against defendants, Exxon Mobil Corporation ("Exxon") and Michael Bourgeois ("Bourgeois"). Exxon filed the instant appeal, alleging that the rulings of the trial court are erroneous because they: (1) allowed appellees' claims to survive prescription under the doctrine of *contra non valentem*; (2) awarded punitive damages under former Civil Code article 2315.3; (3) terminated a surface lease; (4) allowed the Breauxs to sue for property damages that occurred before they bought the land; (5) failed to enforce the terms of the Breauxs' property damage release by relying on inadmissible parol evidence; and (5) awarded excessive, speculative and unsupported damages. Michael Bourgeois separately appealed, asserting the trial court erred in finding him personally liable to plaintiffs for performing administrative duties as an Exxon employee and in assessing damages against him. Plaintiffs filed a cross-appeal, alleging the trial court erred: (1) in not awarding damages for the remediation of "usable groundwater"; (2) in misclassifying the aquifer underlying their property and in determining that it did not require remediation; (3) in failing to award attorneys' fees under the Groundwater Act and in failing to sanction Exxon's discovery abuses and disallowing attorneys' fees related to such; and (4) in awarding inadequate punitive and exemplary damages. For the following reasons, we affirm in part and reverse in part.

BACKGROUND

The claims and defenses asserted in this litigation arise from several leases affording Exxon, or its predecessor, access to explore and produce minerals upon two separate tracts of land owned separately by two sets of plaintiffs. In 1936, E.F. Marin (father of Donald, Engsfeld F., and Veronica) granted a mineral lease to

W.S. Mackey. The lease provided for a payment to plaintiffs of 1/8 of all oil and gas production. In 1937, Canal Bank and Trust Company (CBT) granted a mineral lease to Humble Oil and Refining Company (Humble), Exxon's predecessor.[1] By 1939, Humble had acquired the 1936 Marin lease. The Marin lease serves as the basis for the claims of the Marin heirs.[2] In 1941, E.F. Marin granted a servitude to Humble over approximately 20 acres of property that was used to build a landing/dock area, terminal and related facilities for the production of oil and gas. With some modifications, this eventually became known as the Marin Surface Lease Agreement, which was novated in 1994 and 2001. Additional claims asserted by Veronica Marin Breaux, together with her husband Clyde Breaux, arise from the property originally covered under the Canal Bank and Trust lease, which property was subsequently acquired by the Breauxs.[3]

The Marins own approximately 204 acres in Bayou Sale. Donald Marin, Sr. has lived on the property all his life. Clyde and Veronica Marin Breaux own approximately 75 non-contiguous acres of property in Bayou Sale. Although Mr. Breaux testified that he did not inspect the property prior to purchasing it, he was aware that Exxon was "there" and had a working oil well facility on the property. He also knew there was an open pit on the property. The Breauxs built their home there in 1986 and have resided there ever since. In addition to the oil and gas exploration activities, the property has always been in cultivation, primarily for sugarcane.

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[1]Sometimes in this opinion, the names Exxon and Humble are used interchangeably, to reflect the witnesses' similar practice when testifying and discussing the two corporations and identifying corporate documents.

[2]E.F. Marin died in 1987.

[3]When necessary, to distinguish between the claims asserted or relief granted involving Veronica and Clyde Breaux, we refer to these plaintiffs as "the Breaux plaintiffs" and the additional plaintiffs (although including other claims by Veronica Breaux) as "the Marin plaintiffs."

In the 1980s, much of Exxon's production on the Marin and Breaux properties began to dwindle. As such, some of its operations were shut down. Then, in approximately 1986, many of the pits located on the Marin and Breaux properties were closed, at least in part in response to regulations promulgated by the State of Louisiana.[4]

On November 26, 2003, the plaintiffs filed the instant suit, naming several entities, along with Exxon, as defendants.[5] In their petition, plaintiffs asserted claims for remediation of the soil and groundwater and other damages arising out of Exxon's oil and gas exploration, production and transportation activities on plaintiffs' properties. The petition also included claims that Exxon knowingly disposed of oilfield wastes in unlined earthen pits and/or released the waste directly into waterways, inevitably resulting in seepage, thus contaminating both the soil and groundwater. Plaintiffs alleged that the oilfield wastes deposited into these pits and water bodies contained naturally occurring radioactive material ("NORM"), "produced water,"[6] drilling fluids, chlorides, hydrocarbons, heavy metals and other toxic substances.[7]

For many years, defendant Michael Bourgeois served as supervisor of production for the operators who conducted production activities in the subject oilfield. Plaintiffs alleged that by virtue of his position, Bourgeois directly

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[4]Some pit closures were performed at the request of Breaux, who wanted to conduct farming operations on portions of the lease areas no longer utilized by Exxon.

[5]The plaintiffs also sued MJF Property Management, L.L.C., an entity alleged to have conducted maintenance, pit closure, and other activities upon plaintiffs' properties. However, MJF Property Management, L.L.C. was dismissed on motion for summary judgment prior to trial. Legacy Resources Company, L.P., as alleged owner and/or controller of certain wells on plaintiffs' property, was also sued by plaintiffs. On joint motion and stipulation, plaintiffs and Legacy agreed to try their claims separately from plaintiffs' claims against Exxon and Bourgeois.

[6]"Produced water" is a term used to describe the waste byproduct of the extraction of oil and gas from wells.

[7]Plaintiffs additionally asserted breaches of the oil, gas and mineral leases applicable to the oil and gas activities and claims for nuisance and trespass.

supervised the activities performed on their property and knew, as did Exxon, that the activities complained of caused or contributed to the pollution at issue. Plaintiffs alleged that despite this knowledge, Exxon and Bourgeois failed to warn, and actively concealed, that their operations were hazardous to persons and property.

A five-day judge trial was held,[8] during which conflicting testimony was elicited concerning: (1) whether the property had been contaminated; (2) whether the pit closures had been appropriately accomplished; (3) how the underlying aquifer should be classified; and (4) whether the proposed remediation for soil and groundwater was required and, if so, whether the plan for remediation was appropriate.

After taking the matter under advisement, the trial court rendered judgment on September 19, 2007,[9] in favor of "plaintiffs" and against defendants, Exxon and Bourgeois, *in solido*, awarding the amount of $14,000,891.00 in compensatory damages, and terminating the Marin surface lease agreement. The judgment further awarded punitive damages, solely against Exxon, in the amount of $14,000,891.00. Plaintiffs filed a motion for new trial, assigning as error that the trial court made incorrect calculations concerning soil remediation. The plaintiffs also challenged the trial court's groundwater classification and refusal to apply the Groundwater Act.

The motion for new trial was granted, in part, and a new judgment was rendered on December 21, 2007, in favor of the Breaux plaintiffs and against Exxon and Bourgeois, *in solido*, awarding them: (1) compensatory damages in the

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[8]In addition to the extensive documentary evidence and exhibits introduced at trial, this voluminous record reflects that live testimony was elicited from ten witnesses, mostly experts, and the lengthy deposition testimony of thirty-seven other witnesses was admitted into evidence.

[9]Prior to rendering judgment, the trial court initially issued extensive reasons for judgment on September 7, 2007.

amount of $276,498.35 for remediation of the soil and $63,682.38 for handling groundwater intrusion during soil remediation operations; and (2) punitive damages against Exxon in "an amount equal to compensatory damages," or $340,180.73.

Judgment was further granted in favor of the Marin plaintiffs, i.e., Veronica M. Breaux, Donald Marin, Sr. and E.F. Marin, and against Exxon and Bourgeois, awarding these plaintiffs compensatory damages in the amount of $15,115,390.65 for remediation of the soil, $3,481,317.62 for handling groundwater intrusion during soil remediation operations, and $2,408,868.00 for remediation of contaminated soil and sediments in the canal. The judgment further awarded the Marin plaintiffs punitive damages against Exxon in "an amount equal to the compensatory damages," or $21,005,576.27. Additionally, the judgment denied the defendants' exception of prescription and ordered that the surface lease agreement between the Marin plaintiffs and Exxon was terminated. These appeals followed.

In this voluminous appeal record, a myriad of assignments of error are asserted for review. For convenience and completeness, we address the assignments of error beginning with those of Exxon and therein elaborate on the facts of the case, as established by the testimony and exhibits.

PRESCRIPTION

Exxon's threshold defense in this matter is prescription.[10] The plaintiffs filed suit on November 26, 2003. Exxon contends that the claims of plaintiffs, whether delictual or contractual, prescribed before suit was filed as the plaintiffs

[10]Initially, Exxon filed a peremptory exception raising the objection of prescription. Later, Exxon filed a motion for summary judgment urging the objection of prescription, which had been taken under advisement, but not ruled on prior to the trial on the merits.

had knowledge of a cause of action at least as far back as the 1980s.[11] In this assignment, Exxon asserts that the trial judge erred in failing to sustain the plea of prescription and, in particular, in finding that the running of prescription was suspended under the doctrine of *contra non valentem*.

The judicially created doctrine of *contra non valentem* is an exception to the general rule of prescription and is based on the civilian concept that prescription does not run against a party who is unable to act. American Casualty Company v. Security Industrial Insurance Company, 1998-2075 (La. App. 1st Cir. 11/5/99), 745 So. 2d 832, 834. The doctrine is applied in four general situations:

> (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
> (2) where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
> (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or
> (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

American Casualty Company, 745 So. 2d at 834.

In response, plaintiffs assert that the trial court correctly found that the defendants' actions prevented plaintiffs from availing themselves of their cause of action and that their cause of action was not reasonably knowable. Although *contra non valentem* is a legal principle, a determination of whether or not plaintiffs were indeed prevented from filing their claims is an issue of fact, and the trial court's finding of fact as to this issue is subject to the manifest error, clearly wrong standard of review. Amoco Production Co. v. Texaco, Inc., 2002-240 (La.

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[11] Plaintiffs' breach of contract claims are subject to a ten-year prescriptive period and their tort claims, including claims for property damage, are subject to a one-year prescriptive period. See LSA-C.C. arts. 3492 and 3499. However, LSA-C.C. art. 3493 provides:

> When damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.

App. 3rd Cir. 01/29/03), 838 So. 2d 821, 829-830, writs denied, 2003-1102, 2003-1104 (La. 6/6/03), 845 So. 2d 1096. Essentially, if the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even if convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Carter v. Haygood, 2004-0646 (La. 1/19/05), 892 So. 2d 1261, 1267; Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882-83 (La. 1993).

Damage is sustained, within the meaning of prescription, only when it has manifested itself with sufficient certainty to support the accrual of a cause of action. Cole v. Celotex Corporation, 620 So. 2d 1154, 1156 (La. 1993). The damages suffered must at least be actual and appreciable in quality. Where a claimant has suffered some but not all of his damages, prescription runs from the day on which he suffered actual damages and appreciable damages even though he may thereafter realize more precise damages. Harvey v. Dixie Graphics, Inc., 593 So. 2d 351, 354 (La. 1992). However, prescription will not commence to run at the earliest possible indication that plaintiff may have suffered some wrong. Instead, prescription begins to run when a plaintiff has a reasonable basis to pursue a claim against a specific defendant. Jordan v. Employee Transfer Corporation, 509 So. 2d 420, 424 (La. 1987).

Based on our review of the record, we find no manifest error in the trial court's findings of fact which support the application of *contra non valentem* to defeat the plea of prescription herein. The record reflects that Exxon, or its predecessor, operated open pits on the Marin and Breaux properties from the 1940s until approximately 1988. The pits were commonly used to hold and discharge saltwater into local water bodies. In the late 1980s, the State of Louisiana, through the Department of Natural Resources, amended Statewide Order 29-B to require the registration of existing oilfield pits and their closure on or before January 20,

1989. As such, Exxon commenced to close the pits on the Marin and Breaux properties.

Clyde Breaux has always acted as the family agent/spokesman on behalf of the family in dealing with Exxon. As such, Breaux had many conversations and meetings with Exxon personnel over the years related to the closure of the pits. By at least 1987, Breaux complained to Exxon that his sugarcane would not grow properly in pit areas, and he made demand upon Exxon to make the pit areas suitable for sugarcane growth. Breaux testified "I did not know it was hazardous...It was water in the pits, is all I knew. Exxon had left it open. I wanted it back to grow cane." He also complained that Exxon closed the pits even though they still contained "sludge." Breaux and E.F. Marin, III, took samples of the pit contents and kept them in a jar for many years in a shed, until they were washed away by one of the hurricanes. They never had the contents tested. Breaux testified that he did not take the samples for "evidence." With respect to the collection of samples, Exxon sought to demonstrate that Breaux, a Louisiana state trooper at the time, was savvy in the ways of evidence preservation. Breaux rebutted by testifying that, as a state trooper, he indeed had in his possession capability cameras and collection containers that are legal for compliance with State evidentiary standards. However, he testified "I didn't do that. You never saw me present a bunch of pictures to show what a mess was left. I took that to say when they cover this up, or if they cover this up, I can go show Larry Landry, the superintendent, this is what's at the bottom of the pit. What he could do with it?[sic] Carry my complaint back to the top like he had been doing." He testified "Exxon still told me we're coming back."

In addition to the complaints concerning the stunted sugarcane, Breaux also complained that his tractor sank in the pit area. Breaux kept a family journal from 1987 to 1990, containing entries concerning what his family ate that day, the

weather and who visited. The journal simply recorded what happened from day to day, including any conversations he may have had with Exxon employees. Exxon contends that the journal demonstrates, at a minimum, constructive notice on the part of Breaux concerning any claim he may have against Exxon.[12] Our review of the journal reveals that it is also replete with recordations by Breaux concerning Exxon's representations and strategy related to the re-working, i.e., back-filling of the pits such that the land would support agricultural endeavors and productivity.

Although Breaux had issues with Exxon from the time he bought his property, he attested that his concern was that he could not grow sugarcane; he did not know that the contents of the pits were hazardous. Indeed, many of Exxon's witnesses testified that Breaux expressed legitimate concerns related to the stunted sugarcane growth. Mike Hluza, an Exxon landman, testified that his discussions with Breaux were confined to his concerns about the floating equipment (the tractor) and the stunted sugarcane, stating "Clyde was asking us to go back in, open the pits and rework them such that he could safely drive a tractor or implement over the property and hopefully improve any yield on that piece of property."

Howard E. Jackson, a contract consultant for Exxon regarding environmental issues, testified that when it was brought to Exxon's attention that Breaux was still concerned about the growth of his sugarcane, he took the analytical results relating to the Breaux pits to LSU. He testified "we were at a loss to explain it, so we went to find out....The information [from LSU] was relayed back to our people and the consensus was among us that we would have Mr. Breaux inform us when his final year was and we would go in and take care of the situation... I know that it was our intent, but I don't know what transpired after

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[12]Exxon also contends that Breaux's knowledge, gained as overseer of the Marin property and as family representative, should be imputed to all plaintiffs.

that information was relayed to our people." Notably, Jackson testified that he did not discuss his findings from his visit to LSU with any of the landowners.

Peggy Carr, a landman for Exxon, testified "I thought [Breaux's] claims were valid, I brought it to the attention of the field, they did what they could." Larry Landry, senior field superintendent, testified that he believed Breaux had a legitimate concern in the areas where his sugarcane was stunted and yellow, and he passed the complaint on to management.

After careful review, we find that the record amply supports the trial court's factual determination that, although Breaux had issues with Exxon concerning the stability of the pits, vis-à-vis his ability to use his farm implements there, resulting in stunted sugarcane and "floating" equipment, he, like many of the Exxon personnel involved, lacked sufficient knowledge of the nature or extent of the damage or contamination to his property, such as to commence the tolling of the prescriptive period on this basis.

Defendants also contend that the trial court erroneously relied on the Third Circuit decision in Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp., 2002-266 (La. App. 3rd Cir. 4/2/03), 844 So. 2d 380, 389-390 writs denied, 2003-1585, 2003-1624 (La. 10/31/03), 857 So. 2d 476, and improperly concluded that prescription only commences to run in a property contamination case after full environmental testing is done. According to Exxon, this court should follow its own precedent established in David v. Meek, 1997-0523 (La. App. 1st Cir. 4/8/98), 710 So. 2d 1160. However, we find David distinguishable. In the first instance, David is not an oilfield contamination case. Secondly, in David, the homeowner crawled under his house and noted the presence of rotten wood and what he suspected to be termite tunneling. On appeal, this court found no manifest error in the trial court's determination that the date on which David went under the house and discovered the possible termite damage commenced prescription. David, 710 So. 2d at 1163.

In the present case, however, contaminants contained in soil are not readily discernable or perceptible upon visual inspection by the average person. Indeed, the trial court inspected the property twice and opined that the average person would have no knowledge of whether a pit had been properly cleaned out or not and stated that "the Court cannot see with the naked eye that anything is wrong with the surface of the land." Accordingly, considering the testimony and evidence presented herein, we find no manifest error in the trial court's ruling that prescription did not commence to run until the plaintiffs gained knowledge of the nature and extent of the damage as set forth in the initial report of their expert, Greg Miller.

Additionally, we find the record is replete with testimony concerning promises and assurances made by Exxon personnel to remedy the problem with the sugarcane and to "fix" the pit situation, which lulled the plaintiffs into inaction. For example, Breaux testified that Mike Hluza stated, "You know Exxon only has one release and we can't release our environmental responsibility. This [(a release Breaux signed)] is to give you your land back to see if it will grow cane a second time." Breaux further testified, "I had to believe Exxon didn't lie, and if they told me it was in full compliance, I had to believe them...[Y]ou'all assured me it doesn't matter, if it doesn't grow cane, we're coming back and fix it anyway."

Mike Hluza testified that the remediation goal was to return the property to farmable condition stating, "[t]hat was the expectation." Yet, after performing its second attempt to close the last Breaux pit, Exxon sent Breaux only the data relating to one sample taken of the top 6-8 feet of soil. As the record clearly reflects, at a minimum, Exxon undisputedly omitted critical data from several other samples from different areas of property, taken within ten days of the sample for which Breaux was given results, showing those samples were not in compliance with Order 29-B. Moreover, soil had been hauled in and mixed with "clean

material" from the pits, and it is unclear whether the soil that was tested was actually the soil that was in the pit or was the new soil hauled in.

Moreover, although the trial court did not specifically rely on the "lulling" component of *contra non valentem* in overruling Exxon's exception of prescription, the court did expressly and properly find that plaintiffs detrimentally relied on documents supplied to them by Exxon representing that the remediation was complete and that the pits were cleaned to applicable standards and "parameters, including salts". When a plaintiff has been lulled into inaction by a defendant's misrepresentation, prescription is suspended until plaintiff is made aware of the truth of the matter. Miley v. Consolidated Gravity Drainage District No.1, 1993-1321 (La. App. 1st Cir. 9/12/94), 642 So. 2d 693, 698. Thus, given the facts presented, we also find that Exxon's assurances were sufficient to constitute a "lulling" as contemplated under the *contra non valentem* jurisprudence.

Defendants also request that we consider the recent holding of the United States Court of Appeals for the Fifth Circuit in Kling Realty Company, Inc. v. Chevron USA, Inc., 575 F. 3d 510 (5th Cir. 2009). We are not ordinarily bound by federal court holdings. Federal appellate decisions are persuasive only. Shell Oil Company v. Secretary, Revenue and Taxation, 96-0929 (La. 11/25/96), 683 So. 2d 1204, 1209-1210. Notwithstanding, we find Kling distinguishable from the matter before us.

The Kling court correctly states that under the doctrine of *contra non valentem,* "[w]hen prescription begins to run depends on the 'reasonableness' of [the plaintiffs'] inaction." Kling Realty Company, Inc., 575 F. 3d at 517, citing Cole, 620 So. 2d at 1157. Notably, however, the Kling opinion does not address whether Chevron provided false information to the landowners therein concerning the contamination on their property. Nor, apparently, did the Kling record contain evidence that Chevron acted to prevent plaintiffs from availing themselves of their

cause of action in a timely manner. Indeed, the Kling court specifically noted that there was no evidence in the record showing Chevron was aware of increasing contamination from salt or otherwise. Kling Realty Company, Inc., 575 F. 3d at 518.

In the instant matter, however, the record amply supports the trial court's conclusion that not only did Exxon know the contamination exceeded the requirements of Order 29B, but Exxon purposefully provided false information to plaintiffs. Exxon was also aware that the contamination would continue to migrate. In contrast to Kling, the record herein amply supports the trial court's ultimate conclusion that Exxon's representations lulled the plaintiffs into inaction. Thus, the facts and the record herein are distinguishable from Kling and support the trial court's determination that the plaintiffs' "inaction" was reasonable.[13]

PUNITIVE DAMAGES

In its next assignment of error, Exxon contends that the trial court erred in awarding plaintiffs punitive damages pursuant to former LSA-C.C. art. 2315.3. Prior to its repeal in 1996, Article 2315.3 provided in pertinent part:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

Under Louisiana law, statutes which impose a penalty, such as punitive or exemplary damages, are strictly construed. Chustz v. J.B. Hunt Transport, Inc., 1995-0356 (La. 11/6/95), 662 So. 2d 450, 451. In order to obtain an award of exemplary or punitive damages under LSA-C.C. art. 2315.3, the plaintiff must prove:

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[13]The trial court did not reach the applicability of the concept of continuing tort to suspend prescription in this matter. Because we find that, based on the evidence, the trial court was not manifestly erroneous in concluding that the doctrine of *contra non valentem* is applicable to suspend prescription herein, we also find it unnecessary to address the concept of continuing tort.

(1) that the defendant's conduct was wanton or reckless, involving extreme departure from ordinary care in situations where a high degree of danger is apparent;
(2) that the danger created by defendant's conduct threatened or endangered public safety;
(3) that the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and
(4) that the plaintiff's injury was caused by the defendant's wanton or reckless conduct.

Billiot v. B.P. Oil Co., 1993-1118 (La. 9/29/94), 645 So. 2d 604, 613, *overruled on other grounds by*, Adams v. J.E. Merit Const., Inc., 1997-2005 (La. 5/19/98), 712 So. 2d 88.

The punitive damage statute only applies to conduct that occurred between September 4, 1984 and its repeal on April 16, 1996. Anderson v. Avondale Indus. Inc., 2000-2799 (La. 10/16/01), 798 So. 2d 93, 96. In awarding punitive damages herein, the trial court agreed with Exxon's argument that most of the contamination, if any, would have occurred during the period that predated the enactment of Article 2315.3, or before September 4, 1984. Nevertheless, the trial court found that plaintiffs did receive injury to their land due to the wanton or reckless disregard by Exxon during the period of time from 1984, through the closure of the pits in the late 1980s up and through 1991. Moreover, the court held that Exxon's conduct in failing to properly remediate the contaminants exacerbated the problem.

At the outset, we find no merit to Exxon's assertion that plaintiffs' Article 2315.3 claims, which are derivative of their tort claims, are prescribed. As discussed above, we find no manifest error in the trial court's ruling relating to prescription.

EXXON'S WANTON AND RECKLESS CONDUCT

The following discussion has been utilized by Louisiana courts to define conduct that is "wanton" or "reckless":

> The terms "willful", "wanton", and "reckless" have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual meaning assigned to the terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.

Griffin v. Tenneco Oil Co., 531 So. 2d 498, 501 (La. App. 4th Cir. 1988), writ denied, 534 So.2d 430 (La. 1988), quoting Cates v. Beauregard Electric Cooperative, Inc., 316 So. 2d 907, 916 (La. App. 3rd Cir. 1975), affirmed by, 328 So. 2d 367 (La.), cert. denied, 429 U.S. 833, 97 S. Ct. 97, 50 L. Ed. 2d 98 (1976).

Our review of the record discloses ample evidence to support the trial court's finding that Exxon engaged in wanton and reckless conduct. As documented in the record, Exxon knew that the use of unlined earthen pits to handle produced water and drilling wastes from its operations on plaintiffs' properties caused "[c]hronic pit pollution problem[s]." Nevertheless, Exxon continued to utilize the pits. Exxon also became aware of NORM[14] contamination in oilfield drilling equipment, particularly pipe scale, in the early 1970s. Despite such knowledge, Exxon did nothing to notify or warn plaintiffs of such, or to prevent the release of radioactive material on plaintiffs' properties. In fact, between 1986 and 1993, Exxon performed testing that showed elevated NORM on plaintiffs' properties resulting from its operations, but took no action to remove it until Exxon deemed there was sufficient quantity to justify the expenditure. Thus, NORM was often allowed to stay in place until the field was decommissioned. The record further establishes that Exxon disposed of

[14]As previously set forth, "NORM" is the acronym for "Naturally Occurring Radioactive Material."

radioactive materials on plaintiffs' property and was aware of migration into an adjacent marsh. Exxon tested the property for contamination, but neglected to test the adjacent marsh to assess the impact. By no later than the late 1980s, Exxon undisputedly knew that radiation was present in produced water and that radiation in pits was a regulatory concern. Notwithstanding, Exxon elected to not test the produced water pits on Breaux' property for radiation during the closure operations.

THREAT TO PUBLIC SAFETY

In this case, as in many of the reported oilfield contamination cases, a battle of the experts ensued. We are guided, as always, by the well-established precept of law that we should not set aside the findings of the trial court absent manifest error or unless clearly wrong. Bonnette v. Conoco, Inc., 2001-2767 (La. 1/28/03), 837 So. 2d 1219, 1227.

The trial court was not persuaded by Exxon's argument that the performance of ordinary oilfield work in accordance with customary industry practices cannot constitute wanton or reckless behavior to support a claim under Article 2315.3, citing Wiltz v. Mobil Oil Exploration & Producing N. Am., Inc., 702 F. Supp. 607 (W.D. La. 1989). The trial court was equally unpersuaded by Exxon's contention that its conduct was in accord with the governing regulations in effect at the time. On review, we find no error in these determinations.

Plaintiffs introduced the expert testimony of Dr. Paul H. Templet to establish their claim that the conduct of Exxon endangered public safety. Dr. Templet, the former secretary of Louisiana's Department of Environmental Quality ("LDEQ"), testified that from approximately the 1920s to the 1980s, the Louisiana regulatory scheme involved a system of self-reporting regulation. The old Stream Control Commission, the Louisiana Department of Natural Resources ("LDNR") and the LDEQ "set up regulations and depended on the regulated community to comply

with the regs." He noted that the state had a very small staff and budget and had to rely on the honesty of the regulated community. Nonetheless, Exxon routinely violated the self-reporting requirement. Dr. Templet opined that by the 1930s, the oil companies knew that the pits were leaking and that they should have been using injection wells and tanks to control produced water. Yet, the oil companies continued to use leaking pits until 1989 and "that's why we're having all the problems we're finding."

Templet testified that the oil companies engaged in conduct that clearly constituted committed regulatory violations, stating:

> [T]hey certainly didn't have a permit to use a leaking pit.... Because it's real clear that early on the Office of Conservation was saying you can't contaminate the groundwater strata, or the subsurface strata, as they called it. So, to me, that was a clear violation...[L]eaking pits were not allowed. No permit would ever permit a leaking pit.

Finally, Templet opined that the risk levels on these properties exceeded the standards promulgated by LDEQ; therefore, Exxon's actions posed a threat to human health.

In rebuttal to plaintiffs' expert testimony, Exxon offered the testimony of Drs. John R. Frazier and William J. George. Dr. Frazier is a physicist with emphasis in health physics and radiation protection. Dr. Frazier opined that, in his view, there is no indication that anyone in or near the subject properties can receive a radiation dose from soil or oilfield equipment on those properties greater than the range of radiation doses from natural background radiation sources in Louisiana.

Dr. George, Exxon's expert in toxicology and pharmacology, opined that, more likely than not, the properties belonging to the plaintiffs would not be expected to cause health effects in residents, workers or visitors to the properties.

When a trier of fact's findings are based on determinations regarding the credibility of witnesses, the manifest error, clearly wrong standard demands great

deference to the trier of fact's findings. Lirette v. State Farm Ins. Co., 563 So. 2d 850, 852 (La. 1990). Unless an expert's reasons are patently unsound, this rule applies also to expert testimony. Lirette v. State Farm Ins. Co., 563 So. 2d at 853. After careful review, we find no error in the trial court's acceptance of Dr. Templet's testimony in resolving whether Exxon's wilful conduct presented a threat to public safety. See McLaughlin v. Fireman's Fund Insurance Co., 582 So. 2d 203, 211 (La. App. 1st Cir. 1991), writ denied, 586 So. 2d 536 (La. 1991).

HANDLING AND STORAGE OF HAZARDOUS OR TOXIC MATERIALS

The Louisiana Supreme Court has defined "hazardous" or "toxic" substances as follows:

> Hazardous substances are those that present substantial danger to public health or the environment. A toxic substance is a substance poisonous to living organisms. Thus, the terms "hazardous" and "toxic" refer to substances which cause injury or death to human beings and/or create an environmental hazard.

Chustz, 662 So. 2d at 451.

The trial court disagreed with Exxon's claim that punitive damages were not warranted because the contaminants on plaintiffs' land did not present a high degree of risk or danger to public safety. After considering the evidence and testimony, the trial court concluded that cleanup is necessary due to the high levels of toxic chemicals deposited by Exxon onto plaintiffs' properties, which, in the court's view, exceed acceptable limits established by LDEQ.

Based on our review of the record, we are unable to conclude that the trial court was manifestly erroneous on this issue. Both sides presented voluminous evidence in this case, which encompassed the issue of whether these offending substances constitute "hazardous" or "toxic" materials. On review, we find the record contains evidence from sound sources establishing that these contaminants of concern--barium, chlorides and radiation--are hazardous to human health, fish and wildlife. Even defense expert Dr. George agreed that the constituent

substances identified in the toxological profiles at issue, at certain levels, pose a threat to human health.

Moreover, we do not agree with Exxon's position that, as a matter of statutory interpretation, the definition of "hazardous or toxic substance" is impermissibly vague. Specifically, Exxon complains that Article 2315.3 gives no definition of "hazardous or toxic" whatsoever. The article did provide, "[a]s used in this Article, the term hazardous or toxic substances shall not include electricity." Hence, only electricity is specifically excluded. As an alternative to the "vagueness" argument, Exxon asserts that the legislature did not intend to include oilfield waste within the scope of "hazardous and toxic substances" for the purposes of Article 2315.3, because oilfield waste is expressly excluded from the definition of hazardous wastes in several Louisiana and federal statutes and regulations. We find this argument unpersuasive for the same reasons the Fourth Circuit Court of Appeal rejected a similar argument, albeit with respect to natural gas. Simply because the legislature explicitly excludes a substance from the scope of one statute does not necessarily imply an exemption in another. See State Farm Fire and Cas. Co. v. Sewerage & Water Board of New Orleans, 1997-1862, 1997-1863, 1997-1864 (La. App. 4th Cir. 2/25/98), 710 So. 2d 290, 292-293. Moreover, Article 2315.3 speaks to hazardous as well as *toxic* substances and Exxon's argument fails to address whether oilfield wastes are toxic substances.

AMOUNT OF PUNITIVE DAMAGES AWARDED

Exxon more stridently challenges the award of punitive damages in the first place, rather than the amount awarded. On the other hand, plaintiffs, in answering the appeal, complain that the award is too low. Plaintiffs contend that the utter reprehensibility of Exxon's conduct and the staggering wealth of Exxon justify a substantial increase in the punitive damages award granted by the trial court.

Initially, we note that an award of punitive damages pursuant to Article 2315.3 is discretionary. Secondly, we note that an award of punitive damages pursuant to this article is limited to conduct that occurred between 1984 and 1996. Our review of the punitive damage award in this matter is under the abuse of discretion standard. See Mosing v. Domas, 2002-0012 (La. 10/15/02), 830 So. 2d 967, 975. In reviewing such awards, we are guided by the criteria set forth by the U.S. Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 1595-1604, 134 L. Ed. 2d 809 (1996). BMW of North America instructs that a court should consider: (1) whether the award is "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition; (2) notions of fairness such that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty a State may impose; (3) the degree of reprehensibility of the defendant's conduct; (4) the ratio between the plaintiff's compensatory damages and the amount of the punitive damages; and (5) the difference between the award and the civil or criminal sanctions that could be imposed for comparable misconduct. BMW of North America v. Gore, 116 S. Ct. at 1595-1604.

As discussed previously in this opinion, we find that the trial court's conclusion that the acts of Exxon were wanton and reckless and, therefore, reprehensible, is amply supported by the record. Moreover, the record clearly establishes that Exxon suppressed material facts in its communications with Breaux and acted with a callous indifference toward the plaintiffs and their properties. Based on our thorough review of the record, and considering the above legal precepts, we find no abuse of discretion in the trial court's decision to award punitive damages equal to compensatory damages in this matter. As the court stated in BMW of North America, "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."

BMW of North America, Inc. v. Gore, 116 S. Ct. at 1601. Thus, while we find the record supports the awards of punitive damages made herein, given Exxon's reprehensible conduct, we nonetheless find no basis to increase the awards, which we find to be adequate on the record before us.

EXXON'S LIABILITY TO THE BREAUXS

FOR PROPERTY DAMAGE CLAIMS ALLEGEDLY OCCURRING PRIOR TO LAND PURCHASE

As part of its appeal, Exxon challenges the interlocutory ruling of the trial court denying its peremptory exception raising the objection of no right of action. Exxon asserts that the Breauxs have no right, based in tort or contract, to sue for pre-acquisition damages. Specifically, Exxon asserts that the Breauxs purchased the property in 1978, with full knowledge of the out-of-service pits and facilities located on their land at the time of purchase. Exxon further contends that by the acquisition, the Breauxs did not acquire the right to pursue claims for damages occasioned prior to the acquisition.

Trial court rulings on peremptory exceptions raising the objection of no right of action are reviewed *de novo* on appeal because they involve questions of law. Bunge North America, Inc. v. Board of Commerce and Industry and Louisiana Department of Economic Development, 2007-1746, 2007-1747, 2007-1705 (La. App. 1st Cir. 5/2/08), 991 So. 2d 511, 522, writ denied, 2008-1594 (La. 11/21/08), 996 So. 2d 1106. Generally, an action can only be brought by a person having a real and actual interest that he asserts. LSA-C.C.P. art. 681. The peremptory exception pleading the objection of no right of action is designed to test whether the plaintiff has any interest in judicially enforcing the right asserted. See LSA-C.C.P. art. 927(A) (6). When considering the exception, the court questions whether the plaintiff belongs to a particular class for which the law grants a remedy for a particular grievance. Falcon v. Town of Berwick, 2003-1861 (La.

App. 1st Cir. 6/25/04), 885 So. 2d 1222, 1224. Evidence supporting or controverting an objection of no right of action is admissible. Falcon, 885 So. 2d at 1224.

Exxon cites jurisprudence which provides that the landowner at the time of the alleged damages is the person with the real and actual interest to assert the claim for damages to the land. See Margone, L.L.C. v. Addison Resources, Inc., 2004-70 (La. App. 3rd Cir. 12/15/04), 896 So. 2d 113, 120, writ denied, 2005-0139 (La. 3/24/05), 896 So. 2d 1039; Dorvin Land Corp. v. Parish of Jefferson, 469 So. 2d 1011, 1013 (La. App. 5th Cir. 1985). According to Exxon, this right is a personal right, as opposed to a real right, and consequently is not transferred by a mere transfer of the title to the land. See Lejeune Brothers, Inc. v. Goodrich Petroleum Co., L.L.C., 2006-1557 (La. App. 3rd Cir. 11/28/07), 981 So. 2d 23, 30, writ denied, 2008-0298 (La. 4/4/08), 978 So. 2d 327.

The Breauxs counter that the trial court correctly held that they had a right of action in tort against Exxon. In addition to pleading causes of action relating to breach of contract under the CBT lease, the Breauxs alleged that Exxon's conduct constituted negligence under the provisions of LSA-C.C. art. 2315. The Breauxs contend that the parties entitled to assert claims arising from a tortious breach of a lease include both the parties to the lease itself and third parties damaged by the wrongful conduct constituting the breach, citing Broussard v. Northcott Exploration Co., Inc., 481 So. 2d 125, 128-129 (La. 1986). In Broussard, the Louisiana Supreme Court held that a farming tenant had a right of action in tort against a mineral lessee for crops unreasonably destroyed, even though the tenant farmer was not deemed a third party beneficiary of the mineral lease. See Broussard, 481 So. 2d at 127, 129.

The plaintiffs allege that, in the conduct of their oil and gas exploration and production activities, Exxon knew or should have known that said activities would

cause damage to their properties. Moreover, the storage of and/or failure to remove the contaminants at issue have created an ongoing and damaging nuisance to plaintiffs and their properties. The trial court agreed, finding that the contamination continues today. Tortious "conduct" also includes the failure to act or to correct the problem. See Risin v. D.N.C. Investments, L.L.C., 2005-0415 (La. App. 4th Cir. 12/7/05), 921 So. 2d 133, 138, writ denied, 2006-0041 (La. 4/17/06), 926 So. 2d 519. Based on our review of the record, we cannot say that the trial court was manifestly erroneous in its finding. The testimony and exhibits support the trial court's factual conclusions that Exxon's conduct constituted "negligent operations" and ongoing negligent failure to properly remediate the pit sites.

With respect to the pre-acquisition contract claims, Exxon asserts that to have any right of action to enforce any express or implied obligation in a mineral lease, the Breauxs were required to prove that they were a party to the mineral lease or were specifically assigned the right by the lessor. Breaux admitted that he purchased only the surface rights and was not specifically assigned any interest in the mineral rights that are the subject of the lease. Exxon relies on the Third Circuit opinion in Lejeune Brothers, Inc., 981 So. 2d at 32, for its proposition that tort and/or contract claims for damages to real property arising from oil and gas operations conducted under a mineral lease constitute a personal right that does not run with the property. As such, a party who purchased property from a mineral rights lessor cannot recover from the lessee for property damage that was inflicted prior to the property purchase.

The Breauxs contend that Exxon's argument ignores the Supreme Court decision in Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475 (La. 1991). In that case, plaintiff purchased contaminated property that was burdened with a mineral lease. The seller reserved all mineral rights in the act of sale. After the

purchase, Magnolia sued the successor and assignee of the mineral lease seeking remediation of the contamination. Even though most of the damage resulted from a blowout on the property seventeen years before Magnolia purchased it, the Supreme Court held that Magnolia had a right to restoration. The Supreme Court specifically held "Magnolia's right to recover damages is a property right arising out of the original lease and attached to the property." Magnolia Coal Terminal, 576 So. 2d at 483.

In the instant case, the Breauxs contend that the CBT lease was still in effect at the time they purchased the property. Alternatively, they argue Exxon came forward with no proof at the hearing that the lease was not still active. The Breauxs distinguish Lejeune Brothers on the basis that the mineral lease had expired in Lejeune Brothers prior to the plaintiff's purchase of the property. Indeed, the lease at issue in Lejeune Brothers had terminated over two years prior to Lejeune Brothers's acquisition of the property. Lejeune Brothers, 981 So. 2d at 28. As such, the Third Circuit held it was impossible to transfer rights to an assignee under an expired mineral lease. Lejeune Brothers, 981 So. 2d at 28. Moreover, we agree with the Breauxs' assertion that Lejeune Brothers does not attempt to explain or distinguish Magnolia, which is controlling Louisiana Supreme Court precedent.

Thus, applying these precepts to the record before us, we are unable to find that the trial court committed factual or legal error in denying Exxon's exception of no right of action and, thus, maintaining the claims of the Breauxs.

COMPROMISE

In this assignment of error, Exxon contends that the trial court erred in finding that the Breauxs' claims relating to CBT wells #4 and #7 were not compromised. The evidence shows that the pits associated with these wells were originally closed in the late 1980s. However, Exxon performed additional work on

these former pit sites in 1991 at Breaux's request. After the additional work was completed, on April 4, 1991, Exxon sent testing results to Breaux accompanied by a proposed release. Breaux rejected the release, and a revised one was sent to him. On September 4, 1991, for a consideration of $10.00, the Breauxs executed the revised agreement, which provides in pertinent part:

> [T]he undersigned hereby release and discharge in full... from all claims, demands, or causes of action arising from or growing out of all injuries and damages of every character and description sustained by the undersigned personally or to property of undersigned, whether now apparent or known to undersigned or which may hereafter develop, as a result of:
>
> drilling pit closures and restoration at the site of Canal Bank and Trust Co. Nos. 4 and 7 well locations...
>
> That the said sum is accepted by the undersigned in full settlement and discharge of all claims of whatsoever kind or character the undersigned may have against the above mentioned parties....

As a general rule, when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2046. Also, as a general rule, with regard to a compromise, courts must look only to the four corners of the instrument to discern the parties' intent. Brown v. Drillers, Inc., 1993-1019 (La. 1/14/94), 630 So. 2d 741, 748. Nevertheless, the Louisiana Supreme Court, in Brown, noted that Louisiana courts liberally construe the rule regarding parole evidence, with regard to compromise agreements, where a dispute arises as to the scope of the claims the parties intended to include. Brown, 630 So. 2d at 749-750.

In the instant case, the trial court allowed the introduction of parol evidence to ascertain exactly what issue or claim was being settled at the time the purported "release" was given. Contrary to Exxon's contentions, this is a permissible use of parol evidence.[15] The record reveals that the background discussions leading up to

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[15]See Moak v. American Auto. Ins. Co., 242 La. 160, 165-166, 134 So.2d 911, 913 (La. 1961); Cutrer v. Illinois Cent. Gulf R.R. Co., 581 So. 2d 1013, 1019 n.3 (La. App. 1st Cir. 1991), writ denied, 588 So. 2d 1120 (La. 1991).

the reopening and additional remediation to the Breaux pits were prompted by Breaux's complaint that when Exxon closed the pits in 1987, it must have left some fluids in it. When Breaux drove a tractor or implement over the property, the equipment floated. Hluza testified that Breaux also complained that the sugarcane in this area would not grow to meet expectations or the expected yield. Hluza testified that "the assumption was that--and we had closed it to 29-B in 1987." However, Hluza further stated that Exxon had reworked the pit, although he was not sure about the methodology, and the pits were sampled again and the samples were sent off for analysis. Hluza additionally claimed that the results from the second closing stated that the chemistry of the site was at least acceptable under Order 29-B. After completion of the work, Hluza sent Breaux a letter, accompanying the release, which advised that "all parameters, including salts, [were] well below the accepted standards set by state regulations concerning pit closures." However, as established at trial, this information was incorrect and deliberately misleading. As stated above, Exxon sent Breaux only the data relating to one sample taken of the top six to eight feet of soil. However, Exxon omitted data from several other samples from different areas of property, taken within ten days of the sample for which Breaux was given results, which showed those samples to be out of compliance with Order 29-B. Moreover, in communicating with Breaux, Exxon included results for only the top eight feet of soil. Soil had been hauled in, and Hluza could not answer the important question of whether the soil subjected to testing was actually the soil that was in the pit or the soil that was hauled in. Hluza also could not answer the trial judge's question of why the soil testing was only performed to a depth of eight feet.

The record establishes that, for these particular pits, Exxon dealt with the contents of the pits only and did no work vertically or laterally outside the confines of the pits. The record further shows that without synthetic liners, the

contaminants were able to seep into the surrounding soil and that Exxon was aware of the potential for brine seepage through the walls of produced water pits. Indeed, salt contamination was found at levels as deep as twenty feet.

Breaux sent a letter to Exxon on January 10, 2001, clearly indicating that he had no intent to waive "environmental issues," as follows: "[p]er our recent conversation, the family does not agree to sign away any environmental issues, but only future claims to crop damage." Breaux testified that he understood the release to mean what Mr. Hluza told him it meant, i.e., that Exxon would not and could not sign away any environmental responsibilities. In fact, Hluza testified "[s]o this release is basically set up to say, okay, we're going to go in there and rework this pit, *and as long as we're meeting regs and so forth, we're finished. This was to bring closure to that."* Thus, according to Breaux, the parties contemplated and agreed that if Exxon was not meeting regulations, then the controversy and related claims were not disposed of or contemplated by the agreement.

The trial court determined that Breaux was provided with false information in that there was contamination below eight feet, and he was provided with less than complete lab results, upon which he detrimentally relied. The court rejected Exxon's arguments and found that the "cause," if any, existed for the release was obtained through "fraud and misrepresentation." Moreover, the court expressly found that the release was to compensate for lost sugarcane production only. Notably, the sum paid as consideration for this release of claims was a mere $10.00.

Given the record herein, we find no error in the trial court's finding on the issue of whether Exxon's $10.00 payment represented a compromise of plaintiffs' claims. The trial court's determination of this issue was based firmly on its assessment of the credibility of the witnesses. Thus, we find no error.

TERMINATION OF THE SURFACE LEASE

Exxon further claims that the trial court erred in terminating the Marin surface lease, contending that the issue was not properly before the court. We also reject this contention as meritless. Louisiana Code of Civil Procedure article 862 provides that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief." In addition, LSA-C.C.P. art. 1154 provides "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading."

Plaintiffs questioned Mike Hluza, landman for Exxon, extensively concerning the provision of the lease entitling plaintiffs to termination on account of regulatory violations. Exxon made no objection to this line of testimony.

The pertinent provision of the 1994 surface lease provision provides:

> [Exxon] will bear full responsibility for consequences to the environment caused by or directly resulting from LESSEE's exercise of the rights herein granted, including...any act...which would, could, or will result in violation of any applicable environmental standards ...and not corrected upon demand or request of LESSORS or the appropriate governmental agency involved shall vest in LESSORS the right to immediately terminate this lease.

Exxon also argues that termination was improper because the Marins never made demand upon it to correct the regulatory violations on their property. In response, the Marin plaintiffs argue that a "demand" for contractual compliance need not take any particular form. They further argue that even after they filed suit, which constitutes a formal demand, Exxon did nothing.

Plaintiffs complain that Exxon should also be faulted for its unwarranted "temerity" in arguing that any pollution that occurred took place prior to the 1994 agreement and that the termination provision, accordingly, cannot be used against it. The Marins note that the 1994 agreement is a novation of the 1941 agreement

and that the law of novation is clear that, once the new contract is in place, it is as though all of Exxon's acts under the 1941 surface lease were actually executed under the 1994 agreement, complete with the termination clause. We agree. The amendment, which Exxon drafted, does not remove or limit the termination clause. Thus, the trial court properly held that the clause applied. Moreover, because the court properly found regulatory violations, which findings are supported by the record, the trial court properly ordered that the lease was terminated.

DAMAGES

Exxon contends that the plaintiffs failed to carry their burden of proving with legal certainty every item of damages claimed. Exxon additionally asserts that the underlying premise of the damage award articulated by the trial court is legally flawed, i.e., that Exxon's exercise of its rights under the lease was unreasonable and excessive given its actions in allowing the pits to impact and contaminate the soil and groundwater. The plaintiffs, in answer to the appeal, assert that they are aggrieved by the trial court's failure to award remediation damages to restore the property to background conditions. They contend that the trial court erred in concluding that a lessee's remediation obligation is satisfied by remediation of the leased property merely to the standards set forth in Statewide Order 29-B.

The law regarding appellate review of damage awards provides that the discretion vested in the trier of fact is "great." Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S. Ct. 1059, 127 L. Ed. 2d 379 (1994). The initial inquiry in reviewing an award of general damages is whether the trier of fact abused its vast discretion in assessing the amount of damages for the particular injuries and their effects under the particular circumstances on the injured party. Youn, 623 So. 2d at 1260.

RESTORATION OF THE LEASED PREMISES

We begin our discussion by addressing whether the trial court committed manifest error in finding that Exxon exercised its rights under the leases unreasonably and excessively. Exxon contends that it did not, essentially by arguing that in the six decades that it performed operations on this property, it was not issued a single compliance order or enforcement action for the improper use of pits or improper discharges. However, as noted above, the trial court was presented with competing expert testimony concerning Exxon's conduct and whether it acted unreasonably and excessively.

Gregory Miller, a witness on behalf of plaintiffs, was accepted by the court as an expert in geology, hydrogeology and site assessment. Miller testified at length and explained how oil and gas is produced. He testified that toward the end of an oil well's life, the well produces mainly water, commonly referred to in the industry as "produced water." The resulting substance is called produced water because it is produced with oil and gas. The substance, at least predominantly in South Louisiana, is essentially a sodium chloride with minor other ionic concentrations of potassium, calcium, magnesium and heavy metal trace elements of arsenic, cadmium, chromium, lead, zinc, and minute concentrations of radium 226 and 228.

Miller reviewed all of the historical data relating to how the pits were operated on the Marin and Breaux properties. Production began on these properties in the late 1930s or early 1940s. The documentation revealed that by April of 1942, saltwater was already being produced on the leased premises and that a pit had been constructed to store the saltwater. The saltwater was accumulated in the production tanks and put into the pit. Once the pit was full, a line discharged the excess saltwater into the canal. On the Marin property, there was a tank battery that flowed to a skimming pit, then from the skimming pit into a

four-inch line to the canal, which flowed to Leopard Bayou. The line is still visible today.

In June of 1942, Humble (Exxon's predecessor) requested permission from the Stream Control Commission (predecessor to the LDEQ) to discharge the saltwater that was in the Marin pit into Leopard Bayou. In support, Humble enclosed an Oil Field Waste Disposal Operations Report (Commission Form SCC-2) wherein Humble represented that it would be discharging approximately **31 barrels** a day into a saltwater environment. However, by 1966, an internal memorandum generated by Exxon revealed that approximately **7,900 barrels** of water a day were being produced and needed to be disposed of by Exxon. At that time, Exxon undertook an analysis of the cost feasibility of installing an injection well to dispose of the produced water. Importantly, the Exxon memo acknowledged therein that disposing of the water in the Bayou Sale canal may damage marine life and that daily samples should be obtained over a ten-year period. Miller stated he has never seen any record to demonstrate that Exxon ever took these daily samples. In fact, Miller concluded that Humble (Exxon) never reported this critical (and damaging) information to the State, because the memo states that "it is recommended that the state not be contacted in this matter as an adverse ruling could prove costly to Humble." As noted by Miller, the memorandum further acknowledged that, "[a]n adverse ruling could require shutting in of production along the canal system until such ruling could be reversed, or until saltwater gathering lines could be installed...."

Miller then testified concerning a 1970 memorandum, which reflects that the Bayou Sale Field was disposing of **1,200 barrels** of water per day, which came to the field through the Humble pipeline from South Marsh Island. In addition to Humble, Shell, Texaco, and Chevron all produced into this line, and all of the produced water was dumped into Bayou Sale. Further, he noted that an

incriminating 1971 Exxon internal memorandum revealed that Exxon was aware of a pit in the Bayou Sale field that was not in service because of brine seepage through the pit walls. Miller testified that this pit, which was immediately north of the plaintiffs' properties, was constructed in the same geological regime and under the same conditions as the Marin and Breaux pits. Nevertheless, there is no indication that Exxon, while prompted by its knowledge, ever went out and tested plaintiffs' pits for seepage.

Miller testified that the Stream Control Commission, the LDNR, and the LDEQ set up the regulations and then relied on the regulated community to honestly report and honestly comply with the regulations. According to Miller, in 1988, the LDEQ issued written correspondence to Humble and other parties instructing them to immediately cease the discharge of produced water. Miller summarized Humble's less than forthright representations as follows: "[Humble] represent[ed] to the State that this is a brackish water environment. Well, in actuality, that sample result isn't due to the natural level of salts in the area. That's due to [Humble's] discharge that's been occurring...."

Dr. Templet, another expert whose testimony was discussed above, reviewed and considered Exxon's historic operations on the property, and testified: "[t]hey may have a permit to use a pit, but certainly not a leaking pit. Because it's real clear that early on the Office of Conservation was saying you can't contaminate the groundwater strata...that was a clear violation."

After setting forth how Exxon had utilized the property, Miller provided a lengthy discussion concerning how a site assessment is performed. In this case, Miller's company, ICON Environmental (ICON), took soil borings to determine the horizontal extent of the contamination. Exxon did not take its own samples; rather, it split the samples with ICON. ICON also took groundwater samples,

which were split with Exxon. Thus, the variability in ICON's results and Exxon's results was very minimal.

Austin Arabie used Miller's data in calculating the costs to remediate the soil. Arabie was accepted by the court as an expert in injection well operations and the remediation of soil and groundwater. He was retained in this case to evaluate the data generated by ICON and to develop a remediation plan and a cost estimate for remediation of the site. Quite simply, Arabie's plan for soil remediation on the Marin property involves excavating three areas and transporting the soil off-site to a commercial facility either for treatment or disposal. In some areas, the required depth of the excavation would be to thirty-eight feet. His proposal was to excavate only those areas that exceed the parameters of Order 29-B. Arabie laboriously explained how he arrived at his estimated cost for remediation of the soil, which he determined to be $15,391,889.00. This figure included $14,891,561.00 for the costs of excavation, disposal, and backfilling of all Marin and Breaux sites, and $500,328.00 for excavating, stockpiling, and backfilling soil that is not contaminated. Arabie also explained in his report that groundwater intrusion will occur during the excavation process. Because this will occur and will have to be dealt with during the excavation process, Arabie estimated that addressing this occurrence would cost $3,545,000.00.

Arabie also formulated a proposal for necessary sediment clean-up. He testified that there were contaminated sediments at the end of the canal by the terminal and proposed dredging an approximately three-acre area containing the contaminated sediments at a total cost of approximately $2.4 million.

Exxon called Dr. Lloyd Deuel, Jr., a research soil chemist, as a witness on the issue of soil remediation. The court accepted him as an expert in soil and its effects on the groundwater. Deuel disputed Arabie's soil remediation plan, contending that it was not in accordance with generally accepted scientific

principles that are used in remediation of oilfield sites. Deuel contended that Miller had used selective data to support his claims that areas were not compliant with Order 29-B standards. His opinion was that if soil remediation were required to support sugarcane growth, it could be accomplished subsurface by adding amendments, like gypsum, to the soil to bring it within threshold salinity. Thus, he based his surface soil restoration plan merely on acreage and estimated that the total cost per acre for the work to be done in this case would only be $3,085.00 per acre, for acreage where sugarcane growth is allegedly stunted. However, he acknowledged that this process would take approximately five to seven years. Deuel further stated that he does not believe that DNR would expect the kind of excavation that Arabie is proposing, contending that, in the twenty years in which he has been involved in Order 29-B clean-ups, he has never seen a proposal like the one proposed by Arabie, i.e., to dig and haul dirt to address salt. [R. 5697].

Contrariwise, plaintiffs assert that the trial court erred by declining to award true restoration damages to remediate the soil. The trial court rejected this claim by plaintiffs, reasoning that the difference between regulatory compliance and true restoration was the "wear and tear" to be expected under a commercial lease. However, the court accepted Arabie's calculation as to the cost to bring the soil into regulatory compliance, and determined that this was the appropriate cost of restoration as opposed to the figure sought by plaintiffs to bring the soil to "background."

As support for their argument that the trial court erred in this regard, plaintiffs rely on Terrebonne Parish School Board v. Castex Entergy, Inc., 2004-0968 (La. 1/19/05), 893 So. 2d 789, 801, and contend that if a mineral lease is silent regarding restoration obligations (as are both of the leases herein) then

Mineral Code Article 122[16] imposes a duty to restore the surface to its original condition where there is evidence of *unreasonable* or *excessive* use. Specifically, plaintiffs cite the following language from the case:

> Applying the jurisprudence and Civil Code articles discussed above, we hold that, in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively. The School Board did not present any such evidence....

Terrebonne Parish School Board, 893 So. 2d at 801.

Plaintiffs contend that the corollary is true, i.e., that when, as here, a landowner does prove unreasonable or excessive use, Article 122 then imposes an implied obligation to restore the surface to the original condition. We disagree and do not find that the holding in Terrebonne Parish School Board can be interpreted so broadly. Specifically, we do not find that the Supreme Court ruled therein that even where unreasonable or excessive use has been established, no accounting for normal "wear and tear" is due. Instead, the Supreme Court specifically and favorably cited Judge McDonald's dissent in Terrebonne Parish School Board v. Castex Entergy, Inc., 2001-2634 (La. App.1st Cir. 3/19/04), 878 So. 2d 522, 540, writ granted, 2004-0968 (La. 6/25/04), 876 So. 2d 816, reversed, 2004-0968 (La. 1/19/05), 893 So. 2d 789, (wherein he reasoned that the codal provisions applicable to ordinary leases are also applicable to mineral leases) and noted that Articles

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[16]Article 122 of the Mineral Code, LSA-R.S. 31:122, provides:

> A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

2719 and 2720[17] do not impose a strict obligation to return leased property in an **unchanged condition**. Both articles allow for deterioration of the leased premises because of necessary "wear and tear." Terrebonne Parish School Board, 893 So. 2d at 799-800.

As shown in its reasons for judgment, the trial court carefully considered the dictates of Terrrebonne Parish School Board. As the trial court properly recognized, implicit under any mineral lease which provides for oil drilling and/or production activities, is the concomitant consideration that there will be some wear and tear that will occur commensurate with such activities. Our Louisiana Supreme Court has instructed that, unless the lease itself provides for restoration to the original condition of the property, Articles 2719 and 2720 allow concession for wear and tear. This is especially so where the activities that caused the deterioration were in furtherance of the specific rights granted in the lease. Terrebonne Parish School Board, 893 So. 2d at 800. Hence, although the trial court found that Exxon was excessive or negligent in its operations under the lease, we do not find that the trial court erred in considering and applying an offset or accommodation for normal wear and tear when calculating the appropriate cost of remediation.

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[17]Former Louisiana Civil Code article 2719 provided:

> If an inventory has been made of the premises in which the situation, at the time of the lease, has been stated, it shall be the duty of the lessee to deliver back everything in the same state in which it was when taken possession of by him, making however, the necessary allowance for wear and tear and for unavoidable accidents.

Former Louisiana Civil Code article 2720 provided:

> If no inventory has been made, the lessee is presumed to have received the thing in good order, and he must return it in the same state, with the exceptions contained in the preceding article.

These articles were revised and renumbered by Acts 2004, No. 821, § 1, effective January 1, 2005. However, new article 2692 continues to provide that the lessee is not responsible for repairing the deterioration that is caused by normal and agreed use of the thing. See LSA-C.C. art. 2692 and comments thereto.

Nonetheless, we likewise do not adhere to Exxon's argument that the plaintiffs are not entitled to recover damages to their property in excess of the value of the damaged property because they have not demonstrated a personal reason for restoring the property to its original condition or unless they actually make the repairs.[18] Initially, we note that all of the plaintiffs testified that they would use an award of remediation damages to repair their property. Additionally, as recognized by the Supreme Court in Corbello v. Iowa Production, 2002-0826 (La. 2/25/03), 850 So. 2d 686, 694, the fair market value of the land does not limit defendants' duty to restore. In Corbello, the mineral lease at issue imposed upon Shell the obligation to "reasonably restore" the property to its original condition. Shell argued that to award an amount which is disproportionately greater than the fair market value of the property would give plaintiffs a windfall. Corbello, 850 So. 2d at 694. Although Shell's responsibility to restore the property in Corbello was specifically set forth in contract, and the Supreme Court noted that generally the courts have restrained property damage awards in tort cases, Corbello, 850 So. 2d at 694, we find Exxon's restoration obligation in the instant case is no less significant because it arises due to its negligent and excessive operations on plaintiffs' property. Thus, given the Supreme Court's rationale in Corbello, we reject as unreasonable Exxon's assertion that its responsibility to clean the property is limited to the fair market value of the property (which Exxon asserts is $78,000.00, *assuming the property is not contaminated*) even where the market value is greatly disproportionate to the amount needed to restore and cleanup the property.

[18]Exxon cites Roman Catholic Church of the Archdiocese of New Orleans v. La. Gas Serv. Co., 618 So. 2d 874, 879-880 (La. 1993), as support for this proposition.

GROUNDWATER

In this assignment of error, the plaintiffs/cross-appellants assert that the trial court erred in failing to award damages to clean the groundwater and by failing to apply the Groundwater Act. As demonstrated by this voluminous record, claims relating to groundwater classification and the nature and extent of contamination present complex issues for the trier of fact. On the issue of groundwater classification, the trial court was presented with ample evidence by learned experts, each firmly entrenched in his position. Notably, there was no agreement among the experts concerning the classification of the groundwater, the composition of the underlying aquifer, the regulations applicable to groundwater or the extent of the contamination.

Plaintiffs contend that a classification II groundwater was proven, relying on the testimony of Gregory Miller, plaintiff's expert in the field of geology, who also has a specialty in hydrogeology. As noted above, his company, ICON, conducts groundwater investigations, contamination investigations, remediation and risk assessment. As previously stated, Miller's firm conducted testing on the property. Much of Miller's testimony focused on his opinion that the aquifer underlying the plaintiffs' property is a Class II aquifer (a drinking water aquifer) and that the predominant soil type on this property is silt and not clay. Miller's company provided the data that Arabie used to devise a remediation plan.

Arabie testified that approximately 61 years will be required to completely flush the 65 acres of contaminated groundwater. Arabie testified that cleanup of the premises will require removal of the sources of contamination, installation of a groundwater recovery system (including the installation of 285 wells), operation of the recovery system and disposal of the contaminated groundwater for a period of 61 years. He proposed that the groundwater cleanup should be remediated to background levels. As set forth in his testimony, however, the standard is based on

taste, esthetics, and smell. Thus, his cleanup proposal is not based on health risk at all; nevertheless, the proposed cost estimate for the operation and maintenance of his groundwater remediation plan is $196,909,034.00.

Exxon's groundwater expert was David G. Angle. The parties stipulated to Angle's expertise in the areas of geology, hydrogeology and groundwater site assessment and remediation. Angle was asked to review all of the data generated by ICON, to evaluate the groundwater conditions at the site, and to evaluate the need to institute a groundwater remedy. Angle testified that he disagrees with Miller's assessment that the groundwater that exists under plaintiff's properties qualifies as a Class II aquifer. Angle based his opinion, at least in part, on the sixty-five boring logs installed by ICON, the borings independently logged by his company, review of the U. S. Army Corps of Engineers' boring logs, and on ICON's pump test. Angle opined that the logs related to the soil borings confirm that soils within the uppermost 30 feet below land surface are predominantly clay and silty clay, with silty and sandy zones in the 10-30 foot depth interval comprising the first water-bearing zone. Angle also disagreed with Miller's assertion that there is a thick unconfined aquifer of 85 feet.[19] Angle classified the aquifer as "confined" and explained that a "confined" aquifer "holds things in." He explained that in this case, there is a holding layer composed of clay, which is not very permeable and would affect yield.

Angle testified that he was present when ICON's pump test was performed and the wells continued to go dry. He noted that neither Miller nor Arabie were present when this test was performed. According to Angle, the well went dry after only 65 minutes. He explained that this result is significant, because in order to receive an aquifer II classification, the yield must be more than 800 gallons per day. He contended that the flow rate was so small that the yield could be collected

[19]Miller classified the zone as "semi-confined" in his first report.

in a two-quart measuring cup. Moreover, the water "got siltier and siltier." Angle testified that Arabie's plan to remove the water at a rate of 82,000 gallons per day, 365 days a year, for the next 61.7 years, is not scientifically possible, based on the pump test and also upon his own review of the 65 borings that have been installed by ICON.

Angle testified that Arabie's almost $200,000,000.00 proposal to remediate the groundwater is not necessary, feasible or even scientifically possible, given the subsurface conditions that exist on the properties.[20] He noted that Arabie proposed to pump 285 wells over a 65 acre area and to extract water for 61 years out of very low permeability sediments. He contends Arabie's plan would also interfere with the Corp of Engineers' sheetpile installed on the levee, and that such activities would never be permitted.

Angle testified that he does not believe that remediation of the groundwater is required at all. Nevertheless, assuming it had to be remediated for some reason, he suggested using a few recovery wells to remove one to three "pore volumes"[21] of chloride-impacted groundwater at the two former pit areas. He opined that a shut-in saltwater disposal well on the plaintiffs' property could then be used to handle the extracted ground water at a cost of a couple hundred thousand dollars. He further opined that even accepting Arabie's off-site removal cost estimates, the cost would be between $700,000 and $1.2 million, at most.

Rejecting plaintiffs' claims in part, the trial court accepted Angle's testimony and concluded that the zones underlying plaintiffs' property are likely

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[20] Groundwater III is groundwater within an aquifer that is sufficiently permeable to transmit water to a well at a maximum sustainable yield of less than 800 gallons per day.

[21] Although several experts used this term, apparently to express the volume of water required to flush out water from a volume of porous media, the precise or scientific meaning of "pore volumes" was not fully explained in the record.

RECAP Groundwater Classification III.[22] Thus, while the trial court found that the confined aquifer was contaminated and that some remediation may be necessary, the court concluded that plaintiffs failed to prove the cost or method of remediation for a Groundwater III aquifer.

After careful review, we find no manifest error in the trial court's determination that the aquifer is a classification III, noting again that where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is the most credible. Sistler v. Liberty Mutual Insurance Co., 558 So. 2d 1106, 1111 (La. 1990). We also find no error in the trial court's conclusion that plaintiffs did not carry their burden of establishing the costs or plan for remediating a Groundwater III aquifer.

LIABILITY OF MICHAEL BOURGEOIS

The trial court found Bourgeois liable *in solido* with Exxon, stating, as follows:

> The Court further finds that this unreasonable conduct was facilitated and left unrepaired by the site manager, Michael Bourgeois. For these activities and the breach of the duty to properly conduct drilling and operation activities on the Marin and Breaux properties, the defendants, Exxon and Michael Bourgeois are solidarily liable to plaintiffs.

On appeal, Bourgeois asserts that the trial court erred in finding he was *personally* liable to the plaintiffs for the performance of his administrative duties as an Exxon employee.

The record shows that Bourgeois had limited dealings with the plaintiffs. The record also shows that his involvement was solely in his capacity as one of a number of Exxon employees who had administrative duties at various times for various fields including the property at issue. The testimony and exhibits show:

(1) Bourgeois began his career with Exxon as a roustabout in 1978, approximately 30 years after production began in the Bayou Sale Field.

[22]These zones would likely yield less than 800 gallons of water per day and would therefore be "unusable," i.e., not a drinking-water aquifer.

(2) The last of the pits on plaintiffs' properties were closed in 1991.

(3) Bourgeois became superintendent for an area that included Bayou Sale in about 1997. He had no direct knowledge of the use or construction of the pits, because the pits were closed before he became superintendent in 1997. He did not have any specific knowledge about any pits on the Bayou Sale land other than what he learned from an Exxon contractor, Earl Jackson, and the field operator, Russell Collins. He understood from Mr. Jackson that the pits in question were closed to meet regulatory standards.

(4) Bourgeois was not permanently assigned to Bayou Sale, as he worked on projects that took him to other locations, including: Anchorage, Alaska; Mobile, Alabama; and New Orleans, Louisiana.

(5) With regard to the specific issues of environmental remediation and compliance, he relied on the expertise of Exxon's employees charged with knowledge of and responsibility for environmental and compliance issues. He was not involved in remediation work because this was not his area of expertise and he relied upon other employees in the company to oversee such remediation work.

(6) Exxon employees employed in the Land Department typically dealt with the landowners regarding contract negotiations, lease execution, or other agreements.

The law in Louisiana is well established that an employee does not owe personal liability to third parties for damages allegedly caused by the routine performance of his administrative job duties. An employee is only liable for a breach of a "personal" duty or by failing to act as an ordinary, reasonable man in carrying out employment-related duties. Canter v. Koehring, Co., 283 So. 2d 716, 721-723 (La. 1973), *superceded by statute on other grounds as noted in* Walls v.

Am. Optical Corp., 1998-0455 (La. 9/8/99), 740 So. 2d 1262, 1265. To establish that an employee breached a personal duty, a plaintiff must prove, beyond mere allegations:

> (1) that the principal or employer owes a duty of care to the third person ..., breach of which has caused the damage for which recovery is sought;
> (2) that this duty is delegated by the principal or employer of the defendant;
> (3) that the defendant officer, agent or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances-whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty; and
> (4) with regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent or employee simply because of his general administrative responsibility for performance of some function of employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm.

Canter, 283 So. 2d at 721.

Bourgeois was not called as a live witness at trial, but his deposition was filed into evidence. Focusing on select passages of his deposition, some of which we find are arguably taken out of context, plaintiffs argue Bourgeois could have warned them of the contamination, but failed to do so. Although plaintiffs argue that Bourgeois was aware that "radiation in the form of Radium 226 and 228 could be found in produced water and pipe scale," his testimony, in fact, was that he only became aware of or learned, in the late 1980s when he was a field foreman at Thibodaux or Larose, the terminology "NORM," particularly in regard to pipes that are stored or used in an oilfield. Plaintiffs also contend that Bourgeois knew

that radiation resulting from Exxon's operations had been found on plaintiffs' properties. However, we find the testimony only shows that he was aware of some problems on the properties and, further, his belief and understanding that the problems were being addressed. Plaintiffs argue that Bourgeois "knew" that these activities were hazardous to persons and property, citing an Environmental Inspection report related to Bayou Sale from August of 1993. However, this report was issued before Bourgeois oversaw the property. Notably absent from the record is any evidence or testimony that Bourgeois personally caused contamination or that he personally contributed to the events giving rise to plaintiffs' claims. Therefore, we find the evidence fails to establish that Bourgeois owed a personal as opposed to a general administrative duty to plaintiffs in connection with his employment obligations regarding oversight of the operations on plaintiffs' properties. As such, the evidence is insufficient to warrant the imposition of personal liability on his part. Thus, we reverse the trial court's finding in this regard.

DECREE

For the above and foregoing reasons, the portion of the December 21, 2007 judgment of the trial court, awarding judgment in favor of plaintiffs and against defendant Michael Bourgeois is hereby reversed, and judgment is hereby rendered in his favor, dismissing plaintiffs' claims against him, at plaintiffs' costs. In all other respects, the December 21, 2007 judgment is hereby affirmed. Costs of the appeal are assessed one-half each to plaintiffs and defendant ExxonMobil.

AFFIRMED IN PART; REVERSED IN PART; AND RENDERED.