

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2014 CA 1274**

**JOSEPH AND JOANN CATALANOTTO**

**VERSUS**

**JIM WALTER HOMES**

**Judgment Rendered: APR 24 2015**

**Appealed from the  
Twenty-First Judicial District Court  
In and for the Parish of Tangipahoa, Louisiana  
Docket Number 2006-0001089**

**Honorable Elizabeth P. Wolfe, Judge Presiding**

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Joann Catalanotto**

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Jim Walter Homes, Inc.**

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**BEFORE: WHIPPLE, C.J., McCLEDON, AND HIGGINBOTHAM, JJ.**

*EBW*  
*TMH*  
*PM*

**WHIPPLE, C.J.,**

In this appeal, contractor Jim Walter Homes, Inc. appeals a judgment of the trial court rendered in favor of homeowners, Joseph and Joann Catalanotto, based upon the court's finding that the Catalanottos' home had major structural defects and that they were entitled to damages pursuant to the New Home Warranty Act, LSA-R.S. 9:3141, et seq. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

On January 12, 1996, plaintiffs Joseph and Joann Catalanotto (hereinafter collectively referred to as "the Catalanottos") entered into a contract with Jim Walter Homes, Inc. ("JWH") for the design and construction of a new home on the Catalanottos' property on Stein Road in Hammond, Louisiana.<sup>1</sup> The Catalanottos purchased the Stein Road property in 1990 and lived in a trailer home on the property before building their new home. The new home was built approximately fifteen feet behind the Catalanottos' trailer home. The Catalanottos moved into their home in March of 1996 and signed a "completion certificate" inspection form with JWH.

In July of 2004, the Catalanottos sent a handwritten letter to JWH detailing various problems with the home, including:

- (1) The piers are sinking and leaning out;
- (2) The kitchen floor is swelling, the living room floor has a large dip, and the master bedroom floor is uneven;
- (3) The utility room is rotting;
- (4) The back porch is pulling away from the house and rotting;
- (5) The corner fascia boards are pushed away from the house;
- (6) The front porch does not have the correct pitch to it, causing water to come to the front door;
- (7) The doors are sagging;
- (8) The sheetrock has cracks;
- (9) The hardiplank siding is cracking and breaking.

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<sup>1</sup>The Catalanottos signed several subsequent contracts with JWH regarding the construction and financing of the home. The last building contract was signed on February 17, 1996, stating that the home purchase price was \$60,000.00 to be paid at eight and half percent interest for 360 months, totaling \$166,068.00.

JWH sent various supervisors and contractors to the Catalanottos' home to address their complaints. However, on May 11, 2005, JWH notified the Catalanottos that the home was out of warranty and no further repairs would be undertaken, unless deemed to result from a structural failure covered by a ten-year statutory warranty.

On March 31, 2006, the Catalanottos filed suit against JWH, alleging breach of a ten-year warranty for defects in the construction of the foundation of the home. The petition further alleged that JWH failed and refused to make adequate repairs to the home and the home is "totally and utterly unfit for its intended purpose of providing structurally sound shelter for the plaintiffs." By amended petition filed on December 12, 2011, the Catalanottos specifically alleged that JWH violated the New Home Warranty Act, as the home was not constructed in conformity with the applicable building standards. Accordingly, the Catalanottos sought judgment in the amount of \$166,068.00, representing the full purchase price of the home.

A bench trial was conducted on June 27 and 28, 2013, wherein the trial court heard testimony from the Catalanottos and their expert structural engineer, Darrell Fussell. Although JWH retained an expert to testify at the trial, JWH did not call its expert and rested its case after the presentation of the Catalanottos' case.

After hearing and considering the trial testimony, the trial court rendered judgment in favor of the Catalanottos, finding the home was not free from structural defects within ten years of its purchase. Accordingly, the court awarded the Catalanottos \$60,000.00, plus seventeen-and-a-half years of interest at eight percent, \$12,000.00 in attorney fees, and judicial interest and court costs.

A written judgment in accordance with the trial court's findings was signed on December 2, 2013. JWH then filed a motion for new trial, which the trial court denied.

JWH now appeals, assigning the following as error:

- (1) The trial court abused its discretion by not rendering a decision based on factual findings and law, but rather based on testimony provided by the plaintiffs' expert;
- (2) The trial court erred in finding that loss or damage to plaintiffs' home was the results of JWH's noncompliance with building standards and/or defects in the workmanship of the home;
- (3) The trial court erred in failing to recognize the warranty exclusion found in LSA-R.S. 9:3144 of the New Home Warranty Act;
- (4) The trial court erred in failing to apply the Contractor Immunity Statute found in LSA-R.S. 9:2771;
- (5) The trial court erred in finding that there was actual structural damage to the plaintiffs' home;
- (6) The trial court erred in awarding plaintiffs the maximum amount of damages as plaintiffs presented no evidence to support a finding that the loss or damage to plaintiffs' home rendered the property "unlivable."

### **DISCUSSION**

The New Home Warranty Act ("NHWA"), LSA-R.S. 9:3141, *et seq.*, provides warranties for the occupants and purchasers of new homes in Louisiana. The NWA was originally enacted in 1986, and has since been amended five times in various respects. In 1996, when the Catalanottos acquired legal title to their home, LSA-R.S. 9:3144(A)(3) provided that a builder warrants for ten years following the warranty commencement date that the home will be free from **major structural defects due to noncompliance with the building standards.**<sup>2</sup>

Louisiana Revised Statute 9:3143(5) defines "major structural defect" as follows:

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<sup>2</sup>In 2001, LSA-R.S. 9:3144(A)(3) was amended to change the statutory warranty period for major structural defects from ten years to seven years. Acts 2001, No. 179, §1. The statute was again amended in 2004, to change the statutory warranty period for major structural defects to five years. Acts 2004, No. 45, §1.

The ten-year statutory warranty period in effect in 1996 governs the Catalanottos' claim for "major structural defects." See *Hutcherson v. Harvey Smith Construction, Inc.*, 2008-1046 (La. App. 1st Cir. 2/13/09), 7 So. 3d 775, 778 ("Because the [plaintiffs] obtained legal title to their home on June 21, 1996, the version of the [New Home Warranty Act] in effect on that date controls, and the later amendments are inapplicable.").

[A]ny actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable:

- (a) **Foundation systems and footings.**
  - (b) Beams.
  - (c) Girders.
  - (d) Lintels.
  - (e) Columns.
  - (f) Walls and partitions.
  - (g) Floor systems.
  - (h) Roof framing systems.
- [Emphasis added.]

The trial court's factual findings in cases involving the NHTA are subject to manifest error review. An appellate court cannot set aside the trial court's factual findings unless it determines there is no reasonable factual basis for the findings and the findings are clearly wrong. Thus, if the findings are reasonable in light of the record reviewed in its entirety, this court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Hutcherson v. Harvey Smith Construction, Inc., 2008-1046 (La. App. 1st Cir. 2/13/09), 7 So. 3d 775, 778.

**Sufficiency of the Evidence**  
**(Assignments of Error Numbers One through Five)**

In its first five assignments of error, JWH challenges the sufficiency of the evidence presented at trial, specifically, whether sufficient evidence was presented at trial to establish that there were structural defects to the home. Moreover, JWH contends that insufficient evidence was presented at trial to establish that any alleged structural defects were a result of JWH's noncompliance with applicable building standards, as required by LSA-R.S. 9:3144(A)(3). JWH contends that instead the "most likely cause" of the defects in the Catalanottos' home was inadequate site preparation and the placement of substandard fill dirt by the Catalanottos prior to the construction of the home, which was the Catalanottos' sole responsibility.

## *Structural Defects*

At the trial of this matter, the Catalanottos presented the testimony of Darrell Fussell, a structural engineer who performed several inspections of the Catalanottos' home. Mr. Fussell was qualified as an expert and testified that he first inspected the Catalanottos' home in November of 2007, at which time he noticed sheetrock cracks, unlevel floors, exterior doors not working, and wide cracks in the siding seams. Mr. Fussell testified that the house sits on cinder block piers ("the piers") which are placed on isolated concrete footings ("the pads"). During his visual and cursory inspection of the house, he noticed that several of the piers were leaning towards the rear of the house. He further testified that he reviewed the construction plans and specifications for the Catalanottos' home and found that there were several deviations from the construction plans when the home was built. Specifically, the construction plans stated that: (1) the foundation pads were to be twelve inches thick; (2) the cinderblock piers were to be filled with concrete and rebar; and (3) metal "tie down straps" were to run from the support beam into the concrete to "tie" the home together. However, according to Mr. Fussell, the pads were not the correct depth, there was no concrete or rebar inside of the cinder blocks, and tie-down straps were not used. Additionally, the pads did not conform to the shape and size delineated in the construction plans, and it appeared that no forms were used when the cement was poured for the pads.

Mr. Fussell testified at great length about "off-center loading" or "variable loading," a condition which results when piers are not placed in the center of the foundation pads causing the weight of the house to be distributed unevenly on the foundation pads, which may ultimately result in the foundation pads tilting. He testified that "off-center loading" is acceptable and that the construction plans for the Catalanottos' home called for some degree of off-center loading. However,

there was greater “off-center loading” than anticipated, as a result of the home not being built in accordance with the construction plan specifications.

JWH questioned Mr. Fussell at length during cross-examination and attempted to point out several contradictions from his prior deposition testimony. However, JWH did not offer contradictory testimony as to whether the Catalanottos’ home was built in accordance with the construction plan specifications and whether there was greater “off-center” loading than anticipated, as testified to at trial by Mr. Fussell.

Thus, after reviewing the uncontradicted trial testimony of Mr. Fussell, we are unable to say that the trial court manifestly erred in concluding that the Catalanottos’ home was not free of major structural defects.

Accordingly, these arguments lack merit.

### ***Violation of Applicable Building Standards***

JWH also argues that there was insufficient evidence to establish that the structural defects in the Catalanottos’ home were due to noncompliance with the applicable building standards, as required by LSA-R.S. 9:3144(A)(3).

At the trial, plaintiffs introduced into evidence Tangipahoa Parish Ordinance 45 of 1989, which states in pertinent part that the Parish adopts and is governed by the 1988 Standard Building Code. Plaintiffs also introduced into evidence the 1988 Building Code, commonly referred to as the Southern Building Code.

During his testimony, Mr. Fussell discussed at length Chapter 17 of the Southern Building Code. Mr. Fussell testified that Chapter 17 of the Southern Building Code sets forth standards for “light frame construction,” such as the Catalanannottos’ home. Section 1701.2.1 states, “The quality and design of wood members and their fastening used for load supporting purposes shall conform to good engineering practice.” Section 1701.2.2 states, “All members shall be framed, anchored, tied and braced so as to develop the strength and rigidity

necessary for the purposes for which they are used.” Section 1701.2.3 states, “Preparation, fabrication and installation of wood members and the glues, connectors, and mechanical devices for the fastening thereof shall conform to good engineering practices.”

Mr. Fussell’s professional opinion was that the construction of the Catalanottos’ home did not conform to “good engineering practices,” as required by Chapter 17 of the Southern Building Code. Specifically, Mr. Fussell testified that the lack of tie-down straps, *i.e.*, fasteners, does not conform to “good engineering practices” and, therefore, violated Chapter 17 of the Southern Building Code.

After reviewing the testimony and evidence presented, we find that the record supports the trial court’s factual finding that the structural defects in the Catalanottos’ home were due to noncompliance with the applicable building standards. *Cf., Sonnier v. Bayou State Mobile Homes, Inc.*, 96-1458 (La. App. 3rd Cir. 4/2/97), 692 So. 2d 698, 700-701, *writ denied*, 97-1575 (La. 10/3/97), 701 So. 2d 201, *abrogated on other grounds, Dalme v. Blockers Manufactured Homes, Inc.*, 2000-00244 (La. App. 3rd Cir. 1/25/01), 779 So. 2d 1014, 1017 (“The [plaintiffs] introduced no building code, local or standard, into the record. Therefore, there was no evidence before the court to enable it to determine whether the defects in the home were ‘due to noncompliance with the building standards.’ Accordingly, the [plaintiffs] failed to carry their burden of proof under [LSA-R.S. 9:3144].”).

These arguments also lack merit.

### ***Inadequate Site Preparation***

In a related argument, JWH contends that the “most likely cause” of the defects in the Catalanottos’ home was inadequate site preparation and the placement of substandard fill dirt and, therefore, the trial court erred in failing to recognize the warranty exclusion found in LSA-R.S. 9:3144(B)(18) and the waiver



of liability found in “Section 11” of the construction agreement between the Catalanottos and JWH.

Louisiana Revised Statute 9:3144(B)(18) provides that unless the parties otherwise agree in writing, the builder’s warranty excludes “[a]ny loss or damage to a home caused by soil conditions or soil movement if the home is constructed on land owned by the initial purchaser and the builder obtains a written waiver from the initial purchaser for any loss or damage caused by soil conditions or soil movement.”

Section 11 of the construction agreement between the Catalanottos and JWH states:

Seller assumes no responsibility or obligation for, and in fact disclaims any responsibility or obligation for any testing, study, or knowledge with respect to whether the Buyer’s site is suitable or proper for the construction of the House. Buyer hereby expressly warrants to Seller that Buyer has made and performed any and all reasonable or necessary testing, study, and investigation, or that Buyer has knowingly elected to forego any such testing, study and investigation and that Buyer’s site is in fact, or deemed by Buyer to be, suitable and proper for the construction of the House to be built by Seller. Buyer acknowledges, understands, and agrees that, in agreeing to build the House on the site selected by Buyer, Seller is relying upon Buyer’s representation and warranty that the site is in fact suitable and proper for the construction of the House, including but not limited to the suitability and propriety of the foundation option selected by Buyer.

Notably, JWH offered no countervailing expert opinion to support its argument that the “likely cause” of the defects in the Catalanottos’ home was inadequate site preparation and substandard fill dirt, even though the record reflects that JWH’s expert was present at trial and was pre-qualified as an expert.

At the trial, Mr. Catalanotto testified that prior to the construction of the home, a friend of his delivered approximately six yards of dirt to the Stein Road property which he spread, about three inches thick, on uneven places throughout the property for mowing purposes. Mr. Fussell candidly acknowledged during his testimony that the soil that was brought in prior to the construction of the home

was of unknown composition and that there have been no soil tests performed.<sup>3</sup> However, Mr. Fussell testified that if soil has a bearing capacity of greater than one thousand pounds per square foot, then a foundation can be designed to support a structure like the Catalanottos' home. Moreover, Mr. Fussell testified that based on his observations of the soil and comparing the soil to others he has seen in his prior years of experience, he expects that the soil under the Catalanottos would have a bearing capacity of two thousand pounds or greater, as it appeared to be clay and, therefore, a proper foundation could have been built.

This testimony regarding the cause of the structural defects and whether the defects were caused by inadequate site preparation and substandard fill dirt required the trial court to make factual findings and credibility determinations. Mindful of the great deference owed to such findings and after considering the record as a whole, we are unable to say that the trial court was manifestly wrong in finding that the structural defects were **not** the result of inadequate site preparation and the placement of substandard fill dirt. Accordingly, we conclude that the trial court did not err in refusing to apply LSA-R.S. 9:3144(B)(18) or "Section 11" of the construction agreement between the Catalanottos and JWH as grounds warranting dismissal of the Catalanottos' claim.<sup>4</sup>

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<sup>3</sup>The building specifications stated that A-4 soil was to be used, which Mr. Fussell described as "just the normal standard."

<sup>4</sup>JWH also contends that the trial court erred in failing to apply the Contractor Immunity Statute, LSA-R.S. 9:2771, which provides that a contractor can be immune from liability for defects in work constructed according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications. Again relying on its argument that the structural defects were a result of inadequate site preparation, JWH avers that it is entitled to immunity under LSA-R.S. 9:2771 because it relied on the Catalanottos' "instructions" regarding the building site for construction.

Inasmuch as we have concluded that the record supports the trial court's finding that the defects in the Catalanottos' home were not a result of inadequate site preparation or placement of substandard fill dirt, we find no merit in this argument. See Cupit v. Hernandez, 45,670 (La. App. 2nd Cir. 9/29/10), 48 So. 3d 1114, 1119, writ denied, 2010-2466 (La. 12/17/10), 51 So. 3d 7 ("[T]here is no immunity or protection under La. R.S. 9:2771 when the evidence shows that the defects were not the result of the insufficiency of plans and specifications, but were the result of the quality of the work done by a contractor.").

For the above and foregoing reasons, we reject assignments of error one through five as meritless.

**Damages**  
**(Assignment of Error Number 6)**

JWH next argues that the trial court erred in awarding the maximum amount of damages under the NHTWA. Specifically, JWH contends that the full purchase price of the home should not have been awarded because the Catalanottos presented no evidence to support a finding that the damage to their home rendered it “unlivable.”

The NHTWA provides that damages awarded under the Act shall not exceed the reasonable cost of repair or replacement necessary to cure the defect, and damages with respect to all defects in the home shall not exceed the purchase price of the home. LSA-R.S. 9:3149. Damages awarded pursuant to the NHTWA may not be set aside absent a finding of abuse of the trial court’s discretion. Hutcherson, 7 So. 3d at 778. In an action on a contract to build, the appropriate measure of damages resulting from the contractor’s breach of the implied warranty of good workmanship is generally the cost of repairs **when the thing can be repaired**. Graf v. Jim Walter Homes, Inc., 97-1143 (La. App. 1st Cir. 5/15/98), 713 So. 2d 682, 691.

Here, the Catalanottos testified that for two years before hiring an attorney, they tried to work with JWH to resolve their complaints with the home. JWH sent several contractors to the home. However, the Catalanottos testified in detail as to the numerous issues that they still have with the home, despite JWH’s repair attempts. Specifically, the Catalanottos testified that the cracks in the siding and between the countertops and walls are getting larger, indicating that the house is still moving. Moreover, the Catalanottos testified that they are concerned about their safety in the home due to its structural issues.

After reviewing the testimony of the Catalanottos and considering the record in its entirety, including JWH's failure to present any expert testimony to the contrary to establish that the defects in the Catalanottos' home could be repaired, we are unable to say that the trial court erred. In particular, we find no abuse of discretion in the trial court's decision to award the Catalanottos the full purchase price of the house based upon its factual finding that numerous repairs were attempted, but nothing could fix the problems with the home. In sum, we find on the record before us that the damages awarded to the Catalanottos were proper under the facts of this case.<sup>5</sup>

Accordingly, we likewise reject as meritless JWH's last assignment of error.

### **CONCLUSION**

For the above and foregoing reasons, the December 2, 2013 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to defendant, Jim Walter Homes, Inc.

**AFFIRMED.**

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<sup>5</sup>The Catalanottos were awarded the purchase price of the home, plus the interest paid for the financing of the home according to the terms of their building contract with JWH. While we question whether the "purchase price of the home," as stated in LSA-R.S. 9:3149(A), shall include the interest paid, this was not raised as an assignment of error by JWH, and, therefore, we render no opinion on this issue in this case.