STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2023 CA 0058

CAROL SULAK

VERSUS

BRIMMER CONSTRUCTION SERVICES, LLC,
TERREBONNE PARISH CONSOLIDATED GOVT.,
AND SOLUTIENT ENTERPRISES, INC.

MW
JEW

Judgment Rendered: OCT 10 2023

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On Appeal from the
32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Trial Court No. 174536

The Honorable Timothy C. Ellender, Jr., Judge Presiding

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| Joan M. Malbrough<br>Estelle E. Mahoney<br>Houma, Louisiana | Attorneys for Plaintiff-Appellee,<br>Cross-Appellant, Carol Sulak |
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BEFORE: WELCH, HOLDRIDGE, AND WOLFE, JJ.

GH Holdridge J. concurs in part w/ Reasons

**WOLFE, J.**

This lawsuit concerns a construction contract to elevate a house pursuant to a flood hazard mitigation program. The homeowner sued the contractor, alleging defective work. After a bench trial on the merits, the trial court found in favor of the homeowner and against the contractor, awarding $86,550.07 in damages. Both parties appealed. For the following reasons, we dismiss the homeowner's appeal and affirm the trial court's judgment.

## BACKGROUND

In August 2009, homeowner, Carol Sulak, agreed to participate in a Federal Emergency Management Agency (FEMA) Hazard Mitigation program through a grant awarded to the Terrebonne Parish Consolidated Government (Parish). The FEMA grant provided funding for Ms. Sulak's home located at 191 Pierre Street in Chauvin, Louisiana, to be elevated in accordance with flood guidelines and in a way that mitigated future flood disaster losses in the Parish. The Solutient Corporation (Solutient) was the Parish's mitigation program manager, and T. Baker Smith, LLC (Smith), performed the site inspections during construction to verify that work was completed and that invoices for the work met the terms of the grant before payments were released to the contractor. On January 28, 2013, Ms. Sulak entered into a written agreement to elevate her home with a contractor, Brimmer Construction Services, LLC (Brimmer). The Parish authorized Brimmer to proceed with the project on February 15, 2013, in a formal Notice to Proceed, and the agreement provided that the elevation work be completed within four months from that date.

The only parties to the contractor agreement were Ms. Sulak and Brimmer, in which Brimmer agreed to elevate Ms. Sulak's home in accordance with the plans annexed to the agreement for the sum of $192,523.00. The agreement provided that Brimmer would receive four progress payments as work milestones were completed and approved, and Ms. Sulak agreed that approval of the work milestones would not

be unreasonably withheld. The final progress payment was due upon completion of 100% of the work milestones and the receipt of the approved Certificate of Occupancy. The agreement also provided that if Brimmer failed to complete the project within four months from the notice to proceed (projected to be mid-June 2013), then Brimmer would owe Ms. Sulak a penalty amount of $50.00 for each day the work was incomplete, unless extensions of time were approved.

The elevation of Ms. Sulak's home progressed through June 10, 2013, with three of the work milestone payments authorized by Smith and Ms. Sulak. However, a dispute arose over the final progress payment because Ms. Sulak would not agree that the project was complete, even though the Parish and Smith issued final certifications of completion and occupancy. On October 2, 2014, Ms. Sulak requested that Brimmer "cease and desist" from working on the project until her issues were resolved. One day later, a Certificate of Occupancy was issued by the Parish, and Ms. Sulak was notified on October 6, 2014, that the project was in compliance. On December 9, 2014, Smith issued a "100% Construction Milestone Inspection Report" authorizing the final work milestone payment to Brimmer. Still, Ms. Sulak would not sign the authorization form for the last payment to Brimmer, because she felt Brimmer's work was incomplete and defective in many respects. On January 30, 2015, Ms. Sulak sent Brimmer a Notice of Breach of Contract and an attached Punch List outlining all of the work that Ms. Sulak believed Brimmer needed to complete. In contrast, Brimmer asserted that all work was performed in a timely, workmanlike manner and that the remaining work items requested by Ms. Sulak were outside the scope of the elevation agreement and unreasonably delayed the project. On May 8, 2015, Ms. Sulak filed a petition for breach of contract and damages.[1] Due to the dispute over the final milestone payment, the remaining funds

[1] Ms. Sulak named Brimmer, the Parish, Solutient, and MESA Underwriters Specialty Insurance Company (MESA) as defendants. However, Ms. Sulak dismissed her claims against the Parish, Solutient, and MESA, and the matter proceeded to trial against Brimmer only.

from the FEMA grant for the final payment to Brimmer were deposited into the registry of the court on May 23, 2019.

Following a bench trial on the merits, the trial court signed a judgment on July 11, 2022, in favor of Ms. Sulak and against Brimmer in a sum totaling $86,550.07, plus legal interest from the date of judicial demand and costs.[2] Notice of the judgment was issued on July 13, 2022. On September 9, 2022, Brimmer timely filed a motion seeking to appeal. On September 21, 2022, Ms. Sulak filed a motion for appeal to seek review of the judgment. After Ms. Sulak's appeal was lodged, this court issued a show cause order noting that Ms. Sulak's appeal appeared untimely.[3] In response, Ms. Sulak conceded to this court that her appeal is untimely; however, she requests, without citation to any legal authority or jurisprudence, that in the interest of justice and equity this court should treat her cross-appeal as an answer to Brimmer's appeal, given that she filed her motion to appeal within the deadline for filing an answer to the appeal.

**PROCEDURAL MATTER**

Louisiana Code of Civil Procedure article 2133 provides, in part and with emphasis added:

> A. An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he *must* file an answer to the appeal, *stating the relief demanded*, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be

[2] The judgment outlined the calculation of the total damage award of $86,550.07, in pertinent part, as follows:

- $29,476.98 - Extrapolated from the expert report of Michael J. McCall admitted at trial ...
- $27,100.00 for liquidated damages in the amount of $50.00 per day for 542 days.
- $10,000.00 for inconvenience.
- $19,973.09 in the amount of 30% of the total damage claim [the attorney fees award.]

[3] On May 25, 2023, the rule to show cause was referred to this panel for consideration with the merits.

> equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer. . . .
>
> B. A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs.

We recognize that courts generally look beyond the caption, style, and form of pleadings to determine from the substance of the pleadings the nature of the proceedings, thereby construing a pleading for what it really is, not what it is erroneously called. See **Scott v. Hogan**, 2017-1716 (La. App. 1st Cir. 7/18/18), 255 So.3d 24, 28 n.4. We also acknowledge that this court has recognized that the substantive and procedural effect of an answer to an appeal is the same as an appeal or cross-appeal, with the only distinction that an answer to an appeal is required to state the relief requested. See **Succession of Poole**, 2015-1317 (La. App. 1st Cir. 10/28/16), 213 So.3d 18, 26. However, while an answer to an appeal and an appeal may serve the same function, they are not interchangeable. **Board of Sup'rs of Louisiana State University and Agr. and Mechanical College v. 1732 Canal Street, L.L.C.**, 2013-0976 (La. App. 4th Cir. 1/15/14), 133 So.3d 109, 130. When a party files an answer to an appeal, as opposed to a cross-appeal, the scope of review is limited to the claims expressly stated in the answer. See La. Code Civ. P. article 2133.

An appellee is required to state the relief demanded in its answer to the appeal, which is different than an appeal or cross-appeal that entitles the appellant to raise all issues without specifying them in either the notice or the order of appeal. This distinction is problematic for Ms. Sulak, because she simply makes a blanket statement that she desires to "appeal devolutively from the Final Judgment rendered on July 11, 2022." She does not specifically state the relief requested, which is required by Article 2133 in an answer to the appeal. Therefore, we decline to

consider the pleading filed by Ms. Sulak as an answer to the appeal and, we must dismiss Ms. Sulak's untimely cross-appeal. Nevertheless, given that Brimmer's appeal was timely and remains outstanding, we will consider the merits of Brimmer's appeal.

**DISCUSSION ON THE MERITS**

Brimmer asserts that the trial court erred by: (1) admitting testimony of an unqualified expert on behalf of Ms. Sulak; and, (2) awarding attorney fees to Ms. Sulak contrary to the provisions in the contract. Brimmer does not, however, question the appropriateness of the amount of damages awarded. Ms. Sulak counters that the trial court did not abuse its discretion in accepting her expert, and she further argues that the contract allowed for an attorney fees award in the case of defective work on the part of Brimmer.

Admission of Expert Testimony

At trial, Ms. Sulak tendered Michael J. McCall as an expert in estimating property damage and valuation. Mr. McCall is licensed as an insurance adjuster in Texas, with eighteen years of experience in adjusting property damage claims. He was hired to estimate damages at Ms. Sulak's house, not to determine causation or who was right or wrong under the terms of the contract. After extensive questioning, the trial court accepted Mr. McCall as an expert in property damage evaluation. Guided by La. Code Evid. art. 702, the trial court stated that Mr. McCall would be a reliable witness and he would assist the trial court in ascertaining the amount of property damages sustained by Ms. Sulak. Brimmer objected to Mr. McCall's testimony as an expert.[4]

[4] Brimmer did not file a motion for a pretrial hearing pursuant to La. Code Civ. P. art. 1425(F)(1), to determine if Mr. McCall qualified as an expert witness. Article 1425 does not mandate a pretrial motion to challenge the qualifications of an expert. Thus, the trial court's consideration of Brimmer's objection to the tender of Mr. McCall as an expert during the trial on the merits was proper. See **Williams v. State Farm Mutual Automobile Insurance Company**, 2020-0787 (La. App. 1st Cir. 3/11/21), 322 So.3d 795, 797-798.

It is well settled that a trial court has wide discretion in determining whether to allow a witness to testify as an expert, and its judgment will not be disturbed by an appellate court unless it is clearly erroneous. **LaBauve v. Louisiana Medical Mutual Ins. Co.**, 2021-00763 (La. 4/13/22), 347 So.3d 724, 728. In **Cheairs v. State ex rel. Department of Transp. and Development**, 2003-0680 (La. 12/3/03), 861 So.2d 536, 542-543, the Louisiana Supreme Court held that admission of expert testimony is proper only if all three of the following factors are established: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusion is sufficiently reliable as determined by the sort of inquiry mandated in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (adopted by the Louisiana Supreme Court in **State v. Foret**, 628 So.2d 1116, 1122-1123 (La. 1993)); and, (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. **LaBauve**, 347 So.3d at 728-729.

In 2014, the Louisiana Legislature amended Article 702[5] of the Code of Evidence to provide:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
>
> (4) The expert has reliably applied the principles and methods to the facts of the case.

[5] These provisions are now set forth in paragraph "A" pursuant to 2019 La. Acts, No. 115, § 1.

The supreme court has determined that the 2014 amendment to La. Code Evid. art. 702 did not change the law. **LaBauve**, 347 So.3d at 729. Thus, the admissibility of expert testimony under Article 702 turns upon whether the evidence would assist the trier of fact to understand the evidence or to determine a fact in issue. **Guardia v. Lakeview Regional Medical Center**, 2011-1877 (La. App. 1st Cir. 11/2/12) (unpublished), 2012 WL 5381494, * 4. With these general principals in mind, we now turn to a review of the trial court's ruling admitting the expert testimony of Mr. McCall.

Brimmer's primary complaints about Mr. McCall's testimony are that he is not licensed in Louisiana and has no relevant and/or minimal work experience and education as an estimator of property damages in a breach of contract case. Brimmer does not object to Mr. McCall's estimated values of the damages. Our review of the record reveals that Mr. McCall was questioned extensively about his eighteen years of experience in adjusting property damage claims and the methodology he uses for estimating the costs of property damage. Mr. McCall explained that he uses a computer program, known as Xactimate, that is standard in the insurance adjustment industry, to help estimate costs associated with property damages that are tied to locale and zip code. While this was the first opportunity for Mr. McCall to testify in a Louisiana court, the trial court found that Mr. McCall's testimony would assist the court in estimating the damage to Ms. Sulak's home. Mr. McCall did not testify as to the ultimate cause of the damage, only as to the estimated cost of the damage. Thus, we conclude that the trial court did not abuse its great discretion in finding Mr. McCall's testimony was admissible under the standards set forth in La. Code Evid. art. 702, in **Daubert**, and in **Foret**.

Attorney Fees

It is well-settled in Louisiana that attorney fees are not recoverable unless authorized by statute or contract. **Matter of Succession of Breen**, 2016-1607 (La.

App. 1st Cir. 2/6/17) (unpublished), 2017 WL 476755, *1. Brimmer contends that the contract between Ms. Sulak and Brimmer allowed attorney fees only where the contractor performs defective work and the homeowner corrects the defects. Brimmer alleges that Ms. Sulak took no action to repair or correct the alleged defective work. Brimmer also maintains that the work on Ms. Sulak's home was performed in a workmanlike manner and Ms. Sulak requested work to be done outside the scope of the elevation agreement. Ms. Sulak asserts that she did not have the financial means to repair all of the defective work and, the pace of the entire project was too slow. An examination of the agreement between Brimmer and Ms. Sulak reveals, in pertinent part, that:

> **If within the one year period commencing from the date of the Certificate of Occupancy** or Certificate of Completion of the Works, any aspect of the Works is found to be defective, **CONTRACTOR shall** promptly, without an adjustment in Contract Price, **either correct such defective Work, or if it has been rejected by OWNER** or [PARISH], **remove it from the site and replace it with non-defective work.** If CONTRACTOR does not promptly comply with the terms of such instructions, ... OWNER may have the defective Work corrected or the rejected Work removed and replaced, and **all direct, indirect and consequential costs of such removal and replacement, (including but not limited to fees and charges of** engineers, architects, **attorneys** and other professionals) will be paid by CONTRACTOR. [Emphasis added.]

The Certificate of Occupancy was issued by the Parish on October 3, 2014, one day after Ms. Sulak requested that Brimmer cease and desist from further work on her home until their issues were resolved. Ms. Sulak lifted her cease and desist request so that Brimmer could correct work on an air conditioner platform, which was completed on October 29, 2014. On December 9, 2014, Smith issued a "100% Construction Milestone Inspection Report" stating that "[a]ll construction is complete." On January 30, 2015, Ms. Sulak notified Brimmer of her punch list outlining the remaining items that still needed completion. On February 2, 2015, representatives of the Parish and Solutient communicated about Ms. Sulak's outstanding claims that appeared to be outside the scope of the agreement. Charles

Brimmer testified that his company performed 100% of the FEMA grant program requirements, including two items from Ms. Sulak's punchlist, so that Brimmer should be paid. Brimmer also issued a 24-month warranty on the work, which would be honored after final payment for the elevation project.

Our review of the evidence, the testimony, and the language of the contract clearly reveals that within the one-year period after the Certificate of Occupancy was delivered, Brimmer corrected some of the defective work that Ms. Sulak had rejected and that the Parish and Solutient representatives had found to be within the parameters of work on the elevation project. Thus, the attorney fees provision in the agreement was triggered. For that reason, the trial court did not err in awarding attorney fees to Ms. Sulak. Brimmer does not question the reasonableness or the actual amount of $19,973.09 awarded for attorney fees, but instead, argues that the work was not defective. However, the trial court resolved that disputed issue of fact in favor of Ms. Sulak. It is well-settled in Louisiana law that a trier of fact's findings of fact may not be reversed in the absence of manifest error. See **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993). We have reviewed the record in its entirety, and we conclude that the trial court's conclusion was a reasonable one. Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous. **Stobart**, 617 So.2d at 882-883.

## CONCLUSION

For the stated reasons, Carol Sulak's cross-appeal is dismissed as untimely. The trial court's July 11, 2022 judgment is affirmed. All costs of this appeal are assessed to Brimmer Construction Services, LLC.

**CROSS-APPEAL DISMISSED; AFFIRMED.**

**CAROL SULAK**

**VERSUS**

**BRIMMER CONSTRUCTION SERVICES, LLC, TERREBONNE PARISH CONSOLIDATED GOVT., AND SOLUTIENT ENTERPRISES, INC.**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2023 CA 0058**

**Holdridge, J., concurring in part.**

I respectfully concur in the result as to that part of the majority opinion affirming the trial court's ruling admitting the testimony of Carol Sulak's witness, Michael J. McCall, as an expert in estimating property damage and valuation. However, I disagree with the majority's rationale for affirming the trial court's admission of Mr. McCall's expert witness testimony and its consideration of Brimmer Construction Services, LLC's assignment of error on appeal. Brimmer did not file a motion for a pretrial hearing to determine whether Mr. McCall qualified as an expert or whether the methodologies he employed were reliable under La. C.E. arts. 702-705. See La. C.C.P. art. 1425(F)(1). Because Brimmer did not follow the procedure set forth in La. C.C.P. art. 1425 to challenge Mr. McCall's qualifications, it could not object at trial to the tender of Mr. McCall as an expert witness.

I disagree with this court's decision in **Williams v. State Farm Mutual Automobile Insurance Co.**, 2020-0787 (La. App. 1 Cir. 3/11/21), 322 So.3d 795, 797-98, wherein we stated that La. C.C.P. art. 1425 "does not mandate a pretrial motion to challenge the qualifications of an expert." (Footnote omitted.) In **Williams**, this court affirmed the trial court's consideration of the defendant's objection at trial to the tender of a witness as an expert, despite the fact that the defendant had not filed a pretrial motion pursuant to La. C.C.P. art. 1425(F)(1) to challenge the expert's qualifications. 322 So.3d at 797-98. Any challenge to the qualifications or methodology of the plaintiff's expert should be filed in a pre-trial

motion in accordance with La. C.C.P. art. 1425(F). Louisiana Code of Civil Procedure article 1425(F) sets out in detail the procedure which should be followed in order to challenge the qualifications of an expert or the methodology used by the expert in reaching his opinion. See **Crockerham v. Louisiana Medical Mutual Insurance Co.**, 2017-1590 (La. App. 1 Cir. 6/21/18), 255 So.3d 604, 610-11; **Adolph v. Lighthouse Property Insurance Corp.**, 2016-1275 (La. App. 1 Cir. 9/8/17), 227 So.3d 316, 320, citing **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Furthermore, when the objecting party fails to request an evidentiary "gatekeeping" hearing, his objections to the admissibility of an expert witness's testimony under **Daubert** are not preserved for appeal. **Babcock v. Martin**, 2019-0326 (La. App. 1 Cir. 10/24/19), 289 So.3d 606, 614; **Crockerham**, 225 So.3d at 610-11; **Adolph**, 227 So.3d at 320-21.

The court in **Williams** was correct in that La. C.C.P. art. 1425(F) states that "any party may file for a pre-trial hearing to determine whether a witness qualifies as an expert" and it is not mandatory to file. 322 So.3d at 797-98. Where the court errs is in not following the mandate of La. C.C.P. art. 1425(F)(6), which states:

> Notwithstanding the time limitations in Subparagraphs (1), (2), and (3) of this Paragraph, by unanimous consent of the parties, and with approval by the court, a motion under this Paragraph may be filed, heard, and ruled upon by the court at any time prior to trial. The ruling by the court on such motion shall include findings of fact, conclusions of law, and reasons for judgment complying with the provisions of Subparagraph (4) of this Paragraph.

Only if all parties give unanimous consent and the trial court agrees can an Article 1425(F) motion be heard on the trial date. Since the statutory language of Article 1425(F) addresses the issue of when a challenge to the qualification of an expert or whether the methodologies employed are reliable can be filed and heard, this court does not have to follow the incorrect interpretation given in the **Williams** case. As stated by the supreme court in **Bergeron v. Richardson**, 2020-01409 (La. 6/30/21),

320 So.3d 1109, 1116, where a statute's language addresses an issue, a court should not resort to jurisprudence.