NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1996

DAVID AND ROCHELLE BOUDREAUX

VERSUS

BLAKE G. MATHERNE AND SANDRA DEROCHE MATHERNE

Judgment rendered May 6, 2011.

* * * * * *

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 144,492
Honorable George J. Larke, Jr., Judge

* * * * * *

JOSEPH J. WEIGAND, JR.
HOUMA, LA
AND
DOUGLAS J. AUTHEMENT
HOUMA, LA

ATTORNEYS FOR
PLAINTIFFS-APPELLEES
DAVID AND ROCHELLE
BOUDREAUX

MARK D. PLAISANCE
BAKER, LA

ATTORNEY FOR
DEFENDANTS-APPELLANTS
BLAKE G. AND SANDRA
DEROCHE MATHERNE

* * * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

Defendants/appellants, Blake G. Matherne and Sandra Deroche Matherne, appeal the trial court's judgment in favor of plaintiffs/appellees, David and Rochelle Boudreaux, awarding the Boudreauxes damages and attorney fees pursuant to the New Home Warranty Act ("NHWA"), La. R.S. 9:3141, *et seq.*, and for redhibitory defects in connection with the construction of the Boudreauxes' residence in Terrebonne Parish. For the reasons that follow, we affirm.

PERTINENT FACTS AND RULING OF THE TRIAL COURT

According to the record, the Boudreauxes purchased a new home from the Mathernes on February 27, 2004. Within a month of the sale, several alleged defects in the house started to surface. The Boudreauxes contacted the Mathernes, who agreed to try to resolve the problems. When the defects in the house were not remedied by the Mathernes, the Boudreauxes filed a petition for damages seeking recovery under the laws of redhibition. They later amended the petition to include a claim for damages pursuant to the NHWA. In their answer to the Boudreauxes' petition, the Mathernes stated that they were "ready, willing and able to make the minor cosmetic repairs and adjustments needed in the subject property and have been since the closing of the sale," but had been prevented from doing so by the Boudreauxes. The Mathernes also maintained that the NHWA provides the sole remedies available to the Boudreauxes, as the home they purchased was a new construction.

The matter proceeded to a bench trial on October 28, 2009, at which time the trial court heard testimony from numerous witnesses and considered various exhibits that were introduced into evidence. The trial court ruled from the bench in favor of the Boudreauxes, awarding $21,284.10 in damages for redhibitory defects in the driveway and the walkway from the house to the street. The trial court further found that pursuant to the NHWA, the Boudreauxes were entitled to recover $7,000.00 for the ceramic tile floors; $1,800.00 for the plumbing; $1,000.00 for the brickwork; and $1,500.00 for the baseboards, painting, and repair of the doors, kitchen cabinets, and vanities. The trial court also awarded the Boudreauxes $7,500.00 in attorney fees and

assessed all court costs against the Mathernes, including the $500.00 expert fee for plaintiffs' expert witness. A judgment in accordance with these findings was signed by the trial court on November 4, 2009. This appeal by the Mathernes followed.

ISSUES PRESENTED

The Mathernes assign legal error by the trial court in awarding damages to the Boudreauxes under a theory of redhibition for the driveway and walkway when the NHWA provides the exclusive damages theories for purchasers of new homes and specifically excludes driveways and walkways. The Mathernes also assign error to the trial court's award of damages to the Boudreauxes under the NHWA, arguing that the Boudreauxes failed to present evidence of the building standards or noncompliance with same. Finally, the Mathernes argue that the trial court erred in applying the NHWA because the Boudreauxes failed to provide the Mathernes with prompt notice of the alleged defects and did not allow them an opportunity to make repairs.

DISCUSSION

The trial court's factual findings in cases involving the NHWA are subject to manifest error review. **Hutcherson v. Harvey Smith Const., Inc.**, 2008–1046, p. 3 (La. App. 1 Cir. 2/13/09), 7 So.3d 775, 778. 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. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993). 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. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). With regard to questions of law, the appellate review is simply a review of whether the trial court was legally correct or legally incorrect. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. **Pierce v. State, Office of Legislative Auditor**, 2007–0230, p. 7 (La. App. 1 Cir. 2/8/08), 984 So.2d 61, 67, writ denied, 2008–0542 (La. 4/25/08), 978 So.2d 369.

In ruling in favor of the Boudreauxes, the trial court issued the following reasons for judgment:

> I will try to keep the reasons for judgment as short as possible, but we are also dealing with the claim for redhibition on the concrete and the -- the driveway and the sidewalk. The Court is going to find -- to say that it's -- I think that was the biggest problem I had was the sidewalk and the driveway as far as conditions that definitely needed to be repaired. I didn't hear much testimony exactly on who built it, how it was built, how big it was. The Court did note from Mr. Stein's testimony or from his reports that there weren't any expansion joints placed in there and there was splitting in the driveway. From what I could see from the pictures there weren't any and, you know, his testimony was it wasn't going to last another five years. And that is definitely -- I didn't hear anything to rebut that, to say otherwise, so definitely the Court is going [to] hold that the driveway and the sidewalk need to be replaced -- replaced and removed.
>
> . . . .
>
> As far as the tile goes ... I think there is no reason the tile should be cracking. There is a number of cracks now, even though they are very hard to see ... for some reason they are cracking, whether it is a problem with the moisture or whatever. The Court is going to ... award ... $7,000.00 for the tile work. That should include $7,000.00 for the tile, the sealing of the entire floor because even though these cracks, whether there is moisture ... using better judgment would be to have the whole floor sealed. And I think ... Mr. Chauvin has stated that his quote included ... sealing the entire floor. I am going to include in that, with the $7,000.00, a plumber's fee. I couldn't figure a breakdown on exactly what he had to do, but it seems like certain things have to be removed. I am not certain the tub needs to be removed, but I think he had that in his quote, but I think ... $1,800.00 would be a fair amount for the plumber to remove whatever they have to remove so that the tile can be placed down.
>
> The brick ledges and the brick work, the Court is going to award nothing for the brick work, per se. As far as the slanting of the wall or the weep holes I am going to award some general damages there, but for the brick ledges I think it would be foolish to tear down the entire walls of these brick walls and replace the bricks. I think those ledges can [be] reworked. I am going to award $1,000.00 to rework the brick ledges or either rework the brick ledges or do the sealing of the windows. ...
>
> The driveway and the sidewalk, the only figure I had in there was from Mr. Pitre for $21,284.10 and, of course, I am going to award that.
>
> All of the remainder complaints, the general repairs, the Court finds that they are general repairs, the fixing of the doors, the caulking of the various areas in the house dealing with the molding, the Court is going to award $1,500.00. ...
>
> The Court is going to award the plaintiff attorney fees of $7,500.00, expert fees of $500.00.
>
> The total award will be $40,584.10.

. . . .

> And the Court notes that under the *Graff* case [**Graf v. Jim Walter Homes, Inc.**, 1997-1143 (La. App. 1 Cir. 5/15/98), 713 So.2d 682], the case said when a contractor breaches an implied warranty of good workmanship in a building, contract damages are awarded to place the purchaser in a position he deserved to be in when the building was completed. I think with the exception of the tiles and the cement driveway the figures I gave would place the ... plaintiff back in that position. The biggest concern I had was with the driveway and sidewalks which seemed to be defective. And the only testimony I heard was that their life span would be five years and the Court would find that I'm sure if any purchaser, and especially the purchasers here, would have known -- been told that I am selling you this house with a driveway that will last five years they would have never purchased the house. They said it was redhibitory vice and the Court will grant those damages for that amount.

After a thorough review of the evidence in this case, we agree with the essential factual findings provided in the trial court's reasons for judgment. With regard to the Mathernes' allegation that there was insufficient evidence of noncompliance with building standards to support the Boudreauxes' NHWA claim, we are convinced that the findings of the trial court concerning the defects in the property are reasonable in light of the record in its entirety. Moreover, regarding the Mathernes' claims concerning the lack of prompt notice by the Boudreauxes to the Mathernes of the alleged defects, we have considered the evidence and find that the record reasonably supports a finding that the Mathernes received the required notice pursuant to La. R.S. 9:3145 and were given an opportunity to make repairs.[1]

Finally, we find no merit to the Mathernes' claim that the Boudreauxes have no cause of action for the alleged defects to the driveway or the walkway because the NHWA provides the exclusive damages theory for purchasers of new homes and specifically excludes all driveways and walkways. We acknowledge that absent a written agreement to the contrary, recovery for any defects in the driveway or walkway would not be available to the Boudreauxes under the NHWA pursuant to La. R.S.

---

[1] Louisiana Revised Statutes 9:3145(A) provides as follows:

> A. Before undertaking any repair himself or instituting any action for breach of warranty, the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of this Chapter.

9:3144.[2] Moreover, we are well aware of the exclusivity of the NHWA as it pertains to builders and owners relative to home construction.[3] However, because driveways and walkways have been carved out of the NHWA, this exclusivity provision cannot operate to deny the Boudreauxes their rights under redhibition for the defects in the driveway and sidewalk.

DECREE

For the above and foregoing reasons, we affirm the judgment of the trial court. All costs associated with this appeal are assessed against defendants/appellants, Blake G. Matherne and Sandra Deroche Matherne. We issue this memorandum opinion in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B.

AFFIRMED.

---

[2] Louisiana Revised Statutes 9:3144 provides, in pertinent part, as follows:

> B. Unless the parties otherwise agree in writing, the builder's warranty shall exclude the following items:
>
> (1) Fences, landscaping, including but not limited to sodding, seeding, shrubs, existing and new trees, and plantings, as well as off-site improvements, all driveways and walkways, or any other improvement not a part of the home itself.

[3] Louisiana Revised Statutes 9:3150 provides as follows:

> This Chapter provides the exclusive remedies, warranties, and peremptive periods as between builder and owner relative to home construction and no other provisions of law relative to warranties and redhibitory vices and defects shall apply.