SUPREME COURT

STATE OF LOUISIANA

NO. _____

KEN SMITH d/b/a B & K MUSIC
Plaintiff-Appellee-Respondent

VERSUS

MIKE UNKEL
Defendant-Appellant-Applicant

Application for Writ of Certiorari and/or Review
Parish of Allen, 33rd Judicial District Court, No. C-2000-237; to the
Court of Appeal, Third Circuit, No. CA 03-1362

APPLICATION FOR WRIT ON BEHALF OF DEFENDANT, MIKE UNKEL

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____
TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION
TITLE

Applicant: Mike Unkel

KEN SMITH d/b/a B & K MUSIC

Have there been any other filings in this Court in this matter? [ ] Yes [X] No

VS.

Mike Unkel

Are you seeking a Stay Order? __No___
Priority Treatment? __No___
If so you MUST complete & attach a Priority Form

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Pleading being filed: [ ] In proper person, [ ] In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING
[X] Civil, [ ] Criminal, [ ] Bar, [ ] Civil Juvenile, [ ] Criminal Juvenile, [ ] Other [ ] CINC, [ ] Termination, [ ] Surrender, [ ] Adoption, [ ] Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION
Tribunal/Court: _____ Docket No. _____ Judge/Commissioner/ Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION
Parish and District Court: 33rd JDC, Allen Parish Docket Number: C-2000-237 Judge and Section: Hon. Patricia C. Cole Date of Ruling/Judgment: 06/30/2003

APPELLATE COURT INFORMATION
Circuit: Third Docket No. CA 03-1362 Action: Affirmed Applicant in Appellate Court: Defendant
Filing Date: 7/16/2003 Ruling Date: 3/31/2004 Panel of Judges: Planchard, Gremillion, Ezell En Banc: [ ]

REHEARING INFORMATION
Applicant: Defendant Date Filed: 4/13/2004 Action on Rehearing: Denied Ruling Date: 05/26/2004
Panel of Judges: Planchard, Gremillion, Ezell En Banc: [ ]

PRESENT STATUS
[ ] Pre-Trial, Hearing/Trial Scheduled date: N/A, [ ] Trial in Progress, [X] Post Trial Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No If so, explain briefly
_____

VERIFICATION
I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

_____ DATE

_____ SIGNATURE

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REASONS FOR GRANTING THE WRIT

Defendant-appellant, Mike Unkel, applies for writs from a decision of the Third Circuit Court of Appeal, per Judge *pro tempore* Arthur J. Planchard. The court dismissed defendant's exception of res judicata and affirmed the decision of the trial court awarding damages to plaintiff-appellee Ken Smith for leasehold improvements under LSA-C.C. art. 495 after Unkel's building was sold to the State in connection with the State's expropriation of property for the expansion of Highway 165. The court of appeal's decision presents the following errors meriting a writ under Rule X of the Rules of this Honorable Court:

I. The court of appeal failed to uphold its Constitutional duty to review the law, cited overruled and inapplicable law and applied an improper standard of review, contrary to La. Const., art. 5, § 10(B) and *Bonnette v. Conoco, Inc.,* 2001-2767 (La. 2003); 837 So.2d 1219, meriting a writ under Rule X Sections 1(a)(1), 1(a)(4) and 1(a)(5).

II. The court of appeal's decision dismissing defendant's exception of res judicata and refusing to remand the case for an evidentiary hearing was contrary to legislative intent and conflicts with decisions of other circuits and decisions of this Court, including *Avenue Plaza, L.L.C. v. Falgoust,* 96-0173, p. 7 (La. 7/2/96), 676 So.2d 1077, 1080; *Lewis v. Lewis*, 155 La. 231, 99 So. 202 (1923); *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 2001-0993, (La. App. 1 Cir. 7/3/02); 867 So.2d 709; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cagle*, 94-322 p. 14 (La. App. 3 Cir. 1994); 649 So.2d 642, 651, *writs denied,* 94-2932, 94-3002 (La. 3/17/95); 651 So.2d 266 and *Stansell v. Stansell,* 622 So.2d 1203 (La. App. 2d Cir. 1993), meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

III. The court of appeal's decision affirming the trial court's imposition of liability under LSA-C.C. art. 495 is contrary to law, legislative intent, decisions of the other circuits and decisions of this Court, meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

A. The lower courts' interpretation and application of LSA-C.C. art. 495 was contrary to the express terms of the article and legislative intent, and conflicts with decisions of other circuits and this Court, including, *inter alia*, *Riggs v. Lawton,* 93 So.2d 543, 545, 231 La. 1019, 1024-1025 (1957); *Dreyfuss v. Process Oil & Fuel Co.,* 142 La. 564, 77 So. 283, 285 (1917); *Pylate v. Inabnet,* 458 So.2d 1378, 1390-1391 (La. App. 2d Cir. 1984) and *Taylor Lumber Co., Inc. v. Fuller,* 292 So.2d 878, 883 (La. App. 1st Cir.), *writ denied,* 294 So.2d 839 (La. 1974), meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

B. Additionally, and in the alternative, the lower courts erred as a matter of law and fact in determining that the required elements of La. C.C. art 495 were met, particularly considering counsel for plaintiff's judicial admission that they were not met, meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

C. The lower courts erred as a matter of law in failing to hold that plaintiff, based upon his words and conduct, was estopped from recovering damages under article 495 or any other theory, meriting a writ under Rule X Section 1(a)(4).

D. The lower courts erred as a matter of law in failing to notice that no legal grounds support the imposition of liability against defendant in this case, and that plaintiff's only cause of action was against the State, meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

IV. The court of appeal's decision affirming the trial court's imposition and determination of damages was contrary to law, decisions of the other circuits and decisions of this Court, meriting a writ under Rule X Sections 1(a)(1), 1(a)(2) and 1(a)(4).

A. The lower courts' decision basing an award of special damages on plaintiff's personal estimate of expenses over an eighteen year period that was not corroborated by any receipts, invoices or cancelled checks is contrary to law and conflicts with decisions of other circuits, including, *inter alia, Ganheart v. Executive House Apartments,* 1995-1278 (La. App. 4 Cir. 2/15/96); 671 So.2d 525, *rehearing denied, writ denied* 1996-1337 (La. 9/3/96); 678 So.2d 554; *Tudor Chateau Creole Apartments Partnership v. D.A. Exterminating Co., Inc.,* 96 0951 (La. App. 1 Cir. 2/14/97); 691 So.2d 1259, 1264 and *Hargroder v. Protective Life Ins. Co.,* 556 So.2d 991, 997 (La. App. 3 Cir. 1990), *writ denied,* 559 So.2d 1367 (La. 1990), meriting a writ under Rule X Sections 1(a)(1), 1(a)(2) and 1(a)(4).

B. The lower courts' admission of and reliance upon inadmissible hearsay, including two state appraisal summary sheets as to which the preparers did not testify and a verbal appraisal and unsupported assumptions as to its contents that the trial court itself ruled were inadmissible hearsay, is contrary to law, meriting a writ under Rule X Section 1(a)(4).

C. The lower courts' reliance upon the unreliable testimony of an expert that was based solely on the plaintiff's personal estimate and inadmissible hearsay was contrary to law, decisions of other circuits and decisions of this Court, meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

D. The court of appeal's decision imposing a duty upon defendant to disprove damages not proven by plaintiff and to call witnesses that the plaintiff should have called to establish damages, effectively shifting plaintiff's burden of proof to defendant, is contrary to law and decisions of other circuits, meriting a writ under Rule X Sections 1(a)(1) and 1(a)(4).

V. The inequitable nature of the erroneous decision, as well as its adverse impact on the law of res judicata, landlord-tenant law, expropriation law and the law of evidence merits a writ under Rule X Section 1(a)(4).

In sum, the court of appeal's decision is contrary to Louisiana law, and conflicts with decisions of this Court and other circuit courts on res judicata, LSA-C.C. art. 495, expropriation, evidence and proof of damages. The decision is manifestly unjust to the defendant, particularly considering that plaintiff led defendant to believe that he was pursuing the state for compensation until after the sale of the property and the destruction of the improvements, at which time defendant could no longer protect his rights, and that the court's award exceeded the sum plaintiff paid defendant in rent over the *entire eighteen years* of the lease. The decision is also contrary to the public interest, in that it adversely impacts the law of res judicata, landlord-tenant law, expropriation law and the law of evidence. Accordingly, applicant, Mike Unkel, respectfully requests this Court to grant the writ, and after due proceedings had, reverse the decision of the court of appeal and dismiss plaintiff's suit.

MAY IT PLEASE THE COURT:

Defendant-appellant, Mike Unkel, respectfully submits, through undersigned counsel, his Application for Writs of Certiorari and Review to the Third Circuit Court of Appeal, in conformity with Rule X of the Rules of this Honorable Court. Jurisdiction of this Court to review the final judgment on appeal is proper under Article V Section 5 of the Louisiana Constitution of 1974.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant-appellant, Mike Unkel, applies for writs from a decision of the Third Circuit Court of Appeal, per Judge *pro tempore* Arthur J. Planchard. The court dismissed defendant's exception of res judicata and affirmed the decision of the trial court awarding damages to plaintiff-appellee Ken Smith d/b/a B & K Music for leasehold improvements under LSA-C.C. art. 495 after Unkel's building was sold to the State in connection with the State's expropriation of property for the expansion of Highway 165. The decision was legally erroneous as well as manifestly unjust, meriting a writ.

Mike Unkel permitted Ken Smith to lease a large building at a prime commercial location for only $200.00 per month over a period of eighteen years under an oral lease. Unkel kept the rent low based on Smith's agreement to maintain the interior of the building and his addition of modest cosmetic improvements. In 1998, the state began expropriating and purchasing property in the area in connection with the expansion of Highway 165. In January of 1999, the state made Unkel an offer to purchase the building and improvements for $67,725.00, plus compensation for Mr. Unkel's leasehold interest as lessee of the land from the town of Kinder. Ex. P-14. The state sent a letter to Smith notifying him that DOTD was in the process of acquiring the property, and informing him that he would be required to vacate in 90 days. Ex. P-5.

Unkel accepted the state's offer in February of 1999. Smith attempted to frustrate and delay the sale and refused to vacate the premises, under the (mistaken) assumption that if the lease terminated prior to the sale he would not be entitled to lessee's compensation from the state. He also wanted compensation from the state for cosmetic improvements he made to the interior of the building, of which he claimed ownership. However, he did not explain this to Unkel, who had no idea why Smith was attempting to frustrate the sale. Unkel, understandably upset, asked Smith to leave.

In February of 1999, Smith filed his first lawsuit against Unkel, *Ken Smith d/b/a B & K Music vs. Mike Unkel,* No. C-99-124 on the Docket of the 33rd Judicial District Court.[1] Therein, despite the state's

[1] That suit, which was separate from and prior to the instant suit, was the first of three lawsuits Smith filed (two against Unkel and one against the state) involving the lease, the expropriation sale, and Smith's right to compensation for his improvements. In 2002, Smith also filed an unrelated and meritless third lawsuit against Unkel, *Kenneth Smith vs. Mike Unkel*, 33rd Judicial District Court, Parish of Allen, State of Louisiana, No. C-2002-217.

Notice to Vacate, Smith sought an injunction to maintain the lease, averring that if the lease terminated prior to the sale, the state would pay Unkel for improvements Smith made to the building, which he valued at over $62,000.00, just a few thousand dollars less than the State agreed to pay Unkel for the entire building. Smith purchased his own building and voluntarily vacated the premises in November of 1999, and thereafter, in the same law suit, sought a declaratory judgment against Unkel that Smith was entitled to expropriation damages from Unkel, i.e., the value of his improvements. In December of 1999, this first suit was dismissed **with prejudice** without a reservation of rights against Unkel, reserving only Smith's rights against the state. See, Judgment of December 29, 1999 (I R. 10).

Smith retained the key to the building for a month and a half, until January 1, 2000, in order to remove his property, and informed Unkel and Unkel's wife, Miss Adele, that he had removed everything he wanted. II R. 237, 249. Unkel assumed that Smith had abandoned any property remaining. Smith testified at trial that he did not remove or seek to remove improvements, because he did not want them for his new store, and just wanted money. Neither Unkel nor the state would have objected if he had, because the building was scheduled to be demolished. II R. 247-8.

Smith had been negotiating with the DOTD since February of 1999 in an attempt to recover $63,464.25 for improvements. In support of his request, Smith submitted a one page list prepared from his memory over eighteen years (Ex. P-7), without substantiating receipts or proof of the value of the improvements or labor. DOTD refused to compensate Smith for the improvements due to Smith's complete lack of proof of the value or ownership of the improvements. II R. 222-3. After negotiations with the state failed, Smith filed his second suit, against the State alone, for the value of his improvements, as well as hundreds of thousands of dollars in additional compensation. Smith ultimately recovered $115,907.00 in damages from the state for moving expenses, loss of improvements, and loss of leasehold advantage. The Third Circuit recently affirmed this award in No. CA-03-01450.

On January 24, 2000, the state purchased the building from Unkel at the price offered and accepted in the signed and binding agreement of February 1999. In February of 2000, after the sale, Unkel requested permission from the state to enter the building. He thought he might be able to make use of an old window air conditioning unit that Smith had abandoned. That was the **only** time Unkel entered the building after termination of the lease, and he observed at that time that the interior of the building had been stripped. II R. 238. There was nothing in there that he wanted except one old air conditioner, which he removed and put in an old camp on the river.

In April of 2000, months after the sale of the building to the state was completed and the interior had been vandalized or stripped of improvements, Smith filed the instant suit (his third lawsuit involving

the improvements) against Unkel, **again** seeking compensation for his alleged improvements from Unkel, this time under the doctrine of unjust enrichment and LSA-C.C. art. 495. The trial court correctly held that unjust enrichment did not apply, but ruled in favor of Smith under article 495, despite Smith's counsel's judicial admission at trial that the elements of article 495 were not met. II R. 250-2.

Regarding damages, Smith submitted only the list from his memory over the past eighteen years as to the alleged value of his improvements, without introducing a single supporting receipt, invoice or cancelled check into evidence. Relying upon this list, the court awarded damages of $38,384.12 plus interests and costs, an amount greater than Smith had paid Unkel in rent over the entire life of the lease. As an alternative basis for the award, the court ruled that this amount was comparable to the difference in value between a 1996 verbal appraisal that allegedly did not include the improvements and the values reflected on a state appraisal review sheet, as to which the preparer did not testify. The trial court admitted the state appraisal review sheets over defendant's objection, II R. 202, 204, and the court itself had previously ruled that testimony as to whether the verbal appraisal included the improvements was inadmissible hearsay. I R. 139-140. The court also relied upon testimony of plaintiff's real estate expert that was based solely on the plaintiff's list, the verbal appraisal and the state's appraisal summaries, which were hearsay.

Unkel appealed, and timely filed an Exception of Res Judicata in the court of appeal. The court of appeal denied the exception for lack of sufficient evidence in the Record and refused to remand the case to the trial court for evidence and trial. Failing to review the issues of law, the court affirmed the trial court's decision on liability and damages on the basis of the manifest error rule. The court of appeal's decision presents the following errors meriting a writ under Sections 1(a)(1), 1(a)(2), 1(a)(4) and 1(a)(5) of Rule X of the Rules of this Honorable Court:

1. Applicant respectfully submits that the court of appeal's decision was fraught with serious judicial and legal errors that warrant this Court's attention, including failure to uphold the court's Constitutional duty to review the law applied by the trial court, application of the wrong standard of review and citation and quotation of overruled and inapplicable law.

2. The court of appeal's decision dismissing defendant's exception of res judicata and refusing to remand the case for an evidentiary hearing was contrary to legislative intent, decisions of the other Circuits and decisions of this Court. Smith's claims are clearly barred under Louisiana's mandatory laws relating to res judicata and the effect of final judgments, because a prior final judgment (contained in this Record at I R. 10) dismissed Smith's claims against Unkel with prejudice and without any reservation of rights in the first suit, which involved identical underlying facts and even claims,

including Smith's alleged right to compensation from Unkel for his improvements.

Under the 1990 amendments to Louisiana's law of res judicata and related Code of Civil Procedure articles, including LSA-R.S. 13:4231; LSA-C.C.P. art. 531 and LSA-C.C.P. art. 425(A), the legislature has expressed a strong policy prohibiting multiple lawsuits based upon the same "transaction or occurrence," i.e., the same operative facts. Res judicata is now mandatory, and when the issue is timely raised, as it was in this case, it should be decided by the courts, with a remand if necessary for additional evidence.

In dismissing outright for lack of evidence, the court of appeal overlooked circuit court decisions and prior decisions from this Court, including *Lewis v. Lewis*, 155 La. 231, 99 So. 202 (1923); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cagle*, 94-322 p. 14 (La. App. 3 Cir. 1994); 649 So.2d 642, 651, *writs denied,* 94-2932, 94-3002 (La. 3/17/95); 651 So.2d 266 and *Stansell v. Stansell,* 622 So.2d 1203 (La. App. 2d Cir. 1993), holding that when the evidence before the court of appeal is insufficient to determine an exception of res judicata, the proper procedure is to remand the case to the trial court for an evidentiary hearing. These errors merit a writ.

3. The court of appeal's decision affirming the trial court's imposition of liability is contrary to law, legislative intent, decisions of other circuits and decisions of this Court, meriting a writ. First, the lower courts erred in imposing liability under LSA-C.C. art. 495. Article 495 is a supplemental remedy and by its terms applies only "in the absence of other provisions of law or juridical acts," both of which are present in this case. Article 495 further applies to the "owner" of the immovable, and the State, not Unkel, was the owner of the immovable at the time demand was made and suit was filed.

Moreover, even were article 495 applicable, the trial court completely misinterpreted the article in permitting a tenant who abandoned his property and made no effort to remove it to force a lessor to pay compensation. In accord with the terms of the article, decisions of other circuits and decisions of this Court, including, *inter alia*, *Riggs v. Lawton,* 93 So.2d 543, 545, 231 La. 1019, 1024-1025 (1957); *Dreyfuss v. Process Oil & Fuel Co.,* 142 La. 564, 77 So. 283, 285 (1917); *Pylate v. Inabnet,* 458 So.2d 1378, 1390-1391 (La. App. 2d Cir. 1984) and *Taylor Lumber Co., Inc. v. Fuller,* 292 So.2d 878, 883 (La. App. 1st Cir.), *writ denied,* 294 So.2d 839 (La. 1974), article 495 cannot be used to force a lessor to pay for improvements that a lessee has abandoned and has not attempted to remove. This error, which has grave consequences for landlord-tenant law and practice, merits a writ.

Second, and in the alternative, the lower courts erred as a matter of law and fact in determining that the required elements of LSA-C.C. art. 495 were met. Article 495 requires an election by the owner

of the immovable to keep and pay for the improvements, and even by Smith's counsel's own judicial admission at trial (II R. 250-2), there was no election by Unkel to keep and pay for the improvements.

Third, the lower courts erred as a matter of law in failing to hold that Smith was estopped from recovering under article 495 or any other theory. Based on Smith's representations by words and conduct, upon which Unkel relied in failing to exercise his right to demand removal of the improvements under article 495 before the sale, as well as Smith's conduct in waiting to file suit until the improvements were destroyed, thereby prejudicing Unkel's defense, Smith should have been deemed estopped from obtaining the value of the improvements.

Finally, the lower courts erred as a matter of law in failing to notice that no legal grounds support the imposition of liability against Unkel in this case, and that Smith's only cause of action was against the State. Smith had no valid cause of action, right of action or remedy against Unkel on any legal grounds. The only grounds for recovery asserted by Smith in his Petition were article 495, article 496 and the doctrine of unjust enrichment under LSA-C.C. art. 2298. The trial court was correct in determining that Smith had no claim under article 496 or unjust enrichment. Nor did Smith have a valid claim under article 495. Indeed, Smith's only cause of action and remedy for recovery of the value of the improvements was against the state, not Unkel.

A lessee has no claim against a lessor for damages when the lessor's property has been expropriated. LSA-C.C. art. 2697. Further, it is well settled under the Constitution, laws and jurisprudence of this state, that an expropriator is **required** to pay a lessee for the value of improvements he has placed upon leased property. LSA-Const. 1974, art. I, § 4; LSA-R.S. 48:453; *State, Dept. of Transp. and Development v. Manuel,* 451 So.2d 659, 662 -663 (La. App. 3d Cir. 1984). Assuming that Smith, as he claimed, owned the improvements, Unkel could not sell the state property that he did not own. LSA-C.C. art. 2452 ("The sale of a thing belonging to another does not convey ownership.") As the new owner of property containing Smith's alleged improvements, the State, not Unkel was liable under article 495. Finally, even if the state erroneously paid Unkel for Smith's improvements, any compensation due to Smith was still owed by the State. *State Through Dept. of Transp. and Development v. Wahlder* , 94-761, p. 6 (La. App. 3 Cir. 1994); 647 So.2d 481, 486. The decision was contrary to law and adversely affects landlord-tenant and expropriation law and practice, meriting a writ.

4. The court of appeal's decision affirming the trial court's imposition and determination of damages was contrary to law, decisions of other circuits and decisions of this Court, meriting a writ. Smith did not prove his damages. First, he did not submit any evidence that he was the owner of the improvements. The **only** evidence shows that Unkel was entitled to the value of the improvements

based upon the agreement that Smith was to maintain the building and the mutual understanding of reduced rent in return for improvements. Considering the terms of the lease, uncontroverted testimony by Unkel and the undisputed fact that Smith was paying less than one-third of a reasonable rental, the trial court's assumption that Smith owned the improvements was without any evidentiary basis.

Second, Smith did not introduce competent evidence in support of his exaggerated claim for $63,464.25 in improvements. Smith presented only a list from his memory of alleged expenses over a period of eighteen years. **There is not a single receipt, invoice or cancelled check in this Record.** Numerous circuit court decisions have held that a plaintiff's summary of his expenses that is uncorroborated by receipts or cancelled checks is insufficient to support an award of special damages. See, *inter alia, Ganheart v. Executive House Apartments,* 1995-1278 (La. App. 4 Cir. 2/15/96); 671 So.2d 525, *writ denied* 1996-1337 (La. 9/3/96); 678 So.2d 554; *Tudor Chateau Creole Apartments Partnership v. D.A. Exterminating Co., Inc.,* 96 0951 (La. App. 1 Cir. 2/14/97); 691 So.2d 1259, 1264; *Hargroder v. Protective Life Ins. Co.,* 556 So.2d 991, 997 (La. App. 3 Cir. 1990), *writ denied,* 559 So.2d 1367 (La. 1990). The decision is contrary to law and conflicts with decisions of other circuits.

Moreover, the court of appeal erred in approving the trial court's reliance upon inadmissible hearsay, including unsupported and unproven assumptions regarding a verbal appraisal, testimony as to which the trial court itself ruled was inadmissible hearsay (I R. 139-140), as well as the state's appraisal summaries, as to which the preparers did not testify. Likewise, the court erred as a matter of law in finding that the trial court properly relied upon the unreliable testimony of plaintiff's real estate expert, which was not based on an independent review or appraisal, but rather solely upon plaintiff's uncorroborated list, unsupported assumptions regarding the verbal appraisal and inadmissible hearsay.

Finally, the court of appeal's decision imposing a duty upon **defendant** to **disprove** damages not proven by plaintiff and to call witnesses that plaintiff should have called to establish his damages is contrary to law. The court of appeal, in stating that defendant had the duty to present expert witnesses including contractors and real estate agents, overlooked undisputed evidence in the Record that the interior of the building had been stripped or vandalized prior to the time plaintiff made demand and that the building was demolished, rendering the hiring of experts impossible. Further, in imposing a duty upon defendant to disprove damages not proven by plaintiff, and to call witnesses that the plaintiff should have called to establish damages, the court effectively shifted plaintiff's burden of proof to defendant. These errors merit a writ.

5. Finally, the manifestly unjust nature of the decision, as well as the adverse impact on the law of res judicata, landlord-tenant law, expropriation law and the law of evidence, merits a writ.

Accordingly, and for further reasons discussed in detail *infra,* defendant-appellant, Mike Unkel, respectfully urges this Court to grant his Application for Writs, and after due proceedings had, reverse the Judgment and dismiss plaintiff's suit, at plaintiff's costs. Alternatively, defendant's Exception of Res Judicata should be remanded to the trial court for submission of evidence and trial.

STATEMENT OF THE CASE

Defendant, Mike Unkel, owned a commercial building in Kinder, Louisiana on the Northeast corner of Highway 165 and U.S. Highway 190, a prime location at a busy intersection. In accord with the practice of the town of Kinder, the town retained ownership of the land and charged Unkel a yearly rental. II R. 241-2. Beginning in 1981, Mr. Unkel leased the building to plaintiff, Ken Smith, pursuant to an oral lease. I R. 114. Originally, Smith rented only half of the building at $90.00 per month, and the other half was rented by another business. I R. 134. Then, in 1982 or 1983, Unkel leased Smith the entire 2,880 square foot building for $200.00 per month. Eighteen years later, at the end of the lease, Smith was still paying only $200.00 per month. II R. 234.

Deducting property taxes and rent to the town, Unkel was only receiving $1,600.00 per year for the rental of a building at one of the best commercial locations in Kinder. II R. 243. The rental on another of Unkel's buildings in the same area was $2.50 per square foot, which would make a reasonable rent for Smith at least $650.00 per month. II R. 236. A reasonable average over the life of the lease would have been $500.00 a month. II R. 235-6. Thus, over the course of the lease, Unkel essentially gave Smith $300.00 per month, or $68,400.00. II R. 236.

The parties had a mutual understanding that the reduced rent was in return for improvements. II R. 235, 241, 243. There was never anything in writing regarding improvements. I R. 157-8. However, it was "part of the agreement" that Unkel would keep the rent low so Smith could make "whatever work inside the building for whatever he wanted to do." II R. 236. Because Smith was working on the building and adding items such as inexpensive carpeting and plywood paneling that would benefit Unkel, "I left the lease low at two hundred dollars." II R. 235.

In 1998, the State began purchasing and expropriating property for the expansion of Highway 165. Both Smith and Unkel knew that the State intended to expropriate Unkel's building. I R. 118. At Smith's request, in 1998 Unkel signed a one page undated lease drafted by Smith. I R. 117. According to Unkel: "Ken and I were discussing the fact that the State was gonna be coming through and Ken said to me that he would like to have a written lease and I agreed to let him have it. I said I agreed with him that it would probably put him in a better position to negotiate a better deal with the State if he had a

written lease." I R. 118-119. Smith drew up the lease and Mr. Unkel signed it. I R. 119.[2]

In January of 1999, the State offered to purchase the building and Unkel's leasehold interest. I R. 120. The State offered $67,725.00 for the improvements to the land (including $65,669.00 for the building, $1,556.00 for exterior gravel and $500.00 for the exterior sign) and an additional $140,300.00 for Unkel's leasehold interest. DOTD Negotiator's Report, Exhibit P-14, p. 3. The offer did not include sums for the land that would be due to the town of Kinder, or sums that would be due to Smith as lessee, which were to be negotiated separately. The State also sent a letter to Smith dated January 14, 1999 notifying him that the DOTD was in the process of acquiring the property, informing him that he would be required to vacate within 90 days, and offering him relocation assistance. Exhibit P-5.

In February of 1999, Unkel accepted the DOTD's offer. On February 15, 1999, the state transmitted the sale document, which Unkel and his wife signed. Exhibit P-2. The document was also to be ratified and signed by the mayor because Kinder owned the land, and also by Smith, as Unkel's tenant. The Mayor signed the document. However, Smith refused to sign the document. I R. 122.

On February 19, 1999, David Davis of DOTD spoke with Unkel and Smith. Unkel called from the music store to get Davis to explain to Smith why he was included on the deed. Davis explained to Smith that he was being included as an intervenor and would not be relinquishing any rights if he signed. I R. 145; II R. 209.[3] Smith said he understood, II R. 209, but nevertheless refused to sign. I R. 145. Smith would not explain to Unkel why he refused to sign the deed. As it turned out, Smith refused to sign the deed because he (mistakenly) assumed he would be relinquishing his rights against the state for compensation if he signed the deed and vacated the premises before the sale. I R. 144.[4]

Thereafter, in February of 1999, Smith began negotiating with the state for compensation. II R. 210. David Davis asked Smith to provide an itemized list of improvements within three days, which he

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[2] The Lease, Exhibit P-1, provides:

> MIKE UNKEL (Landlord) and KEN SMITH (d/b/a B & K Music) (Tenant) hereby document their oral agreement reached many years ago concerning the property and improvements on the corner of U.S. Hwy. 165 and U.S. Hwy 190, Kinder, Louisiana as follows:
>
> 1. Tenant shall pay $200 per month as rent.
>
> 2. Tenant shall generally maintain the building except Landlord shall be responsible for maintenance of the structure, roof, walls, foundation, major electrical, plumbing.
>
> 3. The lease shall run from year to year ending December 31 of each year. Unless Tenant notifies Landlord in writing prior to December 31, this lease shall automatically renew for successive one year terms under the same terms and conditions as long as Tenant wishes to lease such property.

[3] For example, the town of Kinder was also included as an intervenor on the deed, the Mayor signed the deed, and the town of Kinder received separate compensation for the value of the land without relinquishing its rights.

[4] Indeed, Smith ultimately did receive compensation from the state of over $115,000.00, despite the fact that he vacated the premises prior to the sale.

did not do. I R. 145-6. Smith prepared one list, Exhibit P-6, then ultimately submitted a revised list, Exhibit P-7, including a claim for $15,464.25 for materials and $48,000.00 in labor, for a total of $63,464.25 in claimed improvements, a few thousand dollars less than the State agreed to pay Unkel for the entire building. Smith's list was not substantiated by receipts or cancelled checks. As Smith explained at trial, his list was from his memory as to what he "thought" things had cost over a period of eighteen years. I R. 147. Davis forwarded the list to Baton Rouge, to the District Manager. II R. 212.

Smith still refused to sign the deed. II R. 212-3. The State would not complete the sale if the tenant refused to sign the agreement. Because Smith would not sign, the DOTD was going to expropriate. II R. 213, 216. Expropriation could take years. Smith still did not tell Unkel why he was attempting to frustrate the sale. Understandably, Unkel became upset with Smith and asked him to leave. I R. 124. Smith then filed a lawsuit against Unkel, the first of three suits involving the lease, the February, 1999 agreement between the state and Unkel, and compensation for the improvements.

On February 26, 1999 Smith filed the first suit, captioned *Ken Smith d/b/a B & K Music vs. Mike Unkel,* No. C-99-124 on the Docket of the 33rd Judicial District Court. Despite the state's 90 day notice to vacate, Smith sued Unkel seeking to maintain the lease, averring that Smith would not be entitled to expropriation damages including the value of his leasehold improvements in the event that the lease terminated prior to the sale, and that the state would pay Unkel. See, Petition and Affidavit, Exhibits A and B to Exception of Res Judicata. In November of 1999, Smith voluntarily vacated the building and relocated his business to another building he had purchased. Thereafter, Smith amended his petition in the first suit to request a declaratory judgment against Unkel declaring that Smith had the right to expropriation damages as tenant of the leased premises, i.e., the value of his improvements, from Unkel. See, Exhibit C to Exception of Res Judicata.

Again, during the preceding months, Smith had been negotiating with the state to recover the value of improvements he allegedly made on the property. According to the Record in the instant case, the state refused to compensate Smith for lack of proof of the value or ownership of the improvements. II R. 222-3.[5] During November of 1999, Smith filed his second suit relating to the lease and his claim for damages for leasehold improvements against the State alone, *Smith v DOTD,* No. C-99-671 on the docket of the 33rd Judicial District Court. Therein, Smith sought to recover from the State $63,464.25 for leasehold improvements as well as substantial additional sums for his leasehold interest.[6]

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[5] Davis explained that he felt that Smith was due some compensation, but Smith did not have documentation. "All I could prove and provide to [the District Office] was the list that he had provided to me. It wasn't for me to make the call, it's for them to give me the answers as to what I should do with all this." II R. 222-3.

[6] Smith was ultimately awarded a total of $115,907.00 in compensation plus legal fees, interests and costs against the state. The Third Circuit affirmed this award in No. CA-03-01450.

In December of 1999, Smith agreed to dismiss his claims against Unkel in the first suit, including his claim for a declaration that Smith was entitled to expropriation damages from Unkel. On December 29, 1999, all of Smith's claims against Unkel were dismissed **with prejudice**, reserving only Smith's rights against the **State**. See, Stipulated Judgment of Dismissal, I R. 10.[7] No appeal was taken from this Judgment, which became final after the delays for appeal elapsed.

When Smith left the building in November, Smith said he would like to keep the key because he had more things to move out. Unkel agreed that Smith could keep the key until the end of December, 1999. II R. 237. At the end of December, Smith asked Unkel if he could keep the key one more day because "I still have a few things in the building." Unkel said yes. II R. 237. On January 1, 2000, Smith brought the key to Mr. Unkel's house. I R. 129. Miss Adele, Unkel's wife, asked Smith if he was able to get everything out of the building that he wanted, and he answered "yes." II R. 249.

Smith admitted that he had all of December to remove anything he wanted. I R. 174-5. He never made a demand or request to Unkel to remove any improvements. I R. 170-1, 175; II R. 237. Unkel would not have protested if he had. The price the State would pay Unkel was set in the binding agreement of February, 1999. II R. 247-8. The building was set to be demolished, anyone could have taken anything out of the building, the State didn't care. II R. 248.[8] Smith knew the building was going to be destroyed. He claimed he did not remove improvements prior to the sale because "there was still negotiating going on and they [the State] were gonna pay me for those improvements." I R. 179. Smith claimed that the state had his list and "I was just waiting to hear what they were gonna compensate me for." I R. 171.

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[7] The "Stipulated Judgment of Dismissal" states:

> In that the parties having stipulated that the subject lease is at an end in accordance with C.C. art. 2697 due to the imminent expropriation by the State of Louisiana,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the subject lease is at an end effective December 31, 1999 and that the above matter is dismissed, with prejudice, reserving to both parties all rights and causes of action against the State of Louisiana, each party to bear his own cost. I R. 10.

[8] Smith admitted that there were many items on his list that he could have easily removed. The window air conditioning units were attached with framing screwed into the wall, and could have been removed by unscrewing the framing. I R. 162, Tr. 53. The exterior sign was fastened with U hooks to the sign post, I R. 163, Tr. 54, and could have been removed. The state tore the sign down and hauled it to a dumpster. The timer for the sign could have been removed without damage by an electrician. I R. 165, Tr. 56. The work benches could have been removed, but they did not "work" in his new space. I R. 165, Tr. 56. The sales counter could have been removed. I R. 166, Tr. 57. The circulating fans and ceiling fans were bolted into plates on the ceiling but they were not welded, I R. 166, Tr. 57, and could have easily been removed. The white shutters were bolted on and could have been removed. I R. 169, Tr. 60. The cinder blocks were not attached to anything and could have been removed. I R. 170, Tr. 61. Smith never had any intention of removing any of the improvements from the building. I R. 172, Tr. 63. He "had no reason to do that." I R. 173-4, Tr. 65. His only interest was to obtain money. I R. 176, Tr. 67.

The sale of the building was finalized on January 24, 2000. II R. 237. Unkel did not enter the building from the time Smith left on December 31, 1999 until after the sale to the state. I R. 129-31; II R. 246. "I just didn't have any business in the building so I didn't go." I R. 130-131. Before the sale, he didn't think there was anything in the building that he wanted. After the sale, he thought about the window air conditioners Smith had abandoned in the building. I R. 131. He called the DOTD office for permission to go inside the building, and David Davis or his assistant said "yes." II R. 246.

The **only** time Unkel entered the building was in February of 2000. II R. 238. At that time, he observed that the interior of the building had been stripped and looked like the worst pictures in the Exhibits. II R. 238; Photographs, P-8. There was nothing in the building that he would put in his house or anywhere else, with one exception, one old window air conditioner. II R. 238. Unkel decided to take the **one** air conditioner out of the building and put it in an old camp on the river. He had a worker remove it on February 15, 2000. II R. 245.[9] Ultimately, the state bulldozed the building. II R. 240.

To Mr. Unkel's surprise, a month **after** the sale to the State, at which time the building had already been vandalized or stripped, Smith's attorneys sent Unkel a letter demanding that Unkel pay Smith $63,464.25 for improvements. See, Letter dated February 28, 2000, Ex. D-A. By letter dated March 29, 2000, Unkel refused to pay any amount to Smith. In April of 2000, this lawsuit followed.

Proceedings Below

In the instant suit, No. C-2000-237 on the Docket of the 33rd Judicial District Court, Ken Smith, d/b/a B & K Music filed a Petition for damages against Mike Unkel, seeking to recover $63,464.25 in leasehold improvements based upon La. Civ. Code arts. 495 and 496 and the doctrine of unjust enrichment. I R. 6. Smith's primary claim was based upon unjust enrichment. He contended that that the state had wrongfully paid Unkel instead of Smith for the improvements, and that Unkel was liable to reimburse him. Petition, I R. 7; I R. 62-65; II R. 250-2.

Unkel countered that he was the owner of the improvements under the understanding between the parties for reduced rent in exchange for improvements. I R. 15, II R. 235, 241, 243. Further, Unkel alleged as an affirmative defense that Smith had abandoned the property and represented to Unkel that he had removed all of his belongings. I R. 15. Finally, Unkel had not prevented Smith from removing

[9] Smith went back into the building in May of 2000, and took pictures. I R. 152. Between January and May someone had been in the building and had vandalized or stripped the interior; however, plaintiff presented no evidence to show who actually did it. Smith stated that there were employees of Mike Unkel in the building on January 4 (I R. 151), which Unkel denies. Smith did not state that he saw anyone removing anything on that date. Smith claimed that all the air conditioners had been removed as of January 8, however, Unkel removed an air conditioner in February, and there is an air conditioner visible in Smith's "after" photographs. P 37-MM, NN. Thereafter, Smith stated that he "saw people in the building" removing improvements, but he never specifically identified those people. I R. 151-2. Smith himself, employees of the state or even vandals could have entered and taken the abandoned property, but it was **not** Unkel or his employees.

improvements, and had not made an election to keep and pay for them as required under article 495.

A bench trial was conducted on April 3, 2003 before Judge Patricia Cole. Smith presented as evidence his unsubstantiated list of improvements, previously rejected by the state, the vague testimony of a carpenter, Jimmy Savoy, who had done some work "two or three times" over the eighteen year life of the lease, and the testimony of a realtor as to the current value of the improvements, which was based on Smith's unsubstantiated list, a 1996 verbal appraisal and a state appraisal review sheet. The court admitted the two state appraisal review sheets as to which the preparers did not testify, over defendant's objections. I R. 202, 204. The court sustained defendant's hearsay objection to Smith's testimony attempting to establish that the 1996 verbal appraisal did not include the improvements. I R. 139-140.

In oral reasons for judgment after trial (Exhibit C hereto), the trial court determined that the doctrine of unjust enrichment was not applicable to this case, and that LSA-C.C. art. 495 was the applicable law. II R. 258. The court stated, "Unkel took an air conditioner. This act along with the sale constitutes an election to keep the improvements." II R. 257. The court then noted that reimbursement under 495 is only available for component parts, as defined by LSA-C.C. art. 465. II R. 257. The items the court deemed component parts included crown molding, plywood, carpet, window air conditioning units, peg board, one workbench, one guitar rack display, one rack for guitar cases, the outside flashing and the floor decking in the studio, which totaled $11,232.50. II R. 257. The court held that Smith could have removed the other items, which were not component parts. II R. 258. Then she added in the full amount plaintiff claimed for labor of $48,000.00. This totaled $59,052.50. II R. 258. Using "the 35 year depreciation rule" of Smith's realtor, David Reinauer, the court calculated the value of the improvements and labor at $38,384.12. II R. 258.

The court found that this amount was equivalent to the enhanced value of the property, by comparing an informal verbal appraisal by real estate agent Ms. Ritter of $24-26,000 in 1996 or 1997, with a state appraisal summary in 1998, the next year, of $65,669.00. II R. 258. Accordingly, the court found for Mr. Smith in the amount of $38,384.12, plus interest, costs and $400.00 for expert fees. II R. 258. Unkel timely appealed, and filed an Exception of Res Judicata in the court of appeal.

In its opinion of March 31, 2004, the court of appeal, per Judge Planchard, Pro Tempore, affirmed the Judgment of the trial court on the basis of the manifest error rule and dismissed defendant's exception of res judicata. Defendant filed an Application for Rehearing, which was denied on May 26, 2004.

The court of appeal's decision presents the following errors of law meriting a writ:

ASSIGNMENT OF ERRORS

I. THE COURT OF APPEAL FAILED TO UPHOLD ITS CONSTITUTIONAL DUTY TO REVIEW THE LAW, FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW AND CITED OVERRULED AND INAPPLICABLE LAW, MERITING A WRIT.

II. THE COURT OF APPEAL'S DECISION DISMISSING DEFENDANT'S EXCEPTION OF RES JUDICATA AND REFUSING TO REMAND THE CASE FOR AN EVIDENTIARY HEARING IS CONTRARY TO LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

III. THE COURT OF APPEAL'S DECISION AFFIRMING THE TRIAL COURT'S IMPOSITION OF LIABILITY IS CONTRARY TO LAW, LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

A. THE LOWER COURTS' APPLICATION AND INTERPRETATION OF ARTICLE 495 IS CONTRARY TO THE EXPRESS TERMS OF ARTICLE 495, LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND THIS COURT.

B. ALTERNATIVELY, THE LOWER COURTS ERRED IN DETERMINING THAT THE ELEMENTS OF ARTICLE 495 WERE MET, PARTICULARLY CONSIDERING OPPOSING COUNSEL'S JUDICIAL ADMISSION THAT THEY WERE NOT MET.

C. THE LOWER COURTS ERRED IN FAILING TO HOLD THAT PLAINTIFF WAS ESTOPPED FROM RECOVERING UNDER ARTICLE 495 OR ANY OTHER THEORY.

D. THE LOWER COURTS ERRED IN FAILING TO NOTICE THAT NO LEGAL GROUNDS SUPPORT THE IMPOSITION OF LIABILITY AGAINST DEFENDANT AND THAT PLAINTIFF'S ONLY CAUSE OF ACTION WAS AGAINST THE STATE.

IV. THE COURT OF APPEAL'S DECISION AFFIRMING THE TRIAL COURT'S IMPOSITION OF DAMAGES IS CONTRARY TO LAW, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

A. THE LOWER COURTS ERRED AS A MATTER OF LAW IN BASING AN AWARD OF SPECIAL DAMAGES ON PLAINTIFF'S PERSONAL ESTIMATE OF EXPENSES OVER AN EIGHTEEN YEAR PERIOD THAT WAS NOT CORROBORATED BY ANY RECEIPTS, INVOICES OR CANCELLED CHECKS.

B. THE LOWER COURTS ERRED IN ADMITTING AND RELYING UPON INADMISSIBLE HEARSAY, INCLUDING STATE APPRAISAL SUMMARIES AS TO WHICH THE PREPARERS DID NOT TESTIFY AND A VERBAL APPRAISAL AND UNSUPPORTED ASSUMPTIONS AS TO ITS CONTENTS THAT THE TRIAL COURT ITSELF RULED WERE INADMISSIBLE HEARSAY.

C. THE LOWER COURTS ERRED IN RELYING UPON THE TESTIMONY OF PLAINTIFF'S REAL ESTATE EXPERT, WHICH WAS BASED SOLELY ON THE PLAINTIFF'S PERSONAL ESTIMATE AND INADMISSIBLE HEARSAY.

D. THE COURT OF APPEAL ERRED IN IMPOSING A DUTY UPON DEFENDANT TO DISPROVE DAMAGES NOT PROVEN BY PLAINTIFF AND TO CALL WITNESSES THAT PLAINTIFF SHOULD HAVE CALLED TO ESTABLISH DAMAGES, EFFECTIVELY SHIFTING PLAINTIFF'S BURDEN OF PROOF TO DEFENDANT.

ARGUMENT

I. THE COURT OF APPEAL FAILED TO UPHOLD ITS CONSTITUTIONAL DUTY TO REVIEW THE LAW, FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW AND CITED OVERRULED AND INAPPLICABLE LAW, MERITING A WRIT.

Applicant respectfully submits that the court of appeal's decision was fraught with serious judicial and legal errors that warrant this Court's attention, including failure to uphold the court's Constitutional duty to review the law applied by the trial court and the legal issues raised in appellant's briefs, application of the wrong standard of review and citation and quotation of overruled and inapplicable law.

Appellate courts have a "Constitutional duty" to review the law and the facts of the case. La. Const. art. 5, § 10(B); *Ambrose v. New Orleans Police Dept. Ambulance Service*, 93-3099 (La. 7/5/94); 639 So.2d 216, 221; *In re Succession of Buck*, 2002-0401 , 3-4 (La. App. 1 Cir. 2002); 834 So.2d 475, 477. Despite this duty, the court of appeal did not review the most important issue of law presented in this case, whether LSA-C.C. art 495, the sole provision of law under which defendant was found liable, is applicable. Defendant cited numerous decisions, including decisions from this Court, demonstrating that the trial court misinterpreted and misapplied article 495. Yet, the court of appeal failed to discuss or analyze the law. Rather, the court provided a lengthy quotation from the trial court's opinion on article 495 and then found only that "The trial court's **factual findings** are supported by the record." Opinion, p. 6 (emphasis added.) The applicability of article 495 is not an issue of fact, it is a very important issue of law, which the court had an obligation to address.[10]

Next, the court erred in applying the manifest error standard of review. Based upon the trial court's misapplication of the law and numerous evidentiary errors that impacted the fact-finding process, including the admission of and reliance upon hearsay, the court should have reviewed the entire case *de novo*. "[I]f a court of appeal finds that the trial court committed a reversible error of law or manifest error of fact, the court of appeal must ascertain the facts *de novo* from the record and render a judgment on the merits." *Bonnette v. Conoco, Inc.,* 2001-2767 (La. 2003); 837 So.2d 1219, 1227, *citing LeBlanc v. Stevenson,* 00-0157 (La. 10/17/00), 770 So.2d 766.

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[10] Additional issues of law which the court did not review and analyze include: 1) the necessity of remand under Louisiana's amended law of res judicata in cases where the evidence of record is deemed insufficient; 2) the applicability of the law of estoppel to bar plaintiff's claims; 3) whether a list from plaintiff's memory unsupported by receipts or cancelled checks was legally sufficient to support an award of special damages; 4) whether the court improperly relied upon inadmissible hearsay; and 5) whether a court may give any weight to expert testimony that is based solely on an unsupported list, unproven assumptions and testimony the court itself ruled was hearsay. These are issues of law not subject to the manifest error rule, which required legal analysis by the court.

In this case, the trial court erred as a matter of law in misapplying and misinterpreting LSA-C.C. article 495; in failing to apply LSA-C.C. art. 2697, LSA-Const. art. I, § 4 and LSA-R.S. 48:453, in failing to apply the law relating to estoppel to bar plaintiff's recovery; in basing an award of special damages on plaintiff's personal estimate without any supporting receipts or invoices; in justifying the award of damages based on inadmissible hearsay; in relying on expert testimony that was based on conjecture, speculation and inadmissible hearsay, and in failing to require plaintiff to meet his burden of proof of every fact and element essential to recovery. These legal errors warranted *de novo* review.[11]

Finally, in dismissing appellant's exception of res judicata, the court of appeal quoted law dating from the 1970's, long prior to the legislature's substantial amendment and revision of Louisiana's law of res judicata in 1990. In *McClendon v. State, Dept. of Transp. and Development,* 94-111, p.4 (La. 9/6/94); 642 So.2d 157, from which the court of appeal's quotation was taken, this Court applied pre-amendment law because the case was filed and the judgment had become final prior to the effective date of the 1990 amendments. *Id*. at 159. Five pages of Appellant's Brief in Support of Exception of Res Judicata detailed the substantial changes in the law and the currently applicable law of res judicata. Applicant pointed out this error out in its Application for Rehearing, to no avail.

Applicant respectfully submits that this case warranted more attention than it received from the court of appeal. This case may not have involved huge sums of money, but the results are still very important, not only to the defendant, but also to the law of res judicata, landlord-tenant law, expropriation law and the law of evidence. Applicant respectfully requests that this Court grant the writ, review this case and reverse the legally erroneous decision.

II. THE COURT OF APPEAL'S DECISION DISMISSING DEFENDANT'S EXCEPTION OF RES JUDICATA AND REFUSING TO REMAND FOR A HEARING IS CONTRARY TO LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

The court of appeal erred in dismissing defendant's Exception of Res Judicata and failing to remand for an evidentiary hearing. The court dismissed appellant's Exception on the grounds that "No proof of the ground of defendant's exception appears of record." Opinion, page 2. To the contrary, the Judgment in the first suit is contained in this Record at I R. 10; Trial Exhibit D-B.[12] Most importantly,

[11] Even assuming that the manifest error standard of review was applicable to certain factual findings of the trial court, defendant respectfully suggests that the court of appeal did not properly apply that standard. A reviewing court must do more than simply review the record for evidence which supports the trial court's findings. *Stobart v. State, Through DOTD,* 92-C-1328 (La. 4/12/1993); 617 So.2d 880, 882. (La. 1993). The reviewing court must review the record in its entirety to determine whether the trial court's findings were clearly wrong or manifestly erroneous. *Stobart,* at 882.

[12] Both the December 29, 1999 and September 30, 2002 Judgments in the first and second suits are contained in this Record. See, I R. 10; Trial Exhibits P-4, D-B. The Petitions and Affidavit in the first suit are contained in the official records of the 33rd Judicial District Court, and are matters of public record. Certified true copies of all documents referenced were attached to the Exception.

the court failed to remand the case to the trial court, which is required under Louisiana's amended law of res judicata and numerous decisions from this Court and the other circuits.

The legislature's 1990 amendments to the law of res judicata and related Code of Civil Procedure articles express a very strong policy prohibiting a litigant from filing multiple lawsuits involving the same transaction or occurrence. Under the 1990 amendments, the doctrine of res judicata "is not discretionary and mandates the effect to be given to final judgments." *Owens v. Book,* 2002-90, pp. 3-4 (La. App. 3 Cir. 6/5/02) 819 So.2d 484, 487; citing *Avenue Plaza, L.L.C. v. Falgoust,* 96-0173, p. 7 (La. 7/2/96), 676 So.2d 1077, 1080. "Once a final judgment acquires the authority of the thing adjudged, no court has jurisdiction to change the judgment…" *Avenue Plaza, supra*, 676 So.2d at 1079.[13] Therefore, when the issue is timely raised, as it was in this case, the courts should address it, remanding if necessary to permit introduction of evidence.

Contrary to the court of appeal's decision, this Court, as well as other circuits, have held that the proper course when there is insufficient evidence in the Record on an exception of res judicata filed on appeal is to **remand** the case to the trial court. In *Lewis v. Lewis*, 155 La. 231, 99 So. 202 (1923),[14] this Court recognized that the plea of res judicata could be first filed in the supreme court, and remanded a motion to dismiss based on res judicata to allow the moving party to prove the finality of the underlying judgment and to allow the respondent an opportunity to contradict the facts alleged in the motion to dismiss. *See also*, *State ex rel. Continental Supply Co. v. Fontenot,* 152 La. 912, 923, 94 So. 441, 445 (La. 1922), wherein this Court remanded a case to the lower court "for the purpose of permitting the introduction of the evidence in support of the pleas of estoppel and res judicata…" *Id.*

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cagle*, 94-322 p. 14 (La. App. 3 Cir. 1994); 649 So.2d 642, 651, *writs denied,* 94-2932, 94-3002 (La. 3/17/95); 651 So.2d 266, wherein neither the Judgment nor the Record in the first suit were before the court, the court stated, in response to the argument by the plaintiff that the Exception of Res Judicata should be denied for lack of evidence:

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[13] The mandatory nature of res judicata is further demonstrated by the legislature's concurrent 1990 amendment to LSA-C.C.P. art. 531, which now provides that when there are two or more suits between the same parties involving the same transaction or occurrence, the first final judgment rendered "**shall be**" conclusive of all. LSA-C.C.P. art. 531 (emphasis added.) The legislature further amended LSA-C.C.P. art. 425(A) to provide: "A party **shall** assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." *Id*., (emphasis added.) According to the 1990 comments to art. 425, "[t]his amendment expands the scope of this Article to reflect the changes made in the defense of res judicata and puts the parties on notice that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation **must be** raised" in one suit. *Id*. (Emphasis added.)

[14] *Lewis* applied article 902 of the former Code of Practice, the source provision for current article 2163 of the Code of Civil Procedure. The comments to article 2163 state that this article does not change the law and simply restates the jurisprudence interpreting its source provision.

> National Union requests that we simply decline to consider the exception for lack of evidence, relying on a strict reading of La. C.C.P. Art. 2163. Instead, we will follow the procedure adopted by the Second Circuit in *Stansell v. Stansell,* 622 So.2d 1203 (La. App. 2d Cir. 1993), and instruct the trial court to consider the merits of the exception upon remand of this case.

Cagle, 94-322 p. 14; 649 So.2d at 651. See also, *Friday v. Prudential Ins. Co. of America*, 389 So.2d 780, 781 (La. App. 3d Cir. 1980), in which the court granted a motion to remand a case to the trial court for the purpose of receiving evidence on res judicata pursuant to its authority under LSA-C.C.P. art. 2164, which states: "The appellate court shall render any judgment which is just, legal and proper upon the record on appeal ...." *Id*.

Decisions from other circuits, including *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 2001-0993, (La. App. 1 Cir. 7/3/02); 867 So.2d 709; *Stansell v. Stansell,* 622 So.2d 1203 (La. App. 2d Cir. 1993) and *Braud v. Braud*, 369 So.2d 1167, 1168-1169 (La. App. 1st Cir. 1979) also hold that when the evidence of record on res judicata is insufficient on appeal, the proper procedure is to remand the case to the trial court for an evidentiary hearing.

In sum, the court of appeal's decision dismissing defendant's exception of res judicata was contrary to the 1990 amendments to the res judicata statute and legislative intent, and conflicts with decisions from this Court and other circuits that are directly on point. Accordingly, defendant respectfully urges this Court to grant the writ and reverse the dismissal of defendant's exception.

III. THE COURT OF APPEAL'S DECISION AFFIRMING THE TRIAL COURT'S IMPOSITION OF LIABILITY IS CONTRARY TO LAW, LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

The court of appeal erred in upholding the trial court's decision that Mr. Unkel was liable under LSA-C.C. art. 495. As discussed in the following sections, the trial court erred as a matter of law in applying article 495, interpreting article 495 and finding liability under article 495. The courts further erred in failing to hold that Smith was barred by estoppel from recovering damages. Finally, the courts erred in failing to notice that no legal grounds support the imposition of liability in this case, and that Smith's only cause of action was against the state.

A. THE LOWER COURTS' APPLICATION AND INTERPRETATION OF ARTICLE 495 IS CONTRARY TO THE EXPRESS TERMS OF ARTICLE 495, LEGISLATIVE INTENT, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

1. The courts erred in applying article 495 to this case.

Article 495, by its express terms, applies only "in the absence of other provisions of law or juridical acts." *Id*. Other provisions of law are applicable to this case, specifically, LSA-C.C. art. 2697,

which bars a lessee's right to damages against a lessor in case of expropriation, and Constitutional and statutory provisions that **require** an expropriator to pay compensation to a lessee for the value of his improvements, including LSA-Const. art. 1, § 4 and LSA-R.S. 48:453. Further, article 495 does not apply in situations where the rights between the parties are regulated by express or implied agreements. *Wilson Oil Co., Inc. v. Central Oil & Supply Corp.*, 557 So.2d 753, 756 -757 (La. App. 2 Cir. 1990), *writ denied,* 563 So.2d 885 (La. 1990), citing Symeonides, *Developments in the Law, 1985-1986--Property*, 47 La. L. Rev. 429, 447 (1986). In this case, the parties had a lease, as well as a mutual understanding for reduced rent in exchange for improvements. Finally, article 495 applies to the "owner" of the immovable, and the state, not Unkel, was the owner of the immovable at the time suit was filed. Accordingly, the lower courts erred in applying article 495, meriting a writ.

2. The courts erroneously interpreted article 495.

The trial court erroneously interpreted article 495 as providing a lessee with the right to demand compensation from the owner of the property for improvements incorporated into the property by the lessee, after the lessee made no attempt to remove them and in fact abandoned his property. Article 495 provides only that the person who incorporates the improvements may remove them subject to the obligation of restoring the property. Louisiana cases also establish that a lessee who makes improvements to leased property has the right to remove them, but does not have a right to demand compensation. *Riggs v. Lawton,* 93 So.2d 543, 545, 231 La. 1019, 1024-1025 (1957); *Pylate v. Inabnet,* 458 So.2d 1378, 1390-1391 (La. App. 2d Cir. 1984).

As this Court stated in *Riggs*, *supra*, a lessee cannot force a lessor to compensate the lessee for improvements left on the property where there is no attempt to remove such improvements. A lessee has the right to remove the improvements that he has made to the thing let provided he leaves it in the state in which he received it. "**However, the lessee cannot force the lessor to compensate him for the improvements which he leaves on the property**." *Riggs*, *supra*, 231 La. at 1024 (emphasis added) *citing Pecoul v. Auge,* 18 La. Ann. 614 (La. 1866); *Dreyfuss v. Process Oil & Fuel Co.,* 142 La. 564, 77 So. 283, 285 (1917). Accord, *Taylor Lumber Co., Inc. v. Fuller,* 292 So.2d 878, 883 (La. App. 1st Cir.), *writ denied,* 294 So.2d 839 (La. 1974).

The fact that property abandoned by a lessee remains on the premises and is used by the lessor does not constitute an election of the part of the lessor to retain and pay for the improvements. *Riggs v. Lawton, supra*, 93 So.2d 543, 545; *Pylate v. Inabnet, supra*, 458 So.2d at 1390-1391; *Taylor Lumber Co., Inc. v. Fuller, supra,* 292 So.2d at 883. As set forth in 2 La. Prac. Real Est. § 18:51 (2000):

The lessor's mere use of improvements after the lessee has abandoned them upon the

> termination of the lease does not constitute an election by the lessor to retain and pay for the improvements within the contemplation of La Civ Code Ann art 495. *Walters v. Greer,* 726 So. 2d 1094 (La. Ct. App. 2d Cir. 1999); *Pylate v. Inabnet,* 458 So. 2d 1378 (La. Ct. App. 2d Cir. 1984). See also *Riggs v. Lawton,* 231 La. 1019, 93 So. 2d 543 (1957) (**a lessee cannot force a lessor to compensate the lessee for improvements when there is no attempt by the lessee to remove the improvements**). *Id.*, (emphasis added.)

Article 495 was intended to protect a lessee who wishes to remove his improvements, not to force a lessor to pay for improvements the lessee abandons and does not wish to keep. Smith **admitted** that he abandoned his alleged improvements and did not wish to remove them. The court's decision to permit a lessee to use article 495 as a sword rather than a shield is contrary to the terms of the article and Louisiana jurisprudence, and will seriously impact landlord-tenant law, meriting a writ.

B. ALTERNATIVELY, THE LOWER COURTS ERRED IN DETERMINING THAT THE ELEMENTS OF ARTICLE 495 WERE MET, PARTICULARLY CONSIDERING OPPOSING COUNSEL'S JUDICIAL ADMISSION THAT THEY WERE NOT MET.

The trial court clearly erred in determining that the elements of article 495 were met. Even counsel for Smith judicially admitted at trial that the elements of article 495 were not met. II R. 250-2. "As to the law on this issue, I think that perhaps both parties have gotten – gone a little too far in trying to force this case into article 495." II R. 252. "**There was clearly no election on behalf of Mr. Unkel as required by 495. There was no effort [by Smith] to remove improvements under 495**." II R. 251. (emphasis added.) Counsel urged that the case should be decided based on unjust enrichment. *Id.*

Article 495 requires that there be an "election" on the part of the lessor to retain and pay for the improvements. Despite both sides' contentions and admissions that Unkel made no election to retain and pay for the improvements, the trial court found that Unkel made such an election, by removal of one air conditioning unit and the sale to the state. II R. 257. Unkel's decision to take one air conditioning unit from a building he no longer owned with the consent of the owner cannot possibly be construed as an election to keep all of Smith's alleged improvements. Smith apprised Unkel and his wife that he had taken everything he wanted from the building, and Unkel rightfully assumed that Smith had abandoned the air conditioner. At best, Unkel's decision to take one air conditioner could be construed as an election to keep one air conditioner.

Nor did the sale of the building to the state constitute an election. Unkel was forced to sell the property to the state, which would have expropriated had he not agreed to sell. The price the state was to pay for the building was fixed in February of 1999 long before Smith vacated the premises, the building was set to be demolished, and it did not matter to either Unkel or the state whether Smith removed improvements or even tore the building down himself. Smith did not want them, they were worthless to him for his new store. Unkel did not remove them, want them, need them, or use them.[15]

[15] Nor did Unkel sell Smith's improvements to the state, because Unkel owned the improvements pursuant to the

The jurisprudence is clear- The mere fact that property abandoned by a lessee remains on the premises does not constitute an election of the part of the landlord to retain and pay for the improvements. *Riggs v. Lawton, supra*, 93 So.2d 543, 545; *Pylate v. Inabnet, supra*, 458 So.2d at 1390-1391; *Taylor Lumber Co., Inc. v. Fuller, supra,* 292 So.2d at 883. The elements of article 495 were not met. No other legal theories support the decision, which must be reversed.

C. THE LOWER COURTS ERRED IN FAILING TO HOLD THAT PLAINTIFF WAS ESTOPPED FROM RECOVERING UNDER ARTICLE 495 OR ANY OTHER THEORY.

The court of appeal did not address defendant's argument that the trial court erred in failing to hold that Smith was estopped from recovering under article 495. Unkel set forth the facts supporting his claim of estoppel as an "affirmative defense" in Paragraph 10 of his Answer, I R. 15, and evidence on the issue was presented at trial. Therefore, the court should have considered the issue.

Smith should be deemed estopped from recovering the value of the improvements from Unkel under article 495 or any other legal theory. Equitable estoppel, or "estoppel in pais," is defined as the effect of the voluntary conduct of a party whereby he is barred from asserting rights against another party justifiably relying on such conduct and who has changed his position to his detriment as a result of such reliance. There are three elements of estoppel: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. *Elliott v. Catahoula Parish Police Jury,* 02-9 (La. App. 3 Cir. 5/8/02); 816 So.2d 996, 997.

Those three elements are met in this case. Smith had a month and a half after he vacated the building in mid-November of 1999 to remove anything he wished. Unkel permitted him to keep the key until January 1, 2000 because Smith requested additional time to remove his property. Smith represented to Unkel and his wife that he had removed everything that he wished to remove, and he abandoned any property remaining in the building. He further led Unkel to believe that he was negotiating with the state for compensation, up to and past the date of the sale- Smith convinced Unkel to sign a lease so that he would have a better chance of recovery from the state. Smith sued the state to recover the cost of the improvements prior to the date of the sale. Smith dismissed his claims against Unkel in the first suit with prejudice and no reservation of rights.

It was not until **after** the sale that Unkel became aware that Smith intended to seek compensation from him again. Had Unkel known that Smith intended to seek compensation from him prior to the sale,

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understanding of the parties for reduced rent in return for repairs and improvements. Even assuming, as Smith contended, that he was the owner of the improvements, Unkel could not sell the state what he did not own, and the state, by law and as the owner of the building containing Smith's improvements, was liable to compensate Smith.

he would have demanded that Smith remove the improvements and thereby protected his rights under article 495. After the sale was complete, that was no longer a possibility. Further, Unkel could have hired experts to disprove Smith's exaggerated claim for $63,464.25, but by that time, the interior of the building had been stripped or vandalized. Smith's attempt to ambush Unkel with a new claim for the value of the improvements after Unkel no longer could protect himself is barred by estoppel. His actions are manifestly inequitable and should not be countenanced by the courts.

D. THE LOWER COURTS ERRED IN FAILING TO HOLD THAT NO LEGAL GROUNDS SUPPORT THE IMPOSITION OF LIABILITY AND THAT PLAINTIFF'S ONLY CAUSE OF ACTION WAS AGAINST THE STATE.

The lower courts erred as a matter of law in failing to notice that no legal grounds support the imposition of liability against Unkel in this case. Smith had no valid cause of action, right of action or remedy against Unkel on any legal grounds. The only grounds for recovery asserted by Smith in his Petition were article 495, article 496 and the doctrine of unjust enrichment under LSA-C.C. art. 2298. The trial court was correct in determining that Smith had no claim under article 496 or unjust enrichment. Nor did Smith have a valid claim under article 495. Smith's only cause of action and remedy for recovery of the value of the improvements was against the state, not Unkel.

A lessee has no claim against a lessor for damages when the lessor's property has been expropriated. LSA-C.C. art. 2697. Further, it is well settled under the Constitution, laws and jurisprudence of this state, that an expropriator is **required** to pay a lessee for the value of improvements he has placed upon leased property. LSA-Const. 1974, art. I, § 4; LSA-R.S. 48:453; *State, Dept. of Transp. and Development v. Manuel,* 451 So.2d 659, 662 -663 (La. App. 3d Cir. 1984). Assuming that Smith, as he claimed, owned the improvements, Unkel could not sell the State property that he did not own. LSA-C.C. art. 2452 ("The sale of a thing belonging to another does not convey ownership.") As the new owner of property containing Smith's alleged improvements, the State, not Unkel was liable under the terms of article 495. Finally, even if the State erroneously paid Unkel for Smith's improvements, any compensation due to Smith was still owed by the State, not Unkel. *State Through Dept. of Transp. and Development v. Wahlder* , 94-761, p. 6 (La. App. 3 Cir. 1994); 647 So.2d 481, 486. The decision was contrary to law and adversely affects landlord-tenant and expropriation law and practice, meriting a writ.

IV. THE COURT OF APPEAL'S DECISION AFFIRMING THE TRIAL COURT'S IMPOSITION AND AWARD OF DAMAGES IS CONTRARY TO LAW, DECISIONS OF THE OTHER CIRCUITS AND DECISIONS OF THIS COURT, MERITING A WRIT.

A. THE LOWER COURTS ERRED IN BASING AN AWARD OF SPECIAL DAMAGES ON PLAINTIFF'S PERSONAL ESTIMATE OF EXPENSES THAT WAS NOT CORROBORATED BY RECEIPTS OR CANCELLED CHECKS.

Plaintiff completely failed to meet his burden to prove damages. Smith did not submit any evidence to prove, as he claimed, that he was the owner of the improvements.[16] Most importantly, Smith did not introduce a single receipt, invoice or cancelled check for materials or labor to support his claim for $63,464.25 in improvements. This amount was only $4,260.75 less than the State paid Unkel for the entire building. The pictures in evidence show that Smith's alleged $63,464.25 renovation included inexpensive plywood paneling and molding, inexpensive carpeting, window air conditioning units, and peg board. The amount of Smith's claim was not supported by competent evidence.

Smith admitted that his main evidence was a list "based upon his memory and also his visual observation of the improvements he had undertaken." Plaintiff's Original Brief, p. 10. The testimony of carpenter Jimmy Savoy **did not** corroborate **any** of the specific items on Smith's list. Savoy testified that he had done work on the building only "two or three times" over the course of 18 years. I R. 182. Savoy provided no specific testimony about the scope, extent or cost of work he had actually done. He testified briefly, without specifying any amount, that Smith "improved the building and increased its value." This testimony did not support Smith's claim for $63,464.25 in improvements and labor, or any specific increase in value of the building. David Reinauer, the real estate agent who calculated the value of the alleged improvements, also relied upon Smith's list, without any independent appraisal, verification of receipts, or even a visit to the building. I R. 189, 194.

As a matter of law, as expressed in numerous decisions of the circuit courts, Smith did not meet his burden to prove damages with "legal certainty." Conjecture and speculation are not legally sufficient to support a judgment for damages. *State, DOTD v. Jacob,* 491 So.2d 138 (La. App. 3d Cir.) *writ denied,* 496 So.2d 331 (La. 1986). A plaintiff's burden to prove with legal certainty every item of damages claimed "must be borne by competent evidence showing the extent of the damage and **plaintiff's own uncorroborated personal estimate of the value of the loss is insufficient."** *Smith v. White*, 411 So.2d 731, 735-736 (La. App. 3d Cir. 1982), *writ denied,* 413 So.2d 508 (La. 1982) (emphasis added).

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[16] The only evidence of record shows that Unkel was entitled to the value of the improvements based upon the agreement that Smith was to maintain the interior of the building and the mutual understanding of reduced rent in return for improvements. Considering the terms of the lease, uncontroverted testimony by Unkel and the undisputed fact that Smith was paying less than one-third of a reasonable rental, the trial court's assumption that Smith owned the improvements was without any evidentiary basis in this Record.

Numerous circuit court decisions have held that a plaintiff's own summary of his expenses that is uncorroborated by receipts or canceled checks is not sufficient to support an award of special damages. See, e.g., *Ganheart v. Executive House Apartments,* 1995-1278 (La. App. 4 Cir. 2/15/96); 671 So.2d 525, *rehearing denied, writ denied* 1996-1337 (La. 9/3/96); 678 So.2d 554; *Tudor Chateau Creole Apartments Partnership v. D.A. Exterminating Co., Inc.,* 96 0951 (La. App. 1 Cir. 2/14/97); 691 So.2d 1259, 1264; *Andrus v. Andrus*, 93-856 (La. App. 3 Cir. 3/2/94); 634 So.2d 1254, 1259; *Hargroder v. Protective Life Ins. Co.,* 556 So.2d 991, 997 (La. App. 3d Cir. 1990), *writ denied,* 559 So.2d 1367 (La. 1990). An estimate unsupported by receipts is insufficient to meet the plaintiff's burden, whether or not the defendant puts on opposing evidence. *Andrus, supra,* 634 So.2d at 1259.

The court of appeal clearly erred in affirming a judgment for damages based on Smith's estimate from memory over the course of eighteen years without any receipts, cancelled checks or any other corroborating testimony as to the value of the improvements. The decision adversely impacts the law of evidence and proof of damages, meriting a writ.

B. THE LOWER COURTS ERRED IN ADMITTING AND RELYING UPON INADMISSIBLE HEARSAY, INCLUDING STATE APPRAISAL SUMMARIES AS TO WHICH THE PREPARERS DID NOT TESTIFY AND A VERBAL APPRAISAL AND UNSUPPORTED ASSUMPTIONS AS TO ITS CONTENTS THAT THE TRIAL COURT ITSELF RULED WERE HEARSAY.

Over defendant's objections, the trial court admitted two appraisal review sheets prepared by state appraisers who did not testify. I R. 202, 204, Exhibits P-11, P-12 The trial court relied upon the second appraisal review sheet, as well as unproven assumptions regarding an informal verbal appraisal (the "Ritter Appraisal") that the trial court itself previously ruled were hearsay (I R. 139-140) as proof of an increase in value of the property due to the improvements.

Smith argued (and the trial court assumed) that the verbal "Ritter Appraisal" did not include the improvements, thereby explaining the difference in Ms. Ritter's estimate of $24-26,000 in 1996-7 and the state's revised appraisal of $67,725.00 in 1998. However, there is not a shred of evidence in this Record that the "Ritter Appraisal" did not include the improvements. Plaintiff did not call Ritter to testify. Testimony on the issue of whether Ritter did or did not include the improvements was properly precluded when the trial court sustained counsel for defendant's hearsay objection. I R. 139-140. Plaintiff did not call **any** appraiser to explain the reasons for the widely disparate appraisals, including **two** by the state's appraisers, one for $34,560.00 and one for $67,725.00. Unkel testified that the building increased in value due to the Casino traffic. II R. 244.

Thus, the fact that there was testimony as to the **amount** of the verbal Ritter appraisal did not support a leap to the conclusion that Ritter did not include the value of the improvements. The court of

appeal stated that **defendant** should have called Ms. Ritter as a witness. It was not defendant's burden to call witnesses that plaintiff needed to call to prove his case. It was plaintiff's burden to prove his damages, and he did not do so.

C. THE LOWER COURTS ERRED IN RELYING UPON THE TESTIMONY OF PLAINTIFF'S REAL ESTATE EXPERT, WHICH WAS BASED SOLELY ON THE PLAINTIFF'S PERSONAL ESTIMATE AND INADMISSIBLE HEARSAY.

The court of appeal further held that the trial court did not err in relying upon the expert testimony of real estate agent David Reinauer. Reinauer did not visit the property or even attempt to conduct an appraisal. Reinauer's testimony was based solely on Smith's uncorroborated list and hearsay regarding the "Ritter Appraisal" and the state's appraisal review sheets. I R. 189. Accordingly, Reinauer had no valid basis for his opinion, which was based on conjecture and hearsay.

The court concluded that "we cannot say that the trial court was clearly wrong in giving weight to the expert testimony." Opinion at p. 8. Manifest error deference is not due when the trial court credits the opinion of an expert where the underlying facts are patently unsound. *Bonnette v. Conoco, Inc.,* 837 So.2d 1219 (La. 2003). As the court stated in *Mathews v. Dousay*, 689 So.2d 503, 510 (La. App. 3 Cir. 1997): "the value of the expert's opinion depends on the existence of the facts on which the opinion is predicated." *Id, citing Gardiner v. Commercial Union Ins. Cos.,* 488 So.2d 1331 (La. App. 3 Cir. 1986). "In order for an expert opinion to be valid and merit much weight, the facts upon which the opinion is based must be substantiated by the record." *Id.* Where the opinion of an expert is based on inaccurate facts, it has no probative value and should be ignored. *Molony v. USAA Property and Cas. Ins. Co.,* 1997-1836 (La. App. 4 Cir. 3/4/98); 708 So.2d 1220.

Recently, in *Cheairs v. State ex rel. Department of Transp. and Development,* 2003-0680 (La. 12/3/2003), 861 So.2d 536, 542, this Court held that "the admission of expert testimony is proper only if all three of the following things are true: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* 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." *Id.* at 542 (Emphasis added.) Reinauer's unsupported factual assumptions as well as his reliance on hearsay rendered his methodology and his opinion completely unreliable. The lower courts' reliance on his testimony was an error of law meriting a writ.

D. THE COURT OF APPEAL ERRED IN IMPOSING A DUTY UPON DEFENDANT TO DISPROVE DAMAGES NOT PROVEN BY PLAINTIFF AND TO CALL WITNESSES THAT THE PLAINTIFF SHOULD HAVE CALLED, EFFECTIVELY SHIFTING PLAINTIFF'S BURDEN OF PROOF TO DEFENDANT.

The court of appeal affirmed the trial court's award of damages primarily on the grounds that **defendant** did not controvert plaintiff's evidence by calling contractors or real estate agents as witnesses. The court overlooked the fact that this would have been impossible. After the sale to the State, and before Smith even sent a demand letter to Unkel, someone stripped or vandalized the interior of the building of the alleged improvements. The building was then demolished by the state. How, then, was Unkel able to retain contractors or real estate experts to opine as to the value of improvements to a building that had been stripped and demolished?[17]

Smith did not meet his burden to prove his special damages with "legal certainty." He presented only a grossly inflated list from memory over eighteen years, without introducing a single receipt, invoice or cancelled check. The vague testimony of Jimmy Savoy did not corroborate a single specific item on Smith's list. The testimony of David Reinauer was based on the unsupported list and inadmissible hearsay. Defendant was not able to obtain experts to opine on the value of improvements to a building which was stripped and demolished. Moreover, it was not defendant's burden to disprove damages or to call witnesses that plaintiff needed to call to establish his damages. The court clearly erred in shifting the burden to defendant to disprove damages, meriting a writ.

CONCLUSION AND PRAYER

The trial court erred as a matter of law in imposing liability and awarding damages against Mr. Unkel. The court of appeal erred in affirming the decision and in dismissing defendant's exception of res judicata. The decision in this case is manifestly unjust and legally erroneous, and adversely impacts the law of res judicata, landlord-tenant law, expropriation law and the law of evidence. Accordingly, defendant-appellant, Mike Unkel, respectfully urges this Court to grant the writ, and after due proceedings had, reverse the decision and dismiss this suit with prejudice, at plaintiff's costs. Alternatively, defendant requests that this Court remand defendant's exception of res judicata to the trial court for submission of evidence and trial.

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[17] This is yet another reason why the courts should have upheld Unkel's claim that Smith was estopped from recovering damages. Smith repeatedly represented to Unkel by his words and actions that he had removed everything he wanted from the building and that he was pursuing the state, and not Unkel, for compensation. Smith did not make demand on Unkel until after the sale and after the building had been stripped, and Unkel was unable to retain experts or otherwise protect his rights. Smith's actions were manifestly inequitable and should not be permitted by the courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a legible copy of the foregoing Application for Writs has been served upon all parties by mailing copies of same by first class United States Mail, postage prepaid and properly addressed to:

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On this, the _____ day of _____, 2004.

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