NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1468

KENNETH LEVATINO

VERSUS

MICHELLE LEVATINO

Judgment Rendered: MAY - 8 2009

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On Appeal from The Family Court
In and For the Parish of East Baton Rouge
Trial Court No. 157,850, Division "D"

Honorable Annette Lasalle, Judge Presiding

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Defendant/Appellee
Michelle Levatino

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

In this appeal, a husband contests a family court injunction prohibiting harassing, stalking, surveilling, or monitoring of his former wife. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Kenneth and Michelle Levatino[1] were married in March 1992. They had two children: a son, Nathan, born in 2000; and a daughter, Leanna, born in 2002. Mr. Levatino is a long-time employee of the Baton Rouge Fire Department. Ms. Levatino is employed by SRA International, Inc. as an information technology project manager, working from home with occasional out-of-state travel.

Mr. Levatino filed a petition for divorce on March 29, 2006. Each party sought custody of the children, child support, and exclusive use of the former matrimonial domicile; alternatively, Ms. Levatino asked that a fair market rental value for the home be fixed. Ms. Levatino also sought and was granted a temporary restraining order against Mr. Levatino, restraining, enjoining, and prohibiting him, his agents or assigns from any form of harassment of Ms. Levatino at her residence or "anywhere she may be located."

On May 2, 2006, the parties agreed to a stipulated judgment, reduced to writing and signed by the trial court on June 12, 2006, which awarded joint custody of the children to the parents and alternated physical custody of the children on a week-to-week basis. The stipulated judgment also provided that the children's nanny was to be allowed to resume the

[1] The caption and the body of the original petition incorrectly identified the parties' last name as "Levantino." The record clearly establishes that the proper spelling is "Levatino." We further note that Michelle's legal name is "Joannie Michelle Levatino."

children's home school curriculum on May 3, 2006 and continue it until May 25, 2006. The parties were further ordered to "maintain the status quo regarding the community obligations of the parties as per their budget of August 2005" with the parties to continue to pay the monthly obligations they had each paid since August 2005. Mr. Levatino was granted the exclusive use and occupancy of the former matrimonial domicile pending trial. Each party was enjoined from alienating, disposing, or encumbering any asset of the community during the pendency of the proceedings.

Subsequently, Mr. Levatino filed a rule for contempt alleging that Ms. Levatino had violated the stipulated judgment by refusing to pay the mortgage note on the former matrimonial domicile, and by interfering with the children's home schooling and visitation plan. Ms. Levatino also filed a rule for contempt similarly asserting that Mr. Levatino had failed to pay certain community obligations and had failed to maintain the children's home school curriculum.

A trial was conducted on August 2, 4, and 28, 2006. The family court rendered judgment awarding the parties joint custody of the children, designating Ms. Levatino as the domiciliary parent, and granting visitation to Mr. Levatino. Each party's rule for contempt was dismissed. On August 31, 2006, the family court issued supplemental written reasons for judgment emphasizing that its judgment was predicated on Ms. Levatino's assurances that she intended to reside in Baton Rouge and that her work-related travel would be nominal. A final written judgment memorializing the family court's custody decision and dismissing the parties' respective rules for contempt was signed on November 30, 2006. In addition, the judgment ordered the parties to attend counseling with Dr. Alan Taylor, and submit a "child support calculation and a Custody Implementation Plan" within ten

days. Mr. Levatino devolutively appealed this judgment on March 2, 2007. The judgment was subsequently affirmed by this court in an unpublished decision. See **Levatino v. Levatino**, 2007-1238 (La. App. 1 Cir. 11/2/07) (unpublished), 966 So.2d 1247 (table).

Meanwhile, on February 13, 2007, Ms. Levatino filed a "Rule for Restraining Order and Injunction" against Mr. Levatino, alleging that he was engaging in demeaning, threatening, and physically and verbally abusive behavior toward her, as well as attempting to demean her reputation through statements to others, including the children and her co-workers.

On February 14, 2007 a judgment of divorce was signed.

Following a hearing on March 27, 2007, a permanent injunction was issued against Mr. Levatino enjoining and prohibiting him or anyone acting on his behalf from "harassing, stalking, surveilling, or any deliberate observation or monitoring of the activities of [Michelle Levatino] via telephone, at her place of employment, her home or at any location or going within 500 yards of [her] at any time or by any other means during the pendency of these proceedings or until further orders of the court except the prearranged exchange of the children." The judgment was signed June 18, 2007. Mr. Levatino filed a motion for devolutive appeal of this judgment on July 2, 2007. This is the judgment currently before this court in the instant appeal.

We further note that on June 25, 2007, the family court notified the parties of its decision fixing child support to be paid by Mr. Levatino to Ms. Levatino. The court's notice stated that the matter came before the court on August 3, 4, and 28, 2006, at which time the parties were ordered to submit a child support obligation worksheet within ten days, and that Ms. Levatino submitted a worksheet on May 30, 2007, while Mr. Levatino had not

submitted a worksheet. The family court determined that Mr. Levatino owed Ms. Levatino $751.53 per month in child support. Medical, dental, insurance coverage, and school tuition issues were also addressed in this judgment. These court rulings were included in a judgment signed by the family court on August 7, 2007. A separate written judgment was also issued by the court on August 7, 2007, fixing the fair market rental value of the former matrimonial domicile at $1,700.00 per month "as per the appraisal submitted at [the August 2006] trial." Devolutive appeals were taken by Mr. Levatino as to both of these judgments, which we address in decisions also rendered this date under numbers 2008CA1478 and 2008CW1469, respectively.

DISCUSSION

In this appeal, Mr. Levatino contends that the injunction issued against him should be declared null and void, urging the following assignments of error:

I. The trial court lacked subject matter jurisdiction to render the June 18, 2007 [j]udgment while it was divested of subject matter jurisdiction by [o]rder of [a]ppeal signed March 2, 2007.

II. The June 18, 2007 [j]udgment is null and void.

III. The June 18, 2007 [j]udgment granting the permanent injunction as to allegations[s] of harassment prior to the trial held August 2, 4 and 29, 2006 is [res judicata].

Mr. Levatino argues on appeal that when the judgment rendered by the family court on November 30, 2006 (following the August 2, 4, and 28, 2006 trial) was appealed on March 2, 2007, the family court was divested of jurisdiction pursuant to LSA-C.C.P. art. 2088, and therefore the family court did not have jurisdiction to render the June 2007 injunction. Mr. Levatino further contends that since the November 2006 judgment was "silent as to

the requested permanent injunction" that silence constituted a rejection of the claimed relief and the judgment could not be substantively "amended" by the June 2007 judgment; therefore he asserts that the 2007 judgment appealed is null and void. Mr. Levatino points out that Ms. Levatino did not appeal or file an answer to his March 2007 appeal of the November 2006 judgment; therefore, he contends, any claim Ms. Levatino had for a permanent injunction was barred by the doctrine of res judicata. Mr. Levatino reasons that all of the events complained of by Ms. Levatino arose prior to the August 2006 trial, so the doctrine of res judicata precludes any cause of action arising out of the transaction or occurrence previously litigated.

After a thorough consideration of these arguments, the record presented on appeal, and the legal principles implicated, we conclude that Mr. Levatino has presented no basis for relief in this appeal. Initially we note that the doctrine of res judicata is inapplicable under the circumstances of this case. The doctrine of res judicata is set forth in LSA-R.S. 13:4231, which provides:

> ***Except as otherwise provided by law***, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

(Emphasis added.)

Comment (c) to LSA-R.S. 13:4231 provides: "This makes it clear that the general principal of res judicata is subject to the exceptions set forth in R.S. 13:4232 and to any other exceptions that may be provided for in the substantive law as, for example, in cases of family matters." An exception for divorce actions and related matters is found in LSA-R.S. 13:4232(B), which provides:

> In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of res judicata ***only as to causes of action actually adjudicated***.

(Emphasis added.) The Comments to LSA-R.S. 13:4232 further state: "Subsection B is added to this Section to make it clear that failure to raise related causes of action in any of the specified actions will not result in the actions that were not urged being barred by the subsequent judgment, if that judgment is silent as to the actions in question."

Although a temporary injunction was issued by the family court in this matter prior to the August 2006 trial of other matters, the issue of a permanent injunction was not addressed during the August 2006 trial; therefore, the propriety of injunctive relief was not adjudicated in 2006. Thus, we find no merit in appellant's arguments based on the doctrine of res judicata. Accord **Stelly v. Stelly**, 2007-640 (La. App. 3 Cir. 11/7/07), 969 So.2d 1283; **Richardson v. Richardson**, 2002-2415 (La. App. 1 Cir. 7/9/03), 859 So.2d 81. See also **Patin v. Patin**, 2000-0969 (La. App. 1 Cir. 6/22/01), 808 So.2d 673.

Mr. Levatino further relies on LSA-C.C.P. art. 2088 in asserting that after the March 2007 appeal was taken from the November 2006 judgment,

the trial court was divested of jurisdiction over the injunction matter. Article 2088 provides:

> A. ***The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested***, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, ***the trial court has jurisdiction*** in the case only ***over those matters not reviewable under the appeal***, including the right to:
>
> (1) Allow the taking of a deposition, as provided in Article 1433;
>
> (2) Extend the return day of the appeal, as provided in Article 2125;
>
> (3) Make, or permit the making of, a written narrative of the facts of the case, as provided in Article 2131;
>
> (4) Correct any misstatement, irregularity, informality, or omission of the trial record, as provided in Article 2132;
>
> (5) Test the solvency of the surety on the appeal bond as of the date of its filing or subsequently, consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof, as provided in Articles 5123, 5124, and 5126;
>
> (6) Grant an appeal to another party;
>
> (7) Execute or give effect to the judgment when its execution or effect is not suspended by the appeal;
>
> (8) Enter orders permitting the deposit of sums of money within the meaning of Article 4658 of this Code;
>
> (9) Impose the penalties provided by Article 2126, or dismiss the appeal, when the appellant fails to timely pay the estimated costs or the difference between the estimated costs and the actual costs of the appeal; or
>
> (10) Set and tax costs and expert witness fees.
>
> B. In the case of a suspensive appeal, when the appeal bond is not timely filed and the suspensive appeal is thereby not perfected, the trial court maintains jurisdiction to convert the suspensive appeal to a devolutive appeal, except in an eviction case.

(Emphasis added.)

Under the plain language of LSA-C.C.P. art. 2088, a trial court's jurisdiction is divested on the taking of an appeal only as to "matters in the case reviewable under the appeal." After the taking of an appeal, LSA-C.C.P. art. 2088 clearly provides that a trial court has jurisdiction in the case "over those matters not reviewable under the appeal."

In the prior appeal of the instant case, the only matters reviewable were: the custody judgment designating the mother as the domiciliary parent of the minor children and awarding Mr. Levatino less than equal physical custody, and the provision of the judgment dismissing Mr. Levatino's rule for contempt. See **Levatino v. Levatino**, 2007-1238. Thus, the trial court was not divested of jurisdiction to hear Ms. Levatino's rule for a permanent injunction, which was not a matter reviewable under the prior appeal, as no judgment had been rendered by the family court thereon.[2]

We further reject the argument on appeal that because the November 2006 judgment did not grant injunctive relief, the subsequently rendered 2007 judgment issuing a permanent injunction against Mr. Levatino constituted an impermissible "amended" judgment prohibited by LSA-C.C.P. art. 1951.[3] Since our review of the record in this case revealed that the issue of injunctive relief was not litigated during the August 2006 hearing dates, the November 2006 judgment arising from those hearing dates did not address injunctive relief. The issue of injunctive relief was obviously set for a separate hearing from the issues heard in August 2006, and was not heard by the family court until March 27, 2007. Thus the judgment rendered by the court in conjunction with the March 2007 hearing, signed on June 18, 2007, was not an amendment of the prior 2006 judgment.

We find no merit in the assignments of error presented in this appeal.

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[2] Even though a temporary injunction was issued early in the litigation, LSA-C.C.P. art. 3612(A) provides that: "There shall be no appeal from an order relating to a temporary restraining order."

[3] Lousiana Code of Civil Procedure article 1951 provides:

> A final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on motion of any party:
>
> (1) To alter the phraseology of the judgment, but not the substance; or
>
> (2) To correct errors of calculation.

CONCLUSION

For the reasons assigned, the judgment of the family court is affirmed; all costs of this appeal are to be borne by the appellant, Kenneth Levatino.

AFFIRMED.