NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 1295

MIKE SPOHRER

VERSUS

JOHN COOPER FORE AND COLT FORE

Judgment Rendered: June 11, 2010

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Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 116082

The Honorable M. Zorraine Waguespack, Judge Presiding

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William S. Dykes **Montpelier, Louisiana**	**Counsel for Defendants/Appellants** **John Cooper Fore and Colt Fore**
Alexis A. St. Amant **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee** **Mike Spohrer**

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

Downing, J. concurs.

McClendon J. agrees in part and dissents in part and assigns reasons.

GAIDRY, J.

The lessee of immovable property and the owner of adjacent immovable property appeal a judgment granting injunctive relief to the lessor and defining the location of the leased property subject to the injunction. For the following reasons, we amend the trial court's judgment in part and affirm it as amended.

FACTUAL AND PROCEDURAL HISTORY

The plaintiff, Mike Spohrer, owned certain rural property along the Amite River in Livingston Parish. He entered into negotiations with John Cooper Fore regarding the sale of a portion of the property and the lease of a right of way upon which a boulevard and cul-de-sac near the river would be situated. On September 7, 2006, plaintiff leased the proposed right of way to John Cooper Fore for ten years, with an option to renew for another ten years. The right of way was described as being 65 feet in width, with the lessee being responsible for maintenance of an additional 25 foot area to the north of the right of way. On September 15, 2006, plaintiff sold the discussed portion of his immovable property to John Cooper Fore's son, Colt Fore.

On October 21, 2006, plaintiff sent a letter to defendants, advising them that their activities had encroached beyond the lease boundaries and that they performed certain work that had damaged plaintiff's property. The leased property was subsequently surveyed at plaintiff's request, and its boundaries were designated on the survey by location of existing (found) pipe markers and placement of additional (set) pipe markers. Disputes soon arose as to the location, extent, and manner of use of the leased property. On January 16, 2007, an attorney representing John Cooper Fore wrote to plaintiff, advising him that Mr. Fore disagreed with plaintiff's interpretation

of the boundaries and location of the leased property, and that it was Mr. Fore's position that an existing access road (Hancock Lane) was situated to the south of the leased property.[1]

On May 22, 2007, John Cooper Fore entered into a separate "Lease Agreement" with John Hancock, acting for himself and others, for "a non-exclusive right of passage over and across Hancock Lane to the east side of the Amite River."

On May 24, 2007, plaintiff instituted this action by filing a petition for injunction and damages, naming John Cooper Fore and Colt Fore as defendants. Plaintiff alleged that the descriptions of the property in the sale and the lease were supplied by defendants and were inaccurate, and prayed for declaratory judgment correcting those descriptions. Plaintiff also alleged that defendants were using the leased property for purposes other than those for which it was leased, and that they were also trespassing on adjoining property owned by plaintiff. Plaintiff sought a preliminary injunction to enjoin the Fores from using the leased property other than as a right of way, from using the additional maintained area for unauthorized purposes, and from trespassing on plaintiff's other property.

The hearing on plaintiff's request for the preliminary injunction was held on August 6, 2007. The trial court ruled in favor of plaintiff, and signed a judgment on September 19, 2007, preliminarily enjoining John Cooper Fore from building any buildings, planting any vegetation, and doing any electrical or plumbing work on the leased right of way. The preliminary injunction further prohibited John Cooper Fore "and anyone acting on his behalf" from parking on the additional maintained area.

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[1] The evidence showed that Hancock Lane is situated to the north of another portion of property immediately north of the property sold to Colt Fore, and that plaintiff claimed ownership of all property at issue north of the property sold to Colt Fore.

On November 7, 2007, defendants filed their answer to plaintiff's petition, incorporating a general denial of all allegations, a peremptory exception of no right of action, and a dilatory exception of improper cumulation of actions.[2]

Following a pretrial conference, the case was set for trial during the week of July 7, 2008. Trial took place on July 11, 2008, and at the conclusion of the trial, the trial court took the matter under advisement for decision.

On August 4, 2008, the trial court signed its judgment and also issued its written reasons for judgment. In the judgment, it declared that both the cash sale and the lease of the right of way were valid. It further ordered John Cooper Fore to "cease and desist any activity on Mr. Spohrer's land that violates the lease" and granted plaintiff a permanent injunction "enjoining [John Cooper Fore] from any activity that violates the lease."

Plaintiff filed a motion for new trial on August 13, 2008, noting that although the trial court correctly specified the dimensions of the leased right of way in its reasons for judgment, its judgment failed to grant the declaratory relief sought relating to the location of the right of way, based upon its description and the evidence presented. Plaintiff accordingly moved for a new trial "to clarify where the leased property begins and ends."

The trial court heard the motion for new trial on November 3, 2008, and after presentation of brief argument on the merits of the factual issue for which clarification was sought, ruled in favor of plaintiff. The trial court's amended judgment, granting a new trial and amending the original judgment, was signed on December 1, 2008. Defendants now appeal.

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[2] Although the peremptory exception of no right of action was originally set for hearing on January 7, 2008, the hearing was continued without date and never reset prior to the trial on the merits.

ASSIGNMENTS OF ERROR

Defendants contend that the trial court erred in the following respects:

1. The trial court erred by amending the substance of the judgment at the hearing on the motion for a new trial without setting a date for the new trial.

2. The trial court erred by amending the judgment to include property not proven to be owned by the lessor, Mr. Spohrer, when that property was already leased by lessee [John Cooper Fore] from a third party owner of a servitude.

DISCUSSION

Prematurity of Amended Judgment

Louisiana Code of Civil Procedure article 1971 authorizes the granting of a new trial "for reargument only." A motion for a new trial shall set forth the grounds upon which it is based. La. C.C.P. art. 1975. When a new trial is granted for reargument only, no evidence shall be adduced. La. C.C.P. art. 1978. Plaintiff's motion for new trial sought a new trial "to modify the judgment to clarify the court[']s ruling" and "to clarify where the leased property begins and ends." That issue was one of the major factual disputes between the parties. It is quite apparent from the motion and plaintiff's supporting memorandum that plaintiff sought a new trial for purposes of reargument only, based upon the evidence introduced at the original trial. Defendants did not submit an opposition memorandum prior to the hearing on the motion, nor during the time that the trial court had the matter under advisement.

At the hearing on the motion, plaintiff's counsel advised the trial court that he expected "about five minutes of arguments." Brief argument relating to the merits of the issue, rather than the procedural granting of a new trial, was then presented by counsel for both parties. The trial court then pronounced its decision on the merits and requested that plaintiff's counsel

prepare an amended judgment. At no time during the hearing did defendants' counsel object to the trial court's consideration of the merits or to its ruling on the grounds of prematurity and the right to a separate hearing, nor did he object on the grounds that he was not allowed to present additional evidence or attempt to make an offer of proof.

No additional hearing is required when the new trial is granted for reargument only, and when the new arguments on the merits have in fact been presented at the hearing on the motion for new trial. *See Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries*, 95-0484, p. 3 (La. App. 1st Cir. 11/16/95), 665 So.2d 523, 526, *writ denied*, 96-0415 (La. 3/29/96), 670 So.2d 1233, and *Eagle Pacific Ins. Co. v. Sunbelt Innovative Plastics, Inc.*, 05-270, p. 3 (La. App. 5th Cir. 11/29/05), 917 So.2d 1178, 1180. Under such circumstances, the trial court is only required to reconsider its previous judgment. *Heritage Worldwide,* 95-0484 at pp. 3-4, 665 So.2d at 526. Defendant has made no showing that he was deprived of any rights to present argument or evidence or that he was prejudiced by the trial court's hearing reargument before actually granting the motion for new trial; therefore, there is no reversible error. *See Russell v. McDonald's Corp.*, 576 So.2d 1213, 1217 (La. App. 5th Cir. 1991). To require the fixing of another hearing under such circumstances would be superfluous and would not promote judicial economy.

In light of the foregoing analysis, defendant's first assignment of error has no merit.

The Location and Ownership of the Leased Property and Access Road

The lease of the right of way was an act under private signature, and its language is somewhat inartfully drafted. The document reads, in pertinent part, as follows:

Lease Agreement for road and fence right of way

> This lease is made on this day the 7th day of September 2006 between Mike Sphorer [*sic*] . . .[,] here in after [*sic*] referred to as LESSOR[,] and John Fore . . . [,] here in after [*sic*] referred to as LESSEE. Right of way to begin 377 feet North of Section line 46 and Section 50 along power line road and corner at 1 ½ inch pipe; thence run 65 feet wide North 76' 10" W for 350 feet and cul-de-sac just before the river then run back 65 feet wide to the 1 ½" pipe on power line road.
>
> LESSOR agrees to lease a right of way for a road that will allow a boulevard and a fence to be built on the north side of this leased property. Not only will this lease be for the road and the fence but LESSEE will be in charge of the maintains [*sic*] of the road, the fence and 25 feet on the north side of the fence. This will include the grass cutting[,] the ornamental plants maintains[*sic*][,] and the over all [*sic*] maintains [*sic*] of the area, with in [*sic*] 25 feet of the right of ways [*sic*] north boundary.
>
> Lease terms [*sic*] is a 10 year [*sic*] with 10 year option[;] lease payment in the amount of $600.00 per year, due on Sept. 7 of each year.
>
> LESSE [*sic*] will build and install two steel gates on the boulevard where it intersects to [*sic*] power line road.
>
> This lease is agreed to by the LESSOR and the LESSEE.

The trial court found that the property intended to be leased for the right of way was bounded on the south by the property sold to Colt Fore, and included Hancock Lane, based primarily upon the 1 ½ inch iron pipe boundary marker, which the trial court expressly found to designate both the northeast corner of the property sold to Colt Fore and the southeast corner of the leased right of way. The trial court obviously found that the "1 ½" pipe on power line road [*sic*]" referred to in the lease of the right of way was the same existing "1 ½ I.P." shown on the professional survey as delineating the southeast corner of the leased right of way. That finding would place Hancock Lane within the geographic area of the lease.

The nature of the property interest of the lessors of the right of passage over Hancock Lane is not apparent from the record. Although the

parties seem to concede in their briefs that the lessors of the right of passage over Hampton Lane themselves possessed only a servitude of passage over that property, we agree with plaintiff that the nature of that property interest in Hampton Lane is ultimately irrelevant to our determination of the correctness of the trial court's amended judgment. As emphasized by plaintiff, La. C.C. art. 2674 provides that "[a] lease of a thing that does not belong to the lessor may nevertheless be binding on the parties." The record shows no pleading or evidence by John Cooper Fore of any disturbance in his exercise of his right of passage over Hampton Lane. A lessee may not refuse to pay rent or carry out his other obligations under the lease solely because of the lessor's claimed or real lack of ownership, as long as the lessor warrants and protects the lessee's possession of the leased property from disturbance. *See* La. C.C. art. 2674, Revision Comments – 2004, (c), and La. C.C. arts. 2682 and 2700.

The record on appeal contains no transcript of the trial proceedings upon which the original judgment was based. Louisiana Code of Civil Procedure article 2131 sets out the mandatory procedure to follow in the absence of a trial transcript:

> If the testimony of the witnesses has not been taken down in writing the appellant must request the other parties to join with him in a written and signed narrative of the facts, and in cases of disagreement as to this narrative or of refusal to join in it, at any time prior to the lodging of the record in the appellate court, the judge shall make a written narrative of the facts, which shall be conclusive.

Where there is no written transcript of testimony, the burden rests upon the appellant to comply with the provisions of La. C.C.P. art. 2131 and furnish, as part of the appellate record, either an agreed stipulation of fact or, in the absence of such agreement, a narrative of facts by the trial court. *Webre v. Heard*, 207 So.2d 880, 881-82 (La. App. 1st Cir. 1968). *See also*

DeLaneuville v. Duplessis, 385 So.2d 385, 386 (La. App. 1st Cir. 1980).

The obligation of strict compliance with the provisions of La. C.C.P. art. 2131 is imposed upon the appellant as part of his obligation to lodge a complete record with the appellate court. *Aube v. American Insurance Co.*, 254 So.2d 654, 658 (La. App. 4th Cir. 1971), *writ denied*, 260 La. 411, 256 So.2d 292 (La. 1972). Here, as was held in *Aube*, "[t]he failure of the appellant to perfect his record by furnishing a proper narrative of testimony leaves for this court's consideration only those facts contained in the trial judge's written reasons for judgment." *Id. See also Rosen v. Shingleur*, 47 So.2d 141, 144 (La. App. 1st Cir. 1950).

Factual determinations are subject to review for manifest error. *Ferrell v. Fireman's Fund Insurance Co.*, 94-1252, pp. 3-4 (La. 2/20/95), 650 So.2d 742, 745. The intent behind a contract is an issue of fact that is to be inferred from all of the surrounding circumstances, including the conduct of the parties before and after the formation of the contract. *Naquin v. La. Power & Light Co.*, 05-2103, p. 12 (La. App. 1st Cir. 9/15/06), 943 So.2d 1156, 1164, *writ denied*, 06-2476 (La. 12/15/06), 945 So.2d 691. Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed unless manifest error is shown. *Bonvillain Builders, LLC v. Gentile*, 08-1994, p. 5 (La. App. 1st Cir. 10/30/09), 29 So.3d 625, 629, *writ denied*, 10-0059 (La. 3/26/10), 29 So.3d 1264.

The trial court's factual findings related to the boundaries and location of the leased right of way are supported by the preponderance of the documentary evidence in the record, including the act of sale to Colt Fore, the lease of the right of way, the hand-drawn non-scale diagrams, and the professional survey. Additionally, it must be presumed that the trial court's judgment was further supported by competent testimony, in the absence of

the transcript of the witnesses' testimony at trial. Under these circumstances, we cannot conclude that the trial court's amended judgment was manifestly erroneous or clearly wrong. Defendants' second assignment of error has no merit.

Amendment of the Judgment's Injunctive Relief

Louisiana Code of Civil Procedure article 3605 requires that "[a]n order granting . . . a final injunction . . . *shall describe in reasonable detail, and not by mere reference to* the petition and *other documents*, the act or acts sought to be restrained." (Emphasis added.) *Fern Creek Owners' Ass'n, Inc. v. City of Mandeville*, 08-1694, p. 16 (La. App. 1st Cir. 6/30/09), 21 So.3d 369, 380. *See also Miller v. Knorr*, 553 So.2d 1043 (La. App. 4th Cir. 1989). The third and fourth decretal paragraphs of the original judgment, which merely enjoin "any activity that violates the lease," are impermissibly vague and overbroad based upon the foregoing standard, and should describe the enjoined activities with more detail, limited to those violations of the lease that were proven at trial.

Pursuant to the authority granted us under La. C.C.P. art. 2164 to "render any judgment which is just, legal, and proper upon the record on appeal," we will accordingly amend those paragraphs of the judgment to limit the permanent injunction to those violations described in the trial court's written reasons for judgment, to provide the detail required by La. C.C.P. art. 3605, in conformity with the intent and tenor of those reasons, the judgment, and the evidence. *See Fern Creek Owners' Ass'n*, 08-1694 at p. 16, 21 So.3d at 380.

DECREE

The trial court's judgment is amended in part with respect to the injunctive relief granted, as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED that a permanent injunction issue herein, and that the defendant, John Cooper Fore, is permanently enjoined from engaging in the following activity violating the terms of the Lease Agreement for Road and Fence Right of Way existing between the defendant and the plaintiff, Mike Spohrer, dated September 7, 2006: (1) parking cotton trailers or other vehicles on the leased right of way and additional maintenance area; (2) installing electrical outlets, lights, or plumbing on the leased right of way and additional maintenance area; and (3) constructing any sheds or other buildings on the leased right of way and additional maintenance area.

As amended, and in all other respects, the judgment of the trial court is affirmed. All costs of this appeal are assessed to the defendants-appellants, John Cooper Fore and Colt Fore.

AMENDED IN PART AND, AS AMENDED, AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1295

MIKE SPOHRER

VERSUS

JOHN COOPER FORE AND COLT FORE

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McCLENDON, J., agrees in part and dissents in part.

To the extent that the majority finds the ownership of the leased property irrelevant, I respectfully dissent. Justice requires a remand to determine the ownership of Hancock Lane, or at the very least, the rights available under the Hancock lease. Only then can it be determined whether the lessee's peaceful possession has been interrupted. In all other respects, I agree with the majority.