NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1012

VINCENT AND GAYLE DISTEFANO

VERSUS

BRUCE AND JILL WILKERSON

*Judgment Rendered:* JUN 19 2013

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 596176

The Honorable Wilson E. Fields, Judge Presiding

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BEFORE: GUIDRY, WELCH, HIGGINBOTHAM, CRAIN, AND THERIOT, JJ.

**THERIOT, J.**

This is an appeal of the Appellees' exception of prescription and dismissal of the Appellants' petition, with prejudice, by the Nineteenth Judicial District Court. For the following reasons, we affirm in part, reverse in part and remand.

## FACTS AND PROCEDURAL HISTORY

On July 7, 1994, Bruce and Jill Wilkerson, Defendants and Appellees in this matter, purchased lot 108 in the Walden subdivision of Baton Rouge. Lot 108 is the residence of the Wilkersons, and throughout their ownership, various shrubberies, fountains, and fences were planted and erected on the property. Most pertinent to this case are the bushes, fountains, and fence facing lot 107 but erected or planted within the confines of lot 108.[1]

On January 16, 2006, Vincent and Gayle Distefano, Plaintiffs and Appellants in this matter, purchased lot 107 of the Walden subdivision, which is adjacent to lot 108 owned by the Wilkersons. Lot 107 is the residence of the Distefanos, making the Distefanos and Wilkersons next-door neighbors.

It is undisputed by the parties that lots 107 and 108 are subject to the Declaration of Rights, Restrictions, Affirmative Obligations and Conditions for the Walden A Subdivision ("Walden Restrictions"). According to Rule 3.6(c) of the Walden Restrictions:

> The Architectural Control Committee may allow construction on within 2 feet of the side lines of any lot or lots (hereinafter called zero lot lines). Where a zero lot line is approved for a particular lot, there may be no zero lot line for the adjoining lot as to the same lot line and a 7 foot servitude is automatically reserved along the boundary line of the lot adjacent to and opposite the approved zero lot line for the construction, maintenance and repair of the wall and/or dwelling on the

[1] In their petition, the Distefanos claim that the permanent iron fence built by the Wilkersons encroaches onto the Distefanos' property, but at no time was evidence of this claim introduced to the trial court, nor has it been made part of the record in this appeal.

> adjoining lot. The use of this servitude by an adjoining lot owner shall not exceed a reasonable period of time during construction nor shall it exceed a period of thirty (30) days each year for essential maintenance. Any shrubbery or planting in the servitude area that is removed or damaged by the adjoining lot owner during the construction, maintenance, or repair of his wall and/or dwelling unit, shall be repaired or replaced at his expense.

The Distefanos claim that the right exterior wall of their residence was constructed with the Architectural Control Committee's approval within two feet of the property line adjacent to the Wilkerson property. This, by virtue of Rule 3.6(c), created a zero lot line on lot 107 and a seven-foot "servitude" for maintenance on the opposite side on lot 108, allowing the Distefanos maintenance of their property. At the time of this appeal, the Wilkersons' bushes, fountain, and fence already existed within this seven foot space which Rule 3.6(c) calls a servitude. The Distefanos allege that their ancestors in title utilized the maintenance area to clean the home's gutters, which run along the zero lot line bordering lot 108. Both the Distefanos and their ancestors in title would prop a ladder against the house to accomplish this task, and the ladder would extend into this maintenance area. Since purchasing their home, the Distefanos have utilized the maintenance area to perform other types of work on their home without disturbance from the Wilkersons.

The Distefanos complain that the Wilkersons have hindered the use of the maintenance area by planting shrubs and bushes, as well as by placing a fountain and latticework in the area. In Jill Wilkerson's deposition, she claimed that the latticework, fountain, and some landscaping were installed in the maintenance area in November of 2008. However, the Distefanos concede that these plants and structures have not made maintenance of their home impossible. Additionally, the Distefanos complain of the Wilkersons'

intent to construct a wall eight-feet high and approximately two feet from the zero lot line. This wall, the Distefanos claim, will effectively prevent any maintenance of their property once it is constructed because it will cut off the maintenance area from use, as well as obstruct the view. As of the date of this appeal, the Wilkersons have not begun construction of this wall, and since the Distefanos did not assert a claim in their petition concerning this wall, it is not made part of this appeal.

On October 29, 2010, the Distefanos filed a petition for declaratory judgment, possessory action, injunctive relief, and damages against the Wilkersons for their prevention of use of what the Distefanos call the "maintenance servitude," disruption of passage, access, and view. The Distefanos petitioned the court to order the Wilkersons to remove their bushes, fountain, fence, and other objects from this area facing the Distefano property. The Wilkersons answered and filed a reconventional demand, also asking for a declaratory judgment and damages.

On January 3, 2012, the Wilkersons filed an exception of prescription and no cause/no right of action. These exceptions alleged that the objects and structures complained of by the Distefanos had been in place and in obvious view for more than two years before the Distefanos filed suit, and pursuant to Louisiana Civil Code article 781, the prescriptive period to bring an action against a building restriction violation is two years from the commencement of a noticeable violation. The Wilkersons point out that their metal fence and bushes have been within the maintenance area for well over two years before the Distefanos filed suit.

On January 27, 2012, the Distafanos filed a motion for summary judgment, which was set on the same date as the hearing on the Wilkersons' exceptions. On February 13, 2012, the trial court declined to hear the

Distefanos' motion for summary judgment, and on March 5, 2012, granted the Wilkersons' exception of prescription and declared the other exceptions moot. The Distefanos' petition was thereby dismissed with prejudice.[2] On March 19, 2012, the Distafanos filed this appeal.

## ASSIGNMENTS OF ERROR

The Distefanos first assign as error the trial court's granting of the Wilkersons' exception of prescription. They secondly assign as error the trial court's dismissal of their claims with prejudice, specifically their claim of having acquired a servitude of view through the windows on the right exterior side of their home by virtue of the Walden Restrictions.

## STANDARD OF REVIEW

In reviewing a peremptory exception of prescription, an appellate court will review the entire record to determine whether the trial court's finding of fact was manifestly erroneous. *Parker v. B & K Const. Co., Inc.*, 2006-1465, p. 2 (La. App. 4 Cir. 6/27/07), 962 So.2d 484, 485; *Babineaux v. State ex rel. Dept. of Transp. and Development,* 2004-2649, p. 3 (La. App. 1 Cir. 12/22/05), 927 So.2d 1121, 1123. If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed evidence differently. *Oracle Oil, LLC v. EPI Consultants, Div. of Cudd Pressure Control, Inc.*, 2011-0151, p. 4 (La. App. 1 Cir. 9/14/11), 77 So.3d 64, 67, writ denied, 2011-2248 (La.11/23/11), 76 So.3d 1157. Further, the standard controlling the review of a peremptory

[2] The trial court rendered and signed two separate judgments in chambers on the same date. In the "Judgment on Defendants' Exceptions of Prescription, No Cause of Action, and No Right of Action," the exception of prescription was granted, and the other exceptions were declared moot. In the "Judgment on Exception of Prescription and No Cause/Right of Action," judgment was rendered in favor of the Wilkersons, and the Distefanos' petition was dismissed with prejudice. The cumulative result of the two judgments is that the exception of prescription was granted, the other exceptions were declared moot, and the Distefanos' petititon was dismissed with prejudice.

exception of prescription requires that this court strictly construe the statutes against prescription and in favor of the claim that is said to be extinguished. *Coston v. Seo,* 2012-0216, p. 8 (La. App. 4 Cir. 8/15/12), 99 So.3d 83, 88.

**DISCUSSION**

Inherent in the exception of prescription is the question of whether the seven-foot "maintenance servitude" is in fact a servitude or a building restriction.

Although building restrictions and predial servitudes are alike in that they create real rights, they differ in three respects: building restrictions may be imposed in the absence of a dominant estate, predial servitudes may not; building restrictions may impose affirmative duties that are reasonable and necessary for the maintenance of the general plan, predial servitudes may not; building restrictions may exclude performance of certain juridical acts, predial servitudes may not. *Napolitano v. State ex rel. Div. of Admin.,* 2011-1286, p. 13 (La. App. 4 Cir. 3/21/12), 88 So.3d 1183, 1191, *writ denied,* 2012-0901 (La. 6/15/12), 90 So.3d 1063.

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La.C.C. art. 646. It is inseparable from the dominant and servient estates, and the charge passes with the ownership thereof. La.C.C. art. 650. The use and extent of such servitudes are regulated by the title by which they are created. La.C.C. art. 697. The establishment of a predial servitude by title is an alienation of a part of the property. La.C.C. art. 708. Therefore, for the "maintenance servitude" to be a servitude in fact benefitting the estate of the Distefanos, there must be some establishment of the servitude in one or both of the title documents of the Distefanos and/or the Wilkersons.

The January 16, 2006 sale of lot 107 to the Distefanos contains the following provision after the property description:

> This act is made and accepted subject to the following:
>
> 1. All previously recorded building restrictions, servitudes, building setback lines, and oil, gas and mineral reservations, conveyances, servitudes and leases of record.

The Wilkersons' July 7, 1994 title to lot 108 refers to the official Walden subdivision map in the property description. The map was recorded in the Parish of East Baton Rouge, and the description of lot 108 ends with the following:

> ... [S]aid subdivision, said lot having such measurements and dimensions and being subject to such servitudes as shown on the said map.
>
> Subject to all previously recorded building restrictions, servitudes, building setback lines; and oil, gas and mineral reservations, conveyances, servitudes, and leases of record.

Both titles contain common language about the properties being subject to any existing servitudes or building restrictions of record, but the Wilkerson title goes further to specify any servitudes contained in the recorded Walden subdivision map. Rule 4.1 of the Walden Restrictions refers to the same map as evidence of existing servitudes in the subdivision, dealing with drainage, sidewalks, and utilities. The map, which forms part of this record, contains no specific designation of a servitude between lots 107 and 108. A plain reading of the language in the titles *supra* regarding servitudes does not establish any new servitudes, but merely calls for the continuance of any servitudes that may have been in existence at the time the property was transferred. The intent of the proprietor to create a servitude must clearly appear on the face of the document. *RCC Properties, L.L.C. v. Wenstar Properties, L.P.*, 40,996, p. 6 (La. App. 2 Cir. 6/5/06), 930 So.2d 1233, 1237. We find from the record that no predial servitudes, whether

being of passage, support, view, or any other form contemplated by the Louisiana Civil Code, were or are in existence between lots 107 and 108 during or prior to their ownership by the Distefanos and the Wilkersons.

Louisiana jurisprudence has firmly established that building restrictions constitute real rights only in the framework of subdivision planning. *Ezell v. Vaughn,* 496 So.2d 534, 535 (La. App. 1 Cir. 1986). The restrictions must be imposed at least by implication in favor of lots in the subdivision in accordance with a general development plan. *Id.* If the restrictions are imposed on individual lots without regard to a general development plan, they may constitute a veritable predial servitude, provided that the requirements for the creation of predial servitudes are met. *Id.*

The "maintenance servitude" at issue here was established by the Walden Restrictions, which were imposed on the Walden Subdivision. Building restrictions are regulated by application of the rules governing predial servitudes to the extent that their application is compatible with the nature of building restrictions. La. C.C. art. 777. Comment (c) to Article 777 states that restrictions imposed by the subdivider prior to the creation of a subdivision do not qualify as predial servitudes because of the requirement of Article 646 for two estates to be in existence. The Walden Restrictions were recorded in the Parish of East Baton Rouge on April 1, 1975. Lot 108 was acquired by the Wilkersons nineteen years later, and the Distefanos acquired lot 107 thirty-two years afterward. Again, there is no evidence of a servitude existing between the two lots at any time. The "maintenance servitude" clearly fits the first two aspects of building restrictions provided by *Napolitano, supra,* and the third aspect dealing with juridical acts is not applicable to the present case.

Building restrictions are subject to a two-year prescriptive period and predial servitudes are subject to a ten-year prescriptive period. *Diefenthal v. Longue Vue Management Corp.*, 561 So.2d 44, 54 (La. 1990). Since it is clear the "maintenance servitude" is actually a building restriction, we turn now to the Civil Code article governing the termination of building restrictions to determine if the Wilkersons' exception of prescription was properly granted. Louisiana Civil Code article 781 states:

> **Art. 781. Termination; liberative prescription.**
>
> No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated.

Initially, we note that the record clearly demonstrates through photographs the Wilkersons have bushes and a low fence within seven feet of the Distefano residence. The Distefanos filed their petition on October 29, 2010, but the record establishes that the objects within the "maintenance servitude," most specifically the fence, were there for over two years prior to the filing of the petition, except for the latticework, fountain, and some landscaping, which Jill Wilkerson testified were installed in November of 2008. As to the objects installed over two years prior, the issue then becomes whether any of these objects constitute a "noticeable violation."

The Distefanos admit in their brief that "despite the placement of these structures in the Maintenance Servitude, the Distefanos have been able to maintain their residence, albeit with some difficulty." Rule 3.6(c) makes no specification that the maintenance of one's property from the "maintenance servitude" must remain easy or convenient; the rule simply calls for the establishment of the seven-foot area for the purpose of maintenance. From the time the Distefanos purchased lot 107 in 2006, they

performed maintenance on the side of their home bordering lot 108, whether doing so was difficult or not, without filing a petition. Even if the fence and other structures can be considered "noticeable violations," they existed for at least two years before the Distefanos filed their petition. The trial court therefore did not err or abuse its discretion in granting the Wilkersons' exception of prescription with respect to the present objects installed two years prior to the filing of the Distefano petition.

As to the latticework, fountain, and landscaping installed by the Wilkersons in the "maintenance servitude" in November of 2008, prescription has not run. It therefore was manifestly erroneous for the trial court to grant the exception of prescription as to those objects. We find that the trial court erred in granting the exception of prescription with respect to these objects. Therefore, we reverse and remand to the trial court to decide if the latticework, fountain and landscaping installed during November of 2008 violates Rule 3.6(c) of the Walden Restrictions.

## CONCLUSION

We find that the seven-foot wide "maintenance servitude" is not a servitude but a building restriction created by the Walden Subdivision Declaration of Rights, Restrictions, Affirmative Obligations, and Conditions. Louisiana Civil Code article 781 provides a two-year prescriptive period from the time there is a noticeable violation of a building restriction to commence an action, and since the Wilkersons' existing metal fence, bushes, and other structures were noticeable for a period longer than two years before the Distefanos filed suit, the trial court did not err or abuse its discretion by granting the exception of prescription. This exception of prescription, however, cannot apply to the latticework, fountain, or landscaping installed by the Wilkersons in the seven-foot wide "maintenance

servitude" in November of 2008. Since there is no prescription as to these objects, the exceptions of no cause and no right of action are not moot as to them, and the Distefanos' petition is not dismissed as to them. As the trial court has not disposed of the motion for summary judgment, we remand for the trial court to determine whether there is any genuine issue of material fact as to whether the installations that fall within the two-year prescriptive period violate Rule 3.6(c) of the Walden Restrictions.

**DECREE**

The ruling of the 19th JDC to grant the exception of prescription in favor of the Appellees, Bruce and Jill Wilkerson, as it pertains to the iron fence and bushes is affirmed; as to the latticework, fountain, and landscaping installed by the Wilkersons in November of 2008, the ruling of the 19th JDC to grant the exception of prescription in favor of the Appellees, Bruce and Jill Wilkerson, and to declare moot the exceptions of no cause and no right of action is reversed and remanded for further proceedings consistent with this opinion. All costs of this appeal are assessed equally to the Appellants and Appellees.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**VINCENT AND GAYLE DISTEFANO** **FIRST CIRCUIT**

**COURT OF APPEAL**

**VERSUS**

**STATE OF LOUISIANA**

**BRUCE AND JILL WILKERSON** **2012CA 1012**

**CRAIN, J., concurs in result**

I respectfully concur in the result. I disagree with the majority's application of the law governing prescription and termination of building restrictions, and believe Section 3.6 of the restrictive covenants creates a predial servitude.

The majority concludes that Section 3.6 creates a building restriction, then analyzes each object or construction to determine if it has been in existence for more than two years. Addressing the constructed metal fence, the majority concludes that the exception of prescription was properly granted because the fence and other structures "were noticeable for a period of longer than two years."

An exception of prescription in a suit to enforce a building restriction can only be granted if the court finds a noticeable *violation* of the restriction for at least two years. La. Civ. Code art. 781. A "noticeable" act is not sufficient; it must be both noticeable and a violation. As explained by Professor A.N. Yiannopoulos, "An activity conducted on a modest scale may not be noticeable or may not be a violation at all; but the same type of activity, if expanded, may become a noticeable violation." 4 La. Civ. L. Treatise, *Predial Servitudes* § 197 (3d ed.). *See also*, *Woolley v. Cinquigranna*, 188 So. 2d 701 (La. App. 4th Cir. 1966) (homeowner's receipt of goods by truck deliveries at his home for nine years did not violate building restriction and thus did not commence running of prescription on suit to prevent subsequent expansion of business activities two years prior to suit). While the majority determines that the fence is noticeable, it fails to analyze whether it violates the restrictive covenants.

To the extent that finding a noticeable violation is implicit in the majority's conclusions, the fact that it continued in excess of two years results in "the immovable on which the violation occurred [being] freed of the restriction that has been violated." La. Civ. Code. art. 781. Consequently, if the constructed fence is a noticeable violation that has existed for over two years, then the land (Lot 108) is freed of the restriction, and the rights created by the restriction in favor of Lot 107 are extinguished. Under this analysis, the remand ordered by the majority serves no purpose because the other objects constructed on Lot 108 are no longer governed by the now-extinguished building restriction.

I believe that Section 3.6 creates a predial servitude. A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. Civ. Code art. 646. There must be a benefit to the dominant estate. La. Civ. Code art. 647. The benefit need not exist at the time the servitude is created; a possible convenience or a future advantage suffices to support a servitude. La. Civ. Code art. 647. When the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude. La. Civ. Code art. 733.

Section 3.6 describes the encumbrance as a "servitude" that is created "along the boundary line of the lot adjacent to and opposite the approved zero lot line for the construction, maintenance and repair of the wall and/or dwelling on the adjoining lot." The provision identifies both the dominant estate (Lot 107, the lot with a zero lot line) and the servient estate (Lot 108, the adjacent lot). The provision also describes the advantage conferred upon the dominant estate and the types of uses intended for the servitude: the construction, maintenance and repair of the wall or dwelling on the lot with a zero lot line. Although the mere use of the label "servitude" is not necessarily determinative, it is entirely consistent with the encumbrance created by Section 3.6.

The servitude is set forth in the restrictive covenants which are recorded in the public land records of East Baton Rouge Parish, and neither party disputes their application to both Lot 107 and Lot 108. The conveyance instruments for both lots provide that the transfers are "subject to" all "previously recorded building restrictions [and] servitudes". Consequently, a specific description of the servitude either in the acts of conveyance or in the subdivision plat is not necessary to create the servitude or encumber the lots. *See*, La. Civ. Code art. 3338(1).

The requirement of Louisiana Civil Code Article 646 that the two estates subject to a predial servitude "must belong to different owners," is also consistent with Section 3.6 creating a predial servitude. A single owner of two estates may impose a charge on his property *that will become a servitude by destination* when the property is subsequently sold and divided. See La. Civil Code art. 741. The recordation of the restrictive covenants together with the subsequent sales of Lot 107 and Lot 108 that reference the recorded covenants satisfies the requirement of Article 741 for the creation of a servitude by destination.

The fact that this servitude is created in a document that also creates building restrictions and other servitudes does not negate Section 3.6 status as a servitude. *See, Floyd v. Swetman*, 493 So. 2d 145 (La. App. 1 Cir. 1986), and *Moonraker Island Phase III Architectural Committee, Inc. v. Marks Lake, Inc.*, 07-2479 (La. App. 1 Cir. 9/9/08), 2008 WL 4148205 (unpublished), *writ denied*, 08-3008 (La. 2/20/09), 1 So. 3d 498.

Factually, the record establishes that the DiStefanos have exercised the servitude on multiple occasions since their acquisition of Lot 107 in 2006. Therefore, the servitude has not prescribed due to nonuse for ten years. See, La. Civ. Code art. 753.

Applying the law of predial servitudes to the subject facts, the DiStefanos allege the Wilkersons have undertaken constructions in the servitude area that

interfere with their ability to utilize the servitude for its intended purpose and seek an injunction prohibiting the interference. The owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude. La. Civ. Code art. 748. Injunctive relief is available to a person who is "disturbed in the possession of immovable property or of a real right therein." La. Code of Civ. Pro. art. 3663(2). This relief is available in a suit which is neither a possessory nor a petitory action. La. Code of Civ. Pro. art. 3663, Official Revision Comment (b). Accordingly, the owner of a dominant estate may obtain injunctive relief against the owner of a servient estate who is diminishing or making more inconvenient the use of the servitude in violation of Louisiana Civil Code article 748. *See, El Paso Field Service, Inc. v. Minvielle*, 03-1293 (La. App. 3 Cir. 3/3/04), 867 So. 2d 120.

Neither Article 748 nor Article 3663 set forth a prescriptive period for filing a suit seeking a mandatory injunction to remove completed constructions that are interfering with the use of a servitude. In my opinion, ten years is the appropriate prescriptive period given the contractual nature of a conventional servitude. La. Civ. Code art. 3499. *See also, Dean v. Hercules, Inc.*, 328 So. 2d 69, 71 (La. 1976) ("nature of the obligation breached determines the applicable prescriptive period"); *James v. Buchert*, 144 So. 2d 435 (La. App. 4 Cir 1962) (servitude holder entitled to removal of fence that impeded use of servitude even though fence was constructed four years prior to filing of suit).

The evidence establishes that the metal fence currently located in the servitude was placed there in 1998. The subject suit was filed on October 29, 2010. Therefore, the DiStefanos' claim seeking to have that fence removed from the servitude area has prescribed and was properly dismissed. The remainder of the constructions were undertaken within ten years of the filing of the subject suit and have not prescribed. Those claims should not have been dismissed on the

exception of prescription and should be remanded for further proceedings to determine if these objects diminish or make more inconvenient the use of the servitude.

For the above reasons, I concur in affirming the trial court's judgment to the extent it granted the exception of prescription and dismissed the claim seeking relief for the construction of the metal fence. I also concur in the reversal of the judgment to the extent it dismissed the remaining claims arising out of the other constructions and plantings placed in the servitude within ten years prior to suit because those claims have not prescribed; and I would order a remand for the purpose of determining if these objects diminish or make more inconvenient the use of the servitude.