LAKEWOOD PROPERTY OWNERS' ASSOCIATION AND MARK HARRIS SAMUELS	*	**NO. 2017-CA-0382**
		COURT OF APPEAL
VERSUS	*	
		FOURTH CIRCUIT
KYLE SMITH AND CHRISTINE SMITH	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2007-13837, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
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Judge Roland L. Belsome
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(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

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AFFIRMED
NOVEMBER 22, 2017

The Appellants, Kyle and Christine Smith, seek review of the trial court's judgment granting injunctive relief in favor of the Appellees, the Lakewood Property Owners' Association (LPOA) and Mark Samuels. In particular, the trial court ordered the removal of their carport after finding that Appellant's proposed remodel did not comply with the Building Restrictions of the Lakewood Property Owners' Association (LPOA). For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

This case comes before us after extensive litigation and for the second time on appeal. The record from the first appeal reveals that the Appellants' submitted their plans to build their carport to the LPOA Architectural Review Committee (ARC),[1] who rejected the plans for failure to comply with the LPOA building restrictions. Specifically, the Building Restrictions required a five-foot setback from side interior yard lines.[2] Later, Appellant, Christine Smith, sent a letter to the

[1] The ARC was formerly named the Architectural Control Committee. *See Lakewood Prop. Owners' Ass'n v. Smith*, 14-1376, p. 3 (La. App. 4 Cir. 12/23/15), 183 So.3d 780, 783, *writ denied*, 16-0138 (La. 2/26/16), 187 So.3d 469.
[2] *Id*., 14-1376, pp. 2-3, 183 So.3d at 783.

chair of the ARC indicating the Appellants' intentions to move forward with constructing the carport despite the ARC's denial. The ARC chair responded, stating they would take appropriate action if the Appellants' structure did not comply with the Building Restrictions. While aware of the potential consequences of their choice, the Appellants went forward with construction of the carport without the approval of the ARC.[3] The Appellants began construction, placing the structure only two-and-one-half feet from the property line. After a trial, the court granted injunctive relief in favor of the Appellees and ordered the removal of the illegally constructed carport.

In the first appeal, this Court affirmed the trial court's judgment. However, the matter was remanded for a determination as to whether the carport could be made compliant with the LPOA's Building Restrictions for Lakewood South, Section Two, Restriction Four, without being completely demolished.[4] Following a trial on remand, the court again ordered the removal of the carport, specifically finding that the Appellant's proposed remodel did not comply with the Building Restrictions. Therefore, it held that the only remedy was to demolish the carport. This timely suspensive appeal followed.

STANDARD OF REVIEW

When reviewing questions of fact as determined by the factfinder, be it a jury or a judge, appellate courts utilize the manifest error or clearly wrong standard of review. *Sassone v. Doe*, 11-1821, pp. 2-3 (La. App. 4 Cir. 5/23/12), 96 So.3d

[3] *Lakewood Prop. Owners' Ass'n v. Smith*, 14-1376, pp. 2-3, 183 So.3d at 783.
[4] *Id.*, 14-1376, p. 26, 183 So.3d at 795.

1243, 1245. "[A]n appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong, and where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong." *Sassone*, 11-1821, p. 3, 96 So.3d at 1245. In order to reverse findings of the factfinder, "an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong." *S.J. v. Lafayette Parish Sch. Bd.*, 09-2195, p. 12 (La. 7/6/10), 41 So.3d 1119, 1127. The Louisiana Supreme Court explained this Court's role as follows:

> [u]ltimately, the issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Id*. If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Id. at 882–883. Accordingly, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. *Id*. at 883.

S.J., 09-2195, pp. 12-13, 41 So.3d at 1127.

The manifest error standard of review is also used for reviewing "mixed questions of law and fact." *Harold A. Asher, CPA, LLC v. Haik*, 12-0771, p. 5 (La. App. 4 Cir. 4/10/13), 116 So.3d 720, 724 (citation omitted). Conversely, appellate courts review questions of law using the de novo standard. *Id*.

LAW AND ANALYSIS

Although the Appellants raise numerous assignments of error, the narrow issue currently before this Court is whether the trial court was manifestly erroneous

in finding that the carport could not be made compliant with Restriction Four, without being completely demolished. In its principal assignment of error, the Appellants claim that the trial court erred when it ordered them to demolish the carport, because moving the columns inward by two-and-one-half feet would bring the carport into compliance with the building restrictions.

Lakewood South, Section Two, Restriction 4 states:

> No building shall be located on any lot nearer to the front lot line or nearer to the side street line than the minimum building set back lines shown on the recorded plat. In any event, no building shall be located on any lot nearer than 20 feet to the front lot line or nearer than 12 ½ feet to any side street line. *No building shall be located nearer than five (5) feet to an interior lot line or twenty (20) feet to the rear lot line, except that the sideline restriction shall not apply to a detached garage, carport or other outbuilding located sixty-five (65) feet or more from the front lot line, which detached garage, carport or other outbuilding shall not be nearer to an interior lot line than three (3) feet unless the same is constructed on the rear and side line of the property*. If such detached garage, carport or other outbuilding is not constructed in the rear corner of the lot on both property lines, then same shall not be nearer to an interior lot line than three (3) feet. For the purposes of this covenant, eaves shall not be considered as a part of a building, provided, however, that this will not be construed to permit any portion of the building on a lot to encroach upon another lot: and further, a garage or carport shall be considered detached even if connected with the main building by a walkway, runway, or breezeway.[5]

It is undisputed that the Smith's carport was built within five feet of the adjacent interior line of the property, in violation of Restriction Four, which requires a five foot setback.[6] At trial, the Appellants offered only one alternative to bring the carport into compliance: moving the columns inward by two-and-one-half feet.

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[5] *See Lakewood Prop. Owners' Ass'n*, 14-1376, p. 3, 183 So.3d at 783 n. 3.
[6] *See Lakewood Prop. Owners' Ass'n*, 14-1376, pp. 11-12, 26 183 So.3d at 788, 795 (where this Court specifically found the structure was in violation of Restriction 4).

The Appellants' expert architect, Elmore Tregre, III, testified that the attached carport could be brought into compliance by moving the columns inward thirty inches, an additional two-and-one-half feet. He reasoned that moving the columns inward would create an eave; and, since eaves are allowed to extend to the property line, the structure would be in complete compliance with the building restrictions. However, on cross-examination, Mr. Tregre admitted that the Building Restrictions did not provide a definition for an eave; therefore one would apply the definition provided in the New Orleans Comprehensive Zoning Ordinance (CZO).[7]

In addition, the Appellees' expert architect, Mr. Richard Albert, explained that the CZO specifically defined "eave" as: "'the projecting edges of a roof overhanging the wall of a structure.'" He confirmed that under the CZO the definition of eave cannot apply to a carport roof overhang, thus the five-foot setback requirements must be met for the entire structure of the carport, including the overhang. He explained: "the purpose of an eave would be to assist in keeping the exterior wall dry." He further explained that the CZO does not allow attached carports to contain a wall. Thus, he concluded that a carport could not contain an eave.

On rebuttal, Mr. Tregre admitted that under the CZO an eave can only extend from a wall. Therefore, he agreed that the roof extension from the columns of the carport was not an eave; rather, it was an overhang.

[7] The CZO specifically defines eave as the following: "The projecting edges of a roof overhanging the wall of a structure.

In its reasons for judgment, the trial court found that moving the columns inward did not comply with the building restrictions. Since this was the only alternative offered at trial, the court concluded that demolition was the only option.

The Appellants argue that Mr. Albert's testimony was inconsistent with the Building Restrictions in that he opined that Building Restriction Four prohibited attached carports. The Appellants misstate Mr. Albert's testimony. However, assuming *arguendo* that the testimony was inconsistent, the trial court was free to reject the inconsistent parts. *See Temple v. Schwegmann Giant Super Markets*, 95-2491, pp. 4-5 (La. App. 4 Cir. 7/10/96), 677 So.2d 1103, 1105-1106 (the trier of fact may also choose to reject all of the testimony of any witness or may believe and accept any part or parts of a witness' testimony and refuse to accept any other part or parts thereof).

Nevertheless, the record reflects that Mr. Albert testified that an attached carport would be in compliance with Restriction Four if the entire structure met the five-foot setback requirement. Likewise, Appellants' expert testified that the setback requirement applies because the carport was attached (to the main building) and fell "within the requirements for the building itself." The chief disagreement between the two experts' testimonies related to whether moving the columns inward, without moving the roof, would bring the structure into compliance.

Though their own expert acknowledged that the roof projection was not an eave, the Appellants attempt to characterize the roof projection as an eave, using this word interchangeably with "overhang." However, the trial court clearly rejected this contention and the record supports this finding. Concluding the CZO defined an eave as a projection from a wall, the trial court resolved this dispute in

favor of Mr. Albert, finding that the carport did not have a wall, thus moving the columns inward would not create an eave as defined by the Building Restrictions. In support of its conclusion, the trial court also cited to an electronic mail written by Tommy Meric and submitted into evidence. Mr. Meric, who was on the architectural review committee for the LPOA and was also an architect, opined that "any structural elements such as columns or supporting walls related to the building and or proposed roof structure related to a carport should be no closer than 5 feet from the side yard property line." Based on the evidence admitted at trial, there was a reasonable basis for the trial court's conclusion.

Notably, Appellants raise several other assignments of error outside of the narrow issue currently before this Court. Particularly, among other arguments, Appellants complain of the trial court's refusal to hear equity arguments and question whether Restriction Four even applies to their carport. These issues were raised and addressed in the first appeal,[8] and the Louisiana Supreme Court denied Appellants' application for supervisory writs. We will not consider these issues again, as they were previously reviewed and are now final.

Considering the foregoing, there was a reasonable basis for the trial court to conclude that the only proposed remodel would not comply with Restriction Four. Accordingly, we cannot find that the trial court was manifestly erroneous in finding that demolition of the carport was the only feasible option. For these

[8] *See Lakewood Prop. Owners' Ass'n*, 14-1376, pp. 11-12, 26 183 So.3d at 788, 795 (where this Court specifically found the structure was in violation of Restriction 4). Additionally, on remand, when refusing to admit evidence on equitable considerations outside of the narrow issue set forth by this Court, the trial court correctly acknowledged that it already heard such evidence and was bound by this Court's directive on remand, which was only to decide whether the carport could be remodeled to comply with Restriction Four.

reasons, the judgment of the trial court ordering the demolition of the Appellants' carport is affirmed.

AFFIRMED