NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2003 CA 2423R

WAYNE COSBY, KARI FITZGERALD, JOHN FITZGERALD, STAN MCDONALD, KEITH STEVENS, KAREN WILLIAMS, CARL WILLIAMS, AND PETER OELSCHLAEGER

VERSUS

HOLCOMB TRUCKING, INC., HENRY H. HOLCOMB, AND JOYCE M. HOLCOMB

Judgment Rendered: May 4, 2007.

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On Remand from the Louisiana Supreme Court
An Appeal from the
Twenty-First Judicial District Court,
In and for the Parish of Livingston,
State of Louisiana
Trial Court No. 95110

Honorable Zorraine M. Waguespack, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO, PETTIGREW, MCDONALD, AND WELCH, JJ.

Pettigrew, J. Dissents and assigns Reasons.

CARTER, C. J.

This is an action to enforce building restrictions. Defendants, Holcomb Trucking, Inc., Harry H. Holcomb,[1] and Joyce M. Holcomb (collectively the Holcombs), appeal the trial court's judgment granting a preliminary injunction in favor of the plaintiffs, Wayne Cosby, Stan McDonald, Carl Williams, and Karen Williams. The injunction prohibits the Holcombs from bringing commercial vehicles onto their property and from engaging in any commercial activity on their property other than specified business communications. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The facts of this case were fully developed in an earlier opinion of this court, **Cosby v. Holcomb Trucking, Inc.**, 03-2423 (La. App. 1 Cir. 12/17/04) (unpublished) (**Cosby I**), and in a decision of the Louisiana Supreme Court, **Cosby v. Holcomb Trucking, Inc.**, 05-0470 (La. 9/6/06), 942 So.2d 471 (**Cosby II**).

On appeal, the Holcombs sought review of several issues, including the trial court's denial of their peremptory exception of prescription. Applying LSA-C.C. art. 781, a majority of this panel found no reasonable factual basis for the trial court's finding the Holcombs' activities were not noticeable and apparent to the public until the spring of 2001 and reversed the trial court's denial of the Holcombs' peremptory exception raising the objection of prescription.[2] Accordingly, the majority found the plaintiffs'

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[1] The case caption mistakenly refers to the defendant as Henry H. Holcomb.

[2] As noted by this court in our earlier opinion, although the parties utilize the term prescription, as do the heading and comments to LSA-C.C. art. 781, the article actually establishes a peremptive period for instituting suits for relief arising out of a violation of building restrictions. Once the peremptive period passes, the cause of action no longer exists. **Investment Management Services, Inc. v. Village of Folsom**, 00-0832 (La. App. 1 Cir. 5/11/01), 808 So.2d 597, 605 n.14.

suit filed on February 20, 2002, "over four years after 'the commencement of a noticeable violation'" was time-barred, and the Holcombs' property was freed of the pertinent restrictive covenants that had been violated.

The Louisiana Supreme Court granted the plaintiffs' writ application. Observing "[t]his is a typical case where there were two permissible views of the evidence and the fact finder chose one," the supreme court concluded "the court of appeal erred in substituting its judgment for the judgment of the trial court." **Cosby II**, 942 So.2d at 479. So concluding, the supreme court reversed this court's decision finding the plaintiffs' suit perempted and remanded the case to our court for consideration of the remaining assignments of error, which in essence, are:

1. Developer William King granted the Holcombs a waiver from the restrictive covenants.

2. Plaintiff Cosby, a resident of Wedgewood Acres Subdivision, has no right of action against the Holcombs.

3. The Holcombs' activities do not constitute a nuisance, such as would support an injunction.

ANALYSIS

Waiver

The 1984 restrictive covenants on the Front Lots,[3] in paragraphs seven and sixteen, allow a prohibited activity on the lot if "approved by the developer." The Holcombs maintain that they possess valid waivers from developer King, exempting their Front Lot from the restrictions against commercial activity.

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[3] As explained in our earlier opinion, in 1984, the Kings, along with Darron Bruce King and Michele Arnold King, developed four rural tracts of land that adjoin Wedgewood Acres Subdivision and front Ben Fugler Road in Livingston Parish. These four tracts of land are collectively referred to as the "Front Lots." The Holcombs' property is one of these four Front Lots on Ben Fugler Road.

Mr. Holcomb testified that when he and his wife purchased Lot P in Wedgewood Acres in 1985, King gave them written permission to operate their trucking business from Lot P. When Lot P was exchanged in 1992 for the Front Lot, the Holcombs did not perform a title search on the Front Lot; nor did the Holcombs procure a new written waiver from the developers. Regardless, the Holcombs argue this court should consider the waiver on Lot P as being equally effective in regard to their Front Lot. In further support of their claim that they possess a valid waiver of the restrictions against commercial activity, the Holcombs offer that four months *after* the present suit was filed, King signed a second waiver giving the Holcombs permission to operate a trucking business on their Front Lot.

Although attached as exhibits to a memorandum the Holcombs filed in the district court record, the waivers were never introduced into evidence at the hearing on plaintiffs' motion for a preliminary injunction.[4] Pursuant to Louisiana Code of Civil Procedure article 2164, an appellate court must render its judgment upon the record on appeal. The appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Memoranda and exhibits not filed in evidence are not part of the appellate record. The briefs of the parties and the attachments thereto are not part of the record on appeal. **Tranum v. Hebert**, 581 So.2d 1023, 1026 (La. App. 1 Cir.), writ denied, 584 So.2d 1169 (La. 1991). Exhibits filed in the trial court, but not introduced into evidence, are not part of the record on appeal. **Tranum**, 581 So.2d at 1027.

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[4] The record indicates the litigants did not invoke LSA-C.C.P. art. 3609, which gives the trial court discretion to issue a written order directing that evidence be taken by affidavit at the preliminary injunction hearing.

In conclusion, at this point in the proceeding, the record contains no competent evidence upon which the Holcombs could meet their burden of establishing a proper waiver of all or part of the building restrictions affecting their Front Lot.

No Right of Action

Plaintiffs, McDonald and Karen and Carl Williams, live on two of the four Front Lots referred to in the 1984 restrictive covenant agreement. In contrast, plaintiff Cosby lives on Lot L in Wedgewood Acres. The Holcombs argue that the restrictive covenants on the Front Lots were not created for the benefit of the residents of Wedgewood Acres; nor do the Wedgewood Acres residents have a right to enforce the 1984 restrictions on the Front Lots. Therefore, the Holcombs maintain that Cosby, as a resident of Wedgewood Acres, does not have a right of action to seek enforcement of the 1984 restrictive covenant agreement.

Only a person having a real and actual interest that he asserts can bring an action. LSA-C.C.P. art. 861. The function of the peremptory exception raising the objection of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. **Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n**, 94-2015 (La. 11/30/94), 646 So.2d 885, 888.

The 1984 restrictive covenant agreement on the Front Lots expressly adopted restrictions 1, 2, 4, and 20 of the Wedgewood Acres restrictive covenant agreement. Restriction 20 provides:

> If the owner, purchaser or occupant of any lot in this subdivision, ... shall violate or attempt to violate any of the restrictive covenants herein, it shall be lawful for any person or persons owning any of said lots to prosecute any proceedings in a court having jurisdiction against the person or persons

> violating or attempting to violate any such restrictions, either to prevent him or them from so doing or to recover damages for such violations.

Building restrictions are real rights running with the land that inure to the benefit of all other grantees under a plan of development. **Tri-State Sand & Gravel, L.L.C. v. Cox**, 38,217 (La. App. 2 Cir. 4/7/04), 871 So.2d 1253, 1256, writ denied, 04-1357 (La. 9/24/04), 882 So.2d 1144. The 1984 restrictive covenant agreement, filed in conjunction with the development of the Front Lots and expressly adopting the 1982 restrictive covenant agreement filed in conjunction with the development of Wedgewood Acres, clearly provides reciprocal rights of enforcement by residents of these adjoining developments for violations of the recorded covenants. The trial court properly concluded that Cosby has a right of action to seek enforcement of the restrictive covenant agreements.

Nuisance

The trial court's judgment grants a preliminary injunction in favor of Cosby, McDonald, and the Williams. As an alternative argument, the Holcombs submit: "If the judgment of the lower court granting the injunction is based on [LSA-C.C. arts. 667, 668, or 669 (nuisance)], it must be reversed for lack of evidence to support the finding." We note that prior to the trial of plaintiffs' entitlement to an injunction due to a violation of the building restrictions, the parties severed the plaintiffs' nuisance claim from the claims based on violations of the subdivision restrictions; the nuisance claim is still pending. Additionally, having concluded the trial court properly granted the plaintiffs a preliminary injunction pursuant to the 1984 restrictive covenants, we pretermit discussion of this alternative argument.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed by memorandum opinion pursuant to Uniform Rules—Louisiana Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed to the defendants, Holcomb Trucking, Inc., Harry H. Holcomb, and Joyce M. Holcomb.

AFFIRMED.

WAYNE COSBY, KARI FITZGERALD, JOHN FITZGERALD, STAN MCDONALD, KEITH STEVENS, KAREN WILLIAMS, CARL WILLIAMS, AND PETER OELSCHLAEGER

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PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

PETTIGREW, J., dissenting.

J.DP.

I must respectfully dissent for the same reasons assigned in this court's earlier opinion, **Cosby v. Holcomb Trucking, Inc.**, 03-2423 (La. App. 1 Cir. 12/17/04) (unpublished) (Cosby I), which decision was reversed and remanded by the Louisiana Supreme Court in **Cosby v. Holcomb Trucking, Inc.**, 05-0470 (La. 9/6/06), 942 So.2d 471 (Cosby II).