

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0962

ALAN L. SCHWARTZBERG

VERSUS

WANDA E. ELLIS

Judgment Rendered: FEB 22 2013

*JEW*  
*RHB*

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Appealed from the  
23<sup>rd</sup> Judicial District Court  
In and for the Parish of Ascension  
State of Louisiana  
Trial Court Number 102184

Honorable Thomas J. Kliebert, Jr., Judge

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Yigal Bander  
Baton Rouge, LA

Attorney for Appellee  
Plaintiff – Alan L. Schwartzberg

Rick A. Alessi  
Gonzales, LA

Attorney for Appellant  
Defendant – Wanda E. Ellis

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BEFORE: PARRO, WELCH, AND KLINE<sup>1</sup>, JJ.

*Kline, Jr concurs*

<sup>1</sup> Hon. William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

**WELCH, J.**

Defendant, Wanda E. Ellis, appeals a judgment granting a preliminary injunction in favor of plaintiff, Alan L. Schwartzberg. We affirm.

**BACKGROUND**

On December 19, 2011, Mr. Schwartzberg filed this lawsuit seeking injunctive relief against his neighbor, Ms. Ellis. Mr. Schwartzberg asked the trial court to order Ms. Ellis to remove two electric gates she had erected on her property directly on a servitude of passage and to refrain from making his use of the servitude more inconvenient. The existence of the servitude of passage is undisputed. Mr. Schwartzberg and Ms. Ellis own adjoining tracts of property on Louis White Road, a private road in Ascension Parish, on which they both reside. It is also undisputed that Mr. Schwartzberg must cross Ms. Ellis' property to reach his residence. Ms. Ellis erected one gate on Louis White Road at the point where her property adjoins property owned by Kenneth Andrus and erected the other gate on Louis White Road at the point where her property borders Mr. Schwartzberg's property in order to contain her animals. According to Mr. Schwartzberg, because Ms. Ellis has no fences along the two sides of her property running along Louis White Road, he is often forced to dodge Ms. Ellis' horses, dogs, and in the past cows, as he traverses the servitude of passage to get to his home. Ms. Ellis filed a reconventional demand in which she averred that the gates do not cause Mr. Schwartzberg irreparable harm or any inconvenience because Mr. Schwartzberg consented to a gate placed on Louis White Road by Mr. Andrus at the front portion of the private road, which operates by the same remote control device that controls her two gates. Ms. Ellis also claimed that even if the trial court found that the gates caused Mr. Schwartzberg irreparable injury and harm, there is another more convenient roadway on her property that Mr. Schwartzberg could use that would

bypass the gates, and she raised this relocation issue as an affirmative defense in her reconventional demand.

A hearing on the preliminary injunction was held. Mr. Schwartzberg's case consisted of his testimony, the testimony of Mr. Andrus, and documentary evidence consisting of: (1) a 2007 survey showing the existence of a 60-foot private servitude of passage for the exclusive use of the owners of Tract 10-A-1-A and Tract 10-A-2-B, (2) the act of sale dated May 14, 2007, through which Mr. Schwartzberg acquired those tracts of land along Louis White Road subject to all existing servitudes; and (3) the act of sale dated the same day whereby Mr. Schwartzberg sold Ms. Ellis Tract 10-A-1-A subject to all existing servitudes. Ms. Ellis offered her testimony, the testimony of Rod Braud, whose company erected the electric gates, and documentary evidence consisting of photographs of the area in question and a 2010 map of the subdivision of the property she and Mr. Schwartzberg own depicting Louis White Road and the existing 60-foot all purpose servitude and private servitude of passage, 30-feet each side of the centerline.

At the conclusion of the evidence, the trial court granted Mr. Schwartzberg's demand for a preliminary injunction as to the gate bordering his property, but declined to grant preliminary injunctive relief as to the gate bordering Mr. Andrus' property because there was evidence showing there had been a gate at that location previously. On March 15, 2012, the trial court signed a judgment ordering Ms. Ellis to remove the gate on Louis White Road at the back of her property adjoining the Schwartzberg property within 30 days, provided that Mr. Schwartzberg furnished security in the amount of \$2,500.00.<sup>2</sup> The trial court observed that Ms. Ellis could put a cattle guard at that location to secure her animals and felt that the sum of \$2,500.00 would be sufficient to cover the cost of the cattle guard in the

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<sup>2</sup> The record reflects that Mr. Schwartzberg did provide the court with proof of a bond in the amount of \$2,500.00 on March 13, 2012.

event it was later determined that the trial court erred in granting the preliminary injunction. The trial court further denied Ms. Ellis's reconventional demand and ordered that the servitude of passage over her property remain where it is and not be relocated.

Ms. Ellis took this devolutive appeal, urging that the trial court erred in: (1) failing to find that the installation of gates across the servitude to contain her livestock is a reasonable action of a servient estate owner when the dominant estate owner has been provided electronic gate openers; (2) basing its decision to grant the injunction on the issue of whether there were gates across the servitude at the time of the acquisition of the property; and (3) dismissing her reconventional demand to establish a new location for the servitude as that issue was not properly before the court at the hearing on the preliminary injunction.

#### DISCUSSION

A party aggrieved by a judgment granting a preliminary injunction is entitled to an appeal. **Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa**, 2004-0270 (La. App. 1<sup>st</sup> Cir. 3/24/05), 906 So.2d 660, 663. However, appellate review of a trial court's judgment granting a preliminary injunction is limited. Because the issuance of a preliminary injunction addresses itself to the sound discretion of the trial court, it will not be disturbed on review unless a clear abuse of discretion has been shown. *Id.*

After reviewing the evidence, we find no abuse of the trial court's discretion in granting the preliminary injunction. Moreover, we do not find any error in the trial court's denial of Ms. Ellis's reconventional demand regarding relocation of the servitude. The trial court did not and could not dismiss the reconventional demand on a preliminary injunction hearing as this issue could only be resolved at a trial on the merits of the permanent injunction. Accordingly, we find no error in

the trial court's judgment and issue this memorandum opinion in accordance with the Uniform Court of Appeal Rule 2-16.1.B.

**CONCLUSION**

Based on the foregoing, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Wanda E. Ellis.

**AFFIRMED.**