NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1600

JEFFREY "JEFF" MCCURLEY AND ELIZABETH MCCURLEY, GEORGE POWERS AND GLORIA POWERS, CURTIS NETTERVILLE AND CAROLYN A. NETTERVILLE, JIMMY HAWKINS AND BRENDA D. HAWKINS, JERRY D'ANTONI AND CAROLYN N. D'ANTONI, AND ROBERT "BOBBY" HANO AND YVONNE HANO

VERSUS

JOHNNY BURTON AND SHERRY K. BURTON

Judgment Rendered: February 13, 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 497, 340
The Honorable Kay Bates, Judge Presiding

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Ronnie Bertholot E. Wade Shows Baton Rouge, LA	Counsel for Plaintiffs/Appellees, Jeffrey Jeff McCurley and Elizabeth McCurley, George W. Powers and Gloria Powers, Curtis Netterville and Carolyn A. Netterville, James Hawlins and Brenda D. Hawkins, Jerry D'Antoni and Carolyn N. D'Antoni, and Robert Hano and Yvonne Hano
Chiquita Tate Baton Rouge, LA	Counsel for Defendants/Appellants, Johnny Burton and Sherry K. Burton

BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.

WHIPPLE, J.

This matter is before us on appeal by the defendants, Johnny and Sherry Burton, from a judgment of the trial court again issuing a permanent injunction in favor of plaintiffs,[1] George and Gloria Powers, Curtis and Carolyn A. Netterville, Jimmy and Brenda Hawkins, Jerry and Carolyn N. D'Antoni, and Robert "Bobby" and Yvonne Hano, allowing them a servitude of passage over defendants' property.

This appeal arises from a property dispute in which plaintiffs had alleged continuous and uninterrupted possession of a right of passage to their homes and property by virtue of a thirty-foot servitude of passage (in the form of a gravel road) through defendants' property. Plaintiffs filed a petition for a temporary restraining order, preliminary injunction, permanent injunction, and damages after receiving notification from defendants that they would no longer be allowed to use the servitude and after defendants began construction of a fence and gate across the gravel road. The defendants reconvened, contending that the gravel road used by plaintiffs to access their homes was actually their "driveway," that the thirty-foot servitude of access plaintiffs sought to enforce use of lay north of defendants' property, and that the actual servitude was a separate and distinct tract from the gravel road plaintiffs had been using. Thus, the defendants requested judgment declaring their ownership of the disputed thirty foot strip of property and awarding damages for wrongful issuance of the temporary restraining order, plus attorneys fees, and costs.

In the earlier proceedings, after a hearing on the request for a preliminary injunction, the trial court rendered judgment ordering a permanent injunction in favor of the plaintiffs and dismissing the defendants' reconventional demand.

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[1]On April 7, 2003, plaintiffs Jeffrey "Jeff" McCurley and Elizabeth McCurley were granted an order removing their names from the petition and caption.

The defendants appealed from the judgment of the trial court. On review, another panel of this Court affirmed the trial court's finding that plaintiffs had acquired a servitude of passage across the defendants' property by virtue of title, and the trial court's denial of defendants' reconventional demand. This Court, however, vacated the trial court's issuance of a **permanent** injunction and amended the judgment to grant a **preliminary** injunction, finding that the trial court had exceeded its authority, absent an express agreement between the parties to convert the preliminary injunction to a permanent injunction. See McCurley v. Burton, 2003-1001 (La. App. 1st Cir. 4/21/04), 879 So. 2d 186, 189.

Thereafter, a trial on the request for a permanent injunction was held on September 6 and 7, 2007. After taking the matter under advisement, the trial court issued written reasons for judgment on May 16, 2008, finding that the plaintiffs had established the creation of a servitude of passage by title and by ten years acquisitive prescription. The trial court found that a sixty-foot servitude for access had been dedicated by virtue of a plat filed in the public records on August 21, 1957, and that the thirty-foot access specified or intended herein for the defendants' use was within the sixty-foot servitude. The trial court further determined that the testimony at trial established that the gravel road had been in continuous use since the initial granting of the servitude; that the plaintiffs and their ancestors in title had maintained and improved the gravel road; and that the gravel road was regularly used by school buses, garbage trucks, and mail trucks, thereby preserving plaintiffs' rights. A judgment conforming to the trial court's reasons was signed on May 23, 2008.

The defendants again appeal from the judgment of the trial court, contending that: (1) the trial court erred in finding a servitude of passage existed over the defendants' property where the map that the trial court relied on could not be tied to the defendants' property; (2) the plaintiffs failed to present evidence

that they "acquired ownership" of the servitude either by title or acquisitive prescription of thirty years; and (3) the trial court abused its discretion in relying on the testimony of the plaintiffs' expert rather than the testimony of the defendants' expert.

DISCUSSION

The issuance of a permanent injunction takes place only after a trial on the merits, in which the burden of proof must be founded on a preponderance of the evidence. State Machinery & Equipment Sales, Inc. v. Iberville Parish Council, 2005-2240 (La. App. 1st Cir. 12/28/06), 952 So. 2d 77, 81. The standard of review for the issuance of a permanent injunction is the manifest error standard. Cathcart v. McGruder, 2006-0986, 2006-0987, 2006-0988 (La. App. 1st Cir. 5/4/07), 960 So. 2d 1032, 1041. Under this standard, in order to reverse a trial court's determination of a fact, an appellate court must review the record in its entirety and find that a reasonable factual basis does not exist for the finding, and that the record establishes that the fact finder is clearly wrong or manifestly erroneous. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, this court may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Stobart v. State, Department of Transportation and Development, 617 So. 2d at 882.

After careful and thorough review of the documentary evidence and lay and expert testimony introduced over the course of the two-day trial herein, we find no error in the trial court's determination that plaintiffs established by the requisite proof and a preponderance of the evidence that they were entitled to a permanent injunction "enjoining the [d]efendants from engaging in any activity or erecting any work which will in any manner interfere with or prevent [p]laintiffs

from exercising their servitude of passage over [defendants'] property." The essential issues in this case were whether a servitude of passage existed over the defendants' property, and whether or not the gravel road, which the defendants contend was their private driveway and which had been extended by plaintiffs' ancestors in title to allow access to their property, was within the servitude of passage.

At trial, the trial court heard the testimony of the defendants, the plaintiffs, who traveled on the gravel road daily to access their homes and property, and of other witnesses who lived on or near the disputed servitude or who had previously owned property on or near the servitude. The trial court also heard the testimony of plaintiffs' and defendants' expert witnesses.

In its reasons for judgment, the trial court noted that Woodrow Kerr's dedication of the servitude in the 1957 plat, which established the servitude in question, stated "Sixty Foot Servitude For Access From Property of Woodrow Kerr Is Hereby Dedicated." The dedication was signed by Kerr and was filed into the public records of East Baton Rouge Parish on August 21, 1957. The trial court noted that the plat depicts two adjacent thirty foot servitudes of passage (one of which traverses the property now owned by defendants) that connect to a proposed sixty-foot street on the adjoining property. The trial court determined that this map and legend establish the intent of Kerr to grant a predial servitude of passage to the Carles' property.

The trial court noted that in 1964, Kerr sold the property currently owned by the defendants to Earl and Minnie Kennedy. The court noted that the Act of Sale dated May 26, 1964 stated that said Tract C was subject to a thirty-foot "access way across the northernmost 196.15 feet width which is adjacent to the Louis J. Carles property to the north." The trial court found that this identical

language was referenced in the act of sale executed by the defendants when they purchased the property on April 22, 1970.

Plaintiffs' expert, Woody Triche, a licensed professional land surveyor, who was accepted by the court as an expert in the field of land surveying and who reviewed the numerous plats and conveyances of title introduced herein, opined that when Woodrow Kerr dedicated a sixty-foot servitude across the property now owned by Mr. Charlton and the defendants, he was allowing Mr. Carles to get to his property, which is next to defendants' property. Triche testified that any successors in title of Mr. Carles or Mr. Ibach, the ancestors in title to the property now owned by plaintiffs, thus would have the same rights to get to their property that Mr. Carles was granted. Triche further testified, without objection, that in his opinion, the photographs introduced in the record show that a gravel road is identifiable as shown within the sixty-foot servitude granted by Woodrow Kerr and that the language in the act of cash sale executed by the defendants when they purchased the property specifically provides that the property is subject to a thirty-foot servitude. Thus, Triche opined that based on his review, the gravel road that is in front of defendants' property is subject to a thirty-foot servitude.

Considering the dedication of a sixty-foot servitude by Woodrow Kerr, the language in defendants' act of cash sale stating that the property is subject to a thirty-foot servitude, and Triche's stated bases for his opinions and expert testimony, we are unable to say the trial court erred in its factual determinations. Accordingly, we find no merit to defendants' first and second assignments of error.

Moreover, to the extent that the defendants argue that the trial court erred in relying on the testimony of plaintiffs' expert, Woody Triche, accepted by the trial court as an expert in the field of land surveying, rather than the testimony of their expert, Carl Jeansonne, also accepted as an expert in land surveying, we

note that, on review, where the testimony of experts differs, it is the responsibility of the trier of fact to determine which evidence or testimony is more credible. Mistich v. Volkswagen of Germany, Inc., 95-0939 (La. 1/29/96), 666 So. 2d 1073, 1077. Moreover, such factual determinations may not be overturned unless manifest error appears in the record. Fox v. Fox, 97-1914 (La. App. 1st Cir. 11/6/98), 727 So. 2d 514, 516, writ denied, 99-0265 (La. 3/19/99), 740 So. 2d 119. As with other witnesses, the fact-trier is entitled to assess the credibility of the opinion of an expert, unless the stated reasons of the expert are found to be patently unsound. The effect and weight to be given such expert testimony depends upon the underlying facts and rests soundly within the broad discretion of the trial judge. Thus, absent a clear showing of error, in deciding to accept the opinion of one expert and reject the opinion of another, a trial court can virtually never be deemed to be manifestly erroneous. Fox v. Fox, 727 So. 2d at 516.

In relying on Mr. Triche's expert testimony, the trial court stated:

> This Court finds Mr. Triche to be a competent and believable witness, based on his qualifications as an expert in the field of land surveying and based on his experience and understanding of this particular case. This Court finds that Mr. Triche's testimony and opinions support the position of the Plaintiffs in this matter, and his opinions are supported by the physical evidence submitted to this Court.

Although the testimony of the two experts may differ, absent any evidence that Mr. Triche's opinions are unsound or unsupported, or any other evidence of error in the record before us, we are unable to find error in the trial court's reliance on Mr. Triche's opinions and testimony. Accordingly, we also find this assignment lacks merit.

After a thorough review of the record and relevant jurisprudence, we find that the trial court's written reasons for judgment adequately explain the

decision, which is amply supported by the record.[2] Finding no error, the May 23, 2008 judgment of the trial court granting a permanent injunction in favor of plaintiffs is affirmed in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed to the appellants, Johnny and Sherry Burton.

AFFIRMED.

[2]Generally, when an appellate court considers arguments made in earlier proceedings before the appellate court, the Court's disposition on the issue considered usually becomes the law of the case, foreclosing relitigation of that issue either at the trial court on remand or reconsideration in the appellate court on a later appeal, absent a showing that the prior disposition was clearly erroneous or created a grave injustice. Louisiana Land and Exploration Company v. Verdin, 95-2579 (La. App. 1st Cir. 9/27/96), 681 So. 2d 63, 65, writ denied, 96-2629 (La. 12/13/96), 692 So. 2d 1067, cert. denied, 520 U.S. 1212, 117 S. Ct. 1696, 137 L. Ed. 2d 822 (1997). Pretermitting whether the law-of-the-case doctrine should apply herein, we find on review that the result mandated herein is the same, i.e. the trial court's judgment granting the permanent injunction is correct and is properly supported by the record. See Spruell v. Dudley, 2006-0015 (La. App. 1st Cir. 12/28/06), 951 So. 2d 339.