NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0452

ROBERT J. LAURENT, SR.

VERSUS

WILLIAM DEXTER, JR. & MICHELLE L. USEY DEXTER

Judgment Rendered: SEP 2 6 2008

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 2007-0000471

Honorable Ernest G. Drake, Jr., Judge

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Plaintiff – Appellee
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Defendants – Appellants
William Dexter, Jr. and
Michelle L. Usey Dexter

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McClendon, J. concurs and assigns reasons.

WELCH, J.

In this dispute arising out of the interpretation and enforcement of building restrictions, the defendants, William Dexter, Jr. and Michelle L. Usey Dexter ("the Dexters") appeal a summary judgment granted in favor of the plaintiff, Robert J. Laurent, Sr., which declared that the terms and provisions of the building restrictions governed the relationship between the parties, found that the Dexters had not complied with the building restrictions, ordered the Dexters to remove a travel trailer and debris from their lot, and ordered the Dexters to pay court costs and attorney fees to Mr. Laurent. For reasons that follow, we vacate the judgment in accordance with Uniform Court of Appeal Rule 2-16.1(B) and remand for further proceedings.

On February 9, 2007, Mr. Laurent filed a petition for declaratory judgment and injunctive relief, alleging that the Dexters had purchased a lot in Green Acres subdivision in Tangipahoa Parish, Louisiana, which was encumbered by building restrictions. Mr. Laurent further alleged that the building restrictions specifically provided that "[n]o structure of a temporary character, trailer, basement, tent, shack, garage, barn or other out-building shall be used on any lot at any time as a residence either temporarily or permanently[,]" and that around May 26, 2006, the Dexters had moved a travel trailer onto their lot and had begun using it as a permanent residence, in violation of the building restrictions. Mr. Laurent also alleged that he and a group of neighbors formally demanded that the Dexters remove the trailer from the lot and comply with the building restrictions, but the Dexters did not respond to the demand, remained non-compliant, and began accosting and harassing Mr. Laurent and his family. Therefore, Mr. Laurent requested that a temporary restraining order be issued (and thereafter, an injunction) to enjoin, prevent, and restrain the Dexters from physically or mentally abusing, harassing, or harming Mr. Laurent or his family. Mr. Laurent also sought

judgment declaring that the building restrictions governed the relationship between the parties, declaring that the Dexters had failed to comply with the building restrictions, ordering the Dexters to remove the travel trailer, and awarding Mr. Laurent court costs and attorney fees.

The Dexters answered and essentially denied that they were in violation of the building restrictions. They also asserted that the travel trailer located on their lot was not improper, because the trailer in question was a temporary substitute residence authorized as a Federal Emergency Management Agency ("FEMA") shelter.

On April 9, 2007, the parties entered into a consent judgment dispositive of the injunction issues, and specifically provided for mutual injunctions enjoining the parties from harassing, intimidating, or interfering with each other in any manner, including, but not limited to, interference with their peaceful possession and use of their respective properties. This consent judgment also provided that each party would bear its own attorney fees and costs. Thereafter, a status conference between counsel for the parties and the trial court was held on May 22, 2007, and at that time, the trial court scheduled a trial on the remaining issues raised by Mr. Laurent's petition for the week of October 15, 2007.

Shortly after the status conference, on June 7, 2007, Mr. Laurent filed a motion for summary judgment, requesting a judgment in his favor finding that the Dexters were in violation of the subdivision building restrictions and ordering the Dexters to remove their travel trailer from their lot. The hearing on the motion for summary judgment was scheduled for August 6, 2007. The Dexters were served with the motion for summary judgment through their attorney of record, Paul Billingsley, on June 15, 2007. Five days later, on June 20, 2007, Mr. Billingsley filed a motion to withdraw as counsel of record, which the trial court granted *ex parte* on June 26, 2007.

On August 6, 2007, the motion for summary judgment was heard. The defendants did not file an opposition to the motion for summary judgment and neither the defendants nor an attorney appeared at the hearing on their behalf. After considering the motion and exhibits, the trial court granted summary judgment in favor of Mr. Laurent. A written judgment in conformity with the trial court's ruling was signed on August 24, 2007. This judgment specifically declared that the terms and provisions of the building restrictions governed the relationship between the parties, found that the Dexters had failed to comply with the building restrictions, ordered the Dexters to remove their trailer and debris from their lot, and ordered the Dexters to pay court costs and attorney fees in the amount of $5,235.00 to Mr. Laurent. From this judgment, the Dexters have appealed.[1]

On appeal, the Dexters contend that the trial court erred: (1) in granting summary judgment, because there were genuine issues of material fact in existence and because the plaintiff was not entitled to summary judgment as a matter of law and (2) in awarding attorney fees and costs in the absence of a statutory or contractual provision for such an award. The Dexters further contend that the trial court erred in allowing their attorney, Mr. Billingsley, to withdraw as counsel of record without complying with Rule 9.13 of the Rules for Louisiana District Courts ("Rule 9.13"), and that as a result of his improper withdrawal, they did not know they needed to file an opposition to the motion for summary judgment, did not receive adequate notice to appear at the hearing, and were deprived of the "usual safeguards afforded by the adversarial process" (*i.e.*, procedural due process); therefore, the trial court inappropriately granted summary judgment.

The propriety of the trial court's granting of Mr. Billingsley's motion to withdraw as counsel of record and whether the Dexters received adequate notice of

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[1] The Dexters timely filed a motion for new trial, but the motion was denied by the trial court on October 15, 2007.

the hearing on the motion for summary judgment must be resolved before we review the trial court's ruling on summary judgment; therefore, we will address these issues first.

Rule 9.13 governs all motions to withdraw as counsel of record and provides, in pertinent part, as follows:

> Enrolled attorneys have, apart from their own interests, continuing legal and ethical duties to their clients, all adverse parties, and the court. Accordingly, the following requirements govern any motion to withdraw as counsel of record:
>
> (a) The withdrawing attorney who does not have written consent from the client must make a good-faith attempt to notify the client in writing of the withdrawal and of the status of the case on the court's docket. The attorney must deliver or mail this notice to the client before filing any motion to withdraw.
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> * * *
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> (c) Any motion to withdraw must include the following information:
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> (1) The motion must state current or last-known street address and mailing address of the withdrawing attorney's client. The withdrawing attorney must also furnish this information to the clerk of court.
>
> (2) If a scheduling order is in effect, a copy of it must be attached to the motion.
>
> (3) The motion must state whether any conference, hearing, or trial is scheduled, and, if so, its date.
>
> (4) The motion must include a certificate that the withdrawing attorney has complied with paragraph (a) and with Rule 1.16 of the Rules of Professional Conduct, Louisiana State Bar Association, Articles of Incorporation, Art. 16. A copy of the written communication required by paragraph (a) must be attached to the motion.
>
> (d) The court may allow an attorney to withdraw on *ex parte* motion if:
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> (1) The attorney has been terminated by the client; or
>
> (2) The attorney has secured the written consent of the client and of all parties or their respective counsel; or
>
> (3) No hearing or trial is scheduled, or the case has been concluded.
>
> (e) If paragraph (d) does not apply, then an attorney may withdraw as counsel of record only after a contradictory hearing and for good cause. All parties and the withdrawing attorney's client must be

> served with a copy of the motion and rule to show cause why it should not be granted.
>
> (f) If counsel's withdrawal would delay a scheduled hearing or trial, the court will not allow the withdrawal, unless exceptional circumstances exist.
>
> (g) Paragraphs (a) through (f) do not apply to an *ex parte* motion to substitute counsel signed by both the withdrawing attorney and the enrolling attorney.

In this case, the motion to withdraw filed by Mr. Billingsley states that the Dexters "have not paid any attorney fees to mover as agreed and, accordingly, mover [Mr. Billingsley] desires leave of Court to withdraw as counsel of record in these proceedings on behalf of [the Dexters]." The order provided with the motion (and subsequently signed by the trial court) authorized Mr. Billingsley to withdraw as counsel of record for the Dexters in these proceedings and ordered that all further notices in the proceedings be served upon the Dexters at a specific address.

Mr. Billingsley's motion to withdraw as counsel of record neither alleged nor had any attachments establishing that the Dexters consented to Mr. Billingsley's withdrawal as counsel of record, that Mr. Billingsley had made any effort to notify the Dexters in writing of the withdrawal and status of the case prior to the filing of the motion, that a hearing on Mr. Laurent's motion for summary judgment was set for August 6, 2007, and that a trial on the merits was scheduled for October 15, 2007; therefore, the motion to withdraw did not comply with Rule 9.13.

Furthermore, Rule 9:13(d) provides that the trial court may grant a motion to withdraw *ex parte* only if counsel has been terminated, counsel has obtained the written consent of the client and of all parties, no hearing or trial has been scheduled, or the case has been concluded. Otherwise, an attorney may withdraw as counsel of record only after a contradictory hearing and for good cause. Again, in this case, the motion to withdraw does not allege that counsel was terminated by the clients, there is no written consent in the record, and a hearing on the motion

for summary judgment was set approximately a month and a half from the filing of the motion. Therefore, under Rule 9.13(d), it was patently improper for the trial court to grant the motion to withdraw as counsel of record on an *ex parte* basis, rather than after a contradictory hearing. See **Spiers v. Roye**, 2004-2189, p. 10 (La. App. 1st Cir. 2/10/06), 927 So.2d 1158, 1164.

The consequences of such a legal error in relationship to a party's entitlement to notice of trial were specifically considered by this court in **Spiers**. After finding that the trial court improperly granted counsel's motion to withdraw *ex parte*, this court stated:

> When a trial court provides written notice of a trial date to the attorney of record, but the attorney thereafter moves to withdraw as attorney of record, the trial court bears the responsibility of ensuring that the litigant receives notice of the pending trial in writing. The court can satisfy this notice requirement by reissuing the notice of trial to the unrepresented litigant directly. Otherwise, the court must receive reasonable proof that the withdrawing attorney has notified the client in writing of the trial date. This can be accomplished by attaching to the motion to withdraw a certified letter to the client or other evidence indicating the client has received unequivocal written notice of trial. If the record demonstrates that a litigant did not receive notice of trial, then he was denied procedural due process and fundamental fairness. (Footnote omitted.)

Spiers, 2004-2189 at p. 10, 927 So.2d at 1164-1165 (quoting **Davis v. Dunn & Bush Construction**, 2001-2472, pp. 3-4 (La. App. 1st Cir. 4/9/03), 858 So.2d 451, 453.

In this case, there is nothing in the record before us to show that the Dexters received written notice—from their attorney or the court—of the hearing on the motion for summary judgment. "[I]f Rule 9.13 is to have any practical force and effect, justice dictates that any judgment rendered at a trial [or hearing] held after its violation is subject to review for possible constitutional invalidity, if actual prejudice results to the client." **Spiers**, 2004-2189 at p. 13, 927 So.2d at 1166. In this case, the Dexters suffered "actual prejudice," as summary judgment was rendered against them and they were cast with court costs and attorney fees in the amount of $5,235.00.

Therefore, because the record before us does not reflect that the Dexters received adequate notice of the hearing on the motion for summary judgment after the inappropriate withdrawal of their counsel of record, we vacate the August 24, 2007 judgment of the trial court in accordance with Uniform Court of Appeal Rule 2-16.1(B) and remand for a new hearing on Mr. Laurent's motion for summary judgment, written notice of which shall be properly provided to the Dexters in accordance with the views expressed in this opinion.[2]

Costs of this appeal are assessed 50% to appellants, William Dexter, Jr. and Michelle L. Usey Dexter, and 50% to appellee, Robert J. Laurent, Sr.

JUDGMENT VACATED AND CASE REMANDED.

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[2] Because of our ruling on this issue, we pretermit discussion of the remaining assignments of error.

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McCLENDON, J., concurs and assigns reasons.

While I agree with the result reached by the majority, I believe that certain statements in the opinion might be misconstrued and should be clarified. The majority states that the defendants alleged a lack of **adequate notice**. This seems to imply that the defendants did not receive notice of the hearing on the motion for summary judgment and therefore were denied procedural due process. However, the defendants did not contend that they lacked actual notice of the hearing date and, in fact, the record indicates that they conceded notice of said hearing. In their motion for a new trial following the August 24, 2007 judgment, the defendants stated that when they received notice of the August 6, 2007 hearing date, their counsel was still enrolled and they believed that he was "taking any and all necessary steps to protect their interests by filing appropriate pleadings on their behalf." Thus, on appeal, the defendants asserted, not that they did not have any notice of the hearing, but rather that they were unaware of the need to oppose the summary judgment motion and that they were unaware that their attorney had not filed an opposition prior to his withdrawal. As a result, no opposition was presented in response to the motion for summary judgment, and said motion was granted.

Nevertheless, we note that the violation of Rule 9.13 resulted in actual prejudice to the defendants and that the record lacked proof of written notice to the defendants. Thus, based on the specific facts presented, I agree with the result reached by the majority and respectfully concur.