NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 0695

SHERWOOD LAKE ASSOCIATION, INC.

VERSUS

ROBERT J. DeANGELO AND CINDY L. DeANGELO

Judgment Rendered: September 12, 2008.

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Appealed from the 19th Judicial District Court
Parish of East Baton Rouge,
State of Louisiana
Suit Number 537,987

The Honorable Curtis A. Calloway, Judge

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Elliott W. Atkinson, Jr. Baton Rouge, La.	Counsel for Plaintiff/Appellee, Sherwood Lake Association, Inc.
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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C.J.

This is an appeal from the grant of a permanent, mandatory injunction enforcing subdivision building restrictions and ordering the defendants to restore their garage to a condition in which it can be used for parking cars. The plaintiff answers the appeal, seeking additional attorney fees for work necessitated by the appeal. For the reasons that follow, we amend the judgment of the trial court and affirm the judgment as amended.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2005, Sherwood Lake Association, Inc., d/b/a Lake Sherwood Council (Sherwood Lake Association), a duly incorporated homeowners association for the Lake Sherwood Acres subdivision, acting through the Lake Sherwood Council (the Council), filed suit against Robert J. DeAngelo and Cindy L. DeAngelo (the DeAngelos) seeking a declaratory judgment and a permanent, mandatory injunction enforcing its building restrictions. Specifically Sherwood Lake Association sought to enjoin the DeAngelos from using their garage as a recreation room. The DeAngelos had purchased their home in 2003, subject to the subdivision's restrictions and protective covenants.

The DeAngelos filed an answer asserting that Sherwood Lake Association had waived its building restrictions by failing to enforce various restrictions in previous unrelated cases. The DeAngelos denied breaching any applicable restrictions or covenants and asserted that the restrictions are vague and unenforceable. The DeAngelos subsequently filed a reconventional demand, seeking a declaratory judgment stating that the restrictions pertaining to the use of their garage should be deemed terminated by abandonment.

At the conclusion of the October 18, 2007, trial, the trial court requested counsel submit findings of fact and conclusions of law. The trial court signed a judgment on December 14, 2007, in favor of Sherwood Lake Association, granting a permanent, mandatory injunction[1] directing the DeAngelos to restore their garage "to a condition where it can be used as a garage for parking for not less than two nor more than five automobiles in compliance with the building restrictions and covenants of record within sixty (60) days of the signing of [the] judgment." The trial court awarded reasonable attorney fees as stipulated by the parties, court costs, and judicial interest. The court dismissed the DeAngelos' reconventional demand at their cost and adopted the Sherwood Lake Association's findings of fact and conclusions of law as its written reasons for judgment. The DeAngelos' suspensive appeal of the judgment followed.

Part I, Section 1.3, of the Restrictions and Protective Covenants of Lake Sherwood Acres, provides for the power of the Council to review and vote to allow any changes or additions to residences in the neighborhood. Part I, Section 1.3, provides that no alteration of any kind may be made without approval in writing by a majority vote of the Council. It further provides:

> The Council shall have the right by majority vote to refuse to approve any such plans or specifications...which are unsuitable or undesirable in its opinion for aesthetic or other reasons, and, in so passing upon such plans, specifications and grading plans, the Council shall have the right to take into consideration the suitability of the proposed building or other structure and of the materials of which it is to be built, the Site upon which it is proposed to be erected, the harmony thereof with the

[1] Pursuant to La. Civ. Code art. 779, building restrictions may be enforced by mandatory and prohibitory injunctions without regard to the limitations of La. Code Civ. P. art. 3601, which requires a showing of irreparable injury, loss, or damage in order to obtain an injunction.

> surroundings, the anticipated costs of construction, the anticipated time to complete construction, and the effect of the building or other structure or improvement as planned on the outlook from the adjacent or neighboring properties.

Part II, Section 2.1, provides that all of the lots in the subdivision shall be used for none other than single family residential purposes "with usual and appropriate outbuildings and a private garage and/or carport designed to house no fewer than two (2) nor more than five (5) automobiles." Part II, Section 2.9 provides:

> No garage apartment shall be erected or permitted on any lot [and] no garage may be used as living quarters. However, a garage with living quarters may be erected for occupancy by servants domestic to the family residence on that lot.

Mr. DeAngelo testified at trial that some vehicles, such as his conversion van, are too large to fit in his garage. He indicated that he and his wife had never used the garage for parking their vehicles. He admitted that, on most days, there were three or four vehicles belonging to his family parked in his front driveway, in addition to any vehicles belonging to guests. He testified that in converting the garage to a recreation room, he removed the garage door, sheetrocked the walls and ceiling, and added insulation to the walls. He added slate flooring over the garage's concrete floor and a heat pump for heating and air-conditioning, independent of the air-conditioning system of the house. Additionally, he added double doors and windows to the brick wall facing the lake. According to Mr. DeAngelo, a licensed architect drew the plans, and Gehrig Construction was the contractor for the project. Mr. DeAngelo testified that he furnished the recreation room with a couch, large-screen television, four theatre chairs, air hockey table, bumper pool table, and coke machine. Additionally, he furnished the room with a small corner bar, without running water. Mr.

DeAngelo averred that the cost of the conversion totaled approximately $26,000. He testified that he obtained building permits for the project in October and that the conversion was completed approximately three months later, in January.

According to Mr. DeAngelo, in early November 2005, prior to beginning the conversion of his garage, his wife visited Leona Grotness, Chairperson of the Architectural Control Committee on the Council, to show her the plans and ask her to submit them to Sherwood Lake Association's Board of Directors (the Board) for approval. Having previously added improvements to his backyard, Mr. DeAngelo had experience in the procedure for obtaining authorization for proposed improvements to his property.

Ms. Grotness indicated to Mrs. DeAngelo that the conversion would violate subdivision restrictions. Thereafter, Ben Fort, President of Sherwood Lake Association, sent a letter by registered mail to the defendants on November 4, 2005, confirming that on November 2, 2005, Ms. Grotness had advised Mrs. DeAngelo that the design plans would not be approved. The letter further advised that the Council had voted against allowing the conversion of the garage. Mr. Fort stated in the letter that the defendants' plans were formally rejected, pursuant to the subdivision's restriction prohibiting the use of garages as living quarters. The letter invited the defendants to attend and speak to the Board members at the next regularly scheduled meeting to be held on November 7, 2005. The Board subsequently voted to deny approval of the plan.

Mr. DeAngelo testified that he continued work on the conversion of the garage despite the Board's denial of his request for approval of his plan.

He stated that he attended the meeting but felt that he was getting nowhere with the members because they had already resolved to reject his plan. On November 15, 2005, the DeAngelos' attorney sent a letter to Mr. Fort, advising that the DeAngelos believed they were within their rights to continue with their plans. Mr. DeAngelo testified at trial that, in the spirit of compromise, he reinstalled the original garage door to the front of the garage rather than installing the windows he had purchased to replace it. Although the door was no longer operable, it restored the appearance of a garage, in harmony with the rest of the neighborhood.

Mr. DeAngelo testified that while there are generally no cars parked in front driveways in the subdivision in the middle of the afternoon, many of his neighbors park their vehicles in their front driveways in the evening. Mr. Fort testified, to the contrary, that there are no cars parked in the front driveways of most homes in the subdivision, and it is rare to see a homeowner's car parked in the front driveway on a regular basis. Sherwood Lake Association presented in evidence photographs of houses and streets in Lake Sherwood Acres, reflecting several well-maintained houses with garages and no parked cars in front driveways or on the streets. Additionally, counsel for Sherwood Lake Association introduced evidence of the Association's website, which provides easy access to information about the subdivision, including the building restrictions.

Ms. Grotness averred that to her knowledge all 313 homes in the subdivision have either a garage or carport. She admitted that not every homeowner parks in his garage. She averred that she has not seen many other homes with cars parked in front, and she added that the defendants often have numerous cars parked in their front driveway. Donald Frattini, a

resident of the subdivision and member of the Board, testified that although there is no requirement that homeowners park in their garages, he rarely sees homes with numerous cars parked in front, as he often sees at the DeAngelos' home. Counsel for Sherwood Lake Association presented in evidence a photograph of the DeAngelos' home with four cars and one pickup truck parked in the front driveway. Mr. Fort testified that these vehicles were parked in front of the DeAngelos' house quite frequently.

LAW AND DISCUSSION

On appeal, the DeAngelos argue that the trial court erred in ordering them to restore the garage to a condition where it can be used for parking cars because the subdivision restrictions do not require homes to have garages or carports, nor do the restrictions require homeowners to park their vehicles in garages or carports. In addition, the DeAngelos contend that the judgment is incorrect in that it limits what items the DeAngelos can place in their garage, which decision is beyond the reach of the subdivision restrictions. Alternatively, the DeAngelos argue that the restrictions are no longer enforceable because they have been abandoned under La. Civ. Code art. 782.

Interpretation of Building Restrictions

The DeAngelos assert that building restrictions are to be strictly construed so as to allow property owners freedom to use their property as they see fit as long as they do not offend or become a nuisance to their neighbors. They argue that the building restrictions cannot govern how they use their property behind closed doors. The DeAngelos urge that any ambiguity in the restrictions must be interpreted in favor of the least

restrictive use of the property. They cite in support of their argument La. Civ. Code art. 783, which provides:

> Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable. *The provisions of the Louisiana Condominium Act, the Louisiana Timesharing Act, and the Louisiana Homeowners Association Act, shall supersede any and all provisions of this Title in the event of a conflict.* (Emphasis added.)

We note that Article 783 expressly acknowledges the Louisiana Homeowners Association Act, which became effective on June 16, 1999. According to La. R.S. 9:1141.4 of the Act, the existence, validity, or extent of a building restriction affecting any association property shall be *liberally* construed to give effect to its purpose and intent. Furthermore, as Sherwood Lake Association points out, the restrictions pertaining to garages, as applicable in the instant case, are not ambiguous and, therefore, do not require interpretation.

The DeAngelos contend that the restrictions pertaining to their garage are vague and outdated and, therefore, unenforceable. They point out, as an example, Part II, Section 2.9, of the restrictions, which provides that a garage may be used as living quarters for *domestic servants*. Sherwood Lake Association counters that this antiquated exception, which is no longer in use by any homeowners in the subdivision, does not invalidate the general prohibition against a homeowner's use of his garage as part of the living area of his home. Sherwood Lake Association notes that the exception allows a domestic servant to live in "a garage with living quarters," rather than a garage that has been entirely converted into a room of the house.

The DeAngelos contend they have satisfied the interest of the Council in keeping an appearance of harmony in the neighborhood by reinstalling the

garage door, although the door is no longer operable. They argue that the position taken by Sherwood Lake Association and its Council is inconsistent with the professional opinion of the licensed Louisiana architect, Larry O'Neal Johnson, who is a member of the Board and to whom Sherwood Lake Association regularly looks for architectural advice. Mr. Johnson was the only member of the Board who abstained from a vote on the DeAngelos' plan to convert their garage into a recreation room, the other nine members voting against granting approval for the project. Mr. Johnson testified at trial that he did not feel the Board had authority to govern the indoor use of the DeAngelos' garage. Mr. Johnson stated that, with the exception of homeowner's dues, all of the subdivision restrictions allow for flexibility in enforcement. He stated that he believed the DeAngelos' changes to their garage did not detract from the attractiveness of the neighborhood and added value to the DeAngelos' home.

As Sherwood Lake Association points out, the DeAngelos did not tender Mr. Johnson to the court as an expert witness, and Mr. Johnson was not recognized by the court as an expert. The DeAngelos presented no credentials to the court to qualify Mr. Johnson to give an expert opinion regarding the application of the building restrictions to the conversion of their garage, which is an issue largely unrelated to architectural expertise. Furthermore, there was no evidence presented at trial reflecting that the Board ever called upon Mr. Johnson for his architectural expertise in the instant matter.

Selective Enforcement

The DeAngelos contend that the instant suit is the first and only lawsuit filed by Sherwood Lake Association attempting to enforce a building

restriction against a subdivision homeowner. They argue that Sherwood Lake Association is attempting to selectively enforce a building restriction only against them. They allege that there are numerous ongoing violations of the subdivision restrictions that have not been enjoined, including the improper parking of mobile homes and trailers, the construction of a metal-roofed carport, and large structures built over the neighborhood lake.

Initially we note that the testimony of Sherwood Lake Association's witnesses reflects that there has been at least one other lawsuit filed by the Association to enforce a building restriction. Furthermore, according to the testimony of Sherwood Lake Association's witnesses, most of the violations alleged by the DeAngelos can be explained. For example, there was no evidence that the mobile homes and trailers, cited by the DeAngelos, are parked too close to the respective property lines so as to violate subdivision restrictions.

According to La. Civ. Code art. 782, building restrictions terminate by abandonment of the whole plan or by a general abandonment of a particular restriction. Article 782 provides that when the entire plan is abandoned, the affected area is freed of all restrictions, and when a particular restriction is abandoned, the affected area is freed of that restriction only. The DeAngelos concede that Sherwood Lake Association has not generally abandoned all homeowner restrictions, pursuant to Article 782. They contend that Sherwood Lake Association has abandoned only the particular restrictions pertaining to garages. The DeAngelos argue that the restriction that garages may not be used as living quarters has been abandoned by Sherwood Lake Association's failure to require all homeowners to park in their garages rather than allowing them to park in front of their homes, using

their garages for storage and other purposes. Sherwood Lake Association counters that there is no restriction requiring homeowners to park in their garages and that the only restriction at issue in this case is the prohibition against a homeowner's using the garage as part of the living area of the home.

Abandonment of a particular restriction is predicated on a sufficient number of violations of that restriction in relation to the number of lots affected by it. **Belle Terre Lakes Home Owners Ass'n v. McGovern**, 2001-722 (La. App. 5 Cir. 1/29/02), 805 So.2d 1286, 1290, writ denied, 2002-0818 (La. 5/24/02), 816 So.2d 850. Once a violation of a building restriction has been established, the burden shifts to the violator to prove abandonment of a particular restriction. **Belle Terre Lakes**, 805 So.2d at 1290. To determine whether building restrictions have been waived, there are three areas of consideration: the number of violations; their character; and the adverse reaction of property owners to those violations. **Belle Terre Lakes**, 805 So.2d at 1290.

The DeAngelos have failed to present evidence of any instance in which the Council approved a homeowner's plan to convert his garage into living area, leaving his property with no functional garage. Ms. Grotness testified that, to her knowledge, each of the 313 lots in Lake Sherwood Acres has either a garage or carport. Ms. Grotness averred that she was aware of only one case in which a homeowner converted his garage into living area, and in that case, the homeowner added a new garage on his lot to replace the old garage. Mr. Frattini, Lake Sherwood Acres homeowner and Board member, testified that one homeowner had converted his garage into a den, and the Board was unaware of it because the garage door was kept

closed. The homeowner installed air-conditioning and carpeting in the garage. When the property was sold to a new owner, neighbors were able to see inside the garage for the first time. Mr. Frattini spoke to the new owner about the problem, and the new owner has since torn out the carpeting and is currently using the structure as a garage. Mr. Frattini averred that he is aware of one other instance in which a homeowner planned to convert his garage into a den. Mr. Frattini approached the homeowner, who told Mr. Frattini that he planned to carpet his three car garage and furnish it with a pool table. According to Mr. Frattini, the garage door is operable, and the homeowner stated that he was going to continue to use the structure as a garage. Mr. Frattini averred that the structure is currently a functioning garage.

The DeAngelos argue that even if there has been no abandonment in the subdivision of the garage usage restriction, there has been selective enforcement of the restriction in their case. According to the DeAngelos, numerous homeowners use their garages for storage rather than parking, and the Board does not attempt to stop these activities. Mr. Frattini testified that the Board is serious about enforcement of building restrictions and that he drives around the neighborhood weekly to check on compliance. He stated that whenever there is a potential violation, the Board acts upon it. According to Mr. Frattini, the Board does everything possible to avoid legal disputes with neighbors and usually is able to resolve concerns upon first contact with the homeowner.

Alternative Relief

The DeAngelos seek, as an alternative remedy, a remand of the matter with instructions that the trial court order them to restore the recreation room

to a garage only at such time as they decide to sell their home to a third party. They suggest as another possible remedy that the trial court order them to restore the garage door to an operable condition, allowing it to remain closed most of the time and allowing them to continue using the garage as a recreation room. The DeAngelos assert that Sherwood Lake Association would be satisfied with either of these remedies as a compromise to the dispute. However, the trial testimony of Sherwood Lake Association's witnesses reflects that the Board members have not reached a consensus that either of these remedies would be satisfactory.

Mr. Frattini testified at trial that although the Board attempts to amicable resolve building restriction disputes with homeowners in order to avoid litigation, he had been reluctant to authorize a compromise offer to the DeAngelos, allowing them to restore their garage door to operating condition and to keep their recreation room. Mr. Frattini averred that the offer was in fact extended to Mr. DeAngelo, and Mr. DeAngelo declined the offer. Mr. Frattini testified that the Board should never have made the offer because it was in violation of the building restrictions.

After a thorough review of the facts presented in evidence at trial, we find the trial court did not err in concluding that the DeAngelos are in violation of Lake Sherwood Acres Restrictions and Protective Covenants, Part II, Section 2.1 and Section 2.9. However, we find that the trial court's judgment imposes an inappropriate remedy. The building restrictions require each home have a "private garage and/or carport designed to house ... automobiles." Nowhere in the building restrictions is there a requirement that the homeowner park his vehicle(s) in the required garage or carport. The DeAngelo's home has a private garage designed to house automobiles

and, with a functioning garage door, the garage will satisfy Part II, Section 2.1 of the building restrictions. Part II, Section 2.9 specifically prohibits the construction of a garage apartment and the use of the garage "as living quarters." "Living quarters" is undefined in the restrictions, but as used in the context of Part II, Section 2.9, the phrase clearly refers to use of the garage as an apartment, either in its totality or with an apartment attached. This conclusion is bolstered by the exception to the restrictions for a "garage with living quarters" for domestic servants. A homeowner's decision to place items in his garage behind a functioning garage door is beyond the reach of the subdivision restrictions. In order to fully comply with the Sherwood Lake Association restrictions, the DeAngelos need only restore their garage door to an operable condition.

Pursuant to La. Code Civ. P. art. 2164, the appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The purpose of this article is to give an appellate court complete freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below. See **Jackson National Life Insurance Company v. Kennedy-Fagan**, 2003-0054 (La. App. 1st Cir. 2/6/04), 873 So.2d 44, 50 n. 6, writ denied, 2004-0600 (La. 4/23/04), 870 So.2d 307. Accordingly, we amend the trial court's judgment to order the DeAngelos to restore their garage door to an operable condition.

Attorney Fees Incurred in Taking the Appeal

Sherwood Lake Association timely answered this appeal, seeking amendment of the trial court's judgment to increase the award of attorney fees in light of the additional work undertaken in defense of this appeal. Attorney fees are not allowed except where authorized by contract or statute.

Smith v. State, Dept. of Transp. & Development, 2004-1317 (La. 3/11/05) 899 So.2d 516, 527. Section 1.3 of the restrictions specifically provides for reasonable attorney fees incurred in enforcing the restrictive covenant. The trial court's judgment awarded Sherwood Lake Association attorney fees in the amount of $7,072.50.

Additional attorney fees may be awarded on appeal when a party appeals, obtains no relief, and the appeal has necessitated additional work on the opposing party's counsel, provided the opposing party appropriately requests an increase. See **Roussell v. St. Tammany Parish School Board**, 2004-2622 (La. App. 1st Cir. 8/23/06), 943 So.2d 449,464. Because the DeAngelos have obtained some relief on appeal in the form of an amended judgment, we decline to award attorney fees to Sherwood Lake Association for the appeal.

CONCLUSION

In conclusion, the trial court judgment is amended in part to replace the language of Subsection I, ordering:

> That there be judgment herein in favor of SHERWOOD LAKE ASSOCIATION, INC. and against ROBERT J. DEANGELO and CINDY L. DEANGELO, granting a permanent mandatory injunction as prayed for directing defendants to restore the garage on Lot 22, Lake Sherwood Acres to a condition where it can be used as a garage for parking for not less than two nor more than five automobiles in compliance with the building restrictions and covenants of record within sixty (60) days of the signing of this judgment.

with the following language:

> That there be judgment herein in favor of SHERWOOD LAKE ASSOCIATION, INC. and against ROBERT J. DEANGELO and CINDY L. DEANGELO, granting a permanent mandatory injunction directing defendants to restore the garage door of their home located on Lot 22, Lake Sherwood Acres, to an operable condition.

The judgment, as amended, is affirmed. The answer to the appeal is denied.

The parties are to bear their own costs of this appeal.

JUDGMENT AMENDED; AFFIRMED AS AMENDED.