NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1311

EVELYN S. ROCKETT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, CAMERON ROCKETT

VERSUS

TODD JEROME NEUPERT AND DIANA SOLANO NEUPERT

C/W

NUMBER 2010 CA 1312

DIANA NEUPERT AND TODD NEUPERT

VERSUS

EVELYN S. ROCKETT, MOTHER OF CAMERON ROCKETT AND GERALDINE SHIRLEY HENKEL

Judgment Rendered: March 25, 2011

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Numbers 2005-001183 C/W 2006-002849
The Honorable Ernest G. Drake, Jr., Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This matter is before us on appeal by defendant/appellant, Geraldine Shirley Henkel, from an adverse judgment of the trial court. Plaintiff/appellees, Todd Jerome Neupert, Diana Solano Neupert, and Pamela Casse, filed an answer to the appeal. For the reasons that follow, we affirm, as amended, the judgment of the trial court. The answer to appeal is denied in part and granted in part.

FACTS AND PROCEDURAL HISTORY

The parties in these consolidated cases are neighbors on contiguous tracts of land in Tangipahoa Parish. Succintly stated, there has been protracted litigation among the various neighbors in connection with or challenging the use of a particular servitude across tracts of land owned by Casse and the Neuperts. Specifically, in 2004, Evelyn Rockett filed suit against the Neuperts when her son, Cameron, was bitten by the Neuperts' dog while Cameron was on the servitude (hereinafter referred to as the "Rockett dog-bite case"). This case was assigned docket number 2004-004176 and was allotted to Division "G" of the Twenty-First Judicial District Court before Judge Ernest G. Drake, Jr.

Then, in 2005, Rockett instituted an injunction proceeding against the Neuperts, which was assigned docket number 2005-001183 and was allotted to Division "G" of the Twenty-First Judicial District Court before Judge Ernest G. Drake, Jr. (hereinafter referred to as "the Rockett injunction suit"). The Rockett injunction suit was initially consolidated with the 2004 Rockett dog-bite case, but was later severed at Rockett's request. After a hearing, a permanent injunction was issued by Judge Drake in favor of Rockett and against the Neuperts on July 29, 2005.

The instant appeal arises from an injunction suit filed in 2006 by the Neuperts against Evelyn Rockett, individually and as the mother of Cameron Rockett, and Geraldine Shirley Henkel, wherein the Neuperts sought to enjoin

Rockett and Henkel from trespassing on their purported property and servitude. This case was assigned docket number 2006-002849 and was allotted to Division "H" of the Twenty-First Judicial District Court before Judge Zorraine Waguespack (hereinafter referred to as "the Neupert injunction suit").

Pamela Casse, another neighbor, filed a petition to intervene in the Neupert injunction suit and similarly sought injunctive and declaratory relief against the Rocketts and Henkel for trespass. At the parties' initial court appearance, Judge Waguespack advised counsel that the matter appeared to be a Division "G" case, and upon confirmation from the minute clerk, the matter was transferred and reset for hearing in Division "G." Thereafter, the litigation continued in Division "G," with a trial ultimately held on February 25 and 26, 2009.

On April 24, 2009, the trial court issued extensive written reasons for judgment wherein the court discussed, at length, the testimony and evidence presented. On June 1, 2009, a judgment was signed by the trial court in conformity with its written reasons, ordering that: (1) Pamela Casse, plaintiff, has a servitude of passage over and across the entirety of the "30-foot road r/w" at issue as denoted on the map of Ansil Bickford dated August 21, 1980; (2) a servitude of passage exists in favor of each contiguous parcel fronting the right-of-way over and across the "50 foot gravel road" and the "30 foot gr.rd" as denoted on the referenced map of Ansil Bickford dated February 11, 1977; and (3) the "30-foot road right of way encompasses the northern entirety of the northernmost 30 feet of Lots 1 and 2, and the easterly most 1/3 of the northernmost 30 feet of Lot 3, **and no further**" as denoted on a referenced exhibit. (Emphasis added).

The judgment further: (1) dissolved a preliminary injunction that had been previously issued by the court on October 16, 2006; (2) awarded judgment in favor of the Neuperts and Casse and against Shirley Henkel and Evelyn Rockett,

in solido, in the sum of $25,000.00 for "aggravation, irritation and attorney's fees";[1] (3) taxed as additional costs: (a) $1,058.00 for the abstract costs of Sandy Godail; (b) $9,447.00 for the survey expense of Sigma Associates for their survey work; and (c) $1,465.00 as the expert witness fees of Greg Breaux of Sigma Associates; and (4) assessed all costs of the proceeding and legal interest on the damage award to Shirley Henkel and Evelyn Rockett *in solido*.

On June 11, 2009, Henkel filed a motion for new trial. On October 19, 2009, the trial court signed a judgment denying the motion for new trial. On November 16, 2009, Henkel filed a motion for a suspensive appeal from the October 19, 2009 judgment. Henkel then filed an amended motion and order for a suspensive appeal on March 19, 2010, wherein Henkel specifically referenced her desire to appeal the June 1, 2009 judgment of the trial court on the merits. After other contested post-trial motions and hearings, including those related to the appellant's failure to post costs and the insufficiency of the bond, the instant appeal was lodged by Henkel.[2]

DISCUSSION

At the outset, we note that Henkel has not challenged the judgment on the merits, or findings of the trial court. Instead, on appeal, Henkel contends only that the trial court erred in allowing the consolidation of the Rockett injunction case (docket number 2005-001183) and the Neupert injunction case (docket number 2006-002849) in the absence of a contradictory hearing as required by LSA-C.C.P. art. 1561 and where the Rockett injunction case (docket number 2005-

[1]In its reasons for judgment, the trial court correctly noted that attorney's fees can be awarded as an element of damages for the dissolution of the wrongful issuance of a preliminary injunction pursuant to LSA-C.C.P. art. 3608.

[2]Evelyn Rockett did not join in the instant appeal.

001183) was no longer "pending" before the court.[3] In support, Henkel relies on Whitney National Bank v. R. E. Coleman, Inc., 2006-0453 (La. App. 1st Cir. 12/28/06) (unpublished opinion) and In re Dendinger, 99-1624 (La. App. 4th Cir. 7/21/99), 766 So. 2d 554.

As a general rule, a trial court has wide latitude with regard to the consolidation of suits pending in the same court. Boh v. James Industrial Contractors, L.L.C., 2003-1211 (La. App. 4th Cir. 2/11/04), 868 So. 2d 180, 187, writ denied, 2004-0456 (La. 3/5/04), 869 So. 2d 801. Consolidation of cases wherein the court finds that common issues and facts and law predominate and that judicial economy will be served by the consolidation has been allowed under LSA-C.C.P. art. 1561. Francois v. Gibeault, 2010-0180, 2010-0181 (La. App. 4th Cir. 8/25/10), 47 So. 3d 998, 1002. Because the trial court's power to consolidate under article 1561 is discretionary, its decision is

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[3]The following pertinent articles govern the transfer and consolidation of cases in the district court:

Louisiana Code of Civil Procedure article 253.2 provides, in part:

> After a case has been assigned to a particular section or division of the court, it may not be transferred from one section or division within the same court, unless agreed to by all parties, or unless it is being transferred to effect a consolidation for purpose of trial pursuant to Article 1561.

Moreover, Louisiana Code of Civil Procedure article 1561 provides, as follows:

> A. When two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions for trial after a contradictory hearing, and upon a finding that common issues of fact and law predominate. If a trial date has been set in any of the subsequently filed actions that have not yet been consolidated, then the written consent of each section or division of the court shall be required.
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> B. Consolidation shall not be ordered if it would do any of the following:
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> (1) Cause jury confusion.
> (2) Prevent a fair and impartial trial.
> (3) Give one party an undue advantage.
> (4) Prejudice the rights of any party.

reviewed under an abuse of discretion standard. Francois v. Gibeault, 47 So. 3d at 1002.

The instant case, i.e., the Neupert injunction case (docket number 2006-002849) was originally assigned to Judge Waguespack, in Division "H" of the Twenty-First Judicial District Court. According to a minute entry in the record, when the parties and their respective counsel appeared in court in Division "H" on October 10, 2006, on a rule for costs and sanctions, Judge Waguespack advised counsel that the matter appeared to be a Division "G" case. The minute clerk confirmed that the matter should have been assigned to Division "G," advised the parties that the matter would be transferred to Division "G," and gave the parties notice of a new hearing date in Division "G."[4] Neither the parties nor their respective counsel objected. In fact, active litigation, including pre-trial proceedings, a full two-day trial on the merits, and post-trial proceedings, thereafter commenced and continued in Division "G" for over three years without objection from the parties and without any request to set the matter for contradictory hearing. Notably, the first objection to consolidation appearing of record herein is in Henkel's presentation as an "issue for review" in the instant appeal.

A party is deemed to have waived its right to object to the consolidation or interdivisional transfer of a case when it acquiesces to the forum at the trial level. Oliver v. Cal Dive International, Inc., 2002-1122 (La. App. 1st Cir. 4/2/03), 844 So. 2d 942, 949, writs denied, 2003-1230, 2003-1796 (La. 9/19/03), 853 So. 2d 638, 648; Garrett v. Universal Underwriters, 586 So. 2d 727, 728-729 (La. App. 3rd Cir. 1991); and LaBouisse v. Orleans Cotton-Rope Manufacturing Company, 43 La. Ann. 582, 584, 9 So. 492, 493 (La. 1891). See, in particular, Marcotte v.

[4]Although the record is devoid of a motion to consolidate by the parties, a "Scheduling Order" filed by the trial court on November 7, 2007, appears in the record and bears a caption showing the Rockett injunction suit as consolidated with the Neupert injunction suit.

Travelers Insurance Company, 236 So. 2d 587, 590 (La. App. 1st Cir. 1970), aff'd, 258 La. 989, 249 S. 2d 105 (1971) (where this court found that an objection to the consolidation of cases made to the trial court at the **midway** point of a trial on the merits came too late). Thus, on the record before us, we are unable to find an abuse of discretion by the trial court to warrant our vacating the judgment. As the record reflects, Henkel failed to timely object to the consolidation of these cases and acquiesced to the forum below; thus, she waived any right to object. Moreover, she cannot now object for the first time on appeal. Further, to the extent that Henkel relies on Whitney National Bank and In re Dendinger, we find that these cases are distinguishable from the facts of the instant case as the parties in Whitney National Bank and In re Dendinger did not agree to or acquiesce in the consolidations and, instead, timely asserted objections to the consolidations to the trial court.

Accordingly, Henkel's assignment of error, challenging the judgment on this basis, lacks any merit.

ANSWER TO APPEAL

Todd Jerome Neupert, Diana Solano Neupert, and Pamela Casse (collectively referred to hereinafter as "the appellees") filed an answer to the appeal contending that the judgment at issue on appeal should be modified to increase the amount of damages and attorney's fees awarded to the appellees and that Henkel's appeal should be dismissed at her cost for the following reasons:

1. The June 1, 2009 judgment of the trial court failed to award appellees sufficient damages to compensate them for their loss;
2. The trial court failed to award appellees sufficient attorney fees in its June 1, 2009 judgment;

3. The trial court should have dismissed the appeal based upon appellant's failure to timely pay the costs of the appeal in the amount set forth in the July 6, 2010 judgment;
4. The trial court failed to award appellees attorney fees in its July 6, 2010 judgment, when appellees were forced to test the bond of appellant and force the payment of costs by appellant; and
5. Appellant failed to appeal the judgment signed by the court on June 1, 2009.

At the outset, with reference to appellees' third and fourth contentions concerning alleged error in the trial court's July 6, 2010 judgment, we note that no appeal or review was sought regarding the July 6, 2010 judgment. Thus, the propriety of that judgment is not before us.

With regard to the appellees' fifth contention, wherein they argue that Henkel failed to appeal the June 1, 2009 merits judgment of the trial court, we likewise find no merit. On November 16, 2009, Henkel filed a motion for a suspensive appeal from the October 19, 2009 judgment of the trial court denying her motion for new trial. Moreover, in her amended motion and order for a suspensive appeal, Henkel specifically referenced her desire to appeal the June 1, 2009 merits judgment.

The denial of a motion for new trial is an interlocutory and non-appealable judgment. McKee v. Wal-Mart Stores, Inc., 2006-1672 (La. App. 1st Cir. 6/8/07), 964 So. 2d 1008, 1013, writ denied, 2007-1655 (La. 10/26/07), 966 So. 2d 583. The Louisiana Supreme Court has instructed us, however, to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits when it is clear from the appellant's brief that the appeal was intended to be on the merits. Carpenter v. Hannan, 2001-0467 (La. App. 1st Cir. 3/28/02), 818 So. 2d 226, 228-229, writ denied, 2002-1707 (La. 10/25/02), 827 So. 2d 1153. In

addition to Henkel's intentions set forth in her first amended motion to appeal, it is also clear from Henkel's brief that she intended to appeal the June 1, 2009 merits judgment. Thus, we have considered the appeal by reviewing the judgments accordingly. See Chaney v. Department of Public Safety & Corrections (Office of Motor Vehicles), 2009-1543 (La. App. 1st Cir. 3/26/10), 36 So. 3d 328, 330 n.1.

Appellees further contend that the trial court's award of $25,000.00 for damages and attorney's fees is insufficient, where the evidence produced at trial showed that appellees' attorney's fees alone were $24,732.50 as of the day before trial. Appellees contend that thereafter, they spent twenty hours in trial and in trial preparation during the two-day trial on the merits, and then eight hours in preparation of the post-trial brief, with ten hours of paralegal/research time at the rate of $75.00 per hour. Further, appellees contend that additional time was spent in preparation of their defense to the motion for new trial and "policing" the appeal through various post-trial court motions concerning the sufficiency of the bond and the proper judgment on appeal, with attendant attorney's fees incurred at the rate of $200.00 per hour. As such, appellees request that the portion of the award representing attorney's fees be increased by the amount of $25,000.00.

Further, citing Henkel's trespass, constant harassment, overt conduct and underlying actions herein in attempting to assert control over the servitude, and the emotional distress suffered as a result, the appellees request that this court increase the general damage award to $100,000.00 to Casse and $50,000.00 each to Todd and Diana Neupert. On review, we decline to award appellees the additional damages sought in the answer to appeal.

However, we find that appellees are entitled to attorney's fees and costs from Henkel for having to defend against Henkel's appeal. Appellees contend that Henkel's appeal is part of her ongoing efforts to harass the appellees and is

based on frivolous grounds that warrant attorney's fees for work spent in preparing an appellate brief to defend this appeal. On review, we agree and find that appellants are entitled to such pursuant to LSA-C.C.P. art. 2164.[5]

While we are mindful that LSA-C.C.P. art. 2164 is penal in nature and must be strictly construed, Assaleh v. Sherwood Forest Country Club, Inc., 2007-1939 (La. App. 1st Cir. 5/2/08), 991 So. 2d 67, 74, after reviewing the record and carefully considering the appeal filed by Henkel, we again note that Henkel did not assign error to the merits of the judgment rendered below. Instead, the only issue raised on appeal is her after-the-fact objection to the consolidation of these parties' ongoing disputes, which she clearly acquiesced in and never objected to below. Moreover, a review of the voluminous record, evidence and testimony shows that the record is replete with unnecessary delays caused by Henkel who has now interposed, via this appeal, an untimely issue that can only be regarded as included for the purpose of further delay and harassment of her neighbors. Accordingly, because we find merit, in part, to the answer to appeal, as the appellees seek and have demonstrated their entitlement to additional attorney's fees for the work necessitated by Henkel's frivolous appeal, we amend the judgment to award appellees an additional $2,500.00 in attorney's fees.

CONCLUSION

For the above and foregoing reasons, the June 1, 2009 judgment of the trial court is affirmed, as amended, to award an additional $2,500.00 in attorney's fees in favor of appellees, Todd Jerome Neupert, Diana Neupert, and Pamela Casse

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[5]Louisiana Code of Civil Procedure article 2164 provides as follows:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

and against appellant, Geraldine Shirley Henkel. In all other respects, the judgment is affirmed.

Costs of this appeal are assessed against the appellant, Geraldine Shirley Henkel.

AFFIRMED, AS AMENDED.