**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 2651**

**AVOCA, INCORPORATED**

**VERSUS**

**ERNEST SINGLETON**

Judgment rendered: June 8, 2007

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On Appeal from the 16th Judicial District Court
Parish of St. Mary, State of Louisiana
Docket Number 105,195; Division A
The Honorable Gerald B. Wattigny, Judge Presiding

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

Downing, J. concurs

**HUGHES, J.**

This appeal from an eviction suit challenges the dismissal on summary judgment of claims asserted by the defendant's intervening co-heirs, claiming an ownership interest in the property at issue and seeking to annul a 1970 judgment declaring plaintiff owner of the property. For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

On December 29, 1999, Avoca, Incorporated ("Avoca") filed the instant suit seeking to evict the named defendant, Ernest Singleton. Avoca alleged in its petition that it owns the immovable property at issue, which it leased to Ernest Singleton by means of a lease agreement dated August 7, 1984. Avoca further alleged that Mr. Singleton has occupied the premises, following the end of the initial one-year lease term, on a month-to-month basis, but that it sent Mr. Singleton a "Termination of Lease Agreement and Notice to Vacate" on November 15, 1999, with which he failed to comply.

Ernest Singleton filed an answer to the suit on February 11, 2000, denying the existence of a lease agreement with Avoca, and citing a 1982 federal court judgment allegedly finding an ownership interest in the property in "his father and other Singleton heirs."[1] Ernest Singleton further alleged that he occupied the land in question with the permission of "Carl Bauer and other heirs of the property." In conjunction with Mr. Singleton's answer, a separate "Reconventional Demand and Petition in Nullity" was filed on behalf of "the certain heirs and

[1] This federal court judgment was not made a part of the record on appeal and has not been cited to this court in support of appellants' position. Nor do we find such authority in the published opinion arising from the federal case, in which only Avoca is referenced as a landowner in interest. See **U.S. v. 101.88 Acres of Land, More or Less, Situated in St. Mary Parish, State of La.**, 616 F.2d 762 (5th Cir. 1980).

assigns of John M. Singleton, et al.,[2] as listed on exhibit "A"[3] alleging ownership of land situated in the Northeast ¼ of Section 36, Township 16, Range 13, located in St. Mary Parish.[4] Plaintiffs-in-reconvention further acknowledged the existence of a May 14, 1970 district court judgment in the matters designated **Avoca, Incorporated v. Hebert Singleton**, **Avoca, Incorporated v. Arthur Singleton**, **Avoca, Incorporated v. William Singleton, Jr.**, **Avoca, Incorporated v. Beatrice Tyler**, **Avoca, Incorporated v. Edward Porche**, **Avoca, Incorporated v. Mrs. Willie Singleton, et al.**, and **Avoca, Incorporated v. Calvin Singleton**, which

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[2] Ernest Singleton was not named as a party in the "Reconventional Demand and Petition in Nullity" even though both his answer and the reconventional demand were filed by the same attorney. Thus, the pleading does not constitute a "reconventional demand," which is a pleading filed by a defendant in the principal action, though additional parties may be joined therein. See LSA-C.C.P. arts. 1061 and 1064. Nevertheless, third parties may intervene in an action in accordance with LSA-C.C.P. art. 1091 et seq. We note that pleadings should be interpreted according to their true meaning and effect in order to do substantial justice, rather than interpreted according to their caption. **Alcorn v. City of Baton Rouge ex rel. Baton Rouge Police Dept.**, 2003-2682, p. 3 (La. 1/16/04), 863 So.2d 517, 519; **Katz v. Katz**, 412 So.2d 1291, 1293 (La. 1982); **Cook v. Matherne**, 432 So.2d 1039, 1041 (La. App. 1 Cir. 1983). Although we recognize that this pleading entitled "Reconventional Demand and Petition in Nullity" is actually an intervention filed by third parties, we will refer herein to the proponents of the pleading as "Plaintiffs-in-Reconvention" merely to be consistent with the terminology used by the district court.

[3] Thirty-two persons were listed as plaintiffs-in-reconvention: Reverend Harold H. Henderson, Sr., Louis Henderson, Mary Ann Bogen, Wayne J. Henderson, Edward Henderson, Lionel Henderson, Theresa Gaskins, Curtis Henderson, John Henderson, George Henderson, Willie Henderson, Marrell Henderson, Louis Henderson, Hilda M. Henderson Jones, Brenda Ledet, Diana Hill, Linda Riley, Celestine Washington, Sonya Washington, Joyce A. Washington, Joseph Washington, John Washington, David Washington, Jr., Mildred Washington Levy, Doloris S. Short, Edward Henderson, Yolanda Henderson-Banks, Janet Henderson, Juanita Toups, Carl Bauer, Arthur Singleton, and Erica Singleton.

[4] On December 11, 2000, thirty-four additional persons filed a "Petition of Intervention" alleging to be descendants of the "original owners" and that they were "co-owners ... with the defendant ... and his ancestor in title" of the property at issue in the case. An amended pleading was filed on February 2, 2001, reducing the number of these intervenors to the following twenty-two persons: Martha Joseph, Betty R. Young, Marion Murray, Diann S. Johnson, Rev. Larry Singleton, Mary C. Johnson, Mary B. Johnson, Delicia Lewis, Rose Mary Jackson, Sidney Madise, Sr., Arthur Bailey, Yvonne Morris, Herbert Singleton, Elaine Singleton, Louise Singleton, Monica Madise, Celestine Mouton, Dorothy Bolden, Audrey Howard, Mary Lee Vining, Mathilda Harris, and Rayfield Richardson. These intervenors further alleged that "title to the immovable property ... has vested in them as descendants of the original owners by title" and that they were in possession of the property. In response to this intervention, Avoca raised a dilatory exception of vagueness. A minute entry appears in the record dated February 9, 2001, indicating that the trial court granted Avoca's exception of vagueness and ordered the pleadings amended within sixty days "in default thereof, the matter will be dismissed." A judgment was signed on January 29, 2003, so stating. The record presented to this court on appeal does not reflect that this "Petition of Intervention" has ever been amended as ordered by the district court. Further, the attorney of record for these intervenors withdrew from representation of these intervenors in January 2003, stating she had not been kept apprised by her clients of their current addresses. No subsequent pleading appears in the record presented on appeal filed by these intervenors.

recognized Avoca as owner of the property in question. However, it was further alleged that neither Avoca nor "the Singleton heirs and assigns had good title to the land in 1970" as the Northeast ¼ of Section 36, Township 16, Range 13 was owned by the State of Louisiana by virtue of a May 1908 tax sale. Plaintiffs-in-reconvention asserted, essentially, that the State has held title to the property since that time until February 7, 2000, when it was redeemed "by Counsel on behalf of his clients," and that no person could adversely possess against the State or lease State property.

In response, Avoca filed peremptory exceptions of prescription and res judicata on March 6, 2000, asserting that the time for bringing an action in nullity had passed, and that the original May 1970 judgment, which had not been appealed,[5] was res judicata as to the issues raised by plaintiffs-in-reconvention.

The district court signed a judgment of eviction on June 7, 2000 ordering Ernest Singleton to vacate the premises. The judgment of eviction was affirmed by this court in **Avoca, Incorporated v. Ernest Singleton**, 2000-2015 (La. App. 1 Cir. 11/9/01) (unpublished), wherein this court stated:

> After considering the evidence in the record, the trial court found that the testimony established by a preponderance of the evidence that (1) Avoca had record title to the property on which Singleton resided, (2) Singleton had entered into a lease of the property with Avoca in 1984, and (3) Singleton had no right to be on the property following the termination of the lease by Avoca. After considering the trial court's assessment of credibility and apparent choice between permissible views,

[5] Although the May 1970 judgment decreeing Avoca owner of the property was not appealed, the eviction of the parties occupying the premises with the permission of Willie Singleton, Avoca's lessee, was appealed. The evictions were affirmed by this court, which essentially held that the rights of these possessors terminated with those of Willie Singleton. See **Avoca, Inc. v. Calvin Singleton, et al.**, 271 So.2d 630 (La. App. 1 Cir. 1972); **Avoca, Inc. v. William Singleton, et al.**, 271 So.2d 633 (La. App. 1 Cir. 1972); **Avoca, Inc. v. Arthur Singleton, et al.**, 271 So.2d 633 (La. App. 1 Cir. 1972); **Avoca, Inc. v. Hebert Singleton**, 271 So.2d 633 (La. App. 1 Cir. 1972); **Avoca, Inc. v. Beatrice Tyler**, 271 So.2d 634 (La. App. 1 Cir. 1972); **Avoca, Inc. v. Mrs. Willie Singleton, et al.**, 271 So.2d 634 (La. App. 1 Cir. 1972).

> we conclude that these findings are reasonably supported by the record and are not manifestly erroneous. Furthermore, Singleton does not dispute that he received written notice to vacate on November 16, 1999. Thus, we find no error in the trial court's finding that Avoca had met its burden of proof in accordance with LSA-C.C.P. art. 4701. See LSA-C.C.P. art. 4732.

Thereafter on March 27, 2001, the district court granted Avoca's exception of res judicata, holding that the prior 1970 judgment declaring Avoca to be the owner of the property at issue precluded relitigation of the issue in the instant suit. An appeal was taken and the judgment was reversed, with this court concluding that "a judgment cannot be res judicata to a suit to annul it." **Avoca, Incorporated v. Ernest Singleton**, 2001-2244 (La. App. 1 Cir. 10/2/02) (unpublished).

Thereafter on December 20, 2002, Avoca filed exceptions and an answer to the reconventional demand and petition in nullity, asserting: plaintiffs-in-reconvention failed to join a party or parties in accordance with LSA-C.C.P. art 641, that no cause of action had been stated under LSA-C.C.P. art. 2001 et seq., that the property at issue in the reconventional demand was the same property at issue in the 1970 judgment, and denying other allegations of the pleading. On February 3, 2003, the district court sustained Avoca's exception of no cause of action and ordered plaintiffs-in-reconvention to amend their petition to state of a cause of action.

The amendment, entitled "Reconventional Amending Petition After Answer Filed," was filed February 21, 2003, and named as plaintiffs-in-reconvention: Mrs. Willie Singleton, Sr., et al. (sic), William Singleton, Jr., Herbert Singleton, Author Singleton, Edward Porche, Calvin Singleton, the heirs of Beatrice Tyler, Beatrice Singleton Johnson, Colestine Tyler Batise, Henry Tyler, Louise Tyler Hamilton, Leola Tyler Adams, Ernest Tyler, Betty Tyler Washington, and Joseph Tyler; some of whom were original

defendants/plaintiffs-in-reconvention in the 1970 petitory action. These new plaintiffs-in-reconvention asserted fraud and ill practices in the attaining of the 1970 judgment. Plaintiffs-in-reconvention further named as a third party defendant The Meridian Resource Corporation ("Meridian")[6] so that Meridian could "defend its lease distributions after the filing of the redemption in February 2000[,] this reconvention action in nullity and this new petitory action for 162 acres in an existing oil and gas unit."

In response, Avoca reasserted its prior defenses, answers, and exceptions, and reasserted its ownership and possession of the premises. Meridian asserted numerous exceptions to the suit, which included lack of in personam jurisdiction, insufficiency of citation and service of process, vagueness, improper cumulation, failure to allege procedural capacity to sue, and failure to conform to the requirements of LSA-C.C.P. art. 891.

On May 2, 2003, Avoca filed a motion for partial summary judgment seeking to dismiss the action in nullity on the basis that no fraud or ill practices occurred within the meaning of LSA-C.C.P. art. 2004, and that the action in nullity was untimely.

On June 4, 2003, the district court issued reasons for judgment finding in favor of Avoca, granting the motion for partial summary judgment, ordering that the amended petition for nullity be dismissed, and declaring Avoca entitled to attorney's fees under LSA-C.C.P. art. 2004. Following a hearing to assess attorney's fees held August 22, 2003, the court rendered judgment in favor of Avoca for attorney's fees in the amount of $31,742.92.[7]

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[6] Meridian was incorrectly named in the amended reconventional demand as "Merdian Oil Company."

[7] Although Avoca argues in support of this award of attorney's fees in brief to this court on appeal, appellants have neither assigned as error nor raised the issue of the propriety of this award in brief to this court; therefore, it has not been considered in this opinion.

On July 28, 2004, the district court signed a partial summary judgment in favor of Avoca, finding that the original plaintiffs-in-reconvention (as listed hereinabove in footnote 3) had failed to amend their petition following the earlier court ruling sustaining Avoca's exception of no cause of action; therefore these original plaintiffs-in-reconvention were dismissed from the suit. The judgment further granted Avoca's motion for partial summary judgment calling for the dismissal of the amended reconventional demand "to the extent it seeks to nullify the May 14, 1970 [j]udgment," and assessing attorney's fees in the amount of $31,742.92 against the plaintiffs-in-reconvention named in the amended reconventional demand (Mrs. Willie Singleton, Sr., William Singleton, Jr., Herbert Singleton, Arthur Singleton, Edward Porche, Calvin Singleton, the heirs of Beatrice Tyler, Beatrice Singleton Johnson, Colestine Tyler Batise, Henry Tyler, Louise Tyler Hamilton, Leola Tyler Adams, Ernest Tyler, Betty Tyler Washington, and Joseph Tyler).

Avoca thereafter filed another motion for partial summary judgment, which was granted by the district court, and signed on June 27, 2005, dismissing all remaining claims asserted in the amended reconventional demand by Mrs. Willie Singleton, Sr., William Singleton, Jr., Herbert Singleton, Arthur Singleton, Edward Porche, Calvin Singleton, the heirs of Beatrice Tyler, Beatrice Singleton Johnson, Colestine Tyler Batise, Henry Tyler, Louise Tyler Hamilton, Leola Tyler Adams, Ernest Tyler, Betty Tyler Washington, and Joseph Tyler.

An appeal was subsequently filed by Ernest Singleton, Mrs. Willie Singleton, Sr., William Singleton, Jr., Herbert Singleton, Arthur Singleton, Edward Porche, Calvin Singleton, the heirs of Beatrice Tyler, Beatrice Singleton Johnson, Colestine Tyler Batise, Henry Tyler, Louise Tyler

Hamilton, Leola Tyler Adams, Ernest Tyler, Betty Tyler Washington, and Joseph Tyler, and "the heirs of William (Willie) Singleton as set forth on exhibit 'B.'"[8] Appellants assert the district court erred in dismissing the claims of the original petition-in-reconvention, those of the amending petition, and in its decision regarding the tax redemption issue.

## LAW AND ANALYSIS

Appellate Jurisdiction

It is the duty of a court to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. **Republic Fire and Casualty Insurance Company v. State of Louisiana Division of Administration, Office of State Purchasing**, 2005-2001, p. 11 n.5 (La. App. 1 Cir. 12/28/06), 952 So.2d 89, 96 n.5; **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716, p. 4 (La. App. 1 Cir. 4/30/03), 867 So.2d 715, 717; **McGehee v. City/Parish of East Baton Rouge**, 2000-1058, p. 3 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260.

In the instant case, appellants have asserted the right to appeal two partial summary judgments rendered in the district court. In general, partial judgments are appealable only when designated as such, as required by LSA-C.C.P. art. 1915(B), which provides:

> (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

[8] Exhibit "B" was first filed with the original reconventional demand and petition for nullity in conjunction with the allegation by plaintiffs-in-reconvention that "since 1982 some of the 187 heirs and assigns are deceased and the number of heirs and assigns affected by this proceeding have increased to an unknown extent. (See attached Exhibit "B")." We note that some of the original plaintiffs-in-reconvention (as listed in Exhibit "A" to the original petition-in reconvention and named hereinabove in footnote 3) were also listed in Exhibit "B;" however, most of the persons listed in Exhibit "B" were never made parties to this litigation.

> (2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the instant case, the June 27, 2005 partial summary judgment sought to be appealed was designated as a final judgment for purposes of appeal, while the July 28, 2004 judgment was not.

However, we do not find Article 1915(B) to be applicable in this matter and rather determine that the June 27, 2005 judgment is a partial final judgment as defined by Article 1915(A) since it dismisses all claims of the parties named therein, and as such is appealable without a specific designation under Article 1915(B)(1). See **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716 at pp. 4-11, 867 So.2d at 717-21. As a final appealable judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him, in addition to review of the final judgment. **Rao v. Rao**, 2005-0059, p. 6 (La. App. 1 Cir. 11/4/05), 927 So.2d 356, 360, writ denied, 2005-2453 (La. 3/24/06), 925 So.2d 1232; **Landry v. Leonard J. Chabert Medical Center**, 2002-1559, p. 5 n.4 (La. App. 1 Cir. 5/14/03), 858 So.2d 454, 461 n.4, writs denied, 2003-1748, 2003-1752 (La. 10/17/03), 855 So.2d 761.

Thus, even though the July 28, 2004 judgment may not have been an Article 1915(A) partial final appealable judgment, because the June 27, 2005 final judgment as to these parties is on appeal before this court, any adverse interlocutory rulings may be reviewed by this court as well. We therefore

conclude that this court has jurisdiction to review both judgments appealed herein.

Motion for Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial--New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Schroeder v. Board of Supervisors of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial

on that issue and summary judgment is appropriate. **Hines v. Garrett**, 2004-0806 at p. 1, 876 So.2d at 765-66.

Pursuant to Article 966(C)(2), the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. Moreover, as consistently noted in LSA-C.C.P. art. 967, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence that will establish that material facts are still at issue. **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

Action in Nullity

"The nullity of a final judgment may be demanded for vices of either form or substance, as provided in Articles 2002 through 2006." LSA-C.C.P. art. 2001.

A final judgment shall be annulled if it is rendered: (1) against an incompetent person not represented as required by law; (2) against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken; (3) by a court which does not have jurisdiction over the subject matter of the suit. Except as otherwise provided in Article 2003, an action to annul a judgment on the grounds listed in this Article may be brought at any time. LSA-C.C.P. art. 2002.

A defendant who voluntarily acquiesced in the judgment, or who was present in the parish at the time of its execution and did not attempt to enjoin its enforcement, may not annul the judgment on any of the grounds enumerated in Article 2002. LSA-C.C.P. art. 2003.

A final judgment obtained by fraud or ill practices may be annulled. An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices. The court may award reasonable attorney fees incurred by the prevailing party in an action to annul a judgment on these grounds. LSA-C.C.P. art. 2004.

In the instant case, plaintiffs-in-reconvention sought to annul the 1970 judgment finding ownership of the property at issue in Avoca on the basis of fraud and ill practices. The following criteria have been established for an action in nullity on this basis: (1) that the circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief, and (2) that the enforcement of the judgment would have been unconscionable and inequitable. **Wright v. Louisiana Power & Light**, 2006-1181, p. 12 (La. 3/9/07), 951 So.2d 1058, 1067; **Kem Search, Inc. v. Sheffield**, 434 So.2d 1067, 1070 (La. 1983).

The nullity action was discussed in Frank L. Maraist, Honorable Harry T. Lemmon, 1 La. Civ. L. Treatise, Civil Procedure § 12.6 (footnotes omitted), as follows:

> A judgment ... may be annulled because it is subject to a "vice of substance," described in the Code as a judgment which was "obtained by fraud or ill practices." The fraud contemplated by the Code is that which was practiced upon the court in obtaining the judgment ... .
>
> The remedy of an action for nullity is not limited to cases of actual fraud or intentional wrongdoing, but encompasses all situations in which the judgment was rendered through an improper practice or procedure which operated, even innocently, to deprive the party cast in judgment of some legal right, if enforcement of the judgment would be "unconscionable and inequitable." The equitable nature of the remedy does not make for neat rules; each case stands on its facts. Some generalizations assist in the analysis.
>
> If the judgment appears contrary to the law and the evidence, the defendant may have been deprived of a legal right. However, the apparent incorrectness of the judgment, standing alone, should not merit annulment for ill practices. An action for nullity is not a substitute for a tardy party's defense on the merits or for a timely appeal. Thus, when plaintiff fails to present sufficient evidence ..., defendant must raise the issue in a motion for new trial or by appeal, and not by an action for nullity.
>
> * * *
>
> Another important factor in determining whether the judgment should be annulled when the defendant fails to appear and defend is whether the judgment was obtained in such a way as to offend the judicial process, i.e., whether there was a fraud on the court. Thus a judgment based upon fraudulent evidence ordinarily should be annulled. When the testimony was not fraudulent but incorrect, the decisions vary. If the plaintiff merely withheld testimony favorable to the defendant, the better view is that annulment is inappropriate.

Discovery of evidence that could have been presented at the original trial usually cannot serve as the basis for an action in nullity. Furthermore, even if new evidence is discovered after the judgment becomes final, despite the exercise of due diligence, that fact cannot be a basis for nullity of a judgment unless fraud was involved or unless the enforcement of the judgment would be inequitable and unconscionable. Otherwise, the finality of judgments would be seriously impaired. **Gladstone v. American**

**Automobile Association, Inc.**, 419 So.2d 1219, 1223 (La. 1982). Further, a party is not obliged to produce evidence favorable to the opponent or to present the opponent's version of the case, and the failure to disclose all information on the issue is not ill practice unless concealment or deceit is involved. Moreover, a party may present only his version of the occurrence, as long as he does not use false or perjured testimony or forged documents. **Id.**

In the instant case, the district court judge found no fraud or ill practices in the failure of Avoca to introduce certain evidence at the 1970 trial, which appellants contend showed possession of the property adverse to the claims of Avoca, noting that plaintiffs-in-reconvention were either aware or should have been aware of the existence of the evidence at the time of the earlier trial. We agree.

Plaintiffs-in-reconvention presented additional claims of fraud and ill practices to the district court, bearing on newly discovered, though ancient documents contained in the public records of St. Mary Parish. However, the discovery and presentation of evidence favorable to one's cause is the burden of the litigant to bear during trial; the documents at issue were available at the time the of the 1970 petitory action in this case and with reasonable diligence should have been discovered and procured in preparation of the case for trial. See **Gladstone v. American Automobile Association, Inc.**, 419 So.2d at 1223; Frank L. Maraist, Honorable Harry T. Lemmon, 1 La. Civ. L. Treatise, Civil Procedure § 12.6. Moreover defects in and/or issues regarding proof must be raised in a motion for new trial or by appeal, not by an action for nullity. See **National Income Realty Trust v. Paddie**, 98-2063, p. 3 (La. 7/2/99), 737 So.2d 1270, 1271; **Goodson v. Sills**, 470 So.2d 966, 969 (La. App. 1 Cir. 1985). It is imperative that courts

review a petition for nullity closely as an action for nullity based on fraud or ill practices is not intended as a substitute for an appeal or as a second chance to prove a claim that was previously denied for failure of proof; the purpose of an action for nullity is to prevent injustice which cannot be corrected through new trials and appeals. **Wright v. Louisiana Power & Light**, 2006-1181 at p. 13, 951 So.2d at 1068. See also **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 2001-0149, p. 5 (La. 10/16/01), 800 So.2d 762, 766.

In this case, Avoca contended in its motion for summary judgment that the action in nullity based on fraud and ill practices was without basis; thus it became the burden of plaintiffs-in-reconvention, in defense of the motion, to show a basis for their allegations of fraud and ill practices. After a thorough examination of the evidence presented, we conclude that the bases asserted by plaintiffs-in-reconvention amounted to assertions that, at most, Avoca had evidence within its possession that might have been helpful to the case of plaintiffs-in-reconvention and chose not to present it at trial. This does not amount to a "knowing concealment" by Avoca where, as here, plaintiffs-in-reconvention with reasonable diligence could themselves have ascertained those facts. Further, as to the documents of title allegedly adverse to Avoca, lately discovered by plaintiffs-in-reconvention, these documents were at all pertinent times discoverable within the clerk of court's records, and the failure of plaintiffs-in-reconvention or their counsel to do so prior to the original trial of the matter cannot now serve as the basis of a nullity action. See **Wright v. Louisiana Power & Light**, 2006-1181 at p. 14, 951 So.2d at 1068.

Having concluded the district court did not err in dismissing the action in nullity, we find it unnecessary to address Avoca's assertion that the nullity action was untimely filed.

Tax Redemption

Finally, appellants assert that a 1908 tax sale to the State of Louisiana of the property at issue has recently been redeemed on their behalf, pursuant to LSA-R.S. 47:2224, which provides, in pertinent part:

> If the owner or any person interested personally or as heir, legatee, creditor or otherwise, in any lots or lands bid in for and adjudicated to the state, as long as the title thereto is in the state or in any of its political subdivisions, or if not heretofore contracted to be sold by such subdivisions, shall pay to the treasurer of the state, the taxes, interests and costs and five per centum (5%) penalty thereon, with interest at the rate of one per centum (1%) per month until redeemed, the Register of the State Land Office, upon production of the treasurer's receipt, shall execute and deliver to such person a certificate of the same under the seal of his office, which, when duly recorded in the office of the recorder of mortgages of the parish wherein said property is situated together with the name of the person redeeming the same, shall be held and taken as evidence of the redemption of such land or lands... .

Redemption inures to the benefit of the tax record owner. See **Hebert v. Hollier**, 2006-1077, p. __ (La. 3/9/07), ___ So.2d ___, ___.

Nevertheless, we conclude that in the instant case the redemption of the tax sale does not change the outcome of the current litigation and is therefore irrelevant. The district court in its 1970 judgment declared Avoca had established better title to the property in question, without reference to the tax sale,[9] but rather based on its factual finding that the Singleton defendants/plaintiffs-in-reconvention and/or their ancestor-in-title had previously acknowledged that Avoca owned the property by entering into a

[9] The issue of property taxes was raised during the trial of the prior suit only in the context of the parties' assertion of payment of taxes in support of their respective claims of ownership. No testimony, evidence, or argument disclosed that the property was the subject of a prior tax sale to the state.

contractual agreement as lessee with Avoca as lessor. Because the 1970 decision was rendered without benefit of any evidence that the tax sale had occurred or that any of the parties had been thereby deprived of their rights in the property, the decision was rendered as if the tax sale had not occurred. Thus, the 1970 judgment in effect adjudicated the rights of the parties as if there had been no tax sale.[10] Since the 2000 tax redemption returned the parties to the status quo prior to the 1908 tax sale, the integrity of the 1970 judgment was unaffected.[11]

## CONCLUSION

For the reasons assigned herein, the judgment of the district court is affirmed; all costs of this appeal are to be borne by appellant.

**AFFIRMED.**

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[10] We note that the occurrence of the tax sale was also a matter of public record at the time of the 1970 litigation and was discoverable by the parties then. As with the other evidence appellants contend should have been presented to the district court during the 1970 trial, any defect in the record resulting from the failure of the parties to obtain evidence of the tax sale and present it to the district court should have been raised by motion for new trial or appeal from the judgment rendered in that suit.

[11] The absence of the State of Louisiana as a party to this litigation or the prior litigation between the parties is of no moment as the redemption of the tax sale by counsel for appellants terminated the ownership interest of the state.