

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

2021 CA 0577

LENFORD LYNN CUTRER, ET AL

VERSUS

NILA HOLTON ALEXIS AND CARLIN ALEXIS

Judgment rendered DEC 22 2021

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On Appeal from the  
Twenty-Second Judicial District Court  
In and for the Parish of Washington  
State of Louisiana  
No. 111308

The Honorable William H. Burris, Judge Presiding

\* \* \* \* \*

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**BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.**

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## **HOLDRIDGE, J.**

This appeal concerns whether the district court erred in granting the plaintiffs' partial motion for summary judgment, wherein they sought to add sixty-eight feet of additional footage to a servitude of passage that the district court had previously granted over the defendants' property to access their enclosed family cemetery. After a *de novo* review of the designation of this partial summary judgment as final, we conclude that the district court erred in so designating it. Accordingly, we dismiss the appeal and remand to the district court.

### **FACTS AND PROCEDURAL HISTORY**

On October 27, 2017, the plaintiffs, Linda Cutrer Short, Regina Gail Cutrer, and Lenford Lynn Cutrer (hereinafter collectively "the plaintiffs"), filed a petition seeking a servitude of passage over neighboring property that they alleged was owned by the defendants, Nila Holton Alexis ("Nila") and Carlin Alexis ("Carlin") (hereinafter collectively "the defendants"). The plaintiffs were trying to gain access to their family cemetery ("the cemetery") of 0.086 acres where their parents, two uncles, and an aunt were buried. The cemetery was enclosed and lacked access to the nearest public road, but since 1975, the plaintiffs and their family had always accessed it on a private road through the defendants' property, where there was a gate in the defendants' fence for this purpose.<sup>1</sup> The plaintiffs alleged that in December of 2016 the defendants advised them that they would no longer be allowed access to the cemetery through the defendants' property. The plaintiffs sought a perpetual predial servitude of passage approximately thirty feet wide pursuant to La.

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<sup>1</sup> According to the petition, the cemetery was within a larger tract of land that the plaintiffs had previously owned. The plaintiffs initially sold the property to Jerry A. Mixon and Tamra Moody Mixon on March 22, 1994, but failed to reserve the cemetery property and a servitude of passage in that sale. Subsequently, on February 20, 2008, the Mixons sold the property to Leon Alexis and Nila, who later executed an act of exchange of the cemetery back to the plaintiffs. Leon and Nila also donated a one-half interest in the property to Carlin on March 11, 2010.

C.C. art. 689, which allows the owner of an enclosed estate to claim a right of passage to the nearest public road over neighboring property.<sup>2</sup>

The plaintiffs filed an amending petition seeking to name Carlin and Berkley M. McKenzie as defendants and to remove Nila as a defendant, alleging that Nila had donated her interest in the property subject to the suit to Berkley after the original petition was filed. The district court signed the order that allowed the amending petition to be filed.<sup>3</sup> Carlin and Berkley answered the suit, alleging in part that the plaintiffs historically accessed and continued to access their cemetery through McGehee Cemetery, which was adjacent to their cemetery and to McGehee Road, a public road.

The plaintiffs filed their first motion for summary judgment, seeking a judgment that they were entitled to a predial servitude of passage over the property of Carlin and Berkley pursuant to La. C.C. art. 689, with a declaration that the servitude of passage across that property was the shortest and least injurious route. On April 10, 2019, the district court signed a judgment granting the summary judgment motion and granting the plaintiffs a perpetual predial servitude of passage over the property owned by Carlin and Berkley.<sup>4</sup> The court reserved ruling on whether this servitude is “with compensation and indemnity as provided in La. C.C. art. 689, or

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<sup>2</sup> Louisiana Civil Code article 689 states in pertinent part:

The owner of an estate that has no access to a public road or utility may claim a right of passage over neighboring property to the nearest public road or utility. He is bound to compensate his neighbor for the right of passage acquired and to indemnify his neighbor for the damage he may occasion.

<sup>3</sup> We note that an amending petition is not a substitute for a motion to dismiss. **Ferguson v. Brice**, 26,733 (La. App. 2 Cir. 5/12/95), 655 So.2d 711, 713. The proper procedural vehicle for plaintiffs to seek dismissal of causes of action is by filing a motion for voluntary dismissal. See La. C.C.P. art. 1671; **Kendrick v. Estate of Barre**, 2020-0474 (La. App. 4 Cir. 6/9/21), 323 So.3d 907, 914. However, we further note that the plaintiffs ultimately did seek a judgment against Nila.

<sup>4</sup> The judgment also grants a perpetual predial servitude of passage to Sharon Diane Cutrer Gaudet and Tammie Cutrer Miller as owners of the property. The judgment contained a legal description of the defendants’ property, the cemetery, and the servitude, but it did not contain the declaration that the servitude over the defendants’ property was the shortest and least injurious route as the plaintiffs had requested.

gratuitous as provided in La. C.C. art. 694.” Nila, Carlin, and Berkley took writs to this court, which did not consider the writ due to the relators’ failure to provide documentation that the writ application was timely filed under Rules 4-2 and 4-3, Uniform Rules of Louisiana Courts of Appeal, and to include a copy of each pleading on which the judgment, order or ruling was founded, including the petition, answer and any incidental demands, pertinent court minutes and the extended return date order, in violation of Rules 4-5(8), (10), and (11) of the Uniform Rules of Louisiana Courts of Appeal. **Cutrer v. Alexis**, 2019 CW 1054 (La. App. 1 Cir. 9/3/19), 2019 WL 4235499 (unpublished writ action).

Nila filed a petition of intervention and a petition for a temporary restraining order and a preliminary injunction on October 14, 2019. She alleged that the tract of land over which the plaintiffs obtained a judgment in their initial motion for summary judgment included one acre of land that she owned by excluding it from her donation of the larger tract of land to her sons Carlin and Kevin Alexis in 2010 and to her son Berkley in 2017. She sought a temporary restraining order and injunctive relief to prevent the plaintiffs from entering her property and constructing anything on it, and she also sought a judgment against the plaintiffs denying them the right of passage. The district court ordered that the petition for intervention be filed and set the injunctive relief for hearing.<sup>5</sup>

Subsequently the plaintiffs filed a motion for leave to file a second supplemental and amending petition for a servitude of passage wherein they added Nila as a defendant. The district court granted the motion. According to the petition, to reach the cemetery from Cutrer Lane, a public road, a person had to travel approximately sixty-eight feet across Nila’s property, then across the property of

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<sup>5</sup> In their answer to the petition for intervention and injunctive relief, the plaintiffs alleged that they had previously dismissed Nila as a defendant because Berkley and Carlin’s counsel represented to the plaintiffs’ counsel that Nila had donated all of her interest in the property and that she had no interest in the land involved in the suit.

Carlin and Berkley. Nila answered the petition wherein she asserted a reconventional demand seeking compensation and indemnity for damages if a servitude of passage was created pursuant to La. C.C. art. 689.

On September 1, 2020, the plaintiffs filed their second motion for summary judgment seeking a servitude of passage over 68.79 feet of Nila's property as the shortest and least injurious passage to the nearest public road. On December 16, 2020, the district court signed a judgment granting the motion for summary judgment, stating that the plaintiffs as owners of the cemetery were granted a perpetual predial servitude of passage over the property owned by Nila.<sup>6</sup> As with the earlier 2019 judgment, this judgment stated that the district court reserved ruling "on whether the perpetual predial servitude of passage and right-of-way is with compensation and indemnity as provided in La. C.C. art. 689, or gratuitous as provided in La. C.C. art. 694." The judgment also was designated as a final judgment for purposes of an immediate appeal as the court determined that there was no just reason for delay. From this judgment, Nila suspensively appeals.<sup>7</sup>

On appeal, Nila contends that the district court erred in granting the plaintiffs' motion for summary judgment because she demonstrated that genuine issues of material fact existed as to the suitability of the proposed servitude of access and whether it was the least injurious route to a public road.

### **APPELLATE JURISDICTION**

At the outset, we note that appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue.

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<sup>6</sup> As was the case with the earlier partial motion for summary judgment, the judgment also grants Sharon Diane Cutrer Gaudet and Tammie Cutrer Miller as owners of the property a perpetual predial servitude of passage. See footnote 3.

<sup>7</sup> We note that along with the suspensive appeal, the district court signed a consent judgment on January 13, 2020, whereby the plaintiffs were prohibited from entering Nila's property, making any construction on it or destroying it, pending further orders from the court. The parties entered into the consent judgment following a motion for new trial after a ruling in favor of the plaintiffs on their contempt motion and a hearing on Nila's request for a preliminary injunction.

**Advanced Leveling & Concrete Solutions v. Lathan Co., Inc.**, 2017-1250 (La. App. 1 Cir. 12/20/18), 268 So.3d 1044, 1046 (*en banc*). A partial summary judgment rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, may be granted in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties pursuant to La. C.C.P. art. 966(E). A judgment granted pursuant to La. C.C.P. art. 966(E) may be immediately appealed during ongoing litigation only if it has been designated as a final judgment by the district court after an express determination that there is no just reason for delay. See La. C.C.P. art. 1915(A)(3) & (B); **Bellevue Estates, LLC v. Knoll & Dufour Lands, LLC**, 2019-1394 (La. App. 1 Cir. 9/21/20), 315 So.3d 252, 258. Although the district court designated the partial summary judgment as a final one pursuant to La. C.C.P. art. 1915(B)(1), that designation is not determinative of this court's jurisdiction. Rather, this court's jurisdiction to decide this appeal hinges on whether the certification was appropriate. See **Bellevue Estates**, 315 So.3d at 258. Because the district court herein did not give reasons for the certification, this court must make a *de novo* determination of whether the certification was proper. **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122.

Historically, our courts have adopted and followed a policy against multiple appeals and piecemeal litigation. **R.J. Messinger, Inc.**, 894 So.2d at 1122. Thus, in considering whether a judgment is properly designated as final pursuant to La. C.C.P. art. 1915(B)(1), a court must take into consideration judicial administrative interests as well as the equities involved. See **Id.** The factors to be considered in determining whether a partial judgment should be certified as appealable include: (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might

be obliged to consider the same issue a second time; and (4) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. However, the overriding inquiry is whether there is no just reason for delay. *Id.* at 1122-1123.

Applying these precepts, we find on *de novo* review that the partial summary judgment before us on appeal was improperly certified as a final judgment pursuant to La. C.C.P. art. 1915(B)(1). The plaintiffs' motion for partial summary judgment herein requested judgment on a small part of the servitude of passage. However, the relationship between the adjudicated claim and the unadjudicated claims does not support the need for immediate review by appeal of this partial judgment. Rather, there are outstanding issues that must be adjudicated in the district court as to whether the plaintiffs "[are] bound to compensate [Nila and the other defendants] for the right of passage acquired and to indemnify [Nila and the other defendants] for any damage [they] may occasion" under La. C.C. art. 689.<sup>8</sup> Louisiana Civil Code article 694 provides for a gratuitous right of passage in certain circumstances, stating:

When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road or utility, and even if the act of alienation or partition does not mention a servitude of passage.

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<sup>8</sup> The right of passage for the benefit of the enclosed estate "shall be suitable for the kind of traffic or utility that is reasonably necessary for the use of that estate." La. C.C. art. 690. The owner of the enclosed estate "may construct" on the right of way "the type of road ... reasonably necessary for the exercise of the servitude." La. C.C. art. 691. Louisiana Civil Code article 692, which is entitled, "Location of passage," states in pertinent part, "The owner of the enclosed estate may not demand the right of passage ... anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road ... at the location least injurious to the intervening lands." Louisiana Civil Code article 692 directs the district court to "evaluate and determine that the location of the servitude of passage ... shall not ... significantly interfere with the operations of the owner of the servient estate or intervening lands prior to the granting of the servitude of passage ...."

The district court in the judgment on appeal and the judgment in the prior summary judgment motion reserved its right to rule on whether the servitude was with compensation and indemnity or was gratuitous, which is an issue also raised in Nila's reconventional demand.

Additionally, the district court previously ruled upon the plaintiffs' right of passage over Carlin and Berkley's property in the earlier summary judgment. Although they sought writs as to this judgment, this court did not consider the writ due to rule violations. Any review of the ruling in the second motion for summary judgment concerning a smaller section of the servitude of passage over Nila's property affects the ruling in the first motion for summary judgment, which involved a longer servitude of passage over Carlin and Berkley's property.<sup>9</sup> These claims are intertwined and center around the same set of operative facts that depend on each other for common resolution, such that they should not be separate on appeal.

In light of the unresolved compensation issues and the procedural posture of this case, we find that any ruling on the issue of a portion of the servitude of passage at this time would promote multiple appeals and piecemeal litigation, possibly requiring this court to consider the same issues in multiple appeals and causing delay and judicial inefficiency. Moreover, the defendants can seek appellate review of the issues presented herein in connection with a final judgment in this suit. Thus, judicial resources may be wasted by immediate appeal of this lone issue. Accordingly, on *de novo* review, we find that the district court erred in finding that there is no just reason for delay. Hence, we find that the district court improperly

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<sup>9</sup> At the hearing on the second motion for summary judgment, the district court stated, "I did look at this as a whole new summary judgment, despite my ruling on the summary judgment previously. ... [T]he more I went through it, the more I think I'm still right. The bottom line is, it is the shortest route." The district court stated that traveling through the defendants' open fields was the shortest and least injurious route and that the route through another adjacent cemetery, the McGehee cemetery, was not shorter or less injurious because one would have to maneuver around grave sites. The judge concluded, "So for the same reasons that I granted the original summary judgment, I grant this summary judgment."

designated the partial summary judgment at issue herein as final pursuant to La. C.C.P. art. 1915(B)(1).

We have the authority to exercise our supervisory jurisdiction and treat the appeal of this interlocutory judgment as an application for supervisory writ. La. Const. art. V sect. 10(A); La. C.C.P. arts. 2081 and 2201. We note that in the present matter, the motion and order for appeal was filed within the 30-day delay for seeking supervisory writs from the ruling of the district court. Uniform Rules-Courts of Appeal, Rule 4-3. The decision to convert an appeal to an application for a supervisory writ of review is within the discretion of an appellate court. **Stelluto v. Stelluto**, 2005-0074 (La. 6/29/05), 914 So.2d 34, 39. Judicial efficiency and fundamental fairness to the litigants can dictate that the merits of an application for supervisory writs be decided especially when the district court decision was arguably incorrect, a reversal would terminate the litigation (in whole or in part), and there is no dispute of fact to be resolved. See **Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc.**, 396 So.2d 878 (La. 1981) (per curiam). Finding that the issue of compensation is intertwined and an important factor in the servitude issue, we find that the criteria set forth in **Herlitz** are not met in this case, and we decline to exercise our supervisory jurisdiction. Accordingly, we decline to convert the appeal to an application for supervisory writs. Once a final judgment on the merits of this matter has been rendered and all issues are properly before this court on appeal, Nila can seek appellate review of this partial summary judgment. See La. C.C.P. art. 2083(A); see also **Kosak v. Louisiana Farm Bureau Casualty Insurance Company**, 2020-0222 (La. App. 1 Cir. 12/10/20), 316 So.3d 522, 530.

### CONCLUSION

For the above and foregoing reasons, plaintiff's appeal of the December 16, 2020 partial summary judgment is dismissed for lack of appellate jurisdiction. Costs

of this appeal are assessed one-half to the plaintiffs, Linda Cutrer Short, Regina Gail Cutrer, and Lenford Lynn Cutrer, and one-half to the defendant, Nila Holton Alexis.

**APPEAL DISMISSED.**