CHALMETTE AMUSEMENT COMPANY, INC.	*	**NO. 2007-CA-1512**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
LIONEL J. ALPHONSO D/B/A DE POPE LAUNCH & TAVERN, DE POPE LAUNCH & TAVERN, INC., J & R AMUSEMENT COMPANY, INC. AND LUCKY COIN MACHINE CO.	*	**STATE OF LOUISIANA**
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TOBIAS, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.

As I previously stated in *Historic Restorations, Inc. v. RSUI Indem. Co.*, 06-1178, pp. 1-3 (La. App. 4 Cir. 3/21/07), 955 So. 2d 200, 210-211 (Tobias, J., dissenting):

> Under Louisiana law, it is not possible to issue a mandatory preliminary injunction, because mandatory injunctions and preliminary injunctions have different procedural rules and different evidentiary burdens as a matter of law. [Footnote omitted.] A mandatory injunction, as opposed to a prohibitory injunction, compels a party to perform a specific action. *Denta-Max v. Maxicare La., Inc.*, 95-2128 (La. App. 4 Cir. 3/14/96), 671 So.2d 995, citing, *Bollinger Machine Shop & Shipyard, Inc. v. U.S. Marine, Inc.*, 595 So.2d 756, 758 (La. App. 4th Cir.), *writ denied*, 600 So.2d 643 (La. 1992); *Maestri v. Destrehan Veterinary Hosp.*, 554 So.2d 805, 808 (La. App. 5th Cir.1989); Werner *Enterprises, Inc. v. Westend Development Co.*, 477 So.2d 829, 832 (La. App. 5th Cir.1985).
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> In the case at bar, the judgment rendered by the trial court contains both prohibitory orders ("RSUI is enjoined ... from changing the terms, conditions, or premium for renewal of Policy No. NHD341277 ...") and a mandatory orders ("and is ordered to renew the same under the same terms and conditions and for the same premium as provided for in the existing policy"). [Footnote omitted.] However, insofar as RSUI is ordered to maintain an insurance policy for one year, it is clear that the trial court has ordered it to affirmatively do (i.e., perform an act) something, making it a mandatory injunction.

> We noted in *Denta-Max, supra*, that a mandatory injunction has substantially the same effect as a permanent injunction. *Denta-Max*, p. 3, 671 So.2d at 997. De facto, they are one and the same. A mandatory injunction may not issue absent a full evidentiary hearing, while a prohibitory preliminary injunction only requires a prima facie showing that the applicant for the writ will prevail on the merits. As the Louisiana Supreme Court has stated in *City of New Orleans v. Board of Directors of the Louisiana State Museum*, 98-1170, p. 11 (La.3/2/99), 739 So.2d 748, 756, citing, *Denta-Max v. Maxicare La., Inc.*, 95-2128 (La. App. 4 Cir. 3/14/96), 671 So.2d 995:
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> > A mandatory injunction may not be issued on a merely prima facie showing that the party seeking the injunction can prove the necessary elements; instead the party must show by a preponderance of the evidence at an evidentiary hearing that he is entitled to the preliminary injunction.
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> We held in *Denta-Max* that a mandatory injunction may not issue absent "a full trial on the merits in which the taking of evidence is not limited that [the petitioner] is entitled to the injunction." *Id.*, 95-2128 at p. 5, 671 So.2d at 998.
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> In *Dore v. Jefferson Guaranty Bank*, 543 So.2d 560 (La. App. 4th Cir.1989), this court held that the requirements for a mandatory injunction were met because the trial court "conducted an evidentiary hearing at which all parties were present, represented by counsel and were afforded the opportunity to present evidence and cross-examine witnesses." 543 So.2d at 562.

Since the parties stipulated that they were trying only the issue of a mandatory *preliminary* injunction, which as a matter of law does not exist, the trial court could not err as a matter of law in denying the mandatory preliminary injunction. Therefore, I would pretermit any other discussion of whether the trial court was correct in denying the preliminary injunction for same is merely dicta.

I disagree, however, with the majority's conclusion that because the reasons for judgment discuss only the preliminary injunction, the actual judgment rendered by the trial court did not dismiss the case in its entirety and only dismissed the request for the preliminary injunction.

The judgment of the trial court in pertinent part states:

> **JUDGMENT AND INCORPORATED REASONS FOR JUDGMENT**
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> * * *
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> IT IS ORDERED, ADJUDGED AND DECREED there be judgment herein in favor of Defendants, Lionel J. Alphonso, d/b/a De Pope Launch and Tavern, De Pop Launch and Tavern, Inc., J & R Amusement Company Inc. and against Petitioner, Chalmette Amusement Company, Inc., dismissing this action, with each party to bear their own cost.

First of all, contrary to the specific mandatory language of La. C.C.P. art. 1918, the reasons for judgment were made a part of the judgment. La. C.C.P. art. 1918 states:

> A final judgment shall be identified as such by appropriate language. When written reasons for the judgment are assigned, they **shall be set forth in an opinion separate from the judgment**. [Emphasis supplied.]

I do not understand how one can reasonably interpret the phrase "dismissing this action" in the trial court's judgment to mean anything other than all causes of action—the action for injunction in all respects.

Second, it is Hornbook Louisiana law that the language of the decree in the judgment controls over any reasons given in support of the decree. Dismissing the action and taxing costs at this stage supports the conclusion that the trial court intended to dismiss the action entirely. *See, e.g., Boykins v. Boykins*, 04-0999, p. 6 (La. App. 4 Cir. 4/24/07), 958 So. 2d 70, 75; *Hansel v. Hansel*, 00-1914, p. 13 (La. App. 4 Cir. 11/21/01), 802 So. 2d 875, 883, *writ denied* 01-3365 (La. 3/8/02), 811 So. 2d 880; *Edwards v. Saul*, 93-1802 n. 1 (La. App. 4 Cir/. 5/26/94), 637 So.2d 1258, 1259; *Kaufman v. Adrian's Tree Service, Inc.*, 00-2381, p. 3 (La. App. 4 Cir. 10/31/01), 800 So. 2d 1102, 1104, citing *Northshore Regional Medical Center v. Parish of St. Tammany*, 96-0717, p. 7 (La. App. 1 Cir. 12/20/96), 685 So.2d 614, 617, citing *First Progenitor, L.L.C. v. Lake Financial Services, Inc.*, 95-251, p. 5

(La. App. 5 Cir. 9/26/95), 662 So.2d 507, 509; *Dean Classic Cars, L.L.C. v. Fidelity Bank and Trust Co.*, 07-0935 n. 9 (La. App. 1 Cir.12/21/07), __ So. 2d__, __, 2007 WL 4463091*8, citing *Babin v. Burnside Terminal, Greater Baton Rouge Port Com'n*, 577 So. 2d 90, 98 (La.App. 1 Cir.1990); *Delahoussaye v. Bd. of Sup'rs of Community and Technical Colleges*, 04-0515, p. 13 (La. App. 1 Cir. 3/24/05), 906 So. 2d 646, 654; *Williams v. Enriquez*, 40,305, p. 9 (La. App. 2 Cir.11/17/05), 915 So. 2d 434, 440; *Taylor v. Bradner*, 05-970, p. 8 (La. App. 5 Cir. 4/25/06), 928 So. 2d 751, 755, citing *Sanford v. Sanford*, 468 So.2d 844, 845 (La. App. 1 Cir. 1985) and *Carner v. Carner*, 97-0128, p. 5 (La. App. 3 Cir. 6/18/97), 698 So.2d 34, 36.[1]

We look imprudent, possibly foolish, holding to the contrary in this case.

Two provisions of the Louisiana Civil Code are applicable to the case before us. La. C.C. art. 2714 states:

> If the leased thing is lost or totally destroyed, without the fault of either party, or if it is expropriated, the lease terminates and neither party owes damages to the other.

La. C.C. art. 2715 states:

> If, without the fault of the lessee, the thing is partially destroyed, lost, or expropriated, or its use is otherwise substantially impaired, the lessee may, according to the circumstances of both parties, obtain a diminution of the rent or dissolution of the lease, whichever is more appropriate under the circumstances. If the lessor was at fault, the lessee may also demand damages.
>
> If the impairment of the use of the leased thing was caused by circumstances external to the leased thing, the lessee is entitled to a dissolution of the lease, but is not entitled to diminution of the rent.

[1] The foregoing listing is merely illustrative of the rule that applies in all Louisiana circuit courts of appeal. Well over a hundred cases have held similarly.

Although the trial judge thought that the premises were totally destroyed by Hurricane Katrina, which would support his decision, that conclusion cannot be correct based upon the facts in the record before us. Mr. Alphonso elected to renovate the existing structure and after the renovations reopen his business. Did Mr. Alphonso and his lessor enter into a new lease because they deemed the old premises to be completely destroyed? The record is devoid of a copy of any lease agreement so that a court can examine its terms. La. C.C. arts. 2714 and 2715 impact any conclusion that a court must reach.

For the foregoing reasons, I respectfully dissent in the majority's holding that the trial court did not dismiss Chalmette Amusement's case in its entirety. I respectfully dissent from the conclusion of the majority that any discussion that we might have regarding La. C.C. arts. 2714 and 2715 would be advisory in nature for the trial court found that the premises were *de facto* destroyed, which terminated the lease between Mr. Alphonso and his lessor. In all other respects, I concur with the majority's opinion.