

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0771

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JFW

FARMCO, INC. AND BRENT A. BEAUVAIS

VERSUS

**ROBERT RAY MORRIS, FRANCES L. MORRIS,
JACQUELINE M. CREER, ZELOTES A. THOMAS,
KEITH E. MORRIS AND RONADA B. MORRIS**

**On Appeal from the 18th Judicial District Court
Parish of West Baton Rouge, Louisiana
Docket No. 35,646, Division "B"
Honorable J. Robin Free, Judge Presiding**

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Plaintiffs-Appellants
Farmco, Inc. and Brent A. Beauvais**

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Jacqueline M. Creer and
Zelotes A. Thomas**

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**Attorney for
Defendants-Appellees
Robert Ray Morris, Frances L. Morris,
Keith E. Morris, Ronada B. Morris
and Sugar West, Inc.**

BEFORE: PARRO, HUGHES,¹ AND WELCH, JJ.

Judgment rendered APR 10 2013

¹ Justice Jefferson D. Hughes III is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

PARRO, J.

Farmco, Inc. (Farmco) and Brent A. Beauvais (collectively, the plaintiffs) appeal a judgment recognizing that Robert Ray Morris, Frances L. Morris, Keith E. Morris, Ronada B. Morris, Zelotes A. Thomas, Jacqueline M. Creer, and Sugar West, Inc. (collectively, the defendants) have, by thirty-year acquisitive prescription and by destination of owner, acquired a servitude of passage over certain land in West Baton Rouge Parish owned by the plaintiffs. For the following reasons, we affirm the judgment in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

The property involved in this litigation is Tract D-4 on a map prepared by Wallace J. Hargrave in 1994 when the property was owned by Ashland Plantation, Inc. (Ashland). Tract D-4, now owned by the plaintiffs, consists of two 60'-wide passageways leading north to the back of Chamberlin Subdivision, one located between residential Lots 6 and 7 and the other between Lots 11 and 12, and another "headland" passageway perpendicular to those and running east-west along the back of all 18 lots in the subdivision. All of the subdivision lots front on Louisiana Highway 620, also known as "Section Road." The 60'-wide passageways are gravel roads leading north from Section Road and connecting with the headland strip. These roads are being used by the defendants and were used by their predecessors-in-title for access to their residences and to the agricultural property north of the subdivision.

The history of the property at issue is as follows. All of the parties trace their ownership interests back to common owners Kenneth H. Kahao (Mr. Kahao), J. King Woolf, Jr., and Charles B. Kahao, who owned in indivision a 691.6-acre tract in West Baton Rouge Parish fronting on Section Road. On October 30, 1969, they transferred all of their ownership interests in the property to Ashland in exchange for Ashland stock. In November 1976, Ashland, through its President, Mr. Kahao, mortgaged the property to secure a loan to Ashland and Mr. Kahao from the Federal Land Bank (FLB). In 1979, Ashland took out a second mortgage on the property with Farmers Home Administration (FHA) to secure another loan to Ashland and Mr. Kahao. In the early 1980's, Ashland decided to develop Chamberlin Subdivision along Section Road. To

make this development possible, in July 1983, the FLB released 71 acres of Tract D, including the 18 lots in Chamberlin Subdivision and the two 60'-wide passageways, from its mortgage. The FHA also released each of the Chamberlin Subdivision lots from its mortgage, but did not release the two 60'-wide strips.² In the final plat of Chamberlin Subdivision prepared for Ashland on April 2, 1984, by John K. Laws, Jr., the two 60'-wide strips were designated as "reserved for private access." Ashland continued to own about 410 acres of the agricultural property adjacent to and north of the subdivision. On February 4, 1987, Ashland granted a predial servitude over one of the 60'-wide strips to Roy G. and Irma P. Nugent, the previous owners of Lot 12, currently owned by Keith E. and Ronada Morris and Robert Ray Morris.³

In the early 1990s, Ashland and Mr. Kahao defaulted on their loans from the FLB and FHA; the property securing the debt to FLB was seized and sold by C.M.V., Inc., the holder of the first mortgage,⁴ to Sugar Plantation, L.L.C.⁵ in a U.S. Marshal's sale on June 19, 1997. This property, consisting of agricultural land adjacent to and north of Chamberlin Subdivision, was sold by Ashland Plantation, L.L.C. to Robert Ray and Frances L. Morris on December 28, 2000. The remainder of the property was seized by the FHA and sold at a U.S. Marshal's sale to Farmco and Beauvais on March 25, 1997. At that sale, the plaintiffs acquired five tracts of land, consisting of roughly 52 acres fronting on Section Road. As shown on the Hargrave map, those tracts included Tract D-4, the property in dispute, consisting of 2.48 acres.⁶

On July 26, 2006, the plaintiffs filed a petition for damages and rule for preliminary injunction against the defendants, seeking to enjoin them from using Tract D-4 and claiming that the defendants' unauthorized use of the property had rendered it

² Various other portions of the Ashland property were released from these mortgages over the years, as portions of the property were sold to other buyers.

³ Keith and Ronada Morris purchased Lot 12 on March 24, 1998; on October 26, 2006, they donated an undivided 1/2000th interest in Lot 12 to Robert Ray Morris. Lot 7 was acquired by Jacqueline M. Creer; Lot 11 was acquired by Zelotas A. Thomas, whose property was seized and sold at a sheriff's sale on October 27, 2011, to Sugar West, Inc., represented by Keith Morris.

⁴ The note evidencing the debt owed to FLB, secured by a first mortgage on the property, had been assigned to Farm Credit Bank of Texas and reassigned to C.M.V., Inc.

⁵ Sugar Plantation, L.L.C. later changed its name to Ashland Plantation, L.L.C.

⁶ Although the record does not show that the headland strip was released from the FLB mortgage, but retained in the FHA mortgage, that apparently was the case, since the sale to the plaintiffs included the headland strip.

unmarketable and caused financial loss to the plaintiffs. After a trial, the court granted the defendants' motion for involuntary dismissal and dismissed the plaintiffs' case. That judgment was appealed to this court. In a previous opinion, Farmco, Inc. v. Morris, 08-1996 (La. App. 1st Cir. 9/4/09), 21 So.3d 428, writ denied, 09-2165 (La. 12/11/09), 23 So.3d 919, this court concluded that the plaintiffs had established that they owned the property at issue, which precluded the trial court's involuntary dismissal of their action against the defendants for unauthorized use of their property. Therefore, this court reversed the dismissal of the plaintiffs' claims and remanded the case to the trial court for admission of certain expert testimony as to the plaintiffs' alleged damages and to allow the defendants to offer evidence to support their claim that they had acquired a servitude of passage over the property owned by the plaintiffs. Following that trial, the court ruled, in a judgment signed January 5, 2012, that the defendants had established that they had each obtained a servitude of passage by thirty-year acquisitive prescription and destination of owner. This appeal followed.

APPLICABLE LAW

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. The two estates must belong to different owners. LSA-C.C. art. 646.⁷ A servitude is imposed upon an "estate" or in favor of an "estate"; it is not imposed on the person or in favor of the person. Cazes v. Robertson, 421 So.2d 423, 425 (La. App. 1st Cir. 1982). A servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, utilities, or vehicles are permitted to pass through the servient estate. LSA-C.C. art. 705.⁸ This right of passage being in favor of immovable property is a "predial" servitude, i.e., a real right which is inseparable from the immovable to which it is attached, and one which remains the same regardless of any change of ownership of the estates owing or due the servitude. Cazes, 421 So.2d at

⁷ Title IV of Book II of the Louisiana Civil Code of 1870, which formerly contained LSA-C.C. arts. 646 to 822, relating to predial servitudes, was revised, amended, and reenacted by 1977 La. Acts, No. 514, § 1, effective January 1, 1978 (Act 514), to contain LSA-C.C. arts. 646 to 774. In this opinion, when referring to these articles, we will be using the wording of the current versions and will note only those amendments that changed the law.

⁸ The 1977 revision comments to Article 705 state that this provision is new and changes the law, in that there is no longer a distinction between urban and rural passage; the servitude is perpetual unless the title provides otherwise. The extent of the right is the same in cities and in the country; it is determined by the title creating the servitude. Article 705 was further amended by 2012 La. Acts, No. 739, § 1 to insert "utilities" in the first sentence and "or utility" in the second sentence.

425. The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it. LSA-C.C. art. 651; Coleman v. Booker, 46,890 (La. App. 2nd Cir. 6/13/12), 94 So.3d 174, 177, writ denied, 12-1983 (La. 11/9/12), 100 So.3d 847. A predial servitude is preserved by the use made of it by anyone, even a stranger, if it is used as appertaining to the dominant estate. LSA-C.C. art. 757; Palace Properties, L.L.C. v. Sizeler Hammond Square Limited Partnership, 01-2812 (La. App. 1st Cir. 12/30/02), 839 So.2d 82, 94, writ denied, 03-0306 (La. 4/4/03), 840 So.2d 1219. Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate. LSA-C.C. art. 730; Palomeque v. Prudhomme, 95-0725 (La. 11/27/95), 664 So.2d 88, 93.

Predial servitudes are either apparent or nonapparent. Apparent servitudes are those that are perceivable by exterior signs, works, or constructions, such as a roadway. LSA-C.C. art. 707. Apparent servitudes may be acquired by title, by destination of the owner, or by acquisitive prescription. LSA-C.C. art. 740;⁹ St. Charles Parish School Bd. v. P & L Inv. Corp., 95-2571 (La. 5/21/96), 674 So.2d 218, 221. Voluntary or conventional servitudes are established by juridical act, prescription, or destination of the owner. LSA-C.C. art. 654; Coleman, 94 So.3d at 177.

An apparent servitude may be acquired by peaceable and uninterrupted

⁹ The 1977 revision comment to Article 740 states:

(a) This provision is new. Under the 1870 Code, it is *continuous and apparent* servitudes that may be acquired by title, by destination of the owner, or by acquisitive prescription. Under Article 756, *apparent* servitudes may be acquired by prescription or by destination of the owner, even though they might be considered discontinuous under the regime of the 1870 Code and thus insusceptible of such modes of acquisition. A right of way servitude exercised by means of a railroad track or a paved roadway may be acquired by prescription and by destination of the owner.

The provision is not retroactive. Thus, the quasi-possession of a servitude that would be discontinuous under the prior law does not give rise to prescriptive rights except from the effective date of the new legislation. Prescription, however, commenced prior to the effective date of the new legislation for the acquisition of a servitude that would be continuous and apparent under the prior law continues to run. Upon accrual of the prescription, the right acquired will be that of an apparent servitude under the new legislation. (Bold emphasis added).

Under Article 727 of the 1870 Code, a servitude of passage was *discontinuous*, because its use depended on acts of man. In contrast, a servitude of drain was *continuous*, because water would continue to flow through such a servitude, regardless of the acts of man.

possession of the right for ten years in good faith and by just title. LSA-C.C. art. 742.¹⁰ A just title is a juridical act, such as a sale, exchange, or donation, sufficient to transfer ownership or another real right. The act must be written, valid in form, and filed for registry in the conveyance records of the parish in which the immovable is situated. LSA-C.C. art. 3483; see also Wetzel v. Khan, 00-1083 (La. App. 4th Cir. 9/19/01), 797 So.2d 122, 130-31, writ denied, 01-2804 (La. 1/4/02), 805 So.2d 202. "Title" refers to the method by which the servitude may be acquired and does not relate exclusively to the conveyance of the servient estate. It is a generic term which embraces any juridical act. Wetzel, 797 So.2d at 131, citing McGuffey v. Weil, 240 La. 758, 765, 125 So.2d 154, 157 (1960).

Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners. When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right. LSA-C.C. art. 741.¹¹ Article 741 does not require an express provision in order for a servitude by destination of the owner to exist, and once it comes into existence, it passes to the new owner of the property unless the former owner disavows the existence of the servitude when both estates cease to belong to him. See Phipps v. Schupp, 09-2037 (La. 7/6/10), 45 So.3d 593, 601.

An apparent servitude may also be acquired by uninterrupted possession for thirty years without title or good faith. LSA-C.C. art. 742. Under LSA-C.C. art. 742, which was amended by Act 514, effective January 1, 1978, acquisitive prescription of a discontinuous apparent servitude is not retroactive, but applies from the amendment's effective date. See Griffith v. Cathey, 99-923 (La. App. 3rd Cir. 2/2/00), 762 So.2d 29, 35, writ denied, 00-1875 (La. 10/6/00), 771 So.2d 85; Wetzel 797 So.2d at 129.

¹⁰ The 1977 revision comments to Article 742 state that this provision is new and "legislatively overrules" contrary jurisprudence, which had held that particular parties acquired, without just title or good faith, continuous and apparent servitudes by the prescription of ten years under Article 765 of the 1870 Code.

¹¹ Article 741 was also reenacted by Act 514. The 1977 revision comments point out that this provision is new. Under the new provision, an apparent servitude may be acquired by destination of the owner under Article 741, even though it might be regarded as discontinuous under the regime of the 1870 Code. Article 741 was further amended by 1978 La. Acts, No. 479, § 1. The 1978 changes did not affect the relevant portions of this article.

ANALYSIS

Thirty-Year Acquisitive Prescription

Under current Civil Code articles 705 and 707, a servitude of passage is an **apparent** predial servitude, since it is evidenced by a roadway. As such, according to current Article 740, it may be acquired by title, by destination of the owner, or by acquisitive prescription. However, the reenactment by Act 514 of these provisions related to predial servitudes, effective January 1, 1978, was not retroactive. See Griffith, 762 So.2d at 35. A right-of-way over a roadway was a **discontinuous** apparent servitude under the 1870 Civil Code. Kizer v. Lilly, 471 So.2d 716, 718 (La. 1985). The 1870 Code provided that discontinuous apparent servitudes could be established only by a title; they could not be acquired by acquisitive prescription. See former LSA-C.C. art. 766 (1870); see also Nash v. Whitten, 326 So.2d 856, 858 (La. 1976). The quasi-possession of a servitude that would be discontinuous under the prior law does not give rise to prescriptive rights except from the effective date of the new legislation. LSA-C.C. art. 740, 1977 revision comment (a). Since the enactment of Article 740 is not retroactive, prescriptive rights as to formerly discontinuous servitudes, including servitudes of passage, commence from the effective date of the article, January 1, 1978. McCann v. Normand, 97-103 (La. App. 3rd Cir. 6/4/97), 696 So.2d 203, 206.

This lawsuit was filed in July 2006. The filing of the lawsuit constitutes an interruption of the defendants' possession of the servitude of passage. See LSA-C.C. art. 3462. Therefore, in order to establish acquisitive prescription of thirty years, the defendants had to prove their possession and use of the servitude of passage since 1976. Since that date pre-dates the current articles, and the current articles are not retroactive, the acquisition of a discontinuous servitude, such as a servitude of passage, by thirty years' possession since 1976 is not available to the defendants. Possession of an apparent servitude that would have been discontinuous under Article 766 of the 1870 Code could not begin to produce prescriptive rights except from the January 1, 1978 effective date of Act 514. Therefore, the defendants in this case could not have acquired a servitude of passage over the plaintiffs' property through acquisitive

prescription, since thirty years had not elapsed between the effective date of Act 514 in January 1978 and the interruption of their possession by the filing of this lawsuit in July 2006.

We conclude, therefore, that the district court erred in applying the current version of Article 740 to establish thirty years' acquisitive prescription of a discontinuous apparent predial servitude that commenced prior to the effective date of Act 514.

Destination of the Owner or Ten-Year Acquisitive Prescription

Voluntary or conventional servitudes may be established and apparent servitudes may be acquired by destination of the owner. See LSA-C.C. arts. 654 and 740. The 1984 final plat of Chamberlin Subdivision prepared for Ashland described the two 60'-wide passageways that it owned as "reserved for private access." Thus, Ashland, which owned both estates at that time, had designated the 60'-wide passageways as access roads between Section Road and its agricultural land to the north of and adjacent to Chamberlin Subdivision, thus creating a "destination of the owner" between two areas of property owned by the same owner that would be a predial servitude if those estates belonged to different owners.¹² See LSA-C.C. art. 741. Since the two estates ceased to belong to Ashland when separately seized and sold in 1997, the servitude of passage, an apparent servitude, came into existence of right, because Ashland did not expressly disavow the existence of the servitude before both estates ceased to belong to it. All of these actions occurred after the codal articles regarding acquisition of predial servitudes by destination of owner were revised by Act 514, effective January 1, 1978.

Moreover, Article 742 provides that an apparent servitude may be acquired by peaceable and uninterrupted possession of the right for ten years in good faith and by just title. On February 4, 1987, in a juridical act duly recorded in the parish conveyance records, Ashland granted a predial servitude over the 60'-wide passageway between Lots 11 and 12 to Roy G. and Irma P. Nugent, then owners of Lot 12. The "Act of Predial Servitude" states that the appearers "have agreed to the creation and establishment of a road or lane of passage to accommodate automobiles or other vehicular use" of the property by the "grantees, their heirs, successors and assigns" for

¹² The 1984 map did not have a similar designation for the headland strip.

the benefit of Lot 12 of Chamberlin Subdivision. The Nugents sold Lot 12 to Daniel L. Miremont on February 25, 1993, and Miremont sold it to Keith and Ronada Morris on March 24, 1998. Tract D-4 was not sold to the plaintiffs until March 25, 1997.¹³

The record shows that the Morrises and their ancestors in title peacefully possessed the 60'-wide passageway between Lots 11 and 12 and used this property as a servitude of passage, in accordance with the provisions of the Act of Predial Servitude, from February 4, 1987, until March 25, 1997, when Tract D-4 was sold to the plaintiffs. Because the 1997 sale of Tract D-4 to the plaintiffs was for the enforcement of the mortgage securing the debt owed by Ashland, the property was sold free of all servitudes established after the mortgage. See LSA-C.C. art. 721; see also Farmco, 21 So.3d at 432. However, the record in the second trial establishes that by 1997, the owners of Lot 12 had peaceably possessed and used the servitude of passage for ten years in good faith and by just title. Therefore, pursuant to Articles 654 and 742, the Morrises had already acquired ownership of this servitude in favor of Lot 12 before Tract D-4 was sold to the plaintiffs. See LSA-C.C. art. 742.

Based on the evidence in the record, we conclude that all of the defendants acquired a servitude of passage over the 60'-wide passageways between Lots 6 and 7 and Lots 11 and 12 of Chamberlin Subdivision by destination of the owner.¹⁴ Additionally, the Morrises, as owners of Lot 12, acquired a servitude of passage over the 60'-wide passageway between Lots 11 and 12 by peaceable possession for ten years in good faith and with just title.

Damages

The plaintiffs in this case claimed damages for the defendants' unauthorized use of Tract D-4, claiming their use had rendered the property unmarketable and caused financial loss to the plaintiffs. We have concluded that the defendants acquired a servitude of passage over the 60'-wide passageways between Lots 6 and 7 and Lots 11 and 12 of Chamberlin Subdivision. Therefore, no damages are owed for their use of those portions of Tract D-4, and the only damage assessment that could be made

¹³ All of these actions, including the Act of Predial Servitude, occurred after the effective date of Act 514.

¹⁴ As previously noted, Ms. Thomas's property, Lot 11, has since been acquired by Sugar West, Inc. Therefore, the servitude of passage in favor of Lot 11 passed to the current owner.

would pertain to the use of the headland strip.

In support of their claim, the plaintiffs presented testimony from a real estate broker, Fred E. Stephens, who had been involved in real estate transactions in the subject area for at least 33 years and was accepted by the court as an expert in the general knowledge of real estate, including land values in that area. His first comment when shown the map of Chamberlin Subdivision and Tract D-4 was that "it [Tract D-4] wouldn't be of any value to anybody except the people that own the home." He elaborated further, stating, "[It's] just a piece of property that's ingress and egress, and that's the only thing of value it's really worth." He acknowledged that when he sold a full 200' by 200' lot in Chamberlin Subdivision five or six years earlier, it sold for about \$25,000. But he persisted in saying that property with the configuration of Tract D-4 was not of any value to anybody, other than for ingress and egress. Mr. George W. T. Ruple, the sole officer and director of Farmco, stated that he had owned all of the property fronting on Section Road between Bueche Road and the Chamberlin Subdivision, and had been selling frontage lots since 1997 or 1998 for about \$21,000 to \$25,000 per acre. Maps in the record show that normal Chamberlin Subdivision lots have frontage footage on Section Road of 139' to 145' and depths of 298' to 310'; each has an area of approximately one acre.

Tract D-4 consists of approximately 2.48 acres in a unique configuration consisting of strips of land no wider than 60 feet, two of which lie perpendicular to Section Road and are interposed between normal subdivision lots. Across the back of the subdivision to its north runs another strip of land, the headland strip, to the immediate north of which is a ditch; just beyond the ditch is the agricultural property currently owned and farmed by the Morrisises. Testimony in the record established that the headland strip had been used since at least the 1950s for access to the agricultural property to the north of what is now Chamberlin Subdivision. Based on the evidence, we conclude that Tract D-4, including the headland strip, never had market value for anything other than the use to which it is currently being put.

That said, however, it does not mean that the property has no value at all, since it clearly has value for those who are using it as an access road to their agricultural

property. However, the plaintiffs did not present any evidence of the use value of Tract D-4. Since they have already had two trials at which to present such evidence, we will not remand for another trial, but find that they failed to meet their burden of proof as to the amount of any damages that might be due for the past or future use of the headland strip portion of Tract D-4.

CONCLUSION

Based on the above reasons, the district court's judgment of January 5, 2012, is affirmed as to its finding that Robert Ray Morris, Frances L. Morris, Keith E. Morris, Ronada B. Morris, Jacqueline M. Creer, and Sugar West, Inc. have acquired a servitude of passage in favor of their lots over the 60'-wide passageways between Lots 6 and 7 and Lots 11 and 12 of Chamberlin Subdivision, comprising a portion of Tract D-4, said property being more particularly described as follows:

A certain tract or parcel of ground measuring Sixty (60') feet front on Section Road by a depth of Three Hundred Two and 40/100 (302.40') feet on its East boundary, by Three Hundred Two and 82/100 (302.82') feet on its West boundary, and Sixty (60') feet across the rear, said tract bounded on the east by Lot 12, on the west by Lot 11, on the south by Section Road, and on the north by property formerly belonging to Ashland Plantation, Inc.; additionally, a certain tract or parcel of ground measuring Sixty (60') feet front on Section Road by a depth of Three Hundred Seven and 67/100 (307.67') feet on its East boundary, by Three Hundred Eight and 8/100 (308.08') feet on its West boundary, and Sixty (60') feet across the rear, said tract bounded on the east by Lot 7, on the west by Lot 6, on the south by Section Road, and on the north by property formerly belonging to Ashland Plantation, Inc., all as shown on that map entitled, "Final Plat of Chamberlin Subdivision First Filing Being a Portion of a Larger Tract of Land Known as Ashland Plantation Located in Section 57, T-6-S, R-12-E, Southeastern Land District, West Baton Rouge Parish, Louisiana for Ashland Plantation," dated April 2, 1984, and prepared by John K. Laws, Jr., Registered Land Surveyor, a corrected copy of which shows "R-11-E" and is on file and of record in Map Book 2, Entry No. 244, in the Office of the Clerk and Recorder for the Parish of West Baton Rouge, Louisiana.

We reverse the judgment as to its finding that the defendants also acquired a servitude of passage over the headland strip. All costs of this appeal are assessed to Farmco, Inc. and Brent A. Beauvais.

AFFIRMED IN PART; REVERSED IN PART.