Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **17th day of March, 2023** are as follows:

BY Crain, J.:

2022-C-01288 1026 CONTI HOLDING, LLC VS. 1025 BIENVILLE, LLC (Parish of Orleans Civil)

AFFIRMED. SEE OPINION.

Weimer, C.J., concurs in the result and assigns reasons.
Hughes, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-C-01288

1026 CONTI HOLDING, LLC

VS.

1025 BIENVILLE, LLC

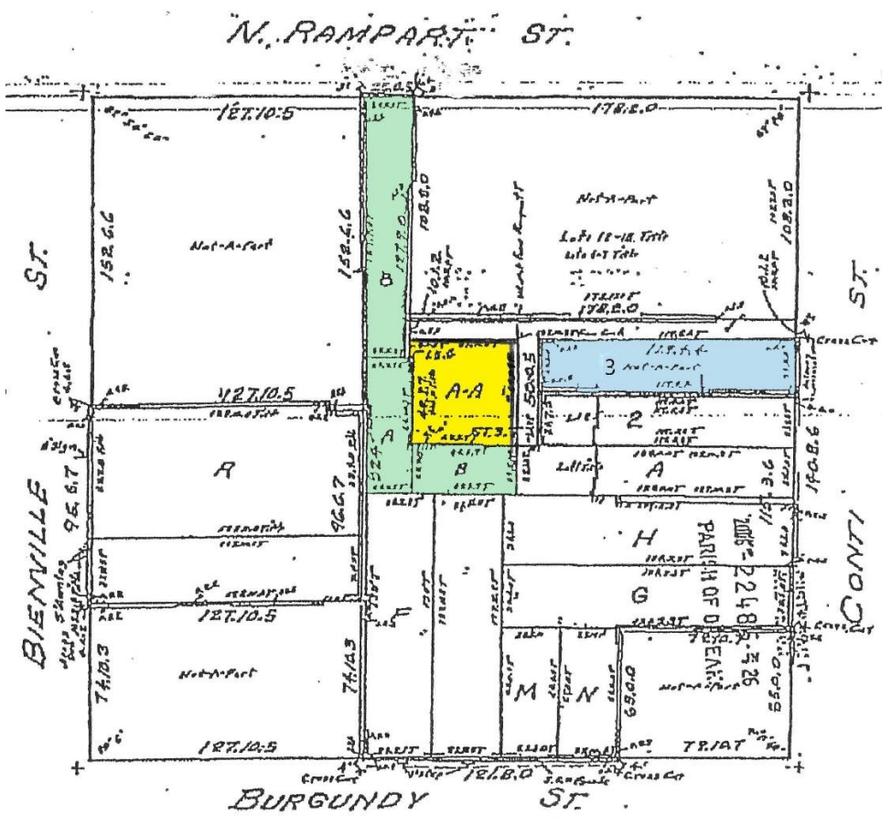
On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans Civil

CRAIN, J.

In this declaratory judgment action, we find the defendant acquired ownership of the subject property by ten-year acquisitive prescription.

FACTS AND PROCEDURAL HISTORY

The immovable property at issue is a small parcel, about 50-feet square, located in the middle of a block in the French Quarter. In older surveys and conveyances, it is identified as a "yard" or "court" but in more recent documents is labeled "AA." The parcel is depicted below by the shaded square containing "A-A." Other relevant lots are also shaded.



Lot AA is bounded on its north and east sides by an alley that accesses Conti Street to the east. On its west and south sides, the lot is contiguous with three parcels identified as lots 8, A, and B, currently owned by defendant, 1025 Bienville, LLC. Nearby lot 3, bordered on its north and west sides by the alley and fronting on Conti Street, is owned by 1026 Conti Condominiums, LLC, a sister entity of the plaintiff, 1026 Conti Holding, LLC. Bienville and Conti Holding both claim ownership of lot AA.

The first mention of lot AA in the acts of conveyance in evidence appears in a sale from several vendors to Gustav Pitard in 1880. This act conveyed ownership of lot B to Mr. Pitard "together with the use of the yard and of the alley in common to said property and others." An attached plat identifies the subject property as "YARD IN COMMON." Five years later, Mr. Pitard bought lot A, and that transfer likewise included "the right to use in common with the Vendors and others the alley and yard" depicted on a referenced plan. Mr. Pitard's wife, Cecilia, previously acquired lot 8, so the couple collectively owned lots 8, A, and B.

In 1918, several years after Mr. Pitard's death, Mrs. Pitard conveyed lots 8, A, and B to Pitard, Inc., represented in the transaction by its president, John Saxton. Saxton's eventual ownership of the subject property is the basis of plaintiff Conti Holding's ownership claim. The legal descriptions of lots A and B in the sale to Pitard, Inc. repeat the same language granting the right to use "the yard" and the alley. However, by a separate conveyance, Mrs. Pitard also purported to convey to Pitard, Inc. the ownership of lot AA, identified in an attached survey by Frank H. Waddill. This act of sale, dated September 3, 1918, is the first instrument in evidence that vests record title to lot AA in anyone. Mrs. Pitard declared in the document that she owned the parcel by virtue of acquisitive prescription because she and her late husband maintained continuous, unequivocal possession of lot AA, as owners, for

more than thirty years. This declaration was corroborated by attached affidavits from five witnesses, each of whom confirmed Mrs. Pitard's statement.

In 1921 Pitard, Inc., acting under a new corporate name, conveyed lots 8, A, B, and AA to Saxton.[1] Although the conveyance includes lot AA, it repeats the language in the descriptions of lots A and B granting a right to use the "yard" and alley, again referring to a Waddill survey. After this 1921 acquisition, record title to lot AA remained in Saxton's name for the next 95 years. During that time, the only recorded transfer of the lot is a tax sale redeemed by Saxton in 1936.

Saxton did, however, grant mortgages affecting lot AA. In 1930 he granted a mortgage on lots 8, A, and B. Whether by design or inadvertence, the legal descriptions of lots A and B again include the language granting a "right of use in common with other parties of the yard and of the alley" depicted in a Waddill survey. In 1931, Saxton granted a collateral mortgage specifically on lot AA. While the course of the collateral mortgage is unknown, Saxton defaulted on the mortgage of lots 8, A, and B, and the parcels were sold at a sheriff's sale in 1938. The sheriff's deed describes the conveyed property precisely as described in the mortgage, including the right to use the yard and alley shown in the Waddill survey.

In 1944, the party who bought lots 8, A, and B at the sheriff's sale sold the property to two brothers, Rudolph Holzer and John Holzer. Like the previous deeds, this act of sale describes lots A and B as including "the right of use in common with other parties of the yard and of the alley" depicted in the Waddill survey. Two years later in 1946, the Holzer brothers transferred lots 8, A, and B, together with use of the yard, to Holzer Realty Company. The Holzer brothers and their corporate entities (collectively, the "Holzers") owned numerous lots in the subject block.

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[1] Before the sale, Pitard, Inc. changed its name to Pitard-Saxton Hardware, Inc. For simplicity, the corporate entity will be referred to herein as "Pitard, Inc."

From 1944 to 2000, the Holzers exclusively used lot AA for access, parking, deliveries, storage, and other uses incidental to the operation of their businesses located on other lots owned by them in the block. Lot AA was also assessed to the Holzers on the property tax rolls during that time, and they annually paid the taxes on it. In contrast, the record contains no indication Saxton, after his default on the mortgage in 1938, ever again used lot AA or had any communications or interactions with the Holzers about the property. Saxton died in 1946, and lot AA was not identified in his succession as an asset of the estate.

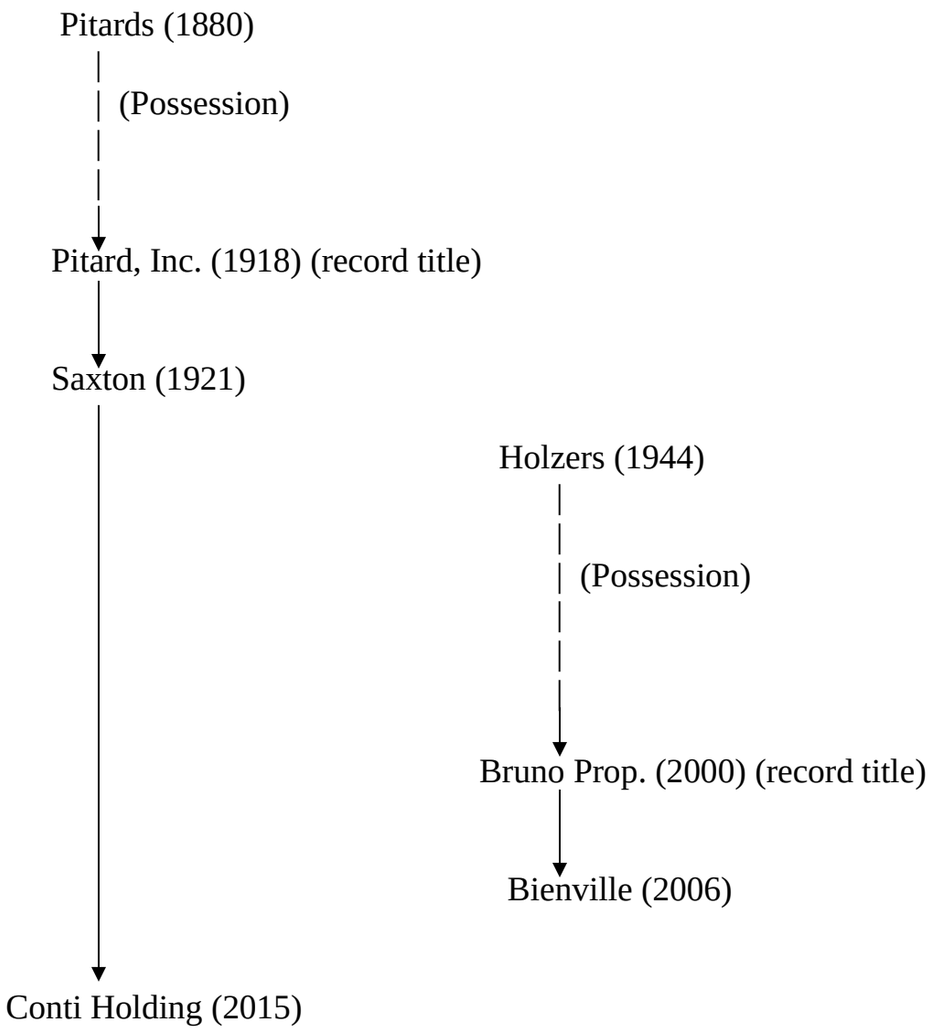
On January 7, 2000, almost sixty years after they first began using lot AA, the Holzers conveyed fifteen parcels, including lot AA, to Bruno Properties, L.L.C. for $1,600,000. This is the first "record title" to lot AA appearing in defendant Bienville's chain of title. The lot's legal description ends with a notation: "Acquired C.O.B. 544/340, July 19, 1946," a reference to the Holzer brothers' sale to Holzer Realty. About six years later, on June 23, 2006, Bruno Properties conveyed fourteen of those parcels, including lot AA, to defendant Bienville for $5,500,000. The remaining parcel, lot 3, was sold by Bruno Properties to Conti Condominiums.

A dispute arose between the new neighbors when Bienville refused to allow the owner of Conti Condominiums, Robert O'Brien, to park on lot AA. In a precursor to the present litigation, Conti Condominiums sued Bienville, alleging a servitude acquired by Conti Condominiums in the purchase of lot 3 granted it the right to park on lot AA. The courts disagreed and found the servitude does not extend to parking. *See 1026 Conti Condominiums, LLC v. 1025 Bienville, LLC*, 15-0301 (La. App. 4 Cir. 12/23/15), 183 So. 3d 724, 730, *writ denied*, 16-0144 (La. 3/14/16), 189 So. 3d 1067.

That litigation did not end the dispute. During the course of the proceeding, O'Brien learned the public records did not contain a sell-out of lot AA from Saxton after he acquired it in 1921. O'Brien located two of Saxton's grandchildren and paid

them $100 to transfer their interest in the property to Conti Holding, a newly formed entity also owned by O'Brien. The Saxton heirs quit-claimed their interest to Conti Holding without warranty in an instrument signed by the parties in 2015. O'Brien also got a judgment of possession in Saxton's succession recognizing the grandchildren as Saxton's only living heirs and reflecting the transfer of their interest in lot AA to Conti Holding.

Relying on these documents, Conti Holding filed the present proceeding against Bienville on February 12, 2016, seeking a judgment declaring Conti Holding the owner of lot AA. The suit also seeks damages for trespass. Bienville reconvened and asserted it acquired ownership of lot AA by either thirty-year or ten-year acquisitive prescription. The respective chains of ownership of lot AA are outlined as follows, with periods of possession preceding record title indicated:



The parties presented evidence at a two-day bench trial. Joint exhibits establish Conti Holding's chain of title for lot AA, starting with the 1918 conveyance from Mrs. Pitard to Pitard, Inc., followed by the transfer to Saxton in 1921, and ending with the quit claim deed to Conti Holding in 2015. The exhibits likewise establish Bienville's record chain of title to lot AA, consisting of the sale from the Holzers to Bruno Properties in 2000 and the sale from Bruno Properties to Bienville in 2006. Assessment records indicate lot AA was assessed to the Holzers from 1947 to 2000, except for a few years when the records were unavailable; to Bruno Properties from 2001 to 2006; to Bienville from 2007 to 2014; and to Conti Holding from 2015 to the present.

Conti Holding presented testimony from Kenneth Kulik, a title abstractor, who reviewed the Orleans Parish public land records. Kulik confirmed the records do not contain a transfer of Saxton's interest in lot AA until the 2015 conveyance to Conti Holding. As for Bienville's title, Kulik stated the 1944 conveyance of lots 8, A, and B from the tax-sale purchaser to the Hozler brothers includes only a servitude of use for lot AA, not ownership. Similarly, the transfer in 1946 from the Holzer brothers to Holzer Realty includes lots 8, A, and B but does not include title to lot AA, only the use of it. The first record title to lot AA in the Bienville chain is the Holzers' conveyance to Bruno Properties in 2000. However, Kulik noted the document incorrectly states Holzer Realty acquired the lot in the 1946 transfer from the Holzer brothers, which only included the servitude.

A surveyor, Louis Hartman, testified the metes and bounds description of lot AA in the 2000 conveyance to Bruno Properties differs from the description in the 1921 acquisition by Saxton. However, on cross-examination, he acknowledged the 2000 conveyance refers to a survey that accurately depicts the boundaries of lot AA. Hartman also located a letter in his files received from an attorney for the Holzers in 1992. The attorney requested specific descriptions for each lot owned by the Holzers

in square 97 and attached a survey of the square with handwritten notes indicating which Holzer entity owned each lot. Lot AA is not identified as one of the lots owned by the Holzers.

For the sale from Bruno Properties to Bienville, Conti Holding called Jean Norton, a retired attorney who does abstracts and title exams for the attorney who handled the 2006 transaction, Stephen Simone. Norton testified the documents she received from Simone did not include a request to research the title for lot AA. She could not remember why, but she did not review the title for the lot or give an opinion about its ownership before the Bienville closing in 2006. However, Norton confirmed lot AA was included in the title policy issued in connection with that sale. About three years later in 2009, Simone asked Norton to review the title to lot AA, apparently at the request of the title insurer in response to a dispute over the lot's use. Norton researched the public records and could not find a sell-out from Saxton after he acquired title to the property in 1921.

Bienville called several witnesses, including Rudolph Holzer III, the grandson of one the original Holzer brothers. Rudolph testified about the family businesses located in the subject block and the use of lot AA. He was born in 1948 and often visited the property with his parents before he began working there in 1966, first during the summers on a part-time basis and then full time beginning in 1970. He eventually became president of the family businesses and continued working there until the sale in 2000 to Bruno Properties. The Holzers owned numerous lots in the block where they operated three businesses, a sheet metal company, a metal wholesale business, and a realty firm. Most of the lots were acquired before Rudolph's involvement with the businesses, so he was not familiar with the language in the acquisitions, including any language granting the right to use lot AA. They regularly used lot AA for parking, deliveries, pickups, access, and anything else needed to operate their businesses, including installation of a gas tank and pump.

Rudolph confirmed the Holzers paid the property taxes for lot AA from the 1940s until they sold the property in 2000.

The Holzers did not allow anyone else to use the lot for any purpose. While other owners in the block sometimes used the alley, Rudolph emphasized "[t]hey never used the lot. We wouldn't let them. That is where we parked our trucks. That is where we did our business." If someone parked in the alley and blocked access to the lot, the Holzers had the vehicle towed or pushed into the street. The Holzers eventually placed a gate at the back of the alley to prevent unauthorized vehicles from entering the lot. Distinguishing the use of the alley, Rudolph emphasized:

> They certainly didn't have use of the lot. The alley was one thing. The lot was ours . . . . That [was] our lot. We had a gas tank. We had a gas pump. We had trucks. A lot of our possessions were back there on that lot. . . . As far as we were concerned, it was ours."

On cross-examination, Rudolph acknowledged his family did not have "paper title" to lot AA. He discussed that with Frank Bruno before the sale to Bruno Properties in 2000. But, Rudolph told Bruno the Holzers owned the lot: "I never said anything other than the fact that we paid the taxes. We think we own [it]. We used it. It was ours."

Marion Bruno, the managing partner of Bruno Properties, testified she and her husband used lot AA in connection with their retail businesses located in the block. They were the only people who parked in the lot, except for construction workers who, with the Brunos' permission, parked there while renovating adjacent Bruno Properties-owned buildings. Anyone else attempting to park in the lot was asked to leave.

Bienville's owner, Vincent Marcello, testified to his use of lot AA after he acquired title to it in 2006 from Bruno Properties. Shortly after the purchase, Marcello began renovating a building in the block and used lot AA as a staging area. His office is in the building, so he visits the property daily. O'Brien, whose company

owned lot 3, requested permission to put a dumpster on the lot, and Marcello agreed. He also allowed O'Brien to park trucks on the lot during some construction. However, Marcello did not allow O'Brien to use the lot for regular parking after the construction ended. In 2009 Marcello striped the lot and posted signs prohibiting unauthorized parking. According to Marcello, he has been in continuous possession of lot AA since he purchased it on June 23, 2006, through the date Conti Holding filed suit, February 12, 2016.

Bienville also introduced deposition testimony from Stephen Simone, the attorney responsible for the sale from Bruno Properties to Bienville. Simone is a title agent for Security Title and, in connection with the title insurance, provided an opinion that Bruno Properties had valid title to all property conveyed, including lot AA. Initially, lot AA was excluded from the title commitment but was later added. Simone could not recall why the lot was initially excluded, but the ownership issue was resolved before the closing. Simone confirmed his opinion in the following exchange:

> Q. All right. But we know based upon all the documents that we have looked at, that there was a problem, for lack of a better word, with the chain of title vis-à-vis lot AA, correct?
>
> A. Yes. There is some issue as to ownership of AA [from] the turn of the century to the turn of the century.
>
> Q. Understood. But ultimately, you concluded and represented that the title that [Bruno Properties] claimed to have vis-à-vis lot AA was good and valid title, correct?
>
> A. Yes.

Simone later added, "I am sure the title in some fashion, I got satisfied with it." He did not recall communicating any issues about lot AA to Bruno Properties or Bienville.

Simone was asked about the acquisition information in the sale from the Holzers to Bruno Properties, which incorrectly stated Holzer Realty acquired title to

lot AA in a 1946 transfer of other lots from the Holzer brothers. Simone explained that if he had looked at that transfer and personally examined the title, he would have known that acquisition information was incorrect. Nevertheless, he stood by his opinion that Bruno Properties conveyed good title to lot AA to Bienville.

Conti Holding's owner, O'Brien, testified and confirmed the events leading up to his company's acquisition of a record title to lot AA in 2015. After learning the public records did not show a sell-out of lot AA from Saxton, O'Brien located Saxton's heirs and bought their interest for $100 in the name of Conti Holding. O'Brien believes the parcel is worth $500,000 to $600,000. He did not discuss that opinion with the heirs. After the sale, Conti Holding began receiving tax notices for the lot, which he pays. After his other company, Conti Condominiums, bought lot 3 in 2006, O'Brien thought lot AA was "common" property. O'Brien believed the servitude Conti Condominiums acquired for lot 3 granted him the right to park on lot AA. Disputing Marcello's testimony, O'Brien said he parked in the lot for three years without asking Marcello's permission. A dispute arose only after Marcello posted signs prohibiting parking on the lot.

After taking the matter under advisement, the trial court issued written reasons finding Conti Holding proved record title to lot AA. However, the trial court concluded Bienville's ancestor-in-title, the Holzers, acquired ownership of lot AA by thirty-year acquisitive prescription. A judgment was signed declaring Bienville owner of lot AA.

The court of appeal affirmed. The court found the Holzers began their possession of lot AA as precarious possessors because a servitude of use was included in their purchase of lots 8, A, and B. However, the court concluded the Holzers thereafter "took overt and unambiguous steps that would have alerted Saxton's estate that they intended to possess Lot AA for themselves." *See 1026 Conti Holding, LLC v. 1025 Bienville, LLC*, 21-0417 (La. App. 4 Cir. 6/29/22), ___

So. 3d ___ (2022WL2338703 at 9, 12). Chief Judge Love dissented in part, finding the trial court legally erred in failing to determine if the Holzers were precarious possessors. Conducting *de novo* review, Chief Judge Love concluded the Holzers were precarious possessors for the entire duration of their use of lot AA, because they never gave actual notice to Saxton's estate that they intended to possess lot AA for themselves. *See 1026 Conti Holding, LLC*, ___ So. 3d at ____ (2022WL2338703 at 13-14) (Love, C.J., dissenting in part). We granted a writ of certiorari. *1026 Conti Holding, LLC v. 1025 Bienville, LLC*, 22-01288 (La. 11/22/22), 350 So. 3d 175.

DISCUSSION

The burden of proof for these competing claims of ownership is set forth in Louisiana Civil Code article 531:

> One who claims the ownership of an immovable against another in possession must prove that he has acquired ownership from a previous owner or by acquisitive prescription. If neither party is in possession, he need only prove a better title.

The Code of Civil Procedure similarly provides that when the issue of ownership of immovable property is presented in a declaratory judgment action, "the court shall render judgment in favor of the party . . . [w]ho would be entitled to the possession of the immovable property . . . in a possessory action, unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive prescription." La. Code Civ. Pro. art. 3654(1). If neither party is in possession, judgment shall be rendered for the one who proves "better title" to the property. La. Code Civ. Pro. art. 3654(2).

The burden of proof thus depends on whether a party is in possession of the property when suit is filed. The trial court did not make this preliminary determination. Instead, the court went directly to the ownership issue, ultimately finding Bienville's ancestor-in-title, the Holzers, acquired it by thirty-year

acquisitive prescription. As discussed in greater detail later, the resolution of the thirty-year acquisitive prescription claim requires consideration of the type of possession exercised by the Holzers, specifically whether their possession was precarious and, if so, whether it changed to adverse. The trial court erred by failing to make that determination.

Generally, a trial court's factual findings are reviewed on appeal under the manifest-error standard of review. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). However, where one or more legal errors interdict the fact-finding process, the manifest-error standard no longer applies, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record. *Kinnett v. Kinnett*, 20-01134 (La. 10/10/21), 332 So. 3d 1149, 1154; *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So. 2d 731, 735. Here, the trial court's error in failing to determine the type of possession at issue interdicted the fact-finding process. Because the record is complete, we conduct *de novo* review. *See Boudreaux v. Cummings*, 14-1499 (La. 5/5/15), 167 So. 3d 559, 561 (*de novo* review required where trial court failed to determine if party was precarious possessor).

Possession of Lot AA When Suit was Filed

Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name. La. Civ. Code art. 3421. To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing. La. Civ. Code art. 3424. Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing. La. Civ. Code art. 3425. One is presumed to intend to possess as owner unless he began to possess in the name of and for another. La. Civ. Code art. 3427. A juridical person acquires possession through its representatives. La. Civ. Code art. 3430.

Suit was filed in 2016. Thus, as discussed earlier, to determine the burden of proof, we must determine who was in possession of lot AA when suit was filed. Bienville's owner, Marcello, confirmed his daily use of lot AA for nearly ten years preceding this suit. The lot was included in the sale from Bruno Properties in 2006, and Marcello initially used it as a staging area for trucks and equipment during the renovation of a nearby building. He continued using the lot for access and parking for his office, and in 2009 striped and posted signs prohibiting parking by unauthorized vehicles.

O'Brien testified he parked on the property without getting Bienville's permission for three years. While this was disputed, even accepting O'Brien's testimony as correct, he acknowledged that he parked on the lot because he believed the servitude held by Conti Condominiums gave him the right to do so. His reliance on the servitude demonstrates his lack of intent to possess the lot as owner. We find Bienville was in possession of lot AA when suit was filed.

Conti Holding's Claim of Ownership of Lot AA

Based on Bienville's possession of lot AA, Conti Holding must prove it "acquired ownership from a previous owner or by acquisitive prescription." *See* La. Civ. Code art. 531, La. Code Civ. Pro. art. 3654; *Chevron U.S.A. Inc. v. Landry*, 558 So. 2d 242, 243 (La. 1990). This burden, sometimes described as proving "title good against the world," is satisfied by proving (1) an unbroken chain of title back to the sovereign, (2) ownership by acquisitive prescription by the claimant or their ancestor-in-title, or (3) a superior title to a common author. *See Pure Oil Co. v. Skinner*, 294 So. 2d 797, 798-99 (La. 1974); *Whitley v. Texaco, Inc.*, 434 So. 2d 96, 102 (La. App. 5 Cir. 1982), *writ denied*, 435 So. 2d 445 (La. 1983); La. Civ. Code art. 532 ("When the titles of the parties are traced to a common author, he is presumed to be the previous owner."); Hargrave, *Presumptions and Burdens of*

Proof in Louisiana Property Law, 46 La. L. Rev. 225, 228 (1985); Maraist, 1A La. Civ. Law. Treatise, *Civil-Procedure – Special Proceedings* § 9.3. (2022).

Conti Holding relies on the second of these methods, acquisitive prescription by an ancestor-in-title.[2] Acquisitive prescription is a mode of acquiring ownership or other real rights by possession for a period of time. La. Civ. Code art. 3446. Ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith. La. Civ. Code art. 3486. The possessor must have corporeal possession, or civil possession preceded by corporeal possession, to acquire a thing by prescription. La. Civ. Code art. 3476. The possession must be continuous, uninterrupted, peaceable, public, and unequivocal. *Id*.

Conti Holding's chain of title originates with the 1918 act of sale from Mrs. Pitard to Pitard, Inc. That act declares Mrs. Pitard and her husband acquired the property though acquisitive prescription by possessing it as owners for thirty years. This statement is corroborated by five witnesses who signed affidavits attached to the conveyance. We further note Bienville acknowledged Mrs. Pitard's ownership of the property in its reconventional demand, alleging she "owned the property by virtue of thirty years' prescription acquirendi causa." Conti Holding did not deny the allegation, which deems it admitted. *See* La. Code Civ. Pro. arts. 1004 and 1035. An admission by a party in a pleading constitutes a judicial confession and is full proof against the party making it. *See* La. Civ. Code art. 1853. *C.T. Traina, Inc. v. Sunshine Plaza, Inc.*, 03-1003 (La. 12/3/03), 861 So. 2d 156, 159. Based on the evidence and Bienville's judicial admission of Mrs. Pitard's ownership, we find Conti Holding proved a record chain of title to one who acquired the property by

[2] We note Saxton is not a "common author" of the parties' respective chains of title. Bienville's claim of ownership originates, at the earliest, with the Holzers, who Bienville alleges acquired the property by thirty-year acquisitive prescription. While Saxton, via the sheriff's sale, is the source of a servitude granted to the Holzers, Bienville does not rely on that transaction or servitude to establish its ownership of lot AA.

acquisitive prescription. *See* La. Civ. Code art. 531, La. Code Civ. Pro. art. 3654; *Pure Oil Co.*, 294 So. 2d at 798-99.

Bienville's Claim of Ownership of Lot AA

Bienville counters that Conti Holding's chain of title, while facially valid, did not convey ownership of lot AA because the Holzers, Bienville's ancestor-in-title, acquired the lot by thirty-year acquisitive prescription. Alternatively, Bienville claims it acquired the lot by ten-year acquisitive prescription based on its own possession and Bruno Properties' possession. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor. La. Civ. Code art. 481. Bienville has the burden of proving its claim of acquisitive prescription. *See Liles v. Pitts*, 145 La. 650, 666; 82 So. 735, 741 (1919). We begin with its thirty-year claim, which relies on the Holzers' possession.

A. Thirty-Year Acquisitive Prescription

The Holzers' extensive possession of lot AA is not disputed. However, the Holzers also had the right to use the lot pursuant to the servitude in the Saxton mortgage, conveyed by the sheriff's sale, and ultimately acquired by the Holzers in their purchase of Lots 8, A, and B. A servitude of use can be mortgaged. *See* La. Civ. Code art. 3286. The adjudication in the Saxton foreclosure proceeding transferred to the purchaser "all the rights and claims of the judgment debtor as completely as if the judgment debtor had sold the property." *See* La. Code Civ. Pro. arts. 2371. A person enjoying the use of a servitude is a precarious possessor. *See* La. Civil Civ. Code art. 3437; *John T. Moore Planting Co. v. Morgan's Louisiana & T.R. & S.S. Co.*, 126 La. 840, 870; 53 So. 22, 32 (1908). This servitude rendered the Holzers' possession of lot AA precarious.

Acquisitive prescription does not run in favor of a precarious possessor or his universal successor. La. Civ. Code art. 3477. However, by undertaking certain actions, a precarious possessor can change his type of possession and begin to

prescribe. Current law distinguishes between a co-owner and all other precarious possessors by imposing a greater burden on the latter to prove his possession is not precarious:

> A co-owner, or his universal successor, commences to possess for himself when he demonstrates this intent by overt and unambiguous acts sufficient to give notice to his co-owner.
>
> Any other precarious possessor, or his universal successor, commences to possess for himself when he gives *actual notice* of this intent to the person on whose behalf he is possessing.

La. Civ. Code art. 3439 (emphasis added); *see also* La. Civ. Code art. 3478 (requiring "actual notice" for precarious possessor who is not co-owner to begin to prescribe).

In *Boudreaux*, this court applied Articles 3439 and 3478 as written, holding that a non-co-owner precarious possessor must give "actual notice" of his intent to possess as owner "sufficient to alert the landowner that his property [is] in jeopardy." *Boudreaux*, 167 So. 3d at 564. In that case, continued use of a right of way was not actual notice of a change of intent. *Id.*

Articles 3439 and 3478 were enacted in 1982 and became effective January 1, 1983, about forty years after the Holzers began possessing lot AA. *See* 1982 La. Acts No. 187 ("1982 revision"). The revision comments say the articles are new but "[do] not change the law." *See* La. Civ. Code arts. 3439 and 3478, Revision Comments--1982 (a). Some legal scholars disagree:

> Under the regime of the Louisiana Civil Code of 1870, a co-owner as well as any other precarious possessor could rebut the presumption of precariousness on proof that he had commenced to possess for himself by overt and unambiguous acts sufficient to give notice of his intent to the person for whom he possessed. There is no change in the law in so far as co-owners are concerned. All other precarious possessors, however, must give actual notice that they intend to possess as owners.

A.N. Yiannopoulos, *Possession*, 51 La. L. Rev. 523, 555 (1991); *see also* Symeonides, *Property*, 46 La. L. Rev. 655, 680 (1986) ("[W]ith regard to precarious possessors other than co-owners, it now takes more to rebut the presumption [of

precarious possession] than it took under the old law."); Yiannopoulos & Scalise, 2 La. Civ. Law Treatise, *Property* § 12:22 ("There was no requirement of actual notice under the regime of the Louisiana Civil Code of 1870.").

The Louisiana Civil Code of 1870 and related jurisprudence are not clear on this point. Article 3512 of the 1870 code provides that a precarious possessor can change the nature of their possession "by the act of a third person." The article then gives an example of a farmer who rents farmland but acquires a title to the property from a third party. Article 3512 continues:

> For if [the farmer] refuses afterwards to pay the rent, if he declares to the lessor that he will no longer hold the estate under him, but that he chooses to enjoy it as his own, this will be a change of possession by external act, which shall suffice to give a beginning to the prescription.

Notably, in this example, the farmer "declares to the lessor" his intent to possess the property as his own. While only an example, this illustration is consistent with the current requirement that a precarious possessor who is not a co-owner must give "actual notice" to the owner of his intent to possess as owner. *See* La. Civ. Code arts. 3439 and 3478.[3]

While the former law arguably may not require the same level of notice as the current law, we need not definitively decide that issue here. The evidence at trial

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[3] Jurisprudence applying pre-1983 law is not uniform as to whether actual or constructive notice is required for a precarious possessor who is not a co-owner to change his possession to adverse. *See Succession of Zebriska*, 119 La. 1076, 44 So. 893 (1907) (A precarious possessor can convert his possession to adverse by an "outward sign" of his intent "manifested by some unequivocal act of hostility, *brought to the knowledge of the vendee*.") (quoting 1 A. & E. E. 818; emphasis added); *John T. Moore Planting Co.*, 126 La. at 879; 53 So. at 35 (Precarious possessor must "indicate by some outward acts of possession his intention to hold no longer under the old title but under the new; and that these acts must be of an unusually pronounced character. He must so conduct himself as to let the owner know that a new order of things has begun."); *St. John Baptist Church of Phoenix v. Thomas*, 08-0687 (La. App. 4 Cir. 12/3/08), 1 So. 3d 618, 621 (Precarious possessor "must give the owner some notice that his property is in jeopardy. This notice may be implied if there is open, notorious, public, continuous and uninterrupted possession to the exclusion of the owners."); *Hammond v. Averett*, 415 So. 2d 226 (La. App. 2 Cir. 1982) (Precarious possessor "must do something to make generally known that he has changed his intent and he must prove specifically when he manifested to others his intent to possess as owner. . . . The character and notoriety of the possession must be sufficient to inform the public and the record owners of the possession as owner."); *Thompson's Succession v. Cyprian*, 34 So. 2d 285 (La. App. 1 Cir. 1948) (Precarious possessor's change in possession was "clearly demonstrated" by her physical possession of property, including selling timber.).

established the Holzers' use of lot AA was insufficient to give either actual or constructive notice of a change in their intent to possess the property as owners. The Holzers were granted the "use" of lot AA. Their act of sale contained no express limitations on the use, and no other evidence suggests any parameters or restrictions. The Holzers certainly used the lot—parking, storing equipment, and placing a gas tank and pump on the property. However, given the vague scope of the servitude, those uses were not so "unusually pronounced . . . to let the owner know that a new order of things has begun." *See John T. Moore Planting Co.*, 126 La. at 879; 53 So. at 35. While the Holzers also prevented others from using the lot, there is no evidence they prevented Saxton or his heirs from using the lot. Absent that evidence, the act of excluding third parties could reasonably be construed as an exercise of the Holzers' right to use the property, which is not sufficient to "give the owner some notice that his property is in jeopardy." *St. John Baptist Church of Phoenix*, 1 So. 3d at 621.

The Holzers' ability to communicate their intent to possess adverse to Saxton, whether by words or deeds, was hindered by Saxton's apparent abandonment of the property. There is no evidence Saxton had any involvement with lot AA after he lost the adjacent lots to foreclosure in 1938. When Saxton died in 1946, his heirs were not aware that he or they owned the lot. This was confirmed by its omission from Saxton's succession inventory. This obliviousness lasted three generations, until Saxton's grandchildren learned of their potential ownership from O'Brien in 2015, and sold it for $100. Under these facts, one can question the utility of requiring a possessor to communicate their adverse intentions to someone who has no idea they own the property. But, as precarious possessors, the Holzers' possession is legally presumed to be on behalf of the owner and, unless changed to adverse in accordance with law, is insufficient for acquisitive prescription. *See* La. Civ. Code

arts. 3437-39, 3477-78. Bienville's thirty-year acquisitive prescription claim is denied.

B. Ten-Year Acquisitive Prescription

Ownership and other real rights in immovables may be acquired by the prescription of ten years. La. Civ. Code art. 3473. The requisites for the acquisitive prescription of ten years are possession for ten years, good faith, just title, and a thing susceptible of acquisition by prescription. La. Civ. Code art. 3475. The purpose of good faith acquisitive prescription is to secure the title of a person who purchases immovable property by a deed translative of title, under the reasonable and objective belief that he is acquiring a valid title to the property, and thereafter remains in peaceful possession of the property for more than ten years without any disturbance by the true owner. *Phillips v. Parker*, 483 So. 2d 972, 976 (La. 1986).

While the Holzers' possession was precarious, Bruno Properties and Bienville possessed lot AA for themselves as owners because they took possession of the lot under acts translative of ownership. *See* La. Civ. Code art. 3479 ("A particular successor of a precarious possessor who takes possession under an act translative of ownership possesses for himself, and prescription runs in his favor from the commencement of his possession."). Bienville possessed lot AA from the date of its purchase, June 23, 2006, through the filing of this suit on February 12, 2016, about four months short of ten years. However, Bienville can tack Bruno Properties' possession to achieve the necessary ten years of possession. *See* La. Civ. Code art. 3442. For just title, the recorded act of sale of lot AA from Bruno Properties to Bienville satisfies this requirement. *See* La. Civ. Code art. 3483. This leaves the good-faith requirement, which applies to both Bienville and Bruno Properties, as the primary dispute for the ten-year claim.

Good faith is defined in the present context by Louisiana Civil Code article 3480:

> For purposes of acquisitive prescription, a possessor is in good faith when he reasonably believes, in light of objective considerations, that he is owner of the thing he possesses.

Louisiana Civil Code article 3481 further provides:

> Good faith is presumed. Neither error of fact nor error of law defeats this presumption. This presumption is rebutted on proof that the possessor knows, or should know, that he is not owner of the thing he possesses.

Enacted as part of the 1982 revision, these provisions confirm the good faith determination is largely objective. *See* La. Civ. Code art. 3480, Revision Comments--1982 (c); *Phillips*, 483 So. 2d at 977. The possessor's belief the seller owned the property must be reasonable by objective standards. Professor Symeonides explains the dual requirements as follows:

> The basis of [the possessor's] good faith is his *mistaken belief* in the seller's ownership. Whether founded on an error of law or an error of fact, this belief is thus the first necessary ingredient of good faith . . . .
>
> The second ingredient of good faith is the requirement that the possessor's belief in the seller's ownership be reasonable by objective standards . . . . [The] process of evaluating the reasonableness of the possessor's belief is simply a process of evaluating the seriousness of his mistake and its impact on society in general. Depending on the circumstances, the possessor's mistake may be objectively justifiable or excusable, or it may be inexcusable.

Symeonides, *Property*, 47 La. L. Rev. 429, 429-30 (1986) (footnotes deleted, emphasis in original); *see also* Hargrave, 46 La. L. Rev. at 237 ("To be a possessor in good faith, the possessor must subjectively believe that he is the owner. In addition, the belief must be a reasonable one.")

The presumption of good faith shifts the burden of proof to the party alleging the buyer is not in good faith. La. Civ. Code art. 3481, Revision Comments–1982 (b); *Phillips*, 483 So. 2d at 979. The presumption is rebutted only if the party proves the possessor knew or should have known he was buying from a nonowner. *See* La. Civ. Code art. 3481; Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 La. L. Rev. 69, 146 n.75 (1983).

By focusing on objective criteria, the 1982 revision eliminated any remnant of the "legal bad faith" doctrine where bad faith could be "imputed" to certain possessors, regardless of their objective good faith. *See Phillips*, 483 So. at 978. Instead, when determining whether the presumption of good faith has been rebutted, the court should consider all the facts and circumstances in a particular case bearing on the reasonableness of the possessor's mistaken belief the seller owned the property. *See Phillips*, 483 So. 2d at 977; *In re Succession of Hendrix*, 08-86 (La. App. 5 Cir. 8/19/08), 990 So. 2d 742, 750, *writ denied*, 08-2498 (La. 1/9/09), 998 So. 2d 729; *City of Shreveport v. Noel Estate, Inc.*, 41,148 (La. App. 2 Cir. 9/27/06), 941 So. 2d 66, *writ denied*, 06-2774 (La. 1/26/07), 948 So. 2d 171. Examples of possible factors include the age and nature of the title defect, the likelihood of discovering the defect, and the sales price. *Phillips*, 483 So. 2d at 978. For errors of law, the general public's awareness of the particular law should also be considered:

> In cases involving an error or ignorance of law, the reasonableness of that belief cannot be divorced from the status in the community at large of the particular legal rule whose ignorance is invoked. The more widely known a rule is to the community at large, the less likely it is that its ignorance by the particular buyer would be excusable, and vice versa.

Symeonides, 47 La. L. Rev. at 436. In short, "the inquiry should be whether the mistake is reasonable or not." Hargrave, *Ruminations on the Revision of the Louisiana Law of Acquisitive Prescription and Possession*, 73 Tul. L. Rev. 1197, 1200.

It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years. La. Civ. Code art. 3482. Because Bienville, a particular successor to Bruno Properties, relies on his author's possession, both must begin their possession in good faith. *See Bartlett v. Calhoun*, 412 So. 2d 597, 600 (La. 1982). We start with Bruno Properties.

Before analyzing the facts, we frame the issue presented. Because good faith is presumed, Conti Holding must prove Bruno Properties knew or should have known the Holzers did not own lot AA. *See* La. Civ. Code art. 3481; Symeonides, 44 La. L. Rev. at 146 n.75. We have found the Holzers did not own the lot, more specifically they did not acquire it by acquisitive prescription because their possession was precarious. Bruno Properties mistakenly believed the Holzers had acquired the lot by acquisitive prescription. The question is whether that mistake is reasonable. *See Phillips*, 483 So. 2d at 977; Symeonides, 47 La. L. Rev. at 436; Hargrave, 73 Tul. L. Rev. at 1200.

Conti Holding argues Bruno Properties cannot be in good faith because it knew the Holzers did not have a "paper title" to the lot. Actual knowledge of a "title defect" at the time of purchase generally precludes good faith. *See Phillips*, 483 So. 2d at 978. Here, however, the buyer relied on the seller's possession of the property, not a contractual title, to establish its ownership. Our law has long recognized that immovable property can be acquired by acquisitive prescription through possession. *See* La. Civ. Code arts. 3446 and 3486. Acquiring ownership in this manner is no less valid and effective than by conventional title and, in fact, can supersede it. *See* La. Civ. Code arts. 481 (ownership is lost when "acquisitive prescription accrues in favor of an adverse possessor") and 794 (when party proves acquisitive prescription, property boundary "shall be fixed according to limits established by prescription rather than titles"). Consistent with Article 3480's mandate to consider all objective considerations when making the good faith determination, we hold a seller's lack of record or "paper" title to the conveyed property is not determinative of the buyer's good faith where, as here, the seller's purported ownership is based on acquisitive prescription. Under these circumstances, knowledge of the seller's lack of record title, while certainly a factor to consider, is not dispositive of the buyer's good faith.

It is not disputed that Rudolph told Bruno the Holzers owned the lot because they alone possessed it for almost sixty years. This possession was also not disputed at trial. Rudolph also told Bruno the property was assessed in the Holzers' name for that same period of time, and the Holzers paid the property taxes. The record supports that statement. The record also establishes that, at the time Bruno Properties' acquired the lot in 2000, the actual owners had no knowledge of their ownership and had no interaction with the lot. Saxton and his heirs had not asserted any dominion or control over the property for at least seventy years. As for the purchase price, Bruno Properties paid a lump sum for over a dozen parcels, so the specific consideration for lot AA cannot be determined.

As pointed out by Conti Holding, the description of lot AA in the act of sale includes an incorrect reference suggesting the lot was acquired in the 1946 transfer from the Hozler brothers to Holzer Realty. Kulik, the title abstractor called by Conti Holding, said this notation is an "acquisition clause" and is usually intended to inform a title researcher of where the seller obtained their interest in the property. Conti Holding presented no testimony from the closing attorney or the parties to the transaction about why this specific reference was included in the legal description. It is undisputed that Bruno Properties did not rely on record title to establish its predecessor's ownership of lot AA. Rather, it relied on nearly sixty years of uninterrupted possession. Even if Bruno Properties is imputed with knowledge of the 1946 conveyance, it merely confirms what Bruno Properties already knew: the Holzers did not have record title to lot AA.

While the 1946 conveyance includes a right of use over lot AA, that fact alone does not overcome the presumption of good faith. To understand the effect of this right on the Holzers' ownership, Bruno Properties would have to surmise (1) the right is a servitude, (2) the servitude made the Holzers precarious possessors, (3) precarious possessors cannot prescribe, and (4) the precarious possession was never

converted to adverse possession. Imputing this degree of knowledge to Bruno Properties is inconsistent with the status of that law in the community at large. *See* Symeonides, 47 La. L. Rev. at 436. While acquisitive prescription is a well-known part of Louisiana law, the legal doctrine of precarious possession and the termination of that possession are not "widely known . . . to the community at large." *Cf.* Symeonides, 47 La. L. Rev. at 436 (quoted language). Our resolution of the precarious possession issues required review of the current and former civil codes; reconciliation of jurisprudence to discern applicable standards (the subject of disagreement among legal scholars); and application of those standards to the facts of this case. These are complex issues not generally known to the public at large. In fact, they proved so vexing in this case that the lower courts, after considering the applicable law and exhaustive evidence, arrived at the same conclusion as Bruno Properties: the Holzers owned lot AA. While we reach the opposite conclusion relative to the Holzers, the lower courts' finding evidences the reasonableness of Bruno Properties' mistake of law.

In light of all objective considerations, we find Bruno Properties' reasonably believed the Holzers owned lot AA. Bruno Properties' presumed good faith is supported by its knowledge of the Holzers' exclusive possession of the lot for almost six decades. The reliance on that possession proved erroneous, not because the Holzers lack contractual title but because their possession was rendered precarious by a servitude granted in a legal description of another parcel. Given the nature of this error of law, Bruno Properties' belief the Holzers acquired the property by acquisitive prescription is a reasonable mistake. Conti Holding thus did not rebut the presumption of Bruno Properties' good faith. *See* La. Civ. Code arts. 3480-81.

Bienville acquired title in 2006. Like the previous sale, a lump sum price was paid for multiple parcels, so the amount paid for lot AA cannot be determined. Stephen Simone prepared the closing documents and confirmed he provided a title

opinion certifying Bruno Properties had valid title to lot AA. The title insurance policy likewise includes lot AA. For reasons Simone and his abstractor, Norton, could not recall, the lot was excluded from the Norton's public records research and the initial coverage binder. However, according to Simone, the issue was resolved, and he concluded Bruno Properties had good title to lot AA, issued his opinion, and bound coverage. Simone maintained that opinion in his deposition. He also does not remember communicating any issues about the lot to Marcello, Bienville's representative. During trial, Marcello was not asked about the closing or his belief Bruno Properties owned the lot.

> If the belief by the possessor results from a title opinion of a reputable attorney, the issue should simply be whether a reasonable person would act on such an opinion. Current practice would seem to indicate that having a good title opinion would be the ultimate in reasonableness.

Hargrave, 73 Tul. L. Rev. at 1200.

Bienville is presumed to be in good faith and purchased lot AA with the benefit of a title opinion from an attorney certifying the seller had good title. Conti Holding failed to prove Bienville knew or should have known Bruno Properties was not the owner of lot AA.

Based on our *de novo* review, we find Bienville proved the necessary elements for ten-year acquisitive prescription for lot AA, including just title, good faith, and possession as owner for ten years. *See* La. Civ. Code arts. 3473 and 3475. Accordingly, we affirm the lower courts' judgments declaring Bienville to be the owner of lot AA.

CONCLUSION

We affirm the lower courts' judgments declaring 1025 Bienville, LLC to be the owner of lot AA, as more particularly described in the attached appendix. We

further affirm the denial of all claims asserted on behalf of 1026 Conti Holding, LLC.

AFFIRMED.[4]

[4] We deny Bienville's motion for leave to file a supplemental brief and Conti Holding's motion for leave to file a response to a timeline distributed at oral argument.

APPENDIX

THAT CERTAIN PIECE OR PARCEL OF LAND designated as **LOT AA of SQUARE 97, SECOND DISTRICT, CITY OF NEW ORLEANS, PARISH OF ORLEANS, STATE OF LOUISIANA,** said parcel being more particularly described as follows:

Commencing at the intersection of the southeasterly right of way line of North Rampart Street and the southwesterly right of way line of Conti Street, said intersection being S52°32'29"E a distance of 3.00 feet (3.0.0) from a cross cut in concrete found; thence, continuing S52°32'29"E, along said Conti Street right of way a distance of 108.35 feet (108.4.2) to a point that is S37°15'16'w a distance of 3.13 feet (3.1.5) from a cross cut found; thence, continuing S37°15'16"W a distance of 127.65 feet (127.7.7) to a cross cut in concrete set and the POINT OF BEGINNING; thence S53°06'42"E a distance of 49.93 feet (49.1.1) to a cross cut in concrete set; thence S37°28'43"W a distance of 49.57 feet (49.6.7) to a cross cut in concrete set; thence N52°33'38"W a distance of 41.35 feet (41.4.2) to a cross cut in concrete set; thence S37°26'22"W a distance of 1.48 feet (1.5.6) to a cross cut in concrete set; thence N52°33'38"W a distance of 8.38 feet (8.4.5) to a cross cut in concrete set; thence N37°15'15"E a distance of 50.57 feet (50.6.7) to the Point Of Beginning.

The above-described parcel contains 0.057 acre as surveyed by Duplantis Design Group, PC, Project No. 21-1169, dated January 28, 2022, a copy of which is attached to Act of Correction And Ratification, dated 9 February 2022, registered at CIN 706156 in the conveyance records of Orleans Parish, Louisiana, attached hereto as **Exhibit "A"**.

Being the same property acquired by 1025 Bienville, LLC, in that Act of Sale dated 23 June 2006, recorded at CIN325302, as corrected and ratified through an Act of Correction And Ratification, dated 9 February 2022, registered at CIN 706156 in the conveyance records of Orleans Parish, Louisiana.

Also being the same property acquired by Bruno Properties, L.L.C. in that Act of Sale, dated January 7, 2000, recorded at CIN191620 in the conveyance records of Orleans Parish, Louisiana.

Also being the same property acquired by John Albion Saxton, in that Act of Sale dated 19 January 1921, registered at COB334/139 in the conveyance records of Orleans Parish, Louisiana.

SUPREME COURT OF LOUISIANA

No. 2022-C-01288

1026 CONTI HOLDING, LLC

VS.

1025 BIENVILLE, LLC

On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans Civil

WEIMER, C.J., concurring in the result.

I agree with the well-written disposition of the ten-year acquisitive prescription issue in this challenging matter. However, because I do not embrace the entirety of the analysis related to the thirty-year acquisitive prescription issue, which I believe to be dicta, I respectfully concur.

SUPREME COURT OF LOUISIANA

No. 2022-C-01288

1026 CONTI HOLDING, LLC

VS.

1025 BIENVILLE, LLC

On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans Civil

Hughes, J., additionally concurring.

It is difficult to argue with the well-written opinion. My concern is with the public records doctrine, which provides some level of certainty in real estate matters.

If one knows that one does not have a good "paper title," does one not have a duty to check the public record to see who does, or may one rely on representations made by a vendor that he has acquired ownership by acquisitive prescription?

If the latter, Civil Code article 3480 appears to allow "objective considerations" to determine whether the belief of a possessor that he owns the thing he possesses is reasonable, and thus in good faith. This is necessarily a case by case inquiry, contrary to the usual philosophy of the Civil Code to limit litigation and provide certainty.