

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0515

CATE PROPERTIES, LLC and  
THE UNIVERSITY OF THE SOUTH

VERSUS

EARL J. HEPBURN, SR., and MAXINE FRANK HEPBURN

Judgment Rendered: November 9, 2011.

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On Appeal from the  
21st Judicial District Court,  
In and for the Parish of Tangipahoa,  
State of Louisiana  
Trial Court No. 2008-0002643

The Honorable W. Ray Chutz, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

**CARTER, C. J.**

Earl J. Hepburn, Sr., and Maxine Frank Hepburn appeal a judgment of the trial court denying their peremptory exception raising the objection of prescription of nonuse and granting summary judgment in favor of Suzanne Barnes Graham, Mertie Barnes Miller, and the University of the South (plaintiffs),<sup>1</sup> recognizing a predial servitude of passage over the Hepburns' property and that the Hepburns' house interferes with the servitude.

**FACTS AND PROCEDURAL HISTORY**

Plaintiffs own an undeveloped, approximately 14-acre tract in Hammond, Louisiana (referred to herein as "the Cate property"), which is contiguous to Wedgwood Subdivision. In 1985, the Cate property's owners and Wedgwood Subdivision's developers executed an "Agreement to Dedicate Servitudes," wherein the Cate property's owners granted a servitude of drainage over a portion of the Cate property, and in consideration thereof, the subdivision developers granted a servitude of passage over what is Lot 19 in Wedgwood Subdivision. In 2000, the subdivision developers sold Lot 19 to Jim Meyer Construction Company. The construction company then constructed a house on Lot 19, which the Hepburns bought in 2006.

Plaintiffs allegedly learned of the construction on Lot 19 in 2007. This suit for enforcement of the predial servitude or, alternatively, for damages against the Hepburns followed. The trial court granted plaintiffs' motion for partial summary judgment, recognizing the existence of the predial servitude of passage and that the Hepburns' house situated thereon

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<sup>1</sup> Suit was originally filed by Cate Properties, L.L.C., and University of the South; however, the trial court later granted leave to substitute Suzanne Barnes Graham and Mertie Barnes Miller as parties plaintiff in place of Cate Properties, L.L.C.

constitutes an interference with that servitude. The trial court denied the Hepburns' peremptory exception raising the objection of prescription, alleging nonuse. This appeal by the Hepburns followed.

### DISCUSSION

A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So. 2d 880, 882-83. A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. Code Civ. Proc. Ann. art. 966B. Summary judgment procedure is favored. La. Code Civ. Proc. Ann. art. 966A(2).

The burden of producing evidence at the hearing on the motion for summary judgment is placed initially on the mover, who can ordinarily meet that burden by submitting depositions or affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. *See* La. Code Civ. Proc. Ann. art. 966C(2); *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 09-1633 (La. 4/23/10), 35 So. 3d 1053, 1059. At that point, the party who bears the burden of persuasion at trial must come forth with evidence that demonstrates he will be able to meet his burden at trial. *Cheremie*, 35 So. 3d at 1059; *see* La. Code Civ. Proc. Ann. art. 966C(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the

motion. *Cheremie*, 35 So. 3d at 1059; see La. Code Civ. Proc. Ann. art. 966C(2). A fact is material when its existence or nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. *Cheremie*, 35 So. 3d at 1059. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*

In support of their motion for summary judgment, plaintiffs submitted the servitude agreement establishing the servitude of passage over Lot 19. In opposition, the Hepburns argued that the servitude was established for the purpose of removing timber from the Cate property and was extinguished by prescription of nonuse because a ten-year period elapsed without a legally sufficient use of the servitude.

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. Civ. Code Ann. art. 646. The use and extent of predial servitudes are regulated by the title by which they are created. La. Civ. Code Ann. art. 697. In the absence of such regulation, they are governed by the rules set forth in Louisiana Civil Code Annotated articles 698 through 774. *See* La. Civ. Code Ann. art. 697.

A right of passage, such as that at issue herein, is a predial servitude that permits passage through the servient estate. La. Civ. Code Ann. arts. 699 and 705. A predial servitude not used for ten years is extinguished by operation of liberative prescription of nonuse. *See* La. Civ. Code Ann. art. 753. For affirmative servitudes (those giving the owner of the dominant estate the right to do something on the servient estate), prescription of nonuse begins to run from the date of the servitude's last use. La. Civ. Code Ann. arts. 706 and 754. When prescription of nonuse is pled, the owner of

the dominant estate has the burden of proving that someone has made even partial use of the servitude in the manner contemplated by the grant of the servitude and as appertaining to the dominant estate during the period of time required for the accrual of prescription, such that no consecutive ten-year period of nonuse occurred. *See* La. Civ. Code Ann. arts. 759 and 764; *Roba, Inc. v. Courtney*, 09-0509 (La. App. 1 Cir. 8/10/10), 47 So. 3d 509, 515.

The agreement between the Cate property's owners and Wedgwood Subdivision's developers states:

Grantee [(the subdivision developers)] does hereby dedicate a sixty (60) foot side [sic] predial right-of-way or servitude of passage in favor of the Parish of Tangipahoa, Louisiana, and the property of Grantors [(the Cate property's owners)] lying east of Wedgwood Subdivision, the right-of-way or servitude of passage to have a width of fifty (50) feet and depth between equal and parallel lines, with the north line of the servitude being the south line of Lot 18, the servitude being more fully described in the plat attached to and marked for identification with this act. Grantee shall have no duty to construct improvements on the servitude area, but Grantors may at their option so construct and dedicate such improvements in favor of the Parish of Tangipahoa, Louisiana.

By the clear language of the agreement, the servitude is one of passage. Unless the title provides otherwise, the extent of the right and the mode of its exercise shall be suitable for the kind of traffic necessary for the reasonable use of the dominant estate. La. Civ. Code Ann. art. 705. The title does not provide that the servitude is restricted or limited in any way. In particular, the title does not indicate that the servitude's purpose is for use in removing timber from the Cate property during periodic logging

operations, as suggested by the Hepburns. Rather, the title establishes a general right of passage over Lot 19<sup>2</sup> in favor of the Cate property.

A predial servitude is preserved by the use made of it by anyone, even a stranger, so long as it is used as appertaining to the dominant estate. La. Civ. Code Ann. art. 757. The language “so long as it is used as appertaining to the dominant estate” has been interpreted by this court as requiring that someone must use the servitude for the purpose of going onto the servient estate for some legitimate purpose, either to see the owner or for something connected with the use of the servient estate. *Roba*, 47 So. 3d at 515.

In 1994, Ben Miller, III, was granted a limited power of attorney to timber the property. Miller used the servitude when he clear-cut the Cate property in late 1994 and early 1995. Suzanne Barnes Graham and her sister took over management of the property in 1998. Graham’s husband testified that he and his wife periodically used the servitude to access the property. In 1998 or 1999, the former manager’s timber advisor walked the property with the Grahams and used the servitude as the means of access. Although there were no timber operations at the time due to the property having been clear-cut, the Grahams explored the possibility of selling the property to the owners of Wedgwood Subdivision for development. The Grahams last accessed the property via the servitude in 2006 or 2007.

The record establishes that the servitude was sufficiently used so as to prevent its extinguishment by prescription of nonuse. As there is no question that the Hepburns’ house interferes with the servitude, we find that plaintiffs were entitled to summary judgment.

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<sup>2</sup> Lot 19 is south of and adjacent to Lot 18.

## **CONCLUSION**

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to Earl J. Hepburn, Sr., and Maxine Frank Hepburn.

**AFFIRMED.**