

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2183

HUY TUYET TRAN

VERSUS

VINCENT GERARD MISURACA, JR.,  
JACK F. ODOM AND GERTRUDE L. ODOM,  
JOHN W. ADAMS

Judgment Rendered: May 6, 2011.

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*RJM*  
*JFW*

On Appeal from the  
23rd Judicial District Court,  
In and for the Parish of Ascension,  
State of Louisiana  
Trial Court No. 85,783

The Honorable Guy Holdridge, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

*RJM - Gaidry, J. dissents with reasons*

**CARTER, C. J.**

Vincent Gerard Misuraca, Jr., appeals a summary judgment declaring that his property is burdened with a predial servitude of passage, existing over a concrete drive that crosses his property and connects his neighbor's contiguous tract with an adjacent highway.

**FACTS AND PROCEDURAL HISTORY**

Misuraca and Huy Tuyet Tran own contiguous tracts of land in Ascension Parish. The tracts originally formed a single tract known as Lot 6-A, which was owned by Odom's Tire and Car Care, Inc. ("Odom's"). Odom's sold a portion of the tract, Lot 6-A-2 (referred to herein as "Tran's tract"), as well as a building and business, to Tran in 2004. Odom's sold the remainder of the tract, Lot 6-A-1 (referred to herein as "Misuraca's tract"), to TRI Investments, LLC, in 2005, which sold it to Misuraca in 2006. The tracts share a common boundary that generally lies on the east of Misuraca's tract and the west of Tran's tract. Tran's tract is not landlocked, but is directly accessible via Highway 73 (the western boundary of Misuraca's tract) only by a concrete driveway that extends across Misuraca's tract and connects Tran's tract to Highway 73.

Tran instituted suit against Misuraca and others, alleging that Misuraca constructed a fence along their shared boundary, which blocked his use of the concrete driveway. Tran sought a judgment declaring that a predial servitude of passage was established in favor of his tract and burdening Misuraca's tract, as well as other relief. Misuraca acknowledged that the driveway existed before he bought his tract, but denied that any servitude existed. The trial court granted Tran's motion for summary judgment on the issue. Misuraca now appeals the trial court's summary

judgment declaring the existence of an apparent predial servitude of passage over the concrete driveway, which is for the benefit of Tran's tract.

### DISCUSSION

The trial court designated the summary judgment as a final judgment for purposes of appeal pursuant to La. Code Civ. Proc. art. 1915. The trial court provided express reasons that its reason for doing so was to shorten and streamline the issues for trial, which, after rendition of the summary judgment, would concern only damages. After reviewing the record, we do not find that the trial court abused its discretion in certifying the judgment as final for purposes of appeal. *See R.J. Messinger, Inc. v. Rosenblum*, 04-1664 (La. 3/2/05), 894 So. 2d 1113, 1122.

The judgment before the court is a summary judgment, which appellate courts review *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Bozarth v. State, LSU Medical Center/Chabert Medical Center*, 09-1393 (La. App. 1 Cir. 2/12/10), 35 So. 3d 316, 323. The motion should be granted only 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 the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966B; *Bozarth*, 35 So. 3d at 323.

The burden of proof on a motion for summary judgment is on the moving party. If the moving party will not bear the burden of proof at trial on the matter that is before the court, the moving party's burden is to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden shifts to the adverse party to prove that there are

genuine issues of material fact by providing factual evidence sufficient to establish the ability to satisfy the evidentiary burden of proof at trial. La. Code Civ. Proc. art. 966C(2).

A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Bozarth*, 35 So. 3d at 324. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Bozarth*, 35 So. 3d at 324; *Saizan v. Pointe Coupee Parish School Bd.*, 10-0757 (La. App. 1 Cir. 10/29/10), 49 So. 3d 559, 563, *writ denied*, 10-2559 (La. 1/14/11), 52 So. 3d 905.

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. Civ. Code art. 646. A right of passage is a predial servitude that permits passage through the servient estate. La. Civ. Code arts. 699 and 705. A servitude of passage may be an apparent servitude, meaning that is evidenced by exterior signs, works, or constructions, such as a roadway. La. Civ. Code art. 707. If the servitude of passage is apparent, it may be acquired by destination of the owner. La. Civ. Code art. 740.

Louisiana Civil Code article 741 provides:

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 and a nonapparent servitude comes into existence if the owner has previously filed for registry in the conveyance records of the parish in which the

immovable is located a formal declaration establishing the destination.

Creation of a servitude by destination of the owner first requires that the estates in question have had the same owner. In this case it is undisputed that Odom's owned both Tran's and Misuraca's tracts as the undivided Lot 6-A. Misuraca argues, however, that since Odom's owned the tracts as an undivided whole, the requirement of two estates being owned by the same owner is not met. Misuraca argues that the division into the two separate tracts did not occur until after the sale to Tran when the Ascension Planning Commission approved the re-subdivision (approximately one month after execution of the Act of Cash Sale between Odom's and Tran).

In his law review article *Creation of Servitudes by Prescription and Destination of the Owner*, Professor Yiannopoulos explained:

For servitudes to be created by destination of the owner, the dominant estate and the servient estate must have belonged in the past to the same person. This may be proven by all sorts of evidence, including oral testimony.

According to well-settled French doctrine and jurisprudence, an owner may establish a [relationship] of destination between two separate estates or between two parts of the same estate. Thus the owner of an estate may establish a charge on a part of his estate in favor of another part, and he may create a servitude by destination upon transfer of one of the parts to another person. This reasoning should be applicable in Louisiana also, as witnessed by the fact that article 741 of the Civil Code speaks of "the owner of the immovable."

A.N. Yiannopoulos, *Creation of Servitudes by Prescription and Destination of the Owner*, 43 La. L.Rev. 57, 77 (footnotes omitted).

Here, Odom's owned Tran's and Misuraca's tracts as part of a single large tract. We find that the requirement of a single owner of what are now the two estates was met and reject Misuraca's interpretation of the law.<sup>1</sup>

The second requirement for creation of a servitude by destination is that the owner (here Odom's) established a relationship between the estates, which would be a servitude if the estates were separately owned. La. Civ. Code art. 741. While it was the owner, Odom's constructed a concrete roadway over what is now Misuraca's tract, connecting Tran's tract to Highway 73. The roadway is indisputably apparent, as evidenced by the aerial photograph submitted in support of the motion for summary judgment, and established a relationship between what are now Tran's and Misuraca's tracts, allowing access to Tran's tract from Highway 73.

The last requirement is that the estates cease to belong to the same owner. This was accomplished when Odom's sold Tran's tract to Tran. Without an express provision to the contrary, an apparent servitude of passage in favor of Tran's tract came into existence.

In opposition to the motion for summary judgment, Misuraca raised issues related to his and Tran's titles. We find this immaterial as the servitude was created by destination of the owner.

Misuraca also argues that if the servitude came into existence, it was extinguished pursuant to La. Civ. Code art. 771, by the failure to reserve and designate the servitude on the map prepared by R.L. Bennett. Article 771 provides that "[a] predial servitude is extinguished by an express and written renunciation by the owner of the dominant estate." The absence of a

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<sup>1</sup> Moreover, as pointed out by Tran in brief, the map showing the subdivision as approved by the Ascension Planning Commission was filed in the public records prior to recordation of the sale from Odom's to Tran.

servitude notation on a map prepared by a third party does not meet the criteria of an express and written renunciation by the owner of the dominant estate. Accordingly, this does not create a genuine issue of material fact so as to defeat Tran's motion for summary judgment.

Finally, we find no merit in Misuraca's argument that the servitude is ambiguous as to its extent and manner. The servitude is marked by a concrete roadway connecting Tran's tract to the highway on the far side of Misuraca's tract. We find no ambiguity that would create a genuine issue of material fact here.

### **CONCLUSION**

After *de novo* review, we agree with the trial court that there is no genuine issue of material fact regarding the existence of the servitude and that Tran is entitled to summary judgment as a matter of law declaring such. Accordingly, the judgment of the trial court is affirmed. Costs of this appeal are assessed to Vincent Gerald Misuraca, Jr.

**AFFIRMED.**

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 **GAIDRY, J., dissents and assigns reasons.**

I disagree with the majority's conclusion that a servitude may be created by destination of the owner in a situation where there is only one estate. Louisiana Civil Code article 741 states that destination of the owner is a relationship established between *two estates* owned by the same owner. In the Louisiana Law Review article quoted by the majority, Professor Yiannopoulos explains that the French jurisprudential rule that an owner may establish a relationship of destination between two parts of a single estate should be applicable in Louisiana as well because article 741 speaks of "the owner of *the immovable*." However, this quoted language is no longer contained in Louisiana Civil Code article 741, and I believe that the language of the statute is clear that there must be two separate estates in order for a servitude to be created by destination of the owner. Additionally, I disagree with the conclusion of the majority that this partial summary judgment was properly designated as final and appealable. *See R.J.*



*Messinger, Inc. v. Rosenblum*, 2004-1664, p. 14 (La.3/2/05), 894 So.2d 1113,

1122. Therefore, I respectfully dissent.