

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 1122**

**SHEILA VANDERBROOK WIFE OF/AND TERRY B. TRAHAN,  
DOLORES DeLAUNE WIFE OF/AND JOHN B. MIDDLETON, E.  
RAY WILKES, JR., ANNE LESTER WIFE OF/AND ROBERT R.  
RAPOSO, SHERIE LANDRY WIFE OF/AND RAYMOND C.  
BURKART, JR., AND STACY MILLER WIFE OF/AND  
LANCE L. ENGOLIA, SR.**

**VERSUS**

*John*  
**CHRISTOPHER R. JEAN; LEE ROAD DEVELOPMENT  
COMPANY; HIGHLAND LAKES DEVELOPMENT  
CORPORATION; JOHNNY F. SMITH TRUCK AND DRAGLINE  
SERVICE, INC.; THE HIGHLANDS HOMEOWNERS  
ASSOCIATION OF ST. TAMMANY, INC.; PALMERS, INC.;  
ALTERNATIVE DESIGN/BUILD GROUP. L.L.C.; NORTHLAKE  
TRUCK CENTER, L.L.C.; MULLER & MULLER, ATTORNEYS AT  
LAW, A LIMITED LIABILITY COMPANY; JOHNNY F. SMITH  
TESTAMENTARY TRUST; RICHARD L. MULLER; SILVIA G.  
MULLER; JANICE SEAL SMITH STUMPF INDIVIDUALLY AND  
AS TRUSTEE OF THE JOHNNY F. SMITH TESTAMENTARY  
TRUST; BARNEY L. CORE; GARY SALATHE; MARTIN MURPHY;  
DAVID T. GLASS; WADE GLASS; ADRIAN SPELL; JODI  
McINTYRE WIFE OF/AND GREGORY "SCOTT" BRIDGES;  
WILLIS A. PALMER**

**Judgment rendered: September 20, 2006**

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**On Appeal from the 22<sup>nd</sup> Judicial District Court  
Parish of St. Tammany, State of Louisiana  
# 2004-11723 "E"  
The Honorable William J. Burris, Judge Presiding**

*Judge Pettigrew, J. concurs in Results  
Hughes, J., concurs in part and dissents in part  
with reasons.*

**PLAINTIFFS/APPELLANTS**

Sheila Vanderbrook wife of/and Terry Trahan, Dolores DeLaune wife of/and John B. Middleton, E. Ray Wilkes, Jr.; Anne Lester wife of/and Robert R. Raposo, Sherie Landry wife of/and Raymond C. Burkart, Jr. and Stacy Miller wife of/and Lance L. Engolia, Sr.  
**Attorney appearing on behalf of Plaintiffs**  
**Raymond C. Burkart, Jr.**  
**Covington, LA**

**DEFENDANTS/APPELLEES**

Northlake Truck Center, L.L.C.  
**Attorney appearing on behalf of Defendants**  
**Julian J. Rodrigue, Jr.**  
**Covington, LA**

**DEFENDANTS/APPELLEES**

Lee Road Development  
**Attorneys appearing on behalf of Defendants**  
**Lee Road Development**  
**William J. Jones, Jr.**  
**Leland R. Gallaspy**  
**Covington, LA**

**DEFENDANTS/APPELLEES**

Palmers, Inc. and Willis Palmer  
**Attorneys appearing on behalf of Defendants**  
**James Lamz**  
**Deanna J. Hamilton**  
**Slidell, LA**  
**and**  
**William J. Faustermann, Jr.**  
**Slidell, LA**

**DEFENDANTS/APPELLEES**

David Glass, Wade Glass and Glass Contracting of St. Tammany, Inc.  
**Attorney appearing on behalf of Defendants**  
**Alan A. Zaunbrecher**  
**Metairie, LA**

**DEFENDANTS/APPELLEES**

Alternative Design/Build Group, L.L.C., Gary Salathe, and Martin Murphy  
**Attorneys appearing on behalf of Defendants**  
**Roger C. Linde**  
**Metairie, LA**  
**and**  
**Lorraine P. McInnis**  
**Metairie, LA**

**DEFENDANTS/APPELLEES**

Christopher R. Jean, Highland Lakes Development Corp., Johnny F. Smith Truck and Dragline Service, Inc., the Highlands Homeowners Association of St. Tammany, Inc., Johnny F. Smith Testamentary Trust and Janice Seal Smith Stumpf and Barney L. Core  
**Attorneys appearing on behalf of Defendants**  
**Michael F. Weiner**  
**Mark W. Frilot**  
**Mandeville, LA**

**DEFENDANTS/APPELLEES**

Muller & Muller, L.L.C., Richard Muller and Sylvia Muller  
**Attorneys appearing on behalf of Defendants**  
**Michael P. Mentz**  
**Alayne R. Corcoran**  
**Metairie, LA**

**DEFENDANT/APPELLEE**

Adrian Spell  
**Attorney appearing on behalf of Defendant**  
**Jesse L. Wimberly, III**  
**Mandeville, LA**

**DEFENDANTS/APPELLEES**

Jodi McIntyre wife of/and Gregory "Scott" Bridges  
**Attorneys appearing on behalf of Defendants**  
**Jack E. Truitt**  
**Nancy N. Butcher**  
**Metairie, LA**

**BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.**

## **DOWNING, J.**

In this appeal, we address whether the trial court erred when it entered judgment granting an exception of improper cumulation and dismissing some of the defendants as a result. For the following reasons, we affirm the trial court's judgment insofar as it granted the exception. We reverse and vacate the judgment, however, wherein it orders the dismissal of the petition against the defendants/appellees David Glass, Wade Glass and Glass Contracting of St. Tammany, Inc., Alternative Design/Build Group, LLC, Gary Salathe and Martin Murphy (collectively, the "Glass Group").<sup>1</sup> We order a separate trial for these defendants.

### **PERTINENT FACTS AND HISTORY**

Plaintiffs/Appellants<sup>2</sup> filed a lengthy petition against a number of defendants generally seeking declaratory judgment and making damage claims dating back to the 1980s involving the development, ownership and construction of the lakes, earthworks, dams, spillways and roadways of Highland Lakes Subdivision in St. Tammany Parish. Included in this petition were claims against the Glass Group arising from their participation in the relatively recent construction of a residence for defendants, Jody and Gregory Bridges. Plaintiffs/Appellants generally allege that Glass Group trucks caused the damage to the subdivision roads.

Several defendants filed several exceptions. On January 27, 2005, the trial court conducted a hearing on these exceptions. No evidence was offered or introduced. After hearing the matter, on March 31, 2005, the trial court signed a judgment containing three decrees: 1) granting the Glass Group's exception of improper cumulation and dismissing the petition

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<sup>1</sup> David Glass, Wade Glass and Glass Contracting of St. Tammany, Inc. filed a separate appellee's brief. The others named here filed their brief jointly.

<sup>2</sup> Sheila Vanderbrook, wife of, and Terry B. Trahan, Dolores Delaune, wife of, and John B. Middleton, E. Ray Wilkes, Jr., Anne Lester, wife of, and Robert R. Raposo, Sheriel Landry, wife of, and Raymond C. Burkhart, Jr., and Stacy Miller, wife of, and Lance L. Engolia, Sr.

against these defendants; 2) granting the exception of vagueness filed by other defendants; 3) denying without prejudice the remaining exceptions.

Plaintiffs/Appellants filed an appeal asserting five assignments of error, summarized as follows:

- 1) the trial court erred in granting the Glass Group's dilatory exception of improper cumulation;
- 2) regarding an August 17, 2005 judgment, the trial court erred in granting Jodi and Gregory Bridges' dilatory exception of improper cumulation;
- 3) the trial court erred in granting the dilatory exception of vagueness filed by defendants Jean, Highland Lakes Corp., JFST, Highland Homeowners, Johnny F. Smith Testamentary Trust, Janice Seal Stumpf, and Barney Core;
- 4) the trial court erred in granting the dilatory exception of vagueness filed by defendants Muller & Muller, Richard Muller and Sylvia Muller;
- 5) regarding a September 10, 2004 judgment, the trial court erred in granting the dilatory exceptions of vagueness and "nonconformity of the petition" filed by defendants Lee Road Development Company, Palmers, Inc., Willis Palmer, Muller & Muller, and Richard and Sylvia Muller.

By separate orders dated August 8, 2005, a previous panel of this court dismissed the appeal as it relates to the third and fourth assignments of error. The appeal was otherwise maintained.

## **DISCUSSION**

### *Issue on Appeal*

We first observe that the second and fifth assignments of error concern judgments that have not been properly appealed. No timely notice of appeal has been filed regarding the September 10, 2004 judgment that is the subject of assignment of error no. five or regarding the August 17, 2005 judgment that is the subject of assignment of error no. two. Nor did any party seek supervisory writs concerning these judgments.

Further, while the judgment before us is appealable as a partial final judgment under La. C.C.P. art. 1915A because it dismisses the action as to

some of the parties, the trial court “retains jurisdiction to adjudicate the remaining issues in the case.” (Emphasis added.) La. C.C.P. art. 1915C. “It is well-settled that prior to final judgment a district court may, at its discretion and on its own motion, change the result of interlocutory rulings it finds to be erroneous.” **VaSalle v. Wal-Mart Stores, Inc.**, 01-0462. p. 5 (La. 11/28/01), 801 So.2d 331, 334. Thus, the trial court is not divested of jurisdiction over these matters on appeal so that ours would attach. The previous panel of this court apparently employed this principle in dismissing the other claims for appeal based on the issue of vagueness.

Additionally, regarding the August 17, 2005 judgment, we note that a prior panel of this court refused to consider a motion concerning the fifth assignment of error because that ruling was not addressed in the judgment on appeal, the one dated March 31, 2005. This matter is not properly before us, as the judgment was signed after the matter on appeal.

Plaintiffs/Appellants now suggest that we exercise our supervisory jurisdiction, but we see no basis for doing so when proper procedures are available to have these matters reviewed.

Accordingly, we dismiss the appeal insofar as it addresses issues pertaining to the judgments of September 10, 2004 and August 17, 2005 as raised in assignments of error two and five. We specifically do not rule on the efficacy of these judgments or on whether the trial court retained jurisdiction pursuant to La. C.C.P. art. 2088 to decide the issues addressed in the August 17, 2005 judgment.

Therefore, the only issue remaining for us to review is the one raised by the first assignment of error regarding whether the trial court erred in

granting the exception of improper cumulation in favor of the Glass Group and ordering the petition dismissed in their regards.<sup>3</sup>

*Improper Cumulation of Actions*

The trial court found that the actions against the Glass Group were improperly cumulated with the claims against the other defendants because the claims lacked a community of interest, the first requirement of La. C.C.P. art. 463. This article, regarding cumulation of plural plaintiffs or defendants, provides as follows:

Two or more parties may be joined in the same suit, either as plaintiffs or as defendants, if:

(1) There is a community of interest between the parties joined;

(2) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and

(3) All of the actions cumulated are mutually consistent and employ the same form of procedure.

Except as otherwise provided in Article 3657, inconsistent or mutually exclusive actions may be cumulated in the same suit if pleaded in the alternative.

Specifically, the trial court found that the claims regarding the Glass Group are relatively recent and have nothing to do with the other claims concerning defective construction in the 1980s. The trial court explained that “[t]he test in determining whether the defendants have a community of interest is whether the cumulated causes of action arise out of the same facts, or whether they present the same factual legal issues. No community of interest exists between these causes of action.” (Citations omitted.)

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<sup>3</sup> The record contains another judgment dated July 6, 2005 again granting the same exception of improper cumulation in favor of Alternative Design/Build Group, LLC, Gary Salathe and Martin Murphy dismissing the “petition, as amended” as to these defendants. We do not rule on the efficacy of this judgment as it is not properly before us. We note, however, that when the judgment on appeal dismissed the petition as to the defendants named therein, it dismissed the amendment as well. The law is long settled for our purposes here that a “supplemental and original petition are to be taken as one and the same proceeding.” **Weyman v. Cater**, 13 La. 492 (La. 1839).

Having reviewed the record, we conclude that the trial court was not manifestly erroneous in finding a lack of community of interest between the Glass Group and the other defendants and in concluding that the action against the Glass Group was improperly cumulated with the others.

Even so, we conclude that the trial court erred in dismissing the petition against the Glass Group. Dismissal is not one of the options provided by La. C.C.P. art. 464, except where the court lacks jurisdiction or venue is improper. Article 464 provides as follows:

When the court lacks jurisdiction of, or when the venue is improper as to, one of the actions cumulated, that action shall be dismissed.

When the cumulation is improper for any other reason, the court may: (1) order separate trials of the actions; or (2) order the plaintiff to elect which actions he shall proceed with, and to amend his petition so as to delete therefrom all allegations relating to the action which he elects to discontinue. The penalty for noncompliance with an order to amend is a dismissal of plaintiff's suit.

In **Blakely v. Powers**, 590 So.2d 1286, 1290 n.2 (La.App. 1 Cir. 1991), this court, citing La. C.C.P. arts 464 and 933, explained that it is error to dismiss a lawsuit against a party when actions are improperly cumulated. In this regard, Art. 464, Official Revision Comments – 1960, comment (c), instructs us that “the penalty . . . is not as drastic as the dismissal of the suit.” Comment (c) further provides that “[s]eparate trials of the actions improperly cumulated is the usual solution of the problem, and requiring the plaintiff to elect would be ordered only in those unusual cases where separate trials of the actions is not feasible.”

Accordingly, upon reviewing the record, we reverse and vacate the judgment of the trial court insofar as it dismissed the petition against the Glass Group. In accordance with Art. 464, we will order a separate trial of Plaintiffs/Appellants' actions against the Glass Group.

## DECREE

For the foregoing reasons, we affirm the judgment of the trial court insofar as it granted the exception of improper cumulation in favor of the defendants, David Glass, Wade Glass and Glass Contracting of St. Tammany, Inc., Alternative Design/Build Group, LLC, Gary Salathe and Martin Murphy and against the Plaintiffs/Appellants. We reverse and vacate the judgment, however, insofar as it dismissed the petition against these defendants. Rather, we order, adjudge and decree in accordance with La. C.C.P. art 464 that a separate trial be had on the Plaintiffs/Appellants' action against these defendants.

Further, we dismiss the appeal insofar as it addresses issues arising from decrees not included in the judgment appealed. Specifically, we dismiss and do not consider the issues raised in the second and fifth assignments of error, addressing decrees in judgments dated August 17, 2005 and September 10, 2004, respectively. Costs of this appeal are assessed to the Plaintiffs/Appellants.

**AFFIRMED IN PART; REVERSED AND VACATED IN PART;  
SEPARATE TRIALS ORDERED; APPEAL DISMISSED IN PART**



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SHEILA VANDERBROOK, ET AL

VERSUS

CHRISTOPHER R. JEAN, ET AL



HUGHES, J., concurring in part and dissenting in part

I respectfully agree with the majority opinion, in part, and dissent, in part. An appellant is entitled to seek review, upon appeal from a final judgment, of all adverse interlocutory rulings. **Judson v. Davis**, 2004-1699, pp. 7-8 (La. App. 1 Cir. 6/29/05), 916 So.2d 1106, 1112-13, writ denied, 2005-1998 (La. 2/10/06), 924 So.2d 167, and **Landry v. Leonard J. Chabert Medical Center**, 2002-1559, p. 5 n.4 (La. App. 1 Cir. 5/14/03), 858 So.2d 454, 461 n.4, writ denied, 2003-1748 (La. 10/17/03), 855 So.2d 761. Since the March 31, 2005 judgment appealed was final as to the defendants Alternative Design/Build Group, LLC, Gary Salathe, and Martin Murphy, who were dismissed from the case, the earlier September 10, 2004 interlocutory judgment, which sustained exceptions of vagueness and nonconformity, is also reviewable as it applied to those defendants.