NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1847

MARY MOISANT HUTCHINSON AND
ARLESS E. HUTCHINSON

VERSUS

OAK CREST HARBOUR TOWNHOME
ASSOCIATION, INC.

Judgment Rendered: September 15, 2006

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2004-10573

Honorable Elaine W. Dimiceli, Judge

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Kuhn, J. dissents & assigns reasons

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

In this dispute among neighbors concerning assigned parking places at the Oak Crest Harbour Townhome property, the plaintiffs, Mary Moisant Hutchinson and Arless E. Hutchinson, appeal a judgment of the trial court that, among other things, granted summary judgment in favor of the defendant, Oak Crest Harbour Townhome Association, Inc. (the "Association"), thereby dismissing the plaintiffs' claims with prejudice. For the following reasons, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

The plaintiffs are the owners of lot T-13 (Unit 321) in the Oak Crest Harbour Townhome property. The Association, comprised of the owners of the fifteen units at the Oak Crest Harbour Townhome property, manages the townhome property. At the time of the original sale of each unit in the Oak Crest Harbour Townhome property, two parking places were assigned to each unit. The assigned parking places for six of the units are contained in the parking area of Lot T.[1] The assigned parking places for the remaining units are in a parking area located on a non-exclusive right of use on Jefferson Street, adjacent to the southern boundary of the townhome property. The Association has adopted and ratified this plan of assigned parking places, both in its bylaws and in the Oak Crest Harbour Townhome declaration.

On February 2, 2004, the plaintiffs instituted this action for declaratory judgment, injunctive relief, and damages, wherein they sought to have the parking places located in Lot T and on Jefferson Street declared not subject to the exclusive

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[1] Lot T represents the common elements of the Oak Crest Harbour Townhome property. The Oak Crest Harbour Townhome declaration defines common elements as "that portion of the townhome property which is not part of any townhome lot but is owned in common by all townhome lot owners in the percentages given herein" (6.67%). The "common elements" include, among other things, a parking area, recreational amenities (a swimming pool and boat slip area), and access walkways.

use of any of the townhome owners; to have the bylaws and rules of the Association, which provide for the exclusive use of designated parking places, declared illegal and unenforceable; to enjoin the Association from enforcing or attempting to enforce any rules, regulations, or bylaws, which restrict or designate where the plaintiffs may park within the parking area in Lot T or on the Jefferson Street servitude; and for damages and other relief.

After preliminary procedural matters were resolved, the plaintiffs and the defendant moved for summary judgment. The hearing on the motions for summary judgment (and on other pending exceptions) was held on February 28, 2005. After the argument of counsel, the trial court took the matter under advisement. On March 9, 2005, the trial court rendered written reasons for judgment, which among other things, denied the plaintiffs' motion for summary judgment and granted the defendant's motion for summary judgment. The trial court signed a written judgment to this effect on March 29, 2005, and it is from this judgment that the plaintiffs now appeal.

On appeal, the plaintiffs contend that the trial court erred in granting the defendant's motion for summary judgment and in denying their motion for summary judgment.[2] Specifically, the plaintiffs assign error to the trial court's conclusions that: (1) the Jefferson Street parking area was part of the Oak Crest Harbour Townhome property regime; (2) the plaintiffs' knowledge of the parking

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[2] The denial of the plaintiffs' motion for summary judgment would generally be a non-appealable interlocutory judgment. See La. C.C.P. arts. 968 and 2083. However, it may be reviewed on an appeal of a final judgment in the suit. See **People of the Living God v. Chantilly Corp.**, 251 La. 943, 207 So.2d 752, 753 (1968); **Devers v. Southern University**, 97-0259 (La. App. 1st Cir. 4/8/98), 712 So.2d 199, 209. In this case, since the trial court's judgment disposed of all the relief prayed for by the parties, it is a final judgment. See La. C.C.P. art. 1841. Therefore, it is appropriate for this court to review the trial court's ruling that denied the plaintiffs' motion for summary judgment in reviewing the trial court's judgment that granted the defendants' motion for summary judgment. See **Board of Trustees of State Employees Group Benefits Program v. St. Landry Parish School Board**, 2002-0393 (La. App. 1st Cir. 2/14/03), 844 So.2d 90, 95, writ denied, 2003-0770 (La. 5/9/03), 843 So.2d 404; **Industrial Indemnity Co. of the Northwest v. Central Nat'l Ins. Co. of Omaha**, 99-2535 (La. App. 1st Cir. 12/22/00), 775 So.2d 1246, 1250; cf., **CITGO Petroleum Corp. v. State, ex rel. Dep't of Revenue and Taxation**, 2002-0999 (La. App. 1st Cir. 4/2/03), 845 So.2d 558, 563 n.8, writ denied, 2003-1243 (La. 6/27/03), 847 So.2d 1274.

system when they purchased their townhome prevented the plaintiffs from contesting the legality of the parking bylaw and the amendment to the townhome declaration; (3) the parking system was legal and enforceable because it was reasonable; and (4) the townhome declaration was properly amended on December 14, 2004, to incorporate the parking system into the townhome declaration.

LAW AND DISCUSSION

Summary judgment is appropriate when all relevant facts are brought before the court, the relevant facts are undisputed, and the sole remaining issue is the conclusion to be drawn from the relevant facts. **Terrebonne v. Floyd**, 99-1036 (La. App. 1st Cir. 5/23/00), 767 So.2d 754, 757. Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **J. Ray McDermott, Inc. v. Morrison**, 96-2337 (La. App. 1st Cir. 11/7/97), 705 So.2d 195, 202, writ denied, 97-3055, 97-3062 (La. 2/13/98), 709 So.2d 753, 754. A motion for summary judgment is properly granted when 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. C.C. P. art. 966(B). Appellate review of a question of law is simply to determine whether the trial court was legally correct or legally incorrect. See **Minor v. Casualty Reciprocal Exch.**, 96-2096 (La. App. 1st Cir. 9/19/97), 700 So.2d 951, 953, writ denied, 97-2585 (La. 12/19/97), 706 So.2d 463.

The Oak Crest Harbour Condominium regime was established by the execution of a condominium declaration on January 15, 1983, by Northshore Development Corporation, which was recorded in the conveyance records for St. Tammany Parish on January 20, 1983 (the "condominium declaration"). See La. R.S. 9:1122.101. Article IX of the condominium declaration provided that the

condominium declaration "may be amended by vote or agreement of Unit owners of Units to which at least eighty (80%) per cent of the votes of the Association are allocated." Thereafter, Colonnade Homes Corporation acquired ownership of thirteen out of the fifteen condominium units (or 86.6% of the units). Pursuant to Article IX of the condominium declaration, on June 22, 1990, Colonnade Homes Corporation, through its president, Gregory Peace, amended the condominium declaration to convert the condominium regime into townhomes (the "townhome declaration"). Additionally, the Association was established by restated articles of incorporation, and its bylaws were subsequently adopted at a meeting of the board of directors. As previously noted, the Association is comprised of the owners of the fifteen townhome units.

In the condominium declaration, Northshore Development Corporation stated that it was submitting the property to the provisions of the Louisiana Condominium Act, La. R.S. 9:1121.101 through 9:1124.117. This provision was not amended by the townhome declaration.

Louisiana Revised Statutes 9:1124.115(A) provides: "The condominium declaration and bylaws shall have the force of law between the individual unit owners. The remedies for breach of any obligation imposed on unit owners or the declarant shall be damages, injunctions, or other such remedies as provided by law." The bylaws of the Association mandate that, "[a]ll present or future owners, tenants, or their employees, or any other person who might use the facilities of this townhome property, including the actual townhomes and all common elements, in any manner, are subject to the regulations set forth in these By-laws."

The townhome declaration provides that ownership of a townhome lot includes the following: "an undivided percentage ownership interest in the Common Elements or Areas, amounting to Six and 67/100 (6.67%) per cent," "[a]ll rights afforded to an undivided co-owner to use all Common Elements as

provided in this act," and, "[a]ll rights, privileges and obligations of the prior Unit or townhome lot owner in the Association." Article II of the townhome declaration states that the 6.67% ownership in the common elements was an inseparable component of ownership, which could not be altered without the consent of all townhome lot owners in writing. However, of particular importance, Article II further provides,

> The Association *shall have the right to establish rules and regulations for the use of the Common Elements* by its members and invitees, tenants and the like. *Subject to the observance of such rules and regulations*, all townhome lot owners may use the Common Elements in such a manner as will not restrict, interfere with or impede the use thereof by other townhome lot owners.
> (Emphasis added).

The townhome declaration can be "amended only by vote or agreement of the townhome owners who have at least eight [*sic*] (80%) percent of the votes of the Association."

The bylaws of the Association provide that the Association has all of the powers necessary to govern, manage, maintain, repair, administer, and regulate the townhome properties. The bylaws also provide that the Board of Directors could "promulgate rules and regulations governing the Units, Common Elements as a supplement to the conditions and restrictions" contained in the townhome declaration. Additionally, a majority of the members of the Association must vote to approve or adopt any rule or regulation for the Oak Crest Harbour Townhome property.

Commencing with the original sale of the townhome units in 1991, Gregory Peace established a system of assigned parking places for each unit. On April 24, 1994, the Association amended its bylaws to include parking restrictions, which provided that parking in the Oak Crest Harbour Townhome lots was limited to two vehicles per unit and that residents could only park in the numbered spaces assigned to their unit. Thereafter, on October 15, 1998, the plaintiffs purchased

Unit 321. When the plaintiffs purchased Unit 321, they were aware of the overall assigned parking plan for the Oak Crest Harbour Townhome property, as well as the specific parking spaces assigned to their unit. Thereafter, the plaintiffs became dissatisfied with the assigned parking plan for the Oak Crest Harbour Townhome property, and requested that the assigned parking plan be eliminated and an open parking plan be instituted.

On February 2, 2003, the bylaws of the Association were further amended to provide that the lot owners, by mutual consent, could "swap parking places" but otherwise, the parking place assignments were to remain "as is," with a drawing of the parking assignments attached thereto. On December 14, 2004, by a vote of 93.33% (fourteen out of fifteen) of the Association, Article II of the townhome declaration was amended, with regard to the common elements, to provide:

> The Associations shall have the right to establish rules and regulations for the use of the common elements by its members and invitees, tenants and the like. Subject to the observance of such rules and regulations, all townhome lot owners may use the common elements in such a manner as will not restrict, interfere with or impede the use thereof by other townhome lot owners, *except that the system of designated parking spaces in use at the time of this amendment, previously adopted and ratified by the association . . . shall remain in effect whereby the designated parking spaces are for the exclusive use of the designated townhome owners, tenants, occupants and guests.* (Emphasis added.)

The plaintiffs contend that above phrase which provides "all townhome lot owners may use the common elements in such a manner as will not restrict, interfere with or impede the use thereof by other townhome owners" should be interpreted to mean that any rule which absolutely prohibits a townhome owner from any use whatsoever of the common elements, is, as a matter of law, unreasonable, illegal and unenforceable.

We disagree as the plaintiffs' argument in this regard ignores the sentence which precedes the phrase as well as the phrase's preface, which provides that the Association has the "right to establish rules and regulations for the use of the

Common Elements" and that *subject to the observance of such rules*, "all townhome lot owners may use the common elements in such a manner as will not restrict, interfere with or impede the use thereof by other townhome owners." Therefore, based on the evidence contained in the record of these proceedings, we find as a matter of law, that both the townhome declaration and the bylaws of the Association give the Association the right to establish rules and regulations for the use of the common elements, including the parking area contained in Lot T, such as the present system of assigned parking places.

The plaintiffs further contend that the amendment to the townhome declaration which provides for an assigned parking plan whereby certain lot owners park in the parking area of Lot T constitutes and alteration of the undivided interest of each townhome owner in the common elements of the townhome property. As such, the plaintiffs contend that Article II of the townhome declaration require such an amendment be consented to in writing by all townhome lot owners. Since the plaintiffs did not consent, they contend that the amendment is illegal and unenforceable.

We disagree, and do not find that the system of assigned parking places alters the plaintiffs' percentage ownership of Lot T. Rather, by implementing a parking plan that had been in place since the inception of the townhome regime, the Association was merely regulating or establishing rules for the use of that particular area of the common elements, as they have done for other areas of the common elements, such the rules for use of the pool and the rules for the use of the harbor/boat slip area.

For these reasons, we find the adoption of the assigned parking plan by the Association is permitted under both the bylaws and the townhome declaration. Therefore, we find that the defendant was entitled to judgment as a matter of law dismissing the plaintiffs' claims, and that the trial court properly denied the

plaintiffs' motion for summary judgment and granted the defendant's motion for summary judgment. Accordingly, we hereby affirm the trial court's judgment of March 29, 2005.

CONCLUSION

For the above and foregoing reasons, the March 29, 2005 judgment of the trial court is hereby affirmed.

All costs of this appeal are assessed to the plaintiffs/appellants, Mary Moisant Hutchinson and Arless E. Hutchinson.

AFFIRMED.

MARY MOISANT HUTCHINSON AND ARLESS E. HUTCHINSON

VERSUS

OAK CREST HARBOUR TOWNHOME ASSOCIATION, INC.

COURT OF APPEAL

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NO. 2005 CA 1847

Kuhn, J., dissenting.

The parking system that the Oak Crest Harbour Townhome Association, Inc. has attempted to implement is unlawful and cannot be implemented by amendment of the Association's bylaws or by amendment of the original townhome declaration, unless such amendment is accomplished by unanimous consent of all of the townhome unit owners in accordance with Article II of the original townhome declaration. As such, the defendant's motion for summary judgment should have been denied. With respect to plaintiffs' motion for summary judgment, the trial court should have granted the plaintiffs' request for declaratory relief insofar as it pertained to property included within the townhome regime, but because plaintiffs did not establish they incurred any damages, I would deny their motion for summary judgment with respect to their claim for damages.

The April 1994 and February 2003 amendments to the Association's bylaws and the December 2004 and February 2005 amendments to the original townhome declaration attempt to effectuate a parking system whereby 6 out of the 15 townhome owners have exclusive use of 12 designated parking spaces within the common element. Because the parking plan prohibits use of the common element parking area by some of the townhome lot owners but grants the exclusive use to other townhome lot owners, these amendments effectively alter the owners' undivided ownership interest in the common elements. ***See Kaplan v. Boudreaux***, 410

Mass. 435, N.E.2d 495 (Mass. 1991); ***Sawko v. Dominion Plaza One Condominium Association No. 1-A***, 218 Ill. App.3d 521, 578 N.E.2d 621, 161 Ill.Dec. 263 (Ill. 1991); ***Ridgely Condominium Ass'n Inc.***, 343 Md. 357, 681 A.2d 494 (Md. 1996). Pursuant to Article II of the original townhome declaration, such an alteration in the common elements can only be accomplished by a unanimous vote, which has not occurred in this case.

Ownership confers on a person the right to make use of a thing within the limits and under the conditions established by law. La. C.C. art. 477. Although Article II of the original townhome declaration provides that the Association has the "right to establish rules and regulations for the use of Common Elements by its members," Article II further provides, "Subject to the observance of such rules and regulations, all townhome lot owners may use the Common Elements in such a manner as will not restrict, interfere with or impede the use thereof by other townhome lot owners." Thus, regulations imposed by the Association must be reasonable and must not impinge on the ownership interests of each individual townhome lot owner. This case does not involve a reasonable regulation of the common areas because the restrictions are not uniformly imposed on all of the owners; some owners are permitted to use the parking area in question while others are prohibited from using it.

In the original Condominium Declaration, recorded in 1983 when the Oak Crest Harbour Condominium Association was initially formed, ownership of a unit in the Oak Crest Harbour Condominiums included a 6.67% interest in the "Common Elements" and the exclusive right to use certain "Limited Common Elements." As set forth in that declaration, "Limited Common Elements" were defined as "those common elements reserved in this declaration for the exclusive use of a certain unit or units"

and the declarations further provided that "the parking spaces and boat docks" were "Limited Common Elements." Because the original condominium declaration designated the parking lot area as a "limited common element," the Association was able to legally impose parking restrictions that limited the use of the parking lot to individual condominium units.

However, when the condominium regime was changed to a townhome regime in 1990, significant changes were made to the "Townhome Declaration" that created the Oak Crest Harbour Townhomes. Under this townhome declaration, the portions of the prior property regime designated as "Limited Common Elements" were changed to "Common Elements." The parking lot in question, shown on the declaration plat as part of Lot T, was changed from its prior designation as a "Limited Common Element" in the condominium declaration to a "Common Element" in the townhome declaration. The original townhome declaration provides that "Common Elements" means "that portion of the townhome property which is not a part of any townhome lot but is owned in common by all townhome lot owners, in the percentages given herein."

Article I of the original townhome declaration provides that the ownership of a townhome lot includes, "An undivided percentage ownership interest in the Common Elements or Areas, amounting to Six and 67/100 (6.67%) per cent therein." Article II of this townhome declaration also provides that each townhome lot owner's 6.67% ownership of the common elements "is an inseparable component of ownership and shall not be altered without the consent of **all** townhome lot owners consenting in writing in an amendment to this declaration filed with the conveyance office, Clerk of Court, St. Tammany Parish." (Emphasis added.)

Although the record establishes that plaintiffs were aware of the challenged parking system when they purchased their townhome lot, this fact is not determinative of the issue presented herein, i.e. whether the December 2004 and February 2005 amendments to the townhome declaration and the April 1994 and February 2003 amendment to the bylaws addressing the parking system are lawful and enforceable. The 1998 act of sale to the plaintiffs conveyed a 6.67% ownership in the common elements of the townhome property regime. The record does not establish that any reference to the parking system was recorded in the conveyance records at the time of the sale, but even if it were, the regulations imposed by the Association are only enforceable to the extent that they are lawful. The fact that the Association had implemented an unlawful rule before plaintiffs purchased their townhome lot does not operate to divest plaintiffs' 6.67% ownership interest in the common elements of the townhome property. Moreover, there is certainly no evidence of a transfer of ownership interest in the common elements by the plaintiffs. See La. C.C. art. 1839.

As such, in accordance with the provisions of the original townhome declaration, the Association must have consent of **all** of the unit owners to lawfully implement the proposed parking system. For these reasons, I respectfully dissent.