

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1499

RICHARD V. HAYWARD

VERSUS

**ROBERT AND DIANE WINSTON, DAVE CLOSSON,
MICHAEL MANINT, AND VIVIAN E. MOLIER**

Judgment Rendered: May 4, 2007

**Appealed from the
Twenty-second Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court Number 2005-11905
Honorable Elaine DiMiceli, Judge Presiding**

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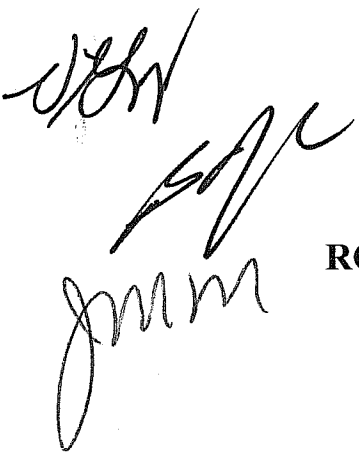
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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.



WHIPPLE, J.

This appeal challenges a trial court's ruling that the owner of an enclosed estate does not have a cause of action to demand passage from neighboring landowners because the previous owner of the property voluntarily caused the enclosure by selling an adjoining property that had access to a public road, without reserving a right of passage. We affirm.

BACKGROUND

On April 20, 2005, Richard Hayward, the owner of "Lot 18," a 6.775 acre tract of land in St. Tammany Parish, filed this lawsuit seeking to acquire a right of passage against the owners of some, but not all, of the 11 lots surrounding his property. The defendant property owners filed peremptory exceptions raising the objections of no right of action and no cause of action, averring that the prior owner of Lot 18 voluntarily enclosed the property by selling her adjoining property without reserving a right of passage, and therefore, plaintiff did not have a cause or right of action to demand passage over their property.

In support of the motion, the defendants submitted evidence including the history of the transfers of Lots 5 and 18, which were both originally owned by Michael Hogg and Lily Landry Hogg (hereafter "Lily Landry").¹ Lot 5, which has frontage on Fair Oaks Lane and is part of Wildwood Subdivision, is contiguous to Lot 18. Lot 18 also borders on lots forming part of Shady Oaks Subdivision. On August 11, 1998, the Hoggs sold Lot 5

¹Although as a general rule no evidence may be introduced to support or oppose an exception of no cause of action, this court has held that evidence admitted without objection in support of or in opposition to the exception of no cause of action serves to enlarge the pleadings and may therefore be considered by the trial court in ruling on the exception. Stephenson v. Nations Credit Financial Services Corp., 98-1689, (La. App. 1st Cir. 9/24/99), 754 So.2d 1011, 1021. No objection was made to the introduction of evidence submitted by the parties in support of the objection of no cause of action. Moreover, both sides relied on this evidence in support of their arguments at the hearing on the exception of no cause of action. Therefore, we conclude the trial court properly considered this evidence in ruling on the exception of no cause of action.

to Wayne and Trudy Aucoin by virtue of a cash sale. Passage across Lot 5 was not reserved by the Hoggs in the act of sale. As a result of the sale of the access property by the Hoggs, Lot 18 became enclosed. Later that month, on August 27, the Hoggs sold Lot 18 to the Aucoins by credit deed. However, on January 23, 2003, after being unable to pay the amount owed to Lily Landry, the Aucoins transferred Lot 18 to Lily Landry in a *Dation en Paiement*. There was no reservation of the right of passage across Lot 5 in the dation.

On August 19, 2004, Lily Landry transferred Lot 18 to Richard and Kathleen Hayward for the sum of \$45,000.00. The sale was made “as is,” with the Haywards acknowledging that the sale was made without any warranties, including, “[a]ccess to or from the property.” The title to Lot 5 was acquired in October of 2004 by JP Morgan Chase Bank following foreclosure proceedings instituted against the Aucoins.

Louisiana Civil Code article 689 allows the owner of an enclosed estate to claim a right of passage over neighboring property to the nearest public road. However, LSA-C.C. art. 693 negates the right of passage otherwise afforded by Article 689 where the enclosure has been created as a result of a “voluntary act or omission of its owner.” LeBlanc v. Thibodeaux, 615 So.2d 295, 298 (La. 1993). It is well settled that Article 693 prevents an owner and his successors from claiming passage across a neighbor’s land where the enclosure results from the owner’s voluntary act of selling his access property without reserving a right of passage. LeBlanc, 615 So.2d at 299; Spotsville v. Herbert & Murrell, Inc., 97-188 (La. App. 3rd Cir. 6/18/97), 698 So.2d 31, 33. See also Watts v. Baldwin, 95-0260, p. 6 (La. App. 1st Cir. 10/6/95), 662 So.2d 519, 522-523. Article 693 has also been held to preclude an owner who lost land with access to a public road as a

result of a Sheriff's sale from demanding passage over adjacent properties. In Petrovich v. Trabeau, 98-2897 (La. App. 4th Cir. 3/7/01), 780 So.2d 1258, 1260, writ denied, 2001-1272 (La. 6/15/01), 793 So.2d 1251, the court reasoned that the owner's failure to pay his creditors constituted a "voluntary act" by which the owner lost his right of passage.

In applying Article 693 to the facts of this case, the trial court found that there were two voluntary acts by Lily Landry that enclosed Lot 18. The first occurred, the court found, when Lily Landry and her husband sold Lot 5 to the Aucoins on August 11, 1998, without reserving a right of passage for Lot 18. The second voluntary act, the court stated, occurred when Lily Landry failed to obtain a right of passage across Lot 5 from the Aucoins as a condition or part of the *dation*. Therefore, the court concluded, the neighbors were not required to furnish passage over their properties to the plaintiff.

We agree that Lot 18 is without access to a public road because of the voluntary act and omission of its owner, Lily Landry. In 1998, Lily Landry and her husband sold their access property, Lot 5, without reserving a right of passage across Lot 18, thereby voluntarily enclosing Lot 18. Although she later had the opportunity to cure the dilemma caused by the 1998 sale of the access property, Lily Landry failed to obtain passage across Lot 5 when she reacquired Lot 18 from the Aucoins, who at the time of the *dation* still owned Lot 5. Article 693 applies to plaintiff as the successor of Lily Landry. Thus, we hold that the trial court correctly applied Article 693 in holding that plaintiff did not have a cause of action to demand passage from the neighboring landowners under Article 689. Although the result is

admittedly harsh, the judgment appealed from is legally correct.

CONCLUSION

For the foregoing reasons, the February 16, 2006 judgment is affirmed. All costs of this appeal are assessed to plaintiff, Richard Hayward.

AFFIRMED.