NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1456

BRANDON WADE HIRSTIUS

VERSUS

CLECO CORPORATION, BELLSOUTH TELECOMMUNICATIONS, L.L.C., CHARTER COMMUNICATIONS, L.L.C.

DATE OF JUDGMENT: JUN 0 5 2015

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2013-12105, DIVISION J, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

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Brandon W. Hirstius Lacombe, Louisiana	Plaintiff-Appellant Pro Se
Daniel A. Webb Candace R. LeBlanc New Orleans, Louisiana	Counsel for Defendant-Appellee Renaissance Media, L.L.C.

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

CHUTZ, J.

In this trespass suit, plaintiff-appellant, Brandon W. Hirstius, appeals a summary judgment dismissing his claims against defendant-appellee, Renaissance Media, L.L.C., as being prescribed. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In 1997, Mr. Hirstius purchased a tract of immovable property located in St. Tammany Parish. On May 6, 2011, he filed a trespass suit against BellSouth Telecommunications, Inc. complaining of the unauthorized presence of a utility pole on his property.[1] Mr. Hirstius claims that he first discovered during the BellSouth trial on June 29, 2012, that Renaissance[2] also owned aerial wires attached to the utility pole. Mr. Hirstius is not a customer of Renaissance's cable service.

On May 6, 2013, Mr. Hirstius filed the present suit against Renaissance[3] seeking damages for trespass, as well as mandatory injunctive relief ejecting all of Renaissance's equipment from his property. After various proceedings, Renaissance filed a single pleading raising the peremptory exception of no right of action and, alternatively, a motion for summary judgment on the grounds that Mr. Hirstius' claims were prescribed. Renaissance argued the claims were prescribed because Mr. Hirstius did not file suit against Renaissance within a year of becoming aware of the utility pole and attached wires, which it alleged occurred no later than 2011.

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[1] For the outcome of that case in which Mr. Hirstius was awarded damages for trespass, see ***Hirstius v. BellSouth Telecommunications, Inc.***, 12-2104 (La. App. 1st Cir. 8/14/13), 123 So.3d 276, writ denied, 13-2709 (La. 2/7/14), 131 So.2d 868.

[2] In his original petition, Mr. Hirstius incorrectly named Charter Communications, L.L.C. as defendant, but Renaissance answered the suit stating that it was the proper party defendant. Subsequently, Mr. Hirstius amended the suit to name Renaissance.

[3] Mr. Hirstius also named Cleco Power L.L.C. as a defendant. The claims against Cleco were dismissed in a separate summary judgment, which is the subject of the appeal before this court in ***Hirstius v. Cleco Corporation et al.***, docket number 2014-CA-1457.

Following a hearing, the trial court concluded Mr. Hirstius' claims were prescribed and granted summary judgment dismissing Renaissance from the suit, with prejudice. The court specifically found that, regardless of when the utility pole and wires originally were placed on Mr. Hirstius' property, he certainly knew of their existence when he filed suit against BellSouth in 2011. The court found that the claims in the instant suit were prescribed since this suit was not filed until 2013, more than one year after the filing of the BellSouth suit. The trial court rejected Mr. Hirstius' argument that his claims were not prescribed because they were based on a continuous trespass of his property. Finally, the trial court denied Renaissance's exception of no right of action on the basis of mootness.

Mr. Hirstius now appeals, raising the following assignments of error in a *pro se* brief:

1. The court erred in granting prescription against Mr. Hirstius and in favor of Renaissance.

2. The court erred in exemption [sic] to right of action filed by Renaissance as being moot.

3. The court erred in not giving Mr. Hirstius a judgment against Renaissance for trespassing. There was no right of way agreement between Renaissance and Mr. Hirstius.

4. The court erred in denying to hear the no right of action exception.

5. The court erred in finding that the case has prescribed.

6. The court erred in its denial of the right to proceed to ejectment.

7. The court erred in its denial of the right to continual relief against trespassing.

DISCUSSION

Initially, we note that Mr. Hirstius' appellate brief contains no argument supporting his assignments of error. He merely asserts that the trial court's judgment "failed to protect [him] from the defendant's unrestricted and burdensome use of his property without a legal servitude" and that "he should be

granted a De Nova [sic] Review." Rule 2–12.4 of the Uniform Rules of the Courts of Appeal provides that this court may consider as abandoned any assignment of error that is not briefed. Nevertheless, in light of Mr. Hirstius' *pro se* status, this court will consider the merits of his appeal, despite the improper form of his appellate brief. See ***Putman v. Quality Distribution, Inc.***, 11-0306 (La. App. 1st Cir. 9/30/11), 77 So.3d 318, 320. The crux of Mr. Hirstius' appeal appears to be his position that the trial court erred in dismissing his claims as prescribed on summary judgment because those claims were based on a continuing trespass that had not prescribed.[4]

When the issue of prescription is raised by motion for summary judgment, review of the trial court's decision is *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. ***Hogg v. Chevron USA, Inc.***, 09-2632 (La. 7/06/10), 45 So.3d 991, 997. A motion for summary judgment should be granted only if there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

A suit seeking trespass damages is an action in tort, subject to a liberative prescription of one year from the date the property owner knew, or should have known, of the damage. La. C.C.P. arts. 3492 & 3493; ***Perrilloux v. Stilwell***, 00-2743 (La. App. 1st Cir. 3/28/02), 814 So.2d 60, 62. Similarly, an action under La. C.C.P. art. 3663(2) for mandatory injunctive relief against trespassers also must be brought within one year of the disturbance. ***Ryan v. Pekinto***, 387 So.2d

[4] Mr. Hirstius' remaining assignments of error clearly lack merit. He asserts in his third assignment that the trial court erred in not rendering judgment in his favor on his trespass claim. This assertion ignores the fact that the matter was before the trial court only on Renaissance's exception and motion for summary judgment. Mr. Hirstius did not file a cross motion for summary judgment requesting such relief. Further, assignment of error numbers two and four concern the trial court's denial of Renaissance's exception of no right of action on the grounds of mootness. We can discern no argument advantageous to Mr. Hirstius regarding these assignments, since that ruling is not adverse to him and he was not the party advocating the exception.

1325, 1329 (La. App. 1st Cir.), writ denied, 394 So.2d 615 (La. 1980). Because prescription is not evident in this case on the face of Mr. Hirstius' pleadings, Renaissance bears the burden of proving prescription. ***Guillot v. LECC-Baton Rouge Inc.***, 05-2537 (La. App. 1st Cir. 12/28/06), 952 So.2d 42, 44.

A review of prior Louisiana jurisprudence, including that of this court, reflects often inconsistent results in continuing trespass cases.[5] In 1999, however, the Louisiana Supreme Court clarified the continuing tort doctrine in ***Crump v. Sabine River Authority***, 98-2326 (La. 6/29/99), 737 So.2d 720, 726, by stressing the distinction between continuous and discontinuous operating causes of injury. See ***Hogg***, 45 So.3d at 1003. The ***Crump*** court held that a continuing tort requires that "the operating cause of the injury be a continuous one which results in continuous damages." A continuing tort is the result of continuing wrongful acts rather than the continuation of the ill effects of an original wrongful act. ***Crump***, 737 So.2d at 728. Subsequently, in ***Hogg***, which specifically involved a continuing trespass claim, the Louisiana Supreme Court explained that:

> A continuous trespass is a continuous tort; one where multiple acts of trespass have occurred and continue to occur; where the tortious conduct is ongoing, this gives rise to successive damages. …

Hogg, 45 So.3d at 1003-04.

Thus, in determining whether a continuing trespass exists, a distinction must be drawn between operating causes that are continuous, giving rise to successive damage, and operating causes that are discontinuous and terminate, even though the damage persists. ***Hogg***, 45 So.3d at 1002-03.

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[5] See, e.g., ***Boudreaux v. Terrebonne Parish Police Jury***, 422 So.2d 1209, 1213 (La. App. 1st Cir. 1982) (the continued existence of a canal and levee unlawfully placed on land by virtue of a trespass does not suspend or interrupt prescription); ***Williams v. City of Baton Rouge***, 96-0675 (La. App. 1st Cir. 4/30/98), 715 So.2d 15, 24 (the continued existence of ditches placed on land by virtue of a trespass constituted a continuing trespass); reversed in part on other grounds, 98-1981 (La. 4/13/99), 98-2024 (La. 4/13/99), 731 So.2d 240.

> If the operating cause of the injury is continuous, giving rise to successive damages, prescription begins to run from the day the damage was completed and the owner acquired, or should have acquired, knowledge of it. On the other hand, if the operating cause of the injury is discontinuous, there are a multiplicity of causes of action and of corresponding prescriptive periods. [Citation omitted.]

Perrilloux, 814 So.2d at 62.

In ***Perrilloux***, 814 So.2d 60, this court dealt with a trespass suit where a shell driveway partially encroached on the adjoining property. The trial court sustained the defendant's exception of prescription, finding that the driveway's mere existence did not constitute a continuing tort. This court agreed that the "mere continued presence of the encroaching driveway" was not a continuing tort. ***Perrilloux***, 814 So.2d at 63. Nevertheless, applying the ***Crump*** analysis, this Court found that the trespass was continuous due to the defendant's repeated use of the driveway on a regular basis, as opposed to her committing a single act with continuing ill effects. ***Perrilloux***, 814 So.2d at 63. The crucial factor in in ***Perrilloux*** was the continuous nature of the defendant's conduct, a distinction that the Supreme Court cited with approval in ***Hogg***, 45 So.3d at 1003.

Similarly, in the instant case, the trespass complained of by Mr. Hirstius does not consist merely of a single entry upon his property without a right of way in order to attach cable wires to a utility pole. In his petition, Mr. Hirstius also specifically alleges that the attached wires are *live and in use* and interfere with the quiet enjoyment and use of his property. If Renaissance continued to use the wires on an ongoing basis after their installation, the alleged wrongful conduct did not terminate when the act of attaching the wire to the utility pole was completed. The continuous use of aerial wires over a landowner's property for the distribution of cable services, if unauthorized by the landowner, is a trespass of a fundamentally different nature than that of merely entering upon the property to attach the aerial wires to a utility pole or failing to remove the wires. Such usage constitutes

continuous acts depriving the landowner of the right to use and peaceful enjoyment of his property on a successive, day-to-day basis.

Renaissance bore the burden of proof on its motion for summary judgment. It offered no evidence suggesting it had ever ceased using the wires in question for the distribution of its cable service. In fact, the deposition testimony of Renaissance's designated representative, Dustin Dreux, indicated that Renaissance continued to use the wires. When questioned as to why Renaissance needed to use the particular utility pole at issue, Mr. Dreux responded that it was necessary to provide cable service to the residents of Lacombe and that "there is no other pole there available."

Because Renaissance continues to use the aerial wires, it has failed to show that Mr. Hirstius' claims were based solely on a single act of trespass that terminated once the aerial wires were installed. Due to the continuing nature of its alleged wrongful conduct, Renaissance did not meet its burden of establishing that Mr. Hirstius' claims were prescribed. Accordingly, the granting of summary judgment was improper.

CONCLUSION

For the reasons assigned, the summary judgment granted by the trial court finding that Mr. Hirstius' claims were prescribed and dismissing Renaissance from this suit, with prejudice, is hereby reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal are to be paid by Renaissance.

REVERSED AND REMANDED.