NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1509

SANDRA B. BROWN

VERSUS

FELIX S. FRANCIS, JR. AND
RONALD C. FRANCIS

Judgment Rendered: MAY 17 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2010-10340

Honorable Richard A. Swartz, Judge

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BEFORE: PETTIGREW, McCLENDON AND WELCH, JJ.

J. P. Pettigrew, J. Concurs
In McClendon, J. Dissents and Assigns Reasons.

WELCH, J.

The plaintiff, Sandra B. Brown, appeals a judgment in favor of defendants, Felix S. Francis, Jr. and Ronald C. Francis (collectively referred to as the "Francis brothers"), denying her right to full use or access to a private canal adjoining her immovable property on a bayou. Finding no error in the judgment of the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Ms. Brown is the usufructuary and attorney in fact of a tract of immovable property adjoining Bayou Liberty in Slidell, Louisiana.[1] The Francis brothers are the owners of an adjacent tract of property, which also adjoins Bayou Liberty. The Baldwin Canal runs along the eastern property line of Ms. Brown and the western property line of the Francis brothers. The entire tract of land encompassing both properties was, at one time, owned by Mario and Edith Ferrata. The Baldwin Canal is entirely within the original tract owned by the Ferratas, and it flows into Bayou Liberty. Ms. Brown's property was purchased by Mr. Wood Brown, her ancestor-in-title, from the Ferratas in 1959, and the Baldwin Canal was not included within the confines of that property. The Francis brothers' property was purchased by their now deceased parents, Felix and Clara Francis, in 1965, and the Baldwin Canal was completely contained within the confines of that property. Sometime after purchasing the property, Felix and Clara Francis strung a cable across and posted a "no trespassing" sign at the mouth of the Baldwin Canal where it meets Bayou Liberty.

Ms. Brown executed a purchase agreement with James Nance and was scheduled to sell her property on October 15, 2009. Apparently, just prior to the sale, Felix Francis informed Mr. Nance (who was apparently planning to build a boat dock in the canal), that the canal was entirely within the property owned by

[1] Although Ms. Brown is the usufructuary of the property, hereinafter, she will be referred to as the owner of the property.

the Francis brothers, that Ms. Brown did not have any access rights to the canal, and that Mr. Nance would not have any access rights to the canal.

Following this dispute, Ms. Brown commissioned a survey, performed by Raymond Impastato, which showed the property line running within the bed of the Baldwin Canal, with the entire western bank of the canal lying within Ms. Brown's property. The Francis brothers also commissioned a survey, performed by Sean Burkes, which was in agreement with the survey by Mr. Impastato, as it also showed the property line running within the bed of the Baldwin Canal and the entire western bank of the canal lying within Ms. Brown's property.

After attempts to amicably resolve the dispute with the Francis brothers failed, Ms. Brown commenced these proceedings seeking declaratory judgment that the entire western bank of the Baldwin Canal was within her property and that she and any successor-in-interest to the property would have full access rights to the entire canal, including the right of ingress and egress between her property and Bayou Liberty, as well as the right to dock boats on the western bank of the canal.[2]

Thereafter, Ms. Brown filed a motion for summary judgment claiming that there were no genuine issues of material fact and that she was entitled to judgment as a matter of law declaring that the entire western bank of the Baldwin canal lay within her property and that she and her successors in interest would have full access rights to the entire canal. Ms. Brown asserted that she was entitled to such relief pursuant to La. R.S. 9:2971[3], as amended by 2003 La. Acts, No. 723, § 1,

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[2] Ms. Brown subsequently filed an amended and supplemental petition asserting a possessory action, seeking maintenance of and damages for disturbance of her lawful possession of the Baldwin Canal.

[3] Louisiana Revised Statutes 9:2971 provides:

> It shall be conclusively presumed that any transfer, conveyance, surface lease, mineral lease, mortgage or any other contract, or grant affecting land described as fronting on or bounded by, or as described pursuant to a survey or using a metes and bounds description that shows that it actually fronts on or is bounded by a waterway, canal, highway, road, street, alley, railroad, or other right-of-way, shall be held, deemed and construed to include all of grantor's interest in and under

and La. C.C. arts. 657[4], 667[5], and 802[6]. After a hearing, the trial court took the matter under advisement.

On August 2, 2010, the trial court rendered reasons for judgment denying Ms. Brown's motion for summary judgment. In the written reasons, the trial court found that there were no genuine issues of material fact and that Ms. Brown was not entitled to judgment as a matter of law. Specifically, the trial court determined that La. R.S. 9:2971, as amended in 2003, could not be applied retroactively to the deed acquired by Ms. Brown's ancestor-in-title, and thus Ms. Brown's claim to

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> such waterway, canal, highway, road, street, alley, railroad, or other right-of-way, whatever that interest may be, in the absence of any express provision therein particularly excluding the same therefrom; provided, that where the grantor at the time of the transfer or other grant holds as owner the title to the fee of the land situated on both sides thereof and makes a transfer or other grant affecting the land situated on only one side thereof, it shall then be conclusively presumed, in the absence of any express provision therein particularly excluding the same therefrom, that the transfer or other such grant thereof shall include the grantor's interest to the center of such waterway, canal, highway, road, street, alley, railroad, or other right-of-way; provided further, however, that no then existing valid right-of-way upon, across or over said property so transferred or conveyed or so presumed to be conveyed and no warranties with respect thereto shall be in any manner or to any extent impaired, prejudiced, or otherwise affected by any of the terms and provisions of this Part or because of the failure of such grantor or transferor to therein make special reference to such right-of-way or to include or exclude same therefrom.

[4] Louisiana Civil Code article 657 provides: "The owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes."

[5] Louisiana Civil Code article 667 provides:

> Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

[6] Louisiana Civil Code article 802 provides: "Except as otherwise provided in Article 801, a co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it. As against third persons, a co-owner has the right to use and enjoy the thing as if he were the sole owner."

ownership to the center of the Baldwin Canal was without merit.[7] Additionally, the trial court found that the Baldwin Canal was a private canal and, as such, that its owner could enjoin the public from its use. The trial court also found that La. C.C. art. 657 did not entitle Ms. Brown to a natural servitude because the Baldwin Canal was not "running water" as contemplated by the article. The trial court also determined that La. C.C. art. 667 was inapplicable to Ms. Brown's claim because there was no evidence that the Francis brothers had made any "works" that obstructed Ms. Brown from using her property. The trial court also noted that Ms. Brown and the Francis brothers owned separate contiguous parcels of property and therefore, they were not co-owners in indivision of the Baldwin Canal and La. C.C. art. 802 was not applicable to Ms. Brown's claims. Lastly, the trial court recognized that based on the survey by Mr. Impastato, the western bank of the Baldwin Canal was located within the boundaries of Ms. Brown's property, and to the extent that her property included a small strip of the western bank of the canal, Ms. Brown was entitled to all of the rights as owner of that portion of the canal, but that she had no right of access to or use of the portion of the Baldwin Canal that was encompassed within the Francis brothers' property boundaries.

A judgment denying the motion for summary judgment was signed on August 27, 2010. Ms. Brown filed an application for supervisory writs with this court. The writ panel of this court declined to exercise its supervisory jurisdiction and denied the writ, but further stated that "[i]t appears from the trial court's reasons that the court has ruled on the merits of the declaratory judgment and that a judgment with proper decretal language would be a final, appealable judgment. If it was the trial court's intent to dismiss Plaintiff's suit in its entirety, the trial court can sign a valid written judgment which includes appropriate language as required

[7] On appeal, Ms. Brown conceded that La. R.S. 9:2971 was not applicable to this case.

by [La. C.C.P. art.] 1918." **Sandra B. Brown v. Felix S. Francis, Jr. and Ronald C. Francis**, 2010-1717 (La. App. 1st Cir. 12/17/2010) (*unpublished writ action*).

On March 1, 2011, the trial court signed an amended judgment denying the motion for summary judgment and declaring, based on the undisputed facts, that the western bank of the Baldwin Canal was within the boundaries of Ms. Brown's property, as set forth in the survey by Mr. Impastato; that La. R.S. 9:2971 did not apply and that Ms. Brown did not own that part of the Baldwin Canal from her property line to the center of the Baldwin Canal; that La. C.C. arts. 657, 667, and 802 did not provide the plaintiff with a right of access over any portion of the Baldwin Canal owned by the Francis Brothers and that Ms. Brown and the Francis brothers were not co-owners in indivision of the Baldwin Canal. From this judgment, Ms. Brown now appeals.[8]

On appeal, Ms. Brown asserts that the trial court erred in (1) denying her the right to full access to the canal because it was undisputed that the canal is navigable, and (2) finding that La. C.C. art. 657 was not applicable to this case.

LAW AND DISCUSSION

Ms. Brown contends that it was undisputed that the Baldwin Canal is navigable and that her property encompasses the canal's western bank, as well as three to five feet of the canal's bed. Ms. Brown further asserts that according to the jurisprudence of our state, the ability of an owner of a private canal to enjoin its use is "severely limited" and does not extend to the ability to enjoin its use by another owner of a portion of that private canal. On the other hand, the Francis brothers contend that navigability is irrelevant to the determination of the use of a private canal.

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[8] We recognize that the amended judgment is a partial final judgment (as it relates solely to the merits of the declaratory judgment), which was designated as a final judgment by the trial court. After a *de novo* review of the record and considering the factors set forth in **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122-23, we find that this partial judgment was properly designated as a final judgment.

Louisiana Civil Code article 448 provides that things are either common, public or private. Louisiana Civil Code article 453, describing private things, essentially forms a residual category of things that are not common or public. "Private things may be subject to public use in accordance with law or dedication." La. C.C. art. 455. Therefore, if no relevant law applies, or if there is no dedication to public use, a private thing is not subject to public use.

The trial court found, as a matter of undisputed fact, that the Baldwin Canal is a private canal. "A navigation canal is an artificial waterway constructed by public authorities or by private persons." Yiannopoulos, *2 Louisiana Civil Law Treatise*, Property, §79 (4th ed.). Thus, the Baldwin Canal is an artificial, private waterway.

Ms. Brown claims that, since it was uncontested that the Baldwin Canal is navigable, the Francis brothers are precluded from enjoining her use and must provide her with a right of access. In support of her contention, she relies on **State ex rel. Guste v. Two O'Clock Bayou Land Co., Inc.**, 365 So.2d 1174 (La. App. 3rd Cir. 1978), writ denied, 367 So.2d 387 (La. 1979), which involved an action by state and parish entities seeking to enjoin certain property owners from obstructing a bayou. The court of appeal, noting that the waterway (the bayou) was not privately constructed and did "not lie wholly within the confines of the property owned by the defendant land company", upheld the trial court's determination that the bayou constituted a navigable stream and granted the injunction to prohibit the obstruction of the waterway. **Guste**, 365 So.2d at 1178.

We find **Guste** is factually and legally distinguishable from the case before us, as the bayou at issue in **Guste** was a natural waterway, whereas the Baldwin Canal is an artificial, privately constructed waterway. Furthermore, "navigability is ordinarily determinative of the classification of a *natural* body of water as a public thing and of the question of whether its water and banks of shores are

subject to public use." (Emphasis added). Yiannopoulos, *2 Louisiana Civil Law Treatise*, Property, §64 (4th ed.).

Although whether a canal is navigable is not entirely irrelevant, Ms. Brown further claims that the ability of an owner to enjoin the use of a private, navigable canal is "severely limited", and thus the Francis brothers cannot prohibit her from using the canal. In support of her contention, she relies on **Discon v. Saray, Inc.**, 265 So.2d 765 (La. 1972) and **U.S. v. Lamastus and Associates, Inc.**, 785 F.2d 1349 (5th Cir. 1986) (*per curiam*). However, we also find these cases distinguishable from the case before us.

In **Discon**, the supreme court considered whether the defendant company, which owned property on both sides of the private, navigable canal, could prevent the plaintiffs, who owned property bordering the same canal, from using the canal to access Lake Ponchartrain. The supreme court, in reversing the appellate court, found that the defendants were not permitted to close the canal, citing La. R.S. 14:97, which prohibits obstructing a navigable waterway, and the plat for the subdivision, which declared that the title to the private canal should remain in the name of the subdivision. Thus, unlike the Baldwin Canal in this case, in **Discon**, the canal was explicitly dedicated for the use by the lots in a particular subdivision. See **Discon,** 265 So.2d at 770.

In **Lamastus**, the Fifth Circuit considered the propriety of the United States Coast Guard imposing a civil penalty on the purported owner of a private canal for blocking the mouth of a private, navigable canal. The court held that the private canal was subject to federal regulatory authority because it was "navigable in fact"—noting that the canal emptied into Lake Ponchartrain and was capable of use in interstate commerce. **Lamastus**, 785 F.2d at 1352-1353. However, in doing so, the court emphasized that the creation of a right of access to the canal was not

at issue (as in this case), but rather, that the federal government was only seeking to regulate the navigability of the canal under its commerce clause power. *Id.*

The trial court's reasons for judgment reflect that it made no finding with regard to the navigability of the Baldwin Canal. The trial court noted that the uncontested facts established that the Baldwin Canal was a private canal and that the owner of a private canal could enjoin the public from its use, citing Yiannopoulos, *2 Louisiana Civil Law Treatise*, Property, §79 (4th ed.) and **Seligman v. Tschirn**, 394 So.2d 1326 (La. App. 1st Cir. 1981), wherein this court determined that where the evidence established that a navigable canal was constructed by a property owner entirely on his own property with his own funds, that the canal remained private and not subject to public use.

Furthermore, in **National Audubon Society v. White**, 302 So.2d 660 (La. App. 3rd Cir. 1974), writ denied, 305 So.2d 542 (La. 1975), another case concerning a canal held to be navigable, the court found no evidence of any act of the collective owners or ancestor-in-title that could justify an inference of intent to dedicate the canal for public use. *Id.* at 665. "[A] canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road." *Id.*; see also La. C.C. art. 450, comment f.

In this case, the record established that the Baldwin Canal was a privately constructed canal and has been treated as such. That the canal is undisputedly navigable does not, as a matter of law, provide Ms. Brown with a right of access over any portion of the Baldwin Canal owned by the defendants, and we find no error in the judgment of the trial court in this respect.

Additionally, Ms. Brown contends that the Baldwin Canal is an indivisible thing, and that, subject to La. C.C. art. 802, Ms. Brown and the Francis brothers are co-owners in indivision; therefore, Ms. Brown would be "entitled to use the thing

held in indivision [,*i.e.* the Baldwin Canal,] according to its destination, but [the Francis brothers] cannot prevent another co-owner from making such use of it." We find no merit to Ms. Brown's argument that the Baldwin Canal is co-owned in indivision. Louisiana Civil Code article 797 defines ownership in indivision as "[o]wnership of the same thing by two or more persons." In this case, the record establishes that Ms. Brown and the Francis brothers do not own "the same thing"; rather, they each own separate and distinct adjacent properties. Accordingly, we find no error in the judgment of the trial court in this respect.

Lastly, Ms. Brown contends that the trial court erred in finding that La. C.C. art. 657 did not apply to the facts of this case to provide her with a right of access (or a natural servitude) to the Baldwin Canal. Louisiana Civil Code article 657 provides that "[t]he owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes." The record establishes that Ms. Brown's property borders the Baldwin Canal, and further, as the trial court found, that Ms. Brown's property now includes the western bank and a small portion of the canal. However, the trial court found, as a matter of undisputed fact, that the waters of the Baldwin Canal were not running waters such that La. C.C. art. 657 applied.[9]

Specifically, the trial court noted in its reasons for judgment that Ms. Brown offered no evidence to support her contention that the waters of the Baldwin Canal were running waters and that uncontested evidence offered by the Francis Brothers established that the Baldwin Canal did not have a continuous current and that the waters of the canal were stagnant, except for movement due to the tides. Accordingly, we find no error in trial court's determination that Ms. Brown had no natural servitude over the entire Baldwin Canal based on La. C.C. art. 657.

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[9] Whether water is "running water" for the purpose of La. C.C. art. 657 is a factual issue to be determined by the trial court. **Verzwyvelt v. Armstrong-Ratterree, Inc.**, 463 So.2d 979, 984 (La. App. 3rd Cir. 1985).

CONCLUSION

As the trial court recognized, Ms. Brown is entitled to all of the rights as owner of that portion of the canal that is within the confines of her property, but she is not legally entitled to a right of access to or use of any portion of the Baldwin Canal that is encompassed within the Francis brothers' property boundaries. Based upon our review of the record and the applicable law, we find no error in the judgment of the trial court. The March 1, 2011 judgment of the trial court is affirmed.

All costs of this appeal are assessed to the plaintiff/appellant, Sandra B. Brown.

AFFIRMED.

STATE OF LOUISIANA

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SANDRA B. BROWN

VERSUS

FELIX S. FRANCIS, JR. AND RONALD C. FRANCIS

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McCLENDON, J., dissents and assigns reasons.

I disagree with the majority's decision to review the denial of Ms. Brown's motion for summary judgment on appeal.

Louisiana Code of Civil Procedure article 968 provides, in pertinent part, that "[a]n appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment." There was no cross-motion for summary judgment filed, and the trial court specifically denied the motion for summary judgment.[1]

Accordingly, I respectfully dissent.

[1] However, I expressly note that the amended judgment of the trial court certified this judgment as appealable in direct response to writ action by this court.