

Bundrick v. Anadarko Petroleum Corp.: Has the Subsequent Purchaser Rule Gone Too Far?

I. OVERVIEW OF THE CASE 113

II. BACKGROUND 114

 A. Eagle Pipe—*Modern Application of the Subsequent Purchaser Rule on Surface Leases*..... 116

 B. Global Marketing—*Louisiana First Circuit’s Application of the Subsequent Purchaser Rule to Land Burdened with Mineral Leases*..... 118

 C. Duck v. Hunt Oil Co.—*Louisiana Third Circuit Leaves Application of the Subsequent Purchaser Rule on Mineral Leases an Open Question*..... 120

III. COURT’S DECISION..... 121

IV. ANALYSIS 122

V. CONCLUSION 127

I. OVERVIEW OF THE CASE

The situation where an individual purchases a tract of land only to later discover contamination from hazardous and toxic waste from past oil and gas activity is becoming common in Louisiana.¹ In this situation, a suit for damages presents a unique problem for courts because they must determine whether the plaintiff has a real or personal right to have their land restored by oil and gas lessees.² One such suit began in March 2006, after an individual discovered that the seven tracts of land he purchased in St. Martin Parish were contaminated by oil and gas activity under a defunct mineral lease.³ The plaintiffs, Mr. Bundrick and his company Cajun Pride, Inc., filed suit, alleging that twelve oil and gas companies negligently damaged the property and breached their

1. See, e.g., *Bundrick v. Anadarko Petroleum Corp.*, 14-993 (La. App. 3 Cir. 3/4/15); 159 So. 3d 1137; *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 (La. 10/25/11); 79 So. 3d 246; *Glob. Mkt. Sols., LLC v. Blue Mill Farms, Inc.*, 2013 CA 2132 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, *cert. denied*, 2014-C-2572 (La. 4/23/15); 173 So. 3d 1164 (mem.); *Frank C. Minvielle, LLC v. IMC Glob. Operations, Inc.*, 380 F. Supp. 2d 755 (W.D. La. 2004); *Duck v. Hunt Oil Co.*, 13-628 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, *cert. denied*, 2014-C-0703 (La. 6/13/14); 140 So. 3d 1189 (mem.).

2. See Ashley M. Liuzza, Comment, *Buyer Beware: How Purchasers Are Left Holding the Bag When It Comes to Property Damages Under the Subsequent Purchaser Doctrine*, 57 LOY. L. REV. 375, 378 (2011).

3. *Bundrick*, 14-993 at p. 1; 159 So. 3d at 1138-39.

obligation under the Louisiana Mineral Code to restore the land as close as practicable to its original condition.⁴ The trial court dismissed Bundrick's claims on summary judgment under the subsequent purchaser rule.⁵ After the ruling, Bundrick appealed asserting the trial court erred in treating his claims as nontransferable personal rights for damages and misapplied the subsequent purchaser rule as iterated by the Louisiana Supreme Court in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.* to remediation claims under the Mineral Code.⁶ The Louisiana Third Circuit Court of Appeal affirmed the trial court. It *held* that Bundrick had no right of action for a negligence claim, because it "is a personal right and is held by the person who was the owner at the time the damage was caused."⁷ Additionally, the Third Circuit overruled its own precedent and held that a mineral lease is a real right that confers real obligations only to the parties that occupy the land contemporaneously.⁸

II. BACKGROUND

The Louisiana Supreme Court defines the subsequent purchaser rule as

[a] jurisprudential rule which holds that an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.⁹

The rule has a long history in Louisiana Jurisprudence. It was first instituted as a means for preventing plaintiffs from a double recovery when the purchaser acquired property with apparent defects.¹⁰ In *Clark v.*

4. *Id.* at pp. 1-2; 159 So. 3d at 1138-39.

5. *See id.* at pp. 2-3; 159 So. 3d at 1139. The Louisiana Supreme Court has defined the subsequent purchaser rule as: "a jurisprudential rule which holds that an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 8; 79 So. 3d at 256-57.

6. *Bundrick*, 14-993 at p. 3; 159 So. 3d at 1139-40.

7. *Id.* at p. 8; 159 So. 3d at 1142. A personal right is defined as an obligation that "is strictly personal when its performance can be enforced only by the obligee, or only against the obligor." LA. CIV. CODE ANN. art. 1766 (2015).

8. *See Bundrick*, 14-993 at p. 10; 159 So. 3d at 1144 (quoting *Glob. Mktg. Sols., LLC v. Blue Mill Farms, Inc.*, 2013 CA 2132, p. 11 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, 1215, *cert. denied*, 2014-C-2572 (La. 4/23/15); 173 So. 3d 1164 (mem.)).

9. *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 8; 79 So. 3d at 256-57.

10. *See Clark v. J.L. Warner & Co.*, 6 La. Ann. 408, 409 (1851), *reprinted in* 6 WILLIAM W. KING REPORTS OF CASES ARGUED IN THE SUPREME COURT OF LOUISIANA 408 (1851).

J.L. Warner Co., the plaintiff purchased a lot “with the buildings and improvements thereon.”¹¹ The property was located next to an icehouse depot; the moisture from the icehouse damaged the buildings on the property and rendered them useless.¹² The purchaser filed suit for damages against the ice company and secured a judgment from the trial court.¹³ On appeal, the Louisiana Supreme Court recognized that a claim for damages is “an incorporeal right, and strictly personal property”¹⁴ and cannot be transferred without a specific assignment from the prior owner.¹⁵ The court noted that the rights to the land in a bill of sale have “always been considered real rights.”¹⁶ Despite the plaintiff’s real right in the property, the court reversed the trial court’s ruling because the property’s low price made the plaintiff aware of the property’s damage at the time of sale.¹⁷ The court could not allow the plaintiff to recover, given the apparent “damages, which probably caused the moderate price given,” explaining that the damages “should [not] be a source of profit to the purchaser, who had a perfect knowledge of their existence when he purchased.”¹⁸

Jurisprudence recognizes an exception to the subsequent purchaser rule: it will allow recovery when the purchased property is encumbered with a real right or servitude.¹⁹ In *Taylor v. New Orleans Terminal Co.*, a subsequent purchaser filed a suit against a construction company for damaging his land and failing to build and maintain drainage ditches.²⁰ Like in *Clark*, the Louisiana Supreme Court dismissed most of the plaintiff’s claims, because the right for damages “became segregated from the property, and the owner became a creditor for the value of the property taken.”²¹ The Court, however, ruled that the plaintiff could enforce improvements—the construction of drainage ditches and fences—promised to the prior owner, because “[t]he original owner acquired the right as a servitude for the benefit of the estate and not for his own benefit.”²² The court found that the servitude created a real right “[t]o the end of protecting the land, it became a part of the plaintiff’s

11. *Id.* at 408.

12. *Id.*

13. *Id.* at 408-09.

14. *Id.* at 409.

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See Taylor v. New Orleans Terminal Co.*, 126 La. 420, 425-26 (1910).

20. *Id.* at 421.

21. *Id.* at 423.

22. *Id.* at 425.

right to a servitude. It became a part of the place, a part of the right bought.”²³

A. Eagle Pipe—*Modern Application of the Subsequent Purchaser Rule on Surface Leases*

In *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, the Louisiana Supreme Court departed from the requirement that the subsequent purchaser rule applies only in situations where the damage to the property is apparent.²⁴ The court correctly noted that the rule was designed to prevent a purchaser from negotiating a low purchase price and later seek recovery in tort.²⁵ The court reasoned that extending the rule to purchasers with nonapparent damage was logical, because “the law does not provide the subsequent purchaser with both the right to sue for rescission of the sale, or a reduction in the purchase price, *and* the right to sue for damages against the tortfeasor.”²⁶ The court reiterated that the right to sue for damages is a personal right of the landowner, and does not pass down to a subsequent owner without assignment or subrogation.²⁷

23. *Id.* at 426. A real right is defined as “the subjection of a thing, in whole or in part, to the authority of a person by virtue of a direct relationship that can be asserted against the world.” 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE 409 (4th ed. 2001). A real right creates a real obligation, which can be “transferred to the universal or particular successor . . . without a special provision to that effect.” LA. CIV. CODE ANN. arts. 1763-64 (2015). The interpretation that a real right passes to the successor in title without subrogation is consistent with doctrinal writings on real rights. Professor Yiannopoulos states:

Real obligations are always duties incidental and correlative of real rights. They are obligations in the sense that they are duties imposed on a particular person who owns or possesses a thing subject to a real right, and they are real in the sense that, as correlative of a real right, these obligations attach to a particular thing and are transferred with it without the need of an express assignment or subrogation.

2 YIANNOPOULOS, *supra*, at 407.

24. 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, p. 37 (La. 10/25/11); 79 So. 3d 246, 275.

25. *Id.* at p. 38; 79 So. 3d at 276.

26. *Id.* This implies that Eagle Pipe would have a claim for rescission of sale or a reduction of purchase price. The Civil Code has a tight prescriptive period for rescission claims on residential or commercial immovable property: “an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer.” LA. CIV. CODE ANN. art. 2534(2).

27. *See Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, at pp. 37-38; 79 So. 3d at 275. In dissent, Justice Weimer criticizes the extension of the subsequent purchaser rule, because of his view of the key issue of the case: when the damage to the property occurred and who suffered the damage. *Id.* at p. 6; 79 So. 3d at 287 (Weimer, J., dissenting). Weimer asserts Eagle Pipe has a right of action, because in “the context of tortious injury to property, the relevant ‘injury’ is the loss of use and resulting loss of value and this injury

The facts in *Eagle Pipe* are straightforward: Eagle Pipe purchased property in 1988 from landowners who had leased it to Union Pipe, which operated an oil pipeline cleaning facility at the site; in 2008, the Louisiana Department of Environmental Quality conducted a field study of Eagle Pipe's property and discovered a hazardous amount of radioactive material—creating a health hazard which left the property with zero value or marketability.²⁸ Eagle Pipe had never cleaned pipe on the property, and the radioactive material resulted from Union Pipe's activity on the land from 1981 to 1988.²⁹ Eagle Pipe filed suit against Union Pipe and ten oil companies alleging breach of contract, negligence, strict liability, redhibition, fraud and conspiracy.³⁰

The procedural history of *Eagle Pipe*, however, is complex. The district court granted the defendants' exception of no right of action.³¹ At the original hearing at the Louisiana Fourth Circuit Court of Appeal, the panel affirmed the trial court.³² The court found that Eagle Pipe had no right of action in tort, because the sale did not include an assignment of the former owner's personal rights.³³ Additionally, the plaintiff had no cause of action for breach of contract, because the contracts entered into with the oil companies were also personal rights of the previous owner.³⁴ On rehearing, the Fourth Circuit reversed, finding that "the subsequent purchaser rule did not apply where damage to property was not apparent at the time of its sale."³⁵

In its review, the Louisiana Supreme Court split Eagle Pipe's claims into two categories: tort and contract.³⁶ The court quickly dismissed the tort claims, because damage to property is a personal right of the original owner.³⁷ It also ruled that the contamination from the toxic waste was not a continuing tort, because continuing torts require overt and continuing acts by the tortfeasor.³⁸

is not incurred by the landowner at the time of the tortious conduct, but by the landowner at the moment the injury is (or should be) discovered." *Id.*

28. *Id.* at pp. 3-4; 79 So. 3d at 253-54 (majority opinion).

29. *Id.*

30. *Id.* at pp. 2-3; 79 So. 3d at 253.

31. *Id.* at p. 1; 79 So. 3d at 252.

32. *Id.* at p. 40; 79 So. 3d at 276-77.

33. *Id.*; 79 So. 3d at 277.

34. *Id.*

35. *Id.* at p. 41; 79 So. 3d at 277.

36. *Id.* at p. 43; 79 So. 3d at 278.

37. *Id.*; 79 So. 3d at 279.

38. *Id.* at p. 44; 79 So. 3d at 279 (quoting *Crump v. Sabine River Auth.*, 98-2326, p.7 (La. 6/29/99); 737 So. 2d 720, 726).

In its contract claims, Eagle Pipe argued that the right for damages was assigned by virtue of the terms of sale and that the defendants breached their real obligation to restore the land to its original condition.³⁹ Eagle Pipe claimed the real rights transferred with the land because the obligation “to restore the premises to their previous condition is a real obligation, following the immovable into the hands of any acquirer.”⁴⁰ The court ruled that real obligations exist only in predial servitudes, and the claim did not pass down with a transfer of ownership.⁴¹ Further, the court concluded the act of sale contained “no express assignment or subrogation of the former property owners’ personal right to sue for damage.”⁴² The court, however, did leave one loophole for potential recovery for subsequent purchasers—stating that the decision “express[es] no opinion as to the applicability of our holding to fact situations involving mineral leases or obligations arising out of the Mineral Code.”⁴³

B. Global Marketing—Louisiana First Circuit’s Application of the Subsequent Purchaser Rule to Land Burdened with Mineral Leases

The Louisiana Mineral Code states that “[m]ineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.”⁴⁴

39. See *id.* at pp. 46-47; 79 So. 3d 246 at 280-81 (quoting LA. CIV. CODE ANN. art. 1764 cmt. f (2011)).

40. *Id.* at p. 46; 79 So. 3d at 280 (quoting LA. CIV. CODE ANN. art. 1764 cmt. f).

41. See *id.* at pp. 46-48; 79 So. 3d at 280-81. The Civil Code defines a predial servitude as “a charge on a servient estate for the benefit of a dominate estate.” LA. CIV. CODE ANN. art. 646. Although Union Pipe had a lease of the land under a previous contract, it was a personal right from the owner to use the property. See *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 51; 79 So. 3d at 283. From time to time, a real right and a personal right seem to have the same effect. *Id.* at p. 16; 79 So. 3d at 262. However, a lessee’s right is personal. LA. CIV. CODE ANN. art. 2668 cmt. b. The court recognizes this distinction by contrasting a usufructuary and a lessee, because they “seem to have the use and enjoyment of a house in much the same way. But, technically, the usufructuary has a right in the enjoyment of a house; the lessee has a right against the owner of a house to let him enjoy it. One has a real right and the other a personal right.” *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 16; 79 So. 3d at 262 (quoting 2 YIANNOPOULOS, *supra* note 23, at 384).

42. *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 47; 79 So. 3d at 281.

43. *Id.* at p. 48 n.80; 79 So. 3d at 281 n.80. This caveat restricts the court’s decision to surface leases. See *id.*

44. LA. REV. STAT. ANN. § 31:16. There is ambiguity within the Mineral Code on whether a mineral lease is a real right. The Mineral Code article on the nature of the mineral lease defines a lease as “a contract by which the lessee is granted the right to explore for and produce minerals.” *Id.* § 31:114. By the plain language, the code seems to infer that a mineral lease is analogous to an ordinary lease and is a personal obligation between the lessee and the lessor. Compare *id.* § 31:114; with LA. CIV. CODE ANN. art. 2668 cmt. b (“Externally, a lease may

Additionally, the lessee is “bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor.”⁴⁵ To be a prudent operator, the lessee is obligated to restore the land as close as practicable to its original condition at the completion of the lease.⁴⁶

A mineral lease is a limited personal servitude.⁴⁷ A limited personal servitude is defined as “an intermediary category between personal and predial servitudes. Like usufruct and habitation, they are charges on things in favor of a person rather than an estate; like predial servitudes, they are necessarily charges on an immovable belonging to another person and are confined to certain advantages of use or enjoyment. Thus, they are both ‘personal’ and ‘limited’.”⁴⁸ Under the Mineral Code, it is clear that a mineral lease confers real rights and obligations to the lessee, but is silent on the real rights and obligations of the lessor.⁴⁹

In *Global Marketing Solutions, LLC v. Blue Mill Farms, Inc.*, the Louisiana First Circuit Court of Appeal addressed how the subsequent purchaser rule applies with respect to land burdened with a mineral

resemble certain real rights, such as the personal servitudes of usufruct . . . [h]owever, unlike those servitudes—which are true dismemberments of ownership . . . a lease simply confers on the lessee the right to demand performance from the lessor and his universal successors.”). The comments to Mineral Code article 114 seems to resolve the issue of whether a mineral lease bestows real rights. *See* LA. REV. STAT. ANN. § 31:114 cmt. It provides that article 114 should be read “in conjunction with Article 16, providing that the mineral lease falls within the generic term ‘mineral right’ . . . [t]hus, the running controversy between the courts and the legislature as to the nature of the mineral lease is laid to rest by classification of the interest as a real right.” *Id.*

45. LA. REV. STAT. ANN. § 31:122.

46. *See id.* § 31:122 cmt. The implied obligation to restore land to as near as practicable to its original condition derives from premineral code jurisprudence. *See* John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729, 732 (1976). The drafters of the Mineral Code did not intend complete restoration of the land, but an obligation to return the land in a reasonable manner. *See id.* at 811 (citation omitted). This has been followed consistently by Louisiana Courts. *See* *Caskey v. Kelly Oil Co.*, 98-C-1193, p.6 (La. 6/29/99); 737 So. 2d 1257, 1261 (citing LA. REV. STAT. ANN. § 31:112 cmt.) (explaining that a mineral lessee has the obligation to “restore the surface as near as practical on completion of operations); *Trinidad Petroleum Corp. v. Pioneer Nat. Gas Co.*, 416 So. 2d 290, 297 (La. App. 3d 1982) (explaining that a mineral lease contains an “implied obligation of the lessee to act as a reasonably prudent operator is read into every mineral lease and is the source of the obligations of the lessee . . . to restore the surface when operations are completed”). Outlying cases holding otherwise do exist. *See* *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 2004-C-0968, pp. 17-18 (La. 1/19/05); 893 So. 2d 789, 801 (holding “in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively”).

47. 3 YIANNPOULOS, *supra* note 23, at 522 (5th ed. 2011).

48. LA. CIV. CODE ANN. art. 639 cmt. c (2015).

49. *See* *Frank C. Minvielle, LLC v. IMC Glob. Operations Inc.*, 380 F. Supp. 2d 755, 775 (W.D. La. 2004).

lease.⁵⁰ The facts are as follows. Global purchased 144 acres of land in the Bayou Choctaw Oil and Gas Field; Global later learned the land was polluted by toxic seepage from drilling performed under a mineral lease.⁵¹ Global claimed the defendants were obligated to restore the land to its original condition under the Louisiana Mineral Code.⁵² The trial court denied the defendants' motion for summary judgment under the subsequent purchaser rule; however, after the Louisiana Supreme Court's ruling in *Eagle Pipe*, the case was remanded and the district court dismissed Global's petition.⁵³

On appeal, the Louisiana First Circuit affirmed the dismissal of Global's claims.⁵⁴ The court interpreted the Mineral Code to "contemplate the real rights and obligations . . . between parties who occupy the land contemporaneously with a mineral lease."⁵⁵ Moreover, the court noted that the *Eagle Pipe* court found that rights and obligations from a mineral lease do not transfer to the subsequent owner without assignment.⁵⁶ The court found no exceptions in the Mineral Code or the Civil Code that would create an exception to the *Eagle Pipe* rule for mineral leases.⁵⁷

C. Duck v. Hunt Oil Co.—Louisiana Third Circuit Leaves Application of the Subsequent Purchaser Rule on Mineral Leases an Open Question

The facts in *Duck v. Hunt Oil Co.* are similar to *Global Marketing*. John Duck acquired a one-half interest in 5.2 acres of land in Concordia Parish; he later learned the property was contaminated with saltwater

50. 2013 CA 2132 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, *cert. denied*, 2014-C-2572 (La. 4/23/15); 173 So. 3d 1164 (mem.).

51. *Id.* at p. 3; 153 So. 3d at 1211.

52. *Id.* at p. 4; 153 So. 3d at 1211 (citing LA. CIV. CODE ANN. art. 667 (2014)). Global argued because of the existence of real rights and obligations, the defendants owed damages under LA. CIV. CODE ANN. art. 667. *Glob. Mktg. Sols.*, 2013 CA 2132 at p. 10; 153 So. 3d at 1215. According to that article, a person is liable if work on an estate causes damage or deprives an individual from enjoying his land. LA. CIV. CODE ANN. art. 667 (2015).

53. *Glob. Mktg. Sols.*, 2013 CA 2132 at p. 4; 153 So. 3d at 1211-12. The oil company defendants' supervisory writs to the Louisiana State Supreme Court were granted, remanding the case to the trial court with direction to reconsider "its rulings in light of *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation*." *Glob. Mktg. Sols. LLC v. Blue Mill Farms, Inc.*, 2010-CC-1922, p. 1 (La. 3/2/12); 84 So. 3d 538, 538 (citing *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 (La. 10/25/11); 79 So. 3d 246).

54. *Glob. Mktg. Sols.*, 2013 CA 2132 at p. 16; 153 So. 3d at 1218.

55. *Id.* at p. 11; 153 So. 3d at 1215.

56. *Id.* at pp. 11-12; 153 So. 3d at 1216.

57. *Id.*

from oil and gas drilling under a series of mineral leases.⁵⁸ Duck filed suit against various oil companies to recover the costs of removing the contaminating saltwater.⁵⁹ The trial court dismissed Duck's claims under an exception of no right of action.⁶⁰ Duck filed an appeal alleging the trial court misapplied the subsequent purchaser rule as iterated in *Eagle Pipe* and erred in finding that the mineral leases did not contain a stipulation *pour autrui* in his favor.⁶¹

The Louisiana Third Circuit reversed the decision and remanded the action to the trial court.⁶² The court correctly noted *Eagle Pipe*'s holding was limited to surface leases.⁶³ Because the leases in *Duck* were mineral leases, "*Eagle Pipe* does not apply . . . [t]hus, the trial court erred in applying the subsequent purchaser theory . . . to bar the claims that Duck asserts in this matter."⁶⁴ Despite the existence of the mineral leases, the court was unsure whether the right to sue passed without stipulation to Duck when he acquired the land.⁶⁵ The court, however, did find that the damage clauses in the mineral leases contained a stipulation *pour autrui* for third-party beneficiaries.⁶⁶ The Third Circuit's ruling created a split within the circuits on the application of the subsequent purchaser rule in the context of mineral leases.⁶⁷

III. COURT'S DECISION

In the *Bundrick v. Anadarko Petroleum Corp.*, the Louisiana Third Circuit overruled its precedent, and adopted the First Circuit's rule that under *Eagle Pipe*, the subsequent purchaser doctrine applies to land burdened by mineral leases and that those leases merely convey personal

58. *Duck v. Hunt Oil Co.*, 13-628, p.1 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, 116, *cert. denied*, 2014-C-0703 (La. 6/13/14); 140 So. 3d 1189 (mem.).

59. *Id.*

60. *Id.*

61. *Id.* at p. 2; 134 So. 3d at 117.

62. *Id.* at p. 12; 134 So. 3d at 122.

63. *Id.* at p. 6; 134 So. 3d at 119 (quoting *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, p. 48 (La. Oct. 25, 2011); 79 So. 3d 246, 281 n.80).

64. *Id.*

65. *See id.* at pp. 7-8; 134 So. 3d at 119-20. The court concluded that the real rights from the mineral lease may not pass to Duck, because a personal servitude is a right in favor of a person, not the estate itself. *Id.* at p. 7; 134 So. 3d at 119 (quoting *Frank C. Minvielle, LLC v. IMC Glob. Operations, Inc.*, 380 F. Supp. 2d 755, 775 (W.D. La. 2004)).

66. *Id.* at p. 12; 134 So. 3d at 122.

67. *Compare id.* at pp. 6-8; 134 So. 3d at 119-20, *with* *Glob. Mkt. Sols., LLC v. Blue Mill Farms, Inc.*, 2013 CA 2132, pp. 11-12 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, 1216 (holding that under *Eagle Pipe* the subsequent purchaser rule applies to claims for damages incurred under a mineral lease), *cert. denied*, 2014-C-2572 (La. 4/23/15); 173 So. 3d 1164 (mem.).

rights that cannot be passed to a successor in title without express assignment or subrogation.⁶⁸ The court recognized that the plain language of the Mineral Code establishes real rights.⁶⁹ It also noted that the Mineral Code is mostly silent on the rights of the lessor.⁷⁰ Despite the Mineral Code's conclusion that mineral leases establish real rights, the court cited the Western District of Louisiana's interpretation of the Mineral Code, which "pointed out that while the right of the mineral lessee is akin to a real right, the right of the mineral lessor is personal."⁷¹

With this in mind, the court reconsidered its ruling in *Duck v. Hunt Oil*.⁷² The First Circuit's ruling in *Global Marketing* persuaded the court. The court understood the Louisiana Supreme Court's grant of supervisory writs to remand the action back to the trial court in *Global Marketing* as an explicit instruction to apply *Eagle Pipe's* interpretation of the subsequent purchaser rule to claims involving mineral leases.⁷³ Because of this ruling, the Third Circuit adopted the rule from *Global Marketing*—that the Mineral Code merely establishes real rights and obligations between parties using the land at the same time.⁷⁴ Therefore, a subsequent purchaser needs assignment or subrogation from the prior owner to pursue claims for damages.⁷⁵

IV. ANALYSIS

The decision in the noted case has serious ramifications for land conservation in Louisiana. It is widely cited that Louisiana is losing close to a football field of land per hour.⁷⁶ The oil and gas industry has accelerated the land loss by creating wells that inject air into wetlands—

68. See *Bundrick v. Anadarko Petroleum Corp.*, 14-993, p. 8 (La. App. 3 Cir. 3/4/15); 159 So. 3d 1137, 1142-43 (quoting *Glob. Mktg. Sols.*, 2013 CA 2132 at p. 10; 153 So. 3d at 1215).

69. See *id.* at p. 8; 159 So. 3d at 1143.

70. *Id.* at p. 9; 159 So. 3d at 1143. The Mineral Code states, "To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee's obligations." LA. REV. STAT. ANN. § 31:128 (2015). The legislature did not create a corresponding statute regarding the rights of subsequent owners of land burdened with a mineral lease. See *Bundrick*, 14-993 at p. 9; 159 So. 3d at 1143.

71. *Id.* at p. 6; 159 So. 3d at 1141.

72. See *id.*; 159 So. 3d at 1141-42 (citing *Duck v. Hunt Oil Co.*, 13-628 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, *cert. denied*, 2014-C-0703 (La. 6/13/14); 140 So. 3d 1189 (mem.)).

73. *Id.* at p. 8; 159 So. 3d at 1143; see *supra* note 53 and accompanying text.

74. *Id.* at pp. 8-10; 159 So. 3d 1143-44 (quoting *Glob. Mkt. Sols., LLC v. Blue Mill Farms, Inc.*, 2013 CA 2132 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, *cert. denied*, 2014-C-2572 (La. 4/23/15); 173 So. 3d 1164 (mem.)).

75. See *id.* at p. 8; 159 So. 3d 1143.

76. Nathaniel Rich, *The Most Ambitious Environmental Lawsuit Ever*, N.Y. TIMES MAG. (Oct. 3, 2014), http://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html?_r=0.

making the wetlands less stable.⁷⁷ *Eagle Pipe* and its progeny make it more difficult for landowners to preserve their land and hold oil and gas companies responsible for the damage. First, *Eagle Pipe*'s extension of the subsequent purchaser rule to land with nonapparent damage perverts the spirit of the rule. Second, application of the subsequent purchaser rule by Louisiana appellate courts to lands damaged under the real right of a mineral lease is based on a faulty interpretation of limited personal servitudes and the duties they create.

The subsequent purchaser rule was a common sense doctrine designed to protect the party who actually suffered an injury.⁷⁸ It is grounded in the theory that the seller has suffered the damage caused by the tortious conduct by selling his property at a reduced price.⁷⁹ The doctrine, as originally conceived, pivoted on the presence of overt and known damage to the property.⁸⁰ The seller is the damaged party if the damage was overt and led to a sale at a price lower than it would have brought if the land was undamaged.⁸¹

The overt damage requirement is also rooted in common sense. The policy justification for the rule is clear: it would be fundamentally unfair for a purchaser to create a windfall of recovery by taking advantage of both a reduced purchase price and a recovery of damages in tort.⁸²

Extending the subsequent purchaser rule to bar recovery for landowners acquiring land with nonapparent damage creates unfairness. Under *Eagle Pipe*, this situation could occur: a seller would have a right of action but not a cause of action, because he did not suffer injury by selling at a reduced price; conversely, the buyer would have no right of

77. *Id.*

78. *See Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, p. 3 (La. 10/25/11); 79 So. 3d 246, 285 (Weimer, J., dissenting).

79. *Id.*

80. *See id.* at p. 3-4; 79 So. 3d at 286. The case law supporting the overt damage requirement is immense. *See Clark v. J.L. Warner & Co.*, 6 La. Ann. 408, 409 (1851) *reprinted in* 6 WILLIAM W. KING REPORTS OF CASES ARGUED AND IN THE SUPREME COURT OF LOUISIANA 408 (1851) (finding the “damages, which probably caused the moderate price given for the house and kitchen, should be a source of profit to the purchaser, who had a perfect knowledge of their existence when he purchased”); *Prados v. S. Cent. Bell Tel. Co.*, 329 So. 2d 744, 751 (La. 1976) (“The general principal, we think, is that a buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sales price.”); *LeJeune Bros. v. Goodrich Petroleum Co.*, 06-1557, p. 10 (La. App. 3 Cir. 11/28/07); 981 So. 2d 23, 30 (“The reasoning behind these principles is that the buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to a sales price.” (citation omitted)).

81. *See Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 3; 79 So. 3d at 285 (Weimer, J., dissenting).

82. *See Clark*, 6 La. Ann. at 409.

action, but would have a cause of action because his land is damaged.⁸³ This creates a potential situation where neither the original landowner nor the subsequent purchaser can recover and the tortfeasor escapes liability scot-free.

Eagle Pipe's extension of the subsequent purchaser rule is absurd because it circumvents basic principles of tort law in Louisiana. The Civil Code states in article 2315 that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”⁸⁴ The Code recognizes that the damage is not suffered by the tortious act itself, because “one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.”⁸⁵ The start of the prescription period at knowledge of the damages makes sense practically, because “some forms of property damage can be insidious and elusive.”⁸⁶ This is especially true for damage from oil and gas drilling, because damage can be purposely or unknowingly concealed—making it difficult for the subsequent buyer to notice the damage.⁸⁷ By applying the subsequent purchaser rule to situations with nonapparent damage, courts fail to apply article 2315 and effectively eliminate its purpose in two ways: by restricting the parties who may file a suit to the owner of the property when the tortious act occurred and by failing to recognize that the injured party is the purchaser of property with hidden damage.⁸⁸

The Louisiana appellate courts’ interpretation of *Eagle Pipe* makes the situation worse for subsequent landowners who own land with nonapparent damage. The problem stems from a general misunderstanding of real rights and obligations in the courts’ interpretation of the Mineral Code. The Mineral Code explicitly states that “[m]ineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.”⁸⁹ A mineral lease is a limited personal servitude, which is a charge on a thing

83. *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at pp. 4-5; 79 So. 3d at 286 (citing *Prados*, 329 So. 2d at 752 (Tate, J., dissenting)).

84. LA. CIV. CODE ANN. art. 2315 (2015).

85. *Id.* art. 3493. By linking the right to damages with discovery of the damage to the land, the article implies that the owner at the time of the discovery possesses the right and the cause of action. *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 7; 79 So. 3d at 288.

86. *Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 5; 79 So. 3d at 293 (Weimar, J., assigning additional reasons for his dissent).

87. See Liuzza, *supra* note 2, at 397.

88. See *id.* at 398-99.

89. LA REV. STAT. ANN. § 31:16; see *supra* note 44 and accompanying text.

in favor of a person.⁹⁰ In the noted case, the Louisiana Third Circuit recognized that a mineral lease establishes real rights, but it qualified those rights by ruling that the real rights are limited to the lessee and not the lessor.⁹¹ This ignores that a real right by definition “is a right in a thing that can be held against the world.”⁹² The effect of the right “is transferred to the universal or particular successor . . . to which the obligation is attached, without a special provision to that effect.”⁹³ Instead of following the Civil Code, the court makes the logical leap that real rights are extinguishable because the Mineral Code is “generally silent” on the rights and obligations of mineral lessors.⁹⁴ In light of this, the court found that real rights and obligations of the lessor do not pass down to a subsequent purchaser without assignment or subrogation.⁹⁵

Here, the court confused the rights of the servient estate and the dominate estate.⁹⁶ As a limited personal servitude, mineral leases are a “charge[] on [a] thing[] in favor of a person rather than an estate.”⁹⁷ Because Bundrick’s property is the burdened estate for the benefit of the oil company lessors, Bundrick acquired the real rights prior to and after the creation of the mineral lease.⁹⁸

A real right gives rise to a real obligation.⁹⁹ The Mineral Code provides that the dominate estate is “bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor.”¹⁰⁰ This obligation requires the dominate estate to return the land as close as practicable to its original state.¹⁰¹ Because this right is a real obligation, it attaches to the immovable, not the individual, and transfers to a universal or particular successor without special provision to that effect.¹⁰²

90. See *supra* notes 47-48 and accompanying text.

91. *Bundrick v. Anadarko Petroleum Corp.*, 14-993, pp. 8-9 (La. App. 3 Cir. 3/4/15); 159 So. 3d 1137, 1143.

92. LA. CIV. CODE ANN. art. 1763 cmt. b (2015).

93. *Id.* art. 1764.

94. See *Bundrick*, 14-993 at p. 9; 159 So. 3d at 1143. The Mineral Code does not allow for this sort of interpretation; it states, “If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.” LA. REV. STAT. ANN. § 31:2, see also *infra* note 102 and accompanying text.

95. See *Bundrick*, 14-993 at p. 9; 159 So. 3d at 1143.

96. See Reply Brief of Plaintiffs-Appellants, Vincent Charles Bundrick, et al. at 1, *Bundrick*, 14-993 (La. App. 3 Cir. 3/4/15); 159 So. 3d 1137 (No. 14-993).

97. LA. CIV. CODE ANN. art. 639 cmt. c.

98. See Reply Brief of Plaintiff-Appellants, *supra* note 96, at 1.

99. See LA. CIV. CODE ANN. art. 1763.

100. LA. REV. STAT. ANN. § 31:122 (2015).

101. See *supra* note 46 and accompanying text.

102. See LA. CIV. CODE ANN. art. 1764. This interpretation is supported by the Mineral Code itself: “If this Code does not expressly or impliedly provide for a particular situation, the

Therefore, the oil company defendants should be obliged to restore the land under a breach of mineral lease theory.

This conclusion is exactly what the majority in *Eagle Pipe* recognized in its analysis of the subsequent purchaser rule.¹⁰³ The court states that a “servitude, being a real right, follows the property without the necessity of its inclusion in an act of sale, unlike a personal right. As such, the new property owner had a right under the servitude to bring suit for enforcement of the obligations established in the former deed.”¹⁰⁴ The situation in the noted case compels the same result. The lessees have a duty to perform as a “prudent operator” and return the land to its prelease condition.¹⁰⁵

The lessees’ obligation to restore the land to its prelease condition could also be reached under an alternate theory. As a limited personal servitude, a mineral lease falls under the rules governing usufruct and predial servitudes as long as the use of the rules is compatible with the terms of the lease.¹⁰⁶ Under a usufruct of a nonconsumable thing, like land, the usufructuary has a duty to use the nonconsumable “as a prudent administrator and to deliver them to the naked owner at the termination of the usufruct.”¹⁰⁷ The comments to the Civil Code indicate that a prudent administrator is bound to “preserv[e] the substance of the thing.”¹⁰⁸ Although the naked owner, in this case the owner of the land burdened with the lease, is obliged to make extraordinary repairs,¹⁰⁹ the naked owner may compel the usufructuary to make repairs for damage he has caused.¹¹⁰ The damage caused by oil and gas drilling cannot fall under the umbrella of extraordinary repairs; to operate an oil well, it is necessary to make major alterations that damage the land—like dredging

Civil Code or other laws are applicable.” LA. REV. STAT. ANN. § 31:2. Additionally, the comments to the Civil Code express that “the obligation to demolish works and to restore the premises to their previous condition is a real obligation, following the immovable into the hands of any acquirer.” LA. CIV. CODE ANN. art. 1764 cmt. f.

103. See *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, p. 26 (La. 10/25/11); 79 So. 3d 246, 268.

104. *Id.* (citing *Taylor v. New Orleans Terminal Co.*, 126 La. 420, 425-26 (1910)).

105. LA. REV. STAT. ANN. § 31:122 cmt.; see also *supra* note 46 and accompanying text.

106. See 3 YIANNPOULOS, *supra* note 23, at 530 (5th ed. 2011); LA. CIV. CODE ANN. art. 645.

107. LA. CIV. CODE ANN. art. 539.

108. *Id.* art. 539 cmt. b.

109. *Id.* art. 577.

110. *Id.* art. 579.

canals and blasting and plugging holes.¹¹¹ Therefore, the lessee may be obligated to make repairs for the damage he incurred.¹¹²

The extension of the subsequent purchaser rule to land with nonapparent damage by the Louisiana appellate courts is an impermissible extension of the law. The Civil Code establishes that there are two sources of law—legislation and custom.¹¹³ Law created by custom may not abrogate legislation.¹¹⁴ Moreover, judicial decisions are not intended to be the authoritative source of law.¹¹⁵ *Eagle Pipe* and its progeny—including *Bundrick*—extend the jurisprudential custom of the subsequent purchaser doctrine into the uncharted waters of the rights and liabilities of purchasers of land with nonapparent damage from mineral leases. This extension ignores the tradition that the Civil Code contains broad principles that should be applied and extended to varying factual circumstances.¹¹⁶ These principles include an obligation to repair damage to land by the individual who causes the damage.¹¹⁷ This decision backs landowners into a corner, because it expands the subsequent purchaser rule without considering the facts of the individual case.¹¹⁸

V. CONCLUSION

The holding in the noted case is a step backward for landowners in Louisiana and a step forward for oil and gas lessees. First, it continues *Eagle Pipe*'s perversion of the subsequent purchaser rule by applying it in the situation where damage to the land is nonapparent at the time of purchase. This defeats the purpose of the rule: to prevent the subsequent purchaser from a double recovery. Second, by holding that *Eagle Pipe* extends to situations involving mineral leases—by definition a real right—the court ignores that real rights and obligations transfer to successors in title as a part of the immovable without express subrogation

111. *Terrebonne Par. Sch. Bd. v. Castex Energy Inc.*, 2004-C-0968, p. 3-4 (La. 1/19/05); 893 So. 2d 789, 805-06 (Weimer J., dissenting) (quoting *Jurisich v. La. S. Oil & Gas Co.*, 284 So. 2d 173, 184 (La. Ct. App. 4 Cir. 1973) (Lemmon J., dissenting in part)).

112. *See* LA. CIV. CODE ANN art. 579.

113. *Id.* art. 1.

114. *Id.* art. 3.

115. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289, p. 7 (La. 10/25/11); 79 So. 3d 246, 288 (Weimer, J., dissenting) (citing *Doerr v. Mobile Oil Corp.*, 00-CC-0947, p. 13 (La. 12/19/2000), 774 So. 2d 119, 128).

116. *Id.* at pp. 7-8; 19 So. 3d at 288.

117. *See* LA. CIV. CODE ANN art. 2315.

118. *See Eagle Pipe*, 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279, 2010-C-2289 at p. 1; 79 So. 3d at 284.

and allows oil and gas companies to wash their hands of any potential liability for the damage they have caused.

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