Judgment rendered January 16, 2013.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 47,388-CA
No. 47,428-CW
(Consolidated Cases)

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

**No. 47,388-CA**
ROBERT L. WALTON, ET AL.
Plaintiffs-Appellants

v.

ANN BUTTS BURNS, ET AL.
Defendants-Appellees

**No. 47,428-CW**
ROBERT L. WALTON,
BONNIE TROUILLE WALTON,
JOHN KEITH LAMM AND
REBECCA BROUSSARD LAMM
Plaintiffs-Applicants

v.

EXXON MOBIL CORPORATION,
EXXONMOBIL OIL CORPORATION,
CORPORATION, BP AMERICA
PRODUCTION COMPANY, AND
MONCLOVA PLANTATION, L.L.C.
Defendants-Respondents

* * * * *

Appealed from the
Sixth Judicial District Court for the
Parish of Tensas, Louisiana
Trial Court Nos. 23,083 and 21,407

Honorable Michael E. Lancaster, Judge

* * * * *

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* * * * *

Before CARAWAY, MOORE and HARRISON (*Pro Tempore*), JJ.

CARAWAY, J., concurs with written reasons.

**MOORE, J.**

In these consolidated oilfield legacy cases, the plaintiffs, current surface owners, contest judgments that refused to allow them to join the mineral servitude owners as defendants in the first suit and sustained exceptions of lis pendens in favor of the mineral servitude owners in the second suit. For the reasons expressed, we grant the plaintiffs' writ application, make it peremptory, direct the district court to give the plaintiffs leave of court to amend their petition to join the mineral servitude owners as defendants in the first suit, and remand for further proceedings. Because of this ruling, we dismiss the second suit as moot.

***Procedural Background: Suit # 1***

These suits are part of an oilfield legacy claim involving a 340-acre tract in the Holly Ridge Oil and Gas Field, Tensas Parish. Plaintiffs Robert and Bonnie Walton bought the tract (surface rights only) in July 2002; they sold it to plaintiffs John and Rebecca Lamm in November 2003. They soon discovered the soil was contaminated by oil and gas exploration and production activities going back several decades, chiefly the storage of oilfield sludge in unlined pits that allowed seepage into groundwater.

In September 2004, the plaintiffs filed Suit # 1[1] against ExxonMobil Oil Corp., Exxon Mobil Corp. and BP America Production Co. ("the oil company defendants," entities that conducted oil and gas operations on the tract from the late 1930s until 1975), and Monclova Plantation LLC, the entity that sold them the tract. The plaintiffs listed 71 oil wells by serial number, described "pits, sumps, pipelines, flowlines, tank batteries,

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[1]Tensas docket no. 21,407, this court's docket no. 47,428-CW.

wellheads, and measuring facilities," and alleged the defendants' negligence, strict liability, breach of contract to restore the land, and wanton and reckless disregard for public safety. They demanded compensatory damages, remediation, punitive damages, and a reduction in purchase price.

The defendants removed the case to federal court, but after it was remanded to the 6th Judicial District Court, the plaintiffs added as defendants McGowan Working Partners Inc. ("McGowan"), the company that has operated Holly Ridge Field since 1973.

McGowan filed several exceptions, including "no right or cause of action." The thrust of the argument was that a 1941 mineral lease covering the tract had no provision for the lessee to pay for damages, and a 1948 salt water disposal contract specifically authorized one of ExxonMobil's predecessors to use the land for disposal of saltwater "and other substances"; hence, there was no contract liability on the part of the lessees or operator.

The oil company defendants adopted these arguments, filing motions for summary judgment. They showed that the mineral rights had been reserved in a 1973 sale, after which the surface rights had been transferred several times; no subsequent sale had any provision for preexisting damages. The thrust of the argument was the "subsequent purchaser doctrine": the plaintiffs were raising a *tort* claim, and as to tort claims, a purchaser of property can recover for only those damages that occurred *after* he acquired the property. *LeJeune Bros. Inc. v. Goodrich Petr. Co.*, 06-1557 (La. App. 3 Cir. 11/28/07), 981 So. 2d 23, *writ denied*, 2008-0298 (La.

4/4/08), 978 So. 2d 327, and jurisprudence dating back to *Clark v. Warner & Co.*, 6 La. Ann. 408 (1851).

The plaintiffs responded, inter alia, that the Mineral Code, La. R.S. 31:11, requires the owner of a mineral right to exercise his rights "with reasonable regard for those" of the surface owner, regardless of contracts and jurisprudential rules.

In early November 2009, the plaintiffs sought leave to file a second supplemental and amending petition to add Cleada N. Butts, et al. ("the Butts defendants"), the current mineral servitude owners, as defendants.

One week later, the district court held a hearing on the exceptions and motions for summary judgment only. The plaintiffs argued that two other circuits had recently rejected the subsequent purchaser doctrine. *Marin v. Exxon Mobil Corp.*, 2008-1724 (La. App. 1 Cir. 9/30/09), 2009 WL 7004332 (unpub.); *Eagle Pipe & Supply Co. v. Amerada Hess Corp.*, 2009-0298 (La. App. 4 Cir. 2/10/10), 47 So. 2d 428, 174 Oil & Gas Rep. 19. The defendants countered that *LeJeune* was still the prevailing law, as another judge of the 6th Judicial District Court had recently rejected an identical oilfield legacy claim in a case called *Wagoner v. Chevron*. Perhaps because *Marin*, *Eagle Pipe* and *Wagoner* were all on appeal, the district court deferred ruling on the motions for summary judgment, and gave the parties 30 days for additional briefing on the exceptions. To date, however, the court has not ruled on any of these filings.

About a year later, the supreme court rendered an opinion in *Marin v. Exxon Mobil Corp.*, 2009-2368 (La. 10/19/10), 48 So. 3d 234, reversing the

award of damages on grounds of prescription but expressly reserving (in footnote 18) any analysis of the subsequent purchaser doctrine. Around the same time, this court affirmed (on rehearing) the district court's application of the subsequent purchaser doctrine in *Wagoner v. Chevron USA*, 45,507 (La. App. 2 Cir. 8/18/10), 55 So. 3d 12, but the property owners in *Wagoner* applied for writs to the supreme court. The district court therefore held all pending motions in Suit # 1 under advisement.

***Procedural Background, Suit # 2***

After waiting over a year with no rulings on anything, the plaintiffs filed Suit # 2[2] in May 2011. They named only the Butts defendants, the current mineral servitude owners, as defendants. The factual allegations and claims for relief were almost identical to those in Suit # 1. They added, however, the legal theory that under the Mineral Code, R.S. 31:22, the owner of the mineral servitude is obligated, "insofar as practicable, to restore the surface to its original condition[.]"

The Butts defendants responded with an exception of lis pendens, arguing that the factual allegations and relief sought were identical to Suit # 1, and thus there was merger of the defendants' identities in both actions. *Louisiana Cotton Ass'n v. Tri-Parish Gin Co.*, 624 So. 2d 461 (La. App. 2 Cir. 1993).

The court held a hearing in October 2011. The plaintiffs conceded that the "remedy might ultimately be the same," but argued that the cause of action against the Butts defendants was based on Art. 22's obligation of the

[2]Tensas docket no. 23,083, this court's docket no. 47,388-CA.

mineral servitude owner to "restore the surface" while that against the oil company defendants was based on Art. 122's obligation of the lessee to act as a "reasonably prudent operator," two distinct legal theories. The district court stated that it was still waiting on guidance from the supreme court in *Eagle Pipe*, but ruled orally that in both Suit # 1 and Suit # 2, there was an identity of the parties and the claims arose from the same transaction or occurrence; hence, the court sustained the exception of lis pendens and dismissed the suit without prejudice. The plaintiffs took this appeal in 47,388-CA.

***Subsequent History in Suit # 1***

A few weeks later, the supreme court rendered judgment in *Eagle Pipe & Supply Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So. 3d 246, 174 Oil & Gas Rep. 32. A plurality of the court reversed the fourth circuit and reinstated the defendants' exception of no cause of action, stating: "In the absence of an assignment or subrogation * * *, a subsequent purchaser of the property cannot recover from a third party for property damage inflicted prior to the sale." However, the plurality carefully limited its holding (in footnote 80): "Moreover, because not factually relevant, we express no opinion as to the applicability of our holding to situations involving mineral leases or obligations arising out of the Mineral Code."

The district court finally held, in February 2012, a hearing on the plaintiffs' motion to amend their petition in Suit # 1. The plaintiffs argued that once the court sustained the exception of lis pendens in Suit # 2, it should be automatic that they could join the Butts defendants in Suit # 1.

The Butts defendants countered that joining them at this late date would be unduly prejudicial; the other defendants urged that under *Eagle Pipe* and this court's *Wagoner v. Chevron USA*, the plaintiffs as subsequent purchasers simply had no cause of action against anybody.

The district court orally adopted the latter argument and denied the motion to amend. The plaintiffs took this writ in 47,428-CW.

About a month later, the supreme court denied writs in *Wagoner v. Chevron USA*, 2010-2773 (La. 3/2/13), 83 So. 3d 1032. Although without precedential value, it allowed this court's application of the subsequent purchaser doctrine, in the context of an oilfield legacy claim, to stand.

***The Parties' Positions***

The plaintiffs contest the denial of leave to amend in Suit # 1 and the granting of the exception of lis pendens in Suit # 2. As a foundation, they show that La. R.S. 31:22 obligates the owner of a mineral servitude to "restore the surface to its original condition at the earliest reasonable time." To prove that Art. 22 is unaffected by the subsequent purchaser doctrine, they cite a case in which the first circuit upheld the Office of Conservation's creation of a coal seam natural gas unit in LaSalle Parish, *Six C Properties LLC v. Welsh*, 2010-1913 (La. App. 1 Cir. 5/26/11), 68 So. 3d 609, *writ granted*, 2011-1353 (La. 11/14/11), 75 So. 2d 440. With the presumptive application of Art. 22, they argue that leave to amend should be freely given, even to add a new theory of recovery. *Giron v. Housing Auth. of City of Opelousas*, 393 So. 2d 1267 (La. 1981). They concede that lis pendens would block a second suit "between the same parties in the same

capacities," La. C. C. P. art. 531. However, they contend that because the Butts defendants' obligation arises from Art. 22, and the oil company defendants' obligation arises from Art. 122, they cannot possibly be in the same capacity.

The Butts defendants respond that whether their duty is framed by Art. 22 or Art. 122, it is "no broader than the duty" of the lessee, McGowan, and thus they are substantially the same party as McGowan. They contend that *Six C Properties* has nothing to do with oilfield legacy claims, but concede that one of the cases cited therein, *Dupree v. Oil, Gas & Other Minerals*, 31,869 (La. App. 2 Cir. 5/5/99), 731 So. 2d 1067, 142 Oil & Gas Rep. 258, held that servitude owners could be liable to surface owners for surface damages caused by their bankrupt lessee. However, they argue that the defendants in *Dupree* had actually conducted operations and that the lease therein had an express restoration and indemnity clause, unlike any lease in this case. Finally, the Butts defendants urge that the grant or denial of leave to amend should be disturbed only on a showing of abuse of discretion, and no abuse is apparent.

The oil company defendants and McGowan cite the concurrence in this court's writ grant in Suit # 1,[3] arguing that their position is identical to that of the lessees in *Wagoner v. Chevron USA*, *supra*, with the result that the plaintiffs have no claim at all. They ask this court to act on the pending exceptions and motions for summary judgment, and end the matter.

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[3]The author of this opinion concurred in the writ grant, noting "the district court's failure (or refusal) to rule on the original defendants' long-pending motions and exceptions; a dispositive ruling on one of these may well have obviated this application."

The final defendant, Monclova Plantation, asserts that it has absolutely no assets and will not participate in the litigation.

***General Principles***

The procedural issue in Suit # 1 is leave to amend the petition. Once the answer has been served, the petition may be amended only by leave of court or written consent of the adverse party. La. C. C. P. art. 1151. Although leave to amend is within the court's sound discretion, it should be granted to promote the interests of justice. *Reeder v. North*, 97-0239 (La. 10/21/97), 701 So. 2d 1291; *Smith v. Jitney Jungle of Amer.*, 35,100 (La. App. 2 Cir. 12/5/01), 802 So. 2d 988, *with denied*, 2002-0039 (La. 3/15/02), 811 So. 2d 913. Courts are generally liberal in allowing amendments to the petition, in the absence of a showing of prejudice to the defendant or a finding of bad faith or dilatory purposes on the part of the plaintiff. *Giron v. Housing Auth.*, *supra*; *Taylor v. Babin*, 2008-2063 (La. App. 1 Cir. 5/8/09), 13 So. 3d 633, *writ denied*, 2009-1285 (La. 9/25/09), 18 So. 3d 76.[4]

The procedural issue in Suit # 2 is lis pendens. When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by filing the declinatory exception of lis pendens. La. C. C. P. arts. 531, 925 A(3). A "fair test" for deciding whether lis pendens should be granted is whether the first suit would be res judicata as to the second suit. *State ex rel. Marston v. Marston*, 223 La. 1046, 67 So. 2d 587 (1953); *Jones v. Southern Natural Gas Co.*, 46,347 (La.

[4]The plaintiffs have not contended that exclusion of the Butts defendants would result in the "absence of complete relief" and thus justify joinder under La. C.C.P. art. 641.

App. 2 Cir. 4/13/11), 63 So. 3d 1080, 173 Oil & Gas Rep. 276, *writs not cons.*, 2011-1242 (La. 9/23/11, 11/4/11), 70 So. 3d 800, 75 So. 3d 911. Res judicata is a concept by which the defendant may defeat an action by declaring the claim extinguished because it already has been litigated. La. R.S. 13:4231. Res judicata applies "between the same parties" or between parties who appear in the same capacity in both suits. *Id.*; *Burguieres v. Pollingue*, 2002-1385 (La. 2/25/03), 843 So. 2d 1049; *Von Drake v. Rogers*, 45,305 (La. App. 2 Cir. 5/19/10), 36 So. 3d 1218, *writ denied*, 2010-1471 (La. 10/15/10), 45 So. 3d 1111. Res judicata also applies if the cause of action asserted in the second suit existed at the time of judgment in, and arose from the same transaction or occurrence that was the subject of, the first suit. *Chevron USA v. State*, 2007-2469 (La. 9/8/08), 993 So. 2d 187; *Von Drake v. Rogers*, *supra*. Res judicata does not require an identity of cause. *Chevron USA v. State*, *supra*.

***Discussion***

The issue posed by both matters is whether the Butts defendants, as mineral servitude owners, and the oil company defendants, as lessees, and McGowan, the working interest owner, owe the same duties to the plaintiffs, the surface owners. If so, the oil company defendants and McGowan contend that res judicata would bar the suit against the Butts defendants in Suit # 2 and support the denial of leave to amend in Suit # 1.

The foundational duty of parties in a case of mineral rights is stated in La. R.S. 31:11 A:

> **§ 11. Correlative rights of landowner and owner of a mineral right and between owners of mineral rights**

> A. The owner of land burdened by a mineral right or rights and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other. Similarly the owners of separate mineral rights in the same land must exercise their rights with reasonable regard for the rights of other owners.

This article contemplates concurrent uses of the land by the owner of mineral rights and the owner of the land and those deriving use rights from him. *Id.*, comment. The general duty of "reasonable regard" under Art. 11 also applies to a mineral lessee. *Ashby v. IMC Exploration Co.*, 496 So. 2d 1334 (La. App. 3 Cir. 1986), *aff'd*, 506 So. 2d 1193 (1987).

The particular duty of a mineral servitude owner is stated in La. R.S. 31:22:

> **§ 22. Certain rights and obligations of mineral servitude owner**
>
> The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.

The particular duty of a mineral lessee is stated in La. R.S. 31:122:

> **§ 122. Lessee's obligation to act as reasonably prudent operator**
>
> A mineral lessee is not under a fiduciary obligation to his lessor, but he 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. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

The distinction is crucial. Although their right is the same, the servitude owner has the duty to restore the surface to its original condition whereas the lessee has the duty to act in good faith and to develop and

operate the property as a reasonably prudent operator. In *Marin*, *supra*, the supreme court held that the "prudent operator standard" of Art. 122 incorporates the "duty to remediate oilfield contamination" if the lessee has operated "unreasonably or excessively." *Id*. at 37-38, 48 So. 3d at 259-260. The court called this the lessee's "additional restoration duty to correct the contamination," and explained that it "does not necessarily mean that the lessee has to duty to restore the land to pre-lease condition," which would be the servitude owner's duty under Art. 22. *Id*. This distinction, though perhaps subtle, reflects the reality that the lessee and mineral servitude owner are not totally in the same position. The court in *Marin* recognized that current contamination adversely affects the surface owner's present use of the land and is different from the ordinary wear and tear from ongoing use by a reasonably prudent operator.

We also note that a special statute, La. R.S. 30:29 (also known as "Act 312"), creates a special procedure to resolve claims of environmental damage arising from oilfield operations. Act 312 applies to actions under Title 31, the Mineral Code. *M.J. Farms Ltd. v. Exxon Mobil Corp.*, 2007-2371 (La. 7/1/08), 998 So. 2d 16. Notably, § 29 C(1) provides that if the finder of fact determines that environmental damage exists and determines the party or parties who cause the damage, then the court shall order those parties "whom the court finds legally responsible for the damage" to develop a plan of remediation. Although the application of Act 312 is not an issue here, it underscores the fact that different defendants – lessees, operators, servitude owners – may have different obligations to evaluate and

remedy contamination. The interests of justice are not served when a concerned party is excluded from the litigation.[5]

The plaintiffs correctly conceded, at the hearing in Suit # 2, that the remediation owed by all defendants might ultimately be the same. We also agree with the plaintiffs' claim that the Butts defendants' obligation to restore the surface at the earliest practicable time is not the same as the other defendants' duty to act as reasonably prudent operators, including a duty to correct contamination immediately, if the contamination is interfering with the plaintiffs' use of the surface. On this showing, we find the district court abused its discretion in denying leave of court to amend in Suit # 1. We therefore grant the writ, vacate the ruling, and remand the case to the district court for the grant of leave to amend.

This ruling venders the issue in Suit # 2 moot; when the plaintiffs are allowed to assert their claims against the Butts defendants in Suit # 1, there is no further need for Suit # 1. We therefore dismiss the appeal as moot and express no opinion as to the exception of lis pendens. We also express no opinion on the potentially dispositive issue raised by the oil company defendants and McGowan, whether the subsequent purchaser doctrine extinguishes the plaintiffs' claims because the contamination occurred *before* the plaintiffs bought the surface rights. Such a ruling would depend on a factual finding which has not yet occurred. The parties apparently have not pressed the district court to rule on the outstanding exceptions and

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[5]According to other filings in these records, the mineral servitude was not created until 1973. If the evidence shows that the environmental damage occurred before that date, the servitude owners could not be liable for tort damage to the land but still liable for surface restoration under R.S. 31:22.

motions for summary judgment. Only after a ruling on these matters will this court have anything to review.

***Conclusion***

For the reasons expressed, we grant the plaintiffs' writ application in Suit # 1, make it peremptory, direct the district court to grant the plaintiffs leave of court to amend their petition to join the mineral servitude owners as defendants in the first suit, and remand for further proceedings. We dismiss as moot the appeal in Suit # 2. All costs are to be paid one-half by the oil company defendants and one-half by McGowan Working Partners Inc.

**WRIT GRANTED; CASE # 1 REMANDED WITH INSTRUCTIONS. APPEAL IN CASE # 2 DISMISSED.**

CARAWAY, J., concurring.

I respectfully concur with the majority ruling as I am not in agreement with both the procedural and substantive analyses given.

In this case, as in the supreme court's important ruling in *Marin v. Exxon Mobil Corp.*, 09-2368, 09-2371 (La. 10/19/10), 48 So.3d 234, the alleged damage is the *existing* contamination of the soil and groundwater which impedes or prevents plaintiffs' *present* use of the land. Plaintiffs' ownership of the immovable is subject to two real right encumbrances or incorporeal immovables – a mineral lease and a mineral servitude. La. R.S. 31:18. As discussed further below, the real obligations of these two mineral rights impose upon their owners the same "restoration duty" to the owner of the servient estate recognized and discussed in *Marin*. *Marin, supra* at 255. The coextensiveness of these Mineral Code obligations for the same restoration debt to the surface owner makes solidary obligors of the parties sued in Suit #1, including the Butts, justifying the plaintiffs' right for the cumulation of their claims into one action. *Narcise v. Illinois Central Gulf Railroad Co.*, 427 So.2d 1192 (La. 1983); La. C.C. art. 1794; La. C.C.P. art. 463. The trial court's denial of plaintiffs' right of joinder under La. C.C.P. art. 463 of these defendants in Suit #1 at this early stage of the proceedings was therefore an abuse of discretion.

The particular title history for this property shows that the initial mineral right was the 1941 oil and gas lease which was granted by the landowner. The second mineral right was created years later when the mineral ownership in the form of the servitude was severed from the

ownership of the land. Significantly, both the mineral lease and the mineral servitude burden plaintiffs' land with an identical right of use as shown by the Mineral Code definitions for each mineral right under Articles 114 and 21. La. R.S. 31:114 and 21. That burden is the right of use to explore for and produce minerals. *Id.* The mineral servitude owner's right to explore for and produce minerals was subject to the mineral lease which was already in existence as a real right when the servitude was created.

The present burden upon the plaintiffs' land in favor of the owners of the two mineral rights, however, does not overwhelm plaintiffs' concurrent right to other uses of the land. There is a balance and relationship of the rights of use between the servient estate and the two mineral estates. Unlike a predial lease which may deliver complete possession and use of the immovable to the lessee, the lessor of the mineral lease or the landowner/seller of a mineral servitude retains possession and use of the surface subject only to the use right to explore for and produce minerals, usually on a small portion of the land or even off the land altogether by unit operations. The servient estate owner under this regime expects continued use of his land. The Mineral Code recognizes this in Article 11(A) which provides for the parties' correlative rights, as follows:

> A. The owner of land burdened by a mineral right or rights and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other. Similarly the owners of separate mineral rights in the same land must exercise their respective rights with reasonable regard for the rights of other owners.

La. R.S. 31:11.[6]

There are two matters underlying the defensive positions of the Butts and the present leasehold owner, McGowan.[7] First, the physical acts causing the alleged contamination appear to have occurred long before the Butts and McGowan acquired ownership of their respective mineral rights. Second, the Butts insist that since any right of use they own over the property is leased to McGowan, they have no existing possessory right of the immovable, enabling their performance of restoration of the land. From the Supreme Court's ruling in *Marin*, the special legislative remedy for restoration under La. R.S. 30:29, and the correlative rights regime of the Mineral Code addressed in Articles 11, 22, and 122, these matters raised by Butts and McGowan do not negate the existence of plaintiffs' causes of action alleged against them in Suit #1. The clear "community of interest" of those causes of action to restore present use of the servient estate to the plaintiffs requires joinder of the parties in Suit #1. La. C.C.P. art. 463.

The important distinction for answer to the defendants' contentions involves the difference between (1) a tort claim for property damage remedied by money damages, and (2) a claim to enforce the real obligations

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[6]Part B of La. R.S. 31:11 was enacted and added to the Mineral Code in 2006. It therefore did not apply to the mineral reservation in the sale of this land which created the Butts mineral servitude. Notably, however, in adding this provision for the creation of mineral servitudes through such reservations, the Legislature recognized the link between Articles 11 and 22 of the Mineral Code limiting the use of the mineral servitude to "only so much of the land, including the surface, as is reasonably necessary to conduct ... operations."

[7]Because of this court's ruling in *Wagoner v. Chevron USA Inc.*, 45,507 (La. App. 2d Cir. 8/18/10), 55 So.3d 12, I will limit my consideration to the plaintiffs' cause of action in Suit #1 against McGowan. McGowan was also the present owner of the disputed oil and gas lease in *Wagoner*. Yet, this court's ruling only addressed and dismissed claims by the surface owners against the former leasehold owners in *Wagoner*. The argument for imposing the real obligations of the mineral lease against the former leasehold owners pursuant to La. R.S. 31:129 was made in Chief Judge Brown's dissent in *Wagoner*.

of Mineral Code Articles 11, 22, and 122 by the owner of the servient estate. A breach of an obligation in tort results in an obligation to pay, while the breach of the real obligation may be remedied by a performance obligation or the special regulatory cleanup of La. R.S. 30:29 to cease the unauthorized misuse of the property or to restore the land to normal use by removal of contamination. Since plaintiffs' causes of action against the Butts and McGowan fall under this second category of action, the time of the actual damaging conduct by other parties which caused the contamination is not crucial. Instead, the existing impediment to the servient landowner's use requires the present owners of the mineral rights to act to restore that use.

In *Marin*, because all the acts of contamination by the use of unlined pits had ceased many years before, the court rejected the tort claims of the landowners. The delictual actions were prescribed; plaintiffs' *contra non valentum* claims and the continuing tort doctrine were rejected. Turning to the additional argument of the *Marin* plaintiffs, the court summarized the parties' conflicting positions, as follows:

> Plaintiffs argue that as a lessee, Exxon has continuing obligations under both the mineral and surface lease that cannot prescribe as a matter of law. Exxon argues that any restoration obligations it may have under these leases do not go into effect until the lease is terminated, making any such claims premature. The plaintiffs' position is correct.

The *Marin* property involved both a predial lease, with its personal obligations, and a mineral lease, a real right, with its real obligations. *Hoover Tree Farm, L.L.C. v. Goodrich Petroleum, L.L.C.*, 46,153 (La. App. 2d Cir. 3/23/11), 63 So.3d 159, 166, *writ denied*, 11-1125 (La. 9/23/11), 69

So.3d 1161, *writ denied*, 11-1236 (La. 9/23/11), 69 So.3d 1162; La. C.C. art. 1763. The court determined that Article 122 of the Mineral Code, a real obligation of Exxon, was breached rejecting Exxon's argument that its duty to restore could only materialize at the expiration of the mineral lease. While certain intended and ongoing use of the property to explore for and produce minerals may require restoration only upon termination of the lease, Exxon's unauthorized misuse of the property amounted to actions taken without reasonable regard to the plaintiffs' surface rights, allowing for immediate remediation. The court found that the reasonable prudent operator obligation of Article 122 was breached. The unreasonableness of the existing contamination also was a violation of the correlative rights principle of Article 11.

In *Marin*, the plaintiffs' contracts for a predial lease and the mineral lease were directly with Exxon and privity of contract therefore existed between the *Marin* family and the company. The court was not required to discuss the effect of the real obligations of a mineral lease between the owner of the land and the owner of an incorporeal immovable who were never in privity of contract. In this case, the Butts acquired their mineral servitude from a former owner and not the plaintiffs. Likewise, the 1941 mineral lease was not a contract between McGowan and the plaintiffs. Nevertheless, even in the absence of privity of contract, the parties' present ownership of the immovable binds them as dominant and servient estate owners to real obligations.

In *Petchak v. Bossier Parish Police Jury*, 45,705 (La. App. 2d Cir. 11/24/10), 55 So.3d 840, 852, *writ denied*, 11-0165 (La. 4/29/11), 62 So.3d 112, this court addressed the unauthorized misuse of the defendant's personal right of use servitude for water drainage in a residential subdivision. We stated:

> Plaintiffs' lot is therefore a servient estate that owes a charge for the benefit of the drainage of the subdivision. La. C.C. art. 646. Plaintiffs' obligation to allow the passage of the water across their property is not a personal obligation but a real obligation because it is a charge on the servient estate that all successive owners of Lot 363 must bear. La. C.C. arts. 1763 and 1764 (footnote omitted). As a correlative real obligation governing the dismemberment of the usus right of ownership of the immovable, (footnote omitted) the owner of the dominant estate, or in this case the owner of the personal servitude, must exercise his "specified use" without exceeding the boundaries of that use in a manner damaging the concomitant use of the servient estate. *See* former Article 778 of 1870 Civil Code. "The owner of the dominant estate may not make use of the servitude that aggravates the condition of the servient estate." A.N. Yiannopoulos, Predial Servitudes § 156, 4 *Louisiana Civil Law Treatise* (3d ed. 2010).

This same correlative rights regime for personal and predial servitudes is embodied in Article 11 of the Mineral Code for the mineral rights now at issue. The plaintiffs' causes of action against the Butts and McGowan exist from the allegations of Suit #1 because they are landowners, in the language of Article 11, "burdened by ... mineral ... rights." The existing misuse of the defendants' "right to explore for and produce minerals" regardless of any prior owners' involvement makes the present owners of the mineral rights legally responsible for remediation to restore the concurrent use of the land to the owners of the servient estate.

The conclusion that the Butts and McGowan have coextensive obligations under Article 11 generally and more specifically under Articles

22 and 122 of the Mineral Code, makes them solidary obligors for the "whole performance" of a singular duty to restore present use of the servient estate. La. C.C. 1794. The special regulatory cleanup for the so-called legacy suits applies as a remedy against not only the "parties who caused the damage" but also to those "who are otherwise legally responsible therefor." La. R.S. 30:29(C)(1).

As between the obligors for the restoration, however, McGowan's obligation under Article 122 as a reasonably prudent operator is also owed to the Butts, as mineral servitude owners. Therefore, the Butts as solidary obligors of plaintiffs will have a right of indemnification from McGowan. Such indemnification right is more than enough to answer the Butts' contentions regarding their lack of possessory rights to the land.