GORDON ARATA MCCOLLAM DUPLANTIS & EAGAN LLC

NEW ORLEANS | LAFAYETTE | BATON ROUGE | HOUSTON

THE CHALLENGE OF CHANGE

NATIONAL ASSOCIATION OF ROYALTY OWNERS
LOUISIANA CHAPTER

April 20, 2015

Presented by:
J. Michael Fussell, Jr.

Assisted by:
Alex Rothenberg

CASE SYNOPSES FOR MICHAEL FUSSELL PRESENTATION

1. *Taylor v. Morris*, 49,425 (La. App. 2 Cir. 10/1/14); 150 So. 3d 952

In January 1999, Taylor Properties, Inc. purchased a 120–acre tract of land in DeSoto Parish in five separate transactions from the owners. Each deed contained a reservation of a mineral servitude using the following language:

> *Vendor hereby reserves all oil, gas and/or mineral rights above and/or below the ground for a period of ten (10) years from the date of this Cash Sale Deed.*

Drilling operations commenced on October 21, 2008, within ten years of the original sale. Taylor later transferred the land and in August 2009, and the subsequent landowners filed a petition for a declaratory judgment claiming that the original act of sale contained a term mineral reservation that expired in January 2009, ten years after the sale. The servitude owners countered that the reservation merely restated the customary ten-year prescriptive period which is subject to interruption by good-faith use of the servitude. The Second Circuit agreed with the servitude owners, and found that "for a period of ten years" was simply a restatement of the default prescriptive period assumed into all mineral rights created in Louisiana, because the parties did not specifically state otherwise.

On the same day, the Second Circuit released its decision in *Moffett v. Barnes*, 49,280 (La. App. 2 Cir. 10/1/14); 149 So. 3d 475, which addressed the same issue, except that the reservation clause excluded the word "period," and came to the same conclusion.

2. *Samson Contour Energy E & P, L.L.C. v. Smith*, 2014 WL 7404070, 49,494 (La. App. 2 Cir. 12/29/14); --So. 3d—

Samson Contour Energy E & P, L.L.C. ("Samson") was a leasee of mineral rights on a tract of land held by a family. After receiving notice that royalty interests had changed hands, Samson still paid the incorrect party. The representatives of the succession, the entity actually entitled to the royalties, resent Samson documentation confirming its entitlement. Samson stated that it would research the matter further.

After a bench trial, the court issued an opinion finding that the succession had given Samson sufficient notice of nonpayment of royalties under Article 137 of the Mineral Code and that Samson owed $1,301,149.13 in royalty payments. The court found that Samson's payment to the incorrect parties was not relevant for the purpose of determining if penalties were appropriate because Samson was in the superior position to remedy the mistake after receiving notice from the succession. The court further found that Samson's failure to pay was not

reasonable and that Samson was liable for damages of double the amount of royalties due. The court rendered judgment awarding the succession $2,602,298.26 in damages and interest and $505,000 in attorney fees. The court of appeal affirmed the decision.

3. *McCarthy v. Evolution Petroleum Corp.*, 49,301 (La. App. 2 Cir. 10/15/14); 151 So. 3d 148

The owners of the 1/8th royalty of mineral leases claimed that the sale of their royalty to the owner of the working interest of those leases was induced by fraud. Evolution had a working interest in the land, but had agreed to sell it to Delhi Unit Denbury Resources, LLC for $50 million; Denbury estimated that by employing a new method of oil recovery it could reach 30 to 40 million barrels. Evolution made several unsolicited written offers to purchase their royalty rights in 2006; the solicitations were made by Evolution with full knowledge of the Denbury agreement to further develop the Delhi Unit. Plaintiffs claimed that the initial offer stated the funding for the purchase was only for a limited time, and that any deal must be closed by May 2006. Evolution never gave any indication to the plaintiffs that there was a pending sale to Denbury or that the royalty interests were in fact worth much more than the plaintiffs had been led to believe. Plaintiffs asserted that they were led to believe that Evolution was making these same offers to all royalty owners in the Delhi Unit, when in fact, offers were made only to the elderly or the particularly unsophisticated royalty owners who would have had a minimal understanding of oil and gas matters and the Delhi Unit. Evolution asserted the peremptory exception of no cause of action. The trial court granted defendant's exception, stating that the plaintiffs had no legitimate cause of action. The court of appeal reversed, finding that the complaint stated a cause of action for fraud by misrepresentation and for fraud by silence.

4. *Crooks v. La. Pac. Corp.*, 2014-724 (La. App. 3 Cir. 12/10/14); 155 So. 3d 686

The district court held that a suit filed against the mineral servitude owner for damages caused by drilling operations was premature while oil and gas operations were ongoing. The court of appeal reversed, finding that there is no requirement under the law that a landowner wait until the end of a lease to sue the mineral servitude owner for damage to his property.

5. *Suire v. Oleum Operating Co., L.C.*, 2013-736 (La. App. 3 Cir. 2/15/14); 135 So. 3d 87, *writ denied*, 2014-0982 (La. 8/25/14); 147 So. 3d 1120

In a dispute between the overriding royalty interest owners and the current oil and gas operators over unpaid ORI, the Third Circuit held that the owner of the subject property is a necessary party. The court of appeal also reiterated that the trial court has broad discretion in deciding whether to impose penalties pursuant to the Louisiana Mineral Code.

6. *Mathews v. Emerson*, 48,887 (La. App. 2 Cir. 5/23/14); 141 So. 3d 346, *writ denied*, 2014-1541 (La. 10/24/14); 151 So. 3d 607

Plaintiff listed property for sale and noted that "mineral rights reserved." The official MLS listing also stated that the mineral rights were reserved. Moreover, in the property disclosure statement there was a notation that the mineral rights were reserved and that there was a long term lease on the property. However, in the sale deed no mention of the mineral reservation was present. Plaintiff continued to receive mineral royalties for two years without objection from defendant. When plaintiff realized the omission of a reservation clause, she contacted an attorney and attempted to have the defendant sign a correction, but the defendant refused and claimed ownership over the minerals. The district court ruled that the plaintiff was entitled to reform the deed to provide the mineral reservation in her favor based on mutual error, and the court of appeal affirmed.

7. *Bundrick v. Anadarko Petroleum Corp.*, 2015 WL 895561, 2014-993 (La. App. 3 Cir. 3/4/15); --So. 3d—

Mr. Bundrick and Cajun Pride, Inc. (hereinafter collectively referred to as "the plaintiffs") owned interests in seven tracts of immovable property located in St. Martin Parish, Louisiana. All seven tracts at issue had been the subject of oil and gas production in the past and were located in what is referred to as the Anse le Butte Field. On March 9, 2006, Mr. Bundrick and Cajun Pride filed a suit for damages, asserting that past oil and gas activities conducted by the twelve defendants, or their predecessors in interest, under defunct oil, gas, and mineral leases caused the contamination of the seven tracts of immovable property. They further asserted that the twelve defendants were negligent and strictly liable for the damage caused and that their conduct created a continuing and damaging nuisance and a continuing trespass on their property. The plaintiffs further asserted that the contamination constituted a breach of the lessees' obligation under the Louisiana Mineral Code, to act prudently and to restore the leased property, as close as practicable, to its original condition at the earliest reasonable time, in addition to their contractual obligations to restore the property to its original condition.

When the summary judgment hearing began, the parties stipulated that the plaintiffs acquired the immovable property after the expiration of the mineral leases at issue and that they did so without obtaining an assignment of their predecessor-in-interest's rights to proceed against the responsible parties for contamination to the land. Without a genuine issue of material fact, the only issue before the trial court was whether the defendants were entitled to judgment as a matter of law. In granting the defendants summary judgment relief and dismissing them from the litigation, the trial court found that the subsequent purchaser rule[1] precluded any right of action by the plaintiffs against the defendants. The court of appeal affirmed, holding that the subsequent purchaser rule applies in matters involving mineral leases, following authority from

[1] "[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 & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11); 79 So. 3d 246, 256-57.

the First Circuit Court of Appeal. *See Global Marketing Solutions, LLC v. Blue Mill Farms, Inc.*, 2013-2132 (La. App. 1 Cir. 9/9/14); 153 So. 3d 1209. However, the court acknowledged that this directly conflicted with a prior decision of the Third Circuit rendered by a different panel. *See Duck v. Hunt Oil Company*, 2013-628 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, 119 ("By its own terms, *Eagle Pipe* does not apply to situations involving mineral leases. Thus, the trial court erred in applying the subsequent purchaser theory recognized in *Eagle Pipe* to bar the claims that Duck asserts in this matter as those claims arise under mineral leases.").

8. *Furie Petroleum Co., LLC v. SWEPI, LP*, 49,462 (La. App. 2 Cir. 11/19/14); 152 So. 3d 255

The State (Louisiana) sought to intervene in a declaratory judgment action between landowners and the putative mineral servitude owners regarding mineral ownership of disputed land. The State claimed that the navigable waterway which it owns divides the tract into two parts, and if established, this fact would directly bear upon the underlying dispute over the maintenance of a mineral servitude over the large tract which was subject to a claim of prescription of nonuse. The district court did not allow the intervention, holding that the State had no interest in the pending declaratory judgment action regarding the mineral servitude dispute. The Court of Appeal reversed, finding that the State had an interest in the underlying suit, because the lawsuit could determine ownership or land and various mineral encumbrances on its property.

9. *Ford v. Lester*, 48,932 (La. App. 2 Cir. 5/14/14); 139 So. 3d 22, *writ denied*, 2014-1567 (La. 11/7/14); 152 So. 3d 175

Surface owners brought declaratory action seeking to name them the owners of the mineral rights of the underlying land. The plaintiffs purchased their land from the Lesters' ancestors-in-title in credit sale deeds. They wanted leases entered into by the Lesters in favor of Chesapeake to be reformed to name them as mineral servitude owner. Plaintiffs claimed they obtained ownership of the mineral rights from the defendants' ancestors-in-title by execution of the credit sale deeds and by the accrual of the 10-year prescription of nonuse. The trial court entered judgment in the defendants favor. The court of appeal affirmed, holding that the open mines doctrine did not affect mineral interests acquired by naked owners pursuant to a judgment of possession.

10. *Haruff v. King*, 2013-940 (La. App. 3 Cir. 5/14/14); 139 So. 3d 1062, *writ denied*, 2014-1685 (La. 11/7/14); 152 So. 3d 176

Plaintiff sought to rescind a sale of immovable property on the basis of lesion beyond moiety. At trial, the plaintiffs relied on expert testimony regarding the fair market value of mineral interests in the property at issue. His opinion included the possibility of future royalty revenue or of a lease bonus. The court of appeal held that this was too speculative to support a claim for lesion beyond moiety.

11. *Chesapeake Operating, Inc. v. City of Shreveport*, 48,608 (La. App. 2 Cir. 1/29/14); 132 So. 3d 537, *writ denied*, 2014-440 (La. 6/20/14); 148 So. 3d 176

A gas well operator filed four concursus actions, naming the city and parish commission as defendants, seeking a determination of whether the city or parish was entitled to receive royalties from mineral production from the operator's gas wells, which were located on land underlying public roads, for which both the city and parish had executed mineral leases in favor of well operator. Concursus actions were consolidated and the assignee of the well operator's interest in the city's mineral lease was permitted to intervene. The city and assignee, whose interests were aligned with the city's, filed separate motions for summary judgment, and the parish and well operator filed cross-motion for summary judgment. The district court determined that the parish was entitled to receive proceeds of mineral production attributable to disputed properties, and granted summary judgment in favor of the parish and well operator. The city and assignee appealed. The Court of Appeal held that, as matter of first impression, the city's annexation of public roads owned by the parish transferred ownership of such roads to the city, and thus, the city had authority over mineral rights in the land underlying disputed roads and right to receive proceeds of mineral production therefrom.

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Education

Louisiana State University, J.D., 2005
University of Louisiana at Lafayette, B.S., *cum laude*, 2001

Bar Admissions

Louisiana (2005)

Practice Areas

APPELLATE
COMMERCIAL LITIGATION
EMPLOYMENT AND LABOR
ENVIRONMENTAL AND TOXIC TORTS
OIL, GAS AND ENERGY LITIGATION
OIL, GAS AND ENERGY TRANSACTIONS
PRODUCTS LIABILITY

Mike Fussell is an experienced litigator at both the trial and appellate court levels with first chair trial experience. He has handled a diverse array of matters including commercial disputes, products liability, and oil and gas issues. Mike has also practiced extensively in the areas of health care and medical malpractice law.

Mike earned his J.D. and Bachelor of Civil Law Studies from Louisiana State University Law School in 2005, and received his B.S. *cum laude* from the University of Louisiana at Lafayette in 2001. Mike is an "AV-Preeminent" rated attorney by the venerable Martindale-Hubbell peer review ratings for both ethical standards and legal ability. AV-Preeminent is the highest rating possible.

Mike was also named by *Super Lawyers* to the Louisiana Rising Star list. *Super Lawyers* is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a rigorous multi-phased process that includes a statewide survey of lawyers, independent research evaluation of candidates, and peer reviews by practice area. No more than 2.5% of the lawyers in Louisiana are named to the Rising Star list.

Acadiana Profile Magazine named Mike as a top lawyer in the Acadiana area in 2015. Voting to determine the top attorneys for *Acadiana Profile Magazine* was open to all licensed attorneys in the Acadiana, Louisiana market area. Each attorney was asked which attorney, other than himself or herself, he or she would recommend in a given practice area. Mike was selected as a top lawyer in multiple practice areas.

Mike is active in the community having won the prestigious Big Brothers Big Sisters of Acadiana "Big Brother of the Year Award" in 2007. He also served as a Board Member for Children's Shelters of America Youth, Inc.

Published Works & Presentations:

- Co-Presenter of *The 411 on Land, Lease and Title Issues: What Every Landman Should Know* (Gordon Arata Annual Duck Lunch & Seminar, October 2014)
- Presenter and co-author of *Handling Disputes Between Surface and Servitude Owners & Recent Developments* (Lorman Education Services' "Oil and Gas Rights in Louisiana" Seminar, September 2014)
- "The Louisiana Public Records Doctrine: A Recent Review by the Louisiana Third Circuit Court of Appeal," Gordon Arata "Drill Deeper" Blog, May 2014
- Presenter and co-author of *Two States Separated by a Common Law: A Comparison of Select Topics in Texas and Louisiana Oil & Gas Law* (Gordon Arata Duck

Lunch & Seminar, 2012)
- Presenter and author of *Medical Malpractice 101* (Continuing Legal Education, Lafayette Parish Bar Association, 2009)

Professional Affiliations:

- American Association of Professional Landmen (AAPL)
- Rocky Mountain Mineral Law Foundation
- Louisiana State Bar Association
- Lafayette Association of Professional Landmen
- Lafayette Parish Bar Association
- Lafayette Young Lawyers Association - Board Member, 2009-2010
- Houston Association of Professional Landmen

Community Involvement:

- Children's Shelters of Acadiana Youth, Inc. - Board Member
- Big Brothers Big Sisters of Acadiana - Mentor, 2007

Honors:

- AV Rated by Martindale-Hubbell
- Named a Rising Star by *Super Lawyers*
- "Big Brother of the Year Award," Big Brothers Big Sisters of Acadiana, 2007
- *Acadiana Profile Magazine's* "Top Lawyers" List 2015 - Appellate Practice; Commercial Litigation; Employee Benefits Law