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Broussard v. Northcott Exploration Co.:
Recovery by Farm Lessee from
Mineral Lessees

by

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Broussard v. Northcott Exploration Co.: Recovery by Farm Lessee from Mineral Lessees

The holder of an unrecorded farm lease sued the holder of a recorded mineral lease for damage to the farmer's soybean crop caused by the mineral lessee's drilling operation. Plaintiff advanced two theories of recovery: an action as third party beneficiary to the contract between the defendant and the landowners, and a delictual claim based on Louisiana Civil Code article 2315.¹ The Louisiana Supreme Court affirmed the appellate court's reversal² of the trial court's award of damages, *holding* that the surface damages provision of the mineral lease did not create a stipulation *pour autrui* in favor of the farm lessee, and that the farm lessee could recover in tort only those damages caused by the mineral lessee's unreasonable exercise of its contractual rights. *Broussard v. Northcott Exploration Co.*, 481 So. 2d 125 (La. 1986).

Third Party Beneficiary Status

Contracting parties may choose to confer a benefit on a third party. One of the contracting parties, the stipulator, may direct the other contracting party, the promisor, to render a performance to a third party, the beneficiary.³ A third party beneficiary may demand perform-

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1. La. Civ. Code art. 2315 states *inter alia*: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

2. *Broussard v. Northcott Exploration Co.*, 469 So. 2d 392 (La. App. 3d Cir. 1985).

3. The terms "stipulator" and "beneficiary" are used to avoid the confusion that might result from the introduction of the term "promisee." The stipulator is in fact the promisee, since he receives the contractual promise of the promisor, while the beneficiary receives the performance of that promise. See Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 Tul. L. Rev. 18, 23, 33 (1936).

Broussard was decided under the Civil Code of 1870 articles on obligations. La. Civ. Code art. 1890 (1870) allowed a person to "make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation . . ." La. Civ. Code art. 1902 (1870) provided that "a contract, in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, can not be revoked as to the advantage stipulated in his favor without his consent."

The third party beneficiary contract, or stipulation *pour autrui*, is now the subject of La. Civ. Code arts. 1978-1982. These articles are the product of the 1984 revision of Titles III and IV of Book III of the Civil Code. Article 1978 allows a party to a contract to "stipulate a benefit for a third person called a third party beneficiary."

The result in *Broussard*, and any other determination of a party's status as a third party beneficiary, should not be affected by the revision. Such a determination is largely one of contract interpretation, dependent upon the language of the contract, the intent

ance from the promisor,⁴ an exception to the ordinary rule of privity of contract.

Mr. Broussard began leasing the property in 1974 through a verbal agreement with the landowners; in 1976 these landowners entered into a written mineral lease with Northcott Exploration Company (Northcott), which was subsequently recorded.⁵ Broussard claimed to be the beneficiary of the surface damages provision of Northcott's lease, which provided that: "The Lessee shall be responsible for all surface damages of Lessor caused by Lessee's operations."⁶ Although the language does not suggest that Northcott might have been making a promise to anyone other than the landowners, the plaintiff argued that *Andrepoint v. Acadia Drilling Co.*⁷ and *Hargroder v. Columbia Gulf Transmission Co.*⁸ dictated a contrary result.

The plaintiffs in *Andrepoint* and in *Hargroder*, holders of unrecorded farm leases, sought recovery for damaged crops from defendants who conducted activity on the land pursuant to contractual agreements with the landowners.⁹ In each case the supreme court found that the damages clause of the contract created a stipulation *pour autrui* in favor of the plaintiff.¹⁰ In *Andrepoint* the clause made the defendant-lessee "responsible for all damages caused by Lessee's operations."¹¹ In *Hargroder* the defendant agreed "to pay such damages which may arise to growing crops, timber, or fences from the construction of the [pipeline]."¹² Neither agreement expressly limited the benefits of the damages provision to the lessor alone. *Broussard* distinguished both cases on the basis of

of the contracting parties, and the relationship among the contracting parties and the third party. See text *infra*. For an examination of the revision's overall impact in the area of third party beneficiaries, see Comment, Third Party Beneficiary Contracts, 45 La. L. Rev. 797 (1985).

4. Before 1985 this right of the beneficiary was recognized by Louisiana courts on the authority of *Mayor v. Bailey*, 5 Mart. (o.s.) 321 (La. 1818). The 1984 revision made this explicit. La. Civ. Code art. 1981.

5. 481 So. 2d 125, 126 (La. 1986).

6. 469 So. 2d at 393.

7. 255 La. 347, 231 So. 2d 347 (1969) (on rehearing).

8. 290 So. 2d 874 (La. 1974).

9. In *Andrepoint* the defendant drilled for oil pursuant to an oil lease granted by the lessors. 255 La. at 350, 231 So. 2d at 348. In *Hargroder* the defendant constructed a pipeline after obtaining a right of way agreement with the landowners. There was an additional claim by the plaintiff for damage to machinery. 290 So. 2d at 874-75.

10. In *Andrepoint*, 255 La. at 356, 231 So. 2d at 350. In *Hargroder*, 290 So. 2d at 876.

11. 255 La. at 354, 231 So. 2d at 349.

12. 290 So. 2d at 876. (Bracketed language by the court.) Note that the agreement does not mention damage to machinery; this was one factor prompting Justice Barham's conclusion that the action could only be grounded in tort. 290 So. 2d at 877 (Barham, J., concurring in decree only).

the language in Northcott's lease limiting its liability to the lessor's surface damages.¹³ The court concluded that Northcott and the landowners did not intend to stipulate an advantage for Mr. Broussard.¹⁴ The distinction is adequate, but less than completely satisfying.

The court was correct in concluding that Northcott's lease did not satisfy the codal requirements for a stipulation in favor of the plaintiff. The agreement expressly benefited the lessor, and the parties did not manifest any intention to benefit the surface lessee. The difficulty is that the court suggested that the absence of similarly limiting language in the *Andrepoint* and *Hargroder* leases implied that the parties to those agreements intended to confer a benefit on a third party.

The stipulation of a benefit to a third person may be implied.¹⁵ In *Fontenot v. Marquette Casualty Co.*¹⁶ the Louisiana Supreme Court, in an action against a reinsurer brought by a tort victim claiming to be the beneficiary of the reinsurer's agreement with the alleged tortfeasor's liquidated liability insurer, held that articles 1890 and 1902 of the Civil Code of 1870 required that a stipulation "clearly express" an intention to benefit the third party.¹⁷ This approach would preclude the results reached in *Andrepoint* and *Hargroder*; indeed, this standard was the basis for the conclusion of the appellate court in *Hargroder* that the lease agreement did not make the plaintiff a third party beneficiary.¹⁸ The supreme court opinion in *Hargroder* simply stated that *Andrepoint* was controlling, and did not address the clear expression requirement

13. 481 So. 2d at 127.

14. *Id.*

15. *Duchamp v. Nicholson*, 2 Mart. (n.s.) 672 (La. 1824), held that the plaintiff, employer of an auctioneer, was permitted to recover as third party beneficiary of the auctioneer's statutorily required surety bond with the defendant. "[I]t was clear that the bond in question was given to protect those in the position of the plaintiff and not to protect the nominal obligee, the public authorities, and the finding of an implied promise of the surety obligating it directly to the plaintiff was in order." Smith, *supra* note 3, at 37.

16. 247 So. 2d 572 (La. 1971).

17. 247 So. 2d at 579. The court also stated that such a stipulation must be in writing. Articles 1890 and 1902 of the Civil Code of 1870 do not suggest either requirement. For criticism of the requirement of a writing, see Spaht and Johnson, *The Work of the Appellate Courts For the 1975-1976 Term—Obligations*, 37 La. L. Rev. 332, 346-47 (1977).

18.

The jurisprudence is clear that the real determinative as to whether or not the contract contains a stipulation pour autrui is whether or not the grantor had in mind protection of a third party. *Fontenot v. Marquette Casualty Co.*, 258 La. 671, 247 So. 2d 572 (1971). We fail to see wherein the language of the subject right-of-way agreement clearly expresses the intent to benefit a third person not named herein.

Hargroder v. Columbia Gulf Transmission Co., 278 So. 2d 864, 868 (La. App. 3d Cir. 1973).

of *Fontenot*.¹⁹ Nonetheless, the court recently restated the requirement in *Arrow Trucking Co. v. Continental Insurance Co.*,²⁰ which relied on *Fontenot* to reject a factually similar claim of an insured to third party beneficiary status under his insurer's reinsurance agreement.²¹ Perhaps the heightened requirement is best explained by the facts of the cases: it would be unusual for a reinsurance agreement to provide benefits for anyone other than the insurer and reinsurer.²²

Under what circumstances would two parties imply a stipulation to benefit another? Given that contracts have the effect of law between the parties,²³ such an implied intention should be present in the minds of both the stipulator and the promisor.²⁴ The existence of such an implied intent is a factual question, to be determined by an analysis of both the contract and the relative position of both parties as to the third person.²⁵ Professor Smith stressed the importance of the following factors:

- (1) the existence of a legal relationship between the promisee and third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge; [or] (2) the existence of a factual relationship between the promisee and the third person, where, (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the [promise] will protect the former; (b) securing an advantage for

19. 290 So. 2d at 876.

20. 465 So. 2d 691 (La. 1985).

21. The result is correct; however, it should have been based on the lack of an intention to stipulate a benefit for another. "In fact the contract specifically and expressly provides that in the event of [the insurer's] insolvency, the proceeds due under the [reinsurance] agreement shall be payable directly to [the insurer's] liquidator, not to Arrow." 465 So. 2d at 698.

22. The court may be suggesting that more compelling evidence of intent will be required in circumstances where a stipulation *pour autrui* would be contrary to ordinary business practices.

23. La. Civ. Code art. 1901 (1870), replaced by La. Civ. Code art. 1984.

24. Where only one party intended such a benefit, there would be no consent to the stipulation, and hence no third party beneficiary. La. Civ. Code art. 1798 (1870), replaced by La. Civ. Code art. 1927.

25. In *Allen & Curry Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980 (1905), Justice Provosty stated for the court:

[W]e do not think that mere form is sacramental in the matter; and we agree with learned counsel for plaintiffs that the question of stipulation *pour autrui*, *vel non*, is a question of what was the intention of the parties, and that that intention must be gathered, just as in the case of any other contract, from reading the contract, as a whole, in the light of the circumstances under which it was entered into.

113 La. at 1101-02, 37 So. at 984.

the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended.²⁶

Professor Smith's criteria were adopted by the supreme court in *Andrepoint*.²⁷

The court did not apply these criteria in the *Broussard* case; had it done so, it might have imposed liability as in *Andrepoint*. The possibility of the landowner's personal liability to the farm lessee would be a factual relationship supporting a finding that the farmer is a third party beneficiary. The Civil Code requires a lessor "[t]o cause the lessee to be in a peaceable possession of the thing" leased.²⁸ In addition, Louisiana Revised Statutes 9:3203 allows a farm lessee to recover from his lessor the market value of an average crop that could have been produced when the lessor has failed to permit the lessee to cultivate the land.²⁹ Thus, the stipulator (lessor) would have intended to benefit the third person (farm lessee) in order to avoid liability predicated on the damage the stipulator caused by leasing the land to the promisor (mineral lessee). Nevertheless, such an analysis would have been incomplete. The element missing is the presence of an intent by the promisor, Northcott, to benefit the plaintiff. This is why the limiting language of the lease, relied on by the court, is critical; the phrase "damages of the Lessor" proves that Northcott did not intend to be contractually liable for surface damage incurred by anyone other than the landowner.

A careful reading of *Andrepoint* and *Hargroder* suggests that in both cases, despite the absence of the limiting language relied on in *Broussard*, the results reached may have been contrary to the intentions of the parties. In both cases the court used the criteria developed by Professor Smith to determine that the landowners intended to stipulate benefits for the plaintiffs.³⁰ However, those criteria, while accurate, do not address the equally important relationship between the promisor and the beneficiary. In order for the promisor and the stipulator to consent to a stipulation *pour autrui*, the promisor must understand the stipulator's

26. Smith, *supra* note 3, at 58. As noted, the promisee is the stipulator.

27. 255 La. at 358, 231 So. 2d at 351.

28. La. Civ. Code art. 2692.

29. La. R.S. 9:3203 (1983) provides:

Any lessor of property to be cultivated who fails to permit the lessee to occupy or cultivate the property leased, is liable to the lessee in an amount equal to the market value of the average crop that could have been grown on the land or on like land located in the immediate vicinity.

30. In *Andrepoint*, 255 La. at 359, 231 So. 2d at 351. In *Hargroder*, 290 So. 2d at 876.

intent to benefit the third party.³¹ The defendants in *Andrepoint* and *Hargroder* obtained written releases from the landowners for the surface damages;³² had they contemplated that the damages provisions benefit someone other than the landowners alone, they would have sought releases from those parties. *Broussard* may indicate that the court will be more willing to examine the promisor's intention to bestow benefits upon the third party before concluding that a stipulation *pour autrui* has been made.

One additional point should be raised. *Andrepoint* has stood for the proposition that stipulations *pour autrui* are "favored in our law."³³ There is no direct authority for such an assertion; the court explained only that they "are specifically authorized in broad terms in Articles 1890 and 1902 of the Civil Code [of 1870]."³⁴ The court's meaning has never been clear. Although the code authorizes a party to stipulate a benefit for another, it does not suggest that a party asserting its status as a beneficiary should enjoy any special protection prior to a determination of whether in fact such a stipulation has been made. The supreme court may have implicitly recognized this in *Broussard*, by declining to broadly interpret "lessor's damages" to include his potential liability to the farm lessee.

Recovery in Tort

Mr. Broussard was allowed to recover under Civil Code article 2315 for only those damages caused by the mineral lessee's unreasonable exercise of his contractual rights. After the defendant complied with

31. The fourth circuit has clearly endorsed the principle: "[T]he existence of a stipulation depends upon both the promisee's intention to confer a benefit upon a third party and the promisor's agreement to do so. In addition, the stipulated advantage or benefit must be contemplated by each of the contracting parties." *Wagner & Truax Co. v. Barnett Enterprises, Inc.*, 447 So. 2d 1255, 1259 (La. App. 4th Cir. 1984). See also *Miller v. Pick*, 467 So. 2d 74 (La. App. 4th Cir. 1985), cert. denied, 472 So. 2d 36 (La. 1985).

32. The release in *Andrepoint* was obtained after the drilling operations. 255 La. at 359, 231 So. 2d at 351. For a suggestion that it was executed under suspicious circumstances, see Hardy, *The Work of the Appellate Courts for the 1969-1970 Term—Mineral Rights*, 31 La. L. Rev. 273, 274 (1971). In *Hargroder* the release was part of the original agreement: "such damages having been anticipated and paid in advance at the time of execution of this instrument" 290 So. 2d at 875. "It is not reasonable to conclude a stipulation for these damages running in favor of another when they have been stipulated away specifically by the landowner." *Id.* at 877 (Barham, J., concurring in decree only).

33. 255 La. at 357, 231 So. 2d at 350.

34. *Id.*

Louisiana Revised Statutes 9:2721³⁵ by recording his lease, "Broussard's [unrecorded] predial lease became subject to the superior rights acquired by Northcott."³⁶ The court reasoned that, while the public records doctrine was not intended to protect tortfeasors from liability, Northcott's reasonable actions under its contract with the landowner were not tortious, for the defendant "was entitled to rely on the absence of any recorded interests when drilling was commenced."³⁷ What "constitutes an 'unreasonable exercise of contractual rights' must be determined on a case by case basis."³⁸

Standing crops which belong to someone other than the landowner are movables by anticipation.³⁹ As to third persons, such crops "are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located."⁴⁰ Since the plaintiff's lease was not recorded, the defendant benefited from the presumption that the crops belonged to the lessor.⁴¹

35. La. R.S. 9:2721 (1965):

No . . . mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

Had the plaintiff's lease been oral, as was the farmer's lease in *Andrepoint*, the public records doctrine would still have applied. See Hargrave, *Burdens of Proof and Presumptions in Louisiana Property Law*, 46 La. L. Rev. 225, 235 (1985).

36. 481 So. 2d at 128. The result would be the same even if Northcott had failed to record its lease. Northcott's contractual rights were independent of the recordation requirement, and only Broussard's recordation could place third persons on notice of separate ownership of crops.

37. *Id.*

38. *Id.* at 129. The case was remanded to the trial court for this purpose.

Justice Watson concurred, but expressed his disapproval of the reasonable destruction exception. 481 So. 2d at 130 (Watson, J., concurring). Justice Lemmon's dissent expressed the view that plaintiff was entitled to a recovery for all damage to standing crops. Although he described this as a tort remedy, he based Northcott's duty on the surface damages provision of the lease. *Id.* Justice Calogero and Justice Dennis dissented without opinion. *Id.* at 129.

39. La. Civ. Code art. 474.

40. La. Civ. Code art. 491.

41. "Comment (e) to LSA-C.C. art. 491 indicates that the presumption created by that article is conclusive since it can be defeated only by an instrument filed for registry." 481 So. 2d at 128. Broussard's lessors owned one-fifth of the crop as rent. *Id.* at 126. La. R.S. 9:3204 (1983) dictates that this portion always belongs to the lessor. Therefore, it is a component part of the tract of land under La. Civ. Code art. 465, and an immovable under La. Civ. Code art. 462. While this obviates the requirement of recordation, it does not aid the plaintiff, who cannot assert an action for damages to that in which he does not have an interest.

The mineral lessee's freedom to act without liability to third persons who may have an interest in the land is predicated on the public records doctrine. Even had the defendant actually known that the crops being destroyed were the property of the plaintiff, his intentional destruction of another's property would not be tortious,⁴² provided the destruction was a reasonable exercise of contract rights. This conclusion is consistent with the court's opinion rendered on the original hearing of *Andrepont*.⁴³ However, it is an express disapproval of the concurring opinions of Justices Barham and Tate in *Hargroder*.⁴⁴ There are strong reasons supporting such a disapproval.

Justice Barham's concurrence in *Hargroder* characterized the plaintiff's delictual action as a personal right unaffected by the requirement of recordation. "Recordation, which serves to separate the crops on the land into the class of movables as to third parties, is not required as to tort-feasors. Tort-feasors are not of the class of third parties contemplated in R.S. 9:2721."⁴⁵ Thus, the plaintiff's rights against a tort-feasor are "separate and apart from the real rights arising under the [plaintiff's] lease with the landowner, which may be exercised against *only the landowner*, in the absence of recordation."⁴⁶ While this argument would be correct as to other tort-feasors who destroyed the plaintiff's crops, this defendant had a real interest in the same land as the plaintiff, and he therefore had a right of his own to expect that the plaintiff's interest would be reflected in the public records.

Justice Tate's analysis focused on the public records doctrine itself. In his view the mineral lessee was not "affected," within the meaning of the doctrine, "unless it entered on the premises solely on the faith of the public records and without any independent knowledge that the growing crops on the land did not belong to the landowners with whom it had contracted."⁴⁷ In any event, where the landowner agreed to allow the defendant to destroy the plaintiff's crops, the landowner "might be primarily liable," but Justice Tate was "not sure that [the defendant] might not be solidarily liable nevertheless (with the right to recover over

42. "[I]t has been held on numerous occasions that actual knowledge of separate ownership does not displace the operation of the Public Records Doctrine." 481 So. 2d at 128.

43. 255 La. at 352-53, 231 So. 2d at 349. Of course, this was in no way binding on the court in *Broussard*. "This merely reaffirms the unanimous opinion of this Court" in *Andrepont*. 481 So. 2d at 128 n.1. The only unanimous opinion was that rendered on the original hearing.

44. 290 So. 2d at 877 (Barham, J., concurring in decree only), 290 So. 2d at 878 (Tate, J., concurring). Justice Tate agreed with the majority's finding that the plaintiff was a third party beneficiary.

45. 290 So. 2d at 877.

46. *Id.* at 878 (emphasis by Justice Barham).

47. *Id.* at 878 (Tate, J., concurring).

from those who misled it) as an actor who destroyed at its peril of non-exoneration property which truly belonged to another.”⁴⁸ Nonetheless, the public records doctrine does not consider actual knowledge, and the defendant was statutorily entitled to rely on the absence of other recorded interests in the land.

Conclusion

In *Broussard* the court correctly concluded that the mineral lessee’s contract did not create a stipulation *pour autrui* in favor of the farm lessee. Further, the public records doctrine was properly applied to preclude the farmer’s tort remedy for crops destroyed in the reasonable exercise of the mineral lessee’s drilling operations. Given the availability of an action by the farmer against his lessor for any crop destruction, the *Broussard* remedy is also fair.

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48. *Id.*