

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

06-1557

LEJEUNE BROTHERS, INC.

VERSUS

GOODRICH PETROLEUM CO., L.L.C., ET AL.

DECUIR, J., dissenting.

LeJeune Brothers, Inc. purchased land in September of 2000 from David Baez, Jr. and months later discovered the property was contaminated with oilfield exploration and production waste. LeJeune Brothers, an owner of one-half of the mineral rights attached to the property, sued the oil and gas producers who contaminated the land. As a basis for its claims, LeJeune Brothers relied in part on a provision of the mineral lease which had given rise to over twenty years of oil production on the subject property: “All provisions hereof shall extend to and bind the successors and assigns (in whole or in part) of Lessor or Lessee.” In preliminary proceedings before all of the evidence had been gathered, the trial court granted summary judgment in favor of Goodrich Petroleum, the only remaining defendant, on LeJeune Brothers’ contract claim. The trial court also granted the defendant’s exception of no right of action on LeJeune Brothers’ tort claim and dismissed all other claims asserted. I disagree with the majority’s decision to affirm the trial court. Accordingly, I respectfully dissent.

The majority begins with LeJeune’s assertion that it succeeded to Baez’s rights under the lease and should prevail under the terms of the lease. LeJeune distinguishes *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 02-266 (La.App. 3 Cir. 4/2/03), 844 So.2d 380, *writs denied*, 03-1585, 03-1624 (La. 10/31/03), 857 So.2d 476,

wherein this court found that a vendee had no rights under a mineral lease because the predecessor in title had reserved all of the mineral rights. In this case LeJeune emphasizes a critical difference: Baez owned the mineral rights and reserved only half of them in the sale. Hazelwood's ancestor in title had reserved *all* of the mineral rights. By contrast, the sale to LeJeune in the present case reserved only half of the mineral rights to the seller Baez, who was the sole mineral lessor when the lease was granted, and transferred the other half to the buyer, LeJeune Brothers. The mineral lease in *Hazelwood* contained almost identical language to the lease at issue here, which transferred all provisions to the successors of the lessor and the lessee. Had there been no mineral reservation in *Hazelwood*, Hazelwood could have sued as a party to the lease. Likewise, I believe LeJeune Brothers has a valid cause of action in this matter.

Further, I find Goodrich's contention that the lease had terminated to be an irrelevant argument. The mineral lessee had restoration duties during the lease and at its expiration, and the breach of those duties gives rise to LeJeune Brothers' cause of action. LeJeune Brothers can assert its cause of action within ten years of the breach, or within ten years of the expiration of the lease, whichever is later, as contract actions prescribe in ten years. Louisiana Civil Code Article 3499.

Alternatively, LeJeune argues that if this court finds that plaintiff is not a successor or assign of Baez who is entitled to sue under the mineral lease, then plaintiff is a third party beneficiary of the mineral lease as we found in *Hazelwood*. The majority, however, disagrees, relying on the very narrow language of *Broussard v. Northcott Exploration Co., Inc.*, 481 So.2d 125 (La. 1986) to exclude LeJeune's claim. LeJeune Brothers distinguishes *Broussard*, pointing out why it is not applicable. The *Broussard* plaintiff was a tenant farmer, not the mineral lessor or his

successor, as in the present case.

The mineral lease in *Hazelwood* contained almost identical language to the lease in the present case: “All the provisions hereof shall extend to and bind the successors and assigns (in whole or, to that extent, in part) of the parties hereto, respectively...” *Hazelwood*, 790 So.2d at 99. Paragraph 9 of the present mineral lease provides identical language and has the same impact as the lease provision in *Hazelwood*. Thus, as in *Hazelwood*, the present lease contains a stipulation *pour autrui* in favor the plaintiff, LeJeune Brothers, the transferee of the property. Hence, LeJeune Brothers is a third party beneficiary under the mineral lease.

The majority then examines the law regarding continuing torts and ultimately determines that LeJeune can find no relief in that doctrine. I disagree. Goodrich’s tortious breach of its obligations under the mineral lease is in the nature of a continuing tort. The conduct that forms the basis of the tort in this action is not only the initial contamination, but contamination that continues until this very day. The conduct is also a failure to act or to correct a problem. *Risin v. D.N.C. Investments, L.L.C.*, 05-0415 (La.App. 4 Cir. 2005), 921 So.2d 133, 138.

In *Estate of Patout v. City of New Iberia*, 97-1097 (La.App. 3 Cir. 3/6/98), 708 So.2d 526, writ granted, 98-961 (La. 7/2/98), 721 So.2d 897, affirmed by, 98-961 (La. 7/7/99), 738 So.2d 544, the third circuit held: “Where the defendant erects a structure or dumps rubbish on the land of the plaintiff, the invasion is continued by a failure to remove it. In such a case, there is a continuing wrong so long as the offending object remains.” *Id.* at 543, quoting W. Page Keaton, et al., PROSSER AND KEATON ON THE LAW OF TORTS, § 13, at 83 (5th ed. 1984). See also *Grefer v. Alpha Technical*, 02-1237 (La.App. 4 Cir. 3/31/05), 901 So.2d 1117; Second Restatement of Torts, § 161.

Under *Patout* and *Grefer*, the tortious conduct does not cease until the contamination is removed. In this case, not only is it alleged that the contamination has not been removed, it is further alleged that the contamination continues to spread and expand throughout the subsurface and has ever since the toxic contamination was deposited. The alleged tortious conduct that constitutes fault in this matter continues at this very moment. Likewise, Goodrich's alleged failure to stop the spreading and expansion of the contamination also constitutes a continuing tort. LeJeune Brothers has asserted both continuous conduct and continuing damages in its tort action. Accordingly, I believe LeJeune Brothers has a cause of action for a continuing tort.

This is a very complex case and there are many other issues involved. Some of the issues are legal and some involve the development of facts. This is not the type of case in which a partial summary judgment and exception of no right of action should have been granted. LeJeune Brothers, an innocent and unsuspecting landowner, should have its day in court. Therefore, I dissent.