Suire v. Lafayette City-Parish Consolidated Government and Detrimental Reliance: Transforming Lightning into a Lightning Bug

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[T]he difference between the almost right word and the right word is really a large matter—'tis the difference between the lightning-bug and the lightning. 1

I. INTRODUCTION

Darrell Suire's home was cracked. Specifically, the “front door, the floor, the foundation, the ceiling, and the walls” were cracked. 2 The mortar on his patio was crumbling, and the roof was leaking. 3 Suire had problems, and the City of Lafayette and its general contractor seemed to have caused those problems. 4 Suire wanted those responsible to repair the damage.

Representatives of the city and its general contractor had come to Suire before they even began work and told him that they had a servitude to enter his land; 5 they assured him that they would pay for any damage to his property. 6 After workers pounded steel sheeting into the ground with a backhoe, Suire began noticing the above problems with his house. 7 He contacted the city and its general contractor in an attempt to obtain compensation for the damage. 8 When they failed to pay, Suire sued the city, its general contracto
contractor, and the engineering firm that supplied the plans, though
the latter party was later released through unopposed summary
judgment. His theories of recovery included negligence and strict
liability, absolute liability, trespass, res ipsa loquitur, breach of
contract, expropriation, and detrimental reliance. The parties
fought a battle of motions for summary judgment over, among
other things, whether each theory of recovery could proceed to
trial. The trial court dismissed all but the negligence and trespass
claims, and the parties appealed to the Louisiana Third Circuit
Court of Appeal. The third circuit, in an unpublished opinion,
reversed as to the claims of absolute liability, breach of contract,
expropriation, and detrimental reliance, holding that the
determination of all four claims should be deferred to the merits.
In Suire v. Lafayette City-Parish Consolidated Government, the
Louisiana Supreme Court considered which of these four claims, if
any, should proceed to trial on the merits.

The supreme court, reversing the third circuit, dismissed both
the absolute liability and breach of contract claims, and affirmed
the third circuit’s decision to allow the expropriation claim to
proceed to trial. Significantly, the court also affirmed the third
circuit’s decision to permit the detrimental reliance claim to
proceed to trial. The court found that Suire had at least alleged
the three elements of a detrimental reliance claim under Louisiana
law: “(1) a representation by conduct or word; (2) justifiable
reliance; and (3) a change in position to one’s detriment because of

9. Suire, 907 So. 2d at 54–57. The supreme court held that the relatively
small payment made by the engineering firm to Suire contingent upon the
court’s granting its unopposed motion for summary judgment did not constitute
a settlement agreement. Id.
10. Id. at 43.
11. Id. at 43–44.
12. Id. at 44–45.
13. Id. at 45–47.
14. See generally id.
15. The court found, as a matter of law, that the installation of metal
sheeting was not “pile driving” for purposes of Louisiana Civil Code article 667.
Id. at 48. It found that Suire “failed, as a matter of law, to establish the
existence of an oral contract under article 1846.” Id. at 58.
16. Id. at 61.
17. Id. at 59–60.
the reliance" (the "judicial test"). After quickly disposing of the city's objections, the court concluded that Suire had alleged the elements necessary to proceed under the theory of detrimental reliance. It supplied little rationale for this part of its decision, and the deficiency exposes problems with Louisiana's current treatment of detrimental reliance claims.

The facts in this case superficially appear to satisfy the above three-part judicial test; however, the test itself is flawed. The difference between the current test and an appropriate test is as small and as great as the difference between "the lightning" and "the lightning-bug." This note explores the proper place of detrimental reliance in Louisiana law, explains that Suire was incorrectly decided with respect to the detrimental reliance claim, and proposes a more suitable judicial test for detrimental reliance claims. Part II briefly explores the origins of detrimental reliance at common law and its adoption into Louisiana law. It proposes that the judicial test should not permit recovery under a detrimental reliance theory where the pleaded facts support an appropriate alternative theory of recovery. Part III explores tort law and property law as two alternative theories of recovery available in Suire. Because this exploration reveals a flaw in the way the court applies the current judicial test, Part III argues that the test should not permit recovery where the detriment was inevitable. Part IV sets out the proposed modified judicial test and applies the facts of Suire for demonstration. Part V highlights some problems with the

18. Id. at 59 (citing Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc., 871 So. 2d 380, 393 (La. App. 4th Cir.), writ denied, 876 So. 2d 834 (La. 2004)). This note refers to this three-part test as Louisiana's judicial test because the three elements—while used by Louisiana courts—are not taken explicitly from the language of article 1967. See source cited infra note 42 and accompanying text.

19. The city's objections were that there was no contract between the parties and that Suire could not show actual reliance on the promise. Suire, 907 So. 2d at 59. The court correctly states that detrimental reliance requires no contract. Id. It glosses over the issue of whether there was actual reliance, stating simply: "[T]o establish reliance to his detriment, Suire need only show that he suffered damages not adequately compensated by the defendant." Id. The purpose of this note is, in part, to explain the flaws in that statement and to suggest a better test.

20. Id.
supreme court's decision particular to Suire; and, more importantly, it argues that Suire is an inappropriate expansion of the theory of detrimental reliance. Part V then explains the problems with expanding a legal theory and hypothesizes some additional problems with this expansion. Finally, Part VI concludes by advocating that Louisiana courts adopt a more appropriate judicial test for detrimental reliance to properly handle detrimental reliance claims.

II. THE ORIGIN AND DEVELOPMENT OF DETRIMENTAL RELIANCE

Though one member of the Louisiana State Law Institute involved in the 1984 revision to Louisiana Civil Code article 1967 asserts that the concept of detrimental reliance stemmed from the Roman law concept *venire contra proprium factum* ("no one can contradict his own act"), drafts of the revision to article 1967 explicitly cite the common law as inspiration, particularly *Restatement (Second) of Contracts* § 90 (hereinafter Section 90). Arguably, the concept of *venire contra proprium factum* underlay some Code articles before the 1984 revision. However, a Louisiana court in 1981 could not find a single instance of a Louisiana court adopting that concept, and in the few years

21. Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future (?)*: The Code Drafter's Perspective, 58 TUL. L. REV. 707, 714 (1984). Evidently only one Louisiana case was explicitly based on the doctrine, and it offered little by way of explanation: "We conclude, on the civil law estoppel doctrine of *venire contra factum proprium non valet* that our lessor cannot be allowed to evict our lessee for failing to actually spend the withheld rent on repairs when it was the lessor herself who importuned the lessee to delay those repairs." Davilla v. Jones, 418 So. 2d 724, 725 (La. App. 4th Cir. 1982), rev'd, 436 So. 2d 507 (La. 1983) (citation omitted). Notably, the supreme court did not mention the doctrine of *venire contra* in its reversing opinion. *See id.*

22. David V. Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 695, 708 (1998). The article is an excellent and thoughtful examination of Louisiana's 1984 revision to article 1967 and explains in-depth the tension between the civil law and common law, which may only be suggested here. *See generally id.*

23. *Id.*

preceding the revision, the maxim arose infrequently. An alternative civilian-rooted concept, the German maxim *culpa in contrahendo* ("fault in contracting"), had similarly scant support in Louisiana jurisprudence; consequently, it too is unworthy of discussion here. Because the common law concept of detrimental reliance is the primary source of the revision, it is the focus of this exploration.

**A. Detrimental Reliance at Common Law**

At common law, legal scholars essentially equate detrimental reliance with the concept of promissory estoppel, which prevents a party from reneging on a promise he has made. The doctrine of detrimental reliance is an equitable remedy for the problem of what

25. See Jon C. Adcock, *The 1984 Revision of the Louisiana Civil Code's Articles on Obligations—A Student Symposium: Detrimental Reliance*, 45 LA. L. REV. 753, 755–56 (1985); Snyder, supra note 22, at 705–06 ("Even fewer cases mentioned *venire contra factum proprium*, and only one or two courts had based a decision on the idea.").

26. Adcock, supra note 25, at 756; Herman, supra note 21, at 743–45; Snyder, supra note 22, at 705 ("Before [revised] article 1967 went into effect, the cases mentioning *culpa in contrahendo* could be counted on one hand, and no court had based a decision on the doctrine."). See also Coleman v. Bossier City, 305 So. 2d 444 (La. 1974). The court explained *culpa in contrahendo* as "a fault in contracting which gives rise to a quasi-contractual obligation" to pay the other party's reliance damages. Id. at 447. Thus, the doctrine appears to be tied closely to contract law.

27. Christian Larroumet, *Eason-Weinmann Center for Comparative Law Symposium on Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century: Detrimental Reliance and Promissory Estoppel As the Cause of Contracts in Louisiana and Comparative Law*, 60 TUL. L. REV. 1209, 1220–21 (1986); Snyder, supra note 22, at 698 (noting the lack of significant distinction between the terms "detrimental reliance" and "promissory estoppel"). Promissory estoppel (detrimental reliance) is itself similar to the concept of equitable estoppel, which allows the court to prevent a party from denying the truth of his own factual assertion. Id. at 701–02. See also Michael B. Metzer & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 SW. L.J. 841, 846–47 (1990). Though both have the same goal—preventing a party from going back on his or her word—they are distinguishable in that equitable estoppel refers to a past or present fact (which is either true or false), whereas promissory estoppel relates to a future, uncertain promise. Snyder, supra note 22, at 701–02. This note is appropriately restricted in scope to promissory estoppel.
to do when one party is injured by relying on the other party's broken promise and the injured party may otherwise obtain no legal relief.\textsuperscript{28} Promissory estoppel developed slowly at common law, primarily in cases outside the commercial arena.\textsuperscript{29} By the time the American Law Institute crafted the \textit{Restatement (Second) of Contracts}, courts had sufficiently acknowledged the doctrine to warrant a clear summary of it.\textsuperscript{30} The result was Section 90, which provides in relevant part:

\begin{quote}
(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.\textsuperscript{31}
\end{quote}

Common law courts have, in turn, adopted different judicial tests for detrimental reliance, but all essentially track the language of Section 90.\textsuperscript{32} While the doctrine was initially limited to donative gratuitous promises and those with only peripheral business and economic motives,\textsuperscript{33} courts eventually broadened the concept to include promises made in a commercial setting that were unsupported by consideration.\textsuperscript{34} As a result, the doctrine became "applicable to

\textsuperscript{28} See, \textit{e.g.}, Larroumet, \textit{supra} note 27, at 1223 ("Detrimental reliance . . . is not an element of the law of contract as is consideration . . . . To consider the promise enforceable on the ground of detrimental reliance does not mean that the promise has led to a contract . . . . This substitute for consideration leads to another ground of recovery that is not purely contractual.").


\textsuperscript{30} Metzer & Phillips, \textit{supra} note 27, at 848.

\textsuperscript{31} \textit{Restatement (Second) of Contracts} § 90 (1981).

\textsuperscript{32} See \textit{generally} C.C. Marvel, Comment, \textit{Detrimental Reliance}, 48 A.L.R.2d 1069 (2005), for a sample of cases using various judicial tests.

\textsuperscript{33} Williston & Lord, \textit{supra} note 29, at 119. An example of a donative gratuitous promise is a promise to give a gift or a promise to donate money to a charity. \textit{See Restatement (Second) of Contracts} § 90 cmt. f (1981). An example of a promise with only peripheral business or economic motives is a gratuitous bailment. Williston & Lord, \textit{supra} note 29, at § 8:6.

\textsuperscript{34} Metzer & Phillips, \textit{supra} note 27, at 849–51. One of the most famous cases in this area—and a good example of a typical commercial promise lacking
any relied-upon promise, whether donative or commercial, fully thought out or preliminary."\(^3\) Though a plaintiff may still rely on an underlying promise that is indefinite,\(^6\) courts usually do not permit recovery under the theory of detrimental reliance when the underlying promise is illusory.\(^7\)

The traditional view was that the doctrine of promissory estoppel/detrimental reliance originated essentially as a gap-filler in contract law—a judicial tool that would allow a promisee to recover when consideration was absent but justice required enforcement of a promise.\(^8\) The doctrine has more recently been characterized as existing somewhere between contract and tort, though its exact nature is still unclear.\(^9\) Promissory estoppel was

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consideration—is Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958), in which the court enforced a subcontractor’s bid to a general contractor by: (1) implying a promise by the subcontractor not to revoke the bid; and then (2) applying the concept of detrimental reliance. \(Id.\) at 759–60. 


36. See Metzer & Phillips, \textit{supra} note 27, at 853–56. “Under traditional contract principles, a promise may be too indefinite for enforcement if it is too vague or too incomplete.” \(Id.\) at 853 n.83.

37. \(Id.\) at 856–63. “An illusory promise is one that in reality imposes no obligation on the promisor.” \(Id.\) at 856 n.109.


The attempt to remedy the problems of the bargain theory with gap fillers like section 90 of the Restatement could reasonably be credited with having saved contract law (and freedom of contract) from the death that some had wished it, but it has not proved entirely satisfactory . . . . The bargain theory of consideration, reflecting the principle of contractual freedom, is thereby placed on a collision course with section-90-type responses, which are based on a principle of reliance that imposes liability despite the absence of manifestations of intent to be legally bound. The exception constantly threatens to swallow the rule.

\(Id.\) (footnotes omitted).

39. See Grant Gilmore, \textit{The Death of Contract} 73, 78–81, 97–98 (Ronald K.L. Collins ed., 2d ed. 1995). Because issues like detrimental reliance appear to be blurring the line between contracts and torts, Professor Gilmore humorously suggests that first-year law students should be taught a single course called Contorts. \(Id.\) at 98.
traditionally viewed essentially as a theory of last resort, though some courts now view it as a primary basis for recovery.\textsuperscript{40}

### B. Detrimental Reliance in Louisiana Law

In 1984, the Louisiana State Law Institute took this primarily common law concept with all its attendant uncertainties and attempted to dress it in civilian clothes.\textsuperscript{41} The 1984 revision introduced detrimental reliance through Louisiana Civil Code article 1967. After defining cause as “the reason why a party obligates himself,” the article continues:

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.\textsuperscript{42}

The similarities between article 1967 and Section 90 are readily apparent. Both speak of a promise, an inducement based on the promise, a reasonableness requirement, and a potential limitation of damages. This similarity is only natural since Section 90 is the inspiration for article 1967.\textsuperscript{43} Thus, it comes as no surprise that the judicial test for detrimental reliance claims used by Louisiana courts echoes those used in common law.

\begin{footnotes}
\textsuperscript{40} See Phuong N. Pham, The Waning of Promissory Estoppel, 79 CORNELL L. REV. 1263 (1994). The author stated:
\[\text{Courts and commentators have declared that promissory estoppel is no longer a theory of last resort, but rather a primary basis for recovery. Adherents of this view claim that courts apply promissory estoppel \textit{instead} of bargain theory “even where there has been a bargained-for reliance” or “even when no apparent barrier exists to recovery on a traditional contract theory.”}\]

\textit{Id.} at 1267–68 (footnotes omitted).

\textsuperscript{41} Snyder, supra note 22, at 695–96.

\textsuperscript{42} LA. CIV. CODE ANN. art. 1967 (2006). The effective date of the revision is January 1, 1985. \textit{Id.}

\textsuperscript{43} See source cited supra note 22 and accompanying text.
\end{footnotes}
jurisdictions. The test employed by Louisiana courts requires: “(1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one’s detriment because of the reliance.” This simple test encapsulates the black-letter meaning of article 1967, yet it omits crucial questions from the test and consequently leaves room for error.

C. An Appropriate Alternative Remedy: An Addition to the Judicial Test

Compared to ordinary contract and tort law, the doctrine of detrimental reliance remains relatively unsettled and confusing. Furthermore, the amount recoverable under detrimental reliance may be limited to actual expenses or damages. Thus, where—as in Suire—a plaintiff has already limited the demand to damages, the amount of recovery will be the same regardless of the theory used. Because double recovery for the same claim is disallowed, the addition of a detrimental reliance claim should not increase the plaintiff’s award. The plaintiff will still have to present sufficient proof of the detrimental reliance claim.

44. See source cited supra note 32 and accompanying text.
45. Suire v. Lafayette City-Parish Consol. Gov’t, 907 So. 2d 37, 59 (La. 2005) (citing Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc., 871 So. 2d 380, 393 (La. App. 4th Cir.), writ denied, 876 So. 2d 834 (La. 2004)).
46. Leon Rittenberg III, Comment, Louisiana’s Tenfold Approach to the Duty to Inform, 66 TUL. L. REV. 151, 190–98 (1991). Louisiana evidently retains elements of both a pre-revision tort-based detrimental reliance theory as well as the post-revision theory based more in contract, but the distinctions and practical effects are largely unclear. Id. See discussion supra Part II.A and infra Part V.
47. See LA. CIV. CODE ANN. art. 1967 (2006) (“Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise.”); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (“The remedy granted for breach may be limited as justice requires.”).
48. Suire, 907 So. 2d at 43.
49. Of course, if the theory of detrimental reliance would somehow allow broader recovery than alternative theories of recovery, then those theories are not “appropriate” with respect to compensating the plaintiff. Thus, even under the modified judicial test, the plaintiff may proceed under a detrimental reliance theory in the appropriate case. See discussion infra Part IV.
50. See sources cited infra note 57 and accompanying text.
theories of recovery are appropriate (if an alternative theory has the potential only for lesser recovery, it should not be considered appropriate), adding a detrimental reliance claim adds complexity without increasing the plaintiff’s potential recovery. Detrimental reliance by nature has traditionally been a residual category upon which to rely when other theories are inapplicable. Louisiana’s current three-part judicial test ignores these considerations, but a proper judicial test should adequately account for alternative appropriate theories of recovery.

III. ALTERNATIVE THEORIES OF RECOVERY IN SuIRE

To say that recovery should not be permitted under the theory of detrimental reliance where there is a more appropriate theory of recovery is not to say that a plaintiff’s suit should be dismissed on technical grounds. In Louisiana “[e]very pleading shall be so construed as to do substantial justice.” “[A] final judgment shall

51. See sources cited supra notes 47–49 and accompanying text.

Promissory estoppel has a place as an equitable remedy when some other cause of action fails and equity demands protection of one of the parties. But equity should only be the last resort when legal remedies fail for some reason. I believe, based on the research conducted, that this case presents a very unique opportunity to distinguish between the proper role of promissory estoppel as a limited remedy rather than as a free standing cause of action. In this instance, [plaintiff] dismissed all its claims for legal remedies and pursued only promissory estoppel. The relief the majority has delivered to [plaintiff] is exactly the same [plaintiff] would have recovered if it had proven a breach of contract. But [plaintiff] dismissed that claim. Why should it be allowed the same relief under an equitable remedy that it chose not to seek as a legal remedy?

Id. The dissent in Frost Crushed Stone Co. attempted and failed to prevent the doctrine of promissory estoppel from overtaking other theories of recovery. Id. For a discussion of how Suire may allow the detrimental reliance theory to do the same, see infra Part V.

53. LA. CODE CIV. PROC. ANN. art. 865 (2006). The Louisiana Supreme Court stated:

We have repudiated the theory-of-the-case pleading of the common law . . . . It is well established that a pleading must be reasonably construed
grant . . . relief . . . even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief.” Thus, Louisiana courts may permit the case to proceed under a theory of recovery that the plaintiff has not pleaded, provided that the pleaded facts support the theory.

Where the plaintiff has pleaded facts sufficient to support an appropriate alternative theory of recovery, the court should decide the case under the alternative theory. Suire appears to have at least two alternative theories of recovery, each of which is supported by the pleaded facts. This note assumes, arguendo, that Suire can prove that the actions of the city and general contractor caused the damage to his home, which will avoid irrelevant issues that are properly reserved to the trial court.

so as to afford the litigant his day in court, arrive at the truth, and do substantial justice. Hence, we look to the substance of the demand.

Royal Furniture Co. v. Benton, 256 So. 2d 614, 616 (La. 1972) (citation omitted).

54. LA. CODE CIV. PROC. ANN. art. 862 (2006). This article is subject to the Louisiana Code of Civil Procedure article 1703, which provides that “[a] judgment by default shall not be different in kind from that demanded in the petition. The amount of damages awarded shall be the amount proven to be properly due as a remedy.” Id. See also LA. CODE CIV. PROC. ANN. art. 1703 (2006). Thus, outside of a default judgment, the court has the full discretion granted by article 862.

55. Rittenberg, supra note 46, at 183–84. See, e.g., Coats v. AT&T, 681 So. 2d 1243 (La. 1996). In Coats, the court allowed the plaintiff to recover under the theory of occupational disease—even though the plaintiff failed to plead or brief the issue—because the pleaded facts sufficiently supported the theory. Id. at 1246. For a similar rule for the similar theory of equitable estoppel, see Thebner v. Xerox Corp., 480 So. 2d 454, 458 (La. App. 3d Cir. 1985), writ denied, 484 So. 2d 139 (La. 1986) (“[Equitable] [e]stoppel, as an element of a cause of action, is not, as a rule, available, unless specifically pleaded. The exceptions to the rule are found in cases where the facts relied upon are set out in the petition, or the plaintiff has had no opportunity to offer the plea.”).

56. Thus, courts may ensure that justice is done while avoiding a potentially confusing area of the law. This is in line with the concept of judicial restraint, one definition of which is “the principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues.” BLACK’S LAW DICTIONARY (8th ed. 2004).

57. A plaintiff must prove that the actions of the defendant actually caused the harm under any theory, even detrimental reliance. See discussion infra Part
A. Recovery Under Tort

Under Louisiana's broad tort law expressed in article 2315, "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."\(^5\) Suire appears to be a classic tort situation, with the plaintiff's property damaged by the alleged tortfeasor.\(^5\) Significantly, Suire did bring a claim under negligence and will proceed to trial under that theory.\(^6\) Suire may establish fault (as required by article 2315) under article 667 of the Civil Code.\(^6\) Clearly, tort law provides an appropriate alternative theory in this case. In permitting it to proceed under a detrimental reliance theory as well, the supreme court addressed an issue it need not have addressed, disturbing an

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III.C. The issue of cause-in-fact is generally a question of fact to be decided at trial. See, e.g., Syrie v. Schilhab, 693 So. 2d 1173, 1180 (La. 1997). The issue of proof is important because if one theory of recovery requires more proof than another, the more burdensome theory will obviously be less desirable to a plaintiff, all else being equal. Significantly, "[a] condition precedent to proving a claim for detrimental reliance is demonstrating the existence of a promise upon which the injured party could reasonably rely." Oliver v. Cent. Bank, 658 So. 2d 1316, 1323 (La. App. 2d Cir.), writ denied, 660 So. 2d 477 (La. 1995). Proving the existence of the promise may be difficult or impossible in the absence of writing, so it may be more difficult to prove detrimental reliance claims than other claims.

59. See discussion supra Part I.
60. Id.
61. Article 667 provides in relevant part:

Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

LA. CIV. CODE ANN. art. 667 (2006). The provisions on res ipsa loquitur and absolute liability are omitted, since they were not permitted in this case. See discussion supra Part I. Thus, Suire must still essentially prove that the defendant was negligent under article 667's "reasonable care" language.
already confusing area of the law. Because Suire pleaded facts sufficient to proceed under general tort law, use of the detrimental reliance theory should not be permitted.

B. Recovery Under the Servitude

In addition to the tort theory of recovery, Suire also pleaded facts sufficient to support a claim for recovery under Louisiana property law. As the supreme court notes in its decision, Suire "was informed that a servitude had been established to permit access to his property for purposes of the project."

The servitude was evidently a legal public servitude, i.e., a predial servitude "imposed for the public or common utility . . . for the making and repairing of . . . other public or common works." Under this servitude, the state, as owner of the dominant estate, had "the right to enter with his workmen and equipment into the part of the servient estate that [was] needed for the construction or repair of works required for the use and preservation of the servitude." As the owner of the servient estate, Suire "[was] not required to do anything. His obligation [was] to abstain from doing something on his estate or to permit something to be done on it . . . ."

Thus, where the city had a servitude to enter the land, Suire was required by law to allow entry onto the land.

62. See discussion infra Part V.
63. Suire v. Lafayette City-Parish Consol. Gov’t, 907 So. 2d 37, 43 (La. 2005).
64. See Original Opposition Brief of Plaintiff/Appellee Darrell J. Suire to Original Brief Submitted by Defendant-Appellants, Lafayette City-Parish Consol. Gov’t at 7, Suire v. Lafayette City-Parish Consol. Government, 907 So. 2d 37 (La. 2005) (No. 04-C-1466). While discussing the expropriation claim, the brief states that "[e]ven though the public entity, such as a drainage board or office of public works, may have a legal servitude, the entity is not authorized to damage private property of adjacent landowners without just compensation." Id. The record contains no other description of the servitude, and since the purpose of the servitude as a drainage improvement project appears to fit the Civil Code definition of a legal public servitude, this appears to be a proper characterization. See source cited infra note 65.
However, simply because the city had a servitude does not mean that the damage it caused must go uncompensated:

It is well settled in Louisiana that, under the applicable Civil Code provisions, one holding a servitude on another's land is bound to use that servitude in such a manner as to not unreasonably injure the rights of the owner of the servient estate. Thus, if the owner of the servitude uses it in a negligent, unauthorized or unreasonable manner, the owner of the servient estate may sue for damages.\(^6\)

Suire should have been able to proceed under a property theory because he pleaded facts alleging that the owner of the dominant estate damaged his servient estate. The court should not have permitted the suit to proceed under a detrimental reliance theory since doing so needlessly increased the risk of making a detrimental change in the law.\(^6\) Suire pleaded facts sufficient to proceed under property law; thus, use of the detrimental reliance theory should not be permitted.

C. It Was Meant to Be: Another Addition to the Judicial Test

The existence of a legal servitude imposed upon Suire a duty to permit the defendant to enter his land, and the defendant had a corresponding right to enter the land.\(^7\) Thus, regardless of what the parties believed, the end result—the entry onto the land and the resulting damage—was inevitable.\(^7\) This inevitability should logically preclude recovery under detrimental reliance.\(^7\)


69. The risk comes to fruition in Suire since the court's decision to allow Suire to proceed under a detrimental reliance theory represents an overextension of the doctrine. See discussion infra Part V.

70. See discussion supra Part III.B.

71. See generally A.N. Yiannopoulos, Predial Servitudes, in 4 LA. CIV. L. TREATISE 505, 507 n.12 (3d ed. 2004 & Supp. 2005). If Suire refused to allow the city entry, the city could likely win an injunction under Louisiana Code of Civil Procedure article 3663 by only showing a disturbance of its right to enjoy
The final element in the current judicial test is "a change in position to one's detriment because of the reliance." The phrase "because of the reliance" strongly suggests that the reliance must have caused the detriment. In Suire, the supreme court cited the current test but went on to explain: "[T]he focus of analysis of a detrimental reliance claim is . . . whether a representation was made in such a manner that the promisor should have expected the promisee to rely upon it, and whether the promisee so relies to his detriment." That explanation contains only a hint of causation, and the court's own treatment of the issue is limited to the statement, "to establish reliance to his detriment, Suire need only show that he suffered damages not adequately compensated by the defendant." Suire's "damages not compensated by the defendant," however, were merely the basis for any theory of recovery and should not have automatically validated the pursuit of a detrimental reliance claim. Furthermore, such a skeletal treatment of the issue glosses over the current test's requirement the servitude. Id. On the other hand, Suire would have to bring an article 3601 injunction, which would require a showing of "irreparable injury, loss, or damage," but since Suire's damage can be fully compensated with money, he should not be able to get such an injunction. Id. at 506 n.3. Thus, Suire could not have prevented the entry, and the end result—the damage—was inevitable.

72. At least one Louisiana court has taken inevitability into account. See Turner v. Dr. X, 878 So. 2d 696 (La. App. 3d Cir. 2004). In Turner, the intervenor was a disbarred attorney who had a legal duty to pay restitution. Id. at 697–98, 700. She attempted to bring a detrimental reliance claim because the defendant had not fulfilled an alleged promise to pay her funds that she, in turn, intended to use to pay the restitution. Id. at 700. The court held that detrimental reliance was an inappropriate theory of recovery because "[s]he was required to pay restitution as a result of her criminal conviction, and she would have had to pay restitution regardless of receiving money [from the defendant]." Id. The court emphasized that the intervenor "cannot show that she 'changed her position to her detriment' based on any reliance." Id.

73. Suire v. Lafayette City-Parish Consol. Gov't, 907 So. 2d 37, 59 (La. 2005) (citing Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc., 871 So. 2d 380, 393 (La. App. 4th Cir.), writ denied, 876 So. 2d 834 (La. 2004)).

74. Id.

75. Id.

76. Id.

77. See discussion supra Parts II, III.A–B.
that the reliance be justifiable,\textsuperscript{78} and it altogether fails to consider that the detriment may have been inevitable.

If Suire had attempted to refuse entry, i.e., refused to rely on the defendant’s promise, the damage to Suire’s home (the detriment in question) would still have occurred since the defendant was entitled to enter the land and perform its work.\textsuperscript{79} The existence of the servitude gave rise to rights and duties that mandated the result.\textsuperscript{80} If the detriment would inevitably have occurred whether or not Suire relied on the promise, it is incorrect to say that the detriment occurred “because of the reliance.”\textsuperscript{81}

Though the current judicial test does include language strongly suggesting that the reliance must actually cause the detriment, the supreme court’s analysis in \textit{Suire} reveals how little weight, if any, is given to the consideration of causation. Where the detriment would have occurred regardless of whether the plaintiff relied on the defendant’s promise, it is incorrect to say that the detriment was caused by the reliance. Permitting a plaintiff to proceed on the theory of detrimental reliance when the detriment was inevitable is illogical and inefficient. Thus, a proper judicial test should not permit pursuit of a detrimental reliance claim where the detriment was inevitable.

\textsuperscript{78} See source cited \textit{supra} note 18 and accompanying text.

\textsuperscript{79} See source cited \textit{supra} note 71 and accompanying text. Again, this note assumes for the sake of simplicity that the defendant caused the damage. See sources cited \textit{supra} note 57 and accompanying text.

\textsuperscript{80} See source cited \textit{supra} note 71 and accompanying text.

\textsuperscript{81} See source cited \textit{supra} note 73. Alternatively, the problem may be phrased in terms of the promisee plaintiff’s lack of free will in the face of inevitability. The concept of reliance implies a choice, so the absence of free will is fatal in the analysis. The problem with using the term “free will” is that it introduces a subjective connotation. If a promisee was ignorant of the inevitability of a detriment, then that promisee retained the illusion of free will and, hence, the illusion of choice in relying on the promise. Objectively, however, the result was still inevitable, and reliance on the promise was not the cause of the detriment. Thus, courts should phrase the problem in terms of inevitability (with its connotations of objectivity), which can be determined with reference to legal rights and duties, e.g., the law of servitude, rather than to the subjective belief of the parties.
IV. ALONG THE PATH TO ENLIGHTENMENT: A NEW JUDICIAL TEST

A proper judicial test should pose the relevant questions from the current test while asking new questions to properly confront the problems of alternative theories of recovery and inevitability. The test should be relatively simple to apply while leaving room for judicial discretion.

A. Just Five Steps: The New Test

Rather than the current three-part judicial test, as exemplified in *Suire*, Louisiana courts should modify the judicial test to more appropriately handle detrimental reliance claims. In addition to the current requirements, courts should add two additional requirements, resulting in the following test:

The theory of detrimental reliance is available only where:

1. there was a representation by conduct or word;
2. there was justifiable reliance on the representation;
3. there was a change in position to one’s detriment because of the reliance;
4. no appropriate alternative theory of recovery is available; and
5. the detriment was not inevitable.

The modified test, like the current test, requires that all criteria be met. Should any criterion fail, recovery under the theory of detrimental reliance should not be permitted.83

82. See sources cited supra note 18.
83. Not permitting a detrimental reliance claim because an appropriate alternative theory of recovery is available is another way of saying that the court will avoid touching the issue of detrimental reliance unless it has no choice. Refusing to permit a detrimental reliance claim because the detriment was inevitable leaves open the possibility of other theories of recovery. For example, the detriment in *Suire* was potentially inevitable because of the existence of the servitude; if so, then detrimental reliance is an inappropriate theory of recovery, but Suire may still recover under property law. See discussion supra Part III.B.
B. Applying the Modified Test to Suire

It will help to better explain the proposed test and to apply the pleaded facts of Suire to it by way of example:

1. Was There a Representation by Conduct or Word?

Suire alleges that the defendant “assured him that they would be responsible for remedying any damages to his property caused by the construction.”84 Thus, the pleaded facts include a representation by word.

2. Was There Justifiable Reliance on the Representation?

This is potentially the most difficult part of the analysis since the court must determine whether there was reliance and whether that reliance was justifiable. Reliance alone appears to be subjective, but the word “justifiable” suggests an objective element as well. However, the word “justifiable” is elusive since a court may change the interpretation to reach the desired result. The supreme court glosses over this element in Suire and suggests that merely alleging uncompensated damages is enough to show justifiable reliance.85 Under any test, this issue warrants more serious attention.

84. Suire v. Lafayette City-Parish Consol. Gov’t, 907 So. 2d 37, 42 (La. 2005). Suire recalls one such assurance as: “[W]e’re going to take care of you. We’re going to replace everything. Blade for blade, grass for grass, tree for tree . . . . If we do anything destructive, we’re going to repair it.” Brief of Suire to All Defendants, supra note 8, at 2.

85. Suire, 907 So. 2d at 59. The court compresses the issues of whether there was reliance, whether it was justifiable, and whether there was a detriment because of that reliance into a single, oversimplified question:

[T]o establish reliance to his detriment, Suire need only show that he suffered damages not adequately compensated by the defendant. Here, it is undisputed that the plaintiff allowed access to his property, and that the City has not paid to repair the damage to the property, as the plaintiff alleges that the City promised to do. Thus, the plaintiff has presented adequate summary judgment proof of this element of his detrimental reliance claim.

Id. (citation omitted).
If all other elements of this test are satisfied, it is reasonable to give the plaintiff the benefit of the doubt on the justifiability of the reliance since the theory of detrimental reliance is otherwise appropriate. Unless the reliance was clearly not justifiable, the court should allow the plaintiff his or her day in court. If the court can determine under another criterion of this test that the theory is inappropriate, however, it need not even address this issue. On the facts of Suire, a court should have sufficient leeway in the word "justifiable" to decide this criterion as it sees fit.

3. Was There a Change in Position to One's Detriment Because of the Reliance?

The court specifically stated that "it is undisputed that the plaintiff allowed access to his property, and that the City has not paid to repair the damage to the property . . . ." This means only that the plaintiff has suffered some detriment, not that the detriment was caused by reliance on the defendant's promise. The phrase "because of the reliance" strongly suggests that the reliance must cause the detriment. A court must examine the element of causation, even at the summary judgment level. If the pleaded facts make clear that the reliance did not cause the detriment, it is inappropriate to permit recovery under detrimental reliance.

4. Was No Appropriate Alternative Theory of Recovery Available?

Not only do potential alternative theories of recovery exist, but Suire actually brought several of them: the case will proceed to trial under the theories of negligence, trespass, and expropriation. Suire has adequate recovery available under the alternative

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86. Id.
87. See source cited supra note 73.
88. For example, consider the following hypothetical: Suire explicitly tells the city that he is only permitting entry onto his property because he is relying on its promise to repair any damage caused. In the next instant, a meteor falls to earth, completely destroying Suire's home. Based on the pleaded facts alone, a court should properly find that the reliance did not cause the detriment. Additionally, see the analysis of inevitability infra Part IV.B.5.
89. See sources cited supra notes 10–20 and accompanying text.
theories, particularly negligence. 90 Furthermore, the detrimental reliance claim arguably will be more difficult to prove since it requires proof of the underlying promise in addition to proof of causation. 91 Because appropriate alternative theories of recovery were available, this criterion fails, and permitting this case to proceed under detrimental reliance theory is inappropriate.

5. Was the Detriment Inevitable?

If, as it appears, the defendant had a legal servitude on Suire's property, then the detriment was inevitable. 92 Whether Suire relied on the defendant's alleged promise or not, the damage was bound to occur. 93 Where the detriment was inevitable, this fifth criterion fails, and the plaintiff should not be permitted to proceed under the doctrine of detrimental reliance.

C. Summary of the Analysis

Under the proposed modified judicial test, Suire should not be permitted to proceed under the theory of detrimental reliance because appropriate alternative theories of recovery are available and because the detriment appears to have been inevitable. Because either of these is sufficient reason not to permit use of the theory, no other criterion need be determined. However, even if both of those criteria were satisfied, the court must still determine whether the reliance was justifiable and whether the reliance caused the detriment, which are potentially complicated questions. Ultimately, the court should not have permitted Suire to proceed under the theory of detrimental reliance.

90. See supra Part III.A for a discussion of general tort theory, which of course encompasses negligence.
91. See sources cited supra note 57 and accompanying text.
92. See discussion supra Parts III.B, III.C.
93. Id.
V. POTENTIAL PROBLEMS WITH THE COURT’S CURRENT TREATMENT

The Louisiana Supreme Court permitted Suire to proceed under the theory of detrimental reliance without fully explaining what it was doing. Permitting the theory was inappropriate for a number of reasons. Most obviously, the trial will now involve more issues, but Suire’s recovery will still be limited to the amount of his damages. Suire’s trial will be less efficient without bringing a corresponding benefit to him. Thus, in permitting the detrimental reliance theory to proceed to trial in Suire, the supreme court pushes the theory beyond its appropriate bounds while doing little to help the plaintiff.

The court improperly permits the claim for two reasons. First, the court does not consider that the detriment in question may have been inevitable as a matter of law, so the court’s decision essentially removes the causation requirement from the analysis. Second, the court permits a detrimental reliance claim where an alternative theory of recovery is appropriate. In doing so, the court needlessly meddles with the theory and applies it liberally where Louisiana courts have traditionally applied it sparingly.

The liberal application of the theory conflicts with its statutory basis. The 1984 Code revisions codified the theory within the article on cause under Title IV of the Civil Code, which pertains to

94. See Suire v. Lafayette City-Parish Consol. Gov’t, 907 So. 2d 37, 52–60 (La. 2005). See also source cited supra note 85 and accompanying text.
95. See sources cited supra note 57 and accompanying text.
96. “Compensatory damages are designed to place the plaintiff in the position in which he would have been if the tort had not been committed.” Frank L. Maraist & Thomas C. Galligan, Jr., LOUISIANA TORT LAW § 7.01 (2d ed. 2004). Thus, if Suire recovers compensatory damages under any of his alternative theories and is made whole, he cannot be made any more whole by adding a detrimental reliance claim.
97. See discussion supra Parts III.C, IV.B.5.
98. See discussion supra Parts II.C, III.
99. See, e.g., Hibernia Nat’l Bank v. Antonini, 862 So. 2d 331 (La. App. 2d Cir. 2003). “Detrimental reliance is not favored in our law and is sparingly applied as it bars the normal assertion of rights otherwise present.” Id. at 336 (citing Miller v. Miller, 817 So. 2d 1166 (La. App. 2d Cir.), writ denied, 827 So. 2d 1154 (La. 2002)).
conventional obligations or contracts.\textsuperscript{100} By doing so, the legislature suggested that detrimental reliance under Louisiana law is strongly related to contracts, yet its precise relationship to contract law remains unclear.\textsuperscript{101} Nevertheless, it appears that detrimental reliance is supposed to be the basis for enforcing an obligation that is not otherwise enforceable.\textsuperscript{102} Where, as here, the obligation is otherwise enforceable,\textsuperscript{103} the court should not permit the detrimental reliance claim to continue; doing so represents an overextension of the theory of detrimental reliance.

The major problem for the future is that detrimental reliance now appears to have no bounds. If the theory of detrimental reliance is now available even when the obligation in question was already enforceable under another legal theory, then how will the court limit the theory in future cases? If the theory is not merely an alternative ground for enforcing an obligation, can it now be used where a valid contract already exists? To do so would weaken contract law since it might enable use of the theory of detrimental reliance to escape express contractual terms.\textsuperscript{104} However, it is difficult to see how the theory of detrimental

\textsuperscript{100} See generally Snyder, supra note 22. See also LA. CIV. CODE ANN. art. 1967 (2006).

\textsuperscript{101} "[I]t is not consistent to state promissory estoppel in a code article that deals with cause, because promissory estoppel is not an acceptable substitute for cause . . . . [I]n contrast to consideration, cause does not need a substitute." Larroumet, supra note 27, at 1225. "Article 1967 does not reveal whether detrimental reliance is a new element of contracts, a substitute for cause, or a source of contractual obligations." Adcock, supra note 25, at 760.

\textsuperscript{102} "Under this article, a promise becomes an enforceable obligation when it is made in a manner that induces the other party to rely on it to his detriment." LA. CIV. CODE ANN. art. 1967 cmt. (d) (2006) (emphasis added).

\textsuperscript{103} Because the obligation is to repair damages, it is the same obligation at the heart of Suire's negligence claim. See discussion supra Part II.A.

\textsuperscript{104} See, e.g., Snyder, supra note 22, at 743–47. Louisiana has so far declined to allow the use of detrimental reliance where an express contractual term applies. Id. at 746 (citing Edwards v. Conforto, 636 So. 2d 901, 907 (La. 1994)). In Edwards v. Conforto, the court held that because the plaintiff had a contractual obligation to repair the damage at its own expense, doing so could not have been caused by reliance on a later promise made by the defendant's lawyer. 636 So. 2d 901, 907 (La. 1994). This analysis represents a proper application of what this note more generally terms "inevitability." See discussion supra Parts III.C, IV.B.5.
reliance would be restricted after *Suire* since the court permits it to be a primary basis for recovery where an appropriate alternative theory exists. Furthermore, the court says that "proof of a detrimental reliance claim does not require proof of an underlying contract,"\(^{105}\) which suggests that a detrimental reliance claim might be pursued even with proof of an underlying contract.\(^{106}\) There is simply no way to predict the future of detrimental reliance theory in Louisiana. It is safe to say, however, that *Suire* muddies the already murky waters of the theory.

VI. CONCLUSION

The court in *Suire* overextended the theory of detrimental reliance because it failed to properly apply the current judicial test to the legal theory of detrimental reliance. Though the old common law "theory of the case" is obviously not in force in Louisiana,\(^{107}\) legal theories are still necessary and useful. Obviously, a plaintiff must know which facts to plead in order to recover, and it is efficient for courts to focus their analysis only on material facts rather than looking at every fact in each case. Thus, even under modern pleading rules, the use of legal theories is alive and well.\(^{108}\) The current judicial test requires a plaintiff to satisfy three elements in order to bring a claim for detrimental reliance,\(^{109}\) but embedded in the simple language of the test are two implied criteria that the court does not examine.\(^{110}\) By failing to properly apply the test, the supreme court muddied the already murky waters surrounding the theory of detrimental reliance.

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106. *Suire* thus seems to approve of the relatively small number of previous Louisiana decisions that already either gave equal weight to contract and detrimental reliance theories, or disregarded a valid contract in favor of detrimental reliance analysis. *See* Snyder, *supra* note 22, at 743–47.
107. *See* sources cited *supra* note 53 and accompanying text.
108. *See*, e.g., *Costello* v. *Hardy*, 864 So. 2d 129, 136, 139 (La. 2005), in which the supreme court refers to the three elements of a malpractice claim and the four elements of a defamation claim.
109. *See* source cited *supra* note 18 and accompanying text.
110. *See* discussion *supra* Parts III.C, IV.B.2, IV.B.3.
The long-term ramifications of the court's decision are unclear, but Louisiana courts can easily avoid any unnecessary consequences by simply applying a proper test for detrimental reliance claims. Though the current judicial test at least implies the proper criteria, Louisiana courts, as exemplified by Suire, may fail to apply it correctly. Thus, Louisiana courts should adopt a judicial test that makes explicit what is already implicit with respect to appropriate alternative theories of recovery and inevitable detriment. The following is a proposed modified judicial test:

The theory of detrimental reliance is available only where:

1. there was a representation by conduct or word;
2. there was justifiable reliance on the representation;
3. there was a change in position to one's detriment because of the reliance;
4. no appropriate alternative theory of recovery is available; and
5. the detriment was not inevitable.

Mark Twain once said that "the difference between the almost right word and the right word is really a large matter—'tis the difference between the lightning-bug and the lightning." By making explicit two criteria that are currently implicit and easily overlooked, Louisiana courts can improve the judicial test for the elements of a detrimental reliance claim. With but a small change, the courts can avoid overextending the theory of detrimental reliance. With but a small change, Louisiana courts can turn lightning back into a lightning bug.

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111. See discussion supra Part V.
112. See source cited supra notes 109–110.
113. See discussion supra Parts II.C, III.C.
114. Twain, supra note 1, at 360.

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