

9-1-2004

## Rizzo v. Nichols, 867 So. 2d 73 (La. Ct. App. 2004)

Cheryl Miller

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Cheryl Miller, Court Report, Rizzo v. Nichols, 867 So. 2d 73 (La. Ct. App. 2004), 8 U. Denv. Water L. Rev. 292 (2004).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

Rizzo v. Nichols, 867 So. 2d 73 (La. Ct. App. 2004)

multiple issues, granted the permanent injunction. The hunters appealed.

In affirming the district court in full, the Court of Appeal of Louisiana for the Third Circuit quoted extensively from the district court's findings and conclusions. First, the court affirmed the district court's holding that while banks of a navigable public waterway through private land were subject to public use, intermittent flooding of the surrounding land did not convert such land to "banks" that were therefore available for public use.

Next, the court affirmed the district court's holding that no public use right existed in the Club's private waterways. The hunters alleged four reasons for finding that a public use right does exist: (1) the private waterways on the Club's land negatively affected the navigability of other local public waterways; (2) state funds had been used to clean the banks of the private waterways; (3) mere navigability in fact created a public use right; and (4) because the Army Corps of Engineers ("Corps") could seek regulatory control over the private waterways, a public use right arose.

The court affirmed the district court's holdings that: (1) the hunters failed to provide adequate factual support for the contention that the private waterways had decreased or eliminated the navigability of local public waterways; (2) use of state funds on private property did not create a public use right unless the government contracted for those rights; (3) a public use right did not arise merely because a river could be used for navigation; and (4) whether the Corps could seek regulatory control over a waterway did not affect the issue of public use of that waterway.

Finally, the court addressed the hunters' contention that even if there was no public use right to private waterways, there was a public use right to the banks of navigable public waterways. The hunters argued the district court should not have granted the Club an injunction denying the hunters the right to hunt on the banks of the public waterways. The court agreed there was a public use right to the banks of navigable public waterways. However, that public use right did not allow the entire spectrum of possible public use. The use right that arose was limited solely to those purposes incidental to the use of the stream's navigational properties. These incidental uses included emergency use during shipwrecks, drying of fishing nets, and resting from the waters. Because the court found no error in any of the district court's determinations, the court affirmed the decision of the district court to grant the Club an injunction.

*Matthew Sarles*

**Rizzo v. Nichols, 867 So. 2d 73 (La. Ct. App. 2004)** (affirming award of damages to landowners whose property flooded because their

neighbor changed the natural drainage of water across the landowners' property, knowing the change would cause water damage).

Jasper and Mary Rizzo ("Rizzos") moved into a house in Alexandria, Louisiana. At that time, the adjacent lot was vacant and the Rizzos' property did not flood when it rained. Heath Nichols ("Nichols") purchased the vacant lot next to the Rizzos' property and began constructing a duplex apartment there. After Nichols began construction, the Rizzos experienced flooding and standing water on their property whenever it rained. Mr. Rizzo discussed the drainage problem with Nichols several times, but Nichols did not take any action to prevent the Rizzo property from flooding. The Rizzos sued Nichols for damages in Alexandria City Court. After a bench trial, the judge concluded Nichols knew his construction project would cause the Rizzo property to flood and the construction was the cause-in-fact of the flooding. The judge awarded the Rizzos actual, inconvenience, and mental anguish damages. Nichols appealed the liability determination and damage awards to the Third Circuit Court of Appeal of Louisiana.

The Louisiana Civil Code establishes the general right of landowners to use their own properties as they choose. However, a landowner may be liable for damages where the landowner interferes with a neighbor's right to enjoy the neighbor's own property. A landowner is liable to a neighbor for damaging the neighbor's property if: (1) the landowner knew, or should have know, that the action would cause damage; (2) the damage could have been prevented by the exercise of reasonable care; and (3) the landowner failed to exercise such reasonable care. The trier of fact is responsible for making this liability determination based on the particular circumstances of each case.

Mr. Rizzo testified at trial that he informed Nichols of the drainage problem shortly after Nichols began construction. Nichols testified that he contacted two plumbers after Mr. Rizzo approached him. However, Nichols did not take any further action to resolve the drainage problem. Instead, Mr. Rizzo installed a catch basin on his own property to prevent his property from flooding. The court concluded that given this testimony, the trial judge did not err in determining that Nichols knew that constructing the duplex on his property would damage the Rizzos' property and that Nichols could have prevented the damage by exercising reasonable care.

To recover under the law of vicinage, the aggrieved party must demonstrate a casual link between the damage sustained and the neighboring landowner's action or inaction. At trial, the previous owner of the Rizzos' property testified that he never experienced flooding when he lived on the property. Rather, water drained from his property through the lower-lying area that ran across the adjacent vacant lot, now owned by Nichols. Mr. Rizzo likewise testified that before Nichols began construction, his property did not flood and water

drained across the adjacent lot. The court concluded that based on this evidence, the trial judge did not err in ruling that Nichol's construction project was the cause-in-fact of the damage to the Rizzos' property.

In a vicinage action a plaintiff may recover general damages, as well as damages for mental anguish, discomfort, irritation, anxiety, and loss of use and/or enjoyment of his property. A trial court has great discretion in awarding damages and an appellate court may not disturb that award absent a clear abuse of discretion. The court concluded the record supported the award of actual and inconvenience damages because Mr. Rizzo installed a catch basin on his property and made repairs to his water-damaged shed. The court also concluded that the award of mental anguish was supported by the record because the Rizzos' backyard became a breeding ground for mosquitoes, the shed flooded and was not usable until a week after the water receded, and the condition of the property caused tension between the Rizzos. Accordingly, the court affirmed the trial court's liability determination and damage awards.

*Cheryl Miller*

**Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. Ct. App. 2004)** (holding that the lake and drainage ditch were formed through accretion or alluvion, rather than through chute or neck cut-off; that the lake and drainage ditch were not navigable and, thus, were privately owned; that actions for trespass, rather than permanent injunction, were the proper vehicle for the landowner to prevent his/her property from being exploited for recreational purposes; and that the trial court acted within its discretion in unilaterally converting the state's motion for suspensive appeal into a devolutive appeal).

Walker Lands, Inc. ("Walker Lands") owned property that included Gassoway Lake, a landlocked shallow lake, and a drainage ditch. Gassoway Lake formed sometime after 1880 when the Mississippi River slowly moved eastward, leaving behind dry land and a shallow swale. The shallow swale eventually became Gassoway Lake. Walker Lands later purchased the land that included Gassoway Lake in 1974.

Walker Lands filed suit seeking an injunction against the State of Louisiana ("State") and the public-at-large to stop all public use of Gassoway Lake and the drainage ditch. Walker Lands also sought a declaratory judgment regarding its ownership status with respect to Gassoway Lake and the drainage ditch. The District Court, Parish of East Carroll, entered a judgment in favor of landowner and against the State. The State appealed the judgment in the Court of Appeal of Louisiana, Second Circuit, which affirmed in part, reversed in part, and remanded.