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## Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. Ct. App. 2004)

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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.

The court first addressed the State's argument that evidence at trial showed that Gassoway Lake was a former bed of the Mississippi River, thus the State owned Gassoway Lake. The court noted that the central issue with respect to the State's argument was the creation of Gassoway Lake and the effect of the movement of the Mississippi River. In resolving this issue, the court found that Walker Lands' predecessors-in-title were the riparian landowners of the property that sat on the bank of the Mississippi River when it changed course and began shifting eastward sometime after 1880. The court further noted that Walker Lands' predecessors-in-title began to acquire, through alluvion, the new land that existed when the Mississippi River shifted eastward. Because Louisiana law established that any alluvion or dereliction forming along the banks of a river belongs to the riparian landowners who own the land adjacent to the river when the river shifts course, Walker Lands' predecessors-in-title owned both the newly formed dry land and Gassoway Lake. Thus, Walker Lands possessed ownership of Gassoway Lake.

The court next addressed the State's argument that the State owned Gassoway Lake since the Lake remained navigable and connected to the Mississippi River as a channel, and therefore qualified as public water under the law. In making this argument, the State pointed out that the Mississippi River frequently floods Gassoway Lake and the lands between the lake and the river. Similarly, the State argued that under Louisiana law, the State owns all bodies of water within its territory when the state joined the Union in 1812. Finally, the State argued that Gassoway Lake and the drainage ditch are navigable bodies of water and the State owns all navigable bodies of water.

The court rejected all of these arguments. First, the court noted that privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. The flooding of the Mississippi River was therefore irrelevant. Next, because Gassoway Lake did not form until the late 1800s, when the Mississippi River shifted eastward, it did not exist in 1812. Further, the court noted that a body of water is navigable if it, as the body of water normally sits, is capable of use for a commercial purpose over which trade and travel takes place in the customary modes of trade and travel. The court held that recreational use of a body of water was not enough to establish commercial use of the body of water. Thus, the court held that Gassoway Lake was a non-navigable body of water that a private entity owned. In short, Gassoway Lake and the drainage ditch were private property; the State did not possess ownership.

The court next addressed the trial court's issuance of a permanent injunction. While the State argued that the judgment was overly broad because it enjoined use of the Mississippi River, the court held that the permanent injunction failed on other grounds. Specifically, the court

noted that Walker Lands and the State were the only parties involved in the lawsuit at trial and no other persons or private entities were involved. Further, the court found no direct evidence in the record of any direct violation by State officials or State departments attempting to invade Walker Lands' property. Consequently, no justiciable controversy between Walker Lands and the State or the public-at-large existed. Thus, the trial court improperly issued a permanent injunction against both the State's use of the property and the public's-at-large use of the property; accordingly, the court reversed the permanent injunction. In doing so, the court noted trespass actions are the proper vehicle for the landowner to use in order to prevent the exploitation of his/her property for recreational purposes.

Finally, the state argued that the trial judge erred by unilaterally converting its motion for a suspensive appeal into a devolutive appeal. Specifically, the trial judge marked out the word suspensive and wrote in devolutive on the draft order the State submitted. The court concluded that under the Louisiana Code of Civil Procedure, the trial judge retained discretion to convert the motion.

In conclusion, the court affirmed the trial court's ruling that Walker Lands owned Gassoway Lake and the surrounding lands; reversed the trial court's grant of a permanent injunction; and remanded the matter to the trial court for the calculation of trial court costs, assessed equally against the parties.

*Benjamin M. Petre*

## MAINE

**S.D. Warren Co. v. Maine Dep't of Envtl. Prot., No. AP-03-70, 2004 Me. Super. LEXIS 115 (Me. Super. Ct. May 4, 2004)** (holding that license renewal for hydroelectric dams required certification subject to water quality certification pursuant to the Clean Water Act).

S.D. Warren Company ("Warren") owned and operated the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa hydroelectric generating dam projects ("Projects") on the Presumpscot River. The Projects provided electricity to Warren's paper mill. When the Projects' operating licenses lapsed, Warren filed for renewal. Along with his application for continued operations, he also requested certification. In April 2003 the Department of Environmental Protection ("DEP") approved the applications and granted certification subject to several conditions. Warren appealed the order to the Maine Board of Environmental Protection ("BEP"). The BEP subsequently denied his appeal.

On appeal to the Superior Court of Maine, Warren contended the BEP erred by requiring the Projects to pass water quality certification under the Clean Water Act ("CWA"). The CWA requires any application for a federal permit or license for an activity that may result in a