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Federal Court Affirms the Destruction of Louisiana's Coastal Marshlands. *Barasich v. Columbia Gulf Transmission Co.*

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FEDERAL COURT AFFIRMS THE DESTRUCTION OF LOUISIANA'S COASTAL MARSHLANDS

*Barasich v. Columbia Gulf Transmission Co.*¹

I. INTRODUCTION

Louisiana's coastal marshlands provide a natural protective barrier to inland residents from hurricane force winds and storm surges. Over the last several decades, scientific studies suggest that the oil and gas industry is responsible for at least thirty percent of Louisiana's coastal wetland loss.² After hurricanes Katrina and Rita, which resulted in tremendous loss of life and property in New Orleans, inland residents brought a class action in the federal district court for the Eastern District of Louisiana against several oil and gas companies. The residents claimed that the defendants' destruction of Louisiana's coastal marshland exacerbated the impact of the storms resulting in their damages.³

The court held that while the case involved controversial political issues, the case did not represent a nonjusticiable political question.⁴ However, the court dismissed the plaintiffs' negligence claims because of the parties' lack of proximity, and the plaintiffs' failure to prove the elements of negligence under Louisiana law. This note focuses on the reasoning behind the court's decision, how the court overlooked important aspects of Louisiana law, and most importantly, how the decision weakened property rights and environmental protection in post-Katrina Louisiana.

II. FACTS AND HOLDING

In the fall of 2005, hurricanes Katrina and Rita hit New Orleans, causing tremendous loss of life and property. In 2006, nine residents of

¹ 467 F.Supp.2d 676 (E.D. La. 2006).

² Douglas Brinkley, *The Great Deluge: Hurricane Katrina, New Orleans and the Mississippi Gulf Coast* 10 (2007).

³ *Barasich*, 467 F.Supp.2d at 678.

⁴ *Id.* at 682.

Jefferson, Orleans, and St. Bernard Parishes brought a class action against several oil and gas companies.⁵ The residents sought to hold the companies liable for the destructive impact of the storms.⁶ The plaintiffs alleged the oil and gas companies' activities over the years severely impaired southern Louisiana's coastal marshlands, which act as a natural protective barrier to inland residents from hurricane force winds and storm surges.⁷

Over the past several decades, oil and gas companies have dredged canals through Louisiana's coastal marshlands for the purpose of locating drill sites and installing pipelines for the transportation of petroleum products.⁸ Dredging activities can destroy coastal marshland by altering the hydrology of the surrounding area.⁹ Recent studies suggest that the oil and gas industry is directly responsible for at least 30 percent of Louisiana's coastal wetland loss.¹⁰

The plaintiffs brought their claim in the federal district court for the Eastern District of Louisiana. They based their claim for recovery on Louisiana strict liability and negligence statutes.¹¹ The plaintiffs asserted that as a result of the oil and gas companies' destruction of Louisiana's coastal marshlands, the "class members suffered injury and/or death, property damage, and the loss of the wetlands' value as storm

⁵ *Barasich*, 467 F.Supp.2d at 679.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Barasich*, 467 F.Supp.2d at 679 (The plaintiffs' complaint describes altered "hydrology" as the process of allowing saltwater to enter the marshlands, which limits freshwater flows. The freshwater flows are essential for distributing mineral sediments, inorganic sediments, and organic matter to those areas. "The effect of the increased exposure to salt water and reduced exposure to freshwater is destruction of indigenous plant life, which traps sediment, builds organic soils, and stabilizes the soil with a dense mat of live roots. Without the marsh vegetation, the root mat disappears, resulting in erosion of the exposed soil and the eventual conversion of the marshlands to open water.")

¹⁰ Penland, S.I. Wayne, L.D. Britsch, L. Jeffress Williams, A.D. Beall, and V.C. Butterworth. 2000a. Proces classification of coastal land loss between 1932 and 1990 in the Mississippi Delta Plain, southeastern Louisiana, sponsored by the Agronne National Library, Gas Research Institute, U.S. Army Corps of Engineers, and the U.S. Geological Survey.

¹¹ *Barasich*, 467 F.Supp.2d at 680.

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protection.”¹² The defendants filed a motion to dismiss the plaintiffs’ claims because they represented a nonjusticiable political question, and because they did not state a claim upon which relief could be granted under any available theory.¹³ The court concluded that the plaintiffs’ action was justiciable, but the court granted the defendants’ motion to dismiss.¹⁴ The court held that the Louisiana statute imposing strict liability for ultrahazardous activities was inapplicable,¹⁵ and that the oil and gas companies had no duty to restore the marshlands to their original state.¹⁶

III. LEGAL BACKGROUND

A. *The Political Question Doctrine*

The political question doctrine “prohibits courts from adjudicating those questions whose resolution is committed by the Constitution to a branch of government other than the judiciary.”¹⁷ Courts typically begin their political question analysis with the principles established by the Supreme Court in *Baker v. Carr*.¹⁸

In *Baker*, Justice Brennan outlined six independent tests used to identify the existence of a political question, specifically, whether there is:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or [5] an

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 688-89.

¹⁵ *Id.* at 689.

¹⁶ *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp.2d 676, 693 (E.D. La. 2006).

¹⁷ *Gordon v. Texas*, 153 F.3d 190, 193 (5th Cir.1998).

¹⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹

The tests are probably listed in order of most to least importance,²⁰ and if any one of the tests is met, the case is nonjusticiable.²¹

The first *Baker* test is the most important because it explicitly has the intention of preventing judicial interference into the other branches of government.²² This test has been applied to controversies arising under Congress's impeachment power and claims that implicate foreign affairs. The second test, "lack of judicially manageable standards," has only been applied to cases brought under the Guarantee Clause,²³ the Naturalization Clause,²⁴ and suits challenging United States military policies as they apply to foreign countries. Also, the Supreme Court has never applied the "lack of judicially manageable standards" test to a dispute between private parties²⁵ because cases involving requests for monetary damages are less likely to raise political questions.²⁶

Furthermore, in *Gordon v. Texas*, the Fifth Circuit addressed whether cases involving coastal erosion lacked "judicially manageable standards."²⁷ In *Gordon*, beachfront property owners brought several lawsuits against public and private defendants alleging that the defendants' conduct contributed to the dramatic erosion problems that the

¹⁹ *Id.* at 271.

²⁰ *Vieth v. Jubelirer*, 514 U.S. 267, 278 (2004).

²¹ *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

²² *Barasich*, 467 F.Supp.2d 676, 681 (citing *Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir. 2003)).

²³ U.S. Const. Art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic Violence.").

²⁴ U.S. Const. Art. I, Sect. 8, Cl. 4 (Congress "shall have Power ... To establish a uniform Rule of Naturalization.").

²⁵ *Barasich*, 467 F.Supp.2d at 684.

²⁶ *Gordon v. Texas*, 153 F.3d at 195.

²⁷ *See Gordon*, 153 F.3d at 193.

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plaintiffs experienced on their properties.²⁸ The district court dismissed the complaint as a nonjusticiable political question, but the Fifth Circuit reversed, holding that “there is nothing inherent in erosion claims making them difficult to manage judicially; the district court need only determine the existence of liability and, if necessary, the extent of damages.”²⁹

The third test set forth in *Baker* makes claims nonjusticiable if they would require a court to make an “initial policy determination” nonjusticiable, because such determinations are best left to the other branches of government.³⁰ The United States Supreme Court has stated that in pollution cases, courts must strike a balance between environmental protection and economic development, which may be impossible without an “initial policy determination.”³¹ In *Connecticut v. American Electric Power Co.*, the plaintiffs sued electric utilities to abate the “public nuisance” of global warming.³² In essence, the plaintiffs asked the court to cap carbon dioxide emissions and mandate annual reductions of an unspecified percentage.³³ The court held that the relief sought by the plaintiffs would require the court to “determine and balance the implications of such relief on the United States’ energy sufficiency, and thus its national security without an initial policy determination having been made by the elected branches.”³⁴

The final three tests set forth in *Baker* apply when another branch of government has acted in an area, and where judicial action would undermine the executive or legislative decision making.³⁵ Over the last several decades, the federal government has played a pivotal role in the management of Louisiana’s wetlands. For example, the Rivers and Harbors Act of 1899³⁶ requires that any party seeking to dredge or alter a

²⁸ *Id.* at 191-92.

²⁹ *Id.* at 195.

³⁰ *Veith*, 541 U.S. at 278.

³¹ *Connecticut v. American Electric Power Company*, 406 F.Supp.2d 265, 272 (S.D.N.Y. 2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984)).

³² *Id.* at 267.

³³ *Id.* at 272.

³⁴ *Id.* at 272-73.

³⁵ *Barasich*, 467 F.Supp.2d at 687.

³⁶ 33 U.S.C. § 403, et seq.

navigable canal receive a permit from the Army Corps of Engineers.³⁷ Also, the purpose of the Breaux Act is to “develop a comprehensive approach to restore and prevent the loss of coastal wetlands in Louisiana.”³⁸ Therefore, for several decades the executive and legislative branches of the federal government have acted in the area of coastal marshland erosion in Louisiana, and the political question doctrine prohibits courts from undermining their decision-making in this area. Nevertheless, in *Gordon*, the Fifth Circuit reasoned that even though the federal government had granted the permit that allowed the dredging at issue, they could not conclude that acting to stop the alleged erosion conflicted with federal policy.³⁹

B. Louisiana Civil Code Article 667

Louisiana Civil Code Article 667 states that “[a]lthough 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.”⁴⁰ Moreover, under Article 667, a landowner who harms his neighbor is liable for damages “without regard to his knowledge or exercise of reasonable care, if the damage is caused by an ultrahazardous activity.”⁴¹ Article 667 limits ultrahazardous activities to pile-driving and blasting with explosives.⁴²

Louisiana courts describe Article 667 as an “obligation of vicinage,” and the statute applies only in cases of damage done to neighboring property.⁴³ However, the Louisiana Supreme Court’s definitions of “neighbor” and “proprietor” under Article 667 have evolved over the years.⁴⁴ Specifically, the court has stated that the development of

³⁷ *Barasich* 467 F.Supp.2d at 687 (citing *Bayou Des Familles Development Corp. v. U.S. Corps of Engineers*, 541 F.Supp. 1025, 1033 (E.D.La. 1982)).

³⁸ 16 U.S.C. 3951, et seq.

³⁹ *Gordon*, 153 F.3d at 194-195.

⁴⁰ Louisiana Civ. Code Ann. art. 667.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Barasich*, 467 F.Supp.2d at 690 (citing *Butler v. Baber*, 529 So.2d 374, 381 (La. 1988)).

⁴⁴ See *Butler v. Baber*, 529 So.2d 374, 381 (La. 1988).

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Article 667 by the court “indicates a trend in the direction of a broader interpretation of the language of the article.”⁴⁵

For example, in *Butler v. Baber*, oyster lessees suffered damage to oyster beds as a result of the dredging activities by mineral lessees.⁴⁶ The lower court denied recovery under Article 667 because the court found it questionable whether co-lessees of the same property were “proprietors” or “neighbors” under Article 667.⁴⁷ The Louisiana Supreme Court reversed the decision of the appellate court and explained that the lower court’s limited interpretation of what constitutes neighbors was “not keeping with the developing concept of property rights.”⁴⁸ Therefore, the court expanded the definition of “neighbor” under Article 667 to include co-lessees of the same or adjacent property.⁴⁹ In a similar fashion, the Louisiana Supreme Court has interpreted the term “proprietor” under Article 667 to mean landowner owner or a person who derives their rights from the owner such as a lessee.⁵⁰

C. Louisiana Civil Code Article 2315

The Louisiana Supreme Court has established that a violation of Article 667⁵¹ constitutes fault within the meaning of Article 2315,⁵² which is the basis for negligence liability in Louisiana.⁵³ Article 2315 states that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”⁵⁴ In order to determine liability under Article 2315, Louisiana courts employ a duty-risk analysis, which involves five elements:

⁴⁵ *Butler*, 529 So.2d at 377.

⁴⁶ *Id.* at 375.

⁴⁷ *Id.* at 377.

⁴⁸ *Id.* at 381.

⁴⁹ *Id.*

⁵⁰ *Inabnet v. Exxon*, 642 So.2d 1243, 1251 (La. 1994).

⁵¹ Louisiana Civ. Code Ann. art. 667.

⁵² Louisiana Civ. Code Ann. art. 2315.

⁵³ *Butler*, 529 So.2d at 380.

⁵⁴ Louisiana Civ. Code Ann. art. 2315.

(1) proof that the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) proof that the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) proof that the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) proof that the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) proof of actual damages (the damages element).⁵⁵

The first step of the analysis is deciding whether or not the defendant owed a duty to the plaintiff.⁵⁶ Louisiana courts have held that duty can be expressed or implied, either statutorily or jurisprudentially.⁵⁷ In *Terrabonne Parish School Bd. v. Castex Energy*, the Louisiana Supreme Court addressed the issue of whether the defendant oil and gas companies had a duty to restore wetlands to their pre-lease conditions after they leased the wetlands for oil exploration.⁵⁸ The lessor claimed that before the oil and gas companies exploration activities started, the property had consistent vegetation, and the defendants' activities severely damaged the marshlands.⁵⁹ Also, the plaintiffs argued that the defendants had a duty to restore the marshland, as nearly as practicable, to its original condition even though no such duty was expressly written into the lease.⁶⁰ The Louisiana Supreme Court held that the oil and gas companies owed no duty to restore the surface of coastal marshlands to pre-lease conditions.⁶¹ The court explained that "the lease's express grant of the right to dredge canals constituted consent to or approval of the changes necessarily incident to dredging, thus, the marshland was worn and torn in

⁵⁵ Long v. State ex rel. Dept. of Transp. And Dev., 916 So.2d 87, 101 (La. 2005).

⁵⁶ *Id.*

⁵⁷ Porteous v. St. Ann's Café & Deli, 713 So.2d 454 (La. 1998).

⁵⁸ Terrabonne Parish School Board v. Castex Energy, Inc., 893 So.2d 789, 793 (La. 2005).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

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precisely the manner the parties' contemplated."⁶² Therefore, the court found that the oil and gas companies did not owe the plaintiffs a duty under Article 2315.

IV. INSTANT DECISION

A. *The Political Question Doctrine*

In the instant decision, the district court for the Eastern District of Louisiana rejects the oil and gas companies' argument that the case represents a nonjusticiable political question.⁶³ The court first addressed whether the case implicates the second prong of the *Baker* test because of the "lack of judicially manageable standards" for courts to apply in coastal erosion claims.⁶⁴ The court explained that federal courts have only found a "lack of judicially manageable standards" in cases brought under the Guaranty Clause, the Naturalization Clause, suits challenging United States military policy as they apply to foreign countries, and cases involving political gerrymandering.⁶⁵ Also, the federal courts have never held a case to be nonjusticiable due to "lack of judicially manageable standards" in a dispute between private parties.⁶⁶

The court also stated that the Fifth Circuit held that coastal erosion is not an area in which courts are unable to determine judicially manageable standards.⁶⁷ In *Gordon v. Texas*, the Fifth Circuit stated that "[t]here is nothing inherent in erosion claims making them difficult to manage judicially; the district court need only determine the existence of liability and, if necessary, the extent of damages."⁶⁸ Furthermore, the court explained that the nature of relief sought by the plaintiffs supported the conclusion that the case did not fail the second prong of the *Baker* test.⁶⁹ In the instant case, the plaintiffs sought monetary damages against

⁶² *Id.*

⁶³ *Barasich*, 467 F.Supp.2d at 688-89.

⁶⁴ *Id.* at 682.

⁶⁵ *Id.* at 682-83.

⁶⁶ *Id.* at 684.

⁶⁷ *Id.*

⁶⁸ *Gordon*, 153 F.3d at 195.

⁶⁹ *Barasich*, 467 F.Supp.2d at 685.

the oil and gas companies, and determining such an award typically does not require courts to dictate policy to federal agencies.⁷⁰ In contrast, requests for injunctive relief have the potential to force the judiciary to intrude into the decision-making of the executive branch.⁷¹

The court also rejected the oil and gas companies' argument that a decision by the court would require it to make an "initial policy determination" that is best left to the other branches of government, which implicates the third prong of the *Baker* test.⁷² Specifically, the oil and gas companies argued that a decision in favor of the plaintiffs would affect energy policy, economic development, and environmental protection, and that the court would have to strike a balance between these competing policies.⁷³ The court reasoned that the third prong of the *Baker* test is not applicable because "an initial policy determination is unnecessary when there are judicially manageable standards to guide the court's decision."⁷⁴

B. Louisiana Civil Code Article 667

Next, the court rejected the plaintiffs' arguments that the oil and gas companies were liable under Article 667.⁷⁵ The court quickly disposed of the plaintiffs' strict liability claim because under Article 667 strict liability is limited to the ultrahazardous activities of pile driving or blasting with explosives, and the plaintiffs failed to establish that the oil and gas companies' activities fell into either of these categories.⁷⁶ The court also rejected the plaintiffs' claims under Article 667 because the parties were not "neighbors."⁷⁷ The court explained that Article 667 creates an obligation of vicinage, which "neighbors" satisfy, and thus Article 667 was inapplicable because some members of the plaintiff class

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 686.

⁷³ *Id.*

⁷⁴ *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp.2d 676, 686-687 (E.D. La. 2006).

⁷⁵ *Id.* at 690.

⁷⁶ *Id.* at 689.

⁷⁷ *Id.* at 690.

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and the location of the oil and gas companies' activities were hundreds of miles apart.⁷⁸

C. Louisiana Civil Code Article 2315

Further, the court rejected the plaintiffs' claim that the oil and gas companies were liable under Article 2315, which is the basis of negligence liability in Louisiana.⁷⁹ Specifically, the court held that the plaintiffs failed to establish that the defendants owed them a duty, and that the defendants' conduct was the cause in fact of their injuries.⁸⁰ Thus, the plaintiffs' inability to show causation under Article 2315, precluded them from recovery under Louisiana's other negligence statutes requiring causation.⁸¹

V. COMMENT

A. Political Issues & Political Questions

In the instant decision, the court recognized that the case involved important political issues.⁸² Recently, there has been an ongoing political debate regarding the balance between domestic energy production, national security and environmental protection in the United States. There is also tremendous public pressure in the United States to rely less on foreign energy, to produce more energy domestically, and to use the energy we consume more efficiently. However, domestic energy production would probably come at some cost to the environment, as the oil and gas companies in the instant case demonstrated by their destruction of a substantial portion of Louisiana's coastal marshlands.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.* at 691.

⁸⁰ *Barasich v. Columbia Gulf Transmission Co*, 467 F.Supp.2d 676, 691 (E.D. La. 2006).

⁸¹ *Id.* at 18

⁸² *Barasich*, 467 F.Supp.2d at 687-88.

⁸³ Penland, S.I. Wayne, L.D. Britsch, L. Jeffress Williams, A.D. Beall, and V.C.

Butterworth. 2000a. Proces classification of coastal land loss between 1932 and 1990 in the Mississippi Delta Plain, southeastern Louisiana, sponsored by the Agronne National

In addition, deciding this case in favor of the plaintiffs would probably have political ramifications because other branches of government have not yet fully addressed balancing the environmental, energy, and economic issues that are still present in post-Katrina Louisiana. Also, as the defendants argued, the current condition of Louisiana's wetlands is a direct legacy of two centuries of federal policymaking and action by legislative and executive branches. For example, the Breaux Act was enacted to develop a comprehensive approach to restore and prevent the loss of coastal wetlands in Louisiana.⁸⁴ On the other hand, the federal government facilitates the destruction of Louisiana's coastal marshlands by granting permits for oil and gas exploration, which is the largest cause of Louisiana's coastal wetland loss.⁸⁵ Policy makers have yet to balance these competing policies and make a determination as to what is in the best interest of the United States' domestic energy policy, the oil and gas industry, and Louisiana's inland residents. Nevertheless, these political issues did not amount to rendering the instant case a nonjusticiable political question, which is consistent with Justice Brennan's reasoning in *Baker* where he stated that the presence of political issues will not necessarily make a case nonjusticiable.⁸⁶

B. "Neighboring" Properties

When interpreting Louisiana law, a federal court should apply the law as the Louisiana Supreme Court would.⁸⁷ The court in the instant case may have reached the right outcome, but it is questionable whether the Louisiana Supreme Court would have applied the same legal analysis. Specifically, the court overlooked the Louisiana Supreme Court's "developing concept of property rights" in its analysis of who can be "neighbors" under Article 667.⁸⁸

Library, Gas Research Institute, U.S. Army Corps of Engineers, and the U.S. Geological Survey.

⁸⁴ Barasich 467 F.Supp.2d at 687-88.

⁸⁵ *Id.*

⁸⁶ *Baker*, 369 U.S. at 217.

⁸⁷ *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 546 (5th Cir. 2004).

⁸⁸ *See Butler*, 529 So.2d at 381.

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Over the years, the Louisiana Supreme Court has expanded its definitions of “neighbor” and “proprietor” under Article 667.⁸⁹ The court has held that the term “proprietor” under Article 667 not only applies to landowners, but also to persons whose rights derive from the owner, such as a lessee.⁹⁰ Also, the court expanded the definition of the term “neighbor” when it held that co-lessees of the same or adjacent property may be “neighbors” under Article 667.⁹¹ However, in the instant case, the court held that the distance between some of the plaintiffs and the defendants prevented them from being “neighbors” under Article 667.⁹² Suing as a class should have cured the defect, and the class should not have been certified if the plaintiffs were not similarly situated in relation to the oil and gas companies’ activities.

Also, assuming that the class was properly certified, the facts of the instant case are analogous to Louisiana cases where a defendant landowner damages a protective “wall” dividing neighboring properties and the neighboring property is harmed. For example, in *Joubert v. Louisiana State Park and Recreation Commission*, the state constructed and maintained a reservoir and dam structure in a state park.⁹³ A farmer owned land which adjoined the state park, and lost a portion of his crops when a large volume of water flowed over the dam.⁹⁴ The court held that the plaintiffs and defendant were “neighbors” under Article 667.⁹⁵ The court’s reasoning in *Joubert* implies that it would have made this determination regardless of whether the farmer’s land extended for miles, or whether the damage to his property occurred several miles away as long as the properties were adjacent to each other.

The facts in *Joubert* are analogous to the facts in the instant case, where the plaintiff class was adjacent to the oil and gas companies’ activities, which resulted in the destruction of a significant portion of Louisiana’s coastal marshlands – the inland residents’ protective “wall.”

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Barasich*, 467 F.Supp.2d at 689-90.

⁹³ *Joubert v. Louisiana State Park and Recreation Commission*, 345 So.2d 220, 221-22 (La. App 3d 1977).

⁹⁴ *Id.*

⁹⁵ *Id.* at 224.

Some of the members of the plaintiff class may have been several miles away but still suffered damages because of the destruction of their protective "wall." Surprisingly, the court in the instant case held that the parties were not "neighbors" even though the plaintiff class as a whole was adjacent to the oil and gas companies' activities.⁹⁶

C. *The Duty Owed to Inland Residents*

In the instant case, the court's analysis of "duty" under Article 2315 was not consistent with Louisiana law. Under Louisiana law, a defendant's duty to conform his conduct to a specific standard may be express or implied, either statutorily or jurisprudentially.⁹⁷ In its analysis, the court relied upon the Louisiana Supreme Court's holding in *Terrabonne Parish*, where the parties were under a contractual agreement.⁹⁸ The court explained that since the Louisiana Supreme Court did not find a duty between contracting parties in *Terrabonne Parish*, it would be unlikely for the court to find a duty in the instant case.⁹⁹ However, the fact that the defendants may have contracted with parties other than the plaintiffs does not mean that they do not owe a duty to undertake their performance with care and not destroy the inland residents' protective coastal marshlands.¹⁰⁰ The court rejected the fact that other Louisiana cases illustrate situations where contracting parties were found liable to third parties under Article 2315.¹⁰¹

D. *Weakened Environmental Protection & Property Rights*

Finally, the court's decision in *Barasich* weakened environmental protection and property rights in post-Katrina Louisiana. The environment is now more at risk because the court affirmed the oil and gas companies' ability to knowingly destroy Louisiana's coastal marshlands at the expense of inland residents. Also, the federal government through the Army Corps

⁹⁶ *Barasich*, 467 F.Supp.2d at 689-90.

⁹⁷ *Porteous v. St. Ann's Care & Deli*, 713 So.2d 454 (La. 1998).

⁹⁸ *Barasich*, 467 F.Supp.2d at 691-92.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 693.

¹⁰¹ *Id.*

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of Engineers, facilitates the destruction of Louisiana's coastal marshlands by providing permits to the oil and gas companies.¹⁰² Thus, the federal government facilitates the destruction of Louisiana's coastal marshlands and simultaneously enacts legislation such as the Breaux Act to repair the damage.¹⁰³

Property rights are weakened in post-Katrina Louisiana because the residents of New Orleans will likely avoid living in areas that may be affected by increased storm surges due to the destroyed marshlands. Residents that remain in these areas may face higher costs, such as homeowner's insurance, as a result of the oil and gas companies' activities. Thus, the oil and gas companies have managed to pass the costs of their activities onto Louisiana's inland residents. Also, property rights are weaker because the court's decision demonstrated the difficulty that plaintiffs have in meeting the legal standards to prove liability even when the defendants' destructive activities are well documented.¹⁰⁴

IV. CONCLUSION

The court in *Barasich* ignored the Louisiana Supreme Court's "developing concept of property rights," which was the basis for the Louisiana Supreme Court's expansion of the definition of what constitutes "neighbors" under Article 667. The court also affirmed that the oil and gas industry can knowingly destroy Louisiana's coastal marshlands, and have no duty to the inland residents of New Orleans who rely on the marshlands for a portion of their protection from hurricanes like Katrina. As a result, the court's legal analysis and decision weakened property rights and environmental protection in post-Katrina Louisiana.

DARRYL CHATMAN

¹⁰² *Barasich*, 467 F.Supp.2d at 687-88.

¹⁰³ *Barasich v. Columbia Gulf Transmission Co*, 467 F.Supp.2d 676, 687-88 (E.D. La. 2006).

¹⁰⁴ See Penland, S.I. Wayne, L.D. Britsch, L. Jeffress Williams, A.D. Beall, and V.C. Butterworth. 2000a. Process classification of coastal land loss between 1932 and 1990 in the Mississippi Delta Plain, southeastern Louisiana, sponsored by the Agronne National Library, Gas Research Institute, U.S. Army Corps of Engineers, and the U.S. Geological Survey.

