

NOT DESIGNATED FOR PUBLICATION

SUCCESSION OF WARREN \* NO. 2007-CA-1183  
VANDERHOFF, SR. AND \*  
BRENDA VANDERHOFF \* COURT OF APPEAL  
CLEVELAND, DEBBIE \*  
VANDERHOFF \* FOURTH CIRCUIT  
JOHANNESSEN, LINDA \*  
VANDERHOFF TARVER, \* STATE OF LOUISIANA  
MICHAEL VANDERHOFF, \*  
ROBERT VANDERHOFF, ROY \* \* \* \* \*  
A. VANDERHOFF, SANDRA  
VANDERHOFF, STEPHEN  
VANDERHOFF, WARREN  
VANDERHOFF, JR., AS  
CHILDREN OF DECEDENT

VERSUS

RUSSELL ALPHONSO,  
CHRISTIE ALPHONSO,  
CHRISTOPHER ALPHONSO,  
GLEN ALPHONSO, ADDISON  
CONSTRUCTION CO., INC.,  
LYMAN ROSENBERGER, JR.  
AND ALICE ROSENBERGER

APPEAL FROM  
ST. BERNARD 34TH JUDICIAL DISTRICT COURT  
NO. 102-825, DIVISION "C"  
Honorable Wayne Cresap, Judge

\* \* \* \* \*

**Charles R. Jones**  
**Judge**

\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and  
Judge David S. Gorbaty)

J. Courtney Wilson  
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COUNSELS FOR ADDISON CONSTRUCTION CO., INC.  
AND LYMAN ROSENBERGER, JR.

**AFFIRMED**

The named appellants (the Succession of Warren Vanderhoff, Sr., et al, hereinafter “the Vanderhoffs”), seek review of a district court judgment which granted the appellees’ motion for summary judgment. We affirm.

This lawsuit arises out of the alleged criminal conduct by the adult sons of Russell J. and Christie K. Alphonso against the plaintiffs, Warren Vanderhoff, Sr., (the decedent) and Michael Vanderhoff.

On or about April 23, 2003, Mr. Lyman Rosenberger, Jr., received a residential rental application for the residence located at 709 W. Josephine St., in Chalmette, Louisiana, from Christie Alphonso. The property is owned by the Addison Construction Company, whose principal is Mr. Rosenberger, Jr. The Vanderhoffs lived at 701 W. Josephine St., which is next door to the rental property which was the subject of the lease application.

On the application for residential rental, the only persons other than Christie Alphonso listed as being the occupants of the house were: Russell Alphonso, husband; Britney and Alley, daughters; Kim Alphonso, daughter; and Rebecca Vicknair, daughter. No other persons were identified as occupants of the

residence. Christopher (hereinafter “Chris”) and Glenn Alphonso, the Alphonso’s adult sons, were not listed as occupants.

The Vanderhoffs alleged that Chris and Glenn had their own residence in a trailer at 1922 Molero Lane, in another part of St. Bernard Parish.<sup>1</sup>

On the same date, April 22, 2003, Mr. Rosenberger, Jr., entered into a verbal lease agreement for the 709 W. Josephine St. location with Mrs. Christie Alphonso, pursuant to the lease application.

However, on May 9, 2003, a trespass occurred whereby Glenn Alphonso entered onto the Vanderhoffs’ property. On May 12, 2003, an armed trespass and vandalism allegedly occurred whereby both Chris and Glenn Alphonso entered onto the property of the Vanderhoffs. The decedent, Mr. Vanderhoff, Sr., was in the home at the time of the invasion and he witnessed all of the events on that date. However, about one week later, on May 19, 2003, the elder Mr. Vanderhoff suffered a stroke. He subsequently died on October 22, 2003.

On May 9th, 12th, and May 19, 2003, and at all times relevant to the time when Mrs. Alphonso and her husband Russell were leasing the premises, the Vanderhoffs alleged that neither Chris nor Glenn Alphonso were listed on, nor were parties to the lease agreement. Because of Chris’ and Glenn’s non-appearance on the lease agreement, the Vanderhoffs noted that Chris and Glenn Alphonso were not tenants of 709 W. Josephine St.

The Vanderhoffs filed suit via a Petition for Assault and Wrongful Death on October 4, 2004, against Russell and Christie Alphonso, their sons, Chris Alphonso and Glenn Alphonso, alleging that the two defendants were of full age of majority,

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<sup>1</sup> Additionally, the Molero Lane address is listed for Chris Alphonso on the arrest report.

as well as Addison Construction Co., Mr. Lyman Rosenberger, Jr., and his wife, Alice Rosenberger. Addison Construction Co., and the Rosenbergers were named as owners of the property.

In their petition, the Vanderhoffs alleged that Chris and Glenn Alphonso committed trespass and vandalism on May 12, 2003, thereby allegedly causing Mr. Vanderhoff, Sr., to suffer the stroke which ultimately claimed his life some months later.

The Vanderhoffs alleged that the Alphonsons were prosecuted and convicted and that Chris Alphonso was sentenced to probation by a St. Bernard Parish court.

In addition to the claims against Chris and Glenn Alphonso, the Vanderhoffs also sued Russell and Christie Alphonso alleging that they permitted Chris and Glenn to live in the dwelling located at 709 W. Josephine St.

Finally, the Vanderhoffs also sued the defendant, Addison Construction Company, the lesser/owner of the dwelling, and its principal, Lyman Rosenberger, Jr., alleging negligence in renting the dwelling to Russell and Christie Alphonso because the Alphonsons' adult children "had known records for violence," and for continuing to lease to the Alphonsons after the elder Mr. Vanderhoff had a stroke.

On January 27, 2007, the appellees, Addison Construction Company and Mr. Rosenberger, Jr., moved for summary judgment on the primary grounds that a lessor has no duty under Louisiana law to protect an adjacent neighbor from the criminal acts of visiting adult children. They also asserted that even if such a duty existed, the Vanderhoffs failed to produce evidence to carry their burden of proof that Addison Construction Company or Lyman Rosenberger, Jr., knew or should have known that Chris and Glenn Alphonso would commit criminal acts upon or otherwise cause damages to their neighbors.

The Vanderhoffs opposed the motion by arguing that although Chris and Glenn Alphonso were not on the lease, they regularly frequented the house. The Vanderhoffs also alleged that during the first month of occupancy by the Alphonsons, that Chris and Glenn made themselves nuisances which culminated in the alleged attack at the Vanderhoffs' residence. The Vanderhoffs asserted that the lessor should be liable pursuant to La. Civil Code art. 667, et seq., the "vicinage" articles.

In a reply memorandum, Addison Construction Company and Lyman Rosenberger, Jr., pointed out that La. Civil Code art. 667, as amended in 1996, provides no basis to hold them, as lessors of the rental property, liable for criminal and or negligent acts of their lessees' adult children who were guests. They also asserted that as lessors, they neither knew nor should have known that their work or activity on the property as lessors, if any, would cause damage to a neighbor.

On April 27, 2007, a hearing was held on a motion for summary judgment filed by Addison Construction Company and the Rosenbergers. The district court granted the motion from the bench and orally assigned reasons stating in pertinent part:

I just don't see a basis to be able to sue a landlord for the activities of the tenant unless -- you know, there are cases of -- and this may show my age -- of letting an unruly place -- and that goes to -- those cases dealt with houses of prostitution mainly in the French Quarter and in the red light district where the owner knew that illegal activity was going all in there and rented the place for such activity. Okay. [sic]

Short of that, I have not found any cases where a landlord renting a residence to be lived in and not a business could be responsible for the activities of the residents. And even under conjecture, even if he knew something was going on you have to prove the

knowledge of it and some type of connexity thereto. I'm going to grant the motion for summary judgment.

On May 10, 2007, the district court rendered a written judgment granting the motion for summary judgment and dismissing Addison Construction Company and Lyman Rosenberger, Jr., from the suit, for the reasons orally assigned. No further reasons were provided. From this judgment, the plaintiffs filed this timely appeal.

### **DISCUSSION**

In their only assignment of error, the Vanderhoffs argue that the district court erred in granting Addison Construction Company's and the Rosenbergers' motion for summary judgment.

The appellate court reviews summary judgments *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Shambra v. Roth*, 04-0467, 04-0468, p. 2 (La.App. 4 Cir. 9/29/04), 885 So.2d 1257, 1259. Accordingly, a motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The Vanderhoffs assert that Louisiana Civil Code article 667 applies to their suit due to Mr. Rosenberger, Jr.'s failure to intervene despite their claims of harassment by the Alphonsos' adult children on the property that the Vanderhoffs leased from Mr. Rosenberger, Jr. In particular, La. Civil Code art. 667 provides:

#### **Limitations on use of property**

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. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

The Vanderhoffs set forth three basic arguments in support of their assertion that Mr. Rosenberger, Jr., and Addison Construction Company are liable for their damages under La. Civil Code. art. 667. These are:

1. Mr. Rosenberger, Jr., allegedly conducted work on the neighboring property and that leasing the property to the Alphonsos was for work purposes as described under La C.C. art. 667; they assert that for purposes of the instant case, “work” has been interpreted to apply to activity.<sup>2</sup>
2. Mr. Rosenberger, Jr.’s, alleged “harboring” of Chris and Glen Alphonso was a nuisance; and that
3. Mr. Rosenberger, Jr., is liable for damages based upon his alleged harboring of two non-tenants who had violent propensities.

In support of their argument that Mr. Rosenberger, Jr., was responsible as an employer of the Alphonsos, the Vanderhoffs cite *Mut v. Newark Ins. Co.*, 289 So.2d 237 (La.App. 1 Cir. 1973). In *Mut*, a suit was filed as a result of an action

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<sup>2</sup> We note that in its definition of activity, the Vanderhoffs cite a First Circuit case and specifically note that this case discussed the pre-amendment version of La. Civil Code art. 667.



arising from the collapse of a wall of a building, which fell on and damaged the adjoining landowner's building. The district court entered a judgment which awarded damages to the adjoining landowner against owners of the collapsed wall, their insurer, and the contractor which designed and constructed the building; granted the owners' recovery against the contractor, denied the contractor's claims against its insurer and claim of indemnity from subcontractor, and denied numerous reconventional demands. All parties except a sub-subcontractor appealed. The First Circuit Court of Appeal, held *inter alia*, that owner was strictly liable to the adjoining landowner regardless of whether there were any negligent acts by owner. In *Mut*, the Court of Appeal wrote:

We interpret *Chaney*<sup>3</sup> to hold that the strict liability imposed by Article 667 is not limited to instances where the mere existence of a work, structure or building on a landowner's premises causes unwarranted damage to neighboring property. In our view, *Chaney* extends Article 667 to all instances wherein an activity, work, structure or building on an owner's property causes unwarranted damage to neighboring property. In this regard, we note the following in *Chaney*:

'Article 667 is therefore a limitation the law imposes upon the rights of proprietors in the use of their property. It is a species of legal servitude in favor of neighboring property, an expression of the principle of *sic utere*.<sup>4</sup> An activity, then, which causes damage to a neighbor's property obliges the actor to repair the damage, even though his actions are prudent by usual standards. It is not the manner in which the activity is carried on which is significant; It is the fact that the activity causes damage to a neighbor which is

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<sup>3</sup> In *Chaney v. Travelers Insurance Company*, 259 La. 1, 249 So.2d 181 (La. 1971), the Supreme Court imposed strict liability in tort upon a landowner for damages resulting to a neighbor from works erected or maintained upon the landowner's property.

<sup>4</sup> Black's Law Dictionary, 6<sup>th</sup> Ed., defines the term *Sic utere tuo alienum non lédas* as a common law maxim which means that one should use his own property in such a manner as not to injure that of another.

relevant. This being ascertained, it remains only to calculate the damage which ensued.’ (Emphasis by the Court.)

*Mut*, 289 So.2d at 244.

In support of their argument that Mr. Rosenberger, Jr.’s, harboring of Chris and Glenn Alphonso constituted a nuisance, the Vanderhoffs cite *City of New Orleans v. Lenfant*, 126 La. 455, 52 So. 575 (La. 1910). In *Lenfant*, the plaintiff and others were convicted of violating an ordinance of the City of New Orleans which prohibited parking on neutral grounds. The appeals court affirmed, but the Supreme Court reversed the case and dismissed the defendants finding that the unauthorized obstruction upon a public street is a nuisance *per se*, but no lawful use which an individual makes of his own property is a nuisance *per se*, nor can it be made so by a municipal ordinance; and whether it is a nuisance, in fact, or *per accidens*, depends upon the circumstances and surroundings. *Lenfant*, 126 La. at 462; 52 So. at 577.

And finally in support of their assertion that Mr. Rosenberger, Jr., is liable, the Vanderhoffs cite La. Civ. Code art. 667 and to the *Restatement of Torts*, 2<sup>nd</sup>, Sec. 838, *Nuisance*, for the proposition that a landowner is answerable for damages, “[u]pon a showing that he knew or should have known (1) that his works would cause damage, (2) that the damage could have been prevented by the exercise of reasonable care.”

The *Restatement of Torts*, 2<sup>nd</sup>, Sec. 838, as asserted by the Vanderhoffs, sets forth the burden of proof in a nuisance case as follows:

A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and (a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will

involve an unreasonable risk of causing the nuisance; and  
(b) he consents to the activity or fails to exercise  
reasonable care to prevent the nuisance.

The Vanderhoffs allege that the ongoing conflict between them and Chris and Glenn Alphonso culminated in an armed attack on Michael Vanderhoff, at their residence, by the Alphonsons' sons Chris and Glenn Alphonso. The Vanderhoffs allege that the conflict began soon after Alphonsons' adult sons engaged in multiple trespasses, on May 9, 2003, and on May 12, 2003.

In self-defense, Michael Vanderhoff avers that he clubbed Chris Alphonso, but the two brothers, each armed with a pistol, entered onto the Vanderhoff property and attacked the Vanderhoff residents. They also allege that the elder Mr. Vanderhoff was very emotionally upset and terrified and that he suffered from sleep deprivation for some days after the attack and intrusion, and that on the seventh day after the incident, he had a stroke.

Prior to the attack, Michael Vanderhoff stated that he would see Glenn at the Alphonso residence every morning and that on some of those days when Glenn was not working, he saw him there all day and into the evening. Michael Vanderhoff alleges that he saw Glenn next door at least 10 times, sometimes even as late as 2 to 3 a.m. Glenn's white Chevy truck was parked next door almost every night. Michael Vanderhoff also alleged that he saw Chris Alphonso next door with the same frequency as Glenn Alphonso.

Three to four days after the Alphonsons moved into the property located at 709 W. Josephine St., Glenn Alphonso came onto the Vanderhoff property and was escorted off by Michael Vanderhoff. After that point, the Vanderhoffs allege that Glenn then began to curse and threaten Michael Vanderhoff several times every day and night. In addition, Glenn Alphonso also repeatedly re-entered the

Vanderhoff property, despite Michael Vanderhoff's warnings. Michael Vanderhoff even indicated that several times when he drove away from his home, Glenn Alphonso would get into his truck and follow him, and attempt to run him off the road.

When the nuisances began, Michael Vanderhoff indicated that he tried, but was not able, to find Mr. Rosenberger, Jr.'s, telephone number in the telephone directory.

About a week later, the Vanderhoffs claim that Glenn Alphonso, "announced" to Michael Vanderhoff, who was seated in a chair on the Vanderhoff property, that he was going to come over and "f%#@# up" Michael Vanderhoff. When Glenn Alphonso got close to Michael Vanderhoff, Michael Vanderhoff hit him with the club, went inside of the Vanderhoff residence, and locked both doors. However, Glenn and Chris Alphonso came into the house armed with pistols, and broke out the picture glass window on the porch. Michael Vanderhoff called the police, who responded quickly, but Chris and Glenn Alphonso left the scene.

The Vanderhoffs assert that about two days before the last trespass, Michael Vanderhoff tried to flag down Mr. Rosenberg in order to tell him about the trouble he had been having with Glenn Alphonso and to ask him to do something about it. Michael Vanderhoff also states that on one occasion he saw that Mr. Rosenberger, Jr., had stopped by the Alphonso's in the morning and then Mrs. Alphonso and Glenn Alphonso put their painting gear in their van and left. In addition, another resident of the Vanderhoff household, Linda Tarver,<sup>5</sup> testified that she saw Mr. Rosenberger, Jr., drop Mrs. Alphonso off at the end of the workday. She testified

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<sup>5</sup> Ms. Tarver is an adult daughter of the elder Mr. Vanderhoff and sister to Michael Vanderhoff.

that it was as late as 10 p.m.<sup>6</sup> Ms. Tarver further testified that on one of these late night occasions, Mr. Rosenberger, Jr., spoke with Glenn and Chris Alphonso for some time.

It is important to note that the Petition for Assault for Wrongful Death, which has eighteen (18) numbered paragraphs, describes the assault and trespass and describes the elder Mr. Vanderhoff's stroke, his ill-health after the stroke, and subsequent death. The petition also alleges that after Mr. Vanderhoff's funeral, the Alphonsons were videotaped making gestures at the Vanderhoff family.

Particularly, the Vanderhoffs allege that the defendants Addison Construction Company and the Rosenbergers are liable for negligently renting to the Alphonsons. The Vanderhoffs also allege that the Rosenbergers were employers of the Alphonsons (including their adult sons, Chris and Glenn), and that because of the employer/employee relationship, Addison Construction Company and Mr. Rosenberger, Jr., were liable for the assault and alleged wrongful death which occurred as a result of the assault by the Chris and Glen Alphonso.

Russell and Christie Alphonso testified in their depositions that Chris and Glenn were adults and that they were not residents of the rental dwelling; and that the landlord had no knowledge of the complaint of incidents until the lawsuit was filed. Mrs. Alphonso specifically noted that the incident which allegedly caused Mr. Vanderhoff's stroke occurred within a month of her moving into the rental dwelling.

Addison Construction Company and Mr. Rosenberger, Jr., assert that Mr. Rosenberger, Jr., never received any notices or complaints from the Vanderhoffs

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<sup>6</sup> The Vanderhoffs indicated that Mrs. Alphonso admitted to working for Mr. Rosenberger in the past, but when she was deposed, she testified that she did not believe she worked for Mr. Rosenberger during May of 2003.

relating to violence or threats being made by the tenants or occupants of the leased premises at 709 W. Josephine Street. They also state that Mr. Rosenberger, Jr., never received any requests to evict the tenants from the property.

In support of their argument that they had no legal duty, Addison Construction and the Rosenbergers cite: *Terrell v. Wallace*, 98-2595 (La.App. 1 Cir. 12/28/99), 747 So.2d 748 and *Foxworth v. Housing Authority of Jefferson Parish*, 590 So.2d 1347 (La.App. 5 Cir.,1991), in which the courts held that there was no duty to protect against the criminal act of one tenant against another.

In *Terrell*, the mother of murdered tenant brought a wrongful death action in tort and contract against an apartment complex owner, manager, and liability insurer, alleging their failure to prevent criminal actions by a non-resident male. The apartment complex owner, manager, and liability insurer joined in filing a motion for summary judgment. The district court granted the motion. The mother appealed. The First Circuit Court of Appeal, held *inter alia*, that the landowners owed no duty to their tenants to control, or warn against, the criminal actions of third persons.

In *Foxworth v. Housing Authority of Jefferson Parish*, the survivors of a murdered tenant of an apartment complex brought an action against the parish housing authority, which owned and operated complex, seeking to recover damages for the housing authority's failure to protect the decedent from a fatal stabbing by another complex resident. The district court summarily dismissed the case and the survivors appealed. The Court of Appeal affirmed the district court and held that the tenant's complaints to the housing authority regarding threats of the other resident did not create "special relationship" between the housing

authority and tenant, such that the housing authority would have a duty to protect the tenant.

In the instant matter, the record contains a copy of the police report related to the incident which occurred on the property at 701 W. Josephine St. The named arrestee is Chris Alphonso, who was charged with the following: La. R.S. 14:103—*disturbing the peace*; three counts under La. R.S. 14:56—*criminal damage over \$500.00*; La. R.S. 14:37—*aggravated assault*; La. R.S. 14:90 5.1—*felony possession of a firearm*; La. R.S. 14:108 .1— *resisting an officer by flight*; La. R.S. 14:99—*reckless operation of a vehicle*; and La. R.S. 32:52—*no possession of drivers license*. Listed as victims on the report are Michael Vanderhoff, Warren Vanderhoff, Sr., and Delores Granmo.

Although it is clear from the record that something did occur between the Vanderhoffs and the Alphonsons, there is an absence of factual support by the Vanderhoffs that would hold anyone other than Chris and Glenn Alphonso liable for their trespass and damages to the Vanderhoffs.

In addition, the fact that Michael Vanderhoff, and at least one other member of the Vanderhoff residence, noticed that Mr. Rosenberger, Jr., stopped by the Alphonsons on several occasions does not establish an employer/employee relationship. Mr. Rosenberger, Jr., had a right to stop by as the principal of the premises.

Furthermore, the Vanderhoffs could have availed themselves, at any time Mr. Rosenberger, Jr., was present at the adjacent property, of an opportunity to speak with him. This is especially significant considering that they could not find a listing for him in the telephone directory. Although the Vanderhoffs assert that Russell and Christie Alphonso were employed by Mr. Rosenberger, Jr., there is no

factual support for this assertion. For this court to conclude otherwise would be a far stretch. Therefore, we conclude that this assignment of error does not have merit.

**DECREE**

For the foregoing reasons, the judgment of the district court is affirmed.

**AFFIRMED**