HAS TEXAS NUISANCE LAW BEEN BLOWN AWAY BY THE DEMAND FOR WIND POWER?

Kristina Culley*

I. INTRODUCTION

In 2005, a group of West Texas landowners brought a nuisance action against the owners and operators of the Horse Hollow Wind Farm.[1] The suit alleged that offensive light, noise, and vibrations emanating from the wind farm had reduced property values and caused the landowners a loss of enjoyment in their land.[2] Both the trial court and the court of appeals held the homeowners could not prevail because their case was based on aesthetic concerns and emotional reactions. [3] Notably, the Texas Supreme Court denied the petition, leaving the question unanswered by the state's highest court.[4] As wind farms become increasingly prevalent in Texas and elsewhere, the issue of whether a plaintiff can bring a successful private nuisance claim against a wind farm operator remains. Unfortunately for homeowners who live near wind farms, legislation at both the state and federal level is designed to increase the number and capacity of wind farms in the coming years.[5]

This article will use *Rankin v. FPL Energy LLC* as a vehicle from which to examine whether and how wind farms may constitute a private nuisance

* J.D., Baylor Law School, 2009; Claremont McKenna College, 2002.

[1] Petition for Review at 1–2, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[2] *Id.* at 3.

[3] *See* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508, 513 (Tex. App.—Eastland 2008, pet. denied).

[4] Rankin v. FPL Energy, LCC, No. 11-07-00074-CV, 2009 Tex. LEXIS 138, at *1 (Tex. Apr. 17, 2009) (denying petition).

[5] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (scattered throughout 2–49 U.S.C.); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765; Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4421(scattered throughout 2–50 U.S.C.).

in Texas.[6] Section I provides background on wind energy and its dramatic expansion in recent years. Section II explores the facts and legal arguments that gave rise to *Rankin*. Section III overviews the historic origins and modern development of nuisance law in Texas. Section IV surveys of the interrelation of wind farms and nuisance law in other states. Finally, Section V addresses the future potential for litigation involving wind farms and affected homeowners.

II. THE GROWING INFLUENCE OF WIND POWER

In Texas, wind energy is booming. Texas is the largest wind power producer in the nation, generating about 7118 megawatts per year.[7] However, Texas is not alone. The wind energy business is rapidly expanding nationwide.[8] While wind power has been generated in the United States since the early 1980s, relatively slow growth occurred until 2001.[9] From 2000 to 2001, cumulative generation capacity in the United States jumped from 2579 MW to 4273 MW.[10] Today, cumulative capacity for the United States is 25,369 MW.[11]

The demand for wind energy is increasing, and many states, including Texas, have responded by bringing large next-generation facilities online. In 2008, Texas installed more new wind capacity than any other state in the nation.[12] In fact, in 2008, only China and the United States as a whole added more new wind energy capacity than Texas.[13] The four largest wind farms in the United States are located in Texas—the largest being the Horse

[6] 266 S.W.3d 506.

[7] *See* American Wind Energy Association, *Annual Wind Energy Report: Year Ending 2008* 4 (2009), http://www.awea.org/publications/reports/AWEA-Annual-Wind-Report-2009.pdf [hereinafter *Annual Wind Energy Report*]. The ability to generate electricity is measured in watts. Megawatts (MW) are units of 1 million watts. An average U.S. household uses about 10,655 kilowatt-hours (kWh) of electricity each year. One megawatt of wind energy can generate from 2.4 to more than 3 million kWh annually. Therefore, a megawatt of wind generates about as much electricity as 225 to 300 households use. *Id.*

[8] *See id*.

[9] *See id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 8.

[13] *Id.*

Hollow Wind Farm outside Abilene.[14] The Horse Hollow Wind Farm came online during 2005 and 2006.[15] The recent expansion has brought most of the large wind farms in Texas and around the country online in the last five years.[16] The new generation facilities are changing the face of the land where they are installed. These statistics set the stage for conflicts between existing landowners in the relatively open and rural areas and the new power generation facilities that have sprung up in the last couple of years.

Wind power provides a clean source of electricity.[17] It has been promoted and marketed as potentially reducing American dependence upon foreign oil.[18] Despite the political endorsement of wind energy, local homeowners and environmental groups have fought new wind farm projects all around the country.[19] Environmental groups largely protest the placement of the turbines and their harmful effect upon migratory birds and bats.[20] Landowners protest the wind farms because of the expected loss in value to their property.[21] There is also growing concern over the health effects of living near a wind farm.[22] In addition to a decrease in property

[14] *Id.* at 14; State Energy Conservation Office, Texas Wind Energy, http://www.seco.cpa.state.tx.us/re_wind.htm (last visited Sept. 9, 2009).

[15] *Annual Wind Energy Report*, *supra* note 7, at 14.

[16] *Id*.

[17] State Energy Conservation Office, *supra* note 14. Power generated by the wind is called a clean source of electricity because its production does not produce pollution or greenhouse gases. According to the Texas State Conversation Office, the use of wind power for our energy needs displaces approximately 23 million tons of carbon dioxide (the leading greenhouse gas) each year, which would otherwise be emitted by other energy sources. Furthermore, wind projects use no water in the generation of electricity. *Id.*

[18] *See, e.g.*, PickensPlan.com, The Plan, http://www.pickensplan.com/theplan/ (last visited Sept. 9, 2009). The well-publicized Pickens plan highlights the United States' dependence upon foreign oil. *Id*. The plan calls for expanding the use of domestic renewable resources, such as wind and solar, in power generation and using supplies of natural gas as a transportation fuel, replacing the need for some of the imported oil. *Id.*

[19] *See, e.g.*, Kerncrest Audubon Soc'y v. City of Los Angeles Dep't of Water and Power, No. F050809, 2007 WL 2208806, at *2–3 (Cal. Ct. App. Aug. 2, 2007); Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power, PLC, No. 05-1025-JTM, 2005 WL 427503, at *1 (D. Kan. Feb. 22, 2005).

[20] *See, e.g.*, *Kerncrest Audubon Soc'y*, 2007 WL 2208806, at *2–3; *Flint Hills Tallgrass Prairie Heritage Found.*, 2005 WL 427503, at *1.

[21] *See, e.g.*, Petition for Review at 6, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[22] *See, e.g.*, Wind Turbine Syndrome: Diaries & Reports, http://www.windturbinesyndrome.com/?p=3205 (last visited July 13, 2009).

values, the plaintiffs in *Rankin* claimed to have suffered from despair, anxiety and insomnia since the construction of the wind farm.[23] Anecdotal accounts from people around the world living near wind farms reflect similar reactions to the noise and vibrations created by the turbines.[24]

This article does not seek to discuss the benefits and detriments of wind energy; rather, the background information is intended to provide an understanding of the size and scale of these machines.[25] Wind turbines and wind farms vary greatly in size and extent.[26] Small wind turbines are available for purchase for residential and personal power generation.[27] However, the turbines used in large-scale wind generation facilities are considerably larger.[28] Most utility scale wind turbines are installed on towers ranging approximately 190–260 feet in height; industry trends show the size of the towers continuously increasing with some turbines exceeding 328 feet in height.[29] As a point of comparison, the new Dallas Cowboys stadium is approximately 300 feet in height at its highest point.[30]

The Horse Hollow Wind Farm, the subject of *Rankin v. FPL Energy*,[31] is currently the largest wind farm in the country.[32] NextEra Energy Resources, Horse Hollow's owner and operator, claims Horse Hollow to be the largest wind generation center in the world.[33] Horse Hollow consists of

[23] Petition for Review at 6, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[24] *See, e.g.*, Wind Turbine Syndrome, *supra* note 22.

[25] *See infra* Part I (two diagrams that generally convey scale of individual turbines).

[26] *Annual Wind Energy Report*, *supra* note 7.

[27] *See* American Wind Energy Association, Small Wind: Buying a Small Wind System, http://www.awea.org/smallwind/faq_buying.html (last visited Sept. 11, 2009).

[28] *Annual Wind Energy Report*, *supra* note 7.

[29] *Id.* 100 meters is the equivalent of 328 feet. National Institute of Standards and Technology, Appendix C: General Tables of Units of Measurement C7 (2008), http://ts.nist.gov/WeightsAndMeasures/Publications/upload/h4402_appenc.pdf.

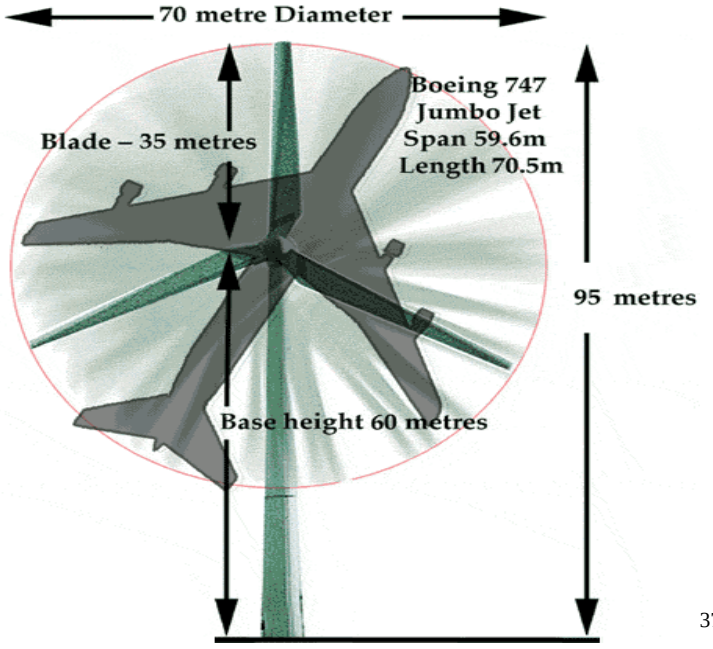
[30] Cowboys Stadium, *Architecture Fact Sheet* 1, http://stadium.dallascowboys.com/assets/pdf/mediaArchitectureFactSheet.pdf (last visited Sept. 9, 2009).

[31] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 (Tex. App.—Eastland 2008, pet. denied).

[32] NextEra Energy Resources, Horse Hollow Wind Energy Center, http://www.nexteraenergyresources.com/content/where/portfolio/pdf/horsehollow.pdf (last visited Sept. 9, 2009).

[33] *Id.*

more than 400 turbines spread over approximately 47,000 acres of land.[34] According to NextEra Energy, each turbine at Horse Hollow is more than 260 feet in height from the ground to the center of the blade hub.[35] The total height of these turbines is approximately 400 feet from the base to the top of the blades.[36]



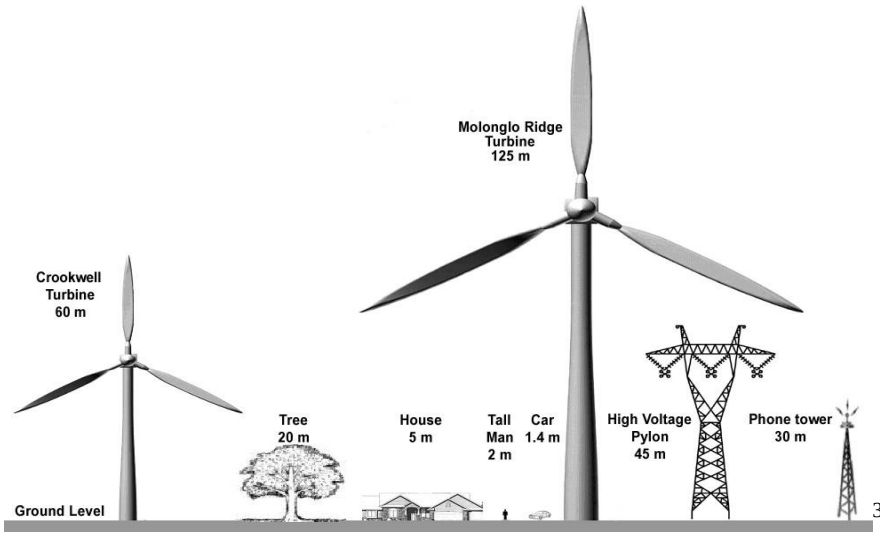
[37]

[34] Industrial Wind Energy Opposition, Areas of Industrial Wind Facilities, http://www.aweo.org/windarea.html (last visited Sept. 9, 2009).

[35] Petition for Review at 1, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[36] 2.3 MW Siemens turbines stand 398 feet tall, as does the 1.5MW GE turbine in total height. Industrial Wind Energy Opposition, Size Specifications of Common Industrial Wind Turbines, http://aweo.org/windmodels.html (last visited Sept. 9, 2009).

[37] Industrial Wind Energy Opposition, Photos and Diagrams of Wind Turbine Size, http://aweo.org/windsize.html (last visited Sept. 9, 2009) (diagram is in meters; 95 meters is 311 feet). The facts of *Rankin* indicate that some of the turbines at Horse Hollow Wind Farm exceed 400 feet. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 511 (Tex. App.—Eastland 2008, pet.



[38]

III. *RANKIN V. FPL ENERGY, LLC*

In *Rankin*, several individuals and one corporation filed suit against the owners and operators of Horse Hollow Wind Farm.[39] The plaintiffs, hereinafter referred to as Rankin, sought injunctive relief and asserted public and private nuisance claims relating to the construction and operation of Horse Hollow Wind Farm.[40] Rankin alleged that noise, vibrations and the aesthetic impact of the wind turbines had interfered with the use and enjoyment of their land and caused a loss of property value.[41] The visual impact included hundreds of blinking red lights at night and both flickering shadows and a strobe effect at dusk and dawn.[42]

The primary defendant in this case was FPL Energy, LLC, the owner

denied).

[38] Coalition to Protect Amherst Island, Visual Pollution Diagram, http://protectai.ca/ (follow "Visual Impacts" hyperlink) (last visited Sept. 9, 2009).

[39] 266 S.W.3d at 508.

[40] *Id.*

[41] Petition for Review at 6, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[42] *Id.* at 2, 5. *See also* Protect Our West Texas Landscape, Rankin Ranch, http://www.powtl.com/?pid=8 (last visited Sept. 10, 2009) (before and after images).

and operator of Horse Hollow Wind farm.[43] The defendants focused on the aesthetic nature of the plaintiff's injury and moved for summary judgment on the grounds that Texas does not recognize aesthetic impact as a basis for private nuisance.[44] The trial court granted this motion and the case went to trial on the remaining nuisance claim issue of whether the noise generated by the turbines constituted a private nuisance.[45] The jury returned a verdict in favor of the defendants.[46]

On appeal, the Eleventh Court of Appeals affirmed by characterizing plaintiff's injuries primarily as emotional:

> [I]f the wind farm is a nuisance, it is because Plaintiffs' emotional response to the loss of their view due to the presence of numerous wind turbines substantially interferes with the use and enjoyment of their property. . . . One Texas court has held that an emotional response to a defendant's lawful activity is insufficient.[47]

While admitting that a lawful business can be considered a nuisance if it is abnormal and out of place in its surroundings, the court of appeals determined that merely characterizing the wind farm as abnormal and out of place does not permit a nuisance claim based on an emotional reaction to the sight of the wind farms.[48] The court went on to note, "Texas case law recognizes few restrictions on the lawful use of property."[49] Case law has balanced the competing interests of each property owner by limiting nuisance actions involving lawful activity to instances where the lawful

[43] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 (Tex. App.—Eastland 2008, pet. denied). There were six named defendants in the original petition, but all defendants were related subsidiaries of Florida Power & Light (FPL). *Id.* FPL Energy, LLC, the branch of FPL focused on clean and renewable power generation, changed its name to NextEra Energy in January 2009. Press Release, NextEra Energy Resources, FPL Energy to Change Name to NextEra Energy Resources (Jan. 7, 2009) (on file with author), *available at* http://www.nexteraenergyresources.com/news/contents/2009/010709.shtml.

[44] *Rankin*, 266 S.W.3d at 508.

[45] Petition for Review at 7, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[46] *Rankin*, 266 S.W.3d at 508.

[47] *Id.* at 511 (citing Maranatha Temple, Inc. v. Enter. Prod. Co., 893 S.W.2d 92, 100 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

[48] *Id.* at 512.

[49] *Id.*

activity results in some invasion of the plaintiff's property.[50] The court of appeals concluded that "[a]ltering this balance by recognizing a new cause of action for aesthetical impact causing an emotional injury is beyond the purview of an intermediate appellate court."[51]

Plaintiffs appealed their case to the Texas Supreme Court, which denied review.[52] While the plaintiffs in this particular case failed to establish a cause of the action, the state of the law in this area is still unclear. Like most nuisance cases, the ultimate disposition turned upon the evidence presented in the case and the characterization it received:

> [Plaintiffs' affidavits] express a consistent theme: the presence of numerous 400-foot-tall wind turbines has permanently and significantly diminished the area's scenic beauty and, with it, the enjoyment of their property. . . . [Plaintiff Brasher stated that she and her husband] had plans for building and operating a small bed and breakfast but cancelled those plans in response to the wind farm. Brasher characterized the presence of the wind farm as the 'the death of hope.'[53]

Given the growing presence of wind farms, it is likely that the wind farm industry will affect more people in Texas and the United States; therefore, it will be increasingly important for the legal community to understand how, and if, wind farms fit into the law of private nuisance.

IV. THE LAW OF NUISANCE

Homeowners, like the Rankins, must turn to nuisance law for relief. Since there is no physical invasion of their property, there is no trespass.[54] The plaintiffs' action is a nuisance claim alleging that the defendant's use of the land as a wind farm interferes with their use and enjoyment of land.[55]

---

[50] *Id.*

[51] *Id.*

[52] Rankin v. FPL Energy, LLC, No. 11-07-00074-CV, 2009 Tex. LEXIS 138, at *1 (Tex. Apr. 17, 2009).

[53] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 511(Tex. App.—Eastland 2008, pet. denied).

[54] Kennedy v. Gen. Geophysical Co., 213 S.W.2d 707, 712 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e).

[55] Petition for Review at 3, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex.

Like most property actions, nuisance law has its origins in the English common law.[56]

The concept of nuisance is fundamental to property law, yet to this day, it is a rather muddled and perplexing area of the law. In 1942, Dean William Prosser wrote on the subject of nuisance describing it as a legal garbage can:

> The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie. Coupled with the dubious notion of 'attraction,' it has been applied even to conditions dangerous to trespassing children. . . . There is a deplorable tendency to use the word as a substitute for any thought about a problem, to call something a 'nuisance' and let it go at that.[57]

Despite the passage of time, the current Prosser and Keeton hornbook suggests that nuisance law remains ill defined: "There is general agreement that [nuisance] is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem."[58]

A. Historical Origins

The word nuisance first appeared in connection with interferences with servitude or other rights to the free use of land.[59] Nuisance originated as a criminal action at common law but, over time, morphed into an action limited strictly to the interference with the use or enjoyment of land.[60] This type of cause of action addressed the interference with an individual's use or enjoyment in land and was referred to as a private nuisance.[61] During this same historical period, the concept of public nuisance also developed.[62]

LEXIS 138 (Tex. 2009).

[56] William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 411 (1941–1942).

[57] *Id.* at 410.

[58] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86(1), (4) (W. Page Keeton et al. eds., West Publishing Co. 5th ed. 1984).

[59] Prosser, *supra* note 56, at 411.

[60] *Id.*

[61] *Id.*

[62] *Id.*

Public nuisance was an action to redress infringement on the rights of society or the rights of the crown.[63] There remains a critical distinction between the two: public nuisance is an interference with the rights of the community, and private nuisance is an interference with the rights of an individual landowner or landowners. A private nuisance does not become a public nuisance simply because it affects many individuals.[64] In order for some interference to become a public nuisance, the injury must affect a public right.[65]

Private nuisance is defined as a non-trespassory invasion of another's interest in the private use and enjoyment of land.[66] Unlike trespass, a private nuisance does not require any entry or invasion of the land of another. Some interferences may be both a trespass and nuisance, but nuisance does not require any physical invasion in a conventional sense.[67] The critical determination is whether there is interference with the use and enjoyment of land.

B. Elements

Generally, the elements of a nuisance cause of action are: (1) the plaintiff had a private interest in land,[68] (2) the defendant interfered with or

[63] *Id.*

[64] *Id.* at 413.

[65] *Id.*

[66] RESTATEMENT (SECOND) OF TORTS § 821D (2001); GTE Mobilenet of S. Tex. Ltd. P'ship v. Pscouet, 61 S.W.3d 599, 615 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[67] From this point on the term "nuisance" refers only to private nuisance unless otherwise expressly stated by the Author.

[68] RESTATEMENT (SECOND) OF TORTS § 821E (1997) ("For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including (a) possessors of the land, (b) owners of easements and profits in the land, and (c) owners of non-possessory estates in the land that are detrimentally affected by interferences with its use and enjoyment."). Fort Worth & Rio Grande Ry. v. Glenn, 80 S.W. 992, 993–94 (Tex. 1904) (holding that a current owner of land can maintain an action for private nuisance if the injury occurred while the plaintiff owned the land); Denman v. Citgo Pipeline Co., 123 S.W.3d 728, 734 (Tex. App—Texarkana 2003, no pet.) (holding that plaintiff could not maintain suit against Defendant because injury occurred before Plaintiff purchased land and deed contained no assignment of cause of action from past owner); Schneider Nat'l Carriers, Inc v. Bates, 147 S.W.3d 264, 268 n.2 (Tex. 2004) (holding that tenant has standing to assert nuisance complaint); Freedman v. Briarcroft Prop. Owners, Inc., 776 S.W.2d 212, 215–16 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (holding that a property owner's association, which had duty to ensure the safety and maintenance of subdivision, had standing to enforce deed

invaded the plaintiff's interest by conduct that was (a) negligent, (b) intentional and unreasonable, or (c) abnormal and out of place in its surroundings; (3) defendant's conduct resulted in a condition that substantially interfered with the plaintiff's private use and enjoyment of the land; and (4) the nuisance caused injury to the plaintiff.[69] It should be noted that there is no single case that lays out the elements of nuisance; case law tends to only address the elements at issue in a given case.[70]

C. Defendant's Conduct

For a nuisance claim to be actionable, a defendant must generally engage in one of three kinds of activity: (1) an intentional invasion of another's interest; (2) a negligent invasion of another's interests; or (3) other conduct, culpable because it is abnormal and out of place in its surroundings, that invades another's interest.[71]

1. Intentional Invasion

A private nuisance may be actionable where the defendant is making an intentional and unreasonable use of his property.[72] The issue that has been historically litigated is what conduct constitutes an unreasonable use of property.[73] One early Texas case on nuisance, *Gulf, C. & S. F. R. Co. v. Oakes*, stated the accepted principle that:

> Since the owner may use his land as he chooses, if he does not violate any law, and is not to be substantially deprived of its use or of the ordinary pursuit of his own interests, but, at the same time, is required in its use to avoid injury to

restrictions).

[69] City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1997) (regarding element 2); Vestal v. Gulf Oil Corp., 235 S.W.2d 440, 442 (Tex. 1951) (regarding element 2); Aguilar v. Trujillo, 162 S.W.3d 839, 850–51 (Tex. App.—El Paso 2005 pet. denied) (regarding elements 2 and 4); Hicks v. Humble Oil Ref. Co., 970 S.W. 2d 90, 96 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (defining elements 2 and 3); RESTATEMENT (SECOND) OF TORTS § 822 (1997) (using different phrasing of the elements).

[70] *See, e.g.*, *Likes*, 962 S.W.2d at 503; Maranatha Temple, Inc. v. Enter. Prods. Co., 893 S.W.2d, 92, 98–99 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied).

[71] *Aguilar*, 162 S.W.3d at 850–51.

[72] RESTATEMENT (SECOND) OF TORTS § 822(a); *see King*, 152 F.2d at 640–42.

[73] Gulf, C. & S. F. R. Co. v. Oakes, 94 Tex. 155, 58 S.W. 999, 1001 (1900).

> another, it at once follows that he may be required to forego a particular use when it is not essential to the substantial enjoyment of his property, and is fraught with unreasonable loss to his neighbor. On the other hand, the particular use may be so important to the owner and the loss or inconvenience to his neighbor so slight compared to his, were he forbidden to so employ his property, that it would be unreasonable and unjust to impose such a restriction.[74]

In *Gulf*, the neighboring landowner filed suit against the Gulf, Colorado & Santa Fe Railroad Company for planting Bermuda grass on its right of way.[75] The Bermuda grass spread onto the plaintiff's property, injuring the plaintiff's farm.[76] In holding that the planting of Bermuda grass was not a nuisance, the Texas Supreme Court focused on the fact that the defendant was not engaged in an unlawful activity and that planting such grass was not an unjustifiable use of their property.[77]

Ten years later in *Gose v. Coryell*, the court found that it was not the lawfulness of the activity in question that determined a nuisance.[78] "[T]he lawfulness of the act, use, or business is not the sole test, and that which is not otherwise unlawful may constitute a nuisance by reason of the surrounding circumstances and the result which it produces."[79] Rather, it was the circumstances and the result produced that were determinative:

> A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case, and, where the use made of his property by the person complained of is not unreasonable, it will not as a rule be enjoined, nor can a person complaining thereof recover damages. But when it is established that a person is creating a nuisance, the mere

[74] *Id.*

[75] *Id.* at 999.

[76] *Id.*

[77] *Id.* at 1002.

[78] 59 Tex. Civ. App. 504, 126 S.W. 1164, 1168 (Austin 1910, no writ).

[79] *Id.*

> fact that he is doing what is reasonable from his point of view constitutes no defense.[80]

Acknowledging the *Gulf* court's decision a few years earlier, the *Gose* court cited the proposition from *Gulf* that there was no bright line rule of law.[81] Rather, it would depend upon the balancing of the various interests involved:

> For this reason, we think it cannot be laid down as a rule of law applicable to all circumstances and situations that one who plants Bermuda grass upon his premises makes himself liable for any damage that may result to his neighbor; nor, on the other hand, that he may not be liable under some circumstances and conditions. As is said in some of the authorities, there must in such inquiries, where rights and interest seem to conflict, be a balancing of them.[82]

The principle suggested by these cases is explicitly affirmed in the Restatement of Torts:

> Not every intentional and significant invasion of a person's interest in the use and enjoyment of land is actionable, even when he is the owner of the land in fee simple absolute and the conduct of the defendant is the sole and direct cause of the invasion. . . . It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.[83]

Therefore, determining unreasonableness requires a specific case-by-case inquiry. Some conduct may be unreasonable in one set of circumstances, but not in another. Compensation will follow only in those situations where the interference with property exceeds the bounds where an individual is expected to bear the loss.[84]

---

[80] *Id.* at 1168.

[81] *Id.* at 1169.

[82] *Id.*

[83] RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1997).

[84] *Id.*

2. Negligent Invasion

Negligent conduct may be either:

> (a) an act that the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
>
> (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.[85]

A nuisance may be, and often is, the consequence of negligence.[86] For instance, where *A* operates a race track within a certain city, his use is lawful and in most instances will not be a nuisance.[87] But where *A* fails to properly sound proof the race track, such that noise from the race car engines is projected into the surrounding neighborhood, *A*'s operation of the race track could be negligent. Similarly, if dust and debris from the race track were being blown into neighboring residential areas because *A* failed to maintain the race track properly, then *A*'s poor maintenance could constitute negligence.

3. Other Culpable Conduct

The third type of actionable activity is one that is culpable because the activity is out of place in its surrounding.[88] It is the type of activity that is generally lawful and beneficial, but may be a nuisance solely because it has been located in an inappropriate place. The famous Supreme Court case *Village of Euclid v. Amber Realty Co.*, aptly described such a situation.[89] "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."[90]

An example of an activity that constitutes a nuisance due to its inappropriate location can be found in *Rylands v. Fletcher*—a famous

---

[85] RESTATEMENT (SECOND) OF TORTS § 284 (1997).

[86] King v. Columbian Carbon Co., 152 F.2d 636, 639 (5th Cir. 1945).

[87] *See* Luensmann v. Zimmer-Zampese & Assocs., Inc., 103 S.W.3d 594, 601 (Tex. App.—San Antonio 2003, no writ) (holding that noise and smoke caused by raceway was insufficient).

[88] Aguilar v. Trujillo, 162 S.W.3d 839, 850–51 (Tex. App.—El Paso 2005, pet. denied).

[89] 272 U.S. 365, 388 (1926).

[90] *Id.*

English case, in which the defendants built a reservoir on their land.[91] The reservoir broke and flooded the property of the adjoining neighbor, rendering the neighbor's coal mine useless.[92] The neighbor sued for damages and the English court found for the neighbor plaintiff.[93] A reservoir built on land will certainly not constitute a nuisance in every circumstance; although, in this case it did. It was a remarkable decision in which the court recognized a nuisance action irrespective of fault. English law had long recognized that intentional and negligent conduct could cause a nuisance, but liability without fault was something new. This strict liability was based on the idea of creating conditions that were abnormal or un-natural in the place where defendant placed them. The court stated the principle of strict liability for "non-natural" uses of land:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[94]

For many years in Texas, there was a dispute as to whether the courts of this state would accept liability without fault.[95] Today this issue has been settled, as it is widely recognized that intentional or negligent conduct is not required for a nuisance cause of action.[96]

---

[91] (1868) 3 L.R.E. & I. App. 330, 311 (H.L.).

[92] *Id.* at 332.

[93] *Id.* at 330.

[94] *Id.* at 339–40.

[95] *See* Turner v. Big Lake Oil Co., 128 Tex. 155, 156, 96 S.W.2d 221, 222 (1936) (rejecting the principle of liability without fault in Texas); *but see* Prosser, *supra* note 56, at 422–23 (suggesting that a close reading of *Turner v. Big Lake Oil Co.*, does not completely reject the application of *Rylands v. Fletcher* in Texas and may have been based on a desire to protect the oil industry).

[96] City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1996) ("Courts have broken actionable nuisance into three classifications: . . . other conduct, culpable because abnormal and out of place in its surroundings." (citing Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied)).

D. Substantial Interference to Persons of Ordinary Sensibilities

Once it is determined that the defendant's conduct or activities will fit into one of the three conduct categories, there are still more hurdles for a successful plaintiff to clear. The defendant's use must work a substantial interference on the plaintiff's use and enjoyment of land.[97] The plaintiff must be able to show an actual injury.[98] The other aspect to this element is that it must be a substantial interference in the eyes of a person of ordinary sensibilities.[99] It is not enough that the plaintiff subjectively believe that the defendant's conduct interferes with his or her use of land.[100]

So, how do courts determine what constitutes a substantial interference to a person of ordinary sensibilities? The Restatement of Torts and Texas case law provide some guidance. According to the Restatement of Torts, significant harm is harm "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."[101] Stated differently, an interference is substantial if it "involves more than slight inconvenience or petty annoyance."[102] Texas cases have found a nuisance if there is a "condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[103] As Dean Prosser stated, it must be "calculated to inconvenience a reasonable man 'or ordinary sensibilities.'"[104]

According to the Restatement, "the standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant."[105] Courts should also consider location, character, and habits of the particular community in determining

[97] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied).

[98] *See id.* at 508.

[99] *Id.* at 509.

[100] *See id.* at 508.

[101] RESTATEMENT (SECOND) OF TORTS § 821F (1997).

[102] City of Temple v. Mitchell, 180 S.W.2d 959, 962 (Tex. Civ. App.—Austin 1944, no writ).

[103] Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269 (Tex. 2004).

[104] Prosser, *supra* note 56, at 415.

[105] RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (1997).

what constitutes an offensive invasion.[106] For instance, machinery that makes noise both day and night would probably not constitute a nuisance in the middle of New York City. However, the same noise in the countryside of Texas may very well constitute a nuisance.

The policy balance being struck by courts aims to differentiate between those activities that would be objectively offensive and those activities that affect only specific persons because of a unique sensitivity or proclivity. For example, a hypersensitive nervous individual cannot base an action for private nuisance upon:

> [T]he normal ringing of a church bell across the street from his house, on the ground that the noise has become so unbearable to him that it throws him into convulsions and threatens his health or even his life, if a normal member of the community would regard the sound as unobjectionable or at most a petty annoyance.[107]

Similarly, if an individual lives in close proximity to a race track and is particularly sensitive to dust due to a health condition, he cannot establish the elements of a nuisance action if a person of ordinary sensibilities would not be affected by the dust.

Courts are rightfully suspicious of hypersensitive individuals or subjective claims of interference with use and enjoyment. At common law, the only remedy was to enjoin the use. Therefore, courts were careful to find nuisances only in situations where interference with the enjoyment and use of land was supported by objective criteria.[108] While the remedies for a nuisance have been expanded to include monetary damages, the consequences for finding a nuisance are serious. For that reason, courts will not lightly find that the defendant's use of his land constitutes a substantial inference.

E. Balancing of the Equities

There are two remedies for a nuisance. The first is to enjoin or abate the nuisance. The second is to award the injured plaintiff monetary damages. It is well recognized that the abatement of a lawful business due to nuisance

[106] *Id.* at cmt. e.

[107] *Id.* at cmt. d.

[108] *Id.* at cmt. c.

is a harsh remedy.[109] And it is the harshness of the first remedy that has shaped nuisance law.

Where an equitable remedy is requested, courts have the discretion to not find a particular use to be a nuisance, even if the interference generally meets the elements of a nuisance. Courts may take into consideration the social and public benefits of the potential nuisance.[110] This doctrine is called the "balancing of the equities."[111] Texas case law has embraced the balancing of the equities test developed by common law, and its application in Texas is very broad. The Texas Supreme Court held that "[a]ccording to the doctrine of 'comparative injury' or 'balancing of equities' the court will consider the injury which may result to the defendant and the public by granting the injunction as well as the injury to be sustained by the complainant if the writ be denied."[112] At their discretion, courts can balance the future harm that would be suffered by other parties in addition to the harm that the public would suffer if the defendant's use would be enjoined.[113] Even where the jury has found a nuisance, courts can refuse to abate it.[114]

Alternatively, the plaintiff may sue to recoup the loss in the market

[109] 58 AM. JUR. 2D *Injunctions Against Businesses* § 313 (2002).

[110] *See, e.g.*, Storey v. Cent. Hide & Rendering Co., 226 S.W.2d 615, 618–19 (Tex. 1950).

[111] *Id.* The English case of *St. Helen's Smelting Co. v. Tipping* is credited with birth of the balancing of the equities doctrine. (1865) 11 Eng. Rep. 1483 (H.L.). Lord Westbury stated that personal sensibilities can be subjected to a balancing of the equities:

> With regard to . . . personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large.

Id. at 1486.

[112] *Storey*, 226 S.W.2d at 618–619.

[113] Tex. Lime Co. v. Hindman, 300 S.W.2d 112, 123 (Tex. Civ. App.—Waco), *aff'd*, 157 Tex. 592, 305 S.W.2d 947 (1957) (holding operation of lime plant was a useful business and injunction would harm society in favor a few individuals).

[114] Schiller v. Raley, 405 S.W.2d 446, 447 (Tex. Civ. App.—Waco 1966, no writ); Fargason v. Econ. Furniture, Inc., 356 S.W.2d 212, 215 (Tex. Civ. App.— Austin 1962, writ ref'd n.r.e.).

value of his property.[115] The balancing of the equities doctrine does not apply to a legal remedy, but the doctrine is probative in understanding courts' reluctance to harm lawful businesses in favor of a few. This is recognition that payment of monetary damages can have the same effect as an injunction.

F. Texas Nuisance Law as Applied to Rankin

The plaintiffs in *Rankin* alleged a number of different actions against the operators of Horse Hollow. First, they alleged that the noise interfered with the use and enjoyment of their land.[116] Second, they alleged that vibrations from the wind turbines were invasive and interfered with their use of the land.[117] Third, the plaintiffs claimed the wind turbines were unsightly and destroyed the picturesque countryside around Abilene.[118] Finally, they alleged that the installation of the wind turbines resulted in a loss of property value.[119]

1. Aesthetic Nuisances

Aesthetic nuisances were not recognized at common law and have not been recognized in Texas.[120] The Missouri case of *Ness v. Albert* demonstrates the judicial distrust of aesthetic nuisances.[121] In *Ness*, the plaintiffs sued alleging that the storage of rusted appliances and a partially burned mobile home was a nuisance.[122] Ruling against the plaintiffs, the court noted that unsightliness alone could not constitute a nuisance.[123] In support of this determination, the Missouri court held:

---

[115] Schneider Nat'l Carrier, Inc. v. Bates, 147 S.W.3d 264, 276 (Tex. 2004).

[116] Petition for Review at 2, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 3.

[120] Cont'l Oil Co. v. Wichita Falls, 42 S.W.2d 236, 241 (Tex. Comm'n App. 1931) (concerning gasoline filling station); Davis v. Joiner, 140 S.W. 252, 253 (Tex. Civ. App.—Dallas 1911, no writ) (concerning a barn); Sanders v. Miller, 52 Tex. Civ. App. 372, 376, 113 S.W. 996, 998 (Texarkana—1908, no writ) (concerning a pool).

[121] 665 S.W.2d 1, 2 (Mo. Ct. App. 1983).

[122] *Id.* at 1.

[123] *Id.* at 2.

> Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice-versa. What is aesthetically pleasing to one may totally displease another—"beauty is in the eye of the beholder". Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty.[124]

This viewpoint has come under attack in recent years by legal scholars, who believe that the non-recognition of aesthetic nuisances by courts ignores modern realities about real property.[125] These legal thinkers believe that a substantial interference can be shown through a diminution in value or loss of use. For instance, if property containing a beach house was highly valued for its ocean views, its use and value would be substantially reduced if some large object obstructed or blocked the ocean view. However, despite this movement to change the law, Texas currently, like most jurisdictions, does not recognize a nuisance based on an aesthetic interference.

Emotional considerations alone are similarly disregarded as not constituting a substantial injury. A Texas court of appeals has held that an emotional response to a defendant's lawful activity is insufficient.[126] A purely emotional injury is more subjective than an aesthetic inference with enjoyment and use of land. Emotional injuries and responses are by their nature unique to their holder; therefore, there is no objective test for courts to employ. A court would essentially have to accept the plaintiff's statement as true that defendant's use of land caused an emotional injury.

As a general rule, courts do not like to find a nuisance. Consistent with the Texas case law, both the trial court and appellate court in *Rankin*

---

[124] *Id.*

[125] Robert R. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 2, 9 (2002); George P. Smith II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 54–55 (1991).

[126] Maranatha Temple, Inc. v. Enter. Prods. Co., 893 S.W.2d 92, 100, 100 n.6 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

dismissed the aesthetic nuisance issues.[127] Absent another ground to rely upon, the current state of the law renders it almost impossible for a plaintiff to prevail on a nuisance claim based primarily upon aesthetic interferences.

2. Vibrations

The plaintiffs' second claim was that the vibrations caused by the wind turbines interfered with the use and value of their land. Vibration, unlike aesthetic interferences, has been recognized in Texas as a valid basis for a nuisance suit. Vibration can rise to the level of a nuisance where the vibration produces actual physical discomfort and annoyance.[128] *Gainesville H&W R. Co. v. Hall* was the first Texas case to recognize vibration as actionable in a nuisance claim.[129] The plaintiff landowner sued the Gainesville H&W Railroad for damages to his property.[130] The plaintiff's home stood only twenty-six feet from the south boundary of his property and about sixty feet from where the trains ran.[131] The damage to the plaintiff's property was caused by "reason of the vibration, noise, smoke and noxious vapors and cinder incident to the running of the trains."[132] The court found that the plaintiff's property was damaged by the railroad's use because it had damaged the value of the plaintiff's home.[133]

Despite the recognition of vibration as an interference with the use and enjoyment of land, it is difficult for plaintiffs to prevail on nuisance claim based on vibration. A recent 2003 case illustrates this challenge.[134] The plaintiffs filed a nuisance action against a drag strip that had opened approximately 700 feet from the plaintiff's home—a home which had been in the plaintiff's family since 1947.[135] The plaintiffs complained that

[127] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512–13 (Tex. App.—Eastland 2008, pet denied).

[128] Mo., K. & T. Ry. Co. of Tex. v. Anderson, 81 S.W. 781, 788 (Tex. Civ. App.—Austin 1904, writ ref'd).

[129] 78 Tex. 169, 14 S.W. 259, 260 (1890).

[130] *Id.* at 259.

[131] *See id.*

[132] *Id.*

[133] *Id.* at 260.

[134] Luensmann v. Zimmer-Zampese & Assocs., Inc., 103 S.W.3d 594, 601 (Tex. App.—San Antonio 2003, no pet.).

[135] *Id.* at 596.

vibrations caused by the races shook their home.[136] Additionally, they complained of noise and smoke caused by the raceway.[137] However, the jury did not find the noise and vibration given off by the track sufficient to be a nuisance.[138] The court of appeals affirmed that no nuisance per se was established, because the track only conducted races on certain nights, and the plaintiffs alleged neither that the race track was a nuisance when it was closed, nor that the track was operating in violation of law.[139] Notably, the court also considered the neighborhood's close proximity to I-10, railroad tracks, and a gun range.[140]

In *Rankin*, the plaintiffs' pleadings indicated that vibrations were part of their cause of action, but there was no discussion of the vibration in the court of appeals' opinion.[141] The procedural history of the case is probably responsible for this result.[142] The plaintiffs appealed the partial summary judgment of their visual impact claims.[143] Their other nuisance claims proceeded to the jury and were denied.[144] It is unclear what evidence the plaintiffs presented on vibration.[145] Since they did not challenge the factual or legal sufficiency of the verdict, it is likely the evidence was not persuasive.[146] *Rankin* leaves open the possibility that a future plaintiff could make out a successful nuisance action based upon vibrations caused by wind turbines. However, case law suggests a plaintiff has a rather high hurdle to overcome. A plaintiff should argue, at least, that the vibrations are continuous and disruptive.

---

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 598, 601.

[140] *Id.* at 601.

[141] Petition for Review at 2, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009); *see generally* Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. denied).

[142] *See Rankin*, 266 S.W.3d at 508.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* None of the three issues on appeal included legal or factual sufficiency challenges. *Id.*

3. Noise

In *Rankin*, the plaintiffs also asserted that noise coming from the turbines interfered with their use and enjoyment of land.[147] Just like vibration, noise has been recognized in Texas as a basis for a nuisance.[148] However, establishing noise as a nuisance is also very difficult. Noise is not necessarily a nuisance "unless it is ill-timed or unusual in the locality where it occurs and causes discomfort to persons not supersensitive to noise."[149] As the *Luensmann* case details, a drag strip in a noisy neighborhood will not be a nuisance if noise is a fact of life in that neighborhood.[150] In affirming a denial of injunctive relief, the San Antonio Court of Appeals explained that closing the track would not improve plaintiff's quality of life because the neighborhood would remain constantly noisy with or without the drag strip track.[151]

Estancias Dallas Corporation v. Schultz is a demonstration of the type of harm a plaintiff must show in order to prevail on a private nuisance claim.[152] In *Estancias*, the plaintiffs' home faced the back-side of a 155-unit apartment complex, serviced by a single air conditioning unit facing the plaintiff's property.[153] Testimony described the noise generated by the air conditioning unit as similar to a jet airplane or helicopter.[154] The plaintiffs testified that even with all of their doors and windows closed, they could not carry on a normal conversation inside their home.[155] The continuous noise even interfered with their sleep at night.[156] The jury found that the noise from the air conditioning unit constituted a nuisance and the

[147] Petition for Review at 2, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[148] 41 AM. JUR. PROOF OF FACTS 3D *Noise Abatement* § 8 (1997).

[149] Iford v. Nickel, 1 S.W.2d 751, 752–53 (Tex. Civ. App.—San Antonio 1928, no writ).

[150] *See* Luensmann v. Zimmer-Zampese & Assocs., Inc., 103 S.W.3d 594, 601 (Tex. App.—San Antonio 2003, no pet.) (referring to the existence of railroad tracks, two airports, and a motorcycle race track in the neighborhood).

[151] *Id.*

[152] *See* 500 S.W.2d 217, 218, 221–22 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (finding the permanent and continuous noise emitted solely from the defendant's air conditioning equipment constituted a nuisance).

[153] *Id.* at 221.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 222.

court granted an injunction.[157] The court of appeals affirmed.[158]

In *Rankin*, the plaintiffs' noise claims were not well developed. The plaintiffs specifically stated that turbines emit a "constant whirring noise."[159] However, their noise claims were tried to a jury and denied.[160] This issue was hotly contested at trial as both parties fought over noise measurements.[161] Defendants claimed that even at peak production periods, the sound output was well below that recommended by EPA guidelines.[162] Plaintiffs produced a sound expert whose measurements contradicted defendant's findings.[163] Wind turbines do generate noise as they rotate and proximity to the turbines does factor into the amount of noise.[164] Some people who live near wind farms claim that the turbines are so noisy that they are forced to keep the windows closed year round.[165] They also claim that the turbines can be heard inside their home.[166] The evidence does not suggest that the plaintiffs in *Rankin* experienced this level of noise.[167] However, the holding in *Rankin* would not prevent a plaintiff who could prove a high level of noise interference from succeeding in a nuisance action. The *Estancias Dallas* case is instructive on this point. The plaintiffs' home was approximately fifty five feet from an air conditioning unit continuously generating noise comparable to a jet airplane.[168] Similarly, noise from a wind farm would have to foreclose a normal

[157] *Id.* at 218.

[158] *Id.* at 222.

[159] Petition for Review at 2, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[160] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 506 (Tex. App.—Eastland 2008, pet. denied).

[161] *See id.* at 513–14.

[162] Response to Petition for Review at 5, Rankin v. FPL Energy, LLC, No. 08-0839 (Tex. 2009), 2009 WL 771807.

[163] *Rankin*, 266 S.W.3d at 513–14.

[164] *See* Industrial Wind Action Group, Opinions: Loud Wind Turbines Do Not Belong Near Homes, http://www.windaction.org/opinions/15875 (last visited Sept. 27, 2009).

[165] *Id.*

[166] *See, e.g.*, National Wind Watch, Government Disregard for Wind Turbine Noise and Health Problems, http://www.wind-watch.org/documents/government-disregard-for-wind-turbine-noise-and-health-problems/ (last visited Sept. 27, 2009).

[167] Petition for Review at 10, Rankin v. FPL Energy, LLC, No. 11-07-00074 CV, 2009 Tex. LEXIS 138 (Tex. 2009).

[168] Estancias Dallas Co. v. Schultz, 500 S.W.2d 217, 221 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

lifestyle to be actionable as a nuisance.

V. WIND FARM AS A NUISANCE IN OTHER STATES

The exponential growth of wind power in recent years is a relatively new phenomenon so there is little case law on point. Only a handful of states outside Texas have had the opportunity to address nuisance issues arising out of wind generation.

A. New Jersey

Rose v. Chaikin addresses the issue of whether or not a windmill installed on a private residence may constitute a private nuisance.[169] The defendants installed a sixty foot tower at the top of which was a windmill used to generate power for the defendants' personal and household consumption.[170] The court found that the noise generated by the windmill was continuous and offensive.[171] Expert testimony showed that the ongoing noise caused the plaintiff nervousness, loss of sleep and fatigue.[172] The court noted that the sounds disturbed many activities associated with normal enjoyment of one's home, including reading, eating, watching television and general relaxation.[173]

The New Jersey Supreme Court found that the defendants' windmill constituted a nuisance and that an injunction was warranted.[174] The court stated that not all windmills constitute a nuisance and suggested that the defendants' windmill might be able to be modified so as to not constitute a nuisance.[175] Additionally, the court found that the windmill interfered with the plaintiff's health and comfort.[176] The court engaged in a balancing of the equities and determined that the benefits were relatively small and the irritation substantial.[177] The court also recognized a right to enjoy the sanctity of a home stating: "The ability to look to one's home as a refuge

[169] Rose v. Chaikin, 453 A.2d 1378, 1381–82 (N.J. 1982).
[170] *Id.* at 1380.
[171] *Id.* at 1382.
[172] *Id.* at 1380.
[173] *Id.* at 1381.
[174] *Id.* at 1383.
[175] *Id.*
[176] *Id.*
[177] *Id.* at 1382–83.

from the noise and stress associated with the outside world is a right to be jealously guarded."[178]

New Jersey and Texas both adhere to the common law for private nuisance actions.[179] The reasoning of the New Jersey court, while only persuasive authority, provides good arguments for a plaintiff whose land use is substantially interfered with by the noise of a wind turbine. *Chaikin*, however, may be limited to situations where a defendant's wind generation is for personal use and serves no great public purpose.

B. North Dakota

In *Rassier v. Houim*, the defendant installed a wind generator on a tower on his property.[180] Several years later, the plaintiff moved in after purchasing an adjoining lot.[181] The plaintiff alleged that the wind turbine was a private nuisance and was erected in violation of a restrictive residential covenant.[182] The Supreme Court of North Dakota affirmed the lower court's finding that the wind generator did not constitute a nuisance.[183] This decision was based upon the law of North Dakota, which does not follow the common law nuisance concept.[184] Instead, a North Dakota statute provides that "[a] private nuisance is one which affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public."[185] Under the statute, a nuisance is defined as "unlawfully doing an act or omitting to perform a duty, which act or omission: (1) [a]nnoys, injures, or endangers the comfort, repose, health, or safety of others; . . . or (4) [i]n any way renders other persons insecure in life or in the use of property."[186]

The majority looked at the applicable law and found that the defendant did not violate his duty to not unreasonably interfere with another person's

[178] *Id.* at 1383.

[179] *See id.* at 1381; Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied).

[180] 488 N.W.2d 635, 636 (N.D. 1992).

[181] *Id.*

[182] *Id.*

[183] *Id.* at 638–39.

[184] *Id.* at 636; N.D. CENT. CODE §§ 42-01-01 to 02 (2009).

[185] N.D. CENT. CODE § 42-01-02.

[186] *Id.* § 42-01-01.

use and enjoyment of his property.[187] This case is distinguishable from *Rankin* because North Dakota's applicable statute defines nuisance narrowly.[188] Texas has no such nuisance statute, and the operator of a wind farm has the legal duty imposed by the common law.[189]

C. West Virginia

Burch v. Nedpower Mount Storm is the most recent West Virginia case on wind power as a nuisance and the closest factually to *Rankin*.[190] Seven homeowners in Grant County, West Virginia filed a complaint in the circuit court seeking to permanently enjoin NedPower and ShellWindEnergy, Inc. from constructing and operating a wind power facility.[191] The 200-turbine wind generation facility was zoned to be built just one-half mile to two miles from the plaintiffs' home, with individual turbines ranging from 210 to 450 feet in height.[192] The plaintiffs asserted that they would be negatively affected by the noise from the wind turbines, the "flicker" or "strobe" effect created by the turbines when the sun nears the horizon, the significant danger from broken blades, ice throws, and collapsing towers, and a reduction in property values.[193] Without a trial, the circuit court granted judgment on the pleadings for the defendant.[194]

On appeal, the Supreme Court of Appeals of West Virginia considered the law of nuisance in West Virginia:

> In the past, we described a nuisance as "anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort. A condition is a

[187] *Rassier*, 488 N.W.2d at 637–38.

[188] N.D. CENT. CODE §§ 42-01-01 to 02.

[189] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied).

[190] 647 S.E.2d 879, 885 (W. Va. 2007); *see generally Rankin*, 266 S.W.3d 506 (where neighbors asserted claims against wind farm operators for public and private nuisance).

[191] *Burch*, 647 S.E.2d at 885.

[192] *Id.*

[193] *Id.*

[194] *Id.*

> nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby." More recently, we held that "[a] private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." The test to determine unreasonableness has been stated by this Court as follows: "An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm."[195]

Ultimately, the Supreme Court of Appeals reversed the lower court finding that the plaintiffs' allegations were legally sufficient to state a claim upon which a prospective injunction of nuisance could be based:

> The appellants have alleged certain injury to the use and enjoyment of their properties as a result of constant loud noise from the wind turbines, the turbines' unsightliness, and reduction in the appellants' property values. If the appellants are able to adduce sufficient evidence to prove these allegations beyond all ground of fair questioning, abatement would be appropriate.[196]

Burch addresses some of the questions that were left unanswered in *Rankin*. The size and scope of the wind farms were nearly identical between the two cases.[197] Just as in *Chaikin*, the *Burch* court mentioned the importance of people being physically comfortable in their homes.[198] Where using the land as a wind farm substantially interfered with its neighbor's enjoyment of the land and comfort in their home, the West Virginia court found abatement was appropriate.[199]

The holding in *Burch* was converse to that of the court in *Rankin*.[200] A potential explanation for the difference in outcomes between the *Rankin* and

---

[195] *Id.* at 886–87 (citations omitted).

[196] *Id.* at 893–94.

[197] NextEra Energy Resources, *supra* note 32; *Burch*, 647 S.E.2d at 885.

[198] *Burch*, 647 S.E.2d at 886.

[199] *Id.* at 893–94.

[200] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 513 (Tex. App.—Eastland 2008, pet. denied); *Burch*, 647 S.E.2d at 895.

Burch cases is a difference in philosophy of the judges. However, there is also a factual difference between the cases. In *Rankin*, the Horse Hollow wind farm was already operational at the time of the suit,[201] whereas the wind farm in *Burch* had not yet been completed.[202] The West Virginia landowners were suing to prevent the wind farm from being completed.[203] This leaves open the possibility that the court may have reached a different conclusion had the suit been initiated after the project was an ongoing concern.

VI. CONCLUSION

As a general rule, it is difficult to prevail in private nuisance actions. Under the traditional common law, restrictions on the use and alienation of property were disfavored. And this principal finds continuing support in Texas case law today. The Eastland Court of Appeals explained that "Texas case law recognizes few restrictions on the lawful use of property."[204]

From a practitioner's perspective, nuisance actions can be difficult to predict. The requirements that must be met in order to prevail on a nuisance claim provide the courts with great discretion.[205] A court inclined to reject a nuisance claim can easily use the elements to support their inclination. On the other hand, this is equally true for a court inclined to recognize a nuisance claim. Was there a substantial interference with the use of land? This is a decision that the judge or jury can make for any reason or no reason. Even where all the elements are met and the court accepts that there has been a substantial interference with plaintiff's interest in land, the court may still deny the nuisance action applying the balancing of the equities.

Wind generation facilities are expensive. Developing a wind farm can cost upwards of one million dollars per megawatt of generating capacity installed.[206] The companies that own and manage the large-scale wind

[201] *Rankin*, 266 S.W.3d at 508.

[202] *Burch*, 647 S.E.2d at 885.

[203] *Id.*

[204] *Rankin*, 266 S.W.3d at 512.

[205] *See supra* Section III.

[206] American Wind Energy Association, Wind Energy Fact Sheet: 10 Steps in Building a Wind Farm, http://www.awea.org/pubs/factsheets/10stwf_fs.pdf (last visited Sept. 26, 2009).

farms need to have some security in their investment. Has the demand for wind power blown away nuisance law? The answer is no. In fact, according to the common law, the result in *Rankin* is appropriate.[207] Wind farms offer many benefits to society and local communities such as job creation and tax revenues.[208] Therefore, the law provides the courts discretion so that one landowner cannot unilaterally extinguish a beneficial use.

In *Rankin*, the Eastland Court of Appeals sent a strong message that wind farms will not be enjoined or restrained absent a very strong showing.[209] In combination with other nuisance case law, plaintiffs in Texas have little chance of success. As far as the wind industry is concerned, this is probably an appropriate outcome. The answer to the conflict between land owners and wind farm operators is not through nuisance law suits. They are too costly and unpredictable, threatening future investment in wind energy. Rather, the wind energy industry should work more collaboratively with the local communities and the government on zoning, permitting and proper siting of the turbines.

[207] *See supra* Section III.

[208] NextEra Energy Resources, *Colorado Gov. Ritter and FPL Energy Break Ground at the Nation's Second Largest Wind Farm*, May 16, 2007, http://www.nexteraenergyresources.com/news/contents/2007/051607.shtml (last visited Nov. 23, 2009).

[209] *See Rankin*, 266 S.W.3d at 512–13.