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SUPREME COURT
STATE OF WASHINGTON
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No. 90115-5
(Court of Appeals No. 41557-7-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HAL MOORE and MELANIE MOORE; and
LESTER KRUEGER and BETTY KRUEGER,

Respondents/Cross-Petitioners,

v.

STEVE'S OUTBOARD SERVICE, and
STEVEN LOVE and MARY LOU LOVE,

Petitioners.

CITATION OF SUPPLEMENTAL AUTHORITY

Dennis D. Reynolds
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Respondents/Cross-Petitioners Moore and Krueger contend that the question of what is a “nuisance per se” is well settled. The Washington Pattern Instructions are cited to aid the Court. Respondents/Cross-Petitioners, pursuant to RAP 10.8, submit this Citation of Supplemental Authority regarding the following authorities:

1. WPI 380.04 Nuisance Per Se

A statute provides as follows:

(Insert a brief description of the requirements of the statute.)

If you find that (name of defendant) violated this statute, then you must find that (name of defendant) committed a nuisance and that (name of plaintiff) has satisfied its burden of proving the first and second propositions found in Instruction (fill in number of the instruction that is based on WPI 380.05).

NOTE ON USE: Use when the plaintiff alleges violation of a statute or regulation that is, by its terms, a nuisance per se. Use this instruction with WPI 380.05, Nuisance—Burden of Proof—No Affirmative Defense.

This citation is offered for the issue of the nuisance *per se* test, that it is a “two-part” test.

2. WPI 380.05 Nuisance—Burden of Proof—No Affirmative Defense

(Name of plaintiff) has the burden of proving each of the following propositions with respect to the claim of nuisance:

(1) That (name of defendant) [acted unlawfully]
[failed to perform a duty]; and

(2) That the [unlawful act] [failure to perform a
duty]:

[**annoyed**, injured, or endangered the comfort,
repose, health, or safety of others;]

[offended decency;]

[unlawfully interfered with, obstructed or tended to
obstruct, or rendered dangerous for passage, any
lake, navigable river, bay, stream, canal, or basin;]

[unlawfully interfered with, obstructed or tended to
obstruct, or rendered dangerous for passage any
public park, square, street, or highway;]

[**in any way rendered other persons insecure in
life, or in the use of property;**] [and]

(3) That (name of defendant's) [act] [failure to
perform a duty] was a proximate cause of [injury to
(name of plaintiff)] [and] [or] [damage to (name of
plaintiff's) property].

If you find from your consideration of all the
evidence that each of these propositions has been
proved, your verdict should be for (name of
plaintiff) on the nuisance claim. On the other hand,
if any of these propositions has not been proved,
your verdict should be for (name of defendant) on
the nuisance claim.

(Emphasis supplied).

This citation is offered for the issue of application of the nuisance
per se test.

3. Definitions

The following definitions are offered to aid the Court in application of the two-part nuisance *per se* test:

Annoy[ed] *verb* \ə-'nɔɪ\ : to cause (someone) to feel slightly angry
transitive verb
1: **to disturb or irritate especially by repeated acts**
2: to harass especially by quick brief attacks
(Emphasis supplied)

Dam·age *noun* \ 'da-mij\
: physical harm that is done to something or to someone's body
: **emotional harm that is done to someone**
: problems that are caused by a mistake, wrong action, etc. : bad or harmful effects on a situation, a person's reputation, etc.
1: loss or harm resulting from injury to person, property, or reputation
2 *plural* : compensation in money imposed by law for loss or injury
3: EXPENSE, COST <“What's the *damage*?” he asked the waiter>
(Emphasis supplied)

In·jure[d] *verb* \ 'in-jər\
: to harm or damage (someone or something)
in·jured in·jur·ing
transitive verb
1a : to do an injustice to : WRONG
b : to harm, impair, or tarnish the standing of <injured his reputation>
c : to give pain to <injure a person's pride>
2a : to inflict bodily hurt on
b : to impair the soundness of <injured her health>
c : to inflict material damage or loss on

Harm *noun* \ 'härm\ : physical or mental damage or injury : something that causes someone or something to be hurt, broken, made less valuable or successful, etc.

1: physical or **mental damage** : INJURY
2: MISCHIEF, HURT
(Emphasis supplied)

Injury *noun* \ 'inj-rē, 'in-jə-\
: harm or damage

: an act or event that causes someone or something to no longer be fully healthy or in good condition

plural in·ju·ries

1a : an act that damages or hurts : WRONG

b : violation of another's rights for which the law allows an action to recover damages

2: hurt, damage, or loss sustained

Insecure *adjective* \,in-si-'kyūr\

: not confident about yourself or your ability to do things well : **nervous and uncomfortable**

: not certain to continue or be successful for a long time

: not locked or well protected

1: not confident or sure : UNCERTAIN <feeling somewhat *insecure* of his reception>

2: not adequately guarded or sustained : UNSAFE
<an *insecure* investment>

3: not firmly fastened or fixed : SHAKY <the hinge is loose and *insecure*>

4a : not highly stable or well-adjusted <an *insecure* marriage>

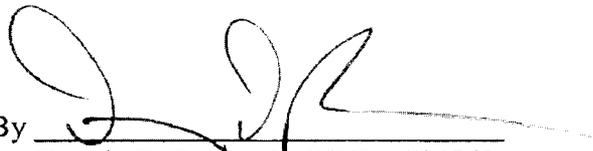
b : deficient in assurance : beset by fear and anxiety <always felt *insecure* in a group of strangers>

(Emphasis supplied)

<http://www.merriam-webster.com/dictionary/>

A comparison of the statutory and WPI tests for nuisance *per se* to the actual facts can be made by reviewing the Trial Court's Finding. See letter dated October 28, 2014, copy attached.

RESPECTFULLY SUBMITTED this 11th day of November, 2014.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2014, I caused the document to which this certificate is attached to be delivered for filing via email to:

Clerk of Court
State of Washington Supreme Court
Email: Supreme@courts.wa.gov

I further certify that on this 12th day of November, 2014, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and priority mail:

Bruce J. Finlay, WSBA #18799
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Shelton, WA 98584-0003
(360) 432-1778, tel
(360) 462-1779, fax
brucef@hctc.com, email

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 12th day of November, 2014.



Christy A. Reynolds
Legal Assistant



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October 28, 2014

By U.S. Mail

Ronald R. Carpenter
Clerk of the Court
Washington State Supreme Court
415 – 12th Avenue Southwest
Olympia, WA 98501-2314

Re: *Moore and Krueger v. Steve's Outboard Service, et al.*
Supreme Court No. 90115-5

Dear Mr. Carpenter:

In oral argument held last Thursday, October 23, 2014, several Justices asked me which findings support our clients' position that the Trial Court found interference because our clients are left insecure ("in any way") in the use of their properties. I referred the Court to Findings of Fact Nos. 22, 23, 29, 30, 35, and 36, and Conclusions of Law Nos. 16.1 and 16.3, found at pp.14-15 of Appellants' Supplemental Brief to the Court of Appeals dated January 4, 2013. I enclose a copy of these two pages for the Court's convenience.

In answer to a follow-up question addressing just Mrs. Krueger (not Mrs. Moore), I inadvertently referred to Finding of Fact No. 30. I intended to cite to the Trial Court's Findings of Fact Nos. 22, 29 and 35. These Findings set out that Petitioners' activities offend Mrs. Krueger's senses and cause her not to use portions of her property. I would respectfully request that you bring my inadvertent erroneous citation to the Court's attention.

Thank you very much for your kind assistance and attention to my request.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis Reynolds

Enclosure

cc: Bruce J. Finlay(w/encl.)

DDR/cr

(afraid of traffic accidents, unsure of whether they will be startled by engine revving noise, and not confident of the ability to carry on conversations or watch television) in their own homes. The precise length of time of Loves' engine revving, maneuvering of trailers in the shoulder and right-of-way, and duration of smoke, fumes and odors from the business is irrelevant.

The trial court's findings and conclusions establish Respondents' engine shop interferes with Appellants' use and enjoyment of the property:

- **Finding of Fact 22:** "The location where Mrs. Krueger hears the revving of boat motors is outside her home when she is getting her mail and when she is working in her flower gardens on the highway-side of her home in the summer."
- **Finding of Fact 23:** "Ms. Moore's testimony on the frequency and volume of the noise produced by Mr. Love's business included that she has to listen to the noise constantly every day; that the noise from Mr. Love's outboard motor repair is so bad that she has to slam her door shut to talk on the telephone inside her home; that she cannot talk on the telephone outside her home; that she and her guests cannot talk outside on her porch; and that she cannot watch television inside her home."
- **Finding of Fact 29:** "The Kruegers have a patio on the highway side of their home. The patio is less than 30 feet from the highway. In the past, Mrs. Krueger would read in this location and would use this location to be outside and out of the wind when the wind was blowing on the waterside of her house. The Kruegers no longer put lawn furniture on this patio and hardly use this patio because of the noise from the Loves' property. Thus affects the Kruegers' use and enjoyment of their property."
- **Finding of Fact 30:** "Mrs. Moore rarely sits on her deck until after 5:00 p.m. due to noise from Mr. Love's business. This affects Mrs. Moore's use and enjoyment of her property."
- **Finding of Fact 35:** "Prevailing winds take smoke and fumes east from the Loves toward the Kruegers. Mrs. Krueger smells fumes

periodically when Mr. Love is working on boats in the spring, summer and fall. The fumes bother Mrs. Krueger.”

- **Finding of Fact 36:** “The Moores’ home is to the west of the Loves so it is not within the area that smokes or fumes are blown by the prevailing winds. Mrs. Moore smells smoke on summer days when there is little air movement. The fumes bother Mrs. Moore.”
- **Conclusion of Law 16.1:** “Noise from Mr. Love’s business is offensive to the senses of Mrs. Krueger and Mrs. Moore. Additionally, due to the noise from Mr. Love’s business, the Kruegers and Mrs. Moore are unable to enjoy a portion of their respective properties in a normal manner, i.e., use of the Kruegers’ highway-side patio is diminished as is use of Mrs. Moore’s deck.
- **Conclusion of Law 16.3:** “Fumes from Mr. Love’s business are offensive to the senses of Mrs. Moore and Mrs. Krueger. Fumes from Mr. Love’s business bother Mrs. Krueger in the spring, summer and fall. The fumes bother Mrs. Moore in the summer.”

The first inquiry in the 2-part test for nuisance *per se* asks whether there is interference with normal use and enjoyment of plaintiffs’ property. The findings and conclusions set forth above satisfy part one of the test.

There is no balancing or comparison with other property owners or considerations of other sources of sounds, noise, fumes, etc. The lower court erroneously judged the “reasonableness” of Appellants’ complaints, and whether the value of property is diminished, which are irrelevant to the query under the law. The decision is clear legal error.¹¹

¹¹ This Court directed: “The court may not consider whether interference with Plaintiffs’ enjoyment of their property is “reasonable,” or should be balanced against any other factors, when analyzing a nuisance *per se* claim.” Order at p. 2.

OFFICE RECEPTIONIST, CLERK

To: Christy Reynolds
Cc: 'Bruce Finlay'; dennis@ddrlaw.com; karen@ddrlaw.com
Subject: RE: Case No.90115-5 - Citation of Supplemental Authority

Received 11-12-2014

Supreme Court Clerk's Office

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From: Christy Reynolds [mailto:christy@ddrlaw.com]
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To: OFFICE RECEPTIONIST, CLERK
Cc: 'Bruce Finlay'; dennis@ddrlaw.com; karen@ddrlaw.com
Subject: Case No.90115-5 - Citation of Supplemental Authority

RE: Moore/Krueger v. SOS/Love
State Supreme Court No. 90115-5

Dear Clerk: Attached for filing in the above referenced case is Respondents/Cross-Petitioners' "Citation of Supplemental Authority." Please confirm acceptance of this filing. Thank you very much.

Christy
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