

**2013 DRAFTING REQUEST**

**Bill**

Received: 3/21/2013 Received By: phurley  
Wanted: As time permits Same as LRB:  
For: Frank Lasee (608) 266-3512 By/Representing: Rob Kovach  
May Contact: Drafter: phurley  
Subject: Courts - costs and fees Addl. Drafters:  
Courts - damages Extra Copies:  
Courts - miscellaneous/other

Submit via email: YES  
Requester's email: Sen.Lasee@legis.wisconsin.gov  
Carbon copy (CC) to:

**Pre Topic:**

No specific pre topic given

**Topic:**

Action for damages caused by wind turbines

**Instructions:**

See attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	phurley 3/22/2013			_____			State S&L
/1		scalvin 3/22/2013	jmurphy 3/22/2013	_____	sbasford 3/22/2013	rosrose 4/12/2013	State S&L

FE Sent For:

→ At  
Intro.

<END>

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/P1	phurley	11 sac 03/22/2013	gm 3/22	self			State S&L

FE Sent For:

<END>

**Rose, Stefanie**

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**From:** Kovach, Robert  
**Sent:** Thursday, March 21, 2013 3:05 PM  
**To:** LRB.Legal  
**Cc:** Jenkins, Kevin; Kovach, Robert  
**Subject:** Drafting Request Right to Damages for Wind Turbine victims

Dear LRB,

Senator Lasee requests a bill draft that will specifically allow people to sue for damages that they suffer as a result of wind turbines sited too close to their homes. We would like them to be eligible to be awarded damages and legal and attorney fees.

Damages could be for taking, loss of property values, compensation for people move to a different home to escape the harmful effects of wind turbines, medical expenses, pain and suffering or any other loss or damages they suffer as a result of the wind turbines sited within 1.5 miles of their home—whether the wind turbine was sited legally or not.

Senator Lasee would like this draft to have RUSH priority.

Thank you,

**Rob Kovach**

Policy Advisor/Committee Clerk  
Office of Senator Frank Lasee  
(608) 266-3512

*permitted  
wind energy  
systems  
Ch. 66  
to B. 66.0101 or  
196.491(3)*

- Qs for Rob:*
- owner-op?*
  - farmer who leases?*
  - strict liability?*
  - injury?*
  - B. nuisance?*

For later cases, see same Topic and Key Number in Pocket Part

339 Wis.2d 734, review granted 810 N.W.2d 221, 339 Wis.2d 734, review granted 810 N.W.2d 225, 339 Wis.2d 740, review granted 810 N.W.2d 225, 339 Wis.2d 740.

Rights and privileges to use and enjoy land, for purposes of a private nuisance claim, are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

*Bostco LLC v. Milwaukee Metropolitan Sewerage Dist.*, 800 N.W.2d 518, 334 Wis.2d 620, 2011 WI App 76, review granted 810 N.W.2d 221, 339 Wis.2d 734, review granted 810 N.W.2d 221, 339 Wis.2d 734, review granted 810 N.W.2d 225, 339 Wis.2d 740, review granted 810 N.W.2d 225, 339 Wis.2d 740.

**Wis.App. 2005.** Nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land or a public right.

*Butler v. Advanced Drainage Systems, Inc.*, 698 N.W.2d 117, 282 Wis.2d 776, 2005 WI App 108, review granted 705 N.W.2d 659, 286 Wis.2d 98, 2005 WI 150, affirmed on other grounds 717 N.W.2d 760, 294 Wis.2d 397, 2006 WI 102.

**Wis.App. 2003.** "Private nuisance" is a term applied to an unreasonable interference with the interests of an individual in the use or enjoyment of land.

*Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee*, 671 N.W.2d 346, 267 Wis.2d 688, 2003 WI App 209, review granted *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 675 N.W.2d 804, 269 Wis.2d 197, 2004 WI 20, affirmed 691 N.W.2d 658, 277 Wis.2d 635, 2005 WI 8.

**Wis.App. 2001.** It is the degree of danger or interference presented, not the degree of care or lack of care, that determines whether a nuisance is present.

*Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 632 N.W.2d 59, 246 Wis.2d 933, 2001 WI App 148, review granted 635 N.W.2d 781, 247 Wis.2d 1031, 2001 WI 117, affirmed 646 N.W.2d 777, 254 Wis.2d 77, 2002 WI 80.

**Wis.App. 1999.** No claim for private nuisance may be made without the underlying negligent or reckless conduct or abnormally dangerous conditions or activities being proved. Restatement (Second) of Torts § 822.

*Stunkel v. Price Elec. Co-op.*, 599 N.W.2d 919, 229 Wis.2d 664, review denied 604 N.W.2d 572, 230 Wis.2d 274.

**Wis.App. 1996.** Gravamen of tort of continuing nuisance is an ongoing harm, and injured party has right to prove diminished value of real estate up to time of trial.

*Andersen v. Village of Little Chute*, 549 N.W.2d 737, 201 Wis.2d 467.

#### 5. Exercise of legal right.

##### Library references

C.J.S. Nuisances § 9.

**Wis. 1983.** A business or activity may constitute a private nuisance even though it is operating in conformity with the law.

*Krueger v. Mitchell*, 332 N.W.2d 733, 112 Wis.2d 88.

**Wis. 1982.** Application of reasonable use standard in nuisance cases normally requires full exposition of all underlying facts and circumstances.

*Prah v. Maretti*, 321 N.W.2d 182, 108 Wis.2d 223, 29 A.L.R.4th 324.

**Wis. 1960.** Lawful business may be conducted in such way as to amount to nuisance either because of location or because of effect of operation.

*Sohns v. Jensen*, 105 N.W.2d 818, 11 Wis.2d 449, 84 A.L.R.2d 643.

**Wis. 1900.** In the absence of physical injury to adjoining property or its occupants, one may use his own land or erect on it any structure he may see fit, regardless of the unreasonableness or maliciousness of his motives, even if by so doing the adjoining property is rendered less valuable and desirable by diminished beauty of surroundings, access of light, and opportunity to see it from the surrounding territory or to freely view such territory therefrom.

*Metzger v. Hochrein*, 83 N.W. 308, 107 Wis. 267, 81 Am.St.Rep. 841, 50 L.R.A. 305.

† This Case was not selected for publication in the National Reporter System For legislative history of cited statutes, see Wisconsin Statutes Annotated

For references to other topics, see Descriptive-Word Index

6. Acts authorized or prohibited by public authority.

Library references

C.J.S. Nuisances §§ 9, 17.

**Wis. 1950.** Where low flying complained of occurred during landing and taking off, such flying did not violate regulation prohibiting aircraft to be flown at altitudes of less than 500 feet "except when necessary for taking off and landing", since quoted words do not refer solely to emergency landings but are applicable to all take-offs and landings.

Kuntz v. Werner Flying Service, 43 N.W.2d 476, 257 Wis. 405.

7. Care and precautions against annoyance or injury.

Library references

C.J.S. Nuisances § 11.

**Bkrty.E.D.Wis. 2006.** Under Wisconsin law, underlying tortious conduct is necessary element of private nuisance claim grounded in negligence.

In re Weinhold, 347 B.R. 887.

**Wis. 2009.** A positive duty to act must exist before liability will arise in a failure to abate a nuisance. Restatement (Second) of Torts § 824.

Hocking v. City of Dodgeville, 768 N.W.2d 552, 318 Wis.2d 681, 2009 WI 70.

Under the "reasonable use rule," a duty to act to abate a nuisance may arise when one uses his or her property unreasonably; if the property is being reasonably used, however, the landowner has no duty to abate the nuisance.

Hocking v. City of Dodgeville, 768 N.W.2d 552, 318 Wis.2d 681, 2009 WI 70.

**Wis. 2006.** Liability for a nuisance may be based upon either intentional or negligent conduct and may be grounded in either creating or maintaining a nuisance.

Butler v. Advanced Drainage Systems, Inc., 717 N.W.2d 760, 294 Wis.2d 397, 2006 WI 102.

When reviewing alleged nuisance claim, after Supreme Court concludes that nuisance existed and that complained-of conduct was cause of creating nuisance, the Court then decides whether the defen-

dant's conduct is otherwise actionable under the rules governing liability for negligent conduct.

Butler v. Advanced Drainage Systems, Inc., 717 N.W.2d 760, 294 Wis.2d 397, 2006 WI 102.

When a nuisance claim is predicated on negligent acts, it is necessary for the court to separately analyze the nuisance claim for relief from the negligence claim for relief.

Butler v. Advanced Drainage Systems, Inc., 717 N.W.2d 760, 294 Wis.2d 397, 2006 WI 102.

**Wis. 2005.** After it is established that a nuisance exists, the next step in a nuisance analysis is determining whether there is any liability-forming conduct. Restatement (Second) of Torts § 822.

Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 277 Wis.2d 635, 2005 WI 8.

Proof of the underlying tortious conduct is an essential element in a nuisance analysis.

Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 277 Wis.2d 635, 2005 WI 8.

Liability for a nuisance may be based upon either intentional or negligent conduct. Restatement (Second) of Torts § 822.

Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 277 Wis.2d 635, 2005 WI 8.

In private nuisance cases that involve changes to otherwise benign objects that develop over time and become harmful, through no fault of the owner of the object, liability is predicated upon the defendant's failure to remove the harmful condition after he has notice of its existence.

Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 277 Wis.2d 635, 2005 WI 8.

Liability for a nuisance is dependent upon the type of underlying tortious conduct that causes the nuisance, be it an act

† This Case was not selected for publication in the National Reporter System  
For legislative history of cited statutes, see Wisconsin Statutes Annotated

Krueger v. Mitchell, 112 Wis. 2d 88.

nuisance would have such a severe impact on the free flow of air commerce that such remedy cannot co-exist with the Act. If state courts were allowed to enjoin the operation of all or part of an airport based on nuisances to neighboring property, air commerce would be completely disrupted. Airport proprietors must be allowed, within federal laws and regulations, to choose the type of service to be provided at our nation's airports, taking into account the safety of those in the aircraft and on the ground, the most efficient use of airport facilities and the needs of the surrounding community. We believe injunctions prohibiting such proprietary decisions are completely preempted under the Act. This preemption of injunctive relief in aviation noise nuisance actions extends to all types of injunction, including the injunction originally sought in this case, which was directed not at the actual flight of the aircraft but at decisions made by the proprietor as the ground facilities. The free flow of air commerce requires that the airport proprietor be free to make and implement such airport planning and operating decisions, subject only to federal requirements and the obligation to compensate those who are injured by such decisions. *Northeast Phoenix v. Scottsdale Mun. Airport*, 130 Ariz. App. at 495; *Greater Westchester v. City of Los Angeles*, 26 Cal. 3d at 94, 100.

We therefore hold that injunctive relief is completely preempted in aviation noise nuisance actions because of the disruptive impact such a remedy would have on air commerce. However, nuisance actions claiming damages only are not preempted by the Act. Such liability on the part of the airport proprietor follows from the clear Congressional intent to vest primary responsibility for protecting local residents from airport noise in the proprietor rather than the federal government. We view this liability to be akin to the remedy of inverse condemnation in the sense that such a claim should deter-

Supreme Court

mine not only past damages but also future damages from the noise nuisance. The injured party must therefore present his or her entire claim for past and future damages in one action. This limitation on such a damage action is necessary in order to protect airport proprietors from repeated and vexatious litigation based on the same nuisance.

The second issue raised on this review is whether an airport which is operating in conformance with state and federal law can constitute a nuisance. The Mitchells urge this court to adopt the rule that an airport which is operating lawfully can not constitute a private nuisance. Well established principles of Wisconsin law require us to reject the defendants' position. [6, 7]

A private nuisance has been defined by this court as an unreasonable interference with the interests of an individual in the use and enjoyment of land. *Hoene v. Milwaukee*, 17 Wis. 2d 209, 214, 116 N.W.2d 112 (1962). It is well established that a business or activity may constitute a private nuisance even though it is operating in conformity with the law. "Even though a business may be lawful, nevertheless it may be conducted in such a way as to amount to a nuisance either because of its location, as in *Hasslinger v. Hartland* (1940), 234 Wis. 201, 290 N.W. 647, or because of the effect of its operation." *Sohns v. Jensen*, 11 Wis. 2d 449, 460, 105 N.W.2d 818 (1960). We find these rules to be equally applicable to the operation of an airport.

The defendants contend that this court's decision in *Kuntz v. Werner Flying Service, Inc.*, 257 Wis. 405, 43 N.W.2d 476 (1950), mandates a different result. *Kuntz* involved a nuisance action against an airport seeking only injunctive relief. This court affirmed the trial court's order dismissing the claim for injunctive relief, finding that injunctive relief was inappropriate because

823.085

**823.085 Actions against owners or operators of solid waste facilities.**

823.085(1)

(1) In this section, "solid waste facility" has the meaning given in s. 289.01 (35).

823.085(2)

(2) (intro.) In any action finding a solid waste facility or the operation of a solid waste facility to be a public or **private nuisance**, if the solid waste facility was licensed under s. 289.31 (1) and was operated in substantial compliance with the license, the plan of operation for the solid waste facility approved by the department of natural resources and the rules promulgated under s. 289.05 (1) that apply to the facility, then all of the following apply:

823.085(2)(a)

(a) Notwithstanding s. 823.03, the court may not order closure of the solid waste facility or substantial restriction in the operation of the solid waste facility unless the court determines that the continued operation of the solid waste facility is a threat to public health and safety.

823.085(2)(b)

(b) The department of natural resources shall comply with a request by the court to provide suggestions for practices to reduce the offensive aspects of the nuisance.

823.085(2)(c)

(c) The amount recovered by any person for damage to real property may not exceed the value of the real property as of the date that the solid waste facility began operation increased by 8% per year.

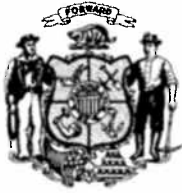
823.085(2)(d)

(d) Punitive damages may not be awarded.

823.085 History

**History:** 1991 a. 269; 1995 a. 227.





## 2013 BILL

3-22-13  
15009

gen cat

1 AN ACT ...; relating to: actions for damages caused by wind energy systems.

### *Analysis by the Legislative Reference Bureau*

Under current law, a person may bring a civil action to be compensated for damages he or she suffers as a result of another's wrongful or negligent act. Parties to a civil action are generally responsible for paying their own attorney fees, but current law generally allows a prevailing plaintiff to recover up to \$500 for attorney fees under certain circumstances.

This bill states that, in an action for damages caused by a wind energy system, the prevailing plaintiff may recover damages for his or her physical and emotional harm, compensation for loss of property value and for expenses incurred by the injured person if he or she moves as a result of harms caused by a wind energy system, and other damages. The bill allows a prevailing plaintiff to recover reasonable attorney fees. Under the bill, if a wind energy system is located within one and a half miles from the plaintiff's residence, it is not a defense to the action to assert that the wind energy system was operating pursuant to an appropriate legal permit or local governmental approval.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

2 SECTION 1. 895.095 of the statutes is created to read:



**Rose, Stefanie**

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**From:** Kovach, Robert  
**Sent:** Friday, April 12, 2013 3:31 PM  
**To:** LRB.Legal  
**Subject:** Please Jacket for Senate LRB 1954

Please Jacket for Senate LRB 1954

Thanks!

**Rob Kovach**

Policy Advisor/Committee Clerk  
Office of Senator Frank Lasee  
(608) 266-3512