IF DON QUIXOTE IS STANDING IN MY FRONT YARD IS IT A NUISANCE? WEST VIRGINIA NUISANCE LAW AND *BURCH V. NEDPOWER*.

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I. Introduction

On November 23, 2005, seven home owners in Grant County, West Virginia, sought an injunction to prevent the construction of an approximately 200 turbine wind power facility on the grounds that it was a nuisance.[1] The circuit court dismissed their claims and the case was appealed.[2] With a 21 syllabus point salute, the Supreme Court of Appeals of West Virginia ("Supreme Court") reversed the dismissal and provided greater detail into what is and is not a nuisance in West Virginia.[3]

Before analyzing the Supreme Court's decision in *Burch v. NedPower Mount Storm, LLC*, this paper first reviews nuisance law in the state with an eye to providing a clear and concise statement of the law. Next, this paper examines the *Burch* decision with a dual focus to explain and put into context the decision and provide commentary on the decision's impact in this area of law.

II. West Virginia Nuisance Law

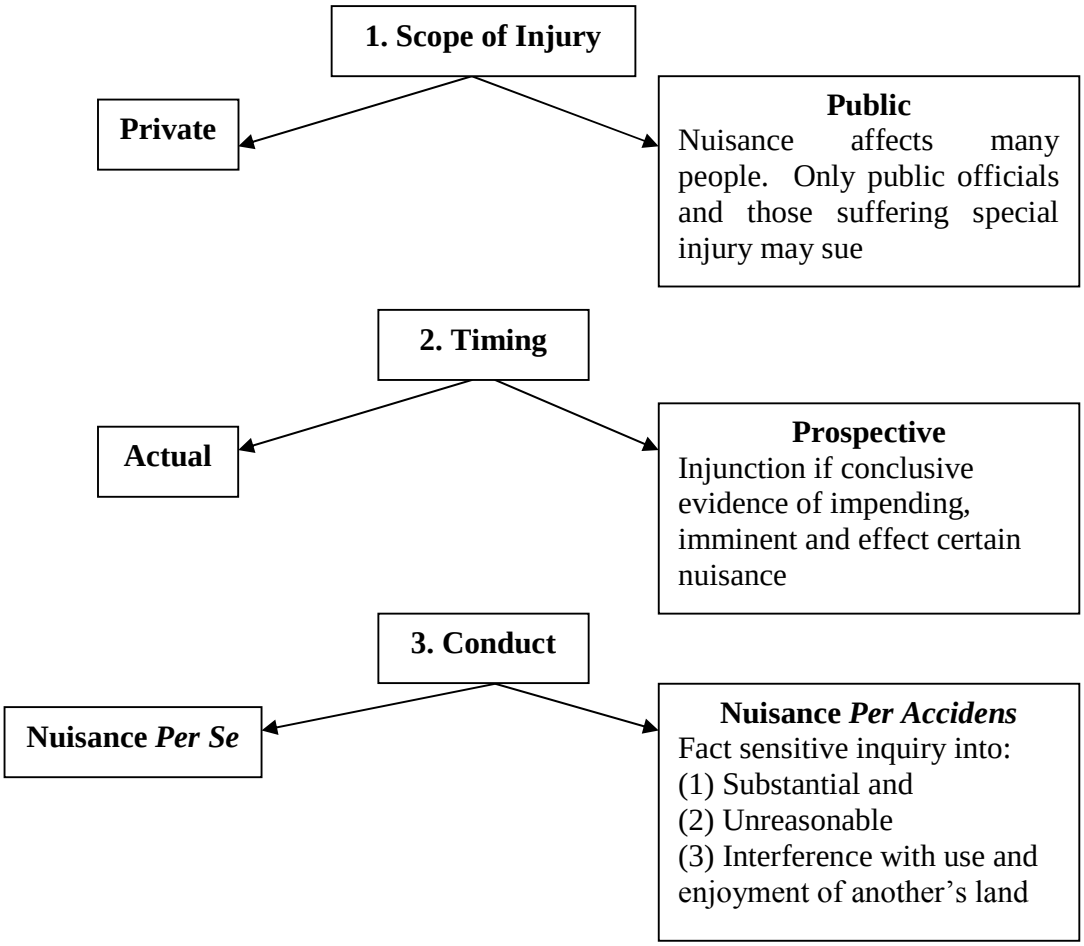
The Supreme Court has generally defined nuisance as:

> A nuisance is 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 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.[4]

[1] *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879, 885 (W.Va. 2007).
[2] *Id.*
[3] *Id.*
[4] *Duff v. Morgantown Energy Assoc.*, 421 S.E.2d 253, 256 (W.Va. 1992) (citation omitted, ellipses in original).

While informative, this description does not address the many subtle branches of nuisance law. To assist in reviewing the branches of West Virginia nuisance law discussed below, the following flow chart is a helpful accompaniment to this text.

Figure 1 – Nuisance Flow Chart



Nuisance law is divided into two distinct branches: public nuisance and private nuisance with the determining factor being who is injured by the nuisance.[5] "A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an

[5] *See* Restatement (Second) of Torts § 821A.

indefinite number of persons."[6] Normally an individual cannot sue for public nuisance unless they can show that an individual, or small group, has suffered a "special injury."[7] Rather, "it is the duty of the proper public officials to vindicate the rights of the public."[8] A private nuisance only allows recovery for those plaintiffs whose property is significantly harmed by the interference.[9]

After considering the scope of the injury, the timing of a nuisance suit determines the standard of review of the activity. If the alleged nuisance has not yet begun operation it is a "prospective nuisance," and it is more difficult for the plaintiffs to obtain relief. Once the activity commences, it becomes an actual nuisance and the burden on plaintiffs is lower. Plaintiffs alleging prospective nuisance must show by conclusive evidence the prospective nuisance is "*impending and imminent* and *the effect certain, not resting on hypothesis or conjecture*."[10] Indeed, the conclusive evidence standard will often prevent a plaintiff from winning an injunction, but will not stop a later nuisance suit once the activity begins.[11] Equitable remedies are available to a court considering a prospective nuisance, but equity will not be given "if the injury be doubtful, eventual, or contingent, or if the matter complained of is not a *per se* nuisance."[12]

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[6] *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W.Va. 1945).
[7] *Id.* at syl. pt. 6.
[8] *Duff* at 257. Although not specifically adopted by the Supreme Court of Appeals of West Virginia, the Restatement (Second) of Torts § 821B(2) provides examples of public rights including: public health, safety, peace, comfort, convenience and conduct prohibited by statute.
[9] *Hendricks v. Stalnaker*, 380 S.E.2d 198, 201 (W.Va. 1989).
[10] *Duff* at 258 (emphasis in original); *see also Chambers* at 693.
[11] An exception exists when a prospective nuisance is a nuisance *per se*. In this scenario, injunctive relief will be allowed to prevent a *per se* nuisance. *See State v. Navy*, 17 S.E.2d 626, 628 (W.Va. 1941) (injunction granted against a house of prostitution).
[12] *Chambers v. Cramer*, 38 S.E. 691, 693 (W.Va. 1901).

Finally, the conduct generating the nuisance is examined. A nuisance *per se* is an "act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings."[13] For nuisance *per accidens*, "[a] private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land."[14] The reasonableness factor of this test balances the gravity of the harm with the social value of the activity.[15] There is a special protection for businesses:

> a fair test as to whether a business or a particular use of a property in connection with the operation of the business constitutes a nuisance, is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all the existing circumstances.[16]

Examining nuisance is a fact intensive endeavor, therefore attached as Table 1 is a table of select cases and the activity at issue to assist in finding analogous facts when faced with defending against a nuisance claim. In Part III(B) the *Burch* court's factual determination will be examined in detail.

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[13] *Duff* at 258 n.8 (citing *Harless v. Workman*, 114 S.E.2d 548, 552 (W.Va. 1960)). The following decisions by the Court found the nuisances *per se*: *Huntington & Kenova Land Dev. Co. v. Phoenix Powder Mfg. Co.*, 21 S.E. 1037 (W.Va. 1895) (blasting dynamite); *State v. Navy*, 17 S.E.2d 626 (W.Va. 1941) (house of prostitution); *Davis v. Spragg*, 79 S.E. 652 (W.Va. 1913) (encroachment on public roads).

[14] Syl. pt. 1, *Hendricks* at 199. This language is very close to that of the Restatement § 821D: "private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." The *Hendricks* decision appears to bring the common law of nuisance as it developed in West Virginia in line with the Restatement, albeit inartfully. To the extent the rule in *Hendricks* differs from the Restatement it is unclear if the differences are substantive or merely semantic. In particular one should note that the Restatement only considers unreasonableness when examining *intentional* interference. While the *Hendricks* syllabus point does not mention intentional interference, the opinion itself does. When discussing the reasonableness requirement, the opinion cites to the Restatement § 826 which deals with intentional interference. Furthermore, the opinion states, "[t]he unreasonableness of an *intentional* interference must be determined by a balancing of the landowner's interests." *Hendricks* at 202. Unfortunately, the bipolar nature of the *Hendricks* decision was not clarified in *Burch*. In conclusion, while the Restatement may provide a nice roadmap for the Court, one should be ready for a construction detour.

[15] Syl. pt. 2, *Hendricks*.

[16] Syl. pt. 2, *Mahoney v. Walter*, 205 S.E.2d 692 (W.Va. 1974).

III. Analysis of *Burch*

A. Facts of the Case

On November 23, 2005, seven homeowners sued a proposed wind power facility to enjoin the impending construction and operation of the facility.[17] This was a case of prospective nuisance because the wind turbines had not yet been constructed. The homeowners alleged that, if constructed, the turbines would (1) generate disturbing noise; (2) create a disturbing "flicker" from the shadow cast by spinning turbine blades; (3) cause injury or danger from thrown turbine blades, ice or collapsing towers;[18] and, (4) reduce property values.[19] The entire project had already been subject to and received Public Service Commission approval.[20] The defendants moved for judgment on the pleadings and the trial court granted the motion, dismissing the action.[21] The trial court ruled that (1) it had no jurisdiction because of the Public Service Commission's approval of the project; (2) the plaintiffs claims were, in part, for public nuisance; (3) an injunction was improper because the facility was not a *per se* nuisance, nor did it have the imminent danger of a certain negative effect; and, (4) the Public Service Commission's approval of

[17] *Burch* at 885.
[18] The Court did not consider this allegation and damages from separate events like these alleged are not appropriate in a nuisance action.
[19] *Id*.
[20] The Court noted that the legislature has since changed the certificate necessary for this type of facility to a siting certificate. *Id*. at 884 n.1. Furthermore, the Public Service Commission has enacted rules for siting certificates that require information that may not have been required at the time it considered the wind power facility in *Burch*. W. Va. R. tit. 150, §30-1 (2008). It is doubtful these new rules would have made a nuisance suit impossible as the court was clear the amendments, and therefore likely the new rules, did not affect their analysis. *Burch* at 888 n.7. However, it is entirely possible that had the Public Service Commission rules been in place and the facility been considered under these new rules the heightened consideration may have either eased the plaintiffs' concerns about the facility, or generated facts sufficient that plaintiffs' could not have met their burden to show a nuisance.
[21] *Burch* at 885.

the project collaterally estopped the nuisance suit.[22] In its decision, the Supreme Court rejected the first and fourth rulings of the trial court and instead held that the Public Service Commission certificate did not preclude a suit for nuisance because the trial court had jurisdiction[23] and the trial court was not collaterally estopped by the certificate process.[24]

B. Acts constituting a nuisance

The Supreme Court examined the actions alleged to be a nuisance to determine if such actions were sufficient to constitute a nuisance. In holding that noise alone can be a nuisance, the Court continued its holding from a line of cases involving noise.[25] Further the Court reaffirmed Syllabus Point 2 of *Ritz* allowing for an injunction "[w]here an unusual and recurring noise is introduced in a residential district, and the noise prevents sleep or otherwise disturbs materially the rest and comfort of the residents."[26] Unfortunately, the Court added little to the understanding of noise as a nuisance because it did not have the aid of expert testimony in the record from the lower court proceedings as it did in *Duff*. As such, the Court affirmed that noise can be a nuisance, but it did not suggest particular levels of noise that may constitute a nuisance.[27] Given the Court's use of a balancing test to determine the reasonableness of an activity, it

[22] *Id*.
[23] *Id*. at 891.
[24] *Id*. at 895.
[25] *Burch* at syl. pt. 9 ("Noise alone may create a nuisance depending on time, locality and degree.") (citing *Ritz v. Woman's Club of Charleston*, 173 S.E. 564 (1934)); sampling of other cases involving noise: *Duff* at 256; *Powell v. Bentley & Gerwig Furniture Co.*, 12 S.E. 1085 (W.Va. 1891); *Snyder v. Cabell*, 1 S.E. 241 (W.Va. 1886).
[26] *Burch* at syl. pt. 10. This syllabus point only applies to "residential areas" therefore the court's holding here may be misleading as there is no record in the court's opinion that this wind turbine facility is being installed in a residential area.
[27] *Duff* at 262.

is unlikely that a "bright line" decibel level will ever be established to prove a nuisance. However, in future cases, the Court may find government noise standards particularly persuasive.[28]

The Supreme Court then considered the alleged "flicker" or "strobe" of shadows allegedly cast by the wind turbines. The Court viewed this as a complaint about the sight – a viewshed concern. In so ruling, the Court held that "[w]hile unsightliness alone rarely justifies interference by a circuit court applying equitable principles, an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances."[29] The Court's holding is somewhat disturbing. What is beauty? What is ugly? Just because beauty pageants use "judges" does not qualify a circuit court judge to make an aesthetic ruling. Thankfully the Court first took pains to qualify its ruling[30] and stopped short by requiring proof of accompanying nuisances – hopefully of a less subjective nature – in order for unsightliness to be "abated."

Finally, the Supreme Court considered the plaintiffs' claim of reduced property values. The Court held that an injunction is allowed when an activity "diminishes the value of nearby property and *also* creates interferences to the use and enjoyment of the nearby property."[31] Most importantly, this holding shows that diminished property value alone is not enough for a nuisance. However, additional requirements are unclear. The second half of the Court's holding is nearly identical to the

[28] *Id.* (making note of EPA noise standard).
[29] *Burch* at syl. pt. 11.
[30] "Unsightly things are not to be banned solely on that account. Many of them are necessary in carrying on the proper activities of organized society." *Burch* at 891 (citing *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W.Va. 1937)).
[31] *Burch* at syl. pt. 12 (emphasis added). The Court does not state that diminished property value without another nuisance would be recoverable at law, but this would seem to be a logical conclusion.

language defining "nuisance" in syllabus point 1 of *Hendricks*.[32] One possible reading of the new *Burch* syllabus point is that diminished property value replaces and substitutes the "substantial and unreasonable" requirement in *Hendricks*. This argument is interesting because in a properly functioning market for property a diminished property value indicates harm to the property – essentially the market is taking the place of the judge – therefore, lower property value shows a "substantial and unreasonable" effect. A plaintiff would only need to show that the effect is caused by the "interference." This interpretation (diminished property value proves both the nuisance and its damage) is very circular and would likely be rejected by the Court. The cases cited by the Court indicate the contrary—that there must first be a proved nuisance that results in diminished property value. Logically, it follows that the Court should look at the entire *Hendricks* definition of nuisance, rather than let diminished property value stand in for both the substantial requirement and the balancing test of reasonableness.

C. Prospective Nuisance Standard

The Supreme Court next considered if the plaintiffs' claims of a prospective nuisance were sufficient to avoid summary judgment. The Court noted and reaffirmed that the strong presumption against prospective injunctive relief when the complained of nuisance is not a nuisance *per se*. All businesses which are authorized by the legislature, or approved by a state agency (the Public Service Commission), are not a nuisance *per se*.[33] Furthermore, "the presumption being that a person enter into a

[32] In *Hendricks*, the Court defined "[a] private nuisance [a]s a substantial and unreasonable interference with the private use and enjoyment of another's land."
[33] *Burch* at 893.

legitimate business will conduct it in a proper way, so that it will not constitute a nuisance."[34]

This presumption, and the protection of businesses approved by the state, is extremely important to businesses in West Virginia. While it will not provide a full "safe harbor" – it does not protect a lawful business that is operated in an improper way – this holding does presume, correctly, that a potential business will be operated properly and not be a nuisance. The Court should have gone further here and ruled that any business approved by a state agency, after that agency conducted a sufficient review of the business, should preclude an action in prospective nuisance. By not entirely closing the door to prospective nuisances, businesses now face the possibility of a lengthy and costly series of regulatory approvals, only so that upon approval they can face a prospective nuisance suit from individuals upset by the decisions of regulators. While the Court is certainly correct that in this case the Public Service Commission's approval does not look at the same evidence and issues as a nuisance case, the practical effect of this holding is harmful to business by adding additional uncertainty to a contemplated new venture.[35] It would have made more sense for the Court to deny plaintiffs a claim for prospective nuisance where the business has sought and received state and federal agency approvals, but still allow plaintiffs to bring a suit for actual nuisance after the business begins

[34] *Burch* at 892.

[35] *Id*. at syl. Pt. 8. It should be noted that the Public Service Commission's review of projects is both over- and under-inclusive of what a court would consider in a nuisance suit, but the overlap is sufficient to justify protecting a business against a prospective nuisance claim.

operation.[36] Businesses that have already incurred the cost of obtaining approval for a new operation should have a safe harbor to establish their new operation before having to defend themselves from an action for nuisance. The Court rejected NedPower's arguments along these lines, noting that "such policy considerations are best left to the Legislature and not the courts."[37] Given the high and difficult standard a plaintiff has to meet to show a prospective nuisance, it is not a big additional step to deny prospective nuisance in these cases, but it was a step the Court was nonetheless unwilling to take.

Additionally, in order to show a prospective nuisance the Court reaffirmed that the plaintiff bears the burden of showing injury is "impending and imminent and the effect certain."[38] The standard of proof here is not a preponderance of the evidence, but a showing "beyond all ground of fair questioning."[39] The Court found that plaintiffs' alleged nuisances –noise, unsightliness, and reduced property value – were sufficient claims that could lead to an injunction if plaintiffs could meet their burden of proof.[40]

Finally, the Supreme Court overruled its decision in *Severt v. Beckley Coals, Inc*.[41] In that decision, a circuit court granted a legal remedy for the alleged nuisance – noise and dust from a coal mine. Plaintiffs introduced evidence of reduced property value and therefore the Court held that equitable remedies were not appropriate when there was an adequate remedy at law. In overturning *Severt*, the Court noted that in

[36] State agency approval alone will not guarantee a business will be operated in a careful manner so as to not become a nuisance, therefore it would be unwise to grant a blanket safe harbor to businesses that have obtained state agency approval.
[37] *Burch* at 889.
[38] *Id*. at 893.
[39] *Id*.
[40] *Id*. Note that while the court cites to all three complained of injuries only noise can stand alone for nuisance, unsightliness and diminished property value need to be linked with another alleged nuisance, in this case noise.
[41] 170 S.E.2d 577 (W.Va. 1969).

nuisance cases the "continual substantial interferences with a person's use and enjoyment of property by things such as noise and unsightliness can best be abated by courts applying equitable principles."[42] While the Court is correct that *Severt* is inconsistent with other nuisance decisions, this holding seems out of place when considering a prospective nuisance. If the injunction were granted, then there would be no harm to property values and evidence of diminished property value would not exist – essentially in a prospective nuisance equity is all that can be recovered. Still, it is arguably an improvement to overturn *Severt* and bring more consistency to nuisance law in West Virginia.

IV. Conclusion

The *Burch* decision develops prospective nuisance law in the state by providing holdings on both the burden to show a prospective nuisance and the acts sufficient to find a prospective nuisance. The case also affirms the presumptions given to businesses, but fails to extend this presumption. While the court would not hold it as such, legislation should be passed to prevent prospective nuisance actions against businesses who obtain Public Service Commission approval, and perhaps businesses approved by other state agencies. Ultimately this will encourage business by reducing the costs and uncertainty in starting a business, and will give businesses a chance to prove the presumption that they will not be a nuisance correct by letting them begin operations that will hopefully demonstrate their activities will not be a nuisance to their neighbors.

[42] *Burch* at 894.

This is a modest proposal because it would still allow an actual nuisance action if a nuisance were to appear.

Table 1: Factual Situations Giving Rise to Nuisance[43]

Factual Situation	Citation
Wind turbines	*Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W.Va. 2007).
Trucking route	*Duff v. Morgantown Energy Associates*, 421 S.E.2d 253, 256 (W.Va. 1992).
Waste water treatment plant effluent	*Taylor v. Culloden Public Service District*, 591 S.E.2d 197 (W.Va. 2003).
Refinery air emissions	*Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795 (W.Va. 1991).
Location of water well	*Hendricks v. Stalnaker*, 380 S.E.2d 198 (W.Va. 1989).
Rock concerts	*Berkeley County Comm'n v. Shiley*, 295 S.E.2d 924 (W.Va. 1982).
School near airport	*Sticklen v. Kittle*, 287 S.E.2d 148 (W.Va. 1981).
Coal truck dust	*West v. National Mines Corp.*, 285 S.E.2d 670 (W.Va. 1981).
Junk yard	*Mahoney v. Walter*, 205 S.E.2d 692 (W.Va. 1974).
Used car lot	*Martin v. Williams*, 93 S.E.2d 835, 844 (W.Va. 1956).
Rail tramroad on a public road	*Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348 (W.Va. 1945).
House of prostitution	*State v. Navy*, 17 S.E.2d 626 (W.Va. 1941).
Automobile garage	*Harris v. Poulton*, 127 S.E. 647 (W.Va. 1925).
Fences	*Donohoe v. Fredlock*, 79 S.E. 736 (W.Va. 1913).
Smoke and soot from plant	*Parker v. City of Fairmont*, 79 S.E. 660 (W.Va. 1913).
Carpenter shop and steam engine	*Wood v. City of Hinton*, 35 S.E. 824 (W.Va. 1900).
Property next to a railroad track	*Guinn v. Ohio River R.R. Co.*, 33 S.E. 87 (W.Va. 1899).
Merry-go-round	*Town of Davis v. Davis*, 21 S.E. 906 (W.Va. 1895).
Explosives factory	*Wilson v. Phoenix Powder Mfg. Co.*, 21 S.E. 1035 (W.Va. 1895).
House built on city property	*Teass v. City of St. Albans*, 17 S.E. 400 (W.Va. 1893).
Factory noise	*Powell v. Bentley & Gerwig Furniture Co.*, 12 S.E. 1085 (W.Va. 1891).
Obstruction to public road	*Keystone Bridge Co. v. Summers*, 13 W.Va. 476 (W.Va. 1878).

[43] This list is adopted from *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 621 (W.Va. 1985).