PUBLIC NUISANCE

General Principles

Historically, public nuisances were prosecuted only criminally (fine or jail time), but in more modern times legislators have enacted measures emphasizing abatement of the nuisance over assessing criminal penalties. 8 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 73. 08(d), at 479 -80 (David A. Thomas ed. 2013). See also RCW 7.48.200 (providing that "[t]he remedies against a public nuisance are: Indictment or information, a civil action, or abatement").

A nuisance is a substantial and unreasonable interference with the use and enjoyment of another person' s property. ***Grundy v. Thurston County***, 155 Wn.2d 1, 6, 117 P. 3d 1089 (2005). Washington' s nuisance law is codified in chapter 7.48 RCW. RCW 7. 48. 010 defines an actionable nuisance as " whatever is injurious to health ... or offensive to the senses, ... so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48. 120 also defines nuisance as an " act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others ... or in any way renders other persons insecure in life, or in the use of property."

If particular conduct interferes with the comfort and enjoyment of others, nuisance liability exists only when the conduct is unreasonable. ***Lakey v. Puget Sound Energy, Inc***., 176 Wn.2d 909, 923, 296 P. 3d 860 (2013). "We determine the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity." Lakey, 176 Wn.2d at 923; *see also* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 10. 3, at 656 -57 (2d, ed. 2004) (whether a given activity is a nuisance involves balancing the rights of enjoyment and free use of land between possessors of land based on the attendant circumstances). "`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.' " ***Shields v. Spokane Sch. Dist. No***. 81, 31 Wn.2d 247, 257, 196 P. 2d 352, 358 (1948)

quoting 46 C. J. 655, NUISANCES, § 20). Whether a nuisance exists generally is a question of fact. ***Lakey***, 176 Wn.2d at 924; ***Tiegs v. Watts***, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).
A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance. 17 STOEBUCK & WEAVER, § 10. 3, at 656; see also ***Tiegs***, 135 Wn.2d at 13. However, a lawful activity also can be a nuisance. ***Grundy***, 155 Wn.2d at 7 n. 5. "[A] lawful business is never a nuisance per se, but may become a nuisance by Reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner." ***Hardin v. Olympic Portland Cement Co***., 89 Wash. 320, 325, 154 P. 450, 451 (1916).

Probability of Harm

A nuisance can be based on a reasonable fear of harm. “Where a defendant’s conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property." ***Lakey***, 176 Wn.2d at 923. "[T]his fear need not be scientifically founded, so long as it is not unreasonable." ***Lakey***, 176 Wn.2d at 923.

In ***Everett v. Paschall***, our Supreme Court enjoined as a nuisance a tuberculosis sanitarium maintained in a residential section of the city where the reasonable fear and dread of the disease was such that it depreciated the value of the adjacent property, disturbed the minds of residents, and interfered with the residents' comfortable enjoyment of their property despite that the sanitarium imposed no real danger. 61 Wash. 47, 50 -53, 111 P. 879 (1910). And in ***Ferry v. City of Seattle***, the Supreme Court affirmed the trial court's decision to enjoin as a nuisance the erection of a water storage reservoir in a city park due to residents' very real and present apprehension that it may collapse and flood the neighborhood damaging property and imperiling residents. 116 Wash. 648, 662 -63, 666, 203 P. 40 (1922). The court held that "the question of the reasonableness of the apprehension turns again, not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue; that is to say the court will look to consequences in determining whether the fear existing is reasonable." ***Ferry***, 116 Wash. at 662.

In any event, whether an activity causes actual or threatened harm or a reasonable fear is not the dispositive issue. The crucial question for nuisance liability is whether the challenged activities are reasonable when weighing the harm to the aggrieved party against the social utility of the activity. ***Lakey***, 176 Wn.2d at 923. For instance, in ***Lakey***, neighbors of Puget Sound Energy (PSE) alleged that the electromagnetic fields (EMFs) emanating from its substation constituted a private and public nuisance. 176 Wn.2d at 914. Our Supreme Court concluded that even though the neighbors had demonstrated reasonable fear from EMF exposure, as a matter of law PSE' s operation of the substation was reasonable based on weighing the harm against the social utility. ***Lakey***, 176 Wn.2d at 923 -25.