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**Tilting at Wind Turbines: Noise Nuisance in  
the Neighborhood After *Rassier v. Houim***

by

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# TILTING AT WIND TURBINES: NOISE NUISANCE IN THE NEIGHBORHOOD AFTER *RASSIER V. HOUIM*

DAVID R. BLISS\*

## I. INTRODUCTION

Most residential property owners have visions of what peace and tranquillity await them as they take that major financial step to purchase a parcel of land. They may be prepared to do battle with runaway lawns, rodents, weeds, and cankerworms, but they may not expect that other invasions may penetrate their quiet refuge from the stresses and strains of the outside world. These intrusions may be termed nuisances. One author has defined a nuisance as

that class of wrongs that arise either from the unreasonable, unwarrantable, indecent or unlawful use by a person of his property or from his own improper, indecent or unlawful personal conduct, working an obstruction or injury to the right of another or the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.<sup>1</sup>

Nuisance may come from the howls of barking dogs<sup>2</sup> or the odor from a hog farming operation.<sup>3</sup> Noises can also be consid-

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1. 6 RICHARD R. POWELL, *THE LAW ON REAL PROPERTY*, ¶ 866.1[3], at 79B-38 (1991) (citing *Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 363 (1941)).

2. *Parker v. Reeves*, 505 So. 2d 323 (Ala. 1987) (finding noise and odors of dogs that interfered with neighbors' enjoyment of their homes enjoined as private nuisance); *Brewton v. Young*, 596 So. 2d 577 (Ala. 1992) (finding noise and odor of dogs that interfered with neighbors' enjoyment of their homes enjoined as private nuisance); *Wilms v. Hand*, 226 P.2d 728 (Ca. 1951) (classifying barking dogs in a dog hospital adjacent to a motel as a nuisance); *Connecticut v. Olson*, 511 A.2d 379 (Conn. 1986) (recognizing dogs that bark excessively as a nuisance); *Herberg v. Smyth*, 230 A.2d 235 (Conn. 1967) (opining that a dog kennel with as many as 46 dogs at one time on residential premises constituted common-law nuisance in view of findings that barking and howling of dogs continued for extended periods of time and occurred at all hours of the day and night). See also N.D. CENT. CODE § 42-03-01.

3. *Valasek v. Baer*, 401 N.W.2d 33 (Iowa 1987) (recognizing that the spreading of hog manure near a neighbor's property can constitute a nuisance even though the nuisance

ered nuisances,<sup>4</sup> such as airplane noise,<sup>5</sup> gunshots from a firing range,<sup>6</sup> or the whine and whir of a wind turbine.<sup>7</sup> Several types of nuisances are recognized in the law and are generally classified as either public or private. Public and private nuisances each implicate different interests and bear little relation to one another, although each causes inconvenience to someone. Their common name has led the courts to apply some of the same substantive rules of law to both types of nuisance.<sup>8</sup>

A private nuisance is categorized as a civil wrong based upon a disturbance of those rights.<sup>9</sup> The remedy against a private nuisance belongs to the one whose rights have been violated.<sup>10</sup> In a public or common nuisance action, however, the rights of the community at large are affected.<sup>11</sup> Unlike the remedy for private nuisances, the remedy for public nuisances is traditionally sought by the state.<sup>12</sup> An agricultural nuisance can assume characteristics of either a public or private nuisance. In most western states, an agricultural nuisance is set apart from the other nuisance definitions since agriculture assumes such an important economic role.<sup>13</sup>

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statute itself not more specific than to note that offensive smells may be actionable under nuisance law).

4. "Whether noise constitutes a nuisance depends on all the facts and circumstances of the case, including the following: the location and surroundings, the character and magnitude of the industry or business complained of and the manner in which it is conducted; the character and volume of the noise; and the time when occurring, and the duration thereof; and the number of people affected." 58 AM. JUR. 2D *Nuisances* § 144 (1989) (citations omitted). "The question whether noise constitutes a nuisance is a relative one, requiring the weighing of the competing interest and rights of the parties in each case, and to constitute a nuisance and a disturbance of the peace a noise must be an unreasonable one in the circumstances or cause material annoyance." *Id.* (citations omitted).

5. *Morris v. Ciborowski*, 311 A.2d 296 (N.H. 1973) (finding that airplane overflights were a permanent nuisance to the enjoyment of the land); *Thornburg v. Port of Portland*, 376 P.2d 100 (1962) (recognizing that noise from low-level flights over private land was an actionable nuisance); *Berg v. Reaction Motors Division, Thiokol Chem. Corp.*, 81 A.2d 487 (N.J. 1962) (recognizing that a disturbance by the defendant contracting with the government for the development and testing of a rocket engine in a supersonic airplane set forth textbook classifications of nuisances). See also N.D. CENT. CODE § 2-04-02 (1987).

6. *Anne Arundel County Fish & Game Conservation Ass'n v. Carlucci*, 573 A.2d 847 (Md. App. 1990) (requiring a trap and skeet shooting club to implement noise abatement for adjoining homeowners in an adjacent residential zone); *Kolstad v. Rankin*, 543 N.E.2d 1373 (Ill. 1989) (enjoining a gunsmith's private firing range as a nuisance to neighboring homes in rural agricultural area); *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369 (Mo. 1988) (finding that a gun club's use of property was nuisance to adjacent property owners).

7. *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ch. Div. 1982) (enjoining a wind turbine which produced noise levels of more than 60 decibels as an unreasonable interference with the neighbors' quiet enjoyment of their residences).

8. 58 AM. JUR. 2D *Nuisances* § 33 (1989).

9. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 86, at 618 (5th ed. 1984).

10. *Id.*

11. *Id.* Common nuisances include indecent exposure, the operation of public gaming houses, and the obstruction of public highways. *Id.*

12. *Id.*

13. North Dakota's agricultural nuisance chapter provides:

The intent of this paper is to provide an overview of North Dakota's public, private and agricultural nuisance statutes with a specific emphasis upon the private nuisance action in light of the North Dakota Supreme Court's recent decision in *Rassier v. Houim*.<sup>14</sup> The *Rassier* court apparently interpreted North Dakota's private nuisance law to mean that violation of an express statute, regulation or ordinance coupled with the violation of the state's nuisance law is a significant but not controlling factor to be considered by the trial court as it weighs the circumstances of each nuisance case.<sup>15</sup> The *Rassier* decision represents another judicial tack in the court's policy as to whether a private nuisance action may be based upon state nuisance law absent the violation of any other express statute, law, ordinance or regulation.

For the first time, the *Rassier* court applied the "coming to the nuisance" doctrine<sup>16</sup> in a nuisance action brought by a residen-

*Agricultural operation defined.* As used in this chapter, "agricultural operation" means the science and art of production of plants and animals useful to man, by a corporation as provided in chapter 10-06, a partnership, or a proprietorship, and including, to a variable extent, the preparation of these products for man's use and their disposal by marketing or otherwise, and includes horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bee, and any and all forms of farm products, and farm production.

N.D. CENT. CODE § 42-04-01 (1983 & Supp. 1991).

*Agricultural operation deemed not nuisance.* An agricultural operation is not, nor shall it become, a private or public nuisance by any changed conditions in or about the locality of such operation after it has been in operation for more than one year, if such operation was not a nuisance at the time the operation began; except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation.

N.D. CENT. CODE § 42-04-02 (1983 & Supp. 1991).

*Recovery for water pollution, condition, or overflow.* The provisions of section 42-04-02 shall not affect or defeat the right of any person to recover damages for any injury or damage sustained by him on account of any pollution of or change in the condition of the waters of any stream or on account of any overflow of lands of any such person.

N.D. CENT. CODE § 42-04-03 (1983).

*Effect on local ordinances.* Any ordinance or resolution of any unit of local government that makes the operation of any agricultural operation a nuisance or provides for the abatement thereof as a nuisance under the circumstances set forth in this chapter is void; except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation or from an agricultural operation located within the corporate limits of any city as of July 1, 1981.

N.D. CENT. CODE § 42-04-04 (1983).

See generally J. Patrick Wheeler, *Livestock Odor & Nuisance Actions vs. "Right-to-Farm" Laws: Report by Defendant Farmer's Attorney*, 68 N.D. L. REV. 459 (1992); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 (1988) (providing a survey of the fifty states with regard to right-to-farm statutes).

14. 488 N.W.2d 635 (N.D. 1992).

15. *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992).

16. See Ferdinand S. Tinio, Annotation, "Coming to Nuisance" As a Defense or Stopper, 42 A.L.R. 3d 344, 346 (1972):

tial property owner against an adjacent property owner within a planned development which was zoned exclusively for residential purposes. The court found that a residential property owner who "comes to the nuisance" must meet the same "heavy burden" of proof which the court has traditionally applied to nuisance actions brought by residential property owners against agricultural operations.<sup>17</sup>

## II. PUBLIC AND PRIVATE NUISANCE

Public and private nuisances represent two distinct fields of tort liability.<sup>18</sup> The term "nuisance" comes from the French word *nuisir*, meaning "to annoy."<sup>19</sup> Although each field involves an element of harm, inconvenience or annoyance to someone, each field is otherwise unrelated.<sup>20</sup> "A public nuisance is an unreasonable interference with a right common to the general public."<sup>21</sup> "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."<sup>22</sup>

The state's police power may be used to prevent and abate nuisances "and, within constitutional limits, the legislature may proscribe what shall constitute a nuisance and the method for the abatement of a nuisance."<sup>23</sup> North Dakota defines "nuisance" as an unlawful act which adversely affects others' health and safety or their rights regarding the use of property, is offensive to decency, or obstructs travel.<sup>24</sup> "Private nuisance" is defined by the North

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Where property is so utilized as to constitute a public or private nuisance, the fact that an individual thereafter purchases or occupies property in an area affected by the nuisance has been held or recognized in a great number of cases not to defeat his right to its abatement or the recovery of damages due to its continuance, since the fact alone that the complainant "came to the nuisance" does not constitute a defense or an estoppel, nor justify the continued operation of the nuisance.

*Id.*

"Priority in time as to the respective uses by plaintiff and defendant is an important consideration, both as to the existence of a nuisance giving rise to a right to recover damages and also as to the issue of whether plaintiff is entitled to injunctive relief of some kind." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 88B at 634 (5th ed. 1984) (citations omitted). "The matter of coming-to-the-nuisance is simply one factor on the issue of whether or not the defendant's use is an unreasonable interference." *Id.* at 635.

17. *Rassier*, 488 N.W.2d at 638.

18. RESTATEMENT (SECOND) OF TORTS §§ 821A - 840E (1977).

19. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 976 (2d ed. 1983).

20. See RESTATEMENT (SECOND) OF TORTS § 821A (1977).

21. *Id.* at § 821B.

22. *Id.* at § 821D.

23. 66 C.J.S. *Nuisances* § 7(a) (1950).

24. *Nuisance—Definition*. A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:

1. Annoys, injures, or endangers the comfort, repose, health, or safety of others;
2. Offends decency;

Dakota Century Code as an interference with a private right of an individual or a certain number of persons.<sup>25</sup> The remedies against a private nuisance are either a civil action or abatement.<sup>26</sup>

### A. PUBLIC NUISANCE

A public, or common, nuisance was originally an infringement against the Crown of England.<sup>27</sup> At common law, a public nuisance generally included crimes categorized as minor offenses, which centered upon interference with the protected interests of the entire community.<sup>28</sup> Most states have adopted statutes which have been interpreted to include common law public nuisances.<sup>29</sup> North Dakota's public nuisance statute defines a public nuisance as one which affects an entire community, neighborhood, or any considerable number of persons.<sup>30</sup> An action for public nuisance may be maintained by a private person only if the public nuisance is "specially injurious to himself or his property."<sup>31</sup> The authority to abate a public nuisance is held by any public body or officer so authorized by law, including municipalities<sup>32</sup> and boards of health.<sup>33</sup> One who maintains or creates any public nuisance, or who willfully omits to perform a legal duty relating to the removal of a public nuisance, is guilty of a class A misdemeanor.<sup>34</sup>

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3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or

4. In any way renders other persons insecure in life or in the use of property.

N.D. CENT. CODE § 42-01-01 (1983 & Supp. 1991).

25. N.D. CENT. CODE § 42-01-02 (1983 & Supp. 1991). "*Private Nuisance—Definition.*

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." *Id.*

26. N. D. CENT. CODE § 42-01-03 (1983). "*Private nuisance—Remedies against.* The remedies against a private nuisance are: 1. A civil action; or 2. Abatement." *Id.*

27. *Id.* at § 821B cmt. a.

28. *Id.* at § 821B cmt. b.

29. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1977).

30. N.D. CENT. CODE § 42-01-06 (1983 & Supp. 1991). "*Public nuisance—Definition.*

A public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Id.*

"[T]he term [public nuisance] has been applied to almost all wrongs which have interfered with rights of citizens whether in person, property, or enjoyment of property or comfort." 66 C.J.S. *Nuisance* § 1 (1950).

31. N.D. CENT. CODE § 42-01-08 (1983). "*Civil action—When maintainable by a private person.* A private person may maintain an action for a public nuisance if it is specially injurious to himself or his property, but not otherwise." *Id.*

32. The North Dakota Century Code confers to the governing body of a municipality the power "[t]o declare what shall constitute a nuisance and to prevent, abate, and remove the same." N.D. CENT. CODE § 40-05-01(44) (1983 & Supp. 1991).

33. The North Dakota Century Code confers upon the local board of health the power to abate and remove a nuisance. N.D. CENT. CODE § 23-05-04 (1991).

34. N.D. CENT. CODE § 42-01-15 (1983). "*Maintaining public nuisance—Penalty.* Every person who maintains or commits any public nuisance, the punishment for which is

## B. PRIVATE NUISANCE

The history of private nuisance actions indicates that the protected interests of one's use and enjoyment of land, including the use and enjoyment of easements and profits, are the same interests which are now protected by contemporary private nuisance statutes.<sup>35</sup> Land use is either private or public.<sup>36</sup> If the land use is private, the land is privileged to the individual and not to the general public.<sup>37</sup> For a private nuisance to be actionable, the interference must be "specially injurious" to the individual because of its nearness to that individual's home.<sup>38</sup> Further, although a nuisance may annoy many people, the nuisance does not prevent private nuisance recovery by those living in the immediate vicinity of the nuisance.<sup>39</sup>

## C. AGRICULTURAL NUISANCE

States, including North Dakota, have long recognized the importance of agriculture to their economies. Most state legislatures have conferred special dispensation upon agricultural producers through "right-to-farm" nuisance statutes which insure that an agricultural operation cannot be found to be a nuisance after the farming operation has been in effect for more than one year.<sup>40</sup> Such right-to-farm statutes have been enacted with the intent to free farmers and livestock producers in particular, from nuisance actions which would hinder their farming operations.<sup>41</sup>

North Dakota's right-to-farm nuisance statute is codified in a separate section of the state's nuisance laws.<sup>42</sup> This statute also includes a one year absolution from an action against the operation as mentioned above.<sup>43</sup>

The North Dakota legislature mandated that local entities of government were to respect the right of farmers to be free from nuisance actions by banning any local ordinance which might open farmers to lawsuits on nuisance claims.<sup>44</sup> The legislative

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not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a class A misdemeanor." *Id.*

35. RESTATEMENT (SECOND) OF TORTS § 821D cmt. a (1977).

36. *Id.* at cmt. c.

37. *Id.*

38. 58 AM. JUR. 2D, *Nuisances* § 47 (1989) (citation omitted).

39. *Id.* (citations omitted).

40. Wheeler, *supra* note 13, at 464.

41. *Id.* at 459.

42. See N.D. CENT. CODE § 42-04 (1983 & Supp. 1991); see *supra* note 13.

43. See N.D. CENT. CODE § 42-04-02 (1983). See also Wheeler, *supra* note 13, at 464.

44. See N.D. CENT. CODE § 42-04-04 (1983).

intent of the agricultural nuisance statute was to give preference to the person who had established his or her operation first.<sup>45</sup> Section 42-04-04 of the North Dakota Century Code states that “[a]ny ordinance or resolution of any unit of local government that makes the operation of any agricultural operation a nuisance or provides for the abatement thereof as a nuisance under the circumstances set forth in this chapter is void . . . .”<sup>46</sup> The North Dakota Supreme Court has upheld the state’s agricultural nuisance laws.<sup>47</sup>

### III. NUISANCE LAW AND THE NORTH DAKOTA SUPREME COURT

#### A. PRE-*RASSIER* DECISIONS

The North Dakota Supreme Court in 1983 had before it an appeal from a local Farmers Union Grain Terminal Association grain elevator (hereinafter “GTA”) whose operations discharged dust, chaff and grindings upon the new and used cars and trucks of the adjacent automobile dealer, Jerry Harmon Motors [hereinafter “Harmon Motors”].<sup>48</sup> The trial court found for the car dealer and awarded Harmon Motors \$57,620.33 in damages.<sup>49</sup> On appeal, the supreme court reversed the trial court, stating that Harmon Motors failed to meet its “heavy burden” to establish that the GTA operations were a private nuisance.<sup>50</sup> The court, applying the “coming to the nuisance” doctrine in North Dakota for the first time,<sup>51</sup> ruled that “any individual or corporation or partnership that comes to an alleged nuisance has a heavy burden to establish liability.”<sup>52</sup>

In its decision, the court clearly considered North Dakota’s newly-passed agricultural nuisance statute,<sup>53</sup> even though the court could not directly and retroactively apply the statute to the *Harmon Motors* facts because section 42-04 of the North Dakota

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45. *Agricultural Operation Not A Nuisance, 1981: Hearings on HB1461 Before the Senate Committee on Agriculture*, 47th Leg. Assembly (1981) (statement by Rep. Nichols).

46. N.D. CENT. CODE § 42-04-04 (1983); see *supra* note 13.

47. *E.g.*, *Jerry Harmon Motors v. Farmers Union Grain Terminal Ass’n*, 337 N.W.2d 427 (N.D. 1983) (recognizing that where a feed plant predated an auto dealership in the area, and the dealership failed to identify any law that imposed a duty upon the feed plant to refrain from emitting dust, the feed plant’s activities do not constitute a nuisance); *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313 (N.D. 1986) (finding that a corporation cannot invoke agricultural nuisance statute protections unless it meets the statutory requirements for a farming corporation).

48. *Harmon Motors*, 337 N.W.2d at 428.

49. *Id.*

50. *Id.* at 432.

51. *Id.* at 431.

52. *Id.* at 437.

53. *Harmon Motors*, 337 N.W.2d at 431-32.

Century Code had not been enacted by the time the suit was initiated.<sup>54</sup> The court noted that North Dakota's agricultural nuisance statute "effectively protects an agricultural business or enterprise from being declared a nuisance. It also protects a person engaged in an agricultural business or enterprise from having it declared a nuisance because of a change in circumstances."<sup>55</sup> The court stated that the state's agricultural economy was a highly significant factor in the interpretation of North Dakota Century Code section 42-04-02.<sup>56</sup>

The *Harmon Motors* court also ruled that Harmon failed to establish how GTA omitted to perform any duty, since no law existed which would regulate dust emissions.<sup>57</sup> In the absence of such a specific law, the court reasoned, Harmon had no case.<sup>58</sup>

Three years later, the supreme court had before it an appeal from landowner Robert Knoff and his tenant, whose property was adjacent to land owned by the American Crystal Sugar Company.<sup>59</sup> American Crystal constructed three waste-water lagoons next to Knoff's farmland. Knoff and his lessee, Thomas Heine, subsequently brought a nuisance action against American Crystal for crop losses which allegedly occurred as the result of the presence of American Crystal's nearby lagoons.<sup>60</sup>

The *Knoff* trial court concluded that American Crystal's operations were "agricultural" under section 42-04-01, and that its lagoons were not, therefore, a nuisance under section 42-04-02.<sup>61</sup> On appeal, the supreme court distinguished between the type of duty found in a negligence action and that which can give rise to a nuisance claim. The court noted that "[t]he creation or maintenance of a nuisance is a violation of an absolute duty, the doing of an act which is wrongful in itself . . . . Nuisance is a condition, and not an act or a failure to act, so that if a wrongful condition exists, the person responsible for its existence is liable for resulting damage to others."<sup>62</sup>

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54. *Id.* The court used section 42-04-02 in order to "take a sense of direction from the enactment." *Id.* at 432.

55. *Id.* at 431.

56. *Id.* The court noted that "[w]e must also consider what role the alleged nuisance activity has with the general business activities of the community and state, which are primarily farming and agricultural . . . . Grain elevators and feed-grinding businesses are needed and support the farming and agricultural activities of this state." *Id.*

57. *Id.* at 432.

58. *Harmon Motors*, 337 N.W.2d at 432.

59. *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313 (N.D. 1986).

60. *Id.* at 315.

61. *Id.*

62. *Id.* at 317 (quoting 58 AM. JUR. 2D *Nuisances* § 3 (1971)).

To hold a person liable for nuisance or negligence, there must be a breach of duty by that person.<sup>63</sup> A person is liable for injuries from negligence if he or she has not exercised proper care; a person is liable for injuries, however, from a nuisance if he or she creates or maintains the nuisance, regardless of the care exercised.<sup>64</sup> Nuisance law applies, rather than a negligence standard, if injuries are a "necessary consequence" of the defendant's actions, or "incident to the business itself or the manner in which it is conducted."<sup>65</sup>

American Crystal argued that the court's decision in *Harmon Motors* implied that "only a breach of duty imposed by statute or regulation will support [a nuisance] action."<sup>66</sup> This time, however, the supreme court rebuked any statutory argument it may have set forth in *Harmon Motors*, stating that American Crystal had interpreted *Harmon Motors'* ruling much too broadly.<sup>67</sup> The supreme court further noted that the plaintiff in *Harmon Motors* did not prove that the defendant violated any regulation or statute; thus, the plaintiff failed to meet its "heavy burden" of establishing liability, which was necessary since *Harmon Motors* had come to the alleged nuisance.<sup>68</sup> Finally, the court stated that "*Harmon Motors* does not stand for the proposition that only a violation of a statute or regulation will constitute breach of a duty which gives rise to an action based upon nuisance."<sup>69</sup> The court remanded the case for trial on the nuisance claims.<sup>70</sup>

## B. THE *RASSIER* CASE

Janet Rassier, her husband and children decided to move to Mandan, North Dakota in the summer of 1988.<sup>71</sup> The couple twice inspected a certain parcel of residential property in the Ventures First Addition development located in the northwest corner of the city. The couple purchased the lot in September, 1988, and moved a large mobile home onto the property in October, 1988. The Rassiers noticed upon their inspections of the property that adjacent landowner Garry Houim had erected a commercial wind

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63. *Id.* (quoting 58 AM. JUR. 2D § 3 (1971)).

64. 39 AM. JUR. 2d *Nuisances* § 4 (1942) (citations omitted).

65. *Id.*

66. *Knoff*, 380 N.W.2d at 317-18.

67. *Id.* at 318.

68. *Id.*

69. *Id.*

70. *Id.* at 321. The parties subsequently settled out of court prior to retrial. Telephone interview with Patrick W. Fisher, attorney for American Crystal Sugar (June 28, 1993).

71. Affidavit of Gerald Rassier at 1.

turbine atop a 70 foot tower approximately ten feet from what is now the Rassier's property line. On each of the Rassiers' prior inspections, the wind was calm and the turbine was relatively quiet. The Rassiers conversed with the City of Mandan's building inspector about the property prior to their purchase. The building inspector revealed no potential noise problems in connection with a wind turbine of this size and kind located in a residential area.<sup>72</sup>

Soon after they moved onto the property, the Rassiers began to experience problems from the noise generated by the Houim wind turbine. At trial, Rassier described the sound of the turbine which awakened her and her family at night: ". . . the wind can be calm when you go to bed, but that's not to say it's not going to come up in the middle of the night. And the whine will wake you up and as the wind gusts go up and down, the whine goes up and down along with it."<sup>73</sup>

Other problems emerged. Rassier stated that the wind turbine's noise interfered with their outdoor conversation, rest and relaxation and other normal outdoor activities around the home.<sup>74</sup> Inside the home, the noise was often so loud that Rassier kept her windows closed during warm weather and ran the air conditioner which, in turn, created higher utility bills. Rassier's thirteen-year old son, Damion, slept with earplugs to keep out the noise.<sup>75</sup>

For the next year, Rassier attempted to negotiate with the Houims as to how the wind turbine's noise could be mitigated.<sup>76</sup> No agreeable solution could be reached.<sup>77</sup>

In October, 1988, James Killingbeck from the North Dakota State Department of Health and Consolidated Laboratories measured the noise levels at and around the Rassier home.<sup>78</sup> The tests revealed that the wind turbine created noise levels which would be prohibited by a typical city noise abatement ordinance in either a commercially zoned or residentially zoned area.<sup>79</sup> Killingbeck concluded that these noise levels could be "annoying, irritating, stressful and may interfere with sleep."<sup>80</sup>

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72. *Id.* at 2.

73. Transcript of Trial at 106, *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992) (No. 16248) [hereinafter Trial Transcript].

74. Transcript of Hearing on Motion for Preliminary Injunction at 62, 65, *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992) (No. 16248).

75. *Id.* at 61.

76. *Id.* at 65.

77. Plaintiff's Complaint at VIII.

78. Trial Transcript at 41-42.

79. *Id.* at 24.

80. *Id.* at 47.

Rassier also became concerned about the structural safety of the turbine.<sup>81</sup> The 70 foot tower<sup>82</sup> loomed above the Rassier home approximately 40 feet from their home.<sup>83</sup> The turbine's propeller reached 26 feet across.<sup>84</sup> Both wind industry recommendations and model community standards require that wind turbines be "set back" in order that any damage resulting from a tower or rotor failure will be incurred upon the owner's property, not an adjacent landowner's property.<sup>85</sup> Rassier alleged that the development's restrictive covenants had been violated by Houim's erection of the wind turbine in their residential area.<sup>86</sup>

Houim disputed Rassier's noise and safety concerns.<sup>87</sup> Houim stated that he had obtained a building permit from the City of Mandan prior to building the wind turbine and therefore, had the authority to erect such a wind turbine in this residential area.<sup>88</sup> Houim claimed that he also obtained permission from those neighbors potentially affected by the erection of the structure.<sup>89</sup> Houim stated that the Rassiers had moved to the nuisance and alleged that Rassier had violated the development's restrictive covenants by building a shed on her property without the covenant committee's permission,<sup>90</sup> thus estopping Rassier from reliance upon the restrictive covenants as a remedy for her noise and safety con-

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81. *Id.* at 108 (stating plaintiff's concern due to ice that had formed on the turbine).

82. *Id.* at 72.

83. *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992).

84. Defendant's Answers to Plaintiffs' Interrogatories and Demands to Defendant, Set No. 1 at 1.

85. Trial Transcript at 70. At trial, the Rassiers' structural engineer expert stated that the minimum setback from an adjacent residential property should be a minimum of one and one half times the tower's height. Trial Transcript at 72. For a 70 foot tower like Houim's, the setback should have been at least 105 feet away from the adjoining property. Houim's tower is located 10 feet from the Rassier property line. *Id.*

86. Plaintiff's Amended Complaint at V. Paragraph No. 1 of the Ventures First Addition's restrictive covenants states that "[n]o lot, lots or portions thereof may, at any time, be used for commercial purposes, it being specifically prescribed that the land subject to these restrictions and conditions shall be used for residential purposes only, and no building shall be erected thereof, except for residential purposes, except that accessory outbuildings may be constructed insofar as they directly relate to the residential use of said property." Declaration of Covenants and Restrictions for Blocks 1, 2 and 3 of Ventures First Addition to the City of Mandan, North Dakota, at ¶ 1.

87. Defendant's Answer.

88. Defendant's Amended Answer at III.

89. Defendant's Trial Brief at 1. The Rassiers never claimed that the noise reached significantly beyond their property. Consequently, they brought a private rather than a public nuisance action. Rassier testified that "I can go out in the street and the noise from the wind charger is nothing. I go in my yard or in my home and we get the noise there." Transcript of Hearing on Motion for Preliminary Injunction at 62. Rassier's psychoacoustics expert explained at trial why the neighbors were not as affected by the noise as the Rassiers. Trial Transcript at 28.

90. The Rassiers' construction of a small shed on their property was specifically allowed by the covenants themselves and had been approved by the covenants committee.

cerns.<sup>91</sup> Houim requested that the nuisance action be dismissed.<sup>92</sup>

Rassier sued and sought injunctive relief.<sup>93</sup> The trial court ruled against her on the basis that the Rassiers had moved to the nuisance and knew “full well of its presence.”<sup>94</sup> “In addition, any injury suffered during the pendency of this action [was] not irreparable, so as to warrant the issuance of a preliminary injunction.”<sup>95</sup>

At trial, Rassier’s noise expert confirmed the North Dakota Health Department’s measurements which showed that the noise generated by Houim’s wind turbine would violate any known typical city residential or commercial noise ordinance.<sup>96</sup> Rassier also argued that the “coming to the nuisance” doctrine was only one factor among many in the determination of a private nuisance action.<sup>97</sup> Houim produced no expert testimony which refuted the Rassier expert testimony as to the amount of noise generated by the turbine. Both parties presented evidence at trial which reflected their respective views that the local restrictive covenants were or were not violated by either Houim or Rassier.<sup>98</sup>

The trial court ruled in favor of Houim.<sup>99</sup> The court stated that “[n]othing in its operation (noise) is in violation of any law, statute, ordinance, or regulation since there are no such legal restrictions on noise or wind turbines.”<sup>100</sup> The court noted that “[t]here exists no duty cognizable at law upon which the Plaintiff can rest her case as to the alternative predicate in section 42-01-01 (breach of duty). The only possible duty here would be the general duty of care [which] generally creates liability only in tort, not nuisance.”<sup>101</sup>

The trial court also ruled that the coming to the nuisance doctrine was applicable here, since Rassier was “fully aware of the existence and noise levels of the turbine before she moved next door.”<sup>102</sup> The court found that the covenants had been “abandoned by the developer” and that the subdivision members had ignored the control committee’s authority to enforce the restric-

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91. Defendant’s Trial Brief at 6.

92. Defendant’s Answer and Amended Answer.

93. Plaintiff’s Motion for Preliminary Injunction.

94. Trial Court’s Order Denying Injunctive Relief at 1.

95. *Id.*

96. Trial Transcript at 21, 24.

97. Plaintiff’s Trial Brief at 7.

98. Trial transcript at 84, 126.

99. Judgment and Decree of Trial Court at 1.

100. *Id.* at 2.

101. *Id.*

102. *Id.*

tive covenants rendering the covenants ineffective.<sup>103</sup> Rassier appealed the trial court decision.<sup>104</sup>

### C. THE *RASSIER* DECISION

On appeal, Rassier argued that the trial court erroneously concluded as a matter of law that the noise and dangers created by Houim's commercial wind turbine did not constitute a private nuisance under North Dakota Century Code sections 42-01-01(1) and (4).<sup>105</sup>

Houim responded that the Rassier family had purchased their Ventures First Addition property two years after Houim had erected his commercial wind turbine, and that Houim had received a permit from the City of Mandan to put up the turbine.<sup>106</sup> Houim admitted that the 70-foot tower was located ten feet from the Rassiers' property line and forty feet from the Rassiers' dwelling.<sup>107</sup> Houim claimed that the lawsuit was initiated by Rassier only after the relationship between the Rassiers and Houims began to deteriorate<sup>108</sup> and that Rassier's arguments as to the violation of the development's restrictive covenants and the turbine's safety were unavailing.<sup>109</sup>

#### 1. *Statutory Duty of Care*

Rassier claimed the duty of care as expressly provided in North Dakota Century Code sections 42-01-01(1) and (4) applied to Rassier's nuisance claim against Houim even though there was no other express law or regulation upon which Rassier's claim was based.<sup>110</sup> Houim argued, as did American Crystal in *Knoff*, that

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103. *Id.*

104. Plaintiff's Notice of Appeal.

105. Appellant's Brief at i. Rassier claimed that the fact that the city of Mandan had not specifically provided for noise regulation does not estop Rassier's claim for relief under N.D. CENT. CODE § 42-01-01. *Id.* Rassier also claimed that ice thrown from a wind turbine blade or a potential tower collapse were substantial health and safety risks created by the wind turbine's presence, and are actionable under N. D. Cent. Code § 42-01-01(4). *Id.*

Rassier argued that the duty of care which gives rise to a claim of nuisance, whether grounded in tort or negligence, is nonetheless applicable to Houim's conduct in the maintenance of a private nuisance. *Id.* Rassier also argued that the fact that she came to the nuisance did not override her claim for relief, and that Houim's erection of his commercial wind turbine violated Ventures First Addition's restrictive covenants which governed the parties' residential development. *Id.* at ii. See *supra* notes 85-86 and accompanying text.

106. Appellee's Brief at 4.

107. *Id.*

108. *Id.* at 5.

109. *Id.* at 5-6. Houim claimed that the covenants control committee was not valid, and his wind turbine tower was stronger than that recommended for a wind turbine generator of the size owned by Houim. *Id.*

110. Appellant's Brief at 4.

only a breach of duty established by statute or regulation will support a nuisance claim.<sup>111</sup>

The court's majority agreed with Houim. Justice Gerald VandeWalle, writing for the majority, noted that the statutory duty of care found in North Dakota Century Code section 42-01-01 is explicit,<sup>112</sup> and that the common law "remains relevant" when one assesses whether omitting to perform a duty which "(a)nnoys, injures, [or] endangers . . . others is a nuisance . . ." <sup>113</sup> Even though Houim's duty of care was clearly set forth as a duty cognizable and imposed at law, the court concluded that the violation of one's statutory duty of care is not enough for another to sustain a private nuisance action.

The majority opinion noted that the trial court's conclusion that Houim had "no duty cognizable at law upon which [Rassier] can rest her case"<sup>114</sup> was apparently based on the supreme court's earlier statements in *Harmon Motors* "that the plaintiff's failure to identify a duty imposed by law was significant."<sup>115</sup> The majority opinion referred to the court's earlier holding in *Knoff*, wherein the supreme court rejected appellee American Crystal's argument that only a statutory breach of duty could create a nuisance action, and stated that American Crystal had read *Harmon Motors* much too broadly.<sup>116</sup>

Unfortunately, neither the *Harmon Motors* court nor the *Rassier* majority opinion spelled out whether the corollary was true—that a nuisance action could be sustained absent the violation of an express statute, regulation or ordinance. The *Rassier* majority opinion cited the *Harmon Motors* court's admonition against the statutory argument and then concluded, without further explanation, that

[w]e construe the decision of the trial court in this case as complying with this explanation in *Knoff* of our opinion in *Jerry Harmon Motors*. The Memorandum Opinion and Order for Judgment indicates that the court engaged in a weighing of the circumstances, stating as a basis for deny-

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111. Defendant's Trial Brief at 5. In *Knoff*, appellee American Crystal contended that the court's decision in *Harmon Motors* "implied[d] that only a breach of a duty imposed by statute or regulation will support an action for nuisance." *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313, 317-18 (N.D. 1986). The court rejected American Crystal's argument, stating that American Crystal had read *Harmon Motors* "much too broadly." *Id.* at 318.

112. *Rassier v. Houim*, 488 N.W.2d at 635, 637 (N.D. 1992).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

ing *Rassier's* claim the fact that she "came to the nuisance."<sup>117</sup>

The *Rassier* court's reference to its earlier *Knoff* holding would seem to imply that the trial court in *Rassier* was wrong when it concluded that the statutory duty of care found in section 42-01-01 was not a duty cognizable at law. Even though Houim's duty of care was found to be clearly set forth by statute, the supreme court nonetheless required *Rassier* to show that Houim violated another statute in order to sustain her private nuisance action. Thus, the majority affirmed the trial court's ruling in a 3-2 decision.<sup>118</sup>

Justices Herbert L. Meschke concurred and dissented, and was joined by Justice Beryl J. Levine.<sup>119</sup> While Justice Meschke agreed with the majority that "there is an absolute duty not to act in a way that unreasonably interferes with the use and enjoyment of the property of other persons" under North Dakota Century Code section 42-02-01, he also stated that the "absolute duty is not dependent upon violation of any other express law, ordinance, or regulation."<sup>120</sup> Consequently, "Justice VandeWalle's analysis thus demonstrates that the trial court's conclusion, that '[n]othing in [the] operation [noise] of [Houim's wind turbine] is in violation of any law, statute, ordinance or regulation since there are no such legal restrictions on noise or wind turbines,' was unsound."<sup>121</sup>

Justice Meschke noted that the majority approved the trial court's ruling despite "the trial court's contorted conclusion that 'there exists no duty cognizable at law upon which [*Rassier*] can rest her case as to' a breach of duty."<sup>122</sup> He disputed the majority opinion's indication that the trial court properly weighed the circumstances of the case and properly found that Houim did not unreasonably interfere with *Rassier's* use of her property.<sup>123</sup>

Justice Meschke pointed out that "[e]xcessive noise is a classic breach of duty, and it is a private nuisance to a neighbor in a residential area."<sup>124</sup> He noted that in a similar wind turbine case from New Jersey, the New Jersey court stated that "the ability to look to one's home as a refuge from the noise and stress associated with

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117. *Rassier*, 488 N.W.2d at 638.

118. *Id.* at 639.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Rassier*, 488 N.W.2d at 639.

123. *Id.* at 638.

124. *Id.* at 640.

the outside world is a right to be jealously guarded. Before that right can be eroded in the name of social progress, the benefit to society must be clear and the intrusion must be warranted under all of the circumstances."<sup>125</sup> Justice Meschke noted that when Houim installed his wind generator, all Ventures First Addition lots, including the Houim and Rassier lots, were subdivided and zoned for residential purposes and protected by recorded covenants which restricted use to residential purposes only and prohibited all commercial use.<sup>126</sup>

Justice Meschke quoted the Restatement (Second) of Torts' explanation that one of the most important factors to be weighed in a nuisance action is the locality's character at the time that the interfering activity is begun.<sup>127</sup> In this case, he said, when Houim erected his wind turbine, all lots in Ventures First Addition were intended for residential purposes.<sup>128</sup> Justice Meschke noted that he would have reversed and remanded the trial court's decisions so that a decision could be rendered with a correct view of private nuisance law.<sup>129</sup>

## 2. "Coming to the Nuisance" Doctrine

Houim claimed Rassier came to the nuisance, a charge undisputed by Rassier.<sup>130</sup> Houim also claimed that the *Harmon Motors*' "heavy burden" of proof must be met by Rassier even though the *Harmon Motors* facts dealt with an agricultural nuisance, not a nuisance in a residentially zoned area.<sup>131</sup>

Rassier countered that coming to the nuisance could not alone

125. *Id.* (quoting *Rose v. Chaikin*, 453 A.2d 1378, 1383 (N.J. Super. Ct. Ch. Div. 1982)).

126. *Id.*

127. *Rassier*, 488 N.W.2d at 640. Meschke quoted the Restatement (Second) of Torts position:

Even between socially desirable and valuable uses of land there is a degree of incompatibility that, in some cases, is so great that they cannot be carried on in the same locality. A slaughterhouse, for example, may be indispensable to the community, but it usually renders other land in its immediate vicinity unfit for residential use and enjoyment. This incompatibility between the various beneficial uses to which land may be put has, in nearly all communities, resulted in a segregation of certain uses in certain localities in order to avoid unnecessary conflict between those that are highly incompatible. Thus some localities come to be devoted primarily to residential purposes, others to industrial purposes, others to agricultural purposes and so on. Sound public policy demands that the land in each locality be used for purposes suited to the character of that locality and that persons desiring to make a particular use of land should make it in a suitable locality.

*Id.* (quoting RESTATEMENT SECOND OF TORTS § 827 cmt. on Clause 9d (1977)).

128. *Rassier*, 488 N.W.2d at 640.

129. *Id.* at 641.

130. Appellee's Brief at 7.

131. *Id.*

override her claim for relief, citing both the majority rule and the Restatement (Second) of Torts<sup>132</sup> for the proposition that coming to the nuisance is but one factor and not sufficient in and of itself to bar a claim for relief.<sup>133</sup> Rassier also argued that Houim should have expected that the residential lot adjoining his own would be settled and that the wind turbine which he erected on his own property could subsequently become an actionable nuisance when the adjacent property was developed.<sup>134</sup> The Restatement (Second) of Torts provides: "The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a

132. Restatement (Second) of Torts states:

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) the extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.

RESTATEMENT (SECOND) OF TORTS § 827 (1977).

Section 828 of the Restatement further states:

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) the social value that the law attaches to the primary purpose of the conduct;
- (b) the suitability of the conduct to the character of the locality; and
- (c) the impracticability of preventing or avoiding the invasion.

*Id.* at § 828 (1977). See also *supra* note 4.

133. Appellant's Brief at 14 (quoting RESTATEMENT (SECOND) OF TORTS § 840D cmt b (1977)).

134. See also *Campbell v. Seaman*, 63 N.Y. 568, 584 (1876) (finding that "[o]ne cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected"); *Hall v. Budde*, 169 S.W.2d 33 (1943) (finding no prescriptive right to operate a public nuisance); *Ingersoll v. Rousseau*, 76 P. 513 (1904) (enjoining the defendant from leasing property to be used as houses of ill repute).

For additional discussion, see T.C. Williams, Annotation, "Coming to a Nuisance" as a Defense or Operating as an Estoppel, 167 A.L.R. 1364 (1947). In *Hall v. Budde*, Williams recognized that:

A person acquiring property has the right to expect and require that his neighbor will utilize his property, notwithstanding its previous use, so as to not interfere with the reasonable enjoyment of his own, and that at most, the fact that the complainant "moved to the nuisance" was but a factor, though an important one, to be considered in connection with all the circumstances in determining the equities of a given case.

*Id.* at 1382. Williams also commented that in *Ingersoll v. Rousseau*:

The "fact that the defendant began making this particular use of his property before the plaintiffs purchased their property did not affect the [nuisance action] . . . . The right of the [plaintiffs] to maintain an injunction, if that right exists at all, is a property right; it runs with the land . . . and existed in favor of the grantors of the [plaintiffs], and passed to them by the purchase of the property."

*Id.* at 1372.

factor to be considered in determining whether the nuisance is actionable."<sup>135</sup> Within this context, comment b to the Restatement (Second) of Torts states further:

The rule generally accepted by the courts is that in itself and without other factors the "coming to the nuisance" will *not* bar the plaintiff's recovery. Otherwise the defendant by setting up an activity or condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land. *The defendant is required to contemplate and expect the possibility that the adjoining land may be settled, sold or otherwise transferred and that a condition originally harmless may result in an actionable nuisance when there is later development.*<sup>136</sup>

The majority opinion sided with Houim. Without distinguishing the residential nature of the Rassier nuisance claim against the clearly agricultural nature of the nuisance action in *Harmon Motors*, the majority noted that the *Harmon Motors* court construed the coming to the nuisance doctrine as placing "a heavy burden to establish liability" upon the nuisance claimant who has moved to the nuisance.<sup>137</sup> The majority then ruled that this burden was not met by Rassier.<sup>138</sup> The majority did acknowledge Rassier's testimony from two noise experts—unchallenged by expert testimony from Houim<sup>139</sup>—that Houim's wind turbine generated noise up to 69 decibels, a per se violation of those North Dakota community noise ordinances which restrict noise in residentially zoned areas.<sup>140</sup> Nonetheless, the majority opinion was not convinced that the trial court mistakenly found that Rassier had not proved a nuisance.<sup>141</sup> The majority opinion noted that the trial court "included the necessary finding that Houim did not

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135. RESTATEMENT (SECOND) OF TORTS § 840D (1977).

136. *Id.* at cmt. b (emphasis added).

137. *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992).

138. *Id.*

139. Appellant's Brief at 10.

140. *Rassier*, 488 N.W.2d at 638.

141. *Id.* at 638-39. The court noted that there were other relevant factors to be considered which relate to the reasonableness of a defendant's interference with a plaintiff's use of property. These factors include "a balancing of the utility of defendant's conduct against the harm to the plaintiff, plaintiff's attempts to accommodate defendant's use before bringing the nuisance action, and plaintiff's lack of diligence in seeking relief." *Rassier*, 488 N.W.2d at 639 (relying on 5 RICHARD R. POWELL & PATRICK J. ROHAN, *THE LAW ON REAL PROPERTY*, ¶ 704[2]-704[3] (1991)).

unreasonably interfere with *Rassier's* use of her property."<sup>142</sup>

In his dissent, Justice Meschke stated that the court's earlier decision in *Harmon Motors* applied the coming to the nuisance doctrine in a distinctly agricultural and commercial context, not residential.<sup>143</sup> He noted that "[t]he rationale for the prevailing rule rejecting 'coming to the nuisance' as a sufficient defense is that otherwise those who settled in an area would acquire complete control over the future of adjoining and nearby land, and the fluidity of land use—a basic aspect of the American economy—would be reduced."<sup>144</sup> Justice Meschke noted that in this case there was planned development, and Houim knew that the residential lot adjacent to his was intended for a home.<sup>145</sup> He stated that the trial court improperly applied the coming to the nuisance doctrine to this clearly residential set of circumstances and had mistakenly concluded, therefore, that *Rassier's* private nuisance action failed as a result.<sup>146</sup>

#### IV. NORTH DAKOTA LAW AFTER *RASSIER V. HOUIM*

It is reasonable to conclude from the *Rassier* decision that one who claims a private nuisance action should not rely solely upon the statutory remedies expressly provided for such actions by North Dakota Century Code section 42-01-03. Although the majority recognized one's "absolute" and statutorily defined duty not to unreasonably interfere with another's enjoyment and use of property,<sup>147</sup> the court appeared to find it significant that no other express statute, ordinance or regulation had been violated.<sup>148</sup> Second, and perhaps more ominous for residential property owners and local units of government alike, it is unclear from the *Harmon Motors* and *Rassier* decisions how significant a statutory violation might be in future nuisance decisions for plaintiffs to prevail, and how specifically tailored the statute must be to the nature of the nuisance allegation in order to be enforceable.

A rose is a rose, and an absolute duty of care in a private nui-

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142. *Rassier*, 488 N.W.2d at 638.

143. *Id.* at 640. "While that [coming to the nuisance] factor is no doubt important to protecting an agricultural industry in an agricultural state, it should not be applied to an inappropriate activity that interferes with the use of property planned, zoned, and dedicated to residential purposes." *Id.*

144. *Id.* at 641 (quoting 5 RICHARD R. POWELL & PATRICK J. ROHAN, *THE LAW ON REAL PROPERTY*, ¶ 704[3], at 64-48 to 64-49 (1991)).

145. *Id.* at 641.

146. *Id.* at 640-41.

147. *Rassier*, 488 N.W.2d at 637.

148. *Id.*

sance action in a residential context should be absolute, not relative as in a negligence action.<sup>149</sup> Both the *Rassier* majority and dissent agree that North Dakota Century Code section 42-01-01 expressly forbids one to omit to perform a duty which act or omission unreasonably interferes with another's quiet enjoyment of property.<sup>150</sup> This duty of care becomes a relative rather than absolute duty, however, when a court imposes this duty only after it first weighs all of the circumstances to determine whether the plaintiff has a claim for relief. While this relative duty may be appropriate when applied in an agricultural context, such a duty is less appropriate in a residential setting.

In *Rassier*, the court imposed a relative rather than absolute duty of care upon Houim not to interfere with *Rassier*'s quiet enjoyment of her property. The court watered down Houim's "absolute" duty in favor of a weaker, relative duty which apparently would be imposed only after the trial court first weighed all the circumstances, such as whether *Rassier* came to the nuisance. Only after the trial court weighed the circumstances did the court find that Houim's level of care did not unreasonably interfere with *Rassier*'s exercise of her property rights.

If a trial court considers the duty of care in a residential nuisance action only after weighing all the circumstances, the result can be a contorted conclusion such as that in *Rassier*, where a commercial wind turbine, located in a residential zone, which produces more noise than that allowed even in a commercially zoned area—clearly a nuisance by any objective standard—is not seen as an "unreasonable" interference because of other factors weighed first by the trial court.<sup>151</sup> Such a result is scarce comfort to a residential property owner, present or future, who must deal with the reality of a bona fide nuisance but with no legal recourse to abate the nuisance.

Since it appears that after *Rassier* it is significant if no express statute or regulation has been violated other than the duty of care found in section 42-01-01, it remains unclear how specifically tailored this statute must be in order that the plaintiff can find relief under the same.

In earlier decisions, the court often cited the lack of a specific statute as a basis for denying relief to the claimant. In *Langer v.*

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149. *Id.* at 637.

150. *See id.* at 639.

151. *Id.*

*Goode*,<sup>152</sup> the defendant was accused of maintaining a nuisance because he failed to destroy wild mustard, the seed of which allegedly blew onto the plaintiff's property. The *Langer* court reached into contract law and chose one of the three definitions of "unlawful," found in what is now North Dakota Century Code section 9-08-01.<sup>153</sup> The *Langer* court declared that no duty devolved upon the defendant since there was no duty prescribed by law which required the defendant to destroy the weeds on his own property.<sup>154</sup> The court chose not to employ subsection 2 of the statute, which would have allowed the court to deem the defendant's omission of duty unlawful as "contrary to the policy of express law, though not expressly prohibited . . . ."<sup>155</sup>

In *Harmon Motors*, the court noted that the plaintiff, which had chaff and grain dust fall upon its car lot from the nearby grain elevator, did not establish a breach of a required duty by the defendant.<sup>156</sup> Further, the court stated that it knew of no law which regulated dust emissions.<sup>157</sup> Likewise, in *Rassier*, where the city had no wind turbine noise abatement ordinance and the Rassier family discovered the effects of an adjacent wind turbine's noise only after living upon their property over a period of time, the court found it significant that no express law which governs wind turbines was violated.<sup>158</sup>

The court appears to require that the plaintiff who brings a nuisance action must be able to sue upon a statute specifically designed for such a nuisance before a court will grant relief. This requirement does not bode well for the plaintiff who encounters a novel nuisance which, although clearly defined as a nuisance by virtue of its annoyance, injury or unreasonable interference with another's property, has yet to be specifically regulated by the legislature, municipality, county commission or state agency.

The "coming to the nuisance" doctrine has now been applied by the North Dakota court in a distinctly residential rather than

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152. 131 N.W. 258 (N.D. 1911).

153. N.D. CENT. CODE § 9-08-01 (1987 & Supp. 1991).

"Provisions that are unlawful. Any provision of a contract is unlawful if it is:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited, or
3. Otherwise contrary to good morals."

*Id.* (emphasis added).

154. *Langer*, 131 N.W. at 261.

155. N.D. CENT. CODE § 9-08-01 (1987 & Supp. 1991) (emphasis added).

156. *Harmon Motors v. Farmers Union Grain Terminal Ass'n.*, 337 N. W. 2d 427, 432 (N.D. 1983).

157. *Id.*

158. *Rassier v. Houim*, 488 N.W. 2d 635, 639 (N.D. 1992).

agricultural context.<sup>159</sup> After the *Rassier* decision, it is arguable that a residential property owner who discovers that he or she lives under the yoke of a nuisance will not be able to sustain an action against it unless the property owner meets a “heavy burden” of proof traditionally applied to agricultural nuisance actions.

## V. CONCLUSION

The supreme court noted in *Rassier* that one’s absolute duty of care in a nuisance claim is the absolute duty not to unreasonably interfere with other persons’ use and enjoyment of their property.<sup>160</sup> The court earlier mitigated this absolute duty of care in agricultural contexts in which the legislature clearly wished to protect the economic interests of the state’s farmers from nuisance actions.<sup>161</sup> Although the *Rassier* court did not specifically rule that a nuisance action can be sustained only if an express statute, regulation, or ordinance is violated in addition to the statutory duty of care, it is arguable that, for all practical purposes, the “heavy burden” which the court now applies to the residential property owner who moves to the nuisance has to meet such a requirement.

The supreme court has readily granted protection to agricultural operations from private nuisance actions brought by claimants who have “moved to the nuisance.” The court has ample statutory underpinnings for doing so.<sup>162</sup> The *Rassier* court, however, apparently extended the “heavy burden” required to prove an agricultural nuisance to a private nuisance action brought by one residential property owner who moves to an adjacent residential property owner’s nuisance, in a development zoned for residential purposes only.<sup>163</sup>

The application of this “heavy burden” to residential private nuisance actions creates a harsh new standard for residential property owners and lacks the sound statutory basis upon which the burden was originally determined under North Dakota’s agricultural nuisance statutes. The court set forth proper public policy when it protected agricultural land use from nuisance actions in past decisions.<sup>164</sup> As the Restatement notes, however, “[s]ound public policy demands that the land in each locality be used for

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159. Plaintiff’s Trial Brief at 6.

160. *Rassier*, 488 N.W.2d at 637.

161. *Harmon Motors*, 337 N.W.2d at 431.

162. N.D. CENT. CODE § 42-04 (1983 & Supp. 1991).

163. See generally *Rassier v. Houim*, 488 N.W. 2d 635 (N.D. 1992).

164. See generally *supra* note 47 and accompanying text.

purposes suited to the character of that locality . . . .”<sup>165</sup> One’s residential home and property are also deserving of similar land use protection against nuisances, especially if the benefits of a nuisance are small, but with substantial irritation.<sup>166</sup>

The court may wish to distinguish the duty of care applied to a residential private nuisance from a nuisance found in an agricultural setting. One’s duty not to create or maintain a nuisance should be far greater when one lives in a residentially zoned area where people relax, sleep, and otherwise take refuge from the noise and stress of the outside world.<sup>167</sup> In an agricultural context, on the other hand, the court has properly invoked the legislatively-mandated protection of the farmer’s economic interests when determining whether a nuisance exists. The legislature has not protected the economic interests of the residential property owner who creates or maintains a nuisance on city land zoned exclusively for residential purposes. Residential property owners deserve more protection from a private nuisance than that which is now provided under the court’s present interpretation of North Dakota’s nuisance law.

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165. See *supra* note 20.

166. See *Rose v. Chaikin*, 453 A.2d 1378, 1383 (N.J. Super. Ct. Ch. Div. 1982).

167. *Id.*