

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1758

Cir. Ct. No. 2007CV349

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BOLLANT FARMS, INC.,

PLAINTIFF,

STEVEN BOLLANT, DELORES BOLLANT AND THOMAS BOLLANT,

PLAINTIFFS-RESPONDENTS,

v.

SCENIC RIVERS ENERGY COOPERATIVE AND FEDERATED RURAL

ELECTRIC INSURANCE EXCHANGE,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. Scenic Rivers Energy Cooperative and its liability carrier, Federated Rural Electric Insurance Exchange (collectively Scenic Rivers), appeal from that part of the judgment against them in favor of Steven Bollant, Delores Bollant and Thomas Bollant (collectively Bollants) for private nuisance damages in the amount of \$1,250,000.00. Scenic Rivers challenges the Bollants' right to recover damages for private nuisance, including damages for annoyance and inconvenience, because it claims the Bollants lacked the necessary possessory interest in the affected property to bring the action. Scenic Rivers also challenges the Bollants' right to nuisance damages for annoyance and inconvenience on the basis that those damages are duplicative of other damages awarded against it. We disagree on both issues and affirm.

BACKGROUND

¶2 The Bollants operate a dairy farm on several properties, milking about 520 cows. The properties on which the dairy farm is operated are owned by Bollant Farms Partnership. The partnership has two equal partners—Thomas and Steven. The cattle and equipment, in turn, are owned by Bollant Farms, Inc., which is also owned by Steven and Thomas, who are officers of the corporation. Bollant Farms, Inc., rents the land on which it operates from the partnership. The Bollants all work for the farming operation, and they each live on one of the properties owned by the Partnership and rented by the corporation.

¶3 In 2001, the Bollants constructed a new barn and milking parlor to accommodate their growing operation. This facility was closer to Ebenezer Road, on which Scenic Rivers maintained an old power line, than the barn and milk house that it replaced. Problems with the herd arose immediately after the

Bollants began using the newly constructed barn and milking parlor. Herd health, herd production, and the quality of milk all declined, and herd management problems arose. None of those problems existed prior to the move into the new barn and milk house in 2001. The Bollants made efforts to fix the problems they encountered with respect to their herd, but to no avail. Eventually, electrical consultants were brought in and it was determined that Scenic Rivers' power line was returning most of its current through the ground to a substation, resulting in stray voltage being transmitted into the new barn. It took until 2008 to resolve the electrical problems. After the electrical problems were fixed, the herd eventually returned to its historical condition.

¶4 The Bollants, along with Bollant Farms, Inc., brought suit against Scenic Rivers for damages resulting from the stray voltage. They alleged, among other claims, that they were entitled to damages for private nuisance. Scenic Rivers disputed the Bollants' right to recover damages for nuisance, on the basis that the Bollants lacked a sufficient possessory interest in the properties affected by Scenic Rivers' actions, which it claimed prohibits the Bollants from bringing an action for nuisance.¹ The court rejected this argument.

¶5 The case was ultimately tried before a jury, which awarded Bollant Farms, Inc. damages in the amount of \$3,750,000 to cover the corporation's economic losses and the Bollants \$1,250,000 in nuisance damages. The circuit court entered judgment upon the verdicts. Scenic Rivers appeals only from the judgment in favor of the Bollants.

¹ Scenic Rivers raised this argument in a motion for partial summary judgment, a motion for reconsideration, and a motion for judgment notwithstanding the verdict. Each of those motions was denied by the circuit court.

DISCUSSION

¶6 Scenic Rivers raises three issues on appeal.² It first contends that the Bollants as individuals lack sufficient possessory interest in the land upon which the dairy farm is operated to be entitled to bring a claim for nuisance. Next, Scenic Rivers claims that the Bollants as individuals lack sufficient interest in the land to recover damages for annoyance and inconvenience. Finally, Scenic Rivers claims that the Bollants' nuisance damages for annoyance and inconvenience are duplicative of the damages of Bollant Farms, Inc.

I. As Possessors of the Land, the Bollants Have Property Rights and Privileges In Respect to the Use and Enjoyment of the Land Sufficient to Maintain an Action for Nuisance

¶7 Scenic Rivers contends that the Bollants cannot recover damages for nuisance from the stray voltage, including those for annoyance and inconvenience, because they did not have a “cognizable interest in the use and enjoyment” of the affected land.³ Whether the Bollants had an interest in the affected land sufficient to recover nuisance damages depends on whether the individual Bollants have the type of interest in the use and enjoyment of land contemplated by the doctrine of nuisance. “Whether the facts ... fulfill a particular legal standard is a question of law which we review de novo.” *Ide v. LIRC*, 224 Wis. 2d 159, 166, 589 N.W.2d 363 (1999).

² Additionally, in its reply brief, Scenic Rivers asserts for the first time that the Bollants were improperly awarded damages for emotional distress. We generally do not address issues or arguments raised for the first time in a reply brief, see *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995), and see no reason to deviate from that practice here.

¶8 Private nuisance is defined as “‘a nontrespassory invasion of another’s interest in the private use and enjoyment of land.’” *Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 423, 548 N.W.2d 829 (1996) (quoting RESTATEMENT (SECOND) OF TORTS § 821D (1979)). More broadly speaking, it is defined as “‘includ[ing] any disturbance of the enjoyment of property.’” *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶27, 277 Wis. 2d 635, 691 N.W.2d 65 (quoted source omitted). “[A]n action to recover damages for a private nuisance may be brought [only] by those who ‘have property rights and privileges in respect to the use and enjoyment of the land affected,’ including possessors of the land and owners of easements.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821E (1979)).

¶9 The question of whether an individual is a possessor of land is not necessarily a question of ownership.⁴ According to the RESTATEMENT (SECOND) OF TORTS §328E (1965), a “possessor of land” includes:

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

³ The Wisconsin Supreme Court has previously decided that private “nuisance law is applicable to stray voltage claims because excessive levels of stray voltage may invade a person’s private use and enjoyment of land.” *Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 427, 548 N.W.2d 829 (1996).

⁴ RESTATEMENT (SECOND) OF TORTS § 328E cmt. a. (1965) explains:

“Possession” has been given various meanings in the law, and the term frequently is used to denote the legal relations resulting from facts, rather than in the sense of describing the facts themselves. It is used here strictly in the factual sense, because it has been so used in almost all tort cases.

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

¶10 Similarly, the RESTATEMENT (FIRST) OF PROPERTY §7 (1936)⁵ states:

A possessory interest in land exists in a person who has

(a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land; or

(b) interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist.

¶11 Scenic Rivers argues that the individual Bollants are not in occupation of the land in their own right, but instead are representatives of Bollant Farms, Inc. We disagree.

¶12 The Comment on RESTATEMENT (FIRST) OF PROPERTY § 7(a) (1936) explains that there are two elements to possession of land. The first is the physical relationship that gives control over the land and excludes others from such control. The second is the intent to exclude others from physical occupation of the land. RESTATEMENT (FIRST) OF PROPERTY § 7 cmt. b. There is no reference in the Comment to the form of ownership in which the land is held. In fact, “[t]he important thing in the law of torts is the possession and not whether it is or is not

⁵ RESTATEMENT (FIRST) OF PROPERTY § 7 (1936) has not been adopted as law in Wisconsin. We use it in this case because we find it persuasive for its value in clarifying RESTATEMENT (SECOND) OF TORTS § 328E.

rightful as between the possessor and some third person.” RESTATEMENT (SECOND) OF TORTS § 328E cmt. a.

¶13 The first element, a “physical relation to the land of a kind which gives a certain degree of physical control over the land,” is present in this case. RESTATEMENT (FIRST) OF PROPERTY § 7(a). The Bollants live upon the affected land. They work it. They make all of the decisions about how and when every activity that takes place on the land occurs, whether through their partnership’s ownership of the land itself, or their ownership and direct management of the corporate entity that operates their farm. There is no entity involved in any physical relationship to the land that the Bollants did not create and that they do not continue to own and control on a day-to-day basis. While they have employees who work upon the farm, those employees lack the relationship to the land enjoyed by the Bollants.

¶14 The second element of possessory interest from the RESTATEMENT (FIRST) OF PROPERTY § 7(a), the intent to exclude others from physical occupation of the land, is likewise present. The Bollants, having established a partnership and a corporation to own and operate the property and having retained all ownership and control over those entities, have manifested an intent to exclude all others from occupation of the land.

¶15 However, even if, as Scenic Rivers argues, the partnership and the corporation are separate, independent persons before the law who stand between the Bollants’ possession of the land, the Bollants meet the requirements of Clause (b) of the RESTATEMENT (FIRST) OF PROPERTY § 7: “interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist.”

¶16 In other words, even if one or both of the elements of RESTATEMENT (FIRST) OF PROPERTY § 7(a) is not completely present, if the overall interests that exist are the same, then there can still be a possessory interest. In this case, the individual Bollants and the corporation do not intend to exclude each other, while excluding other members of society in general from occupancy of the land. The second element of Clause (a), even if it is not literally met, is constructively met. *See* RESTATEMENT (FIRST) OF PROPERTY § 7 cmt. b.

¶17 Viewing the totality of the circumstances, it is clear that the Bollants occupy the property with the intent to control it. The Bollants' occupancy and control of the property is based upon a number of relationships that they bear to the property:

1. Steven and Thomas are the sole partners in Bollant Partnership, which owns the land affected by the stray voltage;
2. Steven and Thomas are the sole shareholders of Bollant Farms, Inc., which owns the cattle and equipment and operates the dairy farm;
3. Delores, as the wife of Steven, is a member of the family;⁶
4. All of the Bollants reside on property which is part of the dairy farm;

⁶ RESTATEMENT (SECOND) OF TORTS § 821E cmt. d. (1979) provides:

“Possession” is not limited to occupancy under a claim of some other interest in the land, but occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land. Thus *members of the family of the possessor or a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors....* (Emphasis added.)

5. All of the Bollants work at the farming enterprise; and
6. All of the Bollants are officers of Bollant Farms, Inc.

¶18 That they have created entities through which they exercise that control is beside the point. The Bollants are possessors of the land, and as such, have the “rights and privileges in respect to the use and enjoyment of the land affected” that entitles them to be protected from private nuisance.

¶19 Scenic Rivers also argues that the Bollants are no different than other employees of Bollant Farms, Inc., and that as such, they cannot maintain an action based on private nuisance. *See* W. PAGE KEATON, ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 87, 621 (5th ed. 1984) (“it is generally agreed that anyone who has no interest in the property affected, such as a licensee, an employee or a lodger on the premises, cannot maintain an action based on private nuisance”). We disagree. The Bollants live on the dairy farm and work on the dairy farm every day, not solely as employees for pay, but as joint, exclusive owners of the entities with legal title, expecting to realize the fruits of the enterprise as any owner would.

II. The Bollants had an Interest in Land Sufficient to Entitle Them to Damages for Annoyance and Inconvenience

¶20 Scenic Rivers recognizes that in Wisconsin, “a plaintiff should be permitted to recover damages for personal inconvenience, annoyance and discomfort caused by the existence of a nuisance even in the absence of any showing of monetary loss or bodily injury.” *Krueger v. Mitchell*, 112 Wis. 2d 88, 105, 332 N.W.2d 733 (1983). It claims, however, that the Bollants were not entitled to such damages because: “where there is no interest in land on the part of the plaintiff, there is no cause of action for the recovery of annoyance and inconvenience damages.”

¶21 We have already determined that the Bollants are possessors of the land and as such have an interest in the land. Accordingly, we need not revisit the issue.

*III. Bollants' Claim for Annoyance and Inconvenience Damages
is Not Duplicative of the Corporation's Claim for Excess Labor Costs*

¶22 Scenic Rivers contends that the Bollants' claim for damages for annoyance and inconvenience is based upon the same evidence as the corporation's claim for excess labor costs, and is thus duplicative. It argues that the sum awarded to the corporation included the amounts determined by an expert witness to have resulted from the extra labor needed to deal with the effects of the stray voltage. Scenic Rivers compares the testimony of Delores regarding the extra work the stray voltage made for the Bollants, and the effect that the stray voltage had upon the family, to the extra labor amount determined by the expert.

¶23 The Bollants respond:

The [corporation] has numerous employees in addition to its owners, the plaintiffs. Dr. Behr's analysis included some excess labor costs, total[ing] \$177,390. There is absolutely no evidence that such costs represented excess amounts paid to the individual plaintiffs, as they did not. [Scenic Rivers'] implication to the contrary is without any support in or reference to the record, and therefore should be disregarded in its entirety. (Citations omitted.)

The Bollants further argue that the jury was expressly instructed not to duplicate damages and that juries are generally presumed to follow the instructions.

¶24 The jury is presumed to have followed the court's instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Nothing in the record rebuts this presumption, and in fact, the record supports the presumption.

¶25 The court gave the following instruction to the jury:

1700 DAMAGES: GENERAL:

....

In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you.

See WIS JI—CIVIL 1700.

¶26 The court also instructed the jury in the use of the special verdict forms with the following instruction:

145 SPECIAL VERDICT QUESTIONS: INTER-RELATIONSHIP

Certain questions in the verdict are to be answered only if you have answered a preceding question in a certain manner. Therefore, read the introductory portion of each question carefully before you answer it. Do not answer questions you are not required to answer.

See WIS JI—CIVIL 145.

¶27 It is evident from the jury’s answers on the special verdict form that the jury followed the court’s instructions. The jury answered “no” to question 4 regarding whether the Bollants were contributorily negligent, and left question 5, on the percentage of damages, blank, as they should have. Furthermore, question 8, in which the jury is asked to set the amount of damages, is divided into two sub-questions, which required the jury to distinguish annoyance, discomfort, inconvenience and loss of use and enjoyment of the dairy farm suffered by the

Bollants as individuals from damages to the corporation.⁷ The jury provided different amounts for each.

¶28 In addition, there is no doubt that there is sufficient evidence to support the jury’s division of the damages into the two categories. Even Scenic Rivers’ brief separately lays out the report of the Bollants’ expert on economic loss suffered by the corporation and Delores Bollant’s testimony on their inconvenience and annoyance. That report and testimony, as presented to the jury, was credible evidence from which the jury could infer that the cost of employees wages (corporate damages) was different from the efforts and frustrations of the owners. See *Peissig v. Wisconsin Gas Co.*, 155 Wis. 2d 686, 702-03, 456 N.W.2d 348 (1990) (“The standard of review for sufficiency of evidence requires a reviewing court to examine the record for any credible evidence which under any rational view fairly admits of an inference that will support the jury’s finding.”)

CONCLUSION

¶29 We hold that the Bollants are possessors of the land and, thus, have sufficient property rights and privileges with respect to the use and enjoyment of the land upon which Bollant Farms, Inc., operates the dairy operation to recover

⁷ Question 8 of the Special Verdict reads as follows:

What sum of money, if any, will fairly and reasonably compensate the Bollants for damages attributable to harmful levels of electricity for:

A. Economic losses[:] \$3.75 million.

B. For the individual Bollants’ annoyance, discomfort, inconvenience, and loss of use and enjoyment of the Bollant Farm: \$1.25 million.

damages for private nuisance. It is undisputed that those with such rights and privileges are entitled to damages for their “annoyance, discomfort, inconvenience, and loss of use and enjoyment of the” property. We also conclude that there was sufficient evidence to support the jury’s decision on the amount of the Bollants’ damages. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

