COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

NOTICE

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

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

No. 94-0094

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARTIN GRIEPENTROG and DOROTHY GRIEPENTROG,

Plaintiffs-Respondents-Cross Appellants,

v.

ADAMS-COLUMBIA ELECTRIC COOPERATIVE, FEDERATED RURAL ELECTRIC INSURANCE CORPORATION,

Defendants-Appellants-Cross Respondents,

WILSON MUTUAL INSURANCE COMPANY,

Defendant.

APPEAL from a judgment and an order of the circuit court for Marquette County: DANIEL W. KLOSSNER, Judge. *Affirmed in part and reversed in part and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. The issues in this stray voltage[1] case are: (1) whether the trial court erroneously exercised its discretion in (a) allowing certain opinion testimony on stray voltage matters and (b) permitting testimony and a jury question on the Griepentrogs' milk-production losses; (2) whether the evidence was sufficient to sustain the jury's verdict that stray voltage from the Cooperative's lines caused damage to the Griepentrogs' cattle; (3) whether the trial court erred in denying the Griepentrogs' motion to add a statutory treble-damage claim prior to trial; and (4) whether, under ***Vogel v. Grant-LaFayette Electric Coop.***, 201 Wis.2d 416, 548 N.W.2d 829 (1996),[2] the Griepentrogs are entitled to present evidence on their claim that the Cooperative's conduct constituted a private nuisance.

We see no error in the trial court's evidentiary rulings and its rejection of the Griepentrogs' motion to add an additional claim, and we are satisfied that the evidence was sufficient on the question of cause. We affirm on those issues. We also conclude, however, that under ***Vogel***, the Griepentrogs were entitled to offer evidence in support of their nuisance claim. We therefore affirm in part and reverse in part, remanding for a new trial limited to the Griepentrogs' private nuisance cause of action.

The facts are not in serious dispute. Martin and Dorothy Griepentrog are dairy farmers, running a herd of approximately fifty cows. Prior to January and February 1990, the herd exhibited no unusual health or behavior problems—although Martin Griepentrog testified that he had begun to notice a drop in milk production during the second half of 1989. Around the beginning of January 1990, the Griepentrogs' son, Carl, who helped work the herd, noticed several of the cows were breaking free of their stanchions and running out of the barn. The cows appeared "normal" the next day—with the exception of one, who was "off feed." The veterinarian examining this cow—

---

[1] We discussed the concept of stray voltage at some length in ***Vogel v. Grant-Lafayette Electric Coop.***, 195 Wis.2d 198, 207 n.3, 536 N.W.2d 140, 144 (Ct. App. 1995), *rev'd*, 201 Wis.2d 416, 548 Wis.2d 829 (1996).

[2] We held this case in abeyance pending the supreme court's decision in ***Vogel***, as some of the issues overlapped.

which eventually died of a displaced abomasum[3]—noted nothing unusual about the rest of the herd at the time.

In succeeding weeks, several other cows went "off feed" and died within days—twelve of them dying between January 17 and 21, 1990. As this was happening, the Griepentrogs' veterinarian sought advice from colleagues at the University of Wisconsin and the Wisconsin Department of Agriculture. While some of the consultants felt that electricity might be a possible factor in the cows' deaths, most concluded, at the time, that some form of toxic exposure was the likely cause.

By the end of January, the problem appeared to have run its course. In early February, Brad Kolpin, a Wisconsin dairy farmer and stray voltage "consultant," visited the Griepentrog farm, along with an investigatory team from a stray voltage advisory group.

Concluding from these and other investigations that stray voltage from the lines of the Adams-Columbia Electric Cooperative caused the problems, the Griepentrogs brought this action against the Cooperative in June 1991, alleging they were damaged by its negligence in maintaining and operating its distribution system so as to permit stray voltage to infiltrate their farm, causing the deaths of their cows and economic loss. They also alleged that the Cooperative's failure to construct and maintain its system in a reasonably adequate manner constituted a nuisance, for which they were entitled to additional damages for "annoyance and inconvenience." The Cooperative's answer denied any negligence and claimed that any damages the Griepentrogs may have suffered resulted from their own negligence. The Cooperative also asserted a defense based on the statute of limitations.

Shortly before the scheduled trial in the fall of 1993, the Griepentrogs moved to amend their complaint to add a claim for treble damages under § 182.017(5), STATS., which imposes treble-damage liability on

[3] An abomasum is "the fourth or true digestive stomach" of a ruminant or mammal with a three- or four-chambered stomach. WEBSTER'S NEW COLLEGIATE DICTIONARY 3 (8th ed. 1977).

communication services and electric utilities in certain instances. The trial court denied the motion.

By its evidentiary rulings at trial, the court effectively dismissed the Griepentrogs' nuisance claim, based on its ruling that relief for nuisance is unavailable to a plaintiff in stray voltage cases as a matter of law. The court also rejected the Cooperative's argument that the statute of limitations barred the Griepentrogs' action. The case went to the jury solely on the Griepentrogs' negligence claim and the jury found the Cooperative 100% causally negligent, assessing damages at $136,822.

In postverdict proceedings, the trial court denied the Griepentrogs' motion for a new trial on their nuisance and treble-damage claims. It also denied the Cooperative's motions for judgment notwithstanding the verdict, for a new trial and for a change in the verdict answers, and entered judgment on the jury's verdict.

The Cooperative, appealing from the judgment and the court's postverdict order, challenges the admission of certain opinion evidence relating to stray voltage, the sufficiency of the evidence as to cause, and the inclusion of milk- production losses in the Griepentrogs' damages. The Griepentrogs cross-appeal from the court's rulings on their nuisance and treble-damage claims. Other facts will be discussed in the body of the opinion.

I. Evidentiary Rulings

The admission or exclusion of evidence is committed to the sound discretion of the trial court, and the question on appeal is not whether this court, ruling initially on the evidence's admissibility, would have allowed it in but whether the trial court appropriately exercised its discretion. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). We will not reverse a trial court's discretionary ruling if the record shows that discretion was exercised and "we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Thus, "where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree."[4] ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations omitted). Indeed, we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39.

A. Opinion Evidence

The Cooperative challenges the admission of the testimony of four witnesses: two of them best described as "lay experts," and two "professionals." Section 907.02, STATS., provides that in cases where "scientific, technical, or other specialized knowledge" will assist the jury in understanding the evidence, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[5] Whether a particular witness meets those qualifications is a question properly left to the trial court's discretion in light of the unique facts and circumstances of the case at hand. *See* ***State v. Donner***, 192 Wis.2d 305, 317, 531 N.W.2d 369, 374 (Ct. App. 1995); ***State v. Richardson***, 189 Wis.2d 418, 424, 525 N.W.2d 378, 381 (Ct. App. 1994).

---

[4] A court is said to exceed the limits of its discretion if an otherwise discretionary determination rests upon an error of law. ***State v. Brunton***, 203 Wis.2d 195, 202, 552 N.W.2d 452, 456 (Ct. App. 1996).

[5] Cases on the subject do not explain exactly how to apply the statute when a layperson

The Cooperative argues that two "lay experts," Brad Kolpin and Thomas Beane, both of whom are dairy farmers and stray voltage "consultants," were wrongly permitted to give opinion testimony concerning a probable causal relationship between electricity and the death of the Griepentrogs' cows. A lay expert has been described as "one whose expertise or special competence derives from experience working in [a particular] field of endeavor rather than from studies or diplomas"; we recognize the opinions of such a witness as "valid even though [they] ... are not based upon technical or academic knowledge but upon expertise gained from [the witness's] experience." ***Black v. General Elec. Co.***, 89 Wis.2d 195, 212, 278 N.W.2d 224, 231 (Ct. App. 1979). Indeed, we noted in ***Black*** that, in some cases, "experience ... may be the most important element of expertise." ***Id***.

With respect to Kolpin, the Cooperative maintains that by allowing him to testify that, in his opinion, stray voltage caused the Griepentrogs' cows to die, the court was improperly permitting him to give his "expert [opinion] on veterinary medicine and electrical engineering"—subjects about which, according to the Cooperative, he was not qualified to testify. We disagree.

Kolpin testified as to his lengthy experience as a dairy farmer, his work with electrical engineers and veterinarians on stray voltage problems and, because he experienced similar problems on his own farm in the early 1980s, the relationship between electrical currents and cattle. In that time, he has developed a consulting business in the field, investigating and consulting on stray voltage problems at more than 200 farms throughout the Midwest, and the Wisconsin Department of Agriculture and the Wisconsin Public Service Commission have appointed him to various committees dealing with stray voltage matters. We believe this is sufficient foundation for him to testify as a lay expert under the authorities just discussed. In our judgment, the Cooperative's objections—that Kolpin's testimony on his qualifications was, in

(..continued)
testifies on technical matters. The Griepentrogs, for example, cite ***Smith v. Atco Co.***, 6 Wis.2d 371, 386-87, 94 N.W.2d 697, 705-06 (1959), where the supreme court affirmed a verdict in an agricultural product liability case based at least in part on the testimony of experienced mink ranchers concerning the cause of death of their mink. The Cooperative cites ***Peacock v. Wisconsin Zinc Co.***, 177 Wis. 510, 518, 188 N.W. 641, 644 (1922), where the court considered it error for a farmer who was familiar only with the processes involved in ordinary agriculture to render an opinion on the effect of noxious fumes on vegetation.

its words, no more than "name dropping with no substance"—go to the weight to be accorded that testimony, not Kolpin's competency to present it. Where, as here, "[the] testimony was sufficient to establish [the witness's] expertise as a lay expert and to lay a foundation for his opinion.... [a]ny inadequacy in his opinions went to the weight, not to the admissibility, of the testimony and was for the jury to accept or reject." ***State v. Sarabia***, 118 Wis.2d 655, 667-68, 348 N.W.2d 527, 534 (1984). We see no error.

The Cooperative makes a similar argument with respect to the testimony of Thomas Beane, who, according to the Cooperative, was permitted to offer similar testimony on the possible relationship between electricity and the cows' deaths despite a lack of expertise in the area.

Like Kolpin, Beane experienced stray voltage problems on his dairy farm in the early 1980s. Following that incident he, too, began to study and work in the area and was named by state officials to a multi-disciplinary team investigating stray voltage complaints around Wisconsin. He worked on investigations at more than sixty farms with a team of professional volunteers, receiving instruction in electricity and the use of electrical testing equipment. Beane has also consulted with more than 250 dairy farmers, as well as banks and real estate firms, on stray voltage problems. On this record, the trial court could, in the exercise of its discretion, determine that Beane's qualifications met the requirements for admission of opinion testimony.[6]

The Cooperative also challenges the testimony of two "professionals," Marquette University engineering professor Alfred Szews and veterinarian Andrew Johnson. Szews testified generally about the nature of stray voltage and specifically about the problems on the Griepentrogs' farm. The Cooperative finds particularly objectionable his testimony that (1) farmers ought to be "concerned" when "cow contact voltage" is above three-tenths of a

[6] As often happens in the course of a trial, the trial court's rulings on some objections to the testimony of these witnesses were as briefly stated as the objections themselves. We have frequently recognized, however, that, even though our review of a trial court's discretionary rulings begins with an examination of the court's on-the-record reasoning process, when its reasoning is inadequately explained, we may "independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

volt; (2) current levels in cows' tissues "cause discomfort"; and (3) "the only thing [he could] think of" that would cause the Griepentrogs' cows to break from their stanchions and run from the barn was an electrical shock. The Cooperative says that Szews simply was not qualified to testify "about cow behavior, animal discomfort or preferences."

Szews, who holds undergraduate and graduate degrees in electrical engineering, has been involved in investigating stray voltage problems on dairy farms since 1980. He has participated in more than seventy such investigations, working closely with dairy farmers and veterinarians and using information gathered from them in forming his own conclusions. The challenged testimony is very brief, occupying only a page or two in a 1300-page transcript; given Szews's training and experience, the court could, in an appropriate exercise of its discretion, accept the challenged testimony—and similar statements—from Szews, leaving the weight to be accorded such testimony to the jury.

Finally, in a similar, if converse, vein, the Cooperative maintains that the trial court improperly permitted Dr. Andrew Johnson to testify about "electrical matters." Johnson, a dairy-cattle specialist, has concentrated for the past several years on consulting with dairy farmers on herd health and milk production. He "analyzes" approximately 300 herds each year and, in each instance, evaluates possible stray voltage problems. In addition, he has been asked specifically to investigate stray voltage complaints at several hundred dairy farms, and both dairy farmers and electric utilities have retained him to advise them on the subject.

The Cooperative specifically objected to a question asking Johnson's opinion as to the probable cause of the deaths of the Griepentrog cows. The trial court permitted the answer, conditioned upon supporting testimony from an electrical engineer on electrical conditions. Given Johnson's foundational testimony and the trial court's conditional ruling, we cannot say that the court reached a conclusion no reasonable judge could make. It was, therefore, an appropriate exercise of discretion. *See* ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (when trial court exercises discretion and its decision is one a reasonable judge could reach and is consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree).

B. Evidence of Loss of Milk Production

The Cooperative moved, in limine, to preclude the Griepentrogs from presenting evidence of damages resulting from lost milk production, arguing that the only proper measure of damages in this case is the diminution in value of the herd. The trial court denied the motion and the Cooperative, citing ***Rosche v. Wayne Feed, Continental Grain Co.***, 152 Wis.2d 78, 447 N.W.2d 94 (Ct. App. 1989), argues it was error to do so.[7] In considering a claim that agricultural products manufactured by the defendant left some of the plaintiff's pigs "ill and sterile," we said in ***Rosche*** that "Wisconsin follows the general rule in holding that the basic measure of damages for an injured animal is the difference between its market value before and after the injury was incurred." ***Id***. at 83, 447 N.W.2d at 96. Where livestock is destroyed, as opposed to simply being injured, damages are measured by the animal's market value, "determined by replacement cost, with an appropriate reduction for any salvage value." ***Id***. at 82-83, 447 N.W.2d at 96.

An economist testifying for the Griepentrogs offered three categories of damages: (1) the value of the twenty-one cows that died; (2) the "net profit" from the milk production of these cows had they remained in the herd; and (3) loss of "net profit" for the cows that remained in the herd but produced at lower levels. The Cooperative argues that items (2) and (3) are improper. It says the situation is similar to that in ***Rosche***, where the plaintiff sought to recover damages for "lost profits traceable to the [sterile pigs'] unborn litters," and we held that under either the "injured-animal" or "dead-animal" damage measures, allowing the plaintiff additional recovery for his claimed lost profits from unborn litters would be "duplicative." ***Id***. at 81, 83-84, 447 N.W.2d at 95, 96-97. "Damages for loss of future births are denied as opening the door to a duplication of damages, because the afflicted animal's ability to reproduce is considered when the fact finder assesses its market value." ***Id***. at 83, 447

[7] As we noted above, *supra* note 4, a court erroneously exercises its discretion when its decision is based on an erroneous view of the law. That is the claim here: that the trial court permitted recovery on a legally erroneous measure of damages. We review questions of law de novo, owing no deference to the trial court's decision. *See* ***Rock Lake Estates Unit Owners Ass'n v. Lake Mills***, 195 Wis.2d 348, 355, 536 N.W.2d 415, 418 (Ct. App. 1995) (interpretation and application of statutory and case law to the facts of a case are questions of law that we review independently).

N.W.2d at 96 (citing ***Nelson v. Boulay Bros. Co.***, 27 Wis.2d 637, 644, 135 N.W.2d 254, 257 (1965)).[8]

We agree with the Griepentrogs that ***Rosche*** and ***Nelson*** are inapposite, for in both cases the court was dealing with damages for livestock bred for slaughter and consumption, of either their flesh or their pelts, rather than a dairy herd that is kept and maintained for milk production throughout the cows' lifetimes. Without some indication (and none has been provided) of an "overlap"—in other words, the witness's valuation of the dead cows included a loss-of-production component—we consider neither ***Rosche*** nor ***Nelson*** to compel the conclusion the Cooperative advances. We are not persuaded that the trial court erred in allowing the testimony.

II. Sufficiency of the Evidence as to Cause

Section 805.14(1), STATS., provides that no motion challenging the sufficiency of the evidence to support a verdict, or an answer in a verdict, will be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Thus, "if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding," that finding may not be overturned. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985). Our task is to search for credible evidence to sustain a verdict, not for evidence that might sustain a verdict the jury could have reached, but did not. ***Finley v. Culligan***, 201 Wis.2d 611, 630-31, 548 N.W.2d 854, 862 (Ct. App. 1996).

---

[8] In ***Nelson***, the supreme court considered a mink farmer's claim that the defendant's feed caused several of his breeding minks to die, and that he was entitled to not only the market value of the breeding stock but also an award for "loss of future production ... based on [his] contention that the death of some of his breeding herd in turn caused a diminution in the next year's total crop." ***Nelson v. Boulay Bros. Co***., 27 Wis.2d 637, 642, 135 N.W.2d 254, 256 (1965). In denying this request, the court stated that it was not only speculative but "may be a duplication of damages, since the market value of an animal would ordinarily include an amount attributable to its ability to reproduce." ***Id***. at 643, 135 N.W.2d at 257.

The Cooperative's challenge to the jury's affirmative answer to the verdict question inquiring whether its negligence caused damage to the Griepentrogs centers on the opinion testimony discussed above. Pointing to cases indicating that verdicts "based on expert opinion which in turn was based on unestablished assumptions" will not be sustained,[9] the Cooperative asserts that it was undisputed at trial that measurements of "cow contact voltages" taken at the Griepentrogs' farm were not high enough to cause the cows to avoid their water sources.[10] And it says that the "theory" devised by the Griepentrogs' witnesses to overcome this hurdle—that the Cooperative's lines emitted either one shock or a series of more severe shocks—is not supported by the evidence.

Professor Szews testified that, in his opinion, a chipped and cracked insulator on the Cooperative's line to the Griepentrog farm caused a "flashover" that briefly raised the normal neutral-to-earth voltage, and such a flashover probably occurred more than once. According to Szews, such an event would significantly increase the current passing through the cows.

The Cooperative says Szews's opinion is speculation, primarily because the insulator itself was not in evidence; rather, Szews relied on another witness's description of the insulator. Its argument is, in essence, that because the markings described as having been on the insulator are subject to differing interpretations, Szews's testimony based on those markings should not have been allowed. In our opinion, the argument goes to the weight of Szews's testimony, not its admissibility, and the weight of the evidence is, of course, for the jury, not this court, to evaluate. ***Hauer v. Union State Bank***, 192 Wis.2d 576, 589, 532 N.W.2d 456, 461 (Ct. App. 1995).

---

[9] *See* ***Bituminous Casualty Corp. v. United Military Supply, Inc.***, 69 Wis.2d 426, 433, 230 N.W.2d 764, 768 (1975); ***Peil v. Kohnke***, 50 Wis.2d 168, 175, 184 N.W.2d 433, 437 (1971); ***Hicks v. New York Fire Ins. Co.***, 266 Wis. 186, 189, 63 N.W.2d 59, 61 (1954).

[10] The testimony as to the cows' deaths suggested that stray voltage can cause cows to avoid water, leading to death by dehydration.

Szews was thoroughly cross-examined by counsel for the Cooperative, and the jury was free to give his testimony whatever weight it deemed appropriate. The Cooperative has not persuaded us that it was inadmissible as a matter of law.

III. The Griepentrogs' "Treble-Damage" Motion

The Griepentrogs brought this action on January 2, 1991, and on June 12, 1991, amended their complaint to bring this action against the Cooperative. On August 9, 1993, a little over one month before trial, they filed a motion to amend their complaint a second time to state a claim for treble damages under § 182.017(5), STATS. The subsection, entitled "Tree Trimming," appears in a statute dealing with the construction and maintenance of transmission lines, and provides as follows:

> Any [electric utility] which shall in any manner destroy, trim or injure any shade or ornamental trees along [its] lines ... or, in the course of tree trimming or removal, cause any damage to buildings, fences, crops, livestock or other property ... shall be liable to the person aggrieved in 3 times the actual damage sustained ....

The trial court ruled the motion untimely and, further, the statue inapplicable to the Griepentrogs' case. We need not consider the court's determination that the motion was untimely filed, for we held in ***Vogel*** that § 182.017(5), STATS., does not apply to stray voltage claims. Considering the statute ambiguous, we looked at the statute in light of its context in the utility-regulatory scheme, and concluded that

> it was intended to address physical damage to trees, buildings, fences or livestock attributable to activities undertaken in the construction, maintenance and abandonment of power lines and related structures within the [utility]'s right-of-way, and does not authorize treble damages in [stray voltage] cases ... which deal with the provision of electric service to the customer.

Vogel v. Grant-Lafayette Elec. Coop., 195 Wis.2d 198, 221-22, 536 N.W.2d 140, 149 (Ct. App. 1995), *rev'd on other grounds*, 201 Wis.2d 416, 548 N.W.2d 829 (1996).

IV. The Griepentrogs' "Private Nuisance" Claim

The Griepentrogs' complaint alleged that the Cooperative's conduct constituted a nuisance, and they contend that the trial court erred when it prohibited them from presenting evidence on the issue. As indicated above, we held this case in abeyance pending the supreme court's decision on a similar claim in ***Vogel***. When the ***Vogel*** decision was issued, holding that the doctrine of private nuisance *is* applicable to stray voltage cases, we requested additional briefing on ***Vogel***'s application to this case. The Cooperative argues that ***Vogel*** is distinguishable, and the Griepentrogs contend that it is applicable, entitling them to trial of their nuisance claim and such additional damages for "annoyance, inconvenience and discomfort" as they may be able to prove. We agree that it does.

The supreme court held in ***Vogel*** that "nuisance law is applicable to stray voltage claims because excessive levels of stray voltage may invade an person's private use and enjoyment of land." ***Vogel***, 201 Wis.2d at 427, 548 N.W.2d at 834. The court was careful to say, however, that the question is fact-specific:

> Although excessive levels of stray voltage may be found to constitute a nuisance in certain circumstances, we do not hold that it constitutes a nuisance under all circumstances. The determination of whether stray voltage unreasonably interferes with a person's interest in the private use and enjoyment of land is reserved for the trier of fact.

Id.

The Cooperative attempts to distinguish ***Vogel*** on the basis that the evidence in this case suggests a single overload or "flashover" as the primary cause of the Griepentrogs' injury, whereas ***Vogel*** involved a continuing

exposure to excessive levels of current. It maintains that applying nuisance law in this case "would turn any tort claim into a nuisance claim." The ***Vogel*** court, however, expressly approved submission of a nuisance claim along with those grounded in negligence, and we fail to see how the distinction advanced by the Cooperative would render ***Vogel*** inapplicable. It follows that the trial court's ruling as a matter of law—that nuisance claims are not cognizable in stray voltage cases—must be reversed because, under ***Vogel***, they may be where the requisite facts are established.[11]

In simplest terms, a nuisance is the "unreasonable interference with the interests of an individual in the use and enjoyment of land." ***Krueger v. Mitchell***, 112 Wis.2d 88, 103, 332 N.W.2d 733, 741 (1983). Whether a particular action, or a particular set of facts, constitutes a nuisance "is particularly a matter for the jury to determine." ***Id***. at 105, 332 N.W.2d at 741. In this case, however, the trial court's rulings prohibited the jury from hearing any evidence on the issue; midway through the Griepentrogs' case, the trial court sustained the Cooperative's objection to all nuisance-related testimony and the jury was never asked to consider it. For that reason, a new trial, limited to that issue, is required.

Opposing such a remedy, the Cooperative argues first that any damages that may be recoverable in nuisance will duplicate and overlap those already awarded by the jury, and affirmed by this court, on the Griepentrogs' negligence claim. We disagree.

Nuisance damages are not conditioned on injury to person or property—or even on any monetary loss—on the part of the plaintiffs. The supreme court said in ***Krueger***, 112 Wis.2d at 105, 108, 332 N.W.2d at 743, that a plaintiff may recover damages for "personal inconvenience, annoyance and discomfort" caused by a nuisance's existence—even without any showing of

---

[11] ***Vogel*** differentiated between "private nuisance" claims and claims for "`intentional invasion' nuisance"—the latter constituting "invasion[s]" which are either "`intentional and unreasonable'" or "`unintentional and ... reckless ... or ... abnormally dangerous.'" ***Vogel***, 201 Wis.2d at 422, 428, 548 N.W.2d at 832, 835 (quoted source omitted). In the latter situation, unlike the former, contributory negligence is not a defense. ***Id***. at 428, 548 N.W.2d at 835. The Griepentrogs' briefs on the nuisance issue are confined to "private nuisance" principles; we do not see any question in this case relating to the "intentional invasion" nuisance also discussed in ***Vogel***.

monetary loss or injury to person or property—"as long as [the] interference with the use and enjoyment of the land is unreasonable and substantial." And the court expressly recognized that those damages—for "inconvenience, annoyance and discomfort"—are "separately and independently recoverable in a nuisance action based on the very essence of the tort of nuisance," which specifically protects one's "`undisturbed enjoyment'" of his or her property. ***Id***. at 106, 332 N.W.2d at 742 (quoted source omitted).

That suggests to us that the type of damages recoverable in a nuisance action—upon proper proof—are separate and independent from damages for economic loss resulting from the defendant's conduct. As a result, the Cooperative's argument that allowing claims for both ordinary negligence and nuisance to go to the jury would result in double recovery is unavailing. Indeed, the trial court instructed the jurors in this case that they were to name as damages "an amount which will fairly and justly compensate the plaintiffs for their *economic damages*," and the jury answered that question on the basis of evidence relating to the economic loss the Griepentrogs suffered when their cows died. Nuisance damages, on the other hand, are noneconomic. While the interest at stake is one in the "usability of land," it has at its core "an element of personal tastes and sensibilities," for it "comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land." RESTATEMENT (SECOND) OF TORTS § 821D, cmt. b (1979), *quoted in part in* ***Krueger v. Mitchell***, 106 Wis.2d 450, 459-60, 317 N.W.2d 155, 159 (Ct. App. 1982), *aff'd*, 112 Wis.2d 88, 332 N.W.2d 733 (1983).[12]

The Cooperative also asserts that, should we remand on the Griepentrogs' nuisance claim, we should order a new trial on all issues. Again, we disagree. The parties fully tried, and the jury fully considered, the issues relating to the Griepentrogs' negligence claim, and we have upheld the jury's resolution of those issues over the Cooperative's objections. We have also held that, under ***Vogel***, the Griepentrogs have the right to pursue their nuisance claim as well; we think it would make little sense to re-try their negligence liability claims—which, as we have indicated, are separate and distinct from a cause of action for private nuisance and have been well and fully tried.

---

[12] We quoted from the first edition of the RESTATEMENT in ***Krueger***. The text, while in a different section, is the same in both editions.

We therefore remand to the trial court for a new trial limited solely to the nuisance claim alleged in the Griepentrogs' Amended Complaint: whether, under applicable law, the elements of nuisance can be established[13] and, if so, whether the Griepentrogs have, as a result, incurred damages of the type and nature outlined in ***Krueger***, ***Vogel*** and similar cases. In all other respects, we affirm the judgment and order.

By the Court.—Judgment and order affirmed in part and reversed in part and cause remanded.

Not recommended for publication in the official reports.

[13] Those elements, embodied in the pattern jury instruction for private nuisance, are: (1) an unreasonable activity that (2) "interferes substantially with the comfortable enjoyment of the life, health, or safety of another person," and (3) causes "significant harm." WIS. J I-CIVIL 1920 (1995). The instruction proceeds to define "significant harm," as the term is employed in cases involving "personal discomfort or annoyance," in terms of whether "ordinary persons living in the community"—specifically not persons who may be "more sensitive than ordinary persons"—"would regard the [activity] in question as substantially offensive, seriously annoying, or intolerable." ***Id***.