

11AP1622

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT II

For Official Use

Barbara J. Allen)

(party designation) Plaintiff)
Appellant)

-vs-)

Dan Luce, Tiesdee Luce,)

Truckers Insurance Exchange)

Mary Buechner and Allstate)

Insurance)

(party designation) Defendant)
Respondent)

**Brief
Cover**

Case No. 11AP1622

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY,

THE HONORABLE (name of Judge) J. MAC DAVIS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT *

Name: Barbara J. Allen
State Bar No., if applicable: _____
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BRIEF COVERS, FRONT AND BACK, MUST BE THE FOLLOWING COLORS:

Appellant's Brief: **BLUE**

Respondent's Brief: **RED**

Reply Brief: **GRAY**

Separate Appendix: **WHITE**

* STATE THE PARTY'S STATUS in the circuit court and in the appellate court (e.g., Plaintiff-Appellant, Defendant-Appellant, Plaintiff-Respondent, etc.).

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3. Forest County v. Goode, 215 Wis. 2d 217, 572 N.W.2d 131 [p. 35-36]
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12. Meurer v. ITT General Controls, 90 Wis. 2d 438, 28 N.W. 2d 156 (1979) [p. 30, 31]
13. Murray v. Holiday Rambler, Inc. 83 Wis. 2d 406, 256 N.W. 2d 513 (1978) [p. 30, 31]
14. S.C. Johnson & Son, Inc. v. Milton E. Morris, 322 Wis. 2d 766, 779 N.W.2d, 19 (Court of Appeals District II, 2010) [p. 20]
15. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974) [pp. 13, 29, 30]
16. State v. H. Samuels Co., 60 Wis. 2d 631, 211 N.W.2d 417 (1973) [p. 13]
17. State v. Vinson, 183 Wis. 2d 297, 515 N.W.2d 314 (Ct. App. 1994) [p. 23]

- 1 18. Tatur v. Solsrud, 174 Wis. 2d 735, 743, 498
2 N.W. 2d 232 (1993); ... [p. 27]
3 19. Town of Rhine v. Brock O. Bizzel, 311
4 Wis.2d 1, 751 N.W.2d 780 [pp. 16-17]
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8 (Ct. App. 1997), 95-2867[pp. 36, 37]

9 **Constitutional Citations**

- 10 1. Article 1 §1 Wisconsin Constitution
11 [p. 17]
12 2. Article 1 §9 Wisconsin Constitution
13 [p. 17. 37]
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15 **Wisconsin Statutes**

- 16 1. § 59.69(1) [pp. 14]
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22 7. § 87.30(2) [pp. 13,14]
23 8. § 752.35 [p. 28]
24 9. § 801.15(1)(b) [p. 25, 26]
25 10. § 805.13(4) [pp. 28]
26 11. § 809.10 [p. 12]
27 12. § 823.01 [p. 13]
28 13. § 823.03 [p. 13]
29 14. § 844.01 [p. 14]
30 15. § 844.20 [p. 14]
31 16. § 895.043(3) [pp. 36, 37, 39]
32 17. § 901.03(4) [p. 23]
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34 **Town of Merton Zoning Codes**

- 35 1. § 17.02 [p. 16]
36 2. § 17.14(5) [p. 16]
37 3. § 17.92 [pp. 16, 18]
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39 **Waukesha County Shoreland&Floodland**
40 **Protection Ordinance**

- 41 1. Section 1(b)5 [p 15]

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STATEMENT OF ISSUES PRESENTED

1. Did the circuit court error by adjudicating Barbara J. Allen’s (hereafter referred to as Allen) case under common law tort principles instead of nuisance and negligence according to law? (R94-646(first clarified by court)) The circuit court employed negligence-based nuisance common law tort principles. (R94-646(first clarified by court))
2. Did the circuit court decide and render motion in limine rulings correctly, were procedural matters fair so not to prejudice Allen? (App.,p.31-32)
Answered by the circuit court: Yes. Request for new trial denied.(App.,p.35)
3. Did the circuit court inform the jury correctly on the law and enter a correct judgment to dispose of all issues of the case? (App.,p.39-48)
Answered by the circuit court: Circuit court was satisfied with verdict and awarded costs to Dan Luce, Tuesdee Luce, Trucker’s Insurance Exchange, Mary Buechner and Allstate Insurance Company (hereafter collectively referred to as Luce). (R96-1130 ;App.,49-54)

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Allen is available to answer any questions the court may have. Please publish opinion if it will work to clarify someone else’s case.

**STATEMENT OF THE CASE AND
STATEMENT OF FACTS**

Allen’s family purchased the home in 1995(R:90-108), with frontage on Moose Lake in Town of Merton in Waukesha County between Luce properties(R:90-108). The properties involved are riparian properties.

1 Allen applied for permits to enlarge her
2 kitchen and make an interior entrance to her
3 basement which also resulted in an expansion of
4 the basement(R:87-E10 pp. 4,9). The building
5 inspector had specific soil bearing requirements
6 that had to be met for the foundations and
7 footings of the addition which were required in
8 the construction of the addition(R:87-E10;
9 R:90-148). Allen testified to other minor
10 improvements to her property(R:90-151-156).
11 The 50+ year old home with basement had no
12 history of interior flooding by previous owner's
13 or Allen until 2008 (R:190-108). 100 year and
14 500 year storms had deluged the area in years
15 prior to 2008(R:90-110). From 1997 to 2008
16 the adjoining Luce properties made
17 alterations(R:90-156-159) which constituted
18 nuisances according to laws (R:87-E34; E35;
19 E36; E66).The Dan and Tuesdee Luce's
20 property alterations were a 1997 (R:87-E13)
21 sunroom addition with a porch addition and a
22 holding tank installation(R:87-E13), a variance
23 in 2000 allowing a two car attached garage with
24 living space above and a new driveway (R:87-
25 E13). Other alterations made to Dan and
26 Tuesdee Luce's property which formed the
27 basis of the nuisance since they were not given
28 permission to construct them were a sidewalk
29 (R:87-E15; E20) between the garage and
30 Allen's property, a failure of preservation of
31 topography (R:87-E15; R:91-172), a berm
32 (R:87-E15; R:91-172), a planting wall(R:87-
33 E15; R:91-172), downspouts extended and
34 pointed towards Allen's property (R:87-E15;
35 R:91-172), a drive way constructed larger than
36 approved (R:87-E15; R:91-172), a screen porch
37 addition(R:87-E15; R:91-172) and an enclosed
38 playhouse (R:87-E15; R:91-172). Mary
39 Buechner's property had unpermitted
40 restructuring of half of Mary Buechner's house
41 (R:87-E15), a parking area (approximates the
42 width of the lot by the road) (R:87-E84)
43 pitched towards Allen's property, additional

1 concrete sidewalks (R:87-E15), a patio (R:87-
2 E15) and a back porch (R:87-E15). These
3 additional alterations to the Luce properties
4 caused an increase in stormwater runoff onto
5 Allen's property (R:87-E15). Allen had
6 solicited the municipalities for enforcement of
7 relief from the nuisances prior to and after the
8 flooding (R:87-E12; E13; E65; E69; R:91-200).
9 In Allen's opinion Waukesha County's and
10 Town of Merton's enforcements did not address
11 all the issues regarding Allen's complaint and
12 did not provide Allen the relief afforded by law
13 (R:87-E20;R:91-177).Allen's home first
14 experienced flooding in 2008 determined by
15 insurance adjusters as sump pump failure
16 concurrent (R:91-238) with flooding outside the
17 house (R:91-166-190). The flooding rendered
18 Allen's home uninhabitable (R:87-E12). In
19 April 2009 Allen filed a summons and
20 complaint against Luce(R:2; R:8; R:91-200).
21 Cause of action was nuisance and negligence
22 due to alterations on the Luce properties that
23 were intentionally created which diverted storm
24 water to Allen's property resulting in (R:2; R:8;
25 R:91-200)continual flooding in 2008creating
26 monetary losses(R:2; R:8; R:91-200),
27 diminution of value and loss of use of Allen's
28 property(R:2; R:8) along with aggravation and
29 emotional distress(R:2; R:8) {note: even though
30 out of chronological order, with continuation
31 and cumulative effect of nuisances Allen's
32 property was flooded again for months in 2010}
33 (R:90). Jury demand was filed by Allen and
34 Luce (R:3; R:13A). The case proceeded in an
35 unremarkable way, with orders (R:12;R:21;
36 R:22; R:25; R:38), hearings (R:9; R:17; R:18),
37 affirmative defenses (R:9; R:17; R:18),
38 depositions, mediation, etc. Attorney Hallstein
39 was replaced by Attorney Cuthbert (R:20) in
40 December 2009. In April 2010 Allen filed a
41 bad faith and breach of contract cause of action
42 against American Family Insurance Company
43 (R:91-238). American Family Insurance

1 Company was homeowner's insurance company
2 for Allen with sump pump endorsement and
3 also Allen's National Flood Insurance Carrier
4 (R:41). Luce motioned the circuit court for
5 summary judgment and motion to stay(R:40;
6 R:41; R:44); motion was heard by the
7 Honorable Judge Patrick Faragher who
8 provided insight on his ruling.(R:88; R:84;
9 App.,p.2-3)
10

11 American Family Insurance Company
12 settled with Allen so the case would not proceed
13 to a trial by granting Allen a monetary award
14 and assigned subrogation rights of the
15 homeowner's policy and sump pump
16 endorsement (R:49). Allen accepted the
17 settlement (App.,p.55-56). Luce filed a motion
18 in limine for four requests(R:29) Allen filed a
19 motion in limine to exclude collateral source
20 insurance payments assigned to Allen(R:49).
21 Response to motions were filed (R:46; R:56).
22 The in limine hearing was held February
23 15,2011 (R:89). The Honorable Judge J. Mac
24 Davis ruled (R:89-20-38). Regarding Luce,
25 Motion A denied in part, Motion B regarding
26 (R:89-20-21) ordinance violations and
27 testimony for lay witnesses, C and D
28 denied(R:89-21-23). The Judge denied Allen's
29 motion to exclude collateral source
30 evidence(R:89-38). Luce's attorney offered to
31 draft the order on all motions(R:89-39). Luce's
32 attorney submitted the proposed order to court
33 on February 23rd, 2011 (R:58). The jury trial
34 commenced March 1st, 2011 (R:90-5). Allen's
35 attorney asked for a copy of the signed order
36 from the in limine hearing(R:90-5). Voir dire
37 was conducted by all three attorneys (R:90-16-
38 94) and the jury(R:90-94-95) was selected. The
39 jury is called (R:90-103). Opening statements
40 (R:90-106-142) by lawyers are given. Allen
41 began to testify(R:90-142). Allen was then
42 cautioned (R:90-160) by the circuit court to
43 obey the in limine order which was brought to

1 the circuit court's attention by Luce's attorney
2 (R:90-160). Allen and her lay witnesses provided
3 (R:90-142-160; R:91-161-290) evidence
4 consisting of testimony and pictures of
5 stormwater runoff and alteration to properties in
6 years up to and including 2010 (R:91-240).
7 Luce's attorney asserted (R:91-240) Allen did
8 not have a permit to expand the basement. Allen
9 clarified that the permit was issued said
10 enclosing basement but the building inspector
11 required (R:91-243) construction to be done to
12 satisfy soil conditions which resulted in a
13 basement expansion under the kitchen addition
14 which worked to enclose the basement (R:91-
15 271). Possible juror conflict, Allen questioned
16 in court regarding Richard R. (R:91-282). Jim
17 Rose (R:91-292), a Luce witness, gave
18 testimony early due to a conflict in his schedule.
19 Rose testified regarding the day Rose drove to
20 the property. Rose said he did not see anything
21 to indicate stormwater diversion from the Luce
22 properties. It was not raining the day of Rose's
23 visit (R:91-310). Allen's attorney presented
24 county and town (App., p.57-67) safety
25 ordinances of the type meant to protect Allen's
26 rights and property during his examination of
27 Robert Kluwin, owner of Raintree Engineering.
28 Kluwin is experienced in ordinance
29 requirements and stormwater projects (R:92-
30 410). Kluwin had researched the two offending
31 Luce properties and had prepared reports.
32 Kluwin's investigation revealed the additional
33 zoning ordinance violations not addressed by
34 municipalities (R:14; R:92-423; R:95-
35 713(admission by Luce)) and evaluated the
36 increase in stormwater runoff that resulted from
37 those violations(R:92-428). Kluwin reported on
38 the diverted stormwater from Luce properties
39 and how construction also had an effect of
40 concentrating the groundwater previously on
41 the Luce onto Allen's. Kluwin surmised the
42 alterations to the Luce's properties had a
43 tendency to raise the height of the ground water

1 level on Allen's property (R:92-427). Terry
2 Carrick presented a devaluation of Allen's
3 property (R:93-563). Luce moved to dismiss
4 claim (R:94-626) based on Hocking v. City of
5 Dodgeville concluding
6 "plaintiff's case would not allow a reasonable
7 jury to conclude that any of the improvements
8 made by the Luce were unreasonable." (R:94-
9 626)
10 Allen's attorney states witnesses testified as to
11 both properties violating ordinances (R:94-628).
12 Dan Luce testified as to Dan Luce's property
13 and Allen's property and presented a video
14 recording (R:94-631). Mr. Luce does not assert
15 his property was higher than Allen's when Luce
16 purchased it contrary to 2008 when it is
17 substantially a higher elevation (R:94-669). The
18 video was meant to demonstrate to the jury
19 events from 2009 and 2010, years following the
20 2008 flooding. Dan Luce asserted the sprouted
21 seedlings on Allen's gutter screens in 2009 and
22 the amount of water discharging from Allen's
23 sump pump due to the Allen property's ground
24 water level was the source of Allen's continuous
25 flooding. Dan Luce gave testimony as to how
26 each of his improvements, in his opinion, did
27 not affect Allen's property (R:94-631-754) Tim
28 Klink, Town of Merton Highway
29 Superintendent, testified. Klink testified the
30 swale between Allen and Luce properties was
31 functional to carry the storm water from the
32 road to the lake. Klink also gave information
33 regarding the general history of the properties
34 and spoke on ordinances and variances (R:94-
35 754-800). Peggy Tilley, a Senior Planner of the
36 Waukesha County Land and Park Use,
37 explained how Allen had filed a complaint
38 regarding unpermitted violations on Luce
39 properties in 2008 (R:95-810; R:87-E69; E78).
40 Tilley chronicled the ordinance violations on
41 the Luce properties (R:95-804-855; R:87-
42 E66; E68). Tilley explained how the initial
43 complaint (R:87-E69; E74) was handled and that

1 the original determination was no surface water
2 diversion was obvious and notified Allen that
3 the corrugated pipe had some cracks allowing
4 some water to be expelled close to Allen's
5 basement foundation. Tilley explained Allen
6 had contacted Waukesha County again
7 requesting further resolution (R:87-E13). The
8 county with cooperation of the Luce property
9 owners brought the violations that Tilley had
10 cited into compliance. After the fact permits and
11 additional non-contiguous property was
12 purchased and combined with the original lot to
13 reduce the floor area ratio to lot size percentage
14 (R:95-822; R:87-E72; E73). Tilley explained
15 Luce had now put elbows on Luce's
16 downspouts so the water emptied towards the
17 lake instead of Allen's property which was one
18 of the conditions of the Luce 2000 variance, not
19 previously complied with (R:87-E71). Also,
20 alterations were made to the Dan and Tuesdee
21 Luce's playhouse and unpermitted screened
22 porch which Dan and Tuesdee Luce could
23 retain due to the additional property that was
24 purchased. Allen's attorney asked Tilley about
25 if her opinion had changed with regards to the
26 evidence (R:95-847-855). Both Luce attorneys
27 rebutted (R:95-856). Tuesdee Luce (R:95-859)
28 and Mary Buechner also testified regarding
29 their respective properties (R:95-883). Tuesdee
30 Luce testified and showed a recording as to rain
31 events that involved Allen's 2010 flooding
32 (R:95-869; E87; E80). Mary Buchner testifies as
33 to the reconstruction of her house done in 2002,
34 in violation of ordinances (R:95-883; 87-E93)
35 and the parking slab (R:95-892; 97-
36 E84; E88; E92) and how Allen's gutters had been
37 cleaned in 2008 and 2009 (R:95-902) and her
38 after the fact permit (R:95-920). Albert Klais,
39 expert for Luce, discussed weather events and
40 observations of Allen's basement
41 elevation compared to the lake from Klais'
42 interior inspection in January (R:95-925; R:87-
43 E94; E98). Mr. Klais' testifies about groundwater

1 and basement relationship (R:95-976-991).
2 Allen was called backed for further questioning
3 (R:96-1007-1023). Allen did not deny in 2009
4 at the time of the video recording the gutters
5 had not yet been cleaned for that year. Allen
6 clarified the gutters were functional in diverting
7 the water away from the foundation because
8 Allen's gutters had screens which permitted the
9 collection of water and downspouts that
10 discharged away from the foundation. Allen
11 also acknowledged some of the corrugated
12 tubing in the video and pictures near the
13 basement foundation had cracks in it until it was
14 repaired. The cracks allowed some water to
15 leak out which did not compare to the
16 thousands of gallons of water an hour Allen was
17 pumping many feet away from Allen's front
18 porch which put the discharge far from the
19 basement and into Allen's front yard away from
20 the Luce properties and down towards the lake.
21 Allen also spoke of the lack of an easement
22 with the Town of Merton which Klink spoke
23 about in his testimony which was another
24 condition of Dan and TuesdeeLuce's 2000
25 variance that wasn't complied with which gave
26 another example that all their violations were
27 not cleared up which was contrary to what Dan
28 Luce had told the jury. Allen presented
29 evidence of requirements from the Town of
30 Merton's Building (R:87-E107) Inspector
31 regarding permitting and offsets for new and
32 replacement of existing driveways. This gave
33 further evidence of the zoning violations which
34 correlated to the nuisance according to law
35 cause of action (R:96-1007-1023). The jury
36 instruction conference was conducted. Allen's
37 attorney requested local ordinance violations
38 (R:96-1029;1045) to be part of the jury
39 directions with regard to nuisance which the
40 circuit court declined (R:96-1029;1045). The
41 jury instruction regarding Barbara Allen's duty
42 to mitigate were requested by Luce and added.
43 The judge instructed the jury before closing

1 statements were made (R:96-1050). Closing
2 statements were made by all attorneys (R:96-
3 1064-1124). Jury retired (R:96-1124) and
4 returned verdict that the judge determined was in
5 favor of Luce(R:96-1130) which the circuit
6 court accepted (R:73). Judgments were signed
7 and Luce was awarded the usual statutory costs
8 (R:75;R:76). Allen motioned the circuit court
9 for a new trial and relief of judgment in the
10 Interests of Justice(R:66; R:67) which the judge
11 denied (73). Allen's attorney withdrew from
12 the case. Allen motioned for a new trial July
13 1st, 2011 on plain error, relief of judgment and
14 sanctions against Luce's attorneys(R:79; R:80)
15 after Allen obtained a transcript of the in limine
16 hearing (R:41). Allen filed a pro se notice of
17 appeal under Wisconsin Statute 809.10. Allen's
18 motion hearing was held August 11th,
19 2011(R:98). Circuit court asked Allen for any
20 comments regarding Luce's response. Allen
21 stated Allen was unsure how to reply since the
22 pages Allen received were not numbered and
23 the judge mentioned a letter that Allen did not
24 receive. Allen had stated Allen stopped in the
25 clerk's office prior to the hearing and no copy
26 was there to compare with Allen's. Luce's
27 attorney told the court how Luce's attorney
28 verified the accuracy of the motion in limine
29 order that Luce's attorney drafted (R:98-10).
30 Allen hastily suggested Luce's attorney could
31 have ordered a transcript if there was any doubt.
32 Allen suggested Luce's attorney should be in
33 contempt of court since the order Luce's
34 attorney drafted was incorrect. The judge ruled
35 the suggestion was abusive. New trial and relief
36 of judgment were denied (R:84). Court drafted
37 order and signed (98-12).

38

39

40 **ALLEN'S ARGUMENT**

41 1. DID THE CIRCUIT COURT ERROR BY
42 ADJUDICATING ALLEN'S CASE UNDER
43 COMMON LAW TORT PRINCIPLES

1 INSTEAD OF NUISANCE AND
2 NEGLIGENCE ACCORDING TO LAW?

3

4 Wisconsin Statutes: Chapter 823 Nuisances:

5 "823.01 Jurisdiction over nuisances. Any
6 person, county, city, village or town may
7 maintain an action to recover damages or to
8 abate a public nuisance from which injuries
9 peculiar to the complainant are suffered, so far
10 as necessary to protect the complainant's rights
11 and to obtain an injunction to prevent the same."

12

13 "823.03 *Judgment.* In such actions, when the
14 plaintiff prevails, the plaintiff shall, in addition
15 to judgment for damages and costs, also have
16 judgment that the nuisance be abated unless the
17 court shall otherwise order."

18

19 ANNOT:"A court of equity will not enjoin a
20 crime or ordinance violation to enforce the law,
21 but will if the violation constitutes a nuisance.
22 Repeated violations of an ordinance constitute a
23 public nuisance as a matter of law, and the
24 injunction can only enjoin operations that
25 constitute violations of the ordinance."State v.
26 H. Samuels Co.,60 Wis. 2d 631, 211 N.W.2d
27 417 (1973).

28

29 ANNOT:"The concept that an owner of real
30 property can, in all cases, do with the property as
31 he or she pleases is no longer in harmony with
32 the realities of society. The "reasonable use" rule
33 applies."State v. Deetz, 66 Wis. 2d 1, 224
34 N.W.2d 407 (1974).

35

36 Wisconsin Statutes: Chapter 87 Flood Control:

37 "87.01 Definitions. In this Chapter:

38 ...

39 (2) "Drainage area" means any parcel or parcels
40 of land within the area whose drainage causes or
41 contributes to flood conditions upon or in the
42 vicinity of a designated stream or body of water.

43 ...

44 (5) "Parcel of land" means that portion of a
45 tract of land which is benefited by the abatement
46 or diminution of flood conditions."

47

48 "87.30 Floodplain zoning.

49 ...

1 (2) ENFORCEMENT AND PENALTIES. Every
2 structure, building, fill, or development placed
3 or maintained within any floodplain in violation
4 of a zoning ordinance adopted under this
5 section, or s. 59.69, 61.35 or 62.23 is a public
6 nuisance and the creation thereof may be
7 enjoined and maintenance thereof may be abated
8 by action at suit of any municipality, the state or
9 any citizen thereof. Any person who places or
10 maintains any structure, building, fill or
11 development within any floodplain in violation
12 of a zoning ordinance adopted under this
13 section, or s. 59.69, 61.35 or 62.23 may be fined
14 not more than \$50 for each offense. Each day
15 during which such violation exists is a separate
16 offense.”
17

18 Wisconsin Statutes: Chapter 844 Interference
19 With Interests; Physical Injury:

20 “844.01 Physical injury to, or interference
21 with, real property.

22 (1) Any person owning or claiming an interest
23 in real property may bring an action claiming
24 physical injury to, or interference with, the
25 property or the person's interest therein; the
26 action may be to redress past injury, to restrain
27 further injury, to abate the source of injury, or
28 for other appropriate relief.

29 (2) Physical injury includes unprivileged
30 intrusions and encroachments; the injury may be
31 surface, subsurface or suprasurface; the injury
32 may arise from activities on the plaintiff's
33 property, or from activities outside the plaintiff's
34 property which affect plaintiff's property.”
35

36 “844.20 Judgment.

37 (1) The judgment shall award the relief, legal or
38 equitable, to which the plaintiff is entitled
39 specifically, and without limitation, interference,
40 encroachment, physical injury or waste may be
41 enjoined; damages may be awarded separately,
42 or in addition.

43 (2) Abatement by the sheriff of any nuisance,
44 structure or encroachment may be ordered by the
45 judgment.”
46

47 Wisconsin Statutes: Chapter 59 Counties:

48 “59.69 Planning and zoning authority.

1 (1) PURPOSE. It is the purpose of this section to
2 promote the public health, safety, convenience
3 and general welfare...

4 (2) PLANNING AND ZONING AGENCY OR
5 COMMISSION

6 (bm)The head of the county zoning agency
7 appointed under sub.(10) (b) 2.... The building
8 inspector shall enforce all laws, ordinances,
9 rules and regulations under this section.

10 ...

11 (11) PROCEDURE FOR ENFORCEMENT OF
12 COUNTY ZONING ORDINANCE. The board shall
13 prescribe rules, regulations and administrative
14 procedures, and provide such administrative
15 personnel as it considers necessary for the
16 enforcement of this section, and all ordinances
17 enacted in pursuance thereof. The rules and
18 regulations and the districts, setback building
19 lines and regulations authorized by this section,
20 shall be prescribed by ordinances which shall be
21 declared to be for the purpose of promoting the
22 public health, safety and general welfare. The
23 ordinances shall be enforced by appropriate
24 forfeitures. Compliance with such ordinances
25 may also be enforced by injunctive order at the
26 suit of the county or an owner of real estate
27 within the district affected by the regulation.”

28
29 ANNOT: “Construction in violation of zoning
30 regulations, even when authorized by a
31 voluntarily issued permit, is unlawful. However,
32 in rare cases, there may be compelling equitable
33 reasons when a requested order of abatement
34 should not be issued.” Lake Bluff Housing
35 Partners v. City of South Milwaukee, 222 Wis.
36 2d 222, 588 N.W.2d 45 (Ct. App. 1998), 97-
37 1339.

38
39 Wisconsin Statutes: Chapter 60 Towns:

40 “60.61 General zoning authority.

41 (1) PURPOSE AND CONSTRUCTION.

42 (a) Ordinances adopted under this section shall
43 be designed to promote the public health, safety
44 and general welfare...”

45

46 Waukesha County Shoreland&Floodland
47 Protection Ordinance Section 1(b)5:

48 “[p]rotecting life, health and property;

49 ...

1 [d]iscouraging the victimization of unwary land
2 and home buyers;
3 ...
4 Preventing increases in flood heights that could
5 increase flood damage and result in conflicts
6 between property owners.” (App.,p.63-64)
7
8 Town of Merton Zoning Code §17.02:
9 “the health, safety, morals, comfort, prosperity,
10 and general welfare of the Town...intending to
11 provide for adequate...drainage...” (App.,p.65)
12
13 Town of Merton Zoning Code §17.14(5):
14 “that would alter the existing drainage or
15 topography in any way as to adversely effect the
16 adjoining property
17 ...
18 [i]n order to protect the property owner from
19 possible damage due to change of the existing
20 grade of adjoining lands.” (App.,p.65)
21
22 Town of Merton Zoning Code §17.14(5) also
23 requires the landowner to obtain
24 “the written consent of the abutting landowner”
25 (App.,p.65)
26 before making such alterations.
27
28 Town of Merton Zoning Code §17.92:
29 “[a]ny building erected, structurally altered or
30 placed on a lot or any use carried on in violation
31 of the provisions of this chapter is hereby
32 declared to be a nuisance per se...” (App.,p.67)
33
34 Town of Merton’s Building Inspector’s
35 webpage admitted as Exhibit Number 107:
36 “A driveway permit is necessary for all
37 driveways, newer replacement.” (App.,p.68-69)
38
39 For this case the nuisance declaration as a cause
40 of action is manifested in the statutes, municipal
41 ordinances and regulations. Violations
42 according to law and can be brought by a
43 citizen and/or owner of real estate within the
44 district. The circuit court’s determination of
45 this case as a common-law nuisance lacks
46 judicial economy, is contrary to decisions of
47 Wisconsin Supreme Court and undermines the

1 purpose of the legislative attempt. The
2 Certification sent to the Wisconsin Supreme
3 Court from the Wisconsin Appellate Court
4 District II in *Town of Rhine v. Brock O. Bizzel*,
5 311 Wis.2d 1, 751 N.W.2d 780 works to clarify
6 the 'impenetrable jungle'. The Wisconsin
7 Supreme Court affirmed the case should have
8 been tried under public nuisance and as a result
9 the case was returned to the circuit court which
10 would apply the Town of Rhine code's
11 definition of public nuisance. Facts of violations
12 are undisputed because Luce admitted to
13 violations of the ordinances (R: 94-714;
14 732;744) and the evidence (R:87-E66; E69)
15 presented in the circuit court revealed it. Proof
16 of noncompliance with zoning violations was
17 prima facie to decide nuisance. The issue is a
18 question of law therefore the circuit court's
19 discretion was not reasonable. The circuit court
20 was compelled to determine the nuisance and
21 negligence cause of action according to law
22 without the jury.

23
24

25 From Annotation of Article 1 §1 Wisconsin
26 Constitution:

27 "The imposition of liability without fault, even
28 when the statute imposes punitive sanctions,
29 does not in itself violate due process. Statutes
30 that are within the police power of the state may
31 impose even criminal liability on a person whose
32 acts violate the statute, even if the person did not
33 intend to do so." *Gross v. Woodman's Food*
34 *Market, Inc.*, 2002 WI App 295, 259 Wis. 2d
35 181, 655 N.W.2d 718, 01-1746.

36

37 From Article 1 §9 Wisconsin Constitution:

38 "Remedy for wrongs. SECTION 9. Every person
39 is entitled to a certain remedy in the laws for all
40 injuries, or wrongs which he may receive in his
41 person, property, or character; he ought to obtain
42 justice freely, and without being obliged to
43 purchase it, completely and without denial,
44 promptly and without delay, conformably to the
45 laws."

46

1 Allen concludes it was unnecessary and an
2 incorrect theory of adjudication for the circuit
3 court to have the jury decide nuisance based on
4 negligence under common law theory of tort.
5 Allen's case should have been tried using local
6 ordinances which stated Luce's violations
7 would be nuisances and negligence according to
8 Town of Merton Zoning Code §17.92. Since
9 the nuisances were intentionally created and
10 unreasonable(violation of the law is
11 unreasonable under all circumstances), liability
12 should be satisfied. This is also supported in
13 Prosser & Keeton, The Law of Torts, § 36 at 227
14 (5th ed. 1984) which assigns strict liability to a
15 violation of statute if no excuse is
16 applicable.This concept is also under The
17 Restatement (Third) of Torts Liability for
18 Physical Harm Section 14.b. which clarifies it
19 is the responsibility of the court to enforce the
20 liability which is clearly stated in the
21 statutes.Luce could have offered two defenses
22 relieving Luce of liability from negligence per
23 se. The Restatement (Second) of Torts 288a
24 discusses an excuse for violation of safety
25 statutes:

- 26 1. Being confronted by an emergency not
- 27 of your own misconduct.
- 28 2. Compliance would cause greater risk
- 29 or harm to others.

30 Luce did not assert or prove either as a defense.

31
32 The continual maintenance of the nuisances
33 created by Luce willfully in violations of
34 building codes, ordinances, and conditions of
35 variance ignoring Allen's concerns defined
36 negligence per se by violation of safety statutes.
37 Therefore a common law adjudication of
38 negligence is also superfluous.

39
40 From *Gustave Jeffrey Totsky v. Riteway Bus*
41 *Service, Inc.* 220 Wis. 2d 889, 584 N.W.2d 188:

42 "¶25 The violation of this safety statute
43 constitutes negligence per se. Negligence per se

1 arises from the violation of a safety statute if
2 three requirements are met: 1) the safety statute
3 was designed to prevent the harm inflicted, 2)
4 the person injured was in a protected class, and
5 3) the legislature has expressed its intent that the
6 statutory section serve as a basis for the
7 imposition of civil liability.”

8 Allen case satisfies these three requirements
9 using the statutes above and the evidence of
10 Luce’s violations on properties, the injury
11 incurred was the type to prevent (flooding) and
12 she was in “protected class” (adjoining property
13 owner).

14
15 Proximate cause should be assigned to violators
16 of ordinances that are specifically put in place
17 to protect the safety of adjacent property owners
18 which result in injury. Ordinances are enacted
19 due to the acknowledgement of the lawmakers
20 relating to preventing the probability of
21 foreseeable consequences. A violation of a
22 safety statute or ordinance, predicts an
23 increased chance of causing the harm in certain
24 situations and places. Wisconsin acknowledged
25 the propensity for damage which is the basis of
26 a requirement of county adopting and enforcing
27 shoreland ordinances. The cumulative effects
28 of the alterations to the Luce properties on
29 either side of Allen had a direct adverse effect
30 on Allen’s property.

31
32 Nuisance from regulatory violations create
33 liability regardless of whether harm results or
34 not. Even though harm is stated in the cause of
35 action, it is not necessary to prove harm. Since
36 negligence here would be determined from the
37 tortious act of the continuation of nuisance, it
38 would be illogical to apply any comparative
39 liability to Allen. Under intentional nuisance a
40 comparative negligence frustrates the concept
41 of holding the tortfeasor accountable for
42 situations caused by their tortious acts. Liability
43 is also explained in the collateral source rule
44 where the full cost of wrongful conduct should

1 be against the tortfeasor and not the injured
2 party.
3 From *Fischer v. Steffen* 333 Wis. 2d 503, 797
4 N.W.2d 501:
5 “¶30 In general, the collateral source rule
6 provides that a tortfeasor’s liability to an injured
7 person is not reduced because the injured person
8 receives funds from other sources. The
9 collateral source rule prevents payments made
10 by the injured party, such as premiums paid for
11 an insurance policy, from inuring to the benefit
12 of the tortfeasor. The collateral source rule is
13 grounded in two policies: (1) to deter negligent
14 conduct by placing the full cost of the wrongful
15 conduct on the tortfeasor, and (2) to allow the
16 injured party, not the tortfeasor, to benefit from
17 a windfall that may arise as a consequence of an
18 outside payment.” *Fischer v. Steffen*, 333 Wis.
19 2d 503, 797 N.W.2d 501
20
21 From *Jacobs v. General Acc. Fire & Life Assur.*
22 *Corp.*:
23 “A person whose liability to plaintiff arose from
24 his intentional wrong is not entitled to
25 contribution.” *Jacobs v. General Acc. Fire &*
26 *Life Assur. Corp.*, 14 Wis.2d 1, 5, 109 N.W.2d
27 462, 464 (1961)
28 Therefore Allen asserts that the comparative
29 negligence approach should not be
30 utilized in a new adjudication.
31
32 From *S.C. Johnson & Son, Inc. v. Milton E.*
33 *Morris*
34 “¶29 We agree. It makes no sense to us that an
35 injured party should be held responsible for
36 negligently failing to discover that someone else
37 was intentionally harming them. Instead, if one
38 party is intentionally harming another, logic
39 would hold that the duty of the victim should be
40 less than it would be for contractual breaches or
41 negligence. So unless the victim, with actual
42 knowledge of the danger, intentionally fails to
43 act in the protection of his or her own interests
44 or is heedlessly indifferent to them, there is no
45 duty to mitigate an intentional tort. *See id.* We
46 adopt the law stated in *Morgan* and the
47 Restatement.” *S.C. Johnson & Son, Inc. v.*

1 Milton E. Morris, 322 Wis. 2d 766, 779 N.W.2d,
2 19 (Court of Appeals District II, 2010)

3 The jury instructions regarding mitigation of
4 damages was not a correct theory of law, and
5 therefore is reversible error. Along with duty to
6 protect your property from harm of an
7 intentional nuisance.

8
9

10 QUESTION 2:
11 DID THE CIRCUIT COURT DECIDE AND
12 RENDER MOTION IN LIMINE RULINGS
13 CORRECTLY, WERE PROCEDURAL
14 MATTERS FAIR SO NOT TO PREJUDICE
15 ALLEN?

16

17 Collateral Source ruling at the motion in limine
18 hearing. (R:89-29-40)
19 Allen asserts the judge applied an incorrect
20 limitation to evidence as stated in the Wisconsin
21 Supreme Court's ruling in Fischer v. Steffen 333
22 Wis. 2d 503, 797 N.W.2d 501. Allen's collateral
23 source evidence should have been excluded
24 from the testimony.

25

26 From Jurgensen v. Smith:

27 "There is an ever-present danger that the jury
28 will misuse the evidence to diminish the damage
29 award." Jurgensen v. Smith, 611 N.W.2d 439,
30 442 (S.D. 200)

31 Allen was prejudiced by the denial to exclude
32 collateral source evidence in that it confused the
33 jury as to the issues, distorted the cause of
34 action, and may have played a role in why the
35 jury did not grant Allen a judgment.

36

37 If American Family Homeowners would not
38 have assigned Allen the subrogation rights and
39 Allen was successful in Allen v. Luce et. al.
40 (App.p.55-56) Allen would have been
41 responsible to indemnify American Family.
42 Allen would not have been in front of the court
43 in American Family's shoes, the only shoes
44 Allen would be wearing were her own.

1
2 Homeowner's Insurance in Wisconsin does not
3 cover damage from flood. Traditional
4 Homeowner's Insurance does not cover sump
5 pump failure and the unique type Allen had paid
6 for afforded Allen additional living expenses
7 (hotel, etc.) which were far beyond the normal
8 coverage. It was that endorsement that led to
9 Allen's Bad faith cause of action and breach of
10 contract claim against American Family.
11 Without Allen's foresight to pay for all this
12 extra insurance coverage Allen's damages
13 would have been exceedingly more. The
14 collateral source payments were subtracted
15 from Allen's losses to give an approximation to
16 the jury of Allen's losses based on the ruling at
17 the in limine hearing. The true impact Luce's
18 nuisances caused Allen was understated to the
19 jury.
20
21 The bigger problem was the evidence that was
22 brought in regarding the sump pump failure
23 concurrent with the flooding in April 2008. The
24 second-chair attorney dwelled on the sump
25 pumps. Allen's attorney was unduly delayed
26 before he could work to rebut assertions made
27 by the Main Attorney in her cross examination
28 of Allen. The sump pumps became the "scape
29 goat" for why the flooding occurred and Luce's
30 attorney asserted Allen had failed to protect
31 Allen's property.
32 "Question:
33 And on the 24th the sump pumps were unable to
34 keep up with the water on the property?
35 ...
36 Mr. Stevens: Same objection, Judge.
37 The Court: Overruled." (R:96-1022 line 6)
38
39 "Q: And the only difference is one of your
40 pumps fails?
41 A: **No, No**, you're **not correct** about that, I'm
42 sorry you're **not correct**." (Bartnik and Allen)
43 (emphasis added) (R:96-1023 line 17)
44 This was contrary to the opinion expressed by
45 Judge Faragher's summary judgment and

1 motion to stay hearing (R:88; R:84; App.2-3).
2 Jury directions which included mitigation of
3 damages and the inquiry to Allen's negligence
4 "drowned out" the true cause of action.
5
6 Allen appearing pro se requested a new trial due
7 to plain error.
8 Wisconsin Statute §901.03 (4) states:
9 "Plain error. Nothing in this rule precludes
10 taking notice of plain errors affecting substantial
11 rights although they were not brought to the
12 attention of the judge."
13 901.03 – ANNOT states:
14 "In order for an error to be "plain error" it must
15 be so fundamental that a new trial must be
16 granted so as not to deny a basic constitutional
17 right. State v. Vinson, 183 Wis. 2d 297, 515
18 N.W.2d 314 (Ct. App. 1994)"
19 Allen's motion for a new trial (R:80) due to
20 plain-error was to show the circuit court Allen's
21 lay witnesses were denied the right to present
22 evidence paramount to the case. At the motion
23 in limine hearing the judge entered a ruling
24 denying Luce's request 'B' to limit Allen's lay
25 witness testimony regarding the ordinance
26 violations of Luce (R:89-20-21). Luce's
27 attorney volunteered to draft the order (R:89-
28 39). Allen and her attorney, in preparation for
29 the trial focused on each alteration to the
30 property that diverted more stormwater in
31 Allen's direction and away from the Luce
32 residences. The proposed order was filed with
33 the court Wednesday February 23rd, 2011 under
34 the 5-day rule. The first day of trial, March 1st,
35 2011, Allen's attorney asked for a signed copy
36 of the order (R:90-5; App.31-32). The
37 transcript shows the court asked for any
38 objections. Allen's attorney started reading the
39 order and said "no" (R:90-5). Allen's attorney
40 instructed Allen to read the order. The first
41 witness for Allen was Allen herself (R:90-142).
42 Examination by Allen's attorney began with
43 background information Allen was asked
44 regarding the years from 1995 until 2008 what

1 alterations Allen personally observed and how
2 those alterations changed the way stormwater
3 came onto Allen's property. The court called a
4 "recess" for lunch. Attorney Cuthbert requested
5 the court remind Allen of the limitations of the
6 order which incorrectly stated the judge's ruling
7 (R:90-160). Allen and her lay witnesses heeded
8 the warning of the court. Allen had requested a
9 transcript of the in limine(R:89) hearing after
10 the trial which had prompted Allen's request for
11 the new trial (R:80); Allen viewed the drafting
12 of the order as "plain error" because it was
13 contrary to the judge's ruling and it denied
14 Allen the right to present evidence the judge
15 ruled was acceptable (R:98). The court denied
16 a new trial, relief of judgment and declined to
17 sanction (R:84).Allen believes the judge
18 proceeded under a misunderstanding of what he
19 could or should do under the
20 circumstances.Drafting of the order contrary to
21 the court's oral absolute prohibitive ruling on
22 February 15th, 2011 should have compelled the
23 circuit court to grant a new trial. Part of the
24 proposed motion in limine that Luce's attorney
25 requested for was:

26 "B. Precluding the plaintiff and any other party,
27 witness, attorney, or any other lay person from
28 testifying to, arguing, stating, implying,
29 inferring, or otherwise conveying to the jury
30 directly or indirectly by any means whatsoever
31 that the improvements made to the Luce
32 property violate zoning ordinances, variances,
33 "Floor Area Ratio," NR116, or Waukesha
34 County Shoreline Requirements."

35 The judge ruled the motion denied. But part of
36 the drafted order which was signed states:

37 "Motion B: Plaintiff and other lay witnesses are
38 precluded from testifying to, arguing, stating,
39 implying, inferring or otherwise conveying to
40 the jury that the improvements made to the Luce
41 property violate zoning ordinances, variances,
42 "Floor Area Ratio(n)," NR116, or Waukesha
43 County Shoreline Requirements unless a proper
44 foundation can be laid that such witness has
45 scientific, technical or otherwise specialized
46 knowledge to support such testimony."

1 The drafted order directly contradicts the ruling
2 and was prejudicial towards Allen (R:58).
3 The jury was prevented from hearing first hand
4 observations regarding how each alteration to
5 the properties in violation of the ordinance
6 (which states violations as nuisance per se)
7 impacted Allen's property which they should
8 have been allowed to hear according to the
9 ruling. Allen suggests that the jury would have
10 been convinced that these intentional acts of
11 Luce created a nuisance if they heard Allen's
12 lay witnesses testify about the violations.
13 Allen's research for the appeal clarified the
14 procedure the court should have taken which
15 would have granted Allen a new trial. Allen was
16 prevented from fairly providing evidence
17 denying Allen justice. Allen's evidence also
18 would have provided more "bite" to Mr.
19 Kluwin's testimony. The jury would have had a
20 "greater weight of evidence" to rule in Allen's
21 favor since the circuit court decided to proceed
22 under common law theory of nuisance based on
23 negligence with "harm." Allen asserts that
24 because Luce's lay witnesses were able to
25 testify about their interpretation of the effects
26 (Dan Luce's testimony (R:94-662-754) gave his
27 interpretation why none of violations caused
28 problems for Allen) the violations from the
29 Luce properties the testimony was unbalanced
30 since Allen's lay witnesses could not. Allen
31 also asserts this is another reason to be granted
32 a new adjudication since the violations were not
33 talked about in terms of water diversion by
34 Allen's lay witnesses who had observed it
35 firsthand. After Allen's motion for plain-error
36 hearing, Allen discovered the motion in limine
37 order was not only incorrect but, submitted
38 untimely. Luce's attorney stating it was a
39 proposed order that Allen's attorney could have
40 objected to has less legitimacy. The fact the
41 judge told Allen's attorney it was submitted
42 under the 5-day rule (R:90-5) when Allen's
43 attorney inquired as to the signed order the first

1 day of trial, may have led Allen's attorney to
2 believe he had forfeited his chance to object.
3 Luce's attorneys submitted the order on
4 Wednesday February 23rd, 2011 (R:58). The 5-
5 day rule is clarified by Wisconsin Statute
6 §801.15 (1) (b):

7 “(b) Notwithstanding ss. 985.09 and 990.001
8 (4), in computing any period of time prescribed
9 or allowed by chs. 801 to 847, by any other
10 statute governing actions and special
11 proceedings, or by order of court, the day of the
12 act, event or default from which the designated
13 period of time begins to run shall not be
14 included. The last day of the period so
15 computed shall be included, unless it is a day the
16 clerk of courts office is closed. When the period
17 of time prescribed or allowed is less than 11
18 days, Saturdays, Sundays and holidays shall be
19 excluded in the computation.”

20 So Thursday was day 1, Friday was day 2,
21 Monday was day 3, Tuesday morning, March
22 1st, 2011 was the first day of trial (day 4). This
23 was a violation of trial procedure denying Allen
24 fair procedure for the trial. It is an error that
25 calls for reversal.

26
27
28 **QUESTION 3**
29 **DID THE CIRCUIT COURT INFORM THE**
30 **JURY CORRECTLY ON THE LAW AND**
31 **ENTER A CORRECT JUDGEMENT TO**
32 **DISPOSE OF ALL ISSUES ON THE CASE?**
33 **(App.,p.39-48)**

34
35 First, Allen's claim never alleges private
36 nuisance or public nuisance it merely states
37 nuisance. A closer look would indicate it is a
38 “mixed nuisance.”

39 From Black's Law Dictionary:

40 “mixed nuisance: a condition that is both a
41 private nuisance and a public nuisance, so that it
42 is dangerous to the community at large but also
43 causes particular harm to private individuals.”
44 p1094 Black's Law Dictionary 7th Edition,
45 copyright 1999 by WEST GROUP Bryan A.
46 Garner, Editor in Chief, St. Paul, MN

1
2 Although violation of an ordinance does not
3 always assign liability it has been stated
4 because of the ordinance enactment based on
5 prevention of a certain type of harm (flooding)
6 that Allen is in a certain class (adjoining
7 property) and experienced the type of harm the
8 ordinance was meant to protect and that also
9 liability is assigned in the law satisfies the cause
10 of action under liability for a violation of a
11 safety statute.

12
13 From Wisconsin Jury Instructions- CIVIL:
14 A qualifying statement is used in “Wis JI - Civil
15 1005 – Negligence: Defined”
16 “...(For the violation of a safety statute, see Wis JI-Civil
17 1009.)”

18
19 (on page 2) “The trial judge must decide
20 whether a safety law applies to the claim
21 negligent act. If so, then see Wis JI - Civil
22 1009.”

23
24 From “Wis JI – Civil 1009 – Negligence:
25 Violation of Safety Statute”

26 “...A safety law applies if the court determines:
27 1. The harm inflicted was the type the statute
28 was designed to prevent; 2. The person injured
29 was within a class of persons sought to be
30 protected; 3. There is some expression of
31 legislative intent that the statute become a basis
32 of imposition of civil liability. Tatur v. Solsrud,
33 174 Wis. 2d 735, 743, 498 N.W. 2d 232 (1993);
34 ... ”

35
36 Violations of ordinances is negligence per se.
37 Negligence then should have been decided by
38 the judge since the judge decides the law or it
39 could have been decided by the jury if the jury
40 was given Civil JI-1009 instead of Civil JI-
41 1005. Civil JI-1009 should have been used
42 because according to Civil JI-1009:

43 “If you determine that (defendant) violated this
44 safety (statute) (regulation) (ordinance), the
45 violation is negligence.”

1 The court was provided thorough documents
2 and evidence prior(R:52; R:54; R:95-810) and
3 during court (R:87:E69; E74) regarding the
4 safety statutes. There shouldn't have been any
5 question that Allen was jurisdictionally allowed
6 the "protected class" designation, and the
7 statutes, regulations or ordinances qualified as
8 "safety law." The harm (flooding) that Allen
9 endured was the type the law was to prevent,
10 Allen was part of the protected class (adjoining
11 property owner) and there was a legislative
12 intent in the law to impose liability.
13 Allen's attorney had requested the local
14 ordinance to be included in the jury instructions
15 and the circuit court denied it (R:96-1029).
16 Recall, the notation in "Wis JI - Civil 1005 –
17 Negligence: Defined" says the "trial judge must
18 decide", not may decide, therefore, the judge in
19 denying Allen's attorney's request proceeded
20 under a misunderstanding of what was expected
21 to be done.

22
23 Allen's second claim against Luce is
24 negligence. The cause of action was not a
25 nuisance based on negligence but instead
26 negligence is determined to be negligence per
27 se from failure to abate a nuisance, maintaining
28 a nuisance or more importantly, direct reference
29 to the zoning ordinances that indicate violations
30 are declared nuisances.

31
32 Although it has been established that the case
33 should have been adjudicated differently, it is
34 still important to take notice of other possible
35 errors.

36 Wisconsin Statute 805.13(4)

37 "Instruction to jury - Failure to object to the
38 material variance or omission between the
39 instructions given and the instructions proposed
40 does not constitute a waiver of error. The court
41 shall provide the jury with one complete set of
42 written instructions providing the burden of
43 proof and the substantive law to be applied to
44 the case to be decided."

1 Under this statute lack of objection should not
2 bar reversal. Also under Wisconsin Statute
3 752.35 it is proper for the Court of Appeals to
4 reverse the judgment because of erroneous set
5 of instructions caused the jury to focus on
6 information that was erroneously admitted in
7 the case along with putting undue emphasis on
8 Allen's duty to prevent harm from occurring to
9 Allen's property when in fact the harm that is
10 caused to Allen's property was from intentional
11 nuisances.

12
13 Wisconsin adopted the modified common
14 enemy rule in State v. Deetz which says in part:
15 "Each possessor is legally privileged to make a
16 reasonable use of his land, even though the flow
17 of surface waters is altered thereby and causes
18 some harm to others, but incurs liability when
19 his harmful interference with the flow of surface
20 waters is unreasonable." State v. Deetz, 66 Wis.
21 2d 1, 224 N.W. 2d 407 (1974)

22 Contrasting that with page 8 of jury instructions
23 under Civil JI-1922: (App., p. 46)

24 "A private nuisance is an invasion of or
25 interference with BARBARA ALLEN'S interest
26 in the private use and enjoyment of her land.
27 The defendants have, however, a legal privilege
28 to make reasonable use of their land, even if
29 they alter the flow of surface water thereby and
30 cause some harm to BARBARA ALLEN. It is
31 for you, the jury, to assess whether any use by
32 the defendant is reasonable."

33 The court earlier had this interpretation of what
34 the law was regarding duty not to cause harm:

35 "The court: The motion is denied. The
36 claim here seems to revolve more around ground
37 water than surface water. So to some degree the
38 case about surface water isn't directly on point,
39 although it could be persuasive or important.

40 But in any event, the Defense has
41 presented sufficient evidence; in fact, a
42 sufficient evidence in law to carry their modest
43 burden for this kind of motion relating to duty to
44 not cause water to go into the neighbor's
45 property in such a way as to harm the neighbor."
46 (R:94-629)

1 In comparing what the court gave to the jury as
2 an instruction and how State v. Deetz is to be
3 interpreted, liability is excluded from the
4 direction given to the jury in Allen v. Luce.
5 The jury would then have reason to believe that
6 it is acceptable for Luce to cause harm without
7 liability. The court had an inaccurate
8 interpretation of reasonableness in the jury
9 instructions.
10 Reasonableness should have been defined like
11 in the Wisconsin Supreme Court in Hocking v.
12 City of Dodgeville (2007):
13 “¶70 In other words, when a private nuisance
14 results from intentional interference with the
15 flow of surface water, "liability depends upon
16 whether the invasion is unreasonable" under
17 Restatement of Torts (Second) §§ 826-831
18 (relating to the reasonableness of an intentional
19 invasion of another's interest in the use or
20 enjoyment of land).
21 ¶71 In contrast, when a private nuisance results
22 from a negligent interference with the flow of
23 surface water, Restatement § 833 requires the
24 same inquiry as Restatement (Second) § 822(b),
25 setting forth the general rule of liability for a
26 private nuisance based on negligent conduct. I
27 applied § 822(b)'s general rule in Part I of the
28 concurrence, as well as the more specific rules
29 (§ 824 and § 839) to which § 822(b) directs the
30 inquiry under the circumstances of the present
31 case. Although liability for the negligent
32 maintenance of a nuisance depends upon
33 whether the defendant's conduct is
34 unreasonable, the test is not whether the
35 defendant has interfered with the flow of surface
36 waters through an unreasonable use of land.”
37 Hocking v. City of Dodgeville, 318 Wis.2d 681,
38 768 N.W.2d 552
39
40 Under State v. Deetz, 66 Wis. 2d 1, 224 N.W.
41 2d 407 (1974), liability is attached if the harm
42 caused is unreasonable. It is considered
43 unreasonable to violate zoning safety statutes
44 that are adopted to prevent harm which was not
45 known to the jury. Therefore, a jury reading the
46 jury instructions would be misled into thinking

1 it was permissible to cause harm without
2 liability.

3
4

5 From Special Verdict Questions:

6 "The form of special verdict is discretionary. A
7 reviewing court will not interfere as long as
8 material issues of fact are encompassed within
9 the questions and appropriate instructions are
10 given."Meurer v. ITT General Controls, 90 Wis.
11 2d 438, 28 N.W. 2d 156 (1979) Murray v.
12 Holiday Rambler, Inc. 83 Wis. 2d 406, 256
13 N.W. 2d 513 (1978)

14

15 From Verdict Question Number 1:

16 "Does a private nuisance exist on Barbara
17 Allen's property?"(App.,p.49)

18 Answered:

19 "yes" (App.,p.49)

20

21 This question did not speak to the issue to be
22 decided for the case, which was did Luce's
23 actions constitute a nuisance. The jury
24 answered yes. So, taking that answer the jury
25 gave with the instruction given to them, the jury
26 recognized an action of nuisance had occurred.
27 The four factors in the instruction to the jury
28 refer to one or more of the defendant's actions,
29 not one or more of the party's actions so by the
30 jury answering yes, they acknowledged the
31 defendants actions had caused a nuisance. In the
32 instruction,

33 "a person is not negligent for failing to abate a
34 private nuisance unless the nuisance existed long
35 enough that the person knew or should have
36 known..."

37 is an incomplete statement of law. An
38 unintended consequence of having the jury
39 answer the question in this manner could cause
40 all kinds of problems for Allen moving forward
41 to repair Allen's property or even retain
42 ownership since Allen's property now has been
43 decided in court as a nuisance. Instead, the
44 circuit court should have asked if the
45 defendants' actions constituted a nuisance.

1 That issue alone, persuaded Allen of the
2 necessity of appealing this case.
3
4
5 Verdict Question #2:
6 “Did the nuisance result in significant harm to Barbara
7 Allen” (App.,p.49)
8 Answered:
9 “yes” (App.,p.49)
10
11 Looking at the plain meaning of the answered
12 questions with the directions as given; so far the
13 jury has determined that the defendants’
14 (Luce’s) actions constituted a nuisance and
15 caused Barbara Allen significant harm. The
16 court’s instruction regarding Civil JI-1922
17 Private Nuisance: Negligent Conduct as
18 discussed before the circuit court’s statement on
19 the law permitting the defendants to cause harm
20 was inaccurate.
21 From Jury Instructions: 1922 PRIVATE
22 NUISANCE: NEGLIGENCE: CONDUCT:
23 pp.8-9 “To sustain a claim of nuisance in this
24 case, BARBARA ALLEN must prove the
25 following four elements.
26 ...
27 Third, one or more of the defendants
28 was negligent. A person is negligent when he or
29 she fails to exercise ordinary care. Ordinary
30 care is the care that a reasonable person would
31 use in similar circumstances. A person is not
32 using ordinary care and is negligent, if the
33 person, without intending to do harm, does
34 something or fails to do something that a
35 reasonable person would recognize as creating
36 an unreasonable risk of invading or interfering
37 with another’s use or enjoyment of property.
38 A person is not negligent for failing to
39 abate a private nuisance unless the nuisance
40 existed long enough that the person knew or
41 should have known of the nuisance and could
42 have remedied it within a reasonable period of
43 time.
44 Fourth, one or more of the defendant’s
45 negligence caused the private nuisance. This
46 does not mean that a defendant’s negligence was
47 “the cause” but rather “a cause” because a

1 private nuisance may have more than one cause.
2 Someone's negligence caused the private
3 nuisance if it was a substantial factor in
4 producing the nuisance. A private nuisance may
5 be caused by one person's negligence or by the
6 combined negligence of two or more people."
7 (App.,p.46-47)
8 Therefore, the jury verdict was inconsistent
9 since here they agree Luce is negligent but fail
10 to assign negligence in the remaining verdict
11 question.
12 Also in part of the nuisance question was a
13 qualifying statement:
14 "A person is not negligent for failing to abate a
15 private nuisance unless the nuisance existed long
16 enough that the person knew or should have
17 known of the nuisance and could have remedied
18 it within a reasonable period of
19 time."(App.,p.47)
20 This is an incorrect statement of law under
21 nuisance per se.
22
23 Should have the emergency doctrine instruction
24 been given for Allen's benefit?
25 From Cords v. Anderson:
26 "The "emergency doctrine" relieves a person for
27 liability for his actions when that person is faced
28 with a sudden emergency he or she did not
29 create. The "rescue rule" applies even though the
30 action of the rescuer is deliberate and taken after
31 some planning and consideration. Rescuers will
32 not be absolved of all negligence if their actions
33 are unreasonable under the
34 circumstances."Cords v. Anderson, 80 Wis. 2d
35 525, 259 N.W.2d 672 (1977).
36 The standard for review is the plaintiff is to be
37 given the benefit of the emergency instruction.
38 Allen was not given this benefit. Allen acted
39 reasonably as shown in testimony by Allen's
40 description of extensive mitigation.
41
42 What other factors might have attributed to the
43 remainder of the verdict answers?
44 Besides the issues already mentioned in other
45 parts of the brief, could it have beendue to the
46 issues Allen's attorney raised at the hearing for

1 a New Trial in the Interest of Justice regarding
2 the misrepresentation of the facts to the jury
3 during the trial? The jury misinformed by the
4 Luce attorney in the closing argument
5 statements. A review of the transcript also shows
6 an additional fatal error that was stated to the
7 jury. Luce's attorney in closing remarks states
8 the only hydrologist that looked at the situation
9 was one from Waukesha County, who decided
10 it was a ground water issue. The court had
11 ruled it hearsay (R:91-314;319). Then in
12 examination of Mr. Klais, Luce's attorney
13 solicits an answer from Mr. Klais that a
14 hydrologist looked at the case. Allen's attorney
15 objected as it was not in evidence, court
16 overruled, Allen's attorney again objected and
17 the court overruled (R:95-993-994). Luce's
18 attorney told the jury in her closing argument:

19 "The only hydrologist that ever looked at
20 anything in this case was somebody for the
21 county. And it confirmed the opinions of Peggy
22 Tilley and Jim Rose that there was no adverse
23 drainage caused by either Mr. Luce or Ms.
24 Buechner, no evidence of matted grass." (R:96-
25 1090)
26
27

28 The jury was told to decide the verdict using the
29 law given to them, making it permissive to
30 cause harm as long as it was reasonable. For
31 example, to want a two car attached garage
32 which required a variance without following the
33 conditions of the variance and it being
34 reasonable to desire a parking area almost the
35 entire width of your lot without permits that
36 violate ordinances restricting offset
37 from property lines and diversion of stormwater
38 (R:96-1085-1088-1090). This is a contradiction
39 of the reasonableness law for surface water
40 diversion and more drastic than the common
41 enemy rule that was employed in Wisconsin
42 before 1974. The damage instruction did not
43 convey to the jury what Luce would be
44 justifiably liable to pay with respect to all of

1 Allen's losses due to their nuisance. Actually, it
2 worked to diminish whatever damages Allen
3 would have been allowed by stating in the Jury
4 Instructions under 1731 Damages: Duty to
5 Mitigate:
6 p8 "If you find that a reasonable person would
7 have taken steps to reduce damages and if you
8 find that Barbara Allen did not take such steps,
9 then you should not include as damages any
10 amount which could have been avoided by
11 Barbara Allen. If a reasonable person would not
12 have taken steps to reduce loss under all
13 circumstances existing in this case, then Barbara
14 Allen's failure to so act may not be considered
15 by you in determining her damages."
16 This fails to realize that defendants that cause an
17 intentional harm are not afforded a comparative
18 negligence instruction assigning possible
19 liability to plaintiff (see *Jacobs v. General Acc.*
20 *Fire & Life Assur. Corp.* on page 18). Any
21 failure to mitigate reductions are subtracted
22 after the sum of money to reasonably
23 compensate Allen for her losses would have
24 been decided by jury. By omitting the
25 emergency doctrine the jury had an incomplete
26 picture of the extent of Luce's liability to Allen.
27 Also, referring back to the collateral source
28 issue the jury was led to believe Allen losses
29 were eliminated by Allen's insurance. There
30 are many errors that even though there was a
31 failure to object it warrants a reversed
32 judgment, most of them constituting failure of
33 the real controversy to be tried and,
34 unfortunately, due to the conduct during the
35 trial the jury was prevented from hearing fairly
36 the evidence. Evidence was clear that Allen
37 took a proactive approach to preserve Allen's
38 property. Repairs are futile without elimination
39 of the nuisance causing activity.
40
41 But the county's approach for the violations
42 falls short to prevent adverse effects to
43 adjoining properties because their goal is to just
44 bring the properties "in compliance." The

1 deleterious effect is articulated in *Forest County*
2 *v. Goode*:

3 “¶8 In the court of appeals' view, a circuit court's
4 refusal to grant injunctive relief under Wis. Stat.
5 § 59.69(11) would judicially usurp the
6 legislative function. Specifically, denial of
7 injunctive relief would, according to the court of
8 appeals, nullify the decision of the body
9 legislatively vested with the authority to make
10 variance determinations. Seeid.at 227. In
11 addition, the court of appeals reasoned that a
12 refusal to grant injunctive relief here would
13 infringe upon the public's right to have zoning
14 ordinances enforced, would increase the
15 dangerous cumulative effects of zoning
16 violations, and would allow persons to
17 "purchase" zoning variances by allowing
18 forfeitures as a remedy in some cases. Seeid.at
19 228-29.”*Forest County v. Goode*, 215 Wis. 2d
20 217, 572 N.W.2d 131
21

22 Although punitive damages would not
23 ordinarily be part of the relief granted from the
24 Appellate Court District II, Allen believes the
25 egregiousness of the lack of effort or interest of
26 the Luce's to modify the alterations they made
27 to their properties knowing that the runoff is
28 adversely affecting Allen's property and
29 Waukesha County's propensity to ignore
30 evidence of variance conditions not satisfied
31 and other zoning violations, this case would be
32 an appropriate one to apply the deterrent for
33 illegal behavior.

34 From Wisconsin Statute 895.043(3) STANDARD
35 OF CONDUCT:

36 “The plaintiff may receive punitive damages if
37 evidence is submitted showing that the
38 defendant acted maliciously toward the plaintiff
39 or in an intentional disregard of the rights of the
40 plaintiff. In awarding punitive damages, the
41 factors to be considered are: 1) the grievousness
42 of the wrongdoer's acts; 2) the degree of
43 malicious intent; 3) the potential damage that
44 might have been caused by the acts; and 4) the
45 defendant's ability to pay. An award is excessive
46 if it inflicts a punishment or burden that is
47 disproportionate to the wrongdoing. That a judge
48 provided a means for the defendant to avoid

1 paying the punitive damages awarded did not
2 render the award invalid."Gianoli v. Pfeleiderer,
3 209 Wis. 2d 509, 5.

4 From Annotation (3) for Wisconsin Statute
5 895.043 (3):

6 " That the defendant act "in an intentional
7 disregard of the rights of the plaintiff"
8 necessitates that the defendant act with a
9 purpose to disregard the plaintiff's rights or be
10 aware that his or her conduct is substantially
11 certain to result in the plaintiff's rights being
12 disregarded. The act or course of conduct must
13 be deliberate and must actually disregard the
14 rights of the plaintiff, whether it be a right to
15 safety, health or life, a property right, or some
16 other right. There is no requirement of intent to
17 injure or cause harm."Wischer v. Mitsubishi
18 Heavy Industries America, Inc. 2005 WI 26, 279
19 Wis. 2d 6, 694 N.W.2d 320, 01-0724.63 N.W.2d
20 562 (Ct. App. 1997), 95-2867.

21
22 Also see LeRoy M. Strenke v. Hogner 279 Wis.
23 2d 52. , 694 N.W.2d 296 at 423

24 25 CONCLUSION

26 The Wisconsin State Courts are the final
27 arbiters of the state law and constitution. Issues
28 indicating absence of fairness that would raise
29 to the level that Allen was denied a fair trial or
30 justice have been articulated in this brief. As
31 stated above, Article 1 Section 9 of the
32 Wisconsin Constitution talks about a remedy
33 for wrongs and conformity to the laws. Allen
34 was denied remedy and conformance of laws
35 meant to protect her. For judicial economy and
36 since due process had occurred. Because the
37 controversies of Nuisance according to laws are
38 not disputed and the continuation of nuisance
39 which is negligence per se is also satisfied since
40 record and argument has proved it.
41 Allen requests the following relief:

- 42
43 1. Reversal of decision deciding Barbara
44 Allen's property as a nuisance.
45 2. Reversal of all judgments and costs.

1
2 *Since the jury ruled Allen had sustained*
3 *substantial loss it would be consistent with the*
4 *jury's verdict to award Allen the damages she*
5 *requests.*
6
7 3. Reimbursement of all circuit court costs,
8 engineering costs, transcriptions costs and costs
9 associated with filing an appeal.
10 4. The Appellate Court to adjudicate the
11 nuisance and negligent cause of action
12 according to law in favor of Allen.
13
14 Since Allen has established that no comparative
15 negligence is appropriate in this case of
16 intentional nuisance.
17
18 5. No comparative negligence assigned to
19 Allen.
20
21 *Since FEMA and NFIP is funded at least*
22 *partially by the taxpayers and because it would*
23 *be unfair for the taxpayers to pay for any of the*
24 *losses due to the tortfeasors.*
25
26 6. Luce is responsible to reimburse FEMA and
27 NFIP non-collateral source benefits afforded to
28 Allen from FEMA and NFIP.
29
30 *Since Allen took a loan from her own retirement*
31 *account that over the life of the loan has a*
32 *significant amount of interest that occurs.*
33
34 7. Luce to pay interest on loan Allen borrowed
35 from her retirement account due to the flood.
36
37 *Since Collateral Source should have been*
38 *excluded, and from agreement in the brief*
39 *tortfeasors should be responsible for losses*
40 *Allen incurred without benefit of any collateral*
41 *payments*
42

1 8. Allen shall be reimbursed for all losses
2 attributed to flooding and collateral source
3 payments will not be deducted. Losses to
4 include but not limited to rental expenses, future
5 mitigation of mold, utility expenses, repair
6 and/or replacement of flooded well and septic if
7 determined necessary by Waukesha County
8 environmental resources.

9 9. Determination of who pays rent expenses
10 until Allen can reclaim occupancy of her house.

11 10. Compensation for emotional distress of
12 Allen and her son due to loss of home and
13 alienation of neighbors due to Luce's
14 influences.

15

16 *When nuisance is established, abatement is*
17 *necessary to stop the continuation of the*
18 *nuisance or else negligence will never cease*
19 *and case will not be disposed of. In order to*
20 *mitigate the chance of continuing problems*
21

22 11. Since the topography of Dan and Tuesdee
23 Luce's property was increased without approval
24 and it would be unreasonable to expect them to
25 remove their entire driveway and garage
26 addition – Allen requests elevation of her
27 property to the same height as Luce on her
28 entire lot to approximate pre-2000 equality of
29 lots. Restoration of Allen's lawn (all permit
30 processes and expenses done by Luce).

31 12. Cease any water diversion to Allen's
32 property and a penalty assigned to Allen if it is
33 violated.

34 13. Luce is to comply with all conditions of
35 variance from 2000. Specifically: Removal of
36 unpermitted concrete in driveway and sidewalk
37 per Robert Kluwin's report.

38 14. Luce to enter into an easement agreement
39 for a stormwater easement with Town of
40 Merton, recorded with Register of Deeds. All
41 stormwater to be confined to the Luce
42 properties.

1 15. Regarding Mary Buechner- all stormwater
2 previously diverted to Allen's property must
3 now be handled by collection systems that will
4 divert it to the north of Buchner's house down
5 to the lake.
6 16. Punitive damage of \$200,000 which is
7 maximum under Wisconsin Statutes
8 895.043(3).
9 17. Bench trial for circuit court with instructions
10 from Court of Appeals granting Allen these
11 reliefs.
12 18. Such other relief as the Court may find just
13 and appropriate.
14
15 Given the gravity of harm caused for Luce's
16 lack of regard for Allen's rights, this is a fair
17 judgment according to Restatement (Second) of
18 Torts 839 and Wisconsin Laws.

19
20 Dated this ____ day of ____, 2012
21
22
23

24
25

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a [choose one] ☐ monospaced or ☒ proportional serif font.

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