



August Case Law Update August 31, 2018

A summary of Wisconsin court opinions decided during the month of August related to planning

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Court Acknowledges Anticipatory Private Nuisance as Part of Wisconsin Common Law

Nuisance has its origins as part of the common law developed centuries ago in England and subsequently incorporated by the states as a foundation of their law. Common law private nuisance provides that a property owner cannot use their land in a manner that harms (injures) the property of a neighboring property owner. In [Krueger v. AllEnergy Hixton, LLC](#), the Wisconsin Court of Appeals acknowledged that Wisconsin allows “anticipatory nuisance.” The concept of anticipatory private nuisance means the harm to neighboring property has not yet occurred but is anticipated in the future.

The *Krueger* case involved a challenge to a proposed frac sand mine in the Town of Hixton in Jackson County by a group of neighboring property owners. The neighbors argued that if the mine were allowed it would cause harm to their property. A panel of 3 Court of Appeals judges heard the appeal. Two judges interpreted Wisconsin law as allowing anticipatory nuisance but concluded that the complaint filed by the plaintiffs failed to state a claim for anticipatory private nuisance. The dissenting judge interpreted Wisconsin law as not recognizing anticipatory private nuisance. He cited other nuisance cases that deal with harm to neighboring property that has not yet occurred. These cases determined the future harm was a nuisance but not adopt the private anticipatory nuisance doctrine. Private anticipatory nuisance is recognized in other states though it is not widely used because it establishes a higher burden of proof than required in other nuisance cases. This issue was raised by the dissent who argues that other Wisconsin nuisance cases dealing with future harm do not require such a high burden of proof. Based on these cases the dissent would not have dismissed the plaintiffs’ case.

As a Court of Appeals decision, the *Krueger* case does not make new law. Only the Wis. Supreme Court can do that. The function of the Court of Appeals is to interpret the law and correct mistakes of the circuit courts. The plaintiffs may petition the Wisconsin Supreme Court to review the case and clarify the status of anticipatory private nuisance in Wisconsin.

The case is recommended for publication in the official reports.

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]