CROSSTEX V. GARDINER AND THE STATE OF NUISANCE LAW IN TEXAS

Note

I. INTRODUCTION

"Nuisance," Judge Cardozo once observed, "as a concept of the law has more meanings than one."[1] It is perhaps the multiple meanings of nuisance that help make it one of the most confusing subjects in tort law.[2] Confusion around nuisance does not stem from the right it seeks to protect, the "use and enjoyment of property."[3] That persons should be able to enjoy their property without interference is in the United States a belief with a long history.[4] Confusion around nuisance law seems to arise when one seeks to define and articulate the elements of the tort. There are many ways in which one's use and enjoyment of property may be interfered with, and there are several legal theories under which nuisance liability may lie.[5] Added to this is confusion generated by the fact that there are two distinct types of nuisance: public and private.[6]

That a right of action may arise from the interference with rights inherent in land ownership is not new;[7] nuisance is over 800 years-old.[8] In the United States, nuisance liability has been recognized from the earliest times, and it became an increasingly important concept during the Industrial Revolution, as the country moved from an agrarian society to a more urbanized society.[9] As industry expanded, so did disputes surrounding the use of land.[10] Decisions from the Texas Supreme Court have referenced nuisance, thus implying recognition of nuisance liability, from around the time the state was admitted to the

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1. McFarlane v. City of Niagara Falls, 160 N.E. 391 (N.Y. 1928).

2. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §86 at 616 (5th ed. 1984) ("Nuisance has meant all things to all people.").

3. *See Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. Many of the country's Founders strongly supported the idea that property rights were essential and deserving of strong protection. *See* Chester James Antieau, *Natural Rights and the Founding Fathers—the Virginians*, 17 WASH & LEE L. REV. 43, 63 (1960).

5. The Texas Supreme Court is not the only court of last resort to recognize that nuisance is inherently confusing. *E.g.*, Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 719–20 (Mich. 1992) ("Because nuisance covers so many types of harm, it is difficult to articulate an encompassing definition. Imprecision in defining nuisance leads to confusion regarding the interest it is designed to protect.").

6. Because the task of synthesizing the state of private nuisance law in Texas is daunting enough, the scope of this writing, and of the *Crosstex* case generally, is confined to private nuisance. Future use of the word "nuisance" in this writing refers solely to private nuisance. Public nuisance has been defined as "[a] condition that amounts to 'an unreasonable interference with a right common to the general public.'" Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979)).

7. Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 192 (1990).

8. *Id.*

9. *See id.* at 198.

10. *See id.* at 199.

Union.[11] In short, nuisance has been recognized for centuries, and it is perhaps its long history combined with the expansive rights it seeks to protect that has created so much confusion.

A. Practical Reasons To Know About Nuisance

Understanding the status of nuisance law in Texas is in itself edifying, but there are also many practical reasons to become familiar with Texas nuisance law. At a time when the population of Texas is rapidly increasing[12] and Texas cities are becoming more crowded,[13] disputes concerning the use and enjoyment of property in Texas are likely to increase. Furthermore, Texas is home to a thriving oil and gas industry, which in exploring for, extracting, and refining minerals uses a substantial amount of real property.[14] The oil and gas industry, therefore, is particularly vulnerable to nuisance liability.[15] Furthermore, nuisance law is particularly important for those who live, work, and represent clients in Houston, a city famous for, among other things, its lack of comprehensive zoning laws.[16] Such a lack of governmental regulations increases the likelihood that disputes concerning land use will be handled through other means, such as a nuisance suit.[17] Because many businesses may face the prospect of legal liability for nuisance, business decision-makers will benefit from learning about nuisance.[18] Property owners in general will also benefit by knowing, if some interference with use and enjoyment of their land should arise, what their legal options are. The reasonably prudent lawyer and future

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11. Texas became a state in 1845. Kate Whitehurst, *Early Statehood*, TEXAS OUR TEXAS (Feb. 10, 2018, 10:19 AM), http://texasourtexas.texaspbs.org/the-eras-of-texas/early-statehood; The Texas Supreme Court referenced nuisance in multiple decisions following the state's admission to the Union. *See e.g.*, Thornton v. Springer, 5 Tex. 587, 592 (1851) ("[T]he question was whether the nuisance would give to those injured by it a right of action . . ."); *See* Burnely v. Cook, 13 Tex. 586, 589 (1855) ("[A]n injunction will not be granted to stay waste or nuisance, before a hearing on the merits . . .").

12. Alexa Ura, *Report: Texas Population to Double by 2050*, BREITBART (Mar. 5 2015, 12:18 PM), https://www.texastribune.org/2015/03/05/report-texas-population-double-2050/.

13. *See* John W. Schoen, *Texas is Tops with Fastest Growing Cities*, CNBC (May 19, 2016, 12:43 PM), http://www.cnbc.com/2016/05/19/texas-is-tops-with-fast-growing-cities.html.

14. *See* Karen Uhlenhuth, *Study: Oil and Gas Drilling Consuming Millions of* Acres, MIDWEST ENERGY NEWS (Feb. 10, 2018, 10:34 AM), http://midwestenergynews.com/2015/04/24/study-oil-and-gas-drilling-consuming-millions-of-acres/.

15. As a prime example, the defendant in *Crosstex*, which is the subject of this writing, is an energy company.

16. *See e.g.*, Bradley Olson, *Nuisance Laws Hand Houston Wins vs. Troublesome Foes*, HOUSTON CHRONICLE (Apr. 10, 2009, 5:30 AM), https://www.chron.com/neighborhood/baytown-news/article/Nuisance-laws-hand-Houston-wins-vs-troublesome-1728388.php.

17. *See id.*

18. Recent jury verdicts in Texas show the risk of ignoring nuisance liability. *See, e.g.*, Jess Davis, *Jury Awards Texas Family $2.9M for Fracking Nuisance Claim,* LAW360 (Apr. 22, 2014, 5:25 PM), https://www.law360.com/articles/530645/jury-awards-texas-family-2-9m-for-fracking-nuisance-claim.

lawyer would, therefore, be wise to become more familiar with nuisance law. Fortunately for those interested in learning about Texas nuisance law, the Texas Supreme Court provided a thorough review of nuisance in its recent decision *Crosstex North Texas Pipeline, L.P. v. Gardiner.*[19]

B. Purpose And Scope Of Case Note

The purpose of this writing is to analyze and contextualize the recent *Crosstex* opinion. The case is noteworthy for several reasons. More than anything else, the case is significant because the Texas Supreme Court "ha[d] previously declined opportunities to comprehensively describe the requirements and limits of a claim alleging nuisance under Texas law."[20] There was previously no Texas Supreme Court case which clearly defined exactly what is required to prevail in a nuisance case.[21] *Crosstex* did not stray far from Texas precedent and, as will be discussed, it did much to confirm longstanding nuisance precedent. But there were several issues in nuisance law that remained unclear or unsettled because they had been answered differently by the various appellate courts in Texas. The court also took time to clear up confusion around these unsettled issues.

C. Why Crosstex is Different

Crosstex, in the way in which it details the elements of the tort, reads more like a hornbook than a decision from a court of last resort. It provides a detailed description of nuisance and the various theories under which a defendant may be held liable for nuisance.[22] This type of wide-ranging analysis which arguably says more than what is needed to dispose of the case is somewhat unusual for a court of last resort. Courts of last resort often prefer to limit their commentary to the limited question at hand and leave other questions to be decided later or by another court.[23] For example, the court in *Crosstex* took a markedly different approach than that taken by the United States Supreme Court, which prefers to issue "narrow" rulings.[24] The *Crosstex* opinion was written in such an expansive way because there were no clear and

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19. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 590–94 (Tex. 2016).

20. *Id.* at 591.

21. *Id.*

22. *Id.* at 604–07.

23. *See* Jeffery Toobin, *The Trap in the Supreme Court's "Narrow" Decisions*, THE NEW YORKER (June 30, 2014), https://www.newyorker.com/news/news-desk/the-trap-in-the-supreme-courts-narrow-decisions.

24. Justice Sonia Sotomayor recently summarized the Supreme Court's general adherence to this philosophy when she said, "[w]here we can find a very, very narrow way of deciding a case, we use it." *Sonia Sotomayor: Antonin Scalia's Comments Made Me Want to Use Baseball Bat*, CBS (Oct. 19, 2016, 11:30 AM), http://www.cbsnews.com/news/sonia-sotomayor-antonin-scalia-comments-want-baseball-bat/.

comprehensive answers to all questions surrounding nuisance in Texas case law.[25] Such a thorough analysis by the Texas Supreme Court is a gift to lawyers, judges, and all citizens of Texas, who now have a clear answer to what type of conduct will give rise to liability.

D. Roadmap

In this case note, I first provide a description of the case's key facts and holdings. I then analyze in detail the court's description of nuisance, noting how it is in keeping with or in opposition to various Texas nuisance cases, and with nuisance laws in various American jurisdictions. Next, I comment on the possible ramifications—particularly those faced by businesses—of the court's decision. I then discuss what lessons may be learned from the court's decision. Lastly, for those who find the court's decision distressing, I offer a possible legislative response by analogizing Texas' right-to-farm statue, and contemplate a similar statue which offers protection for oil and gas exploration, production, and processing.

II. FACTUAL BACKGROUND OF THE CASE

Plaintiffs Andrew and Shannon Gardiner owned a 95-acre ranch, which they had purchased both as an investment opportunity and to "raise cattle, ride horses, and enjoy as a family until a future sale."[26] Across the road from the Gardiner ranch was a 20-acre parcel owned by Crosstex North Texas Pipeline, L.P.[27] Crosstex bought the parcel during a period in which it was constructing a pipeline; the parcel was used for storage and was purchased as a possible location for a compressor station.[28] The Gardiners, after negotiating with Crosstex, agreed to sell to Crosstex an easement, which allowed Crosstex to run its pipeline across the Gardiners' land.[29] In its dealings with the Gardiners, Crosstex never mentioned that its adjacent 20-acre parcel might be the future home of a compressor station.[30]

Eventually, Crosstex decided to construct the compressor station on the adjacent parcel.[31] The compressor station consisted of four large diesel engines, each of which were "bigger than mobile homes," and at least one of the engines ran continuously.[32] Although, after testing, Crosstex determined that sound mitigation was not needed and it

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25. *See Crosstex*, 505 S.W.3d 587–88.
26. *Id.* at 588.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* (internal quotations omitted).

installed "hospital grade" mufflers on each of the engines.[33] Before operation of the compressor station began, the surrounding area was quiet, in keeping with its rural surroundings.[34] However, after Crosstex began operating the compressor station, the Gardiners and others were perturbed by the noise and complained to Crosstex.[35] The complaints made about the noise were strong and supported the idea that the noise was intolerable.[36] The noise was described variously as a "constant roar," "an engine of a locomotive sitting on the driveway," and comparable to the level of noise generated by a jet airplane.[37] In response to the complaints, Crosstex sent a representative to the site—and her notes—describing the noise as "BAD" and "VERY LOUD"—confirmed that the complaints were not unfounded.[38]

Their annoyance increasing, the Gardiners and others demanded that Crosstex construct both a building around the engines and a sound wall.[39] Crosstex did not fully acquiesce, but instead "constructed a partially enclosed building around the engines ... installed sound blankets inside the building's walls, installed sound walls on three sides of the building, and planted vegetation around the building and walls."[40] However, these mitigation efforts did not assuage the noise problem on the Gardiners' property and, because the only open side of the partially enclosed building faced the Gardiners, the efforts appeared to exacerbate the problem.[41] The Gardiners filed suit in May 2008 and Crosstex, between the time of filing and the January 2012 trial, continued to take various sound-abatement measures, but the Gardiners alleged that none were effective.[42]

The Gardiners alleged claims of ordinary negligence, gross negligence, and intentional and negligent nuisance.[43] At trial, the Gardiners also attempted to submit a jury question on whether Crosstex created a nuisance by their conduct that was "abnormal and out of place in its surroundings."[44] The trial court judge entered a directed verdict on the ordinary negligence claim, but submitted questions about whether Crosstex intentionally caused the nuisance and if Crosstex

33. Hospital grade mufflers are apparently an intermediate type of muffler; there are types of mufflers which provide for more sound mitigation, and others which provide for less. *Id.*

34. *Id.* at 588–89.

35. *Id.* at 589.

36. *Id.*

37. *Id.* (internal quotations omitted).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (internal quotations omitted).

negligently created the nuisance.[45] The jury found that Crosstex negligently created a nuisance and that, as a result, the value of the Gardiners' property declined by over $2 million.[46] Crosstex appealed.[47]

At the court of appeals, the court ruled that there was not factually sufficient evidence to support the jury's finding of a negligently created nuisance.[48] The court of appeals reversed the trial court's denial of the Gardners' request for a trial amendment to include a jury question of whether Crosstex created a nuisance by engaging in actions that were "abnormal and out of place."[49] The case was remanded, and a new trial was ordered.[50] Each party filed petitions for review to the Texas Supreme Court.[51]

III. THE COURT'S HOLDING

Although a full analysis of the court's reasoning and the possible ramifications of the ruling will follow, it is helpful to briefly summarize the court's commentary on nuisance law in Texas. The word nuisance in Texas refers not to a particular cause of action, but rather to a type of legal injury.[52] Nuisance is the substantial interference with the right and enjoyment of property which causes unreasonable discomfort or annoyance.[53] A defendant may be liable for causing nuisance intentionally, negligently, or by engaging in abnormally dangerous and out-of-place conduct that creates a high degree of risk of serious injury.[54] Because the trial court did not have the assistance of a comprehensive guide to nuisance law, the Texas Supreme Court remanded the case for a new trial.[55]

A. Nuisance As Legal Injury, Not Wrongful Conduct

The first part of the court's opinion that requires analysis is its decision to define nuisance not as wrongful conduct, but rather as a type of legal injury.[56] Previously, certain Texas courts had defined nuisance differently than in *Crosstex*.[57] In some Texas court decisions, nuisance

45. *Id.* at 590.
46. *Id.*
47. *Id.*
48. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 451 S.W.3d 150, 176 (Tex. App. 2014), aff'd, 505 S.W.3d 580 (Tex. 2016).
49. *Id.* at 179. (internal quotations omitted).
50. *Id.*
51. *Crosstex*, 505 S.W.3d at 590.
52. *Id.* at 588.
53. *Id.* at 595.
54. *Id.* at 588.
55. *See id.*
56. *Id.*
57. *Id.* at 594.

was clearly used to describe a type of wrongful conduct that may give rise to liability.[58] For example, a 2007 nuisance opinion issued by the Beaumont court of appeals defined private nuisance as "a nontrespassory *invasion* of another's interest in the private use or enjoyment of land."[59] Similarly, a 2010 opinion issued by the Court of Appeals for the Fourteenth District of Texas referred to "a nuisance cause of action."[60] A 2011 decision from the Austin court of appeals stated that there were two acceptable ways to conceptualize nuisance: as damage or invasion.[61] The court wrote that: "[n]uisance . . . refers to a type of damage or invasion of another's interests that can potentially be actionable in tort."[62] To call nuisance an invasion or cause of action emphasizes the wrongful nature of the conduct rather than the type of injury suffered by an aggrieved party.[63] The court in *Crosstex* recognized that, for purposes of clarity, conceptualizing nuisance as wrongful conduct may be misleading.[64]

Indeed, other American jurisdictions have described nuisance as wrongful conduct or as a cause of action.[65] A recent decision from an intermediate appellate court in California referred to "[a] private nuisance cause of action,"[66] and an appellate court in New York also used the exact same language when it referred to "[t]he elements of a private nuisance cause of action."[67] Additionally, courts in Illinois and South Carolina have referred to a "nuisance cause of action."[68] To define nuisance, therefore, as a cause of action is not unusual in American jurisdictions, but the Texas Supreme Court offered a better way to define the tort.

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58. *See* In re Premcor Refining Group, Inc., 233 S.W.3d 904, 907 (Tex. App. 2007) (citing Lethu Inc. v. City of Hous., 23 S.W.3d 482, 489 (Tex. App. 2000) (defining nuisance as an invasion which emphasizes the wrongful nature of the conduct).

59. *In re Premcor*, 233 S.W.3d at 907 (citing Lethu Inc. v. City of Hous., 23 S.W.3d 482, 489 (Tex. App. 2000)); Bily v. Omni Equities, Inc., 731 S.W.2d 606, 611 (Tex. App. 1987) (emphasis added).

60. Yalamanchili v. Mousa, 316 S.W.3d 33, 37 (Tex. App. 2010).

61. Hanson Aggregates West, Inc. v. Ford, 338 S.W.3d 39, 45 (Tex. App. 2011).

62. *Id.*

63. *Id.* at 45–46.

64. *See* Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 595 (Tex. 2016).

65. *C.f. id.* at 594–95, with cases cited *infra* notes 67–69.

66. Adams v. MHC Colony Park, L.P., 224 Cal. App. 4th 601, 610 (Cal. Ct. App. 2014).

67. Aristides v. Foster, 901 N.Y.S.2d 688, 689 (N.Y. App. Div. 2010).

68. *See generally* Young v. Bryco Arms, 765 N.E.2d 1, 9 (Ill. App. Ct. 2001) (describing nuisance as a cause of action in Illinois); *See also* Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 753 S.E.2d 846, 852 (S.C. 2014) (describing nuisance as a cause of action in South Carolina).

In defining other types of torts, emphasis is also often placed on the type of wrongful conduct.[69] For example, a common definition of the tort of assault is when a person "*engages* in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim."[70] The textbook definition of the tort of negligence similarly emphasizes wrongful conduct.[71] Black's Law Dictionary defines negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . ." [72] Other types of torts, however, are not as nebulous as nuisance. What nuisance seeks to protect, the use and enjoyment of property, is more expansive than, for example, trespass's protection of property rights.[73] It would be hard to compile a comprehensive list of all the ways that one's enjoyment of property may be interfered with. Even though for many torts emphasis is placed on the type of wrongful conduct, the Texas Supreme Court thought that the wiliness of the nuisance definition required something different.[74]

Another slightly different nuisance definition has also been used in the Texas courts.[75] This other definition calls nuisance "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[76] Defining nuisance as a condition rather than an invasion emphasizes the harm done, rather than the wrongful act committed. The word condition does not denote prohibited conduct, but invasion does. In *Crosstex*, the court endorsed this definition of nuisance as a condition.[77] It further explained:

> Today we clarify that the term "nuisance" does not refer to the 'wrongful act' or to the "resulting damages," but only to the legal injury—the interference with the use and enjoyment of property—that may result from the wrongful act and result in the compensable damages.[78]

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69. *See* Clark v. Virginia, 676 S.E.2d 332, 336 (Va. Ct. App. 2009) (defining the tort of assault as when a person engages in an overt act intended to place the victim in fear or apprehension of bodily harm, which emphasizes the type of wrongful conduct).

70. *See id.* (emphasis added).

71. *Elements of a Negligence Case*, FINDLAW, http://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html (last visited Apr. 7, 2018).

72. *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

73. G. Nelson Smith, III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 41–42 (1995).

74. *See* Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264, 270–72 (Tex. 2004).

75. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 509 (Tex. App. 2008) (quoting *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004)) (emphasis added).

76. *Id.*

77. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 593 (Tex. 2016).

78. *Id.* at 595.

The focus on the type of injury rather than a condition or wrongful conduct was not unprecedented. The Texas Supreme Court, for example, had given a similar focus on nuisance as harm 150 years before, in an 1856 nuisance case.[79] The court summarized that "[the] general principle runs through all these cases ... is ... that whatever *tends to the hurt or injury* of another's property; and *whatever is offensive* to the smell or senses of a portion of the community, is, per se, a nuisance."[80] In 1972, the Dallas court of appeals similarly defined nuisance as "a *condition* which substantially interferes with the use and enjoyment of land by causing discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.[81] The *Crosstex* decision was not revolutionary in the way it defined nuisance. The definition adopted by the court was used many times by Texas courts since around the time Texas became a state.[82] But, as has been shown, there were different ways in which Texas courts have conceived of nuisance, and that the Texas Supreme Court would endorse the conceptualization of nuisance as legal injury was not a foregone conclusion. The court could have instead took the approach used by other American jurisdictions and various Texas courts of appeal by characterizing nuisance as a type of wrongful conduct.[83]

There is a certain genius in defining nuisance as a legal injury rather than as a cause of action. Doing so helps alleviate the confusion which surrounds the tort. For, as has been previously mentioned and will be elaborated on below, part of the confusion surrounding nuisance is generated by the fact that nuisance liability may arise under several theories: negligence, intentional, and strict liability.[84] That nuisance liability may arise through a nearly limitless list of encroachments—noise, odor, pollution, light, etc.—also adds to the confusion.[85] If one defines nuisance as a cause of action rather than the legal injury suffered, it is easy to conflate, for example, negligently created nuisance with intentionally created nuisance. But if instead nuisance is defined as the legal injury suffered rather than a cause of action, it becomes easier to isolate in one's own mind the idea of the legal injury suffered and then determine under what theory (negligence, intentional, or strict liability) and under what factual scenarios the defendant may be found liable.

79. *See* Burditt v. Swenson, 17 Tex. 489, 499 (Tex. 1856).

80. *Id.* (emphases added).

81. Meat Producers, Inc. v. McFarland, 476 S.W.2d 406, 410 (Tex. App. 1972) (emphasis added).

82. *See* Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003); *See also* Nat. Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 153 (Tex. 2012) (citing Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269 (Tex. 2004)).

83. *See supra* pp. 13–14.

84. *See infra* pp. 32–36.

85. *See Schneider*, 147 S.W.3d at 269 ("There is no question that foul odors, dust, noise, and bright lights—if sufficiently extreme—may constitute a nuisance.").

Furthermore, conceptualizing nuisance as invasion, cause of action, or generalized wrongful conduct does not help explain the nature of the tort. Anyone with a basic understanding of tort law understands that nuisance necessarily involves alleged wrongful conduct.

Texas is not the only jurisdiction to clarify that nuisance, properly understood, refers to a type of harm or legal injury.[86] The Wisconsin Supreme Court, for example, has similarly stated that "[a] nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm."[87] The Supreme Court of Iowa has also commented that "[t]he term "private nuisance" refers to the (private) interests invaded."[88] The Supreme Court of Tennessee has also remarked that "nuisance does not describe a defendant's conduct, but a type of harm suffered by the plaintiff."[89] The Indiana Supreme Court also has conceptualized nuisance as harm. In a 2003 case, the court remarked, "[t]he essence of a nuisance claim is the foreseeable *harm* unreasonably created by the defendants' conduct."[90] The District of Columbia court of appeals also remarked that "we have explained that nuisance is a type of damage and not a theory of recovery in and of itself."[91] Texas is one of many jurisdictions that have decided the best way to conceptualize nuisance is through focusing not on the wrongful conduct, but rather on the harm or injury.

B. Interference Must Be Substantial

Having established that nuisance describes a type of legal injury, the court then turned to the next portion of the definition, the requirement that the interference be "substantial."[92] This requirement is in keeping with the well accepted general principle that the "law does not deal in trifles."[93] Quoting from an 1856 Texas Supreme Court case, the court explained a nuisance only exists if the interference is "so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value."[94] Therefore, in determining whether in Texas an interference with the use and enjoyment of land

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86. *See* Young v. Brown, 46 S.E.2d 673, 676 (S.C. 1948); Antonik v. Chamberlain, 78 N.E.2d 752, 759 (Ohio 1947); Beckham v. Marshall, 85 So.2d 552, 555 (Fla. 1956).

87. Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 669 (Wis. 2005).

88. Ryan v. City of Emmetsburg, 4 N.W.2d 435, 438 (Iowa 1942).

89. Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 365 (Tenn. 2002).

90. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1235 (Ind. 2003) (emphasis added).

91. Ortberg v. Goldman Sachs Group, 64 A.3d 158, 167 (D.C. 2013).

92. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 595 (Tex. 2016).

93. *Id.*

94. *Id.* (quoting Burditt v. Swenson, 17 Tex. 489, 504 (Tex. 1856)).

qualifies as a nuisance, one must satisfy both elements of this test.[95] The interference must destroy the comfort and impair the value.[96] In most cases, one would imagine that destroying comfort of neighboring landowners would cause a decline in value.

It must be recognized that there are certainly categories of harm or annoyance which would only decrease the value of real property depending on whether the property is located in an urban, suburban, or rural area.[97] As a nineteenth century Maryland court observed, "[e]very one taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."[98] Determining whether a nuisance exists thus requires a thorough examination of where the property and alleged nuisance is located.

Importantly, the court placed virtually no limits on the type of substantial interference that may give rise to nuisance. It first explained that what qualifies as substantial will depend upon the circumstances.[99] It then commented on the scope of interference which may give rise to liability:

> [T]he condition the defendant causes may interfere with a wide variety of the plaintiffs' interests in the use and enjoyment of their property. It may, for example, cause physical damage to the plaintiffs' property, economic harm to the property's market value, harm to the plaintiffs' health, or psychological harm to the plaintiffs' "peace of mind" in the use and enjoyment of their property.[100]

Businesses and others interested in limiting their liability should take note of this essentially limitless list. Businesses should be well aware by now that injuring the health of neighboring landowners may give rise to liability,[101] but it may come as a surprise to some that causing psychological harm or damaging the peace of mind of a neighboring landowner may give rise to liability. These types of harms may be more

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95. *Id.*

96. *Id.*

97. See RESTATEMENT (SECOND) OF TORTS § 821F cmt. d–e (AM. LAW INST. 1979).

98. Dittman v. Repp, 50 Md. 516, 522 (Md. 1879).

99. *Crosstex*, 505 S.W.3d at 595–96.

100. *Id.* at 596.

101. *E.g.*, Kathleen Thurber, *Second Group Files Lawsuit Against Schlumberger*, MIDLAND REP. TELEGRAM (May 7, 2011), http://www.mrt.com/news/article/Second-group-files-lawsuit-against-Schlumberger-7437018.php (describing a suit in which Schlmuberger, among other corporate defendants, was alleged to have caused a nuisance through use of chemical allegedly hazardous to health).

difficult to prove, but they nevertheless may be compensable under Texas nuisance law.[102]

In the United States there is an increased awareness of the small and large-scale impact of environmental risks[103] and, because of this increased awareness, businesses should realize that they may face liability for environmentally risky behavior under the expansive definition of interference given in *Crosstex*. But, if faced with such a suit based merely on fear or other emotional turmoil rather than some physical disturbance, it appears that businesses may have recourse to a "lawful operation" defense.[104] In a 1994 nuisance case, the First Court of Appeals of Houston remarked that "we decline to allow a nuisance in fact cause of action based on fear, apprehension, or other emotional reaction that results from the lawful operation of industries in Texas."[105] But the Texas Supreme Court in *Crosstex* did not mention the lawful operation defense, and it is unclear whether the court would recognize it.[106] Because of that, in planning, building, or other projects which may affect another's enjoyment of real property, lawyers and business decision makers should consider not only the obvious sources of nuisance liability (e.g. noise, odors), but also the psychological impact of the activity.

The Texas Supreme Court could have further limited the types of injuries that will support nuisance liability. Not all jurisdictions recognize that nuisance liability may lie for nonphysical harms. For example, Pennsylvania has limited the types of harms that will support nuisance liability.[107] After noting that a broad reading of nuisance may lead to the protection of more ephemeral rights, the Superior Court of Pennsylvania wrote that "[a]fter careful consideration, we conclude that private nuisance only recognizes injuries that require physical presence on the property in order to be perceived."[108] Kansas also generally disfavors allowing recovery for emotional distress on a nuisance

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102. *See Crosstex*, 505 S.W.3d at 598 (citing Vestal v. Gulf Oil Corp., 235 S.W.2d 440, 441–42 (Tex. 1951) (describing the Vestal Court's rejection of defendant's argument that fumes blowing onto plaintiffs' adjacent property, thereby "negatively 'affect[ing] their health and their peace of mind,'" did not constitute a private nuisance)).

103. *E.g.*, Steven Cohen, *The Growing Level of Environmental Awareness*, HUFFINGTON POST (Feb. 28, 2015), http://www.huffingtonpost.com/steven-cohen/the-growing-level-of-envi_b_6390054.html; *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 12, 2012), http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/.

104. *See* Maranatha Temple, Inc. v. Enterprise Prods. Co., 893 S.W.2d 92, 100 (Tex. App. 1994).

105. *Id.*

106. *See generally Crosstex*, 505 S.W.3d 580 (noting that the court did not mention the lawful operation defense).

107. *See* Golen v. Union Corp., 718 A.2d 298, 300 (Pa. 1998).

108. *Id.*

claim.[109]

The reluctance of some jurisdictions to extend the protections of nuisance law to cover psychological harms appears to be in keeping with the Second Restatement of Torts.[110] In a comment explaining what the interest in use and enjoyment of land means, the Second Restatement explains that:

> [The] interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress .... The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability of land and, although it involves an element of personal tastes and sensibilities, it receives much greater legal protection.[111]

Emotional distress and psychological harm is more difficult to quantify than other types of harm.[112] The reluctance of some jurisdictions to extend nuisance law protections to psychological harms is justified because it is difficult to conceptualize how and to what extent a defendant's act could cause emotional distress to a person of ordinary sensibilities. Prosser eloquently summarized these concerns when he wrote:

> The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.[113]

Indeed, the fact that Texas has adopted the broad reading of the rights protected by nuisance law does increase the chance of faked emotional distress.[114] The court must have reasoned that any increase in the chance of faked emotional distress was outweighed by the benefit of offering greater protections to landowners.

Other jurisdictions are also in accord with the broad position adopted by Texas, that nuisance protects a wide array of interests, including emotional harm.[115] For example, a California appellate court confirmed in a 1994 case that "[d]amages for emotional distress can be

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109. Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1534 (D. Kan. 1990) ("As a general rule, Kansas law prohibits recovery for emotional distress in tort actions, unless the emotional distress is accompanied by a physical injury.").

110. See RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (AM. LAW INST. 1979).

111. *Id.*

112. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 329 (4th ed. 1971).

113. *Id.*

114. *See* cases cited *infra* note 121.

115. *See infra* notes 118–21 and accompanying text.

recovered in an action for private nuisance."[116] Ohio also recognizes that a plaintiff in a nuisance action may recover for emotional harm.[117] In a 2010 case, the Supreme Court of Ohio remarked that:

> [A] person may pursue a claim for damages for emotional distress without manifestation of physical injury ... [and] a person may recover for annoyance and discomfort for a nuisance, including fear and other emotions, without a physical component if the annoyance or discomfort are connected to the person's loss of use or loss enjoyment of property.[118]

The comparatively broad protections offered by Texas nuisance law has the effect of strengthening the rights of property owners. Property owners now clearly have a right to enjoy their land free from essentially all types of interference. It should be noted that this broad reading of nuisance protection was very much in line with Texas precedent.[119]

C. Unreasonableness As To Interference, Not Defendant's Land Use

In *Crosstex*, the court elaborated on the latter part of the nuisance definition when it stated "a condition that substantially interferes ... by causing *unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.*"[120] One area of confusion in the Gardiners' suit and in the state of nuisance law generally was whether a plaintiff needed to prove "that the defendant's conduct or land use was unreasonable, or that the effect of the resulting interference with the plaintiff's use and enjoyment of land was unreasonable, or both."[121] Crosstex had argued that "[t]he Gardiners also failed to secure a jury finding on an essential element of their negligent nuisance claim — namely, whether Crosstex's use of its property was unreasonable.[122] The court then concluded "[t]his omission is fatal under this Court's decision in *Vestal*."[123] The Gardiners argued that Texas law required them to prove only that the defendant

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116. Koll-Irvine Ctr. Prop. Owners Assn. v. Cty. of Orange, 29 Cal. Rptr. 2d 664, 668 n. 3 (Cal. Ct. App. 1994).

117. *See* Banford v. Alrich Chem. Co., Inc., 932 N.E.2d 313, 319 (Ohio 2010).

118. *Id.*

119. *E.g.*, Aguilar v. Trujillo, 162 S.W.3d 839, 850 (Tex. App. 2005) ("A nuisance may arise by causing ... emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind."); Kane v. Cameron Int'l Corp., 331 S.W.3d 145, 147-48 (Tex. App. 2011) (recognizing that nuisance may arise through infliction of emotional harm).

120. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 605 (Tex. 2016) (emphasis added).

121. *Id.* at 596.

122. Petitioner's Reply Brief on the Merits at 10-11, Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580 (Tex. 2016) (No. 15-0049).

123. *Id.*

unreasonably interfered with the use and enjoyment of their land, not that the defendant's land use was unreasonable.[124]

Vestal was a 1951 nuisance case in which the plaintiffs, the Vestals, brought suit against Gulf Oil Corporation.[125] Near the Vestals residence was a storage facility in which Gulf kept approximately 15,000 gallons of gasoline.[126] The Vestals averred that the vapors from the gasoline:

> [W]ere blown directly into their home and constantly menaced their safety and property, "filled them with fear that it would explode, ignite and burn them up, caused them to be nervous and afraid, affected their health and their peace of mind, [and] constituted a private nuisance. . . ."[127]

Among other issues addressed by the court was which party bore the burden of showing "that a reasonable use was being made of the property [by the defendant]."[128] The court concluded "[i]t was an ultimate issue and the burden rested on the petitioners to plead and prove and secure a jury finding that the *use* of the wholesale property by the respondent was unreasonable."[129] This statement, which emphasizes the unreasonableness of the use, seems to strongly support the proposition advanced by *Crosstex* that, in a nuisance case, the unreasonableness a plaintiff must prove is that of the defendant's conduct, not the unreasonableness of the effects of defendant's interference with the enjoyment of plaintiff's land.[130]

But the court in *Crosstex* explained away the *Vestal* decision, and came to a different conclusion.[131] The court said that "we confirm that the plaintiffs must prove only that the *effects of the interference* (the plaintiff's 'discomfort or annoyance') are unreasonable, not that the defendant's conduct or land use was unreasonable."[132] This sentence is critical to understanding the current state of nuisance law. A well informed lawyer defending, for example, a corporation in a nuisance suit may not plausibly raise the defense that the plaintiff cannot recover in a nuisance suit because the plaintiff cannot prove that the defendant's use of the land was unreasonable.[133]

Many states are in agreement with Texas that to prove a nuisance claim a plaintiff must show that the interference was unreasonable, not

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124. *See* Response to Petition for Review at 14–16, Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580 (Tex. 2016) (No. 15-0049).

125. Vestal v. Gulf Oil Corp., 235 S.W.2d 440, 440 (Tex. 1951).

126. *See id.* at 440–41.

127. *Id.* at 489.

128. *Id.* at 492.

129. *Id.* (emphasis added).

130. *See* Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 596–601 (Tex. 2016).

131. *See id.* at 614–15.

132. *Id.* at 599 (emphasis added).

133. *See id.*

that the land use was unreasonable.[134] In a 2002, the Supreme Court of Connecticut remarked:

> [W]hile an unreasonable use and an unreasonable interference often coexist, the two concepts are not equivalent, and it is possible to prove that a defendant's use of his property, while reasonable, nonetheless constitutes a common-law private nuisance because it unreasonably interferes with the use of property by another person.[135]

Missouri also appears to take a similar approach.[136] A Missouri appellate court remarked that "although the strict definition of nuisance mentions the defendant's unreasonable use of his or her property, the real focus is the defendant's unreasonable interference with the use and enjoyment of the plaintiff's land."[137] Colorado also has stated that the focus of whether land use was unreasonable depends upon the type of interference the land use was alleged to have caused.[138]

It would be much more difficult for a plaintiff to recover in a nuisance suit if the plaintiff simply needed to prove that the defendant's use of the land was unreasonable. There are many imaginable situations where defendants, in the course of their use of land, produce effects that disturb neighboring landowners. For example, a manufacturer may produce loud noises and emit noxious odors and, if the plaintiff needed to show the unreasonableness of the use of land, the plaintiff would likely have a very difficult task. Noxious odors and noise may be considered a reasonable byproduct of the manufacturing process. The Supreme Court's decision has the effect of making it easier for landowners to recover in a nuisance suit. This is in keeping with the tradition in Texas, which has generally favored robust property rights.[139]

The court went on to explain that an objective test is used in deciding whether the effects of the interferences are unreasonable.[140] The court clarified that "the effects of the defendant's conduct of land use must be such as would disturb and annoy persons of ordinary

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134. *See infra* pp. 28–29.

135. Pestey v. Cushman, 788 A.2d 496, 507 (Conn. 2002).

136. *See* Frank v. Env't Sanitation Mgmt., Inc., 687 S.W.2d 876, 880 (Mo. 1985).

137. Rosenfeld v. Theole, 28 S.W.3d 446, 451 (Mo. Ct. App. 2000) (emphasis in original) (citing Frank v. Env't Sanitation Mgmt., Inc., 687 S.W.2d 876, 880 (Mo. 1985)).

138. *See* Pub. Serv. Co. v. Van Wyk, 27 P.3d 377, 391 (Colo. 2001) ("[T]o be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient.)."

139. *See* Bill Peacock, *Thinking Economically: Texas Supreme Court Leading the Way in Property Rights Protections*, TEXAS PUBLIC POLICY FOUNDATION (Oct. 20, 2011), http://www.texaspolicy.com/blog/detail/thinking-economically-texas-supreme-court-leading-the-way-in-property-rights-protections.

140. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 599 (Tex. 2016).

sensibilities, and of ordinary tastes and habits."[141] This holding is in keeping with Texas precedent, precedent from other jurisdictions, and with the opinion of commentators generally.[142] Therefore, a plaintiff will not be able to recover if her annoyance derives from unusual sensitivities.

In determining the substantiality and reasonableness of the interference with the use and enjoyment of land, the court provided a non-comprehensive list of numerous factors to consider.[143] Those factors include:

> [T]he character and nature of the neighborhood, each party's land usage, and social expectations; the location of each party's land and the nature of that locality; the extent to which others in the vicinity are engaging in similar conduct in the use of their land; the social utility of each property's usage; the tendency or likelihood that the defendant's conduct will cause interference with the plaintiff's use and enjoyment of their land; the magnitude, extent, degree, frequency, or duration of the interference and resulting harm; the relative capacity of each party to bear the burden of ceasing or mitigating the usage of their land; the timing of each party's conduct or usage that creates the conflict; the defendant's motive in causing the interference; and the interests of the community and the public at large.[144]

It is unsurprising that the court used these factors, as they are drawn from well-known sources including the Second Restatement of Torts, and from various works by Prosser and Keeton.[145] The factors require a consideration of all the interests at stake: the comfort of the plaintiff; the type of land usage in which the defendant is engaged; and the broader interest of society.[146] In nuisance law, there is no bright-line rule determining what qualifies as a nuisance and what does not.[147] The court then went on to comment that "[a]ll of these factors must be thrown on the scale, and the decision must be made on the basis of what is reasonable under the circumstances."[148] This necessarily requires the trier of fact to make an informed decision.

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141. *Id.* (Internal quotations and citations omitted).

142. *Id.*; Kreimer v. Bureau of Police, 958 F.2d 1242, 1268 (3d Cir. 1992) ("The determination of whether [something] constitutes a "nuisance" involves an objective reasonableness test.").

143. *Crosstex*, 505 S.W.3d at 600.

144. *Id.*

145. *See generally* RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (AM. LAW INST. 1979); PROSSER AND KEETON ON THE LAW OF TORTS § 88 at 630; PROSSER, LAW OF TORTS § 91, at 628 (3d ed. 1964).

146. *See* RESTATEMENT (SECOND) OF TORTS § 821F cmt. d–e (AM. LAW INST. 1979).

147. *See* § 1:156, Nuisance, 1 Tex. Prac. Guide Torts § 1:156 (describing nuisance as being "broadly defined").

148. *Crosstex*, 505 S.W.3d at 600 (internal quotations omitted).

What is surprising in the court's listing of these factors is that some of them, taken together, could lead one to adopt an understanding that the court in the same opinion disavowed: that liability will lie if the defendant's land use is unreasonable. For example, considering in the first factor, the character and nature of the neighborhood and social expectations could lead one to believe that this is the standard against which the reasonableness of the defendant's conduct should be measured. Likewise, evaluating the extent to which others in the vicinity are engaging in similar conduct in the use of their land can also suggest that the standard to be evaluated is the reasonableness of the defendant's land use. So, one must not read these factors to be misread: The focus of nuisance liability does not rest on the reasonableness of the defendant's land use, but rather on the reasonableness of the interference.[149]

D. Theories Under Which Nuisance Liability May Lie

1. Intentional Nuisance

The court then proceeded to discuss the various theories under which nuisance liability may arise, and began that discussion with a confirmation that Texas recognizes intentional nuisance.[150] Those without a legal background should recognize that intent, in this and other legal contexts, takes on a broader meaning different than that used in everyday conversation. In this context, the court endorsed the traditional legal definition of intent that "the actor *desires* to cause [the] consequences of his act, or that he believes that the consequences are *substantially certain* to result from it."[151] It must be proven that the defendant intended the interference, not merely that the defendant intended the conduct.[152] The court explained, "the evidence must establish that the defendant intentionally caused the interference that constitutes the nuisance, not just that the defendant intentionally engaged in the conduct that caused the interference."[153] This understanding that nuisance liability may be found under an intentional

149. *Id.* at 596–97.

150. *Id.* at 604–05 ("We first confirm that a defendant may be held liable for intentionally causing a nuisance based on proof that he intentionally created or maintained a condition that substantially interferes with the claimant's use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.").

151. *Id.* at 605 (quoting Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) (emphasis added) (internal quotations omitted)).

152. *Id.*

153. *Id.*

theory has strong support in the jurisprudence of Texas and of other American jurisdictions.[154]

2. Negligent Nuisance

The court then went on to confirm that Texas recognizes negligent nuisance.[155] The court explained that proof of negligence in this context mirrors what must be proven in other non-nuisance negligence cases.[156] It confirmed that "'[t]he elements the plaintiff must prove are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach.'"[157] As in all nuisance cases, the standard of care is measured against the conduct of the hypothetical "'person of ordinary prudence in the same or similar circumstances.'"[158]

Recognizing negligent nuisance is contrary to what is recommended by the famous and influential tort scholars Prosser and Keeton.[159] However, those who practice in this area should not be surprised that the court recognized negligent nuisance because such recognition is in keeping with the jurisprudence of the state.[160] Other American jurisdictions have also recognized the existence of negligent nuisance.[161]

3. Strict Liability Nuisance

The court then went on to explain the other theory under which a claim for nuisance might be brought: strict liability.[162] The first case in which this theory was explained was the famous English case of *Rylands*

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154. *E.g.*, Golden Harvest Co., Inc., v. City of Dall., 942 S.W.2d 682, 689 (Tex. App. 1997) ("Since an intentional invasion supports an action for nuisance, proof of negligence by a plaintiff is not necessary."); Bily v. Omni Equities, 731 S.W.2d 606, 611–12 (Tex. App. 1987) ("The [nuisance] invasion can be intentional or unintentional."); United Proteins, Inc. v. Farmland Industries, Inc., 915 P.2d 80 (Kan. 1996) (discussing what must be proven to show intentional nuisance); Public Service Co. v. Van Wyk, 27 P.3d 377 (Colo. 2001) (describing what constitutes private nuisance).

155. *Crosstex*, 505 S.W.3d at 607.

156. *Id.*

157. *Id.* (quoting IHS Cedars Treatment Ctr., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004)).

158. *Id.* (quoting Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 753 (Tex. 1998)).

159. *Id.* at 606–07.

160. *See, e.g.*, Port of Hous. Authority v. Aaron, 415 S.W.3d 355, 359 (Tex. App. 2013) (recognizing indirectly the existence of a negligent nuisance claim); Furness v. Mich. Pub. Serv. Comm'n, 299 N.W.2d 35, 37 (Mich. 1980).

161. *E.g.*, Physicians Plus Inc. Corp. v. Midwest Mut. Ins. Co., 646 N.W.2d 777, 793 n. 22 (Wis. 2002) ("negligence is merely one type of conduct upon which liability for nuisance may be based . . . ."); Jackson v. City of Blue Springs, 904 S.W.2d 322, 328 (Mo. Ct. App. 1995) ("[n]egligence is merely one type of conduct which may give rise to a nuisance, and liability for nuisance depends upon the existence of negligence only if the claim of nuisance is based upon negligence.").

162. *Crosstex*, 505 S.W.3d at 607.

v. Fletcher.[163] Unlike other places in its opinion, the court was more restrained in describing the requirements of strict liability nuisance.[164] It clarified that "to the extent that a claim exists in Texas based on a nuisance created by abnormal and out of place conduct, it arises only out of conduct that constitutes an abnormally dangerous activity" or involves an abnormally dangerous substance that creates a high degree of risk of serious injury."[165] Whether nuisance could be brought under a strict liability theory in Texas had previously not been definitively resolved.[166]

Texas case law concerning a strict liability theory of nuisance law is not well developed, but there were, before *Crosstex*, references to the fact that nuisance liability may be found under such a theory.[167] The Texas Supreme Court in a 1997 case wrote that "[c]ourts have broken actionable nuisance into three classifications ... [one of which is] culpable conduct because [it is] abnormal and out of place in its surroundings."[168] In a 2011 decision, the Austin court of appeals recognized that nuisance liability may lie for "conduct [that is] culpable because [it is] abnormal and out of place in its surroundings."[169] The court did not spend much time discussing the contours of strict liability nuisance. Furthermore, it does not appear that there are any other Texas Supreme Court cases that contain much of a discussion of exactly what is required to find nuisance liability under a strict liability theory. This dearth of a discussion of strict liability nuisance is in contrast to other parts of the opinion, where the court provides an ample amount of detail. Anyone presented with a strict liability case, therefore, will need to begin with what the court established in *Crosstex*, and then look to other sources for more information.

IV. OTHER EFFECTS OF THE CASE

Aside from the impact to Texas legal doctrine, it is worth noting the other effects and of the *Crosstex* case. First, the *Crosstex* decision was a gift to lawyers and non-lawyers because it helped to clarify a part of the law which was confusing and not terribly well defined. Whenever there are clear boundaries established between acceptable behavior and behavior that may lead to legal liability, everyone benefits. Landowners annoyed with a neighbor's use of land now have a better idea of whether

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163. Rylands v. Fletcher, [1868] UKHL 1, http://www.bailii.org/uk/cases/UKHL/1868/1.html.

164. *Crosstex*, 505 S.W.3d at 609; *Cf. id.* at 607.

165. *Id.* at 609 (internal quotations and citations omitted).

166. *Id.*

167. *Id.* at 607.

168. City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1997).

169. Hanson Aggregates West, Inc. v. Ford, 338 S.W.3d 39 (Tex. App. 2011).

a legal remedy is available to solve the problem. Businesses whose operations place them at risk for nuisance liability now have a better idea of what a nuisance is in Texas. Businesses can take steps to protect themselves from such liability.

It is also important to reflect on what the case tells us about the Texas Supreme Court. The case also shows that the court is willing, under the right circumstances, to write a broad, didactic opinion. The court eschewed a preference for a narrow opinion in favor of writing a comprehensive guide to an important area of the law.

V. POSSIBLE RESPONSE TO CROSSTEX HOLDING

There are those who will find the court's decision in *Crosstex* unsettling. Even considering that the Gardiners' ranch was nearby, the gas compression was occurring in an area that was more rural than residential. Others may object to the court's finding on the grounds that the defendant was an oil and gas company. The oil and gas industry plays a disproportionately large role in the Texas economy.[170] Because of the oil and gas industry's considerable contributions to the economy and general power and prosperity of the state, some would argue that it should be immune from nuisance liability. The regulation of oil and gas companies is a politically sensitive issue,[171] and it is accepted that intelligent, well-intentioned people may vociferously disagree on the extent to which the industry should be regulated.

A. Right-To-Farm Statute

Those wishing to protect oil and gas companies from nuisance liability can look to how the agricultural industry has gained similar protections in Texas and around the country through "right-to-farm" statutes.[172] Indeed, every state has some version of a right-to-farm statute.[173] In this section of the case note, I will examine the right-to-farm statute in Texas and other jurisdictions, discuss how it has fared in

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170. According to a 2015 article, oil and gas extraction is the largest industry in Texas. It contributes approximately $123.9 billion to the gross domestic product, and privately employs about 103,838 people. Thomas C. Frohlich et al., *Largest Industry in Each State*, 24/7 WALL ST. (Sept. 18, 2015, 9:39 AM), http://247wallst.com/investing/2015/09/18/largest-industry-in-each-state-2/.

171. For a recent example of the tension between a desire to allow the industry to operate freely and environmental concerns, consider the debate surrounding authorization for the Keystone Pipeline. *See, e.g.*, Peter Baker and Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html?_r=0.

172. Jeffry R. Gittins, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, BYU L. REV. 1381, 1383 (2006).

173. *Id.*

the courts, and comment on how the oil and gas industry could pursue a similar protection.

Texas has a right-to-farm statute which affords special protection the farming industry. The policy statement preceding the relevant regulations states that:

> It is the policy of this state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. It is the purpose of this chapter to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be regulated *or considered to be a nuisance.*[174]

Thus it is the express purpose of the statute, which was enacted in 1981, to limit the nuisance liability exposure faced by the farming industry.[175] The protection afforded by the statute is wide. To receive protection against nuisance liability, an agricultural operation need only show that it has been operating for at least a year, and the conduct complained of has been occurring since the date at which the operation began.[176] The statute grants even more protection to the agricultural industry by providing that any nuisance action brought by a plaintiff which is barred by operation of the statute will be liable to the defendant agricultural operation for paying to defend the suit.[177]

The statute gives a broad definition of what type of activities qualify as agricultural activity.[178] The statute provides that covered activities include:

(A) cultivating the soil;
(B) producing crops for human food, animal feed, planting seed, or fiber;
(C) floriculture;
(D) viticulture;
(E) horticulture;
(F) silviculture;

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174. TEX. AGRIC. CODE ANN. § 251.001 (2017) (emphasis added).

175. *Id.*

176. *See* AGRIC. § 251.004(a) ("No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation. This subsection does not restrict or impede the authority of this state to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.").

177. *See id.* § 251.004(b) ("A person who brings a nuisance action for damages or injunctive relief against an agricultural operation that has existed for one year or more prior to the date that the action is instituted or who violates the provisions of Subsection (a) of this section is liable to the agricultural operator for all costs and expenses incurred in defense of the action, including but not limited to attorney's fees, court costs, travel, and other related incidental expenses incurred in the defense.").

178. *See id.* § 251.002(1) (defining "agricultural activity").

(G) wildlife management;
(H) raising or keeping livestock or poultry; and
(I) planting cover crops or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.[179]

This list is long and inclusive. Having it further protects farmers, and it also helps courts apply the statute.

Although the protection for farmers against liability is wide, it is not absolute. First, farmers will not be able to escape liability if their operations are relatively new; they must be in operation for at least a year.[180] Granted, farming is a land-intensive business which requires significant initial investment and, because of this, new farming operations are less likely to arise suddenly.[181] This is unlike other types of businesses which, because they do not necessarily involve such large land use, may arise more quickly. The statute requires that "the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation."[182] This means that the conduct complained of must not be a new annoyance. Thus, if a farmer decides to, years after the start of the farming operation, engage in a new practice which, because of noise, odors, or something else, annoys his neighbors, the farmer may not be protected from liability. A farmer would also not be protected against liability if the conduct complained of was not related to the farming operation.[183] And the statute does not in any way restrict the authority of the legislature or other governmental authorities to regulate farming in other ways.[184]

In addition to this, the statute does not prohibit plaintiffs from bringing tort actions against farmers under other theories of liability.[185] Indeed, plaintiffs are free to bring actions alleging any intentional tort, and any tort based upon negligence (but not, of course, negligent nuisance).[186] These other theories of tort liability are wide, and plaintiffs' access to them helps ensure that, even in the absence of a nuisance theory, wrongful conduct may be deterred and abated through a lawsuit.

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179. *Id.*
180. *Id.* § 251.004(a).
181. *See* Ben Schiller, *What Does It Cost to Start a New Farm*, FAST CO. (Aug. 30, 2017), https://www.fastcompany.com/40458330/what-does-it-cost-to-start-a-new-farm.
182. *See* AGRIC. § 251.004(a).
183. *Id.*
184. *Id.*
185. *Id.* § 251.004(c).
186. *See id.*

Texas' right-to-farm statute has been effective in protecting farmers from nuisance liability.[187] This is somewhat unsurprising considering that the statute is unambiguous, well drafted, and expansive in its protections for the farming industry. An added benefit of the statute is that it eliminates the need of the courts in many situations to grapple with nuisance theories as they apply to farming operations. This is valuable because, as has been shown, nuisance is a somewhat confusing topic, and trying to understand it can be difficult.

B. Right-To-Farm Statute As Model For Oil And Gas Industry

As the *Crosstex* case demonstrates, the oil and gas industry is not immune from nuisance liability. Current nuisance law provides many avenues for plaintiffs to pursue a nuisance cause of action based on intentional nuisance, negligent nuisance, and nuisance arising out of abnormally dangerous behavior.[188] In order to limit the nuisance liability that may be faced by the oil and gas industry, the industry would be wise to look to the right-to-farm statute as a model for a similar act which affords similar protections for those engaged in various oil and gas activities.

Before getting into the specifics of what such a statute may look like, it is important to realize how similar the farming industry is to the oil and gas industry. Farming necessarily involves the use of large amounts of land to grow crops and produce food. Even those farmers who do not produce crops but are engaged in the raising of various animals necessarily need space to raise those animals. Farming also serves an extremely important role in society because the industry supplies food for the state and country, and it also has an important economic impact on the state.[189] In an increasingly urban society, and in an industry in which the average worker is comparatively quite old,[190] many believe that such an industry deserves protection.[191] But the industry does necessarily produce other byproducts which those who live near farms might find annoying. Farmers' animals produce manure

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187. *See, e.g.*, Aguilar v. Trujillo, 162 S.W.3d 839, 851 (Tex. App. 2005) (holding that the right-to-farm statute barred a nuisance action against a farming operation).

188. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 580 (Tex. 2016).

189. *Tex. Ag Stats*, TEXAS DEPARTMENT OF AGRICULTURE, http://www.texasagriculture.gov/About/TexasAgStats.aspx (last visited Mar. 19, 2018) (indicating that Texas leads the nation in number of farms and ranches, and the cash receipts in agriculture in Texas average $20 billion annually).

190. As of 2014, the average age of a farmer was 55.9 years. Among occupations for which the Labor Department keeps such statistics, this was the second oldest profession. *See* Danielle Kurtzleben, *The Rapidly Aging U.S. Farmer*, U.S. NEWS (Feb. 24, 2012, 4:18 PM), http://www.usnews.com/news/blogs/data-mine/2014/02/24/us-farmers-are-old-and-getting-much-older.

191. *See generally* TEX. AG STATS, *supra* note 189 (noting the important influence of farming in the Texas economy).

and may be loud. To those who live nearby farming operations, the equipment may be loud and the pesticides may be offensive or dangerous.

The oil and gas industry, like the farming industry, produces many important societal benefits. It produces the energy which we use to run our vehicles and power our homes, schools, and places of business.[192] The oil and gas industry is vital to the Texas economy, directly employs many people, and indirectly has a large and positive effect on the state economy. Like farming, the oil and gas industry necessarily requires large amounts of land to explore, extract, and refine hydrocarbons. But, like farming, the oil and gas industry also produces objectionable byproducts.[193] Operations engaged in by the oil and gas industry can be noisy,[194] dangerous, and, in some instances, harmful to the economy.[195] Some have also alleged that the industry is accelerating the warming of the planet.[196] The similarities between the two industries are striking, and these similarities suggest that a right-to-produce oil and gas statute might protect the industry against nuisance claims.

C. Right-To-Produce Oil And Gas Statute

It is not difficult to envision what a right-to-produce oil and gas statute might look like. Indeed, the right-to-farm statute provides an excellent template. A right-to-produce statute in its purpose section would comment on what an important role the industry has played and has continued to play in Texas. It would note how crucial the industry has been in making Texas a prosperous state. Its definition section could also be modeled on the right-to-farm statute. Activities covered by the right-to-produce oil and gas statute could include: any lawful exploratory activity; any lawful extractive activity, including hydraulic fracturing; any activity involving the transportation of oil or gas; any

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192. *Use of Oil – Energy Explained, Your Guide to Understanding Energy*, U.S. ENERGY INFORMATION ADMINISTRATION (Sep. 19, 2017), https://www.eia.gov/energyexplained/index.cfm?page=oil_use (explaining various uses for oil and gas).

193. *TENORM: Oil and Gas Production Wastes*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/radiation/tenorm-oil-and-gas-production-wastes (last visited Mar. 19, 2018).

194. *See* Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 613 (Tex. 2016).

195. *See, e.g.*, Debbie Elliot, *5 Years After BP Oil Spill, Effects Linger and Recovery Is Slow*, NPR NEWS (Apr. 20, 2015, 3:47 AM), http://www.npr.org/2015/04/20/400374744/5-years-after-bp-oil-spill-effects-linger-and-recovery-is-slow (discussing the long term economic impact of the Deepwater Horizon disaster).

196. *See, e.g.*, Alex Guillen et al., *EPA Nominee Pruitt Survives Democrat Assault*, POLITICO (Jan. 18, 2017, 10:51 AM), http://www.politico.com/story/2017/01/epa-scott-pruitt-confirmation-hearing-233760 (discussing how a cabinet appointee was sharply questioned on the issue of whether and to what extent the oil and gas industry is contributing to climate change).

activity related to the refining of oil and gas; and any of the surface uses associated with any of the aforementioned conduct.

The operative provisions of the right-to-produce oil and gas section could similarly be modeled after the right-to-farm statute. It could perhaps look like this:

> No nuisance action may be brought against an oil and gas operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation. This subsection does not restrict or impede the authority of this state to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.

In the political process there are of course concessions that need to be made to ensure the passage of new laws. To pass such a statute, language giving greater protections to landowners may be required. Like the right-to-farm statute, there need not be any protections against other tort actions based on intentional or negligence theories. But, importantly, such a statute should include something similar to the last sentence, which guarantees that the statute would not be used to deny the power of governmental bodies to subject the oil and gas industry to other regulation. To strengthen the power and effectiveness of the right-to-produce oil and gas statute and to prevent frivolous litigation, it could also include an attorney fee shifting provision. This could perhaps provide that a plaintiff who brings a nuisance action which is found to be barred by the right-to-farm statute is responsible for paying for the cost of defending the suit.

A right-to-produce oil and gas statute may be the proper way to provide nuisance liability protection to the oil and gas industry. It would allow the industry greater flexibility and certainty in its operations, which would likely lead to greater efficiency and, ideally, an economic benefit for the industry, which will in turn benefit the state economy. Although there would likely be some who would assert that the industry is not deserving of such protection, it must be realized that the farming industry, which does not contribute to the state economy as much as the oil and gas industry,[197] already enjoys such protection.

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197. *Gross Domestic Product by State*, BUREAU OF ECONOMIC ANALYSIS (Nov. 21, 2017), https://bea.gov/itable/iTable.cfm?ReqID=70&step=1#reqid=70&step=10&isuri=1&7003=200&7035=-1&7004=naics&7005=-1&7006=48000&7036=-1&7001=1200&7002=7090=70&7007=2016&7093=levels.

VI. CONCLUSION

Nuisance is a broad and sometimes confusing area of tort law. And because it aims to protect such an important right—the use and enjoyment of land—it is important to understand its contours. There are so many ways in which the use and enjoyment of land may be interfered with. Noise, foul odors, light, the list of the conduct which may give rise to a nuisance suit appears endless. Considering all of this, it is not surprising that law student, lawyers, and courts have grappled with what nuisance means.

The Texas Supreme Court was keenly aware of all of the potential confusion caused by nuisance when it issued its *Crosstex* opinion. The *Crosstex* opinion helped to eliminate confusion, and it corrected what the court saw were some inconsistencies and inaccuracies among the lower courts. The court confirmed that the proper definition of nuisance is "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."[198] As to evaluating unreasonableness, the inquiry must be based on the unreasonableness of the interference, not on the unreasonableness of the defendant's land use.[199]A nuisance action may be brought under a negligence theory, an intentional theory, or, perhaps, a theory based on abnormally dangerous activity.[200]

The *Crosstex* opinion is a gift to lawyers in Texas in that it provides a textbook-like discussion of nuisance. It will help people and businesses plan their conduct in such a way as to avoid nuisance liability. *Crosstex* may serve as a reminder to all, and to the oil and gas industry in particular about how all-encompassing nuisance liability is. To protect against nuisance liability, the oil and gas industry may want to consider a right-to-produce oil and gas statute that is modeled on the effective and longstanding right-to-farm statute. In any event, it is important particularly for lawyers and business decision makers to be aware of nuisance law and what type of conduct may give rise to liability. In our increasingly urbanized society, nuisance will continue to play a role, as it has for centuries.

Braden Burgess

198. *Crosstex*, 505 S.W.3d at 593.
199. *Id.* at 582.
200. *Id.* at 588.