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EXHUMING THE FUNERAL HOME CASES: PROPOSING A PRIVATE NUISANCE ACTION BASED ON THE MENTAL ANGUISH CAUSED BY POLLUTION

Michael D. Riseberg*

I. INTRODUCTION

Imagine that you have lived in the same house for twenty years, and that you have recently decided to sell your property. While checking on your home's listing in the local newspaper, you learn that there has been a major accident at a neighboring chemical company. As a result of this accident, hazardous waste has contaminated the majority of the ground water in your neighborhood.

Concerned about the safety of your family, you arrange to have a group of experts come to your home and assess the damage to your property. Luckily, the experts assure you that because of a geological rift in the earth none of the contamination has or ever will physically invade your property.

Relieved, you call your realtor to relay this information. Although happy to hear the news, the realtor explains to you that your home has nonetheless depreciated by anywhere from fifteen to thirty percent of its original value. Slightly confused and very distressed, you ask the realtor why your home should have depreciated when none of the contamination has or will invade your property.

Unfortunately, you discover that the issue is not as simple as whether or not any of the pollution has physically invaded your property. As a result of the accident, your home has become a less desirable place to live. Located in what was once a very appealing residential neighborhood, your property is now situated amidst area-wide contamination. Like good schools or public transportation, you dis-

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cover that environmental concerns have a real effect on the value of your home.

To make matters worse, you soon realize that the change in your neighborhood is not the only culprit at work. Because of your home's location, the majority of consumers mistakenly assume that the contamination has or will physically invade your property. The unfounded public perception that your property has been polluted contributes significantly to the depreciation of its value. Confident that you can remedy this problem, you set out to explain the facts of the situation to potential purchasers. Nevertheless, you soon realize that no one is willing to pay more for your home than its now greatly diminished market value.

Recently, circumstances virtually identical to these came before the Michigan Supreme Court in Adkins v. Thomas Solvent Co. The plaintiffs in Adkins were homeowners who brought suit against a chemical company for polluting the ground water in their neighborhood with toxic chemicals. Despite the fact that none of the contamination had or would physically invade the plaintiffs' land, the plaintiffs alleged that the defendants caused their property values to depreciate because of the unfounded public perception that their land was polluted.

The plaintiffs in Adkins sought relief under a private nuisance theory because that theory does not require any physical invasion of the plaintiffs' land. Essentially, a private nuisance is a substantial "interference with the use and enjoyment of land." The plaintiffs in Adkins alleged that the defendant chemical company, by mishandling toxic chemicals, created a private nuisance by causing a stigma of contamination to attach to their land.

The Michigan Supreme Court, however, refused to recognize the plaintiffs' claim. The court held that a private nuisance cannot be based on the unfounded fears of third party purchasers. In reaching its decision, the Adkins court noted that its determination did not rest on the fact that there had not been any physical invasion of the plaintiffs' land. The Adkins decision reaffirmed the widely held belief...
that property depreciation, without other harm, is *damnum absque injuria*—i.e., a loss without injury in the legal sense.\(^{10}\)

This Comment focuses on exactly what a plaintiff must allege, in addition to a depreciation in property value, to establish a cognizable claim in private nuisance where there has not been any physical invasion of the plaintiff's land. Section II provides a general overview of the private nuisance doctrine, focusing on the interest protected by the nuisance doctrine and the general rule that property depreciation without other harm is *damnum absque injuria*.\(^{11}\) Section III discusses whether or not a physical invasion of the plaintiff's land has traditionally been considered a tacit requirement of a nuisance action.\(^{12}\) Section IV examines cases involving nuisance claims based solely on a landowner's mental anguish without any physical invasion of the plaintiff's land.\(^{13}\) This section also surveys the recent trend in the courts away from recognizing such claims.\(^{14}\) Section V takes a closer look at the *Adkins* decision revealing that a possibility of recovery may remain for a plaintiff who finds himself or herself in a similar situation.\(^{15}\) Finally, section VI proposes that a plaintiff in this situation might prevail by setting forth a private nuisance action based on the mental anguish of living amidst area-wide contamination.\(^{16}\)

**II. THE PRIVATE NUISANCE DOCTRINE**

**A. The Analytical Framework and Elements of the Private Nuisance Action**

A private nuisance\(^{17}\) is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."\(^{18}\) While a trespass

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\(^{11}\) *See infra* notes 17–97 and accompanying text.

\(^{12}\) *See infra* notes 98–169 and accompanying text.

\(^{13}\) *See infra* notes 170–99 and accompanying text.

\(^{14}\) *See infra* notes 200–16 and accompanying text.

\(^{15}\) *See infra* notes 230–45 and accompanying text.

\(^{16}\) *See infra* notes 246–82 and accompanying text.

\(^{17}\) This Comment focuses on the private nuisance action as opposed to public nuisance. For a discussion of the differences between a private nuisance and public nuisance action, see KEETON ET AL., supra note 5, § 86, at 618. Unless otherwise indicated, the use of the word *nuisance* in this Comment refers to the private nuisance action only.

protects the right to the exclusive possession of land, a private nuisance protects those rights that are incidental to property ownership. For example, while a trespass action prevents the defendant from walking across the plaintiff's land or casting objects upon it, a private nuisance action prevents the defendant from projecting odors or noises onto the plaintiff's land that disturb the comfortable use and enjoyment of it.

Ultimately, the line that separates a trespass action from a private nuisance action is a fuzzy one. An important distinction, however, is that a trespass action can arise without regard to any harm or damage being caused to the plaintiff's land. This is because a trespass action is designed to provide a peaceful way of vindicating property rights and resolving disputes regarding title to land. A private nuisance, on the other hand, requires that the disturbance complained of cause substantial harm to the plaintiff. The courts have held that an interference is substantial where it would cause significant harm to a person of normal sensibilities in the community.

The substantial interference requirement reflects the conflict between neighboring land uses that lies at the heart of the nuisance doctrine. While landowners each have the right to use their property as they see fit, this right must be balanced against the correlative

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20 Keeton et al., supra note 5, § 13, at 70.
22 See, e.g., Mangini, 281 Cal. Rptr. at 833–34 n.6. The Restatement (Second) of Torts comments:
There may ... be some overlapping of the causes of action for trespass and private nuisance ... . If the interference with the use and enjoyment of land is a significant one, sufficient in itself to amount to a private nuisance, the fact that it arises out of or is accompanied by a trespass will not prevent recovery for the nuisance ... . The two actions, trespass and private nuisance, are thus not entirely exclusive or inconsistent, and in a proper case in which the elements of both actions are fully present, the plaintiff may have his choice of one or the other, or may proceed upon both.
Restatement (Second) of Torts § 821D cmt. e (1977).
23 See Keeton et al., supra note 5, § 13, at 70.
24 Id. § 13, at 70.
25 See, e.g., Robie v. Lillis, 299 A.2d 155, 158 (N.H. 1972) ("[s]ubstantial harm is that in excess of the customary interferences a land user suffers in an organized society. It denotes an appreciable and tangible interference with a property interest.").
right of each landowner to be free from an unreasonable interference created by another. Nonetheless, the courts recognize that it is not a nuisance every time one landowner disturbs another. The courts recognize that certain disturbances must be tolerated because they are incidental to living in an organized society.

In addition to the substantial interference requirement, a nuisance must also satisfy one of two other standards to be actionable. According to § 822 of the Restatement (Second) of Torts, the interference must also be either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." Accordingly, there are two general categories of nuisance actions, one intentional and the other unintentional.

1. An Intentional and Unreasonable Nuisance Claim

By intentional conduct the courts do not mean that the defendant acts with malice. Rather, a nuisance results from intentional conduct "merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interest is occurring or is substantially certain to follow." A nuisance is unreasonable if it "would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it." At the heart of the unreasonable use requirement is the balancing test—"of the harm created versus the utility of the conduct creating the harm." In making this determination, the courts consider the character of the locality, the extent and nature of the harm involved, and the utility of the conduct creating the harm.

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29 E.g., id.
30 E.g., id.
34 See Keeton et al., supra note 5, § 87, at 625.
35 See French, supra note 31, at 102-03. See also RESTATEMENT (SECOND) OF TORTS § 826 (1977); Patterson, 122 N.E.2d at 51-52.
36 See Keeton et al., supra note 5, § 88, at 630; Winget v. Winn-Dixie Stores, Inc., 130 S.E.2d 363, 367 (S.C. 1963); Patterson, 122 N.E.2d at 51-52.
2. An Unintentional and Negligent Nuisance Claim

In addition to intentional and unreasonable nuisance claims, the courts also recognize nuisance claims arising from unintentional conduct. In order for unintentional conduct to be actionable as a nuisance, the plaintiff must show that the conduct was negligent, reckless, or abnormally dangerous. Courts recognize nuisance claims based on unintentional or accidental conduct despite the general rule that the maintenance of a nuisance implies a continuity of action over a period of time. The courts recognize that in certain circumstances, a single act, such as the contamination of ground water, can produce a continuing result that is sufficient to create a nuisance without requiring a recurrence of the act.

In summary, a private nuisance action protects a property right or privilege respecting the use and enjoyment of land. A nuisance action will not arise unless the interference is substantial in that it would cause significant harm to a person of normal sensibilities. Additionally, to be actionable a nuisance must be (1) intentional and unreasonable; or (2) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra-hazardous conduct. Because Adkins involved the unintentional or accidental release of toxic chemicals, it falls within the latter variety of nuisance claims.

B. The Interest Protected

The initial requirement of a nuisance action is an interference with a property right or interest respecting the plaintiff's use and enjoyment of land. The nuisance doctrine, however, covers so many types of injury that "it is difficult to articulate an encompassing definition" of the interest it protects. Often a nuisance will take the form of some

38 See Restatement (Second) of Torts § 822 (1977).
39 See id.
41 Id. See also Restatement (Second) of Torts § 832 (1977); Keeton et al., supra note 5, § 87, at 624.
42 See supra notes 18–21 and accompanying text.
43 See supra notes 25–26 and accompanying text.
44 See supra note 32 and accompanying text.
actual physical damage either to the plaintiff's land or to tangible property located on the land. For example, in Mel Foster Co. Properties v. The American Oil Co. (AMOCO), it was a nuisance where gasoline seeped onto the plaintiff's property causing the property to become less attractive for the development of commercial real estate. Similarly, in Lacy Feed Co. v. Parrish, it was a nuisance where large amounts of feathers and dust got into the plaintiff's water storage tank thereby polluting what had previously been good drinking water.

Alternatively, a nuisance can take the form of a physical discomfort to those who are using or occupying the land. According to the Restatement (Second) of Torts, the "freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself." For example, it was a nuisance in Pate v. City of Martin, where odors emanating from the operation of a nearby sewage lagoon made habitation of the plaintiffs' homes almost impossible. Similarly, in Jones v. Queen City Speedways, Inc., it was a nuisance where lights used to illuminate an automobile race track cast a glare on the plaintiffs' property which kept the plaintiffs awake at night. Finally, in Guarina v. Bogart, a drive-in movie theater, equipped with loudspeakers, constituted a private nuisance with respect to neighboring property owners who were disturbed by the noise.

In addition to physical discomfort, the courts have also recognized that the nuisance doctrine protects a landowner from mental distur-

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47 KEETON ET AL., supra note 5, § 87, at 619.
48 427 N.W.2d 171 (Iowa 1988).
49 Id. at 172–73.
51 Id. at 849.
54 614 S.W.2d 46 (Tenn. 1981).
57 Id. at 43. See also Greene v. Spinning, 48 S.W.2d 51, 59 (Mo. Ct. App. 1931) (cars pulling into gas station which cast bright lights into plaintiff's house created actionable nuisance).
59 See id. at 559–60. See also Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 573 A.2d 847, 848–49, 853 (Md. Ct. Spec. App. 1990) (loud noise emanating from defendant's property which frightened plaintiff's child constituted a private nuisance).
bances.\textsuperscript{60} For example, in \textit{Powell v. Taylor}\textsuperscript{61} the Supreme Court of Arkansas enjoined the establishment of a funeral home “not upon a finding that [the] undertaking parlor [was] physically offensive but rather upon the premise that its continuous suggestion of death and dead bodies tend[ed] to destroy the comfort and repose sought in home ownership.”\textsuperscript{62}

Despite the various forms that a nuisance action can take, commentators have criticized the Restatement (Second) of Torts for its effort to label all conduct that interferes with the use and enjoyment of land as a nuisance.\textsuperscript{63} They argue that despite being gathered under a single label, “the so-called interest in the use and enjoyment of property is not a single type of interest.”\textsuperscript{64} These different interests “are not protected in the same way from all kinds of conduct.”\textsuperscript{65} In other words, the protectible property interest in the use and enjoyment of land may fluctuate depending on what type of conduct creates the harm.

Essentially, what might be a nuisance arising out of one type of conduct, might not be a nuisance arising out of a different type of conduct.\textsuperscript{66} For example, where the interference takes the form of a mental disturbance, an actionable claim arises only if the mental disturbance results from intentional conduct.\textsuperscript{67} Where a mental disturbance results from unintentional or negligent conduct, it will generally not be actionable as a nuisance unless accompanied by another ground of tort liability.\textsuperscript{68} It is a widely accepted rule in negligence that “an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury.”\textsuperscript{69} The reason for this rule is that “such damages are too remote and speculative, are easily

\textsuperscript{60} Keeton et al., supra note 5, § 87, at 620.
\textsuperscript{61} 263 S.W.2d 906 (Ark. 1954).
\textsuperscript{62} Id. at 907.
\textsuperscript{63} Keeton et al., supra note 5, § 87, at 623, § 91, at 652.
\textsuperscript{64} Id. § 91, at 652.
\textsuperscript{65} Id.
\textsuperscript{66} See id.
\textsuperscript{67} See id. at 653. See, e.g., Rockenbach v. Apostle, 47 N.W.2d 636, 643 (Mich. 1951) (enjoining the establishment of a funeral home because it was a constant reminder of death that had a depressing effect on neighboring landowners and reduced neighboring property values); Tedescki v. Berger, 43 So. 960, 961 (Ala. 1907) (prohibiting continued operation of a house of prostitution because it rendered neighboring plaintiff’s home “not only less comfortable, but intolerable, and it necessarily depreciated the value of his property”).
\textsuperscript{68} See Keeton et al., supra note 5, § 91, at 653. The assertion that a nuisance cannot be based solely on a mental disturbance where the nuisance arises out of negligent conduct should not be confused with nuisance cases in which mental anguish is recoverable as an element of damages. See, e.g., Maccia v. General Telephone Co. of Northwest, Inc., 495 P.2d 1193, 1195–96 (Or. 1972). See also infra notes 217–29 and accompanying text.
\textsuperscript{69} Deutsch v. Shein, 597 S.W.2d 141, 145–46 (Ky. 1980).
simulated and difficult to disprove, and there is no standard by which they can be justly measured."\textsuperscript{70}

1. An Exception to the Physical Impact Rule in Negligence: The Bystander Proximity Doctrine

Despite the need to avoid fraudulent claims, some courts have recognized an exception to the physical impact rule in negligence. The California Supreme Court in \textit{Dillon v. Legg}\textsuperscript{71} created the so-called "bystander proximity doctrine"\textsuperscript{72} which holds a defendant liable for a plaintiff's emotional trauma despite the absence of any physical impact to the plaintiff.\textsuperscript{73} This doctrine requires that the plaintiff's emotional trauma be reasonably foreseeable to the defendant at the time of the accident.\textsuperscript{74} This exception was used in \textit{Dillon} to compensate a mother for the emotional trauma she suffered from witnessing her child get run down and killed by a motorist although the mother was in a position of complete safety.\textsuperscript{75}

In reaching its decision, the California Supreme Court rejected the argument that it must "deny recovery upon a legitimate claim because other fraudulent ones may be [set forth]."\textsuperscript{76} The court reasoned that although juries and trial courts sometimes reach erroneous results, that does not justify substituting the case-by-case resolution of disputes with an "artificial and indefensible barrier."\textsuperscript{77} According to the court, "the mere assertion that fraud is possible" does not require courts to abandon principles of "foreseeability, proximate cause and consequential injury that generally govern tort law."\textsuperscript{78}

Recognizing a need to limit the defendant's liability, the \textit{Dillon} court held that the defendant should be liable only for injuries to others which were reasonably foreseeable at the time of the accident.\textsuperscript{79} To determine whether the injury should have been foreseen by the defendant, the court took into account the following factors:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2)

\textsuperscript{70} Id.
\textsuperscript{71} 441 P.2d 912 (Cal. 1968).
\textsuperscript{72} See \textit{Keeton et al.}, \textit{supra} note 5, § 54, at 366.
\textsuperscript{73} See \textit{Dillon}, 441 P.2d at 914–15.
\textsuperscript{74} Id. at 919.
\textsuperscript{75} Id. at 914, 921.
\textsuperscript{76} Id. at 917–18.
\textsuperscript{77} Id. at 918.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 919.
Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.80

In holding that the plaintiff had set forth a sufficient prima facie case, the Dillon court concluded that the negligent driver who caused the death of the young child should reasonably have foreseen that the mother would not be a far distance away and would, upon witnessing the accident, suffer emotional trauma.81

C. In Private Nuisance, Property Depreciation, Without Other Harm, is Damnum Absque Injuria

Despite certain controversies regarding the scope of the nuisance doctrine,82 the courts have long recognized that a depreciation in property value, without other harm, does not constitute an actionable interference with the use and enjoyment of property.83 Property depreciation, in itself, is considered *damnum absque injuria*, because it does not belong to that class of wrongs arising from the “unreasonable, unwarranted or unlawful use of one’s property.”84

This rule protects a landowner in the freedom to use his or her property as he or she sees fit.85 For example, the construction of a jailhouse or a gas station in a residential neighborhood will not constitute a nuisance merely because it causes a depreciation in property

80 Id. at 920.
81 Id. at 921.
82 See supra notes 63–70 and accompanying text.
85 See Stotler v. Rochelle, 109 P. 788, 789 (Kan. 1910). The Stotler court noted: [T]he law does not recognize any legal right in any one to compel his neighbor to follow his tastes, wishes, or preferences, or to consult his mere convenience. He cannot dictate the style of architecture or, generally, the location of the buildings; or maintain that an unsightly or ill proportioned edifice is a nuisance because if offends his eye, or his too cultivated taste . . . . The diminution of the market value of adjacent buildings, by such use, will not of itself make it a nuisance.

Id.
values. Similarly, the mere placement or location of a facility such as a nuclear power plant or a sanitary landfill does not constitute a nuisance merely because it causes a reduction in neighboring property values. Furthermore, it is not a nuisance where a landowner uses a style of architecture or a color of paint on his or her property that causes neighboring property values to depreciate. According to one commentator, where a landowner erects a business on his land that detracts customers away from his neighbor’s business, his neighbor suffers damnum but there might be no injuria.

The failure of courts, however, to distinguish damnum (damages) from injuria (injury) has been the source of much confusion with respect to the role of property depreciation in the nuisance doctrine. Although property depreciation, in itself, does not constitute an “actual interference” with the use and enjoyment of land, it is nevertheless recoverable as a “traditional element of damages” in the nuisance doctrine. For example, courts have held that when a nuisance results in contamination of property for an indefinite period of time, the proper measure of damages is the diminution in the market value of the property.

Similar to its role as an element of damages, property depreciation is also used as a measuring stick for assessing when an independent harm, such as a noise or odor, has risen to an actionable level. In other words, courts will often intercede only where plaintiffs show an interference with the use and enjoyment of their property substantial enough to reduce market value. Thus, courts have said that property depreciation is a contributing factor in assessing whether a nuisance has been created, but is not a controlling factor.

86 City of Newport v. Emery, 559 S.W.2d 707, 709 (Ark. 1977).
88 See City of Newport, 559 S.W.2d at 709.
89 See Stotler, 109 P. at 789.
90 William A. McRae, Jr., The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27, 38 (1948).
92 See supra notes 83-84 and accompanying text.
93 See Adkins, 487 N.W.2d at 725.
94 See, e.g., Mel Foster Co. Properties v. American Oil Co. (AMOCO), 427 N.W.2d 171, 175 (Iowa 1988); Pate v. City of Martin, 614 S.W.2d 46, 48-49 (Tenn. 1981).
96 See Twitty, 354 S.E.2d at 304.
III. NUISANCE AND THE ISSUE OF PHYSICAL IMPACT

As previously indicated, property depreciation, in itself, cannot create a nuisance because it does not constitute the type of "actual interference" with the use and enjoyment of land that a nuisance action requires.\(^\text{98}\) In assessing what does constitute an "actual interference," controversy arises with respect to whether such an interference requires a physical invasion of the plaintiff's land.

A. Nuisance Claims Involving a Physical Invasion of the Plaintiff's Land

Traditionally, the nuisance doctrine has been distinguished from trespass in that nuisance does not require entry onto the plaintiff's land.\(^\text{99}\) While it is true that a nuisance does not require a tangible entry onto the plaintiff's land rising to the level of a trespass,\(^\text{100}\) the vast majority of nuisance actions do involve a physical invasion of the plaintiff's land.\(^\text{101}\) Indeed, there is considerable overlap between the nuisance and trespass doctrines.\(^\text{102}\)

As previously discussed, many nuisance claims involve actual physical damage either to the plaintiff's land or to tangible property located on the plaintiff's land.\(^\text{103}\) In such situations, the nuisance doctrine is much like the trespass doctrine in that the nuisance generally results from a tangible invasion of the plaintiff's property.\(^\text{104}\) For example, in *Mel Foster*,\(^\text{105}\) gasoline seeped onto the plaintiff's property causing it to become less attractive for the development of commercial real estate.\(^\text{106}\) Similarly, in *Lacy*,\(^\text{107}\) the defendant's turkey farm created a nuisance by causing large amounts of feathers and dust to travel onto the plaintiff's property and get into the plaintiff's water storage tanks.\(^\text{108}\)

\(^{98}\) See supra notes 83--84 and accompanying text.
\(^{101}\) See infra notes 103–17 and accompanying text.
\(^{102}\) See, e.g., *Mangini*, 281 Cal. Rptr. at 833 n.6.
\(^{103}\) See supra notes 47–51 and accompanying text.
\(^{104}\) See, e.g., *Mangini*, 281 Cal. Rptr. at 833 n.6.
\(^{105}\) *Mel Foster*, 427 N.W.2d 171 (Iowa 1988).
\(^{106}\) See id. at 172–73.
\(^{108}\) Id. at 849.
Unlike a trespass, a nuisance does not require a tangible invasion of the plaintiff’s land to be actionable. A tangible invasion of land is generally necessary to create the type of interference with the exclusive possession of land that the trespass doctrine was designed to prevent. A private nuisance, however, protects the more expansive right to the use and enjoyment of land.

As previously discussed, many nuisance claims take the form of a physical discomfort to the occupants of the plaintiff’s land, as where lights keep the plaintiff awake at night, odors make habitation of the plaintiff’s land impossible, or noise frightens the plaintiff’s children. Although such intangible invasions are generally insufficient to give rise to a trespass, they are arguably physical invasions of the plaintiff’s property. In such situations, one could argue that the noise, odor, or light actually passes over and onto the plaintiff’s property.

The courts, however, recognize that a nuisance is not contingent on a physical invasion of the plaintiff’s land, but rather is contingent on whether the defendant substantially and unreasonably interfered with plaintiff’s use and enjoyment of property. Accordingly, there are a minority of nuisance cases arising without any physical invasion of the plaintiff’s land. The most common example of these are the so-called anticipatory nuisance claims in which the threat of future injury creates a present interference with the use and enjoyment of land. Additionally, a nuisance can arise without any existing or threatened physical invasion of land where the defendant causes either a physical inconvenience or mental disturbance to the occupants of the land.

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111 See id. at 1540.
112 See supra notes 52–59 and accompanying text.
113 See supra note 57 and accompanying text.
114 See supra note 55 and accompanying text.
115 See supra note 59 and accompanying text.
116 See Keeton et al., supra note 5, § 13, at 71.
118 Id.
120 See infra notes 123–26 and accompanying text.
121 See infra notes 157–69 and accompanying text.
122 See infra notes 170–99 and accompanying text.
B. Anticipatory Nuisance Cases

The most common examples of nuisance claims arising without any physical invasion of land are the so-called anticipatory nuisance claims in which the threat of future injury creates a present interference with the use and enjoyment of land. In a number of early anticipatory nuisance cases, courts enjoined certain establishments, such as tuberculosis sanitariums or cancer hospitals, from locating in residential neighborhoods based on neighboring landowners' fears of contagion.

In a number of these cases courts indicated a willingness to enjoin these establishments despite the fact that the plaintiffs' fears were not based on scientifically verifiable or reasonable concerns. For example, in *Everett v. Paschall*, the Washington Supreme Court enjoined the continued operation of a tuberculosis sanitarium based on a neighboring landowner's fear of contagion. According to the court "[t]he question is not whether the fear is founded in science ... but whether it is real, in that it affects the movements and conduct of men." Despite this dictum, the *Everett* court found that tuberculosis did pose some actual threat to neighboring landowners. Thus, the court explained that its decision did not rest on fears that were "unreal, imaginary, or fanciful."

Nonetheless, the *Everett* court's explanation stands for the proposition that a nuisance can be based on unfounded fears so long as an average person in the community would be similarly frightened. The reasoning in cases like *Everett*, however, is probably best viewed

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124 See *Everett v. Paschall*, 111 P. 879, 879, 882 (Wash. 1910).


127 See, e.g., *Stotler*, 109 P. at 790; *Fairfield Improvement*, 39 A. at 1084; *Birchard*, 169 N.W. at 901.

128 111 P. 879 (Wash. 1910).

129 Id. at 882.

130 Id. at 880.

131 Id. at 881.

132 Id. at 880.

as the high-water mark with respect to the anticipatory nuisance cases.\(^{134}\)

The trend in subsequent decisions has been to require that an anticipatory nuisance be based on a real and reasonable concern of future harm.\(^{135}\) In *O'Laughlin v. City of Fort Gibson*,\(^{136}\) for example, the Oklahoma Supreme Court refused to overturn a decision denying plaintiffs' request to enjoin the construction of a sewage facility in their neighborhood.\(^{137}\) The plaintiffs based their claim on allegations that the lagoon would emit noxious odors, and might overflow causing pollution to disseminate onto their property.\(^{138}\) Ruling against the plaintiffs, the *O'Laughlin* court decided that it would not apply the reasoning in *Everett* with respect to recognizing nuisance claims based on unfounded fears.\(^{139}\) Accordingly, the *O'Laughlin* court refused to issue the injunction because the evidence failed to demonstrate a reasonable probability that injury would result.\(^{140}\)

The anticipatory nuisance theory was used in two recent class action cases.\(^{141}\) In *DeSario v. Industrial Excess Landfill, Inc.*,\(^{142}\) for example, the Ohio Court of Appeals commented that "in Ohio, to recover damages under a private nuisance theory, the plaintiffs need not show a physical intrusion onto their land."\(^{143}\) The plaintiffs were a group of homeowners who filed a class action in nuisance against, among others, the owners of an industrial waste landfill.\(^{144}\) The court affirmed the plaintiffs’ class certification that was based on members asserting a claim for a reduction in property values caused by the presence of the landfill.\(^{145}\) In addition to plaintiffs whose land was physically contaminated by the waste, the group also included landowners whose property was merely threatened with exposure in the future.\(^{146}\) As to these landowners, the court commented that "a class

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\(^{134}\) See Doane, *supra* note 123, at 458–59 n.128.

\(^{135}\) Id. Despite this trend, there are a number of inverse condemnation cases in which landowners have been permitted to recover damages for property depreciation caused by unfounded fears that resulted from a taking. See, e.g., *City of Santa Fe v. Konis*, 845 P.2d 753, 756–57 (N.M. 1992); *San Diego Gas & Elec., Co. v. Daley*, 253 Cal. Rptr. 144, 151–52 (Cal. Ct. App. 1988).

\(^{136}\) 389 P.2d 506 (Okla. 1964).

\(^{137}\) Id. at 508–10.

\(^{138}\) Id. at 507–08.

\(^{139}\) Id. at 509–10.

\(^{140}\) Id.


\(^{142}\) 587 N.E.2d at 454.

\(^{143}\) Id. at 461.

\(^{144}\) Id. at 455.

\(^{145}\) Id. at 458.

\(^{146}\) See id. at 461–62.
action may be premised on the public’s perception of contamination irrespective of actual land contamination.” Despite this language, DeSario simply reaffirms the belief that a nuisance can arise without actual contamination of the plaintiff’s land, so long as there is, at least, a threat of contamination in the future. Similarly, in *Allen v. Uni-First Corp.*, the Vermont Supreme Court held that the trial court erred in failing to instruct the jury on damages based on evidence of the public perception of widespread contamination. The case involved a private nuisance action brought by homeowners against a dry cleaning operator. The plaintiffs alleged that the defendant discharged hazardous chemical residuals from its business operation into the town’s sewage system which ultimately leaked into the ground. In reaching its decision, the Vermont Supreme Court noted that in addition to evidence of actual contamination at the public schools and town well, the jury heard evidence that the bedrock and the deep aquifers beneath the town had become contaminated. Additionally, expert testimony was adduced to the effect that underground plumes of contamination were migrating slowly through the bedrock under the town. The court also found that the plaintiffs presented sufficient evidence to establish a causal connection between the overall contamination theory and the alleged decrease in plaintiffs’ property values. Thus, the court concluded that the jury was permitted to consider the “public perception” of contamination in assessing whether a permanent nuisance had been created. In summary, *Allen* is a case in which there was sufficient evidence of actual and threatened contamination throughout the town such that the jury was permitted to consider the extent of the pollution problem caused by the “public perception” of widespread contamination.

In conclusion, *Allen* and *DeSario* appear to reaffirm the belief that a private nuisance action does not require an actual physical invasion of the plaintiff’s land. In each of these cases, however, there was, at least, a threat of future contamination. Accordingly, the reasoning

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147 Id. at 461.
149 Id. at 963-65.
150 Id. at 962-63.
151 Id. at 963.
152 Id. at 963-64.
153 Id. at 964.
154 Id. at 963, 965.
in these cases would not appear to provide relief for plaintiffs in an Adkins situation whose land is not, and never will be, contaminated.\textsuperscript{156}

\textit{C. Nuisance Claims Without Physical Invasion Based on a Physical Inconvenience to Occupants}

Unlike the anticipatory nuisance cases in which there was a threat of future invasion of land, the court in \textit{Exxon Corp. v. Yarema}\textsuperscript{157} found a nuisance without any existing physical invasion of land or threat of future invasion.\textsuperscript{158} In Yarema, landowners brought an action against the owner of a service station to recover for a private nuisance resulting from leakage of gasoline from storage tanks.\textsuperscript{159} The evidence showed that contamination had spread to several building lots.\textsuperscript{160} The property of one of the plaintiffs, however, had not been contaminated because it was upgradient and a substantial distance from the service station.\textsuperscript{161} Even though this land had not been contaminated, the city's health department imposed severe land use restrictions upon it.\textsuperscript{162} These restrictions forbade the plaintiffs from using their groundwater, building houses on their land, or selling their property even at a reduced price.\textsuperscript{163}

Appealing a lower court decision that found in favor of the plaintiffs, the defendant argued that there could be no recovery in nuisance for those plaintiffs whose property had not actually been contaminated.\textsuperscript{164} In affirming the lower court decision, the Maryland Court of Appeals held that “although a nuisance may involve a physical impact much of the time, that is not an essential element of the tort.”\textsuperscript{165} The appeals court reasoned that the gasoline contamination imposed severe restrictions both on the contaminated land and the property adjacent to it.\textsuperscript{166} The court decided that these were injuries for which the plaintiffs were entitled to recover if the jury believed that the harm was caused by the defendant’s tortious conduct.\textsuperscript{167}

\textsuperscript{156} See infra notes 232–34 and accompanying text.
\textsuperscript{158} See id. at 1001–05.
\textsuperscript{159} Id. at 994–96.
\textsuperscript{160} Id. at 994.
\textsuperscript{161} Id. at 1001.
\textsuperscript{162} Id. at 994–95.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 1001–02.
\textsuperscript{165} Id. at 1004.
\textsuperscript{166} See id. at 1005.
\textsuperscript{167} Id.
To summarize, *Yarema* goes beyond the anticipatory nuisance cases in that a nuisance is found without any existing or threatened physical invasion of land. The plaintiffs in *Yarema* sustained a severe physical inconvenience to the use and enjoyment of their property. They were prohibited from using their drinking water, selling their property, or even building on it. Even more controversial than *Yarema*, however, is whether a nuisance claim may be based solely on a landowner's mental anguish without any existing or threatened physical invasion of the land.

IV. PRIVATE NUISANCE CLAIMS BASED SOLELY ON MENTAL ANGUISH

Although a private nuisance does not require an existing or threatened physical invasion of land, the question whether a nuisance may be based solely on a mental disturbance to the occupants of the land, has been the source of controversy. In the early half of the twentieth century, courts embraced the idea that a private nuisance protects a landowner from mental disturbance as well as physical discomfort. In these early cases, nuisance claims were based on the mental disturbance of living next to certain establishments, such as funeral homes or prostitution houses, without any existing or threatened physical invasion of land. Although these cases have never been overruled, modern courts have been reluctant to recognize nuisance claims based solely on mental anguish.

A. The Funeral Home and Prostitution House Cases

In the early half of the twentieth century, the courts frequently used the nuisance doctrine to enjoin certain establishments such as funeral homes and prostitution houses from operating in residen-
tial neighborhoods. These cases represented one of the first instances in which the courts embraced the idea that the nuisance doctrine protected a landowner from mental disturbances as well as physical discomfort. Moreover, these cases exemplify some of the earliest nuisance cases arising without any physical invasion of the plaintiff's land.

Initially, the courts were reluctant to enjoin these establishments based merely on the presence of a mental disturbance. To find a private nuisance, the courts would strain reason to characterize the establishment as creating a physical disturbance. For example, in Tureman v. Ketterlin, the Missouri Supreme Court held that a funeral home constituted a private nuisance because it created a constant reminder of death that had a weakening effect on a person's physical resistance to disease.

Later cases relinquished the fiction that a funeral home makes people more susceptible to disease. For example, after enjoining the establishment of a funeral home, the Arkansas Supreme Court, in Powell v. Taylor, commented that its decision did not rest on a finding that the funeral home was physically offensive. Rather, the court's decision rested on the premise that the funeral home presented a "continuous suggestion of death and dead bodies [that tended] to destroy the comfort and repose sought in homeowner­ship." In addition to the question of mental annoyance, another controlling issue in Powell was whether the neighborhood at issue was residential in character. Where, as in Powell, the neighborhood was found to be residential in character, injunctive relief was granted.

Similar to the reasoning in the funeral home cases, the Alabama Supreme Court, in Tedescki v. Berger, enjoined the operation of a house of prostitution in a residential neighborhood. According to the court, the prostitution house was a private nuisance because it disrupted the comfortable enjoyment of neighboring property and

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177 See Powell, 263 S.W.2d at 906--07; Streett, 291 S.W. at 497--98.
178 263 S.W. at 202.
179 Id. at 203. See also Saier, 164 N.W. at 507--08.
180 263 S.W.2d at 906.
181 Id. at 906--07.
182 Id. at 907. Streett, 291 S.W. at 497--99.
183 Powell, 263 S.W.2d at 907.
184 Id. See also Howard v. Etchieson, 310 S.W.2d 473, 474--75 (Ark. 1958); Rockenbach v. Apostle, 47 N.W.2d 636, 638--39 (Mich. 1951).
185 43 So. 960 (Ala. 1907).
186 Id. at 961. See also Crawford v. Tyrrell, 28 N.E. 514, 515 (N.Y. 1891); KEETON ET AL., supra note 5, § 87, at 620.
caused a depreciation in neighboring property values. The court also noted that the nuisance doctrine should not only protect landowners from physical discomfort but from certain moral effronteries as well.

The funeral home and prostitution house cases demonstrate that a nuisance claim can be based on a mental disturbance without any physical invasion of the plaintiff's land. Most courts that have addressed the issue more recently, however, have not followed the reasoning in the funeral home and prostitution house cases. Moreover, although the funeral home and prostitution house cases have not been overturned, there is authority indicating that these cases may have limited precedential value.

Commentators have indicated that the funeral home and prostitution house cases are best viewed as an example of town planning prior to the emergence of zoning laws, rather than psychological nuisance cases. Supporting this contention is the reasoning in cases like Powell, which placed greater emphasis on the character of the neighborhood at issue rather than the disturbance created. Not surprisingly, as the use of zoning laws began to increase in this country the number of cases like the funeral home and prostitution house cases declined precipitously.

Another factor that may undermine the precedential significance of the funeral home and prostitution house cases is that these cases were all based on intentional conduct. Therefore, the funeral home and prostitution house cases can be distinguished from cases, such as Adkins, that involve unintentional or negligent conduct. Unlike an intentional nuisance, the courts may be unwilling to recognize a nuisance claim arising out of negligent or unintentional conduct that is

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187 Tedeschi, 43 So. at 961.
188 Id.
189 See supra notes 180–88 and accompanying text.
190 See infra notes 200–15 and accompanying text.
193 Powell, 263 S.W.2d 906 (Ark. 1954).
194 Id. at 907.
195 See Ellickson, supra note 192, at 722 n.157.
196 See, e.g., Howard v. Etchieson, 310 S.W.2d 473, 473–74 (Ark. 1958); Keeton et al., supra note 5, § 87, at 624–25.
based solely on a mental disturbance.\textsuperscript{198} The rationale behind this rule is the need to prevent fraudulent or exaggerated claims.\textsuperscript{199}

B. The Trend Away From the Funeral Home and Prostitution House Cases

Recently, most courts have been reluctant to recognize a nuisance claim based solely on a mental disturbance without any physical invasion of land. An early example of this was \textit{McCaw v. Harrison},\textsuperscript{200} where the Kentucky Court of Appeals affirmed a lower court's decision refusing to enjoin the defendants from using their property for the location of a commercial cemetery.\textsuperscript{201} According to the \textit{McCaw} court, "a cemetery does not constitute a nuisance merely because it is a constant reminder of death and has a depressing influence on the minds of persons who observe it."\textsuperscript{202} The \textit{McCaw} court further reasoned that a cemetery would be a nuisance only if, unlike the cemetery at issue, it endangered the public health by contaminating the area's drinking water.\textsuperscript{203} Thus, the court refused to recognize a nuisance claim based on mental anguish without a physical invasion of the plaintiff's land.

As the law developed, the reasoning in \textit{McCaw} emerged as the prevailing view, and the courts showed an increasing reluctance to recognize nuisance claims based solely on a psychological disturbance.\textsuperscript{204} For example, in \textit{Akins v. Sacramento Municipal Utility District},\textsuperscript{205} the California Court of Appeals refused to recognize a nuisance claim based upon the alleged anxiety and emotional distress stemming from the operation of a nuclear power plant.\textsuperscript{206} The plaintiffs in \textit{Akins v. Sacramento} were homeowners who brought, among other

\textsuperscript{198} See \textit{Keeton et al.}, \textit{supra} note 5, § 87, at 623–24, § 91, at 653.
\textsuperscript{199} See, e.g., \textit{Deutsch v. Shein}, 597 S.W.2d 141, 145–46 (Ky. 1980).
\textsuperscript{200} 259 S.W.2d 457 (Ky. Ct. App. 1953).
\textsuperscript{201} Id. at 459.
\textsuperscript{202} Id. at 458.
\textsuperscript{203} Id.
\textsuperscript{204} See, e.g., \textit{Berry v. Armstrong Rubber Co.}, 780 F. Supp. 1097, 1104 (S.D. Miss. 1991) (dismissing property damage claim based on property depreciation caused by beliefs of residents' and potential buyers' that dangerous chemicals in area were causing health problems, absent confirmed physical property damage or confirmed threat of physical property damage); \textit{Gray v. Southern Facilities, Inc.}, 183 S.E.2d 438, 443 (S.C. 1971) (refusing to recognize damages claim based upon property depreciation resulting, not from any physical injury, but from a psychological factor, in that prospective buyers allegedly would be reluctant to purchase the property due to the fear of another fire occurring near plaintiff's property in the future).
\textsuperscript{205} 8 Cal. Rptr. 2d 785 (Cal. Ct. App. 1992).
\textsuperscript{206} Id. at 811.
claims, a private nuisance action against a neighboring nuclear power station. The plaintiffs alleged that the defendant caused legally excessive levels of radiation to be released in their neighborhood. It was conceded, however, that the plaintiffs had not suffered any present physical injury as a result of the radiation. Rather, the plaintiffs sought damages for emotional distress resulting from the defendant’s creation of a nuisance.

Despite these allegations, the Akins v. Sacramento court concluded that the plaintiffs failed to demonstrate that the power plant “released legally excessive levels of radioactive materials.” Accordingly, the court found that the plaintiffs were not exposed to “harmful and legally cognizable levels of radiation on their properties.” In making its decision, the court reasoned that a nuisance claim cannot be based upon the “mere existence of a facility or activity which is statutorily authorized or upon anxiety caused by the mere knowledge of its presence.” Additionally, the court commented that “fear, anxiety, and emotional distress which are not caused by an interference with a specific private property right . . . will not support a private action for nuisance.” Accordingly, the plaintiffs’ claim was dismissed.

To summarize, it appears that the reasoning in McCaw, that a nuisance claim cannot be based solely on mental anguish, has emerged as the prevailing view. Despite this trend, the funeral home and prostitution house cases, which recognize nuisance claims based solely on mental anguish, have not been overturned. Accordingly, it is conceivable that a court today might be willing to recognize such a claim.

C. Recovery of Damages for Mental Anguish

As the previous discussion demonstrated, there is a controversy regarding whether or not a nuisance claim can be based solely on

\[\text{207 Id. at 788–89.}\]
\[\text{208 Id.}\]
\[\text{209 Id. at 805.}\]
\[\text{210 Id. at 810.}\]
\[\text{211 Id. at 811.}\]
\[\text{212 Id.}\]
\[\text{213 Id.}\]
\[\text{214 Id.}\]
\[\text{215 Id.}\]
\[\text{216 See supra note 191 and accompanying text.}\]
mental anguish. Independent of this controversy is the widely accepted belief that mental anguish is recoverable as an element of damages where it accompanies an independent basis of tort liability.\textsuperscript{217} Accordingly, in the private nuisance context, a plaintiff can recover damages for mental anguish that accompanies an otherwise actionable interference with the use and enjoyment of land. For example, in \textit{Macca v. General Telephone Co. of Northwest, Inc.},\textsuperscript{218} the Supreme Court of Oregon allowed a homeowner to recover damages for emotional distress after first characterizing repeated telephone calls to the plaintiff's home as a private nuisance.\textsuperscript{219} The unwanted telephone calls resulted from the defendant telephone company's negligence in placing the plaintiff's telephone number in an advertisement for an after hours floral shop.\textsuperscript{220}

Similarly, in \textit{Edwards v. Talent Irrigation District},\textsuperscript{221} the Supreme Court of Oregon allowed the plaintiff to recover damages for mental anguish that accompanied an actionable nuisance.\textsuperscript{222} The defendant's irrigation ditch caused water to flow onto plaintiff's property destroying his sewage system and killing his fruit tree and garden.\textsuperscript{223} Finally, in \textit{Bolin v. Cessna Aircraft Co.},\textsuperscript{224} the District Court for the District of Kansas, applying Kansas law, allowed plaintiffs to recover damages for emotional distress where the defendant contaminated plaintiffs' ground water with a carcinogenic solvent.\textsuperscript{225}

Unlike the funeral home or prostitution house cases, in which the mental disturbance was the sole basis of tort liability,\textsuperscript{226} in each of the preceding cases there was an independent basis of tort liability—i.e., the unwanted phone ringing in \textit{Macca};\textsuperscript{227} the destruction of the fruit tree and garden in \textit{Edwards};\textsuperscript{228} and the contamination of ground water in \textit{Bolin}.\textsuperscript{229}

\textsuperscript{218} 495 P.2d at 1195.
\textsuperscript{219} Id. at 1195.
\textsuperscript{220} Id. at 1193.
\textsuperscript{221} 570 P.2d 1169 (Or. 1977).
\textsuperscript{222} Id. at 1169–70.
\textsuperscript{223} Id. at 1169.
\textsuperscript{225} Id. at 697, 720.
\textsuperscript{226} See supra note 175 and accompanying text.
\textsuperscript{227} \textit{Macca v. General Tel. Co. of the Northwest}, 495 P.2d 1193, 1196 (Or. 1972).
\textsuperscript{228} \textit{Edwards v. Talent Irrigation Dist.}, 570 P.2d 1169, 1169 (Or. 1977).
V. The Adkins Decision

The plaintiffs in Adkins v. Thomas Solvent Co.\textsuperscript{230} alleged that the defendant chemical company, by mishandling toxic chemicals in their neighborhood, created a private nuisance by causing a stigma of contamination to attach to their land.\textsuperscript{231} Despite the fact that none of the contamination had or ever would physically invade their land, the plaintiffs alleged that their property values had depreciated because of the unfounded public perception that their land was polluted.\textsuperscript{232} Curiously, the plaintiffs' claim did not arise out of their own personal discomfort or annoyance.\textsuperscript{233} Rather, it arose out of the unfounded fears of third party purchasers.\textsuperscript{234}

In refusing to recognize the plaintiffs' claim, the Adkins court held that a private nuisance cannot be based on property depreciation caused by unfounded fears of third party purchasers.\textsuperscript{235} According to the court, "the fact ... that plaintiffs made no claim for relief arising out of their own fears illustrate[d] the point that defendants' activities did not interfere with their use and enjoyment of property."\textsuperscript{236} Because the plaintiffs were not alleging that they themselves were disturbed or annoyed by the contamination, their claim was based entirely on allegations of property depreciation. Therefore, by refusing to recognize the plaintiffs' claim, the Adkins decision reaffirmed the widely held belief that property depreciation without other harm is \textit{damnunm absque injuria}.\textsuperscript{237}

In support of its decision, the Adkins court reasoned that to award damages for property depreciation resulting from the unfounded fears of third party purchasers would ultimately divert funds away from the actual cleanup.\textsuperscript{238} The court noted that polluters have limited resources and reasoned that it would not make sense to benefit those who have not suffered a cognizable injury at the expense of those who have.\textsuperscript{239}

\textsuperscript{230} 487 N.W.2d 715 (Mich. 1992).
\textsuperscript{231} Id. at 721.
\textsuperscript{232} Id. at 718, 721.
\textsuperscript{233} See id. at 724, 726-27.
\textsuperscript{234} Id. at 724.
\textsuperscript{235} Id. at 724-25.
\textsuperscript{236} Id. at 724.
\textsuperscript{237} Id. at 723-25.
\textsuperscript{238} Id. at 727.
\textsuperscript{239} Id.
Additionally, the *Adkins* court justified its decision on the basis that recognizing the plaintiffs' claim would create a dangerous precedent.\textsuperscript{240} According to the court it would:

not only be odd but anachronistic that a claim of nuisance . . . could be based on unfounded fears regarding persons with AIDS moving into a neighborhood, the establishment of otherwise lawful group homes for the disabled, or unrelated persons living together, merely because the fears experienced by third parties would cause a decline in property values.\textsuperscript{241}

At first glance, the *Adkins* decision appears to hold that one cannot recover for property depreciation due to the presence of hazardous substances without proof of existing contamination.\textsuperscript{242} The court stated explicitly, however, that a private nuisance does not require a physical invasion of land.\textsuperscript{243} The court dismissed the plaintiffs' claim not because of the absence of a physical invasion of land, but rather because the plaintiffs' claim was based solely on a depreciation in property value.\textsuperscript{244} The court indicated that the case may have come out differently had the plaintiffs alleged that the "character of the neighborhood [had] changed for the worse" or that an "unusual number of abandoned, neglected, and otherwise depressed properties in the neighborhood interfered with their use and enjoyment of land."\textsuperscript{245}

Therefore, the *Adkins* decision arguably stands for the principle that a plaintiff can prevail in private nuisance without alleging any physical invasion of land so long as the plaintiff complains of more than a mere depreciation in property value.

VI. BEYOND *ADKINS*

The *Adkins* court indicated that the plaintiffs may have prevailed had their claim arisen out of their own fears or discomfort, as opposed to the fears of third party purchasers.\textsuperscript{246} Moreover, the court explained that a private nuisance does not require a physical invasion of land.\textsuperscript{247} Looking beyond the *Adkins* decision, the question remains as to

\textsuperscript{240} Id. at 726.
\textsuperscript{241} Id.
\textsuperscript{244} Id. at 725.
\textsuperscript{245} Id. at 727.
\textsuperscript{246} See *supra* notes 235–36 and accompanying text.
\textsuperscript{247} See *supra* notes 242–44 and accompanying text.
whether there is a legal theory that would allow similarly situated plaintiffs to recover. For example, could plaintiffs recover under an anticipatory nuisance theory in which the plaintiffs allege that they themselves are frightened by the threat of future contamination? Alternatively, could plaintiffs assert, as in Exxon Corp. v. Yarema, that the contamination in their neighborhood has created a physical inconvenience to the use and enjoyment of their land? Finally, could plaintiffs use the funeral home and prostitution house cases to set forth a nuisance claim based on the mental anguish caused by living amidst area-wide contamination?

A. Anticipatory Nuisance in the Adkins Situation

An anticipatory nuisance theory will probably not afford recovery for plaintiffs in a situation similar to Adkins. Because the plaintiffs are assured that none of the contamination has or ever will physically invade their property, the plaintiffs' fear of future contamination is unfounded. Despite early hospital and sanitarium cases such as Everett v. Paschall, the courts have moved away from recognizing nuisance claims based on fear of future injury that is not grounded in objectively verifiable or reliable scientific information. Thus, as in O'Laughlin v. City of Fort Gibson, plaintiffs in a situation similar to Adkins, will be probably unable to recover in private nuisance based on unfounded fears of future injury.

B. Nuisance Based on the Physical Inconvenience of Living Amidst Area-Wide Contamination

Although plaintiffs in an Adkins situation probably cannot prevail under an anticipatory nuisance theory, Yarema demonstrates that plaintiffs can prevail in private nuisance despite the absence of any existing or threatened physical invasion of land. Under this theory, the plaintiffs should allege, as in Yarema, that the contamination in

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249 See supra notes 171-99 and accompanying text.
250 See supra note 232 and accompanying text.
251 111 P. 879 (Wash. 1910). See supra notes 127-33 and accompanying text.
252 See supra notes 135-40 and accompanying text.
254 Id. at 509. See also supra notes 135-40 and accompanying text.
256 See supra note 232 and accompanying text.
257 See 516 A.2d at 1005.
their neighborhood has imposed physical inconveniences upon them that have disturbed the use and enjoyment of their property. Concededly, the facts in the Adkins situation may not be as strong as those in Yarema, where the city forbade the plaintiffs from using their ground water, building houses on their land, or selling their property even at a reduced price. Even in the absence of such formal restrictions, however, it is conceivable that plaintiffs in a situation similar to Adkins may be able to allege certain physical inconveniences caused by the contamination. For example, access to the plaintiffs’ property may become more difficult due to the clean-up effort in their neighborhood. Perhaps the plaintiffs can argue that they can no longer build on their property because of their inability to obtain financing. Finally, the inconvenience might be as simple as the plaintiffs’ inability to entertain because friends are reluctant to visit.

C. Nuisance Based on the Mental Anguish Caused by Area-Wide Contamination

As opposed to a physical inconvenience, it is conceivable that the plaintiffs in an Adkins situation may prevail on the theory that living amidst area-wide contamination has had a depressing psychological effect on them which has disturbed the comfortable use and enjoyment of their property. As in the funeral home and prostitution house cases, the courts have recognized that the right to the use and enjoyment of land includes freedom from mental annoyance. Arguably, the thought of living amidst area-wide contamination creates as much mental anguish in neighboring landowners as the depressing effect of living next to a funeral home or the moral effrontery created by a house of prostitution.

Unlike an anticipatory nuisance, which is based on the fear of future harm, a nuisance based on a mental disturbance would not require the plaintiffs’ anguish to be “well founded in science.” Accordingly, the plaintiffs in an Adkins situation could prevail, regardless of the fact that none of the contamination has or ever will physically invade their property. Additionally, because this claim is based on a disturbance to

258 See supra note 232 and accompanying text.
259 See 516 A.2d at 1004–05.
260 See supra notes 175–88 and accompanying text.
261 See id.
262 Everett v. Paschall, 111 P. 879, 881 (Wash 1910). See supra notes 135–40 and accompanying text.
the plaintiffs' peace of mind, it does not challenge the 600-year-old rule that property depreciation, in itself, is *damnnum absque injuria.*

Concededly, there are a number of obstacles which must be overcome before a court would be willing to recognize this claim. First, with the exception of the funeral home and prostitution house cases, there is little case law to support this proposition. Moreover, there is authority indicating that the funeral home and prostitution house cases have limited precedential significance. Certain commentators have indicated that these cases are probably best viewed as examples of town planning prior to the emergence of zoning laws rather than psychological nuisance cases.

Despite these obstacles, the funeral home and prostitution house cases have not been overturned. Indeed, these cases have been cited in recent decisions. Additionally, Keeton and Prosser cite the funeral home and prostitution house cases for the proposition that the right to the use and enjoyment of land includes freedom from mental disturbance.

Additionally, a potential obstacle to relying on the funeral home and prostitution house cases is that they involve intentional conduct. Therefore, these cases can be distinguished from the *Adkins* situation which arose out of unintentional or negligent conduct. Because of the physical impact rule in negligence, courts may be particularly reluctant to recognize a nuisance claim based solely on a mental disturbance that arises out of negligent conduct. The rationale behind the physical impact rule is the need to prevent fraudulent or exaggerated claims.

An exception to the physical impact rule in negligence, the so-called "bystander proximity doctrine," could arguably be applied in the private nuisance context. The doctrine holds a defendant liable for a plaintiff's emotional trauma, without any physical impact to the plaintiff, where the emotional trauma was reasonably foreseeable to the defendant.

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264 See supra notes 175–88 and accompanying text.
265 See supra notes 191–92 and accompanying text.
266 See supra note 192 and accompanying text.
267 See supra note 191 and accompanying text.
268 See id.
269 KEETON ET AL., supra note 5, § 87, at 620.
270 See supra note 34 and accompanying text.
271 See supra note 231 and accompanying text.
272 See supra notes 61–70 and accompanying text.
273 See supra note 70 and accompanying text.
274 See supra notes 71–81 and accompanying text.
In a nuisance context, the bystander proximity doctrine could allow recovery for plaintiffs in an Adkins situation, where the plaintiff's mental anguish would be reasonably foreseeable to the defendant polluter. In assessing whether the plaintiff's mental anguish was reasonably foreseeable to the defendant, courts may consider a number of factors similar to the reasoning adopted in Dillon v. Legg.\textsuperscript{275} For example, courts may consider whether the plaintiff's land was located near the scene of the accident as contrasted with land that was located a substantial distance away from it. Courts could require that the plaintiff's land borders contaminated land. As in the funeral home and prostitution house cases, courts may require that the damaged land be located in a strictly residential neighborhood, as opposed to an industrial neighborhood. Courts might also consider the size of the spill caused by the defendant or the toxicity of the substances involved.\textsuperscript{276}

In addition to the physical impact rule, courts might be unwilling to recognize a nuisance claim based on mental anguish because of a reluctance to divert money away from the cleanup.\textsuperscript{277} The court in Adkins commented on the fact that it would be unproductive to allow a reordering of a polluter's resources for the benefit of persons who have suffered no cognizable harm at the expense of claimants who have been subjected to actual contamination.\textsuperscript{278} Arguably, while this type of claim might divert resources away from the cleanup, the object of the tort system is to compensate those who have been injured by tortious conduct. Similarly, if a number of plaintiffs have sustained a depreciation in property value, it is not clear why certain plaintiffs should be denied compensation because of the fortuity that none of the contamination has or will physically invade their property. Additionally, it can be argued that compensating plaintiffs for the mental disturbance caused by pollution serves as a deterrent to this type of conduct.

Additionally, a court might invoke the "slippery slope" argument as a reason to deny recovery for this claim.\textsuperscript{279} As indicated in Adkins, courts are reluctant to recognize a cause of action that could also be used to frustrate socially desirable conduct, such as a hospice for

\textsuperscript{275} See 441 P.2d 912, 920 (Cal. 1968); supra note 80 and accompanying text.
\textsuperscript{276} In addition to these restrictions, the threat of fraudulent claims will also be reduced by the substantial harm requirement. See supra notes 25–26 and accompanying text. To prevail in private nuisance, the plaintiff must establish that the interference complained of would cause significant harm to a person of normal sensibilities in the community. Id.
\textsuperscript{277} See supra notes 238–39 and accompanying text.
\textsuperscript{279} See supra notes 240–41 and accompanying text.
AIDS patients or the establishment of a group home for the disabled. Concededly, such establishments might create as great a mental disturbance to neighboring landowners as living amidst area-wide contamination.

Unlike such socially desirable establishments, however, which involve intentional conduct, the *Adkins* situation involves unintentional or negligent conduct. Nuisance claims based on unintentional conduct can be distinguished from intentional nuisance claims because they do not involve the unreasonable use requirement. Accordingly, unintentional nuisance claims place far less emphasis on the balancing test—of the harm created versus the utility of the conduct creating the harm—which lies at the heart of the unreasonable use requirement. Such a balancing test could prevent a nuisance action based on mental anguish from prevailing against a socially desirable establishment, such as a hospice for AIDS patients.

VII. Conclusion

Homeowners, who find themselves in a situation similar to the plaintiffs in *Adkins v. Thomas Solvent Co.*, face an uphill battle. To prevail under a private nuisance theory, homeowners will have to establish that they have incurred an interference with the use and enjoyment of their land. Unfortunately, the courts widely hold that a depreciation in property value, without other harm, will not suffice. Additionally, case law demonstrates that homeowners in this situation will most likely fail under an anticipatory nuisance theory because their fear of future injury is unfounded. Accordingly, the strongest argument for these homeowners is to allege, as did the plaintiffs in *Exxon Corp. v. Yarema*, that the contamination in their neighborhood has imposed certain physical inconveniences upon them. If the facts in a particular case do not permit such an argument, however, homeowners should allege that living amidst area-wide contamination has caused them substantial mental anguish which has disturbed the comfortable use and enjoyment of their property. Although the courts have yet to be presented with such a claim, this theory is supported by the reasoning applied in the funeral home and prostitution house cases.

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280 See 487 N.W.2d at 726.
281 See *supra* note 231 and accompanying text.
282 See *supra* notes 33-37 and accompanying text.