

**REAL PROPERTY**  
**Professor Justin O'Connell**  
**Final, Spring 2023**

Instructions:

Answer three (3) questions in this examination.

Total Time Allotted: Three (3) hours.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

### Question 1

Oscar owned and lived on Blackacre, which was real property adjacent to a public road called Camden Drive. Adam owned Whiteacre, which was a parcel of land that bordered Blackacre on the far side away from Camden Drive. Whiteacre was adjacent to another public road.

In 1998, Oscar gave Adam oral permission to drive back and forth from Whiteacre across a 20-foot-wide strip of grassy land on Blackacre to access Camden Drive. At that time, Adam told Oscar that Adam would not make improvements to the access way. Thereafter, Adam often drove across the access way..

In 1999, Oscar came home to find that Adam had graded the access way flat with a bulldozer, and a drainage ditch had been dug on Blackacre along the access way. Oscar was angry Adam had done this but did not object to Adam. Thereafter, Adam continued to often drive across the access way.

In 2021, Adam asked Oscar if Adam could place gravel on the access way. Oscar said no. The next day, Adam did so anyway. When Oscar saw the gravel, he told Adam that Adam could not use the access way ever again. Adam apologized and offered to pay Oscar \$10,000 to keep using the access way in its current, improved condition. Oscar agreed and said Adam could keep using the access way "as is." Adam immediately paid Oscar the \$10,000 as agreed and continued to often drive across the access way.

In 2022, Adam asked Oscar if Adam could pave the access way if Adam paid the \$25,000 cost of paving Oscar's driveway. Oscar agreed. Adam then hired a paving company that paved Oscar's driveway. Oscar then placed Blackacre on the market for sale. About a week later, Oscar sold Blackacre to David, at which time paving of the access way had not begun. Prior to the sale, Oscar did not disclose to David that Adam had any rights to the access way.

Soon after David bought Blackacre, he placed a fence across both ends of the access way, thereby preventing Adam from using the access way and preventing the paving company from paving it. The jurisdiction has a 20 year statute of limitations for prescriptive easements.

Discuss the rights of Adam and David regarding any easement claims.

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# **REAL PROPERTY**

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## **Question 2**

Able and Charles inherited Blackacre as joint tenants. Blackacre consisted of 10 acres of land that is unimproved other than a single-family home on it.

After receiving ownership, Charles moved into the home on Blackacre. Charles lived on Blackacre for three years without paying anything to Able for the use of Blackacre. Able never attempted to enter into possession of Blackacre during that three-year period. Charles made all the property tax payments during that three-year period. He also spent \$100,000 building a motorcycle dirt race track covering 2 acres of Blackacre.

After Charles had been living on Blackacre for three years, he leased Blackacre to David for a two-year period. David paid Charles monthly rent. David paid nothing to Able, and Charles did not share any of the rental income with Able. Able never attempted to enter into possession of Blackacre during David's tenancy. Charles made all property tax payments for Blackacre during David's tenancy.

At the end of David's two-year tenancy, Charles renewed David's lease for another two-year term. Able immediately found out, was angry, and executed a grant deed transferring all his rights, claims and interest in Blackacre to Esther and such deed was delivered and accepted.

What claims could Esther and Charles make against each other in a partition proceeding?

What remedies does Esther have regarding David's occupation of Blackacre?

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**REAL PROPERTY**  
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**Spring 2023**  
**Question 3**

Alex bought Blackacre, a one-acre parcel of undeveloped property in the country. When Alex bought Blackacre, an adjacent property, Whiteacre, was a fifty-acre parcel with a small, free-range chicken egg farm owned by Bob, with 300 chickens. Bob was legally entitled to house and farm up to 1,000,000 chickens on Whiteacre for their eggs or meat.

A week after Alex purchased Blackacre, Bob sold Whiteacre to Chicken Town, a national meat company.

After Chicken Town purchased Whiteacre, Chicken Town began legal construction of immense, industrial chicken houses. Within months, construction was complete, and Chicken Town was legally raising up to 500,000 chickens at a time for meat.

A faint odor from the chickens occasionally drifted onto Blackacre. There were large, compressed bundles of plucked feathers stacked each day on Whiteacre, near the joint property line with Blackacre, being readied for transport offsite. Alex visited Blackacre many times and could smell the odor, see the bundles of feathers, hear the chickens, and hear sounds of machinery coming from Whiteacre. Alex was a staunch animal rights activist and became physically ill whenever he visited Blackacre. Alex wanted to build his home on Blackacre, but he felt he could not do so as long as Chicken Town operated on Whiteacre.

Alex set up bright lights on Blackacre that shined only towards the chicken houses on Whiteacre at night. The lights caused the chickens to suffer from a lack of sleep causing some to lose weight and others to die.

What rights and remedies do Alex and Chicken Town have against one another under the doctrine of nuisance?

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**REAL PROPERTY – ANSWER OUTLINE**  
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**Final, Spring 2023**

*Q1 Easements Outline*

1998

*Oral Permission:*

*Oscar grants a mere license which is revocable at any time. Adam has no enforceable rights at this point.*

1999

*Improvements:*

*Adam may have a claims for Prescriptive easement arising in 1999:*

*Actual use: changing nature and physical aspects of property constitute use of the property*

*Open and notorious: use was obvious, not hidden, and easily determinable by servient owner (Oscar)*

*Hostile: done without permission of servient owner (Oscar)*

*Continuous: 20 year statute of limitation is met*

*Notice: David would have been on inquiry notice when he purchased the property since the use by Adam was apparent and David should be imputed knowledge of Adam’s claim.*

2021

*Express Easement*

*An express easement must be in writing to satisfy the statute of frauds. Exception that might apply here is full performance in that the terms of the purchase were agreed to and performed.*

*Notice: David would have been on inquiry notice when he purchased the property since the use by Adam was apparent and David should be imputed knowledge of Adam’s claim.*

2022

*Express Easement (additional right to pave)*

*Same as with 2021 – terms agreed to and performed. However, here David would not have been on notice as there is nothing to indicate Adam would have the right to pave.*

*Easement by Estoppel*

*Adam might have an easement by estoppel. He detrimental relied on Oscar’s promise, David received the benefit of that promise (paved driveway) and a court might find in equity that Adam has the right to pave.*

Q2

*Co-ownership outline:*

*Esther's title:*

*The property started off as joint tenants. When Able deeded to Esther, he severed the joint tenancy. She is now a 50% tenant in common with Charles.*

*Method of Partition:*

*Historically in kind (physical partition) was favored. Modernly, partition by sale is often the practical solution due to size and nature of property and legal restrictions on lot sizes.*

*Here, in kind could be accomplished (if legal lot sizes are OK), if there were a way to divide the property to allow each party equal value. The problem will be that the home likely increase the value of a lot, the motorcycle track might reduce the value, and the location of each will be important to determine where to divide the property. Otherwise, the property is sold and each party receives half.*

*Accounting in the Partition Action:*

*Charles' occupancy:*

*Co-owner does not owe rent absent and ouster, which did not occur here, so Charles owes Esther nothing.*

*Charles could claim reimbursement for taxes, but he also had sole occupancy so the court could find in equity no 50% reimbursement from Esther.*

*Charles could claim reimbursement for race track, but 1) it might not add value and 2) it was done without co-owner permission so the court could find in equity no 50% reimbursement from Esther.*

*David's occupancy:*

*Esther has no direct claim against David. She cannot evict or demand rent. Esther's sole remedy is to receive half the past and future rental income from David (future pending completing of the partition action)*

Q3

*Nuisance outline:*

*Substantial and unreasonable interference with property rights of another*

*Look to a balancing test of social utility of conduct vs. gravity of harm to others*

*CT actions*

*Many indicators that Alex is an unusually sensitive neighbor. His belief system will not be protected, nor his physical ailments prevented, if Chicken Town's operations are reasonable:*

*CT is operating legally and below allowed capacity*

*Faint odor likely not enough given location of the property*

*Not clear how loud chickens and machinery are – is it loud to an reasonable person or loud to a person with unusual sensitivity*

*Same with sight of feather – would a reasonable person find sight objectionable to a degree requiring a remedy*

*What remedy: Should CT pay damages, be enjoined, or suffer no adverse judgment. Depends on the circumstances discussed above, but judge will not “mediate” the issue – the threshold issue is whether there is a nuisance, then a remedy is determined*

*Alex's actions:*

*Little social utility – predicated on his belief system and harming chickens to prevent harm to chickens is not in furtherance of good policy or social order.*

*Gravity of the harm is clear in that chickens are losing weight or dying, CT thereby likely loses revenue.*

*The conduct is only tangentially related to Alex's desired use of his property, and the conduct is primary aimed at interfering with CT use of their property.*

*Likely a nuisance, and Alex will likely be enjoined and may also owe damages to CT.*

1)

Adam

Easements

An easement is when a person has a non-possessory interest in another person's land. There are five types of easements: express, necessity, prior use, prescriptive, and estoppel.

Appurtenant Easement

An appurtenant easement runs with the land, meaning it remains in effect no matter who the owner is. An easement in gross is specific to a particular owner. This case involves an easement that is an access way, and therefore is an appurtenant easement. ✓

Scope of the Easement

The scope of the easement in this case is a 20-foot-wide strip of land and a drainage ditch along that 20-foot-wide strip of land.

Express Easement

An express easement is an easement that is in writing and signed by both parties. Here, there was never a signed agreement between Oscar (O) and Adam (A) or David (D) and A. Therefore, there was no express easement in this case. ✓

Necessity Easement

A necessity easement can only arise when there is a common ownership of two properties and the ownership is split. If one of the properties becomes "landlocked" a court can grant them a necessity easement that will allow the person to enter the other property to

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access a public road. Whiteacre (W) and Blackacre (B) never had common ownership, so there is no necessity easement in this case. ✓

### Prior Use Easement

A prior use easement can only arise when there is a common ownership of two properties and the ownership is split. If it is apparent the possessor of one property used the land of the others, a court can grant the new owner a prior use easement to allow them to continue to use the land of the other property in the same way. W and B never had common ownership, so there is no prior use easement in this case. ✓

### Prescriptive Easement

A prescriptive easement (PE) is formed when the owner of one property actually uses another property in a hostile, open and notorious manner for a continuous period of time to satisfy the statute of limitations in that jurisdiction. A will argue that he obtained a prescriptive easement in this case.

### Actual Use

To obtain a prescriptive easement, one must actually use another person's property. Here, A will argue that he had often driven across an access way on B from 1998 through 2022, and that constitutes actual use. Additionally, A will argue that he used the access way by grading the access way flat and digging a drainage ditch. A will also point out that O, the previous owner of B, can prove that A used the access way since O was aware of A's use. D will not have a persuasive argument to rebut this, and a court would agree with A that A actually used the access way.

### Open and Notorious

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The party seeking the PE must also use the property in an open and notorious way. A will argue that his usage of the access way was obvious, as he often drove across it, and also made clearly visible improvements to the access way. Furthermore A will argue that not only should the previous owner of B, O, should have known A was using the access way, but that O *did* know, as O gave permission to A to use the access road in 1998, 1999, and 2021. D will not have any persuasive argument to rebut A's argument, and a court would agree that A's use was open and notorious.

### Hostile

The party seeking the PE must also use the property in a hostile manner. That means that the use must be without the owner's permission. Here, D will argue that while O had several issues with A's use of the access way throughout the years, A never used the access way without O's permission. D will argue that O originally granted A permission in 1998, and that the only time O ever withdrew his permission for A to use the access way was in 2021, but after A paid O \$10,000 O once again said A could keep using the access way "as is". When D purchased B from O that permission was still in effect. When a party has permission to use another's land, it is called a license. D will argue that because A had a license to use the access way, A's use could not have been hostile. A may try to argue that because A's original license from 1998 was contingent on him not making improvements and that A did make improvements in 1999 which means the use of the access way was hostile after 1999. D will argue that because O gave permission to A again in 1999 after the improvements were made the use was still not hostile. A court would agree with D, and find that A's use was not hostile as every time O raised an issue with A's use, O ultimately affirmed that A would continue to have permission to use the access way. *only if paid though*

### Continuous

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Finally, to obtain a PE the party must continuously use the property in a hostile, open and notorious way for a certain number of years to be determined by the jurisdiction, which is referred to as the statute of limitations. The statute of limitations in this jurisdiction for PEs is 20 years. A will argue that he used the access way continuously for 24 years, and as such is entitled to a PE. D will argue that because A had a license to use the access way the entire time, A did not use the land in a hostile manner at any time, and therefore the statute of limitations was not satisfied. A court would agree with D and find that because A's continuous use was not in a hostile manner, it does not satisfy the statute of limitations.

Therefore, A would not be granted a prescriptive easement.

### Estoppel Easement

For a court to grant A an EE, A will have to prove that a promise was made to him that A could use B, and A relied on that promise to his detriment.

### Promise

A will argue that on 1998, O promised A that A could use the access way, and then re-affirmed that promise in 1999, 2021, and 2022. D will argue that he never made any promises to A. However, because this is a claim for an appurtenant easement that runs with the land, the license given to A still runs with the land.

### Detrimental Reliance

For an EE it is not enough for a promise to be made, but the party has to rely on that promise to their detriment. Here, A will argue that O agreed to allow A to pave the access way for \$25,000, and based on that promise A hired a construction company. A will also argue that based on the previous license he already spent \$10,000 in 2021 to place gravel on the access way, and that A also invested labor into the access way in 1999 when A

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graded the access way and dug a drainage ditch. D will argue that he never made those promises to A. D will also argue that because W is adjacent to another public road that A can simply use that road to exit B and that A does not "need" to use the access way. A will argue that the other public road is not relevant, because A still relied on a promise he could use the access way to his detriment. A court will likely agree with A and find A did detrimentally rely on O's promises.

### Termination, Abandonment

A will also argue that although there is no possibility of a prior use easement, the access way was very obvious and that D should have known the owner of W was using that access way before D purchased B.

D may argue that when A stopped using the access way it terminated whatever potential easement claim A had because A abandoned the easement. However, abandonment of an easement requires more than the party simply not using the easement. A party must take affirmative action to abandon an easement, like telling the other party they will not use the easement anymore. Because A simply stopped using the access way, never told D he would stop using the access way, and did not do anything like remove the gravel, a court would not consider A's potential easement abandoned.

### Conclusion EE

A court would likely grant A an EE for the access way as is with the gravel.

### Remedies for A and D

There would be an open question as to what the EE will look like. Because D spent money on the fence, A could have to reimburse D to alter the fence to allow for the access way to be accessed. Additionally, because A already hired a paving company to pave the access way, D may have to pay A whatever costs were associated with A

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cancelling the contract to pave the access way. Alternatively, D could simply take the reimbursed money to alter the fence and allow A to pave the access way as he originally planned.

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## Types of Tenancy.

### Joint Tenants (JT)

Joint tenants are parties that share an equal and undivided interest in the property with a right of survivor ship. A joint tenancy must be created by a single document, expressly creating a joint tenancy between the parties at the same time. Because it is an undivided interest, each party has a equal share to the entire property. When A JT is broken, each party gets an equal share, regardless of how much money they put into the property.

A joint teneancy may be broken by transferring an owner's rights to themselves or a third party, a contract for sale or divorce

Here, Able (A) and Charles (C) are stated to be joint tenants of Blackacre (BA) , and remain so until Charles grants his share to Ester (E). A joint tenancy is broken when one party sells or grants the half to a 3rd party, and the joint tenancy is converted into a new tenancy in common between Charles and Ester. ✓

### Tenants in Common (TIC)

Tenants in common hold divided interests in a property. If not expressly stated there is a rebuttable presumption that the shares are equal. A tenancy in common can be transferred or inherited.

Here, after Able sells his shares to Ester, Ester and Charles become Tenants in common. Since Able and Charles were joint tenants, who automatically have even shares, Ester has purchased a right to 50% of Black Acre. ✓

Thus when Ester and Charles enter into partition proceedings they each start out with a 50% interest in Blackacre. ✓

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## Partition and Accounting

**Partition:** A partition is a court remedy to divide a property. this is done by partition in kind, where the property is physically split between the parties, or a partition by sale, where the property is sold and the proceeds divided. Traditionally, Partition in kind is preferred, however modernly it is not always feasible.

**Accounting:** An accounting is a tally of the various debts and credits attached to a land, divided equitably among the parties.

Here, Blackacre is a ten acre lot with (1) single family home on it, and the motorcycle track that Charles added. The home is currently being rented out to David. This makes the land very hard to split in a partition in kind, as the land is not equal. If Ester and Charles enter into a partition proceeding it will likely be partition by sale, while the courts prefer partition in kind, it is far easier to equitably divide money than it is land.

### Rent of Charles

In a Co-ownership, one owner does not owe another owner rent, as long as they allow the other co-owners the same rights to the property as they have. If they have ousted the other party, by not allowing them access to the property, they own that co-owner their share of a fair market value of the property.

Here, Charles lived on BA for three years, and did not pay rent to Able. Able never attempted to access blackacre, so there are no facts that show Charles ousted him. Thus it was fair for Charles to not have to pay rent. This means that in the partition and accounting, Charles does not owe Ester any back rent from his time living at blackacre.

### Rent of David

A Co-owner who rents a property to a third party owes the other co-owners their fair share of the rents collected, minus the related expenses in renting the property.

Here, Charles has been renting Black acre to David. David does not pay any rent to Able and Charles does not share the collected rent with him. This is not fair, and in a partition proceeding, as JT's, Charles would owe Able 1/2 (minus related expenses) of the rent collected from David. However, Ester now owns Able's Share as a TIC with Charles, she has all the rights claims and interest that Able had in the property.

Therefore, Charles now owes Ester the 1/2 the rent collected from David in the last two years, and from the rent he continues to collect from David (Presuming David is allowed to continue renting, See below.)

#### Improvement (motorcycle track)

An co-owner who "improves" a property may only receive back the amount that the improvement adds value to the property regardless of the money spent.

Here, Charles spent 100,000 dollars in putting in a motorcycle race track in the undeveloped land around Blackacre. He will argue that he should get his 100,000 dollars back. However, when the land is sold for a partition by sale, only the amount attributed to the sale from the racetrack will be added to Charles' payout. This means that If the racetrack is a profitable business, this might be a lot of money. if the racetrack is for personal use and the noise may be an nuisance to neighbors it will be far less.

Thus It depends on how much value the racetrack ends up adding to the sale to determine how much of the money Charles will get back on his improvement.

#### Carrying costs

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Property taxes, mortgages and insurances are all carrying costs. A co-owner may ask for compensation for these charges if they have been paying them. Unless they have been in sole possession of the property, and then they may only ask for the amount past the fair rental value of the property.

For the whole five years, Charles has paid all of the property taxes. He will argue that Ester owes him 1/2 of five years of property taxes since she has received Able's shares. However, for the first three years, Charles was the sole occupant of the property, and thus for those three years he will only get back Ester's half of the property taxes that remain after deducting the fair rental cost of the property for those three years.

For the two years where David was renting the property, Charles does have a right to get back 1/2 of the money spent on property taxes for those two years, since he was not longer the occupier of the house. Ester will argue that she should not have to pay those property taxes, as David is the occupier of the house and thus she still cannot use it. However, this will be balanced against her rights to 1/2 of David's rent.

The courts will likely determine that it is fair for Ester to pay back the 1/2 of the taxes from the last two years since she profits off of David's occupancy, but she does not profit for Charles occupancy.

### **Ester's rights to David's Occupations**

Ester has received all the rights that Able had to the property, creating a tenancy in Common with Charles. David has rented out Black acre for two years, and has just signed a lease for the next two years.

Ester will argue that as a new landlord she should have the right to remove David from Blackacre, but David has signed a lease with Charles who is also his landlord. Since the lease is presumably valid, Ester does not have the right to simply remove or evict David at this time. However, she may, as a owner to the property, enforce the lease and may be

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able to evict him if he violates it. Additionally, when the two year lease is finished, she has the right too insist that the lease not be renewed.

Ester will then argue that David signing a lease with David without Able's consent amounts to Ouster, as Able, and now Ester, do not have the right the access they property as they wish. However, renting to a third party is generally not considered an Ouster, unless Charles fails to pay Ester the 1/2 of the rent she is owed.

Partition by sale: To enact a partition by sale, the property must be sold. This is hard to do with David existing as a valid tenant on the land. However, if the courts decided instead that it would be fair to have a partition in kind, granting Charles the right to the home he is rented David and the two acres he improved with the motorcycle track, and Ester the remaining property, then Davids rights as a tenant have not be violated, and Ester has gotten her equitable share of the property.

However, as reasoned above, the partition in kind is likely not equitable, thus if a partition by sale is ordered, the sale of the land will have to wait until David is rightfully removed or his lease is up. Either way, Ester is due her fair share of the rents Charles will collect form David.

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## **Nuisance**

A nuisance is a non-trespassory, substantial, and unreasonable interference with the quiet enjoyment of another's property. A nuisance can be private or public. To determine the rights of Alex and Chicken Town against one another under the doctrine of nuisance, it is necessary to analyse the various facts for public utility compared to gravity of harm, as well as to consider defenses to nuisance.

## **Public Nuisance**

In a public nuisance, an individual is suing on behalf of the public. To assert this, there must also be some special harm done to the plaintiff beyond the harm to the general public. Otherwise, the filing of such a nuisance claim would be the role of the government, not an individual. Here, there is no indication that other nearby residents or business are negatively affected by the odor or noise of chickens, the piling feathers, or the bright lights shining on Whiteacre from Blackacre. Therefore, this is not a case for public nuisance.

## **Private Nuisance**

A private nuisance is a substantial and unreasonable interference with quiet enjoyment specific to the individual seeking remedies for nuisance. Courts will evaluate the significance of a private nuisance by balancing the public utility of the activity against the gravity of harm caused to the complainant.

Here, Alex's quiet enjoyment of Blackacre is being interfered with by Chicken Town. Chicken Town's enjoyment and use of their commercial property Whiteacre is also being interfered with by Alex.

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One key issue is whether either or both of these interferences rise to the level of nuisance. Next, will be to determine what relief or remedy they may be eligible for.

### **Substantial**

A nuisance must be substantial to be a cause for relief.

#### **Substantial - Alex's Claim**

The interference experienced by Alex includes: (1) a faint odor occasionally drifting, (2) compressed bundles of plucked feathers near the property line, (3) noise of chickens, (4) sounds of machinery. Considering the very high number of chickens - 500,000 - it is reasonable to assume that the noise was considerable. Although the odor is described as faint, it causes Alex to become sick whenever he visits Blackacre.

#### **Substantial - Chicken Town's Claim**

The interference experienced by Chicken Farm is very substantial. They have lost some chickens entirely, which is a monetary loss of investment and future revenues. Other chickens have lost weight and suffer from a lack of sleep. It is reasonable to assume that there are additional veterinary costs needed to deal with the impact of the bright lights on the health of the chickens.

### **Unreasonable**

A nuisance must be unreasonable to be a cause for relief. Here, it will be challenging for Alex to show that Chicken Town's actions are unreasonable.

#### **Unreasonable - Alex's Claim**

Alex will argue that the properties were originally in a quiet, peaceful countryside. He will point out that Chicken Town built "immense, industrial chicken houses," which were out

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of character when compared to what had been there before. However, the construction was all legal, and Whiteacre was sold to Chicken Town with the right to house and farm up to 1,000,000 chickens, meaning their current use is only half of what is legally allowed.

Alex may assert that because he is a staunch animal rights activist, and he becomes physically ill, that these amount to unreasonable. Chicken Town will counter that everything they have done is legal.

### **Unreasonable - Chicken Town's Claim**

When Alex installed the bright lights on Blackacre, there was no purpose other than to disrupt the chicken houses on Whiteacre. He pointed the lights directly onto the adjacent property, and there is no indication that these lights could serve any other reasonable purpose. Chicken Town will argue that Alex's installation of these lights was unreasonable because they serve no legitimate purpose.

### **Public Utility vs. Gravity of Harm**

In weighing a nuisance claim, courts will balance the public utility of the activity causing the alleged nuisance with the gravity of harm caused by the alleged nuisance. Here, the two possible nuisance claims have very different balancing results using this analysis.

### **Public Utility vs. Gravity of Harm - Alex's Claim**

For Alex's claim, the court will first consider whether there is public utility in Chicken Town's activities. Chicken Town is a national meat company. They provide food, an essential good for society. They are legally raising their chickens, and employing workers to operate equipment and help with the farm. As employers, and food providers, there is very high public utility in Chicken Town's activities.

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The gravity of harm done to Alex by Chicken Town's activities is comparably low. He becomes physically ill when he visits Blackacre, but he does not live there so that is a temporary concern. The greater harm to Alex is that he "felt" he will not be able to build his home on Blackacre. Although this is not negligible, Alex has incurred no construction costs and suffered no permanent injury or damages.

Based on the above considerations, the court will likely find that the public utility of Chicken Town's activities outweighs the Gravity of Harm done to Adam.

### **Public Utility vs. Gravity of Harm - Chicken Town's Claim**

For Chicken Town's claim, the court will consider whether there is public utility in Alex shining bright lights on the chicken houses across the fence from Blackacre. There is no reasonable purpose for these lights, they are not providing any benefit to anyone--indeed, not even Alex. There is essentially zero public utility in the lights.

On the other hand, the gravity of harm to Chicken Town is measurable monetary damages, including lost profits and lost investment in the form of chickens dying.

Based on these considerations, the court will almost certainly find that the gravity of harm done by Alex to Chicken Town substantially outweighs any public utility offered by the lights.

### **Intentional Nuisance**

An intentional nuisance is one that is created willfully, and that results in significant, substantial, and unreasonable harm. To determine intent, courts will look at the conduct of parties, not just the result of their actions. Here, Alex set up bright lights and intentionally pointed them to Chicken Town. Chicken Town will argue that they have lost investment revenue, future profits, and incurred additional medical expenses as a result of

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the unreasonable, egregious, and materially significant harm caused by the bright lights installed by Alex.

Because his conduct shows a willful intent, and there was serious harm caused, a court would almost certainly recognize Alex's setup of the bright lights as an intentional nuisance.

### **Unintentional Nuisance**

For a nuisance to be unintentional, there must be recklessness, negligence, or some ultra-hazardous condition that is created. Chicken Town was not negligent or reckless in their construction--all indication is that it was legal, safe, and performed in line with all necessary statutes and codes. Alex may try to assert that there is some negligence in allowing the feathers to stack near the property line, or to not do something to contain the noise or odor, but neither of these are likely to be seen as negligent or reckless in the view of the court.

As for ultra-hazardous, Alex will argue that the nuisance caused by Whiteacre is hazardous because he becomes physically ill whenever he visits Blackacre. To establish this element, Alex will need to show that a reasonable person would also be made physically ill by the odor and other sensory input caused by Whiteacre.

### **Nuisance per se**

Another type of nuisance is nuisance per se, which is nuisance as determined by statute. There is no indication that Alex's installation of the lights violated any ordinance, and Chicken Town's construction and farming has all been specifically legal. Therefore, there is no nuisance per se related to either claim.

### **Super-Sensitive Plaintiff**

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When a plaintiff brings a cause for nuisance and they have sensitivities that are extreme or that contribute to the impact of the nuisance on their well-being, courts will not take that plaintiff as they are. Rather, they will base their evaluation on a reasonable person standard. In the same situation, would a reasonable person have a similar reaction?

The odor is described as "faint" and "occasionally drifted" -- this language suggests that the offensive smell is intermittent, and that it is not overwhelmingly powerful. Unless Alex can show that a reasonable person would also get sick when visiting Blackacre, he will not be able to show that the nuisance is ultra-hazardous.

### **Coming to the Nuisance**

A partial defense to nuisance, coming to the nuisance may be raised when the nuisance already existed before the party moved nearby. Here, when Alex bought Blackacre, there was already a chicken farm next door at Whiteacre. Chicken Town will use this fact to argue that Alex came to the nuisance. Although Bob raised only 300 chickens, it was a fifty-acre parcel, clearly one with plenty more room to work with than for just 300 chickens.

With a little bit of asking around or research, Alex could have easily discovered that Bob was legally entitled to have up to 1,000,000 chickens. The court will weigh how foreseeable was it that a reasonable person in Alex's position would have known that a much larger chicken farm could be developed on Whiteacre.

Another consideration in coming to the nuisance is intensification of use. There is a major difference between 300 chickens and 500,000 chickens. Chicken Town intensified their use of Whiteacre substantially since when Alex "came to the nuisance."

### **Rights and Remedies**

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Rights and remedies for nuisance include injunction, monetary damages, abatement, zoning changes, or none at all if the plaintiff loses entirely.

### **Types of Injunction**

Injunctions for nuisance include:

1. Preliminary injunction - these are requested before trial, and the plaintiff must show that they are more likely than not to succeed in their claim, and that they will suffer harm in the meantime.
2. Permanent injunction - a court will issue a permanent injunction after trial to be effective in the future.
3. Prohibitory injunction - courts favor a prohibitory injunction, which is an order to not do something. These orders are easier to monitor than mandatory injunctions.
4. Mandatory injunction - a court orders a party to do something when they issue a mandatory injunction. These orders are difficult and require more resources to monitor, and are less favored by courts.

### **Preliminary**

Alex and Chicken Town will both want to file a preliminary injunction. Alex will ask that the court order Chicken Town to cease its machinery and shut down operations. For this to succeed, Alex would have to show a serious risk of harm in the meantime. Because he does not live at Blackacre currently, he is not forced to be there. It is unlikely that the court would grant such an injunction.

Chicken Town will seek a preliminary injunction to order Alex to turn off the lights until the trial is complete. Because the lights are causing an immediate and documented harm,

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and there is no other way for Chicken Town to alleviate that harm, the harm is substantial.

Chicken Town will also have to show that they have a better chance than not of winning the case. Because they can show an intentional private nuisance by Alex, supported by damages, and considering the severity, the court will likely view the motion favorably.

### **Permanent, Prohibitory, Mandatory**

Both parties will seek a permanent injunction at the conclusion of the trial. Chicken Town will want a prohibitory permanent injunction to force Alex to remove the lights. Alex will want either a permanent prohibitory injunction to completely stop Chicken Town from operating, or a mandatory permanent injunction to reduce the size of their operation.

### **Monetary Damages**

Monetary damages may be past damages, for past harms, or future damages, which is a one-time payment in exchange for permission to continue with the alleged nuisance activity.

### **Alex's Claim for Nuisance Summarized**

Alex will allege an unintentional private nuisance by Chicken Town. He will argue that the harm he suffers is substantial, and that Chicken Town's activities are unreasonable. Chicken Town will counter that their activities are legal, and that the parcel is in an otherwise rural ("country") region. Chicken Town will refute any attempt by Alex to raise a moral issue as an animal rights activist, and will challenge his claims of being ill, on the grounds that he has unreasonably severe sensitivities. Only if a reasonable person would experience the same degree of harm and interference as Alex, would his claim be valid.

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The only way that Alex could succeed at his nuisance claim would be to show that a reasonable person would be as sick as he is by the odor, thus proving that there was a substantial and unreasonable interference with his quiet use and enjoyment of Blackacre. However, any injunction against Chicken Town would be extremely unlikely. Chicken Town is operating a legal farming business, and the court has no incentive nor interest in interfering with the proper commercial use of a property. Therefore, a prohibitory injunction would not be a reasonable remedy. A mandatory injunction to reduce operations would be even less likely, as the court would have no desire to monitor progress towards some goal of operating levels.

This would leave Alex with the possibility of being awarded monetary damages. So far, he has not incurred significant past damages. Even though he had planned to build on Blackacre, he has done nothing to invest in the property. Therefore, past damages would not be appropriate. That would leave future damages.

If Alex is able to show that a reasonable person would be sick from the odor, and that this harm substantially interferes with his use of Blackacre, he could be entitled to some small future monetary damages. This would be a one-time payment from Chicken Town to Alex, after which Chicken Town would be free to continue as they have been.

If Alex is not able to show that a reasonable person would be equally sick from the odor, then as a super-sensitive plaintiff, the gravity of harm to him would not be based on his subjective experience, but upon the objective "reasonable" person standard. In that case, considering the high public utility of the chicken farm, Alex would likely lose his claim and receive no relief.

### **Chicken Town's Claim for Nuisance Summarized**

Chicken Town will allege an intentional private nuisance by Alex. They will argue that they have suffered significant and substantial monetary harm, incurred additional

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expenses, and lost future revenues. Chicken Town will point out that there is no reasonable purpose for the bright lights, and that they are so bright the chickens cannot sleep and are becoming ill and dying--clearly a substantial interference. Chicken Town has a very strong claim for this intentional private nuisance.

Chicken Town will first seek a preliminary injunction to have Alex turn off the lights. Later, if they win their claim, they will ask the court for a permanent prohibitory injunction preventing Alex from shining lights on Whiteacre in the future.

Further, they will provide an accounting for their lost revenue, additional veterinary and animal care costs, and any other business costs directly resulting from the additional care needed for the chickens. They will ask the court to award a monetary judgment for past damages in this amount.

**END OF EXAM**

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