

QUESTION 3

Len, an excellent chef, installed a smokehouse in his backyard three years ago to supply smoked meats to his friends. Len's neighbor, Michelle, enjoyed the mild climate and spent most of her time outdoors. She found the smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. She asked Len multiple times to stop using the smokehouse, but he rebuffed her requests.

Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Michelle put up a "no trespassing" sign and a wire fence between their parcels. After the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least ten years and wouldn't stop now.

Last week, the Town filed suit to condemn Michelle's land for a public park. It tendered to the court as compensation a sum substantially exceeding the prices of comparable parcels recently sold in the neighborhood. Michelle argues that the amount is insufficient because it is substantially less than a sum she turned down for her parcel a few years ago and it does not include compensation for relocation costs.

1. If Michelle sues Len regarding his continued use of the smokehouse, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.
2. If Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.
3. Is Michelle likely to prevail in her argument for additional compensation from Town? Discuss.

QUESTION 3: SELECTED ANSWER A

Property/Tort (Nuisance), Torts (Trespass/SL), Property (easement by prescription),
Con Law (Takings)

1. Smokehouse

a. Private Nuisance

A private nuisance is any substantial and unreasonable interference with the use and enjoyment of property.

i. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, M finds the smoke and smell annoying, so much so that she stopped having parties. This is, however, irrelevant.

It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. If the smoke is found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. This is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is

reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse is unreasonable because it prevents her from enjoying the outdoors in the way which she had done for years. Furthermore, it prevents her from having her parties, and likely depreciates her property somewhat.

However, L will counter that the smokehouse enables him to hone his skills as a chef and provide smoked meats to his friends. He will argue that these activities are of substantial benefit.

However, because L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse will likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. Interfering with access to light traditionally has not met this standard. However, the introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke is only offensive in that it blocks light, and that therefore there is no interference.

M will counter that the smell component of the nuisance is fundamentally particulate in nature, because of how noses work (discussion omitted). Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property.

Because there is some degree of physical trespass, M will succeed in demonstrating interference

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance.

Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence, M could succeed in an action for private nuisance. (see statute of limitations, below)

Remedy

Generally, the remedy for a private nuisance is an injunction. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages may be awarded instead.

Here, L's smokehouse serves limited economic purpose, and does not benefit the community as a whole. Therefore, M will likely receive an injunction.

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large.

i. Standing

Public nuisance has strict standing requirements. In order to collect under public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. Therefore, M lacks standing to bring a public nuisance cause of action.

c. Statute of Limitations

The statute of limitations serves as an absolute bar to legal action. For most causes of

action, the statute of limitations is one year from the time the cause of action arises. However, continuous actions can be recovered for any violation within the previous year.

Here, L started using his smokehouse 3 years ago. While this initial use would be outside the statute of limitations, L has used the smokehouse continuously. M will still be able to obtain an injunction against current and future use.

2. Fetching the Dog

a. Trespass

A trespass is any physical occupation of real property without permission.

i. Intent

A trespass only occurs if the trespasser actually intended to occupy the land. The trespasser's knowledge about the ownership of the land is irrelevant. A mistaken belief that they had the right to enter the land is not a defense. In essence, trespass is a strict liability offense.

Here, L entered M's property past a fence with a no trespassing sign. L intended to enter the property, so the intent requirement is met.

ii. Physical Presence

The trespasser must be physically present on the property.

Here, L actually entered M's property. The physical presence test is met.

iii. Without Permission

The property owner must not have consented to the trespass, impliedly or expressly.

M did not expressly consent to the trespass. Any implied consent from the adjoining nature of their properties was withdrawn when M constructed the fence. M did not consent to the trespass.

iv. Damages

There is no requirement of actual harm. Nominal damages are recoverable.

Here, M can recover nominal damages for L's trespass. Additionally, she can recover from the actual harm she suffered when L cut the wires on the fence (cost of repairs).

b. Defenses

i. Necessity

a. Private Necessity

Private necessity exists when exigent circumstances cause the trespass. For example, docking a ship on a storm constitutes a private necessity, or swerving to avoid an obstacle on the road. Private necessity allows the avoidance of nominal damages and ejection.

Here, L trespassed in order to retrieve his dog. L needed to trespass in order to ensure that his dog was safe and that it did not cause any damages to M's property without his supervision, since he could be held liable for such damages. As such, private necessity exists, and M cannot eject L or collect nominal damages.

I. Private Necessity - Limitations (Actual Damages)

Private necessity fundamentally involves a balancing of the risk of not trespassing and harm inflicted by trespassing. The trespasser has the ultimate decision on the balance of these factors. As such, the trespasser is traditionally held responsible for any actual damages that occur as a result of the trespass.

Here, L caused actual damages when he cut through M's fence in order to retrieve his dog. As such, L is responsible for actual damages despite the necessity.

b. Public Necessity

Public necessity exists when the trespass is necessary to prevent harm to the public at large. Unlike private necessity, the landowner cannot collect actual damages from public necessity.

Here, the necessity was solely to protect L's dog and prevent L's liability. There was no

benefit to the public at large, and therefore no public necessity. L remains liable for actual damages.

ii. Easement

a. Implied Easement by Prescription

Easements grant the dominant estate (or a party in limited circumstances) the right to use the subservient estate for limited purposes. An implied easement has no writing requirement. An easement by prescription functions similarly to adverse possession of a property, but only for a limited use. In order to establish that there is an easement by prescription, the seeker of the easement must demonstrate **(1) continuous use of the subservient estate, (2) for a statutory period, (3) that was open and notorious, and (4) hostile**. Unlike in adverse possession, there is no requirement that the easement holder have had exclusive use over the property, since the easement does not eliminate the property owners' rights entirely.

i. Continuous Use

The use must have been continuous throughout the statutory period. It need not have been constant, but must have been reliable enough for the scope of the easement sought.

Here, L claims that he had been fetching his dog for 10 years. Because he did so "frequently", this is likely continuous use.

ii. Statutory Period

The use must have lasted the statutory period (usually 7-14 years)

Here, it is unclear what the statutory period for adverse possession is in the jurisdiction. It is likely 10 years or less just based on average AP statutes. As such, the statutory period requirement is met.

iii. Open and Notorious

The use must have been such that an observant landowner would be aware of it. In essence, the landowner must have been put on inquiry notice of the use.

Here, L invaded M's patio. For 7 of the 10 years, M regularly spent time outside and

likely observed his actions. Furthermore, even after M abandoned the outside due to the smoke, she should have observed L walking on her patio. As such, the open and notorious requirement is met.

iv. Hostile

The use must have been without the permission of the landowner. Otherwise, there is a freely revocable license.

Here, it is unclear whether or not M consented to the use prior to erecting the fence.

b. Right to Protect Easement

An easement holder has the right to protect their easement from interference, even from the landowner. This includes the dismantling of any barrier erected as an impediment to that easement.

If L had not received permission to trespass on M's property at any point, then he likely has an easement (assuming the statutory period is met). However, if he had permission to retrieve his dog, then there will be no easement.

If there is an easement, L is not vulnerable to nominal damages or ejection for trespass, so long as the trespass is for the purpose of retrieving his dog. Additionally, L has the right to protect his easement by demolishing or circumventing barricades such as M's fence. As such, he is not liable for actual damages either.

3. Town's Suit

Government entities have the right to "take" property, providing that "just compensation" is provided. In order to take, the government must merely show that the taking is rationally related to a legitimate government purpose.

Town is a government entity.

a. Legal Taking

If the taking was illegal, than M may be able to retake her property or receive additional damage. As above, a taking must be rationally related to a legitimate government purpose. Here, T took the property for the purpose of building a public park. Building a public park is a legitimate purpose. Additionally

b. Just Compensation

Generally, the compensation must merely be equal to the full market value at the time of the taking, including the value of any improvements. Fair market value can be determined by appraisal or by the sale of comparative properties.

Here, the government determined the FMV by paying based on comparable properties in the area. Assuming that those properties actually were comparable, including the cost of any improvements, the compensation was just. If M can demonstrate that the other properties were defective, she can recover more.

However, the prior offer to purchase M's property is likely not relevant. Current FMV is the indicator for just compensation, not prior FMV. If the increased value was due to mineral rights or something, than M can likely recover more, but otherwise she is probably out of luck.

c. Relocation Costs

The government may be liable for losses resulting from reliance on the assumption that there would be no taking. For example, the government may be required to compensate a party for the cost of recent improvements. However, the government is not responsible for other costs, such as the costs of finding a replacement property.

Here, M is seeking relocation costs. However, these costs were not incurred on reliance of the assumption that her property would not be taken. Additionally, they were not incurred based on any recent improvement to her property. They are the types of cost incurred in almost every taking, and as such M is not entitled to additional compensation.

QUESTION 3: SELECTED ANSWER B

1. Whether Michele may assert any claims against Len for his smokehouse.

Michelle is most likely to succeed against Len in a claim for private nuisance. To state a claim for private nuisance, the plaintiff must allege that the defendant's conduct constitutes a substantial and unreasonable interference with the use and enjoyment of her property. Interference is substantial if it would be annoying or offensive to an average member of the community. Interference is unreasonable if the harm to the plaintiff outweighs the benefit of defendant's activity. If there are other members in the community, Michelle may also make a claim for public nuisances. However, it is harder to plead these threshold elements. A claim for public nuisance requires that defendant's activity constitute a substantial and unreasonable interference with the use and enjoyment of the property of the public at large, and at least one homeowner suffers specific injury that is distinct from the common injury suffered by the community. Since the facts do not support a public nuisance claim and do not allege a community of homeowners, Michelle is best off bringing a claim for private nuisance.

What is the nuisance?

Michelle will argue that the smokehouse Len installed in his backyard is a nuisance because, while it smokes the meat, it produces smoke and smells that waft over to Michelle's property and prevent her use and enjoyment of it. Len installed the smokehouse three years ago and he uses it to supply smoked meats to his friends. Len is an excellent chef, so presumably his smoked meats are in high demand. Michelle enjoys the climate near her home and enjoys spending time outdoors. She used to have parties outdoors, but she stopped doing that after she received complaints from her guests. Even though she has asked Len to stop using the smokehouse, he has

refused.

Based on these facts, Michelle should argue that the smoke and smells from Len's smokehouse are a substantial and unreasonable interference with the use and enjoyment of her property because they prevent her from spending time outside.

Is it a substantial interference?

Interference is substantial if the interference would be annoying or offensive to an average person in the community. Based on these facts, the smoke and smells from Len's smokehouse is substantial. An interference is not substantial if it is annoying or offensive to the plaintiff because of her particular traits or sensitivities. Here, nothing in the facts suggests that Michelle has specific sensitivities. Moreover, she has guests over and they also find the smells and smoke to be annoying and they find it unpleasant to be outside. The smokehouse not only prevents her from having outdoor dinner parties (which Len will argue are a specialized use of the property and do not give rise to nuisance) but from spending time outdoors as she enjoys.

It is important for Michelle to focus on the harm that she suffers as an average member of the community. If she alleges that the harm is that she cannot have outdoor dinner parties anymore, her claim for nuisance may fail because Len will argue that the nuisance arises from her particular circumstances. It is important for Michelle to show that having a few friends over for dinner is a regular part of being a homeowner.

Michelle's strongest argument is that the smoke and smells prevent her from being outside and enjoying her property. She should use her friends as evidence that the smoke and smells are offensive to an average person.

Is it an unreasonable interference?

Interference is unreasonable if the harm to plaintiff outweighs the benefit to defendant. Here, the harm Michelle likely outweighs the benefit to Len. Michelle can no longer enjoy the outdoors on her property, something that she enjoys doing. Therefore, she has been deprived of the use and enjoyment of her property. Michelle will argue that Len's harm is slight - she is merely asking him to stop using the smokehouse in his backyard. Although Len is a chef, the facts do not indicate that he's smoking the meat for commercial gain or as part of his livelihood. Len is merely providing the smoked meats to his friends, gratuitously. Accordingly, the harm to Len is slight if he has to stop using the smokehouse. Len will argue that the smokehouse cost a lot of money, and he will be harmed greatly, because he will not be able to reap the benefit of his investment. On balance, Michelle will probably prevail that the interference is unreasonable.

Defenses

Len will probably assert the defense of laches and argue that too much time has passed for Michelle to assert this claim. He will argue that he installed the smokehouse 3 years ago, and this is the first time that she is alleging it is a nuisance. In response, Michelle will argue that she tried to live with it, but after three years, it was clear that the smokehouse would permanently deprive her of the use and enjoyment of her property. She will also bring up that she asked Len, multiple times, not to use the smokehouse, and tried to arrive at a compromise. Len, however, rejected her attempts to deal. Since she and Len were not able to resolve it privately, she is finally bringing suit. Len will probably not prevail on his defense of laches.

Outcome

Michelle is likely to prevail on her private nuisance claim. Since the remedy for nuisance is often an injunction, or a court order telling a person to act or not act, the

court may balance the harms. Instead of granting a complete injunction against Len using the smokehouse, the court may limit his use so that it does not substantially and unreasonably interfere with Michelle's use and enjoyment of her property. An injunction may permit Len to use the smokehouse for a certain number of hours or to give Michelle notice that he will use it. An injunction may also order Len to install some technology to limit the smoke and smells coming from the smokehouse. While Michelle will likely prevail on her claim, Len's own right to the use and enjoyment of his property will probably block her from obtaining a complete injunction.

2. Whether Michelle may assert any claims against Len for fetching his dog from her patio.

The issue here is whether Michelle may assert a claim against Len for trespass for fetching the dog (not for the dog itself), and whether Len has any valid defenses.

The elements of trespass are 1) intentional act, 2) entering the land of another, 3) causation, 4) damages. The interference with the property right is sufficient for damages. The facts state that Len's dog had been entering the property for years and that Len repeatedly entered the property to fetch the dog. Michelle will argue, on these facts, she has stated a valid cause of action for trespass. Len intentionally enters her land and retrieves her dog. Her damages/injury is the injury to her property right and her right to keep trespassers from her property. Len's conduct is the actual cause of her injury.

Len's Defenses

Privilege

Len will argue that his entrance onto the land was privileged because he was retrieving

his property, the dog. However, when an animal is on another's property, the owner is not privileged to go and retrieve it himself without giving notice to the landowner. Len's entrance onto the land would only be privileged if he informed Michelle that his dog was on her property and he intended to retrieve. She would then be compelled to allow him to retrieve it at a reasonable time and in a reasonable manner. The facts state that no such communications occurred. Therefore, Len's entrance onto land was not privileged.

Prescriptive easement

Len will argue that he has an easement by prescription to enter Michelle's property and retrieve the dog from the patio. An easement is a nonpossessory right in land. Here, Len will argue that there is an easement appurtenant. His land is the dominant tenement, and Michelle's land is the servient tenement. He has a right to use the servient tenement within the scope of the easement.

An easement by prescription is an easement that is acquired through use over time, and the elements are similar to those of adverse possession. The use of the land must be continuous for the statutory period (usually the same as adverse possession), open and notorious, and hostile to the landowner. Here, the facts state that Len has been entering the property and retrieving the dog from the patio for the last 10 years. In many jurisdictions, ten years is the applicable period for the statute of limitations. Therefore, the first element is likely satisfied. Second, his entrance has been open and notorious. First, Michelle knows that Len regularly enters her property, because sometimes the dog is there and sometimes it is not. Based on Len's statement to Michelle, he does not try to keep it a secret that he regularly enters her property. Additionally, Michelle installed a fence and 'no trespassing' signs, showing she was aware of the trespass. Therefore, the open and notorious factor has likely been satisfied. Finally, the entrance is hostile because Len enters knowing it is not his land and knowing that Michelle considers him a trespasser.

Michelle may argue that Len merely had a license to enter her property and remove the dog from the patio, and that she revoked his license to do that when she built the fence and put up the signs. A license is not a right in land, it is merely permission to enter the land of another. Michelle will argue that she implicitly granted Len a license to retrieve the dog from the patio, however she chose to revoke that license, and built a fence so the dog would not enter her property and Len would not retrieve it. Len then clipped the fence and trespassed onto her property.

Michelle may not succeed in an action alleging that all of Len's entrances onto her land constituted trespass. However, she will probably prevail in an action for any trespass that occurred after Len clipped the fence and re-entered her property. Moreover, clipping the fence on Michelle's property constitutes trespass to chattels (interference in the use and enjoyment of personal property) which is actionable.

3. Whether Michelle is likely to prevail in her argument for additional compensation from Town.

The issue here is whether Town has provided Michelle with just compensation for her property.

Takings

Under the 5th Amendment, the government is permitted to condemn private land for public use so long as it provides the landowner with just compensation. Just compensation is measured as fair market value at the time of condemnation. Here, the condemnation is likely valid because the government is taking the land for a public use, to create a public park. The facts state that Town has offered Michelle a sum "substantially exceeding the prices of comparable parcels recently sold in the neighborhood." Generally, the way to determine fair market value for real property is to look at recent sales of similar parcels in the area. Here, Michelle will receive even more

than the sale price of comparable lots. While this isn't a guarantee of fair market value, it makes it likely that she is receiving fair market value. However, Michelle will still point out the sum she turned down a few years ago. The fact is that the market a few years ago is not the current market, and a pass offer does not affect the value of property under takings law. She will also argue that the price is insufficient because it doesn't provide compensation for relocation. However, the Takings Clause does not require the government to compensate landowners for relocation costs. Accordingly, Michelle's challenges to the Town's taking will probably not prevail. If she wants to challenge the purchase price, she must have her land appraised and sue the government in court, arguing that what they offered her is below market compensation.