

## EXAMINERS' ANALYSIS OF QUESTION NO. 6

The question requires discussion about the three different nuisance claims brought by Paul against Smith. Though there is some room for debate on the nuisance in fact claim, ultimately Paul cannot maintain any nuisance claim against Smith.

### 1. PRIVATE NUISANCE

A private nuisance comprises both nuisance-in-fact and nuisance per se, *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269 n 5 (2008), and "is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302 (1992). An actor is subject to liability for a private nuisance if

(a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Id.* at 304.]

#### A. NUISANCE IN FACT

Nuisance in fact is an act that becomes a nuisance "by reason of the circumstances and surroundings." *Ypsilanti Charter Twp*, 281 Mich App at 269 n 5. Under the facts presented, Paul can establish some of these elements, but not all. First, Paul had property rights to the use and enjoyment of his property. Second, Paul will have a tough argument that the invasions caused by Smith, the noise and smoke, resulted in significant harm to him. Smith can reasonably use his property as he sees fit, although he cannot do so if it causes significant (rather than de minimis) harm to an adjoining property owner. *Adkins*. at 310. The harm to Paul-not being able to use his yard at all, and losing sleep because of the constant and excessive noise-is de minimis, and it appears to be

temporary. Since Smith has removed all his trees, he will no longer be cutting trees with the tractor. And, presumably, he will no longer be burning the cut down trees 24 hours a day. Lacking a degree of permanence, Paul will have difficulty proving this element. *Id.* at 308. Third, Smith clearly caused the invasion, and it was intentional, particularly after Paul informed him of the damage it was causing to his enjoyment of his property. Fourth, and finally, Paul can establish that Smith was acting unreasonably because of continuing to burn the wood, and run the tractor, on a virtually 24 hour a day period, as his conduct interfered with Paul's use and enjoyment of the land. Paul will be unsuccessful on his nuisance in fact claim. Because this is a factually based, and somewhat subjective determination, an answer that covers the proper factors but comes to a different conclusion should receive the same credit.

#### B. NUISANCE PER SE

"[A] nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings," *Ypsilanti Charter Twp v. Kircher*, 281 Mich App at 269 n 4. See, also, *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427 (2009). The burning of wood and running a noisy tractor is not under all circumstances a nuisance, as it would likely not be a nuisance or disturbance under these facts were it not occurring next to a populated subdivision. For example, if it occurred in a sparsely populated agricultural setting it would not rise to that level. Thus, because it is the location in which the activity is occurring that makes it a nuisance, it is not a nuisance per se. *McKee v Dep't of Transportation*, 132 Mich App 714, 724 (1984).

#### 2. PUBLIC NUISANCE

A public nuisance was described in *Cloverleaf Car Co v Phillips Petroleum Co.*, 213 Mich App 186, 190 (1995), as "an unreasonable interference with a common right enjoyed by the general public." Additionally, the Court outlined what criteria to consider when determining if specific conduct constitutes an "unreasonable interference:"

The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's

health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [Id. (citation omitted).]

Paul will not be able to prevail on his public nuisance claim. Although he can prove that he suffered a harm different than those in the general public, nothing in the facts reveal that the noise or smoke interfered with the general public health, safety, peace, comfort or convenience. In cases where the offending action only impairs the enjoyment of one property owner, a public nuisance will not be found. Nor is there anything in the facts indicating a "permanent or long-lasting" effect on Paul's enjoyment of his property. Presumably once the last tree was cut, the noise and smoke ended.

For these reasons, the best answer is that Paul will not succeed on any of his nuisance claims.