PJC 7.1  Negligent Hiring of Employee

QUESTION _____

Was ABC Company negligent in hiring employee Don Davis?

An employer is negligent in hiring an employee:

1. if the employer failed to use ordinary care when investigating, screening or supervising a prospective employee before hiring the employee and, in the exercise of such care:

   a. would have discovered the risk of harm presented by the employee and would not have hired the employee;

   or

   b. had been put on notice that hiring the employee would present a risk of harm to others; and

2. the risk of harm to others presented by the employee proximately caused the [occurrence][injury][occurrence or injury].

Answer “Yes” or “No.”

Answer: _____________________________

COMMENT

When to use. In addition to the vicarious liability that may be attributable to an employer for the negligent conduct of its employee, an employer may also be deemed to have direct liability for its own negligence in failing to use ordinary care in its original selection and hiring of the negligent employee. Such liability attaches where the exercise of such ordinary care by the employer would have revealed the risk that ultimately caused the plaintiff’s injury. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 240 (Tex. 2010) (“In a negligent-hiring or negligent-entrustment claim, a plaintiff must show that the risk that caused the entrustment or hiring to be negligent also proximately caused plaintiff's injuries.”); see also Fifth Club, Inc. v. Ramirez, 196 S.W.3d 788, 796 (Tex. 2006) (“Negligence in hiring requires that the employer's ‘failure to investigate, screen, or supervise its [hirees] proximately caused the injuries the plaintiffs allege.’”).
**Background check must disclose the risk.** To sustain such a claim based on a failure to exercise ordinary care in the screening and investigation of a prospective employee, a plaintiff must show that anything found in a background check “would cause a reasonable employer to not hire” the employee, or would be sufficient to put the employer “on notice that hiring [the employee] would create a risk of harm to the public.” *Fifth Club*, 196 S.W.3d at 796–97. The plaintiff must also establish that the risk that should have been exposed by the use of ordinary care in the employer’s screening, investigation or supervision proximately caused the accident at issue. *TXI Transp. Co.*, 306 S.W.3d at 240. A plaintiff will not succeed on a negligent entrustment or hiring claim where an investigation would not have revealed the risk. *Id.*

**Foreseeability of harm.** It is not sufficient for a plaintiff to show that, if the employer had used ordinary care in its investigation of the prospective employee, it would not have hired the negligent employee. The plaintiff must establish that the risk that would have been disclosed by the employer’s investigation proximately caused the plaintiff’s injury. See, e.g., *TXI Transp. Co.*, 306 S.W.3d at 241 (“We agree with the court of appeals ‘that neither Rodriguez's status as an illegal alien or his use of a fake Social Security number to obtain a commercial driver's license created a foreseeable risk that Rodriguez would negligently drive the gravel truck.’”); *Fifth Club*, 196 S.W.3d at 796 (noting that the fact that nightclub might not have hired off-duty police officer as security if it had known that the officer had been reprimanded for using profanity to a member of the public and that such off-duty employment was prohibited by the city did not create liability because these incidents would not have put the nightclub on notice that hiring the officer would create a risk of harm to the public) (“It does not show foreseeability of harm to the public by West.”).

**Harm suffered must arise from an actionable tort.** An employer can only be held liable for negligent hiring if the employee at issue committed an actionable tort. See, e.g., *Brown v. Swett & Crawford of Texas, Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (“To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff.”); *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App.—San Antonio 1999, no pet.) (“In the context of negligent hiring claims, if the employee did not commit an actionable tort, the plaintiff has not been injured in the eyes of the law; therefore, the employer's negligence has not caused a legally compensable injury.”), overruled in part on other grounds by *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447–48 (Tex. 2004)

**Existence of a claim for negligent hiring.** In a footnote of a 2010 opinion, the Texas Supreme Court put into question the very existence of a common-law cause of action for negligent retention and supervision of an employee by an employer. In *Waffle House, Inc. v. Williams*, the Supreme Court declared in a footnote that it had “not ruled definitively on the existence, elements, and scope of such torts [as negligent retention and supervision of an employee by an employer] and such related torts as negligent training and hiring.” 313 S.W.3d 796, 804 n.27 (Tex. 2010). The Court followed this declaration, however, with citation to several of its precedents that suggested otherwise. *Id.* (“But see *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 790, 796–97 (Tex.2006) (holding that no
evidence supported jury findings that defendant was negligent in hiring and retaining independent contractor); *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953-54 (Tex.1996) (per curiam) (holding that no evidence supported claim that defendant was negligent in hiring employee); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477-78 (Tex.1995) (holding that no evidence supported element of causation, ‘[a]ssuming without deciding that [defendant] owed the plaintiffs the duty to exercise reasonable care” to investigate, screen, or supervise its volunteer workers.’)).” The Court went on to note that the *Waffle House* case “does not present an occasion to address these issues.” *Id.*

Rebuttable presumption of no negligence for in-home service or residential delivery companies. Section 145.001 of the Texas Civil Practice & Remedies Code provides that an in-home service company or residential delivery company is rebuttably presumed not to have acted negligently if: (1) at the time a person was hired, the company obtained criminal history record information regarding the officer or employee under Section 145.002(1) of the Civil Practice & Remedies Code; and (2) the criminal history record information shows that, in the 20 years preceding the date the information was obtained for a felony or in the 10 years preceding the date the information was obtained for a Class A or Class B misdemeanor, the officer or employee had not been convicted of or placed on deferred adjudication for: (a) an offense against the person or family; (b) an offense against property; (c) public indecency; or (d) an offense in another jurisdiction that would be considered one of the offenses listed in (a), (b) or (c) in Texas.

**Submission.** The leading Texas Supreme Court cases on negligent hiring include “investigate, screen or supervise” language. See, *e.g.*, *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 706 (Tex. 2006) (“Negligence in hiring requires that the employer's ‘failure to investigate, screen, or supervise its [hirees] proximately caused the injuries the plaintiffs allege.’”); *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (1995) (“Assuming without deciding that the Boys Club owed the plaintiffs the duty to exercise reasonable care in investigating its personnel and that it breached that duty, we focus on the issue whether the Boys Club's failure to investigate, screen, or supervise its volunteers proximately caused the injuries the plaintiffs allege.”). *But see NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953 (Tex. 1996) (discussing plaintiff’s separate claims for negligent hiring and negligent supervision). The Committee notes that “investigate, screen or supervise” may constitute alternative theories of recovery which, under certain circumstances, may warrant separate submission in lieu of broad form. See the discussion of broad form submission in the Introduction to this Volume, Section 4a.
PJC 7.2 Negligent Hiring of Independent Contractor

QUESTION _____

Was *ABC Company* negligent in hiring independent contractor *Don Davis*?

An employer is negligent in hiring an independent contractor:

if the employer failed to use ordinary care when inquiring into the qualifications and background of the independent contractor *and*, in the exercise of such care, employer would have:

a. discovered the risk of harm to others presented by the incompetence of the independent contractor;

*or*

b. been put on notice that the incompetence of the independent contractor would present a risk of harm to others; and

2. the risk of harm presented by the independent contractor proximately caused the [occurrence][injury][occurrence or injury].

Answer “Yes” or “No.”

Answer: ________________________________

COMMENT

**When to use.** Although, except under limited circumstances, an employer will not be deemed liable for the negligence of an independent contractor, an employer may be held liable for its own negligence in hiring the negligent independent contractor. *See Duran v. Furr’s Supermarkets, Inc.*, 921 S.W.2d 778, 789 (Tex. App.—El Paso 1996, writ denied) (noting that Texas recognizes a cause of action for negligence in the hiring of an independent contractor); *King v. Associates Commercial Corp.*, 744 S.W.2d 209, 213 (Tex. App.—Texarkana 1987, writ denied)(same); *Jones v. Southwestern Newspapers Corp.*, 694 S.W.2d 455, 457–58 (Tex. App.—Amarillo 1985, no writ)(same); *Texas Am. Bank v. Boggess*, 673 S.W.2d 398, 400–01 (Tex. App.—Fort Worth 1984, writ dism’d by agr.)(same). When an independent contractor’s negligent conduct causes harm to another, an employer may be held directly liable for hiring the independent contractor if the employer failed to exercise ordinary care in hiring the contractor and the exercise of such care would have disclosed that the contractor was incompetent to perform the duties for which he was being
hired. King, 744, S.W.2d at 213. One hiring an independent contractor may be held responsible for the contractor's negligent acts if (1) the employer knew or should have known that the contractor was incompetent and (2) a third party was injured because of the contractor's incompetence. Id. See, PJC 10.8 for the definition of an independent contractor.

**Ordinary care.** An employer has a duty to use ordinary care in employing an independent contractor. King v. Assocs. Commercial Corp., 744 S.W.2d 209, 213 (Tex. App.—Texarkana 1987, writ denied); Jones v. Sw. Newspapers Corp., 694 S.W.2d 455, 458 (Tex. App.—Amarillo 1985, no writ). The exercise of such ordinary care includes an employer’s investigation into the qualifications of the independent contractor. King, 744 S.W.2d at 213.

**Sufficiency of inquiry.** Mere inquiry by the employer is insufficient. If an inquiry was made by the employer, then the issue becomes whether the inquiry made by the employer was sufficient to constitute the exercise of due care. King, 744 S.W.2d at 213.


**No presumption of employer’s negligence in hiring.** The fact that an independent contractor’s negligence caused injury to another does not create a presumption that the employer was negligent in selecting the contractor. King, 744 S.W. at 214.

**Presumption of no negligence for persons utilizing a residential delivery or in-home service company.** A person who contracts with a residential delivery or in-home service company is rebuttably presumed to have not acted negligently in doing so if: (1) the residential delivery or in-home service company is in compliance with § 145.003(b) of the Texas Civil Practice & Remedies Code; or (2) the person who contracts with the residential delivery company or in-home service company requests that the company obtain a criminal history background check described by § 145.002 of the Texas Civil Practice & Remedies Code on any employee of the company being sent to deliver, place, assemble, repair, or install an item and the person’s request is in writing and is delivered to the company prior to the company’s employee being sent. Tex. Civ. Prac. & Rem. Code § 145.004. A copy of any such request must be maintained for at least two (2) years. Id.
CHAPTER 12.0 – When to Apply

“Nuisance” means a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities. *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269-270 (Tex. 2004); see also *Warwick Towers Council of Co-Owners v. Park Warwick, LP*, 298 S.W.3d 436, 446-447 (Tex. App. – Houston [14th] 2009, no pet.) (reversing lower court and sustaining nuisance claim based on analysis in *Schneider Nat’l Carriers*). Because the term nuisance has been used frequently in different contexts, this section seeks to clarify distinctions within the law in the context of public and private nuisances.

In a public nuisance action, a defendant’s conduct unreasonably interferes with a right common to the public at large by affecting the public health or public order. In a private nuisance action, a defendant’s conduct substantially interferes with the use and enjoyment of private property owned by an individual or small group of persons. A claim for attractive nuisance is not actually a common law nuisance in the legal sense and remains within the purview of premises liability pattern jury charges. Similarly, criminal nuisances are not common law nuisances and thus remain within the purview of criminal pattern jury charges. Practitioners should apply 12.1 through 12.4 as follows:

1. If the claim involves a right to use and enjoy privately owned land, use PJC 12.1 Private Nuisance.
2. If the claim involves a public right, use PJC 12.2 Public Nuisance. PJC 12.1 and 12.2 may both be used if the claim invokes both public and private nuisance.
3. In both private and public nuisance actions, proximate cause must be submitted to the jury as in PJC 12.4.
4. If the claim involves children injured while trespassing on a defendant’s property, use PJC 66.10 Attractive Nuisance.
5. If the alleged conduct is a crime under the Texas criminal statute, use the applicable definition from the statute or Texas Penal Code.
6. If the alleged conduct involves a trespass, the charge should refer to trespass separately from nuisance.

**Pleading specific culpability.** Nuisance actions involve three levels of culpability: negligent conduct, intentional conduct, or conduct that is abnormal and out of place in its surroundings. *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex. App.–Waco 1993, writ denied); cf. *Wales Trucking Co. v. Stallcup*, 474 S.W.2d 184, 186-187 (Tex. 1971). If the defendant is governmental entity, a plaintiff must show intentional nuisance. *City of San Antonio v. Pollock*, 284 S.W. 3d 809, 821 (Tex. 2009) (plaintiff’s recovery for nuisance barred because of government immunity to negligence suits).
PJC 12.1 – Private Nuisance

*Don Davis* creates a “private nuisance” if his conduct substantially interferes with *Paul Payne’s* use and enjoyment of his land. “Substantial interference” means that *Don Davis’s* conduct must cause unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy his land. It is more than a slight inconvenience or petty annoyance.

**QUESTION __**

Did *Don Davis* intentionally create a private nuisance?

“Intentionally” means that *Don Davis* acted with intent with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or the result.

Answer “Yes” or “No.”

Answer: _______

**QUESTION __**

Did *Don Davis* negligently create a private nuisance?

“Negligently” means that *Don Davis* failed to use ordinary care, that is, he failed to do that which a person of ordinary prudence would have done under the same or similar circumstances or did that which a person of ordinary prudence would not have done under the same or similar circumstances. “Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No.”

Answer: _______

**QUESTION __**

Was *Don Davis’s* conduct abnormal and out of place in its surroundings such as to constitute a private nuisance?

Answer “Yes” or “No.”

Answer: _______
COMMENT

When to use. PJC 12.1 is appropriate in cases involving private nuisance. In private nuisance cases, the jury decides factual disputes regarding the frequency, extent, and duration of the conditions causing the nuisance. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 275 (Tex. 2004); Beere v. Duren, 985 S.W.2d 243, 245 (Tex.App. – Beaumont 1999, pet. denied) (nuisance jury submission); Columbian Carbon Co. v. Tholen, 199 S.W.2d 825, 826 (Tex.App. – Galveston 1947, writ ref’d) (jury questions on private nuisance); Lacy Feed Co. v. Parrish, 517 S.W.2d 845, 850-51 (Tex.App. – Waco 1974, writ ref’d n.r.e.) (definition of intentional nuisance); but see Watson v. Brazos Elec. Power Coop., 918 S.W.2d 639, 644-645 (Tex.App. – Waco 1996, writ denied). The question should be phrased based on the pleadings, evidence, and specific allegations.

Source of definition and culpability levels. Nuisance means a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269, 275 (Tex. 2004); Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003). In a private nuisance action, a defendant’s conduct substantially interferes with the use and enjoyment of private property owned by an individual or small group of persons. Id. Texas courts have broken actionable nuisance into three classifications: negligent, intentional, and abnormal or out of place in its surroundings. City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1997); see C.C. Carlton Industries Ltd. v. Blanchard, 311 S.W.3d 654, 660 (Tex. App. – Austin 2010, no pet.) (noting that appellant waived error for broad nuisance charge not setting out culpability levels); see Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App. – Waco 1993, writ denied). In the context of nuisance actions, there is no definition for “abnormal and out of place,” nor is there any general definition found in any Texas Supreme Court case.

Proximate Cause Required for All Culpability Levels. Under all forms of nuisance, proximate cause should also be submitted to the jury. Practitioners should use PJC 12.4.

Elements of Nuisance. The four elements of a private nuisance action can be characterized as the following: (1) plaintiff had an interest in land, (2) defendant interfered with or invaded the plaintiff’s interest by conduct that was (a) negligent, (b) intentional, or (c) abnormal and out of place in its surroundings, (3) defendant’s conduct resulted in a condition that substantially interfered with the plaintiff; and (4) the nuisance caused injury to the plaintiffs. City of Tyler v. Likes, 962 S.W.2d 489, 503-04 (Tex. 1997); Burditt v. Swenson, 17 Tex. 489, 502 (1856); Peterson v. Jansen, 2009 WL 334915, *4 (Tex. App. – Houston [14th Dist.] Feb. 12, 2009); In re the Premcor Refining Group, Inc., 233 S.W.3d 904, 905 (Tex. App. – Beaumont 2007); Aguilar v. Trujillo, 162 S.W.2d 839, 850-51 (Tex. App. – Houston [14th Dist.] 1998, pet. denied); see Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 275 (Tex. 2004).

Damages. See PJC 12.4.

Instruction regarding usefulness. The court may further instruct the jury that if a nuisance exists, it shall not be excused by the fact that it arises from lawful or useful conduct. City of Uvalde v. Crow, 713 S.W. 2d 154, 157 (Tex. App. – Texarkana 1986, writ ref’d n.r.e.)
(affirming jury charge submission). A state-issued permit does not shield the permit holder from civil tort liability for the authorized activities. *FPL Farming Ltd. v. Environmental Processing Systems, LC*, 351 S.W.3d 306 (Tex. 2011). Furthermore, even if a commercial enterprise holds a valid permit to conduct a particular business, the manner in which it performs its activity may give rise to an action for a nuisance. *C.C. Carlton Industries Ltd., v. Blanchard*, 311 S.W.3d 654, 660 (Tex.App. – Austin 2010, no pet.) (citing *Manchester Terminal Corp. v. Texas TX Marine Transp., Inc.* 781 S.W.2d 646, 650 (Tex.App. – Houston [1st Dist.] 1989, writ denied)). When appropriate, the following sentence may be added to the jury submission:

You are further instructed that a nuisance, if the same exists, is not excused by the fact that it arises from the conduct of an operation that is in itself lawful or useful.

**Standing in private nuisance actions.** A private nuisance may be asserted by those with property rights and privileges in respect to the use and enjoyment of the land affected, including possessors of the land. *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791-792 (Tex.App. – Waco 2009, no pet.). However, minor plaintiffs have no standing to assert nuisance claims based on damage to real property because they do not own the properties when the nuisance began. *In re Premcor Refining Group, Inc.*, 262 S.W.3d 475, 480 (Tex.App. – Beaumont 2008, no pet.). Standing is a matter of law for the court to decide. *Douglas v. Delp*, 987 S.W.2d 879, 882-883 (Tex. 1999); *West v. Brenntag*, 168 S.W.3d 327, 335 (Tex. App. – Texarkana 2005, no pet.).
PJC 12.2 – Public Nuisance

Don Davis creates a “public nuisance” if his conduct unreasonably interferes with a public right or public interest. A “public right or public interest” means that the conduct affects public safety or health. The conduct must adversely affect all or a considerable part of the community.

QUESTION __

Did Don Davis intentionally create a public nuisance?

“Intentionally” means that Don Davis acted with intent with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or the result.

Answer “Yes” or “No.”

Answer: _______

QUESTION __

Did Don Davis negligently create a public nuisance?

“Negligently” means that Don Davis failed to use ordinary care, that is, he failed to do that which a person of ordinary prudence would have been done under the same or similar circumstances or did that which a person of ordinary prudence would not have done under the same or similar circumstances. “Ordinary care” means that degree of care that would be used by a person or ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No.”

Answer: _______

QUESTION __

Was Don Davis’s conduct abnormal and out of place in its surroundings such as to constitute a public nuisance?

Answer “Yes” or “No.”

Answer: _______
COMMENT

When to use. PJC 12.2 is appropriate when a claim for public nuisance is made. A public nuisance may be intentional, negligent, or arise from conduct otherwise culpable as abnormal and out of place in its surroundings. When the defendant’s conduct is intentional, liability depends on whether the defendant’s conduct was unreasonable. When the defendant’s conduct is unintentional, liability depends on whether the defendant's conduct was negligent, reckless, or abnormal and out of place. Peterson v. Jansen, 2009 WL 334915, *4 (Tex. App. – Houston [14th Dist.] Feb. 12, 2009) (citing RESTATEMENT (SECOND) OF TORTS § 822 and § 833 cmt. B); Bily v. Omni Equities, Inc., 731 S.W.2d 606, 611-612 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.). The question submitted should be based on the trial pleadings, evidence, and allegations. A definition for negligence can be found at PJC 2.1.

When injunction sought, judge makes determination. When the plaintiff seeks injunctive relief, the court, not the jury, makes a determination of reasonableness based on balancing the equities. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 287, 289 (Tex. 2004). The judge may make such a determination before submitting the nuisance question to the jury. Id. at 289.

Source of definition and culpability levels. Nuisance means a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269, 275 (Tex. 2004); Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003). Texas courts have broken actionable nuisance into three classifications: negligent, intentional, and abnormal or out of place in its surroundings. City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1997); C.C. Carlton Industries Ltd. v. Blanchard, 311 S.W.3d 654, 660 (Tex. App. – Austin 2010, no pet.) (noting that appellant waived error for broad nuisance charge not setting out culpability levels); see Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App. – Waco 1993, writ denied). In the context of nuisance actions, there is no definition for “abnormal and out of place” nor is there any general definition found in Texas Supreme Court cases.

Use of other definitions. Nuisance is defined differently in statutes and municipal ordinances. Statutory definitions are narrow and specific to certain activities. If brought under such statutes, the charge should be modified to include the specific statutory definition.

Effect of statutes. Statutorily prescribed conduct may also determine reasonableness. For example, with respect to contamination, the Texas Water Code determines whether “unreasonable levels” of contaminants are present in certain bodies of water. Ronald Holland's A-Plus Transmission & Auto., Inc. v. E-Z Mart Stores, Inc., 184 S.W.3d 749, 758 (Tex. App.--San Antonio 2005, no pet.) (noting an unreasonable level of contamination in excess of actionable levels of contamination). Statutes dealing with statutorily-defined “public nuisances” or “common nuisances” provide that private citizens may bring a lawsuit to abate certain enumerated nuisances. TEX. CIV. PRAC. & REM. CODE §§ 125.0015, 125.061, 125.062, 125.063. For example, a person who maintains a place or knowingly tolerates activity and fails to abate such activity is deemed to maintain a common nuisance for any of the following activities:
improperly discharging a firearm in public, engaging in illegal gambling, compelling or engaging in prostitution, and other activities. Tex. Pen. Code §§ 22.02, 22.011, 22.021, 29.02. Practitioners are also encouraged to review the Texas Penal Code and the Texas Health & Safety Code for provisions that may be applicable to facts at issue.

Statutory nuisance is not necessarily common law nuisance. The Texas Legislature has outlined specific conditions that constitute a nuisance under various statutes. A “nuisance per se” is an act, occupation, or structure that is a nuisance at all times and under any circumstances, regardless of location or surroundings. City of Dallas v. Jennings, 142 S.W.3d 310, 316, n. 3 (Tex. 2004). A nuisance “in fact” is an act, occupation, or structure that becomes a nuisance by reason of its circumstances or surroundings. Id. However, violation of a statute or ordinance is not sufficient to prove a nuisance without additional evidence. Del Luensmann v. Zimmer-Zampese & Associates, Inc., 103 S.W.3d 594, 598 (Tex. App. – San Antonio 2003, no pet.) (holding drag racing not a nuisance per se).

Damages. See PJC 12.4.

Instruction regarding usefulness. The court may further instruct the jury that if a nuisance exists, it shall not be excused by the fact that it arises from lawful or useful conduct. City of Uvalde v. Crow, 713 S.W. 2d 154, 157 (Tex. App. – Texarkana 1986, writ ref’d n.r.e.) (affirming jury charge submission). A state-issued permit does not shield the permit holder from civil tort liability for the authorized activities. FPL Farming Ltd. v. Environmental Processing Systems, LC, 351 S.W.3d 306, 310-311, 314 (Tex. 2011). Furthermore, even if a commercial enterprise holds a valid permit to conduct a particular business, the manner in which it performs its activity may give rise to an action for a nuisance. C.C. Carlton Industries Ltd., v. Blanchard, 311 S.W.3d 654, 660 (Tex.App. – Austin 2010, no pet.) (citing Manchester Terminal Corp. v. Texas TX Marine Transp., Inc. 781 S.W.2d 646, 650 (Tex.App. – Houston [1st Dist.] 1989, writ denied)). When appropriate, the following sentence may be added to the jury submission:

You are further instructed that a nuisance, if the same exists, is not excused by the fact that it arises from the conduct of an operation that is in itself lawful or useful.

Proximate cause required for all culpability levels. Under all forms of nuisance, proximate cause should also be submitted to the jury. Practitioners should use PJC 12.4.

Standing in public nuisance actions. To bring a private suit for public nuisance, a private citizen must establish standing. The plaintiff must have suffered harm different in kind from the public at large. Jamail v. Stoneledge Condo. Owners Ass’n, 970 S.W.2d 673, 676 (Tex.App. – Austin 1998, no pet.). Standing, however, is a matter of law for the court to decide. Douglas v. Delp, 987 S.W.2d 879, 882-883 (Tex. 1999) (courts may not address the merits of case unless standing is present because it is part of subject matter jurisdiction); West v. Brenntag, 168 S.W.3d 327, 334 (Tex.App. – Texarkana 2005, no pet.) (standing is a question of law subject to de novo review); see also American Electric Power Co. v. Connecticut, et al., 131 S.Ct. 2527 (2011).
12.3 – Nature of the Nuisance

QUESTION __

If you found that a nuisance occurred in Question Number [    ], then answer the following question. Otherwise do not answer this question.

Was the nuisance caused by Don Davis permanent or temporary?

A nuisance is “permanent” if it involves activity that will continue indefinitely and results in an injury that is constant and continuous.

A nuisance is “temporary” if it is occasional, intermittent, or recurrent such that it is uncertain that any future injury will occur, or will occur only at long intervals.

To determine if the nuisance is permanent or temporary, you may consider the following:

(1) whether the nuisance is regular and constant (permanent) or irregular and intermittent (temporary).

(2) whether the nuisance is likely to continue in the future (permanent),

(3) whether the nuisance results in permanent injury to real property (permanent).

Answer “Permanent” or “Temporary” in the blank below:

Answer:  _______

COMMENT

Permanent or temporary nuisance. If the nature of a nuisance is in dispute, categorizing a nuisance as temporary or permanent is a question for the jury. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 286 (Tex. 2004) (citing Bayouth v. Lion Oil Co., 671 S.W.2d 867, 869 (Tex.1984)).

Consequences of classification. There are three distinct consequences that result from categorizing the nuisance as permanent or temporary: (1) whether damages are available for future or only past injuries; (2) whether one or a series of suits is required; and (3) whether claims accrue, and thus limitations begin, with the first or each subsequent injury. Schneider Nat’l Carriers, Inc. v. Bates, 147 S.W.3d 264, 275 (Tex. 2004). The distinction between temporary and permanent nuisances also determines the damages that may be recovered. See id.; West v. Breentag Southwest, Inc., 168 S.W.3d 327, 336, n. 9 (Tex.App. – Texarkana 2005, no pet.). If a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued. Schneider, 147 S.W.3d at 276. Future damages for temporary nuisance are not recoverable. Id. If a nuisance is permanent, the owner may recover lost market value, a figure that reflects all losses from the injury, including lost rents expected in the future. Id. The two claims are mutually exclusive; a landowner cannot recover both in the same action. Id.