

## PJC 12.2 Private Nuisance

### PJC 12.2A Intentional 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 the person’s land. It is more than a slight inconvenience or petty annoyance.~~

QUESTION \_\_\_\_\_

Did *Don Davis* intentionally create a private nuisance?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne’s* land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“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 was the conscious objective or desire to engage in the conduct or the result.

“Intentionally” means that *Don Davis* acted for the purpose of causing the interference or knew that the interference ~~was resulting~~ would result or was substantially certain to result from his conduct.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### PJC 12.2B Negligent 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 the person’s land. It is more than a slight inconvenience or petty annoyance.~~

QUESTION \_\_\_\_\_

Did *Don Davis* negligently create a private nuisance?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne's* land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“Negligently” means that *Don Davis* failed to use ordinary care, that is, 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: \_\_\_\_\_

### **PJC 12.2C      Strict-Liability 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 the person’s land. It is more than a slight inconvenience or petty annoyance.~~

QUESTION \_\_\_\_\_

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

~~“Abnormal and out of place in its surroundings” means that *Don Davis* engaged in an abnormally dangerous activity or type of ultrahazardous conduct.~~

~~Answer “Yes” or “No.”~~

QUESTION \_\_\_\_\_

Did Don Davis create a private nuisance by abnormal and out-of-place conduct?

A private nuisance is a condition that substantially interferes with the use and enjoyment of Paul Payne’s land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“Abnormal and out--of--place conduct” means ~~that Don Davis engaged in~~ conduct that

- 1) was out of place in its surroundings; and,
- 2) ~~that~~ was an abnormally dangerous activity or involved an abnormally dangerous substance; and
- 3) ~~that~~ created a high degree of risk of serious injury.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### COMMENT

**When to use.** PJC 12.2 is appropriate in cases involving private nuisance. The grounds listed in PJC 12.2A–12.2C are alternatives, and any of the listed grounds that are not raised by the pleadings or supported by sufficient evidence should be omitted. In private nuisance cases, the jury decides factual disputes regarding the frequency, extent, and duration of the conditions causing the nuisance. *Crosstex*, 505 S.W.3d 580, 609 (Tex. 2016). *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275 (Tex. 2004); *see also Barnes v. Mathis*, 353 S.W.3d 760, 763–64 (Tex. 2011) (per curiam); *Hanson Aggregates West, Inc. v. Ford*, , 41 (Tex. App. —Austin 2011, pet. denied); *Beere v. Duren*, 243, 245 (Tex. App. —Beaumont 1999, pet. denied); *Lacy Feed Co. v. Parrish*, S.W.2d 845, 850–51 (Tex. Civ. App. —Waco 1974, writ ref’d n.r.e.); *Columbian Carbon Co. v. Tholen*, , 826–27 (Tex. Civ. App. —Galveston 1947, writ ref’d). The question should be phrased based on the pleadings, evidence, and specific allegations.

~~Strict liability nuisance must be pleaded as a theory of liability in the case. *Crosstex North Texas Pipeline v. Gardiner*, No. 15-0049, 2016 WL 3483165, at \*26 (Tex. June 24, 2016).~~

**Source of definition and culpability levels.** “Nuisance” generally 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. ~~attempting to use and enjoy it. *Crosstex North Texas Pipeline*, 2016 WL 3483165, 505 S.W.3d at \*12, 24600, 624; *Barnes*, 353 S.W.3d at 763; *Schneider National Carriers, Inc.*, 147 S.W.3d at 269; *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). Whether a defendant may be held liable for causing a nuisance depends on the culpability of the defendant’s conduct, in addition to proof that the interference is a nuisance. There must be some level of culpability on behalf of the defendant. Nuisance cannot be premised on mere accidental interference with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct. Texas courts have broken actionable nuisance into three classifications: negligent, intentional, and ~~abnormal or~~ abnormally dangerous conduct that is also out of place in its surroundings. *Crosstex North Texas Pipeline*, 2016 WL 3483165, 505 S.W.3d at \*15588, 604 (retaining the three categories); *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997).; *Pool v. River Bend Ranch, LLC*, , 857 (Tex. App. — Tyler 2011, pet. denied); *C.C. Carlton Industries, Ltd. v. Blanchard*, , 659–60 (Tex. )denied); *Bible Baptist Church v. City of Cleburne*, , 829 (Tex. App. — Waco 1993, writ denied). In the context of nuisance actions under PJC 12.2C, there is no definition for “abnormal and out of place,” but it must be based on conduct that constitutes “an abnormally dangerous activity.” See *Crosstex North Texas Pipeline*, 2016 WL 3483165, at \*19.~~

**Elements of private nuisance.**—The four elements of a private nuisance action can be characterized as follows: (1) the plaintiff had an interest in the land; (2) the defendant interfered with or invaded the plaintiff’s interest by conduct that was negligent, intentional, or abnormal and out of place in its surroundings; (3) the defendant’s conduct resulted in a condition that substantially interfered with the plaintiff’s use and enjoyment of his land; and (4) the nuisance caused injury to the plaintiff. See *Likes*,—04; *Burditt v. Swenson*, , 502 (1856); *Aguilar v. Trujillo*, , 850–51 (Tex. App. — El Paso 2005, pet. denied); see also *Schneider National Carriers, Inc.*, . These elements do not need to be submitted to the jury in separate questions.

**Damages.** See PJC 12.5 and 12.6, as applicable.

**Instruction regarding usefulness.** A “defendant’s liability for creating a nuisance does not depend on a showing that the defendant acted or used its property illegally or unlawfully.” *Crosstex*, 505 S.W.3d at 601. 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. See *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, L.C.*, 351 S.W.3d 306, 310–11, 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 approved activity may give rise to an action for nuisance. *C.C. Carlton Industries, Ltd.*, 311 S.W.3d 654, 660 (Tex. App.—Austin 2010, pet. denied). When appropriate, the following sentence may be added to the jury submission:

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

**When injunction sought, judge makes determination.** When the plaintiff seeks injunctive relief, the court, not the jury, makes a determination of reasonableness based on a balancing of the equities. *Crosstex*, 505 S.W.3d at 610; *Schneider National Carriers, Inc.*, 147 S.W.3d at 286–87. The judge may make such a determination before submitting the nuisance question to the jury. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289.

**Standing in private nuisance actions.** A private nuisance may be asserted by those with property rights and privileges with 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 (Tex. App.—Waco 2009, pet. denied). Minor plaintiffs have no standing to assert nuisance claims based on damage to real property if they did 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.) (per curiam). Standing, however, is a matter of law for the court to decide and should not be submitted to the jury. See *Douglas v. Delp*, 987 S.W.2d 879, 882–83 (Tex. 1999); *West v. Brenntag Southwest, Inc.*, 168 S.W.3d 327, 335 (Tex. App.—Texarkana 2005, pet. denied).

## **PJC 12.3 Public Nuisance**

### **PJC 12.3A Public Nuisance—Intentional**

*Don Davis* creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis*’s conduct must be a significant interference with the public’s safety or health, and 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 was the conscious objective or desire to engage in the conduct or the result for the purpose of causing the interference or knew that the interference was resulting would result or was substantially certain to result from his conduct.~~

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### **PJC 12.3B Public Nuisance—Negligent**

*Don Davis* creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis*’s conduct must be a significant interference with the public’s safety or health, and the conduct must adversely affect all or a considerable part of the community.

QUESTION \_\_\_\_\_

Did *Don Davis* negligently create a public nuisance?

“Negligently” means that *Don Davis* failed to use ordinary care, that is, 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: \_\_\_\_\_

**PJC 12.3C Public Nuisance—Abnormal and Out of Place in Its SurroundingsAbnormally Dangerous Conduct**

*Don Davis* creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis*’s conduct must be a significant interference with the public’s safety or health, and the conduct must adversely affect all or a considerable part of the community.

QUESTION \_\_\_\_\_

Was~~Did~~ *Don Davis*~~’s conduct~~Davis create a public nuisance by abnormal and out-of-place conduct?

“Abnormal and out-of-place conduct” means that Don Davis engaged in conduct that

- 1) was out-of-place in its surroundings; and, such as to constitute a public nuisance? that
- 2) was abnormally dangerous activity or involved an abnormally dangerous substance; and,
- 3) that created a high degree of risk of serious injury.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 12.3 is appropriate when a claim for public nuisance is made. The grounds listed in PJC 12.3A–12.3C are alternatives, and any of the listed grounds that are not raised by the pleadings or supported by sufficient evidence should be omit-

ted. A nuisance may be intentional or negligent or arise from conduct otherwise culpable as ~~abnormal~~abnormally dangerous and out of place in its surroundings. The question submitted should be based on the trial pleadings, evidence, and allegations. *Watson v. Brazos Electric Power Cooperative*, 918 S.W.2d 639, 644–45 (Tex. App.—Waco 1996, writ denied) (per curiam) (~~describing actionable nuisance pleadings and evidence must support submission~~).

**Source of definition and culpability levels.** ~~“Nuisance” generally 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 National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004); see also *Barnes v. Mathis*, 353 S.W.3d 760, 763–64 (Tex. 2011) (per curiam); *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). Actionable nuisance is classified as conduct that is negligent, intentional, or abnormal and out of place in its surroundings. *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853, 857 (Tex. App.—Tyler 2011, pet. denied); *C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 659–60 (Tex. App.—Austin 2010, pet. denied); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied). Public nuisance actions involve an unreasonable interference with a right common to the general public. *Crosstex*, 505 S.W.3d at 591 n.3; *Jamail v. Stoneledge Condominium Owners Ass’n*, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.); *Walker v. Texas Electric Service Co.*, 499 S.W.2d 20, 26–27 (Tex. Civ. App.—Fort Worth 1973, no writ); see also *McKee v. City of Mt. Pleasant*, 328 S.W.2d 224, 229 (Tex. Civ. App.—Texarkana 1959) (describing historical definition of public nuisance). ~~The interference must also adversely affect all or a considerable part of the community. See *Soap Corp. of America v. Balis*, 223 S.W.2d 957, 960 (Tex. Civ. App.—Fort Worth 1949, writ ref’d n.r.e.). In the context of nuisance actions under PJC 12.3C, there is no definition for “abnormal and out of place,” but it must be based on conduct that constitutes “an abnormally dangerous activity.” See *Crosstex North Texas Pipeline v. Gardiner*, No. 15-0049, 2016 WL 3483165, at \*19 (Tex. June 24, 2016).~~~~

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

**Effect of statutes.** Statutorily prescribed conduct may determine the reasonableness of a defendant’s conduct. For example, with respect to contamination, the Texas

Water Code determines whether “unreasonable” levels of contaminants are present in certain bodies of water. *See Ronald Holland’s A-Plus Transmission & Automotive, 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). Statutes dealing with statutorily defined “public nuisances” or “common nuisances” provide that private citizens may bring a lawsuit to abate certain enumerated nuisances. *See* Tex. Civ. Prac. & Rem. Code §§ 125.0015, 125.061–.063. For example, a person who maintains a place and knowingly tolerates certain activities on the premises and fails to abate those activities is deemed to maintain a common nuisance for any such activities including, but not limited to, the following: improperly discharging a firearm in public, engaging in illegal gambling, or compelling or engaging in prostitution. *See* Tex. Civ. Prac. & Rem. Code § 125.0015. Practitioners are encouraged to review the Texas Penal Code, the Texas Civil Practice and Remedies Code, and the Texas Health and Safety Code for provisions that may be applicable to the facts at issue.

**Statutory nuisance 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. *Jennings*, 142 S.W.3d at 316 n.3. However, violation of a statute or ordinance is not sufficient to prove a common-law nuisance without additional evidence. *Luensmann v. Zimmer-Zampese & Associates, Inc.*, 103 S.W.3d 594, 598 (Tex. App.—San Antonio 2003, no pet.).

**Damages.** See PJC 12.5 and 12.6, as applicable.

**Instruction regarding usefulness.** [A defendant’s liability for creating a nuisance does not depend on a showing that the defendant acted or used its property illegally or unlawfully. \*Crosstex\*, 505 S.W.3d at 601.](#) 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. *See 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, L.C.*, 351 S.W.3d 306, 310–11, 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 approved activity may give rise to an action for nuisance. *C.C. Carlton Industries, Ltd.*, 311 S.W.3d at 660. When appropriate, the following sentence may be added to the jury submission:

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

**When injunction sought, judge makes determination.** When the plaintiff seeks injunctive relief, the court, not the jury, makes a determination of reasonableness based on a balancing of the equities. *Crosstex*, 505 S.W.3d at 610; *Schneider National Carriers, Inc.*, 147 S.W.3d at 286–87. ~~The judge may make such a determination before submitting the nuisance question to the jury. *Schneider National Carriers, Inc.*,~~

**Standing for private individuals alleging public nuisance actions.** Typically, a city or state attorney's office brings a public nuisance action. A private citizen must establish standing to bring a public nuisance action. To establish standing, the plaintiff must have suffered harm different in kind from the public at large. *Jamail*, 970 S.W.2d at 676; *Quanah Acme & Pacific Railway Co. v. Swearingen*, 4 S.W.2d 136, 139 (Tex. Civ. App.—Amarillo 1927, writ ref'd). Standing, however, is a matter of law for the court to decide and should not be submitted to the jury. *See Douglas v. Delp*, 987 S.W.2d 879, 882–83 (Tex. 1999) (courts may not address merits of case unless standing is present because it is part of subject-matter jurisdiction); *West v. Brenntag Southwest, Inc.*, 168 S.W.3d 327, 334 (Tex. App.—Texarkana 2005, pet. denied) (standing is question of law subject to de novo review); *see also American Electric Power Co. v. Connecticut*, 564 U.S. 410, 419 (2011) (discussing Article III standing as matter of law in nuisance case).

QUESTION \_\_\_\_\_

*[Following a court determination that the nuisance was permanent.]*

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, resulting from the permanent nuisance?

Consider the elements of damages listed below and none other. Consider each element separately. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. In determining damages resulting from the nuisance, you may consider the proximity, duration, and intensity of the nuisance.

Answer separately, in dollars and cents, for damages, if any.

*[Select either “cost of repairs” or “loss of market value.”]*

\_\_\_\_\_ *Cost of repairs.*

*Consider the reasonable cost to restore the property to the condition it was in immediately before the occurrence in question.*

*Answer: \_\_\_\_\_*

*{or}*

1. Loss of market value, including lost rents and profits, if any.

Consider the difference in value of *Paul Payne*'s property immediately before and after the nuisance, if any. “Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Answer: \_\_\_\_\_

2. Personal injury sustained in the past.

Answer: \_\_\_\_\_

3. Personal injury that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: \_\_\_\_\_

**QUESTION** \_\_\_\_\_

~~If you answered “Yes” to Question \_\_\_\_\_ [question finding an intentional nuisance], then answer the following questions. Otherwise, do not answer the following questions:~~

~~4.—Mental anguish sustained in the past.~~

~~“Mental anguish” means the emotional pain, torment, and suffering experienced by *Paul Payne* because of the nuisance.~~

~~Answer: \_\_\_\_\_~~

~~5.—Mental anguish that, in reasonable probability, *Paul Payne* will sustain in the future.~~

**COMMENT**

**Damages for nuisance include property and personal injury damages.** A plaintiff may recover in a nuisance action for property damage and, personal injuries, and mental anguish. See *Crosstex*, 505 S.W.3d 580, 596 (Tex. 2016); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275–80 (Tex. 2004). The following types of damages may be recoverable when they arise from a nuisance: ~~(1) physical harm to property, such as by encroachment of a damaging substance; (2) physical harm to a person on his property from an assault on his senses or by other personal injury; and (3) emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind. *Kane v. Cameron International Corp.*, , 147–48 (Tex. App. —Houston [14th Dist.] 2011, no pet.):~~ “physical damage to the plaintiffs’ property, economic harm to the property’s market value, harm to the plaintiffs’ health, or psychological harm to the plaintiffs’ ‘peace of mind’ in the use and enjoyment of their property.” *Crosstex*, 505 S.W.3d at 596.

The above instruction lists alternative methods of proving damages, but only the method(s) supported by the pleadings and evidence should be submitted. Only those elements for which evidence is introduced should be submitted.

**Property damages recoverable by those with property interest: loss of market value or cost of repairs.** When a nuisance is permanent the claimant may recover lost market value. The value should be ascertained at the date of trial, and should be the market value of the property for any use to which it might be appropriated. The jury is permitted to consider all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become available within the foreseeable future. However, a jury may not consider purely speculative uses. *Crosstex*, 505 S.W.3d at 610-11.

When the nuisance is temporary a plaintiff may recover only damages that have accrued up to the institution of the suit or to the time of the trial. ~~Such damages include loss of rental value, or use value, or possibly the cost of restoring the land.~~ “Such damages are calculated as loss of rental value, or use value, or possibly the cost of restoring the land.” *Crosstex*, 505 S.W.3d at 610.

When the damage results from an ongoing condition rather than a single event that results in a permanent nuisance, courts apply a more flexible rule; the proper comparison is the market value of the property with and without the nuisance. *Crosstex*, 505 S.W.3d at 611–12. Persons whose property interests were invaded may bring a private nuisance action. Persons with property interests include owners, renters, and easement owners. See *Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2 (tenants at time of injury maintain standing).

**Current owners, past owners, and tenants can recover damages.** A current owner can seek damages for personal injury and injury to real property. ~~*City of Uvalde v. Crow*, 158 59 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.).~~ *Crosstex*, 505 S.W.3d at 596. A past owner can sue for property damages if the injury occurred while the plaintiff owned the land, damages resulted from a permanent nuisance, and the plaintiff did not assign the right to sue to a later purchaser. See *Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562–63 (Tex. 1936); *Lay v. Aetna Insurance Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.). A tenant may seek nuisance damages for personal injury. *Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2; *Faulkenbury v. Wells*, 68 S.W. 327, 329 (Tex. Civ. App.—Dallas 1902, no writ). An easement owner can seek an injunction to stop a nuisance. See, e.g., *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 215 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (property owners association had standing to sue to enforce restrictions).

**Loss of market value.** Loss of market value or diminution in value is a figure that reflects all property damages, including lost rents expected in the future. *Crosstex*, 505 S.W.3d at 610 (citing *Schneider National Carriers, Inc.*, 147 S.W.3d at 276. Jurors

make a reasonable estimate of the long-term impact of a nuisance based on competent evidence. *Schneider National Carriers, Inc.*, 147 S.W.3d at 277. However, a decrease in market value does not necessarily mean there is a nuisance, nor does an increase mean there is not a nuisance. *Schneider National Carriers, Inc.*, 147 S.W.3d at 277.

**Cost of repairs.** Cost of repairs cannot be obtained for the same damage when market value is already assessed or included. *See C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 662–63 (Tex. App.—Austin 2010, pet. denied). Repair costs can be separately divided into jury questions specific to each property damaged. *See C.C. Carlton Industries, Ltd.*, 311 S.W.3d at 662–63.

**Generally no double recovery allowed.** Texas law does not generally permit double recovery for loss of market value and cost of repairs. ~~*Parkway Co. v. Woodruff*, 441 (Tex. 1995); *Southern County Mutual Insurance Co. v. First Bank & Trust of Groves*, 173–74 (Tex. 1988). When the prevailing party fails to elect between alternative measures of damages, the court should render the judgment affording the greatest recovery. *See, e.g., Kish v. Van Note*, 463, 468 (Tex. 1985) (rendering judgment for each separate element of damages in order to give plaintiffs complete compensation for their losses); *Schneider National Carriers v. Bates*, 147 S.W.2d 264, 276 (Tex. 2004)~~ However, a dual recovery of diminution in value and cost of repairs is allowed if the issue is submitted to the jury and if the property will suffer a reduction in market value once repairs have been completed or has suffered a loss of market value even though repairs were completed. *See Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex. 1988) (per curiam); *Royce Homes v. Humphrey*, 244 S.W.3d 570, ~~575–78~~582 (Tex. App.—Beaumont 2008, pet. denied). In such cases the above question should be modified to include a finding on the cost to repair. Additionally, “stigma” damages, which represent the market’s perception of a decrease in property value that may continue to exist after an injury to real property has been fully repaired or remediated, may also be recoverable in certain circumstances. *See Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820, 824–26 (Tex. 2014) (describing effect of “damage to the reputation of the realty”).

**Personal injury damages recoverable.** While many nuisance actions are based on property damages, a plaintiff may also recover personal injury damages caused by a nuisance. ~~*Schneider National Carriers, Inc.*, *Crosstex*, 505 S.W.3d at 596.~~ This could be considered physical harm or something that assaults the senses. *See City of Tyler v. Likes*, 962 S.W.2d 489, 503–04 (Tex. 1997). Personal injury damages can be enumerated based on the basic question at PJC 28.3. Use only the elements of damage that apply to the damages sought in the case.

**Mental anguish damages not recoverable in negligence-based nuisance actions.**

In a nuisance action based on negligence, mental anguish damages are not recoverable. *See Likes*, 962 S.W.2d at 494–96, 503–04; *see also Kane*, 331 S.W.3d at 148–50 (noting that Texas law does not recognize fear-of-dreaded-disease claims in nuisance absent showing capability of harm); *Hanson Aggregates West, Inc. v. Ford*, 48 (Tex. App.—Austin 2011, pet. denied) (injunction for nuisance could not be sustained based on a negligent infliction cause of action).

**Annoyance and discomfort.** ~~The Texas Supreme Court has noted that is “considerable” authority exists for the proposition that a nuisance which impairs the comfortable enjoyment of real property may give rise to damages for “annoyance and discomfort.” *Crosstex* at 610 n.21. However, because no such damages were sought in the *Crosstex*, court noted that since no such claim was asserted in that case, the Court did not address decide the scope of these damages or determine if they are available for either temporary nuisance, permanent nuisance, or both.~~

**Higher level of culpability required to obtain damages against governmental entities.** If the defendant is a governmental entity, intentional conduct is a prerequisite in order to recover damages. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 820–21 (Tex. 2009). When intentional conduct is required to recover for damages, the mere possibility of damage resulting from conduct is not evidence of intent. *Pollock*, 284 S.W.3d at 821.

**Prejudgment interest recoverable.** Prejudgment interest is recoverable on property damages. Tex. Fin. Code § 304.102; ~~see also Tex. Civ. Prac. & Rem. Code § 18.091.~~

**Statutory nuisance damages distinguished.** Texas statutes also permit distinct remedies for statutory nuisances separate from common-law nuisances. For example, a person affected by a statutory health code violation may bring suit for an injunction and receive court costs and reasonable attorney’s fees. *See* Tex. Health & Safety Code § 343.013(e), (d), (b). Examples include storing refuse that is not contained in a closed receptacle and maintaining a building that is unsafe. *See* Tex. Health & Safety Code § 343.011.

Claims relating to air particulates and emissions may be considered a toxic tort claim requiring *Havner*-like requirements for proof. *See Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 621–22 (Tex. App.—San Antonio 2015, pet. ~~filed denied~~); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Such claims may also

be affected by the Texas Civil Practice and Remedies Code, which limits liability for an “air contaminant” not produced by a natural process. *See* Tex. Civ. Prac. & Rem. Code § 75.002(h). The Committee expresses no opinion about whether *Havner* standards would apply to nuisance claims.

**Abatement affects damages.** Abatement of a nuisance may necessitate changes to a jury submission regarding damages. *Schneider National Carriers, Inc.*, 147 S.W.3d at 288–89. Past and future damages may be separated with only past damages recoverable for a nuisance if there is abatement. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289. When a plaintiff seeks a temporary injunction, a trial court may make the determination whether to abate the nuisance before a jury finds it exists. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289–90. However, if the jury determines that no nuisance has occurred, a trial court does not maintain discretion to issue a permanent injunction based on nuisance. *See Hanson Aggregates West, Inc.*, 338 S.W.3d at 45–48.

**Determination of permanent vs. temporary injury.** Similar to determining whether a nuisance is permanent or temporary, the court also determines if an injury to real property is permanent or temporary. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, [481480-81](#) (Tex. 2014). For specific questions regarding a permanent injury to real property versus a temporary injury to real property, practitioners may use the instructions found in chapter in this volume, “Trespass.”

**Economic feasibility exception.** If the cost of repairing a temporary injury so disproportionately exceeds the resulting diminution in the property’s market value that restoration is no longer economically feasible, the temporary injury is deemed permanent as a matter of law and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Therefore, in the case of a temporary nuisance, the Committee recommends that questions concerning both market value and cost to restore be submitted to the jury. See PJC 12.6. It is unclear whether disproportionality between cost to restore and diminution in value is always a matter of law or whether, in some circumstances, it may be a fact question. In any event, upon the court’s determination of the nature of the injury, only the appropriate calculation of damages -- i.e., repair costs or diminution in value -- should be considered. See *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

**Intrinsic value exception.** If the reduction in market value caused by a permanent injury is “essentially nominal,” the plaintiff may be able to recover the damaged property’s “intrinsic value.” *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482–83 (confirming intrinsic value exception is valid and extending *Porras v. Craig*, 675 S.W.2d 503, 506 (Tex. 1984)). In such a circumstance, an additional question will be required. *Gilbert*

*Wheeler, Inc.*, 449 S.W.3d at 482. The Committee recommends the following language be used:

If you found that there was no diminishment of the property's fair market value, or so little diminishment of that value that the loss is essentially nominal, what amount, if any, should be awarded to *Paul Payne* for the intrinsic value of *his* damaged property, that is, the ornamental and utilitarian value of the property?

**Elements considered separately.** *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

## PJC 12.6 Damages from Temporary Nuisance

QUESTION \_\_\_\_\_

*[Following a court determination that the nuisance was temporary.]*

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, resulting from the temporary nuisance?

Consider the elements of damages listed below and none other. Consider each element separately. Do not reduce the amount, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. In determining damages resulting from the nuisance, you may consider the proximity, duration, and intensity of the nuisance.

~~Answer separately, in dollars and cents, for damages, if any.~~

Answer separately, in dollars and cents, for damages, if any.

~~1. Loss of use and enjoyment that has already occurred, as measured by:~~

~~1. Loss of rental value in the past.~~

Answer: \_\_\_\_\_

[or] \_\_\_\_\_

~~1. Loss of use value in the past.~~

Answer: \_\_\_\_\_

\_\_\_\_ [or]

~~1. The reasonable cost to restore the property to the condition it was in immediately before the occurrence in question.~~

Answer: \_\_\_\_\_

2. Personal injury sustained in the past.

1. Cost of repairs.

~~Consider the reasonable cost to restore the property to the condition it was in immediately before the occurrence in question.~~

1. Loss of use and enjoyment that has already occurred.

~~Consider loss of rental value, or use value or possibly the cost of restoring the land to the condition it was in immediately before the occurrence in question.~~

Answer: \_\_\_\_\_

2. Damages for personal injury sustained in the past.

QUESTION \_\_\_\_\_

~~If you answered “Yes” to Question \_\_\_\_\_ [question finding an intentional nuisance], then answer the following question. Otherwise, do not answer the following question.~~

3. Mental anguish sustained in the past.

~~“Mental anguish” means the emotional pain, torment, and suffering experienced by *Paul Payne* because of nuisance.~~

Answer: \_\_\_\_\_

**COMMENT**

[Comments here are identical to PJC 12.5]