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QUESTION 3

Al owns Blackacre, a country property with extensive highway frontage. Blackacre adjoins property on which the Restview Inn is located. In 1982, after prolonged discussion, Al said to his son-in-law, Bret, "I grant you the right to construct and maintain 10 billboards on Blackacre." No consideration was agreed to or paid. The statement was overheard by Carl, an attorney and mutual friend. Al and Bret previously had asked Carl what words they should use to put their intentions into effect.

Immediately thereafter, Bret erected 10 large, neon-lighted billboards. Each cost in excess of $2,500. The billboards dominate the landscape as seen from the adjacent Restview Inn, which for more than 25 years prior to the erection of the billboards had been very popular with vacationers desiring to escape the urban sprawl and to enjoy the unobstructed view of the natural countryside. One billboard blocks the view and cuts off the sunlight to one side of the Inn's dining room.

Peter, the owner of Restview Inn, is threatening to sue Al if he does not remove the billboards and Bret is threatening to sue Al if he does.

1. What are the rights and remedies, if any, of Peter against Al? Discuss.

2. What are the rights and remedies, if any, of Bret against Al? Discuss.

3. If Bret sues Al, will Al be able to prevent Carl from testifying to what Carl heard Al say? Discuss.

ANSWER A TO QUESTION 3

Peter v. Al

Peter would have a cause of action in nuisance against Al, since the erection and maintenance of the large billboards interferes with the use and enjoyment of Peter's land which is a vacation resort. Since Peter's customers come to Restview Inn to get away from it all and enjoy unobstructed views, the maintenance of these large billboards would interfere with the right of Peter to create such an environment for his customers.

Peter could collect damages depending upon the nature of the nuisance being either permanent or continuing. This is due in large part upon the resolution of the dispute between Bret and Al discussed infra.

If deemed permanent, while the facts do not indicate any specific money amounts Peter has lost, since his Inn has been in business for 25 years, he could possibly recover lost profits due to the fall in customers who do not wish to stay there due to the billboards. These would not be too speculative since the length of time that Peter has been in business would be sufficient

to establish a base to compare to any lost profits as a result of the billboards.

If deemed continuing, Peter could also recover the lost profits as argued above for the length of time such billboards are standing.

Peter could seek an injunction to compel Al to tear down the billboards. There does not appear to be any immediacy involved so a temporary restraining order would not be appropriate.

In his suit for injunction, Peter would have to show the following:

1. That the remedy at law is inadequate. Here, since we are dealing with the subject of land, courts have held land is unique and legal damage remedies are usually inadequate.

2. Peter would have to show a property right, which is present here in view of the fact he is the owner of land.

3. The injunction must be feasible and capable of being enforced. There does not appear to be a problem in this regard since the land and parties are before the court and the injunction can be couched in negative terms to make enforcement feasible.

4. Unless the acts of Al are willful, the court will balance the hardships of the parties to determine whether the injunction should issue. Under these facts (and as will be explained in more detail infra) Al would be obligated in his dealings with Bret to honor his agreement for the erection of the billboards. On the other hand, Peter has used this property for over 25 years as a vacation resort and his customers come to his establishment for the purpose of getting away from urban sprawl and for the unobstructed view.

In reviewing the facts of this case, since Blackacre has extensive highway frontage, the billboards would most effectively be located on or along the highway. The facts are unclear as to the location of the Restview Inn (other than it is adjoining). The court perhaps could fashion a remedy which in balance would take into account the locations of the properties having Blackacre with highway frontage of its billboards if possible, and Restview Inn, depending on its location in relation to Blackacre, perhaps being further away from the annoyance of the neon lights, etc.

5. There do not appear to be any viable defenses on the part of Al for either laches or unclean hands. Nuisance is exception to rule that equity will not enjoin a crime. In review, it would appear the court could attempt to abate the nuisance as outlined above, and in that event allow damages (clean up doctrine) which Peter would be able to prove for lost profits until that time.

In the event the injunction is granted, Peter will not be entitled to future lost profits (these are alternative remedies) .

Courts have generally recognized negative easements concerning the passage of air, light, and view, however have kept these limited to these narrow areas and require that such be created expressly. Since there does

not appear to be an express agreement between Peter and Al, any action under a negative easement would not be successful.

Bret v. Al

Bret's biggest hurdle is that his agreement with Al is not in writing and since it concerns an interest in land, such is required to be in writing pursuant to the Statute of Frauds.

The agreement between the two would appear to be an attempt to create an easement which is the non-possessory use of land of another in some limited way. Under these facts Bret would be making use of Al's land for the maintenance of the 10 billboards.

Bret could attempt to argue part performance in order to take the contract out of the Statute of Frauds. This would appear to be a viable defense under these facts since Bret not only "took possession" in installing the billboards, but further expended $2,500 each for the materials, constituting the improvement requirement.

Bret could further argue that both Al and Bret had asked Carl what words they should use in order to make their intentions effective, and Bret could argue the same should be applied to Al to estop him from asserting the Statute of Frauds as a defense.

While courts will generally not inquire into adequacy of consideration in land sale dealings, here there was no consideration present at all. Is such lack of consideration fatal to this agreement? Easements do not require consideration to be effective. Indeed, easements can be donative and such would not prevent this agreement from being enforceable as argued.

Unless the court was willing to find part performance sufficient to take this agreement out of the Statute of Frauds, it does not appear Bret could meet the requirements for an implied easement since there is no necessity involved for his use of Al's land.

Another theory Bret could rely on, however, would be that Al granted him a license, which does not require a writing to be effective. A license is generally revocable however, and if the court found such to be the case (not upholding the agreement as an easement) , could order Al to have the billboards removed. Bret could argue, however, that the cost involved exceeded $2,500 each for the billboards and that his "license" is coupled with an interest in the chattel located on the land and such makes the license irrevocable, for at least as long as the chattel remains.

Bret's remedies would depend on how the court rules on both the easement vs. license, and the injunction.

In the event the court orders the billboards removed, Bret could seek damages against Al. The computations would be made either on a theory of personal property, which would be repair or diminished value. There does not appear to be any damage to the billboards themselves, nor is there any evidence as to what profits in advertising Bret gets for the billboard space, but such could be considered alternatively.

Carl's Testimony

Carl's testimony would relate what he heard Al say to him. Such would certainly be relevant in that Bret is attempting to show that the parties intended to enter into an agreement, and Al's statement shows such was his intent as well. However, Al is the declarant and by having Carl testify thereto, such would constitute hearsay, since it is an out of court statement offered to prove the truth of the matters stated therein.

Bret could argue that the statement is not offered for its truth, but merely that the words were said and such have legally operative significance apart from their truth to constitute an intent to be bound to the agreement. Further, he would be able to allege that in any event since Al is a party, such could be argued to be an admission of a party opponent, which is an exception *to* the hearsay rule and in Federal courts is not even considered hearsay, and is admissible.

Thus, it does not appear Al will be able to prevent Carl from testifying unless he would be successful in alleging attorney-client privilege, and that such communications were confidentially made to an attorney for purposes of consultation. Bret could argue, however, that both Al and Bret had consulted Carl and as such would come under the joint client's exception and if available, Al would lose the attorney-client privilege.

Carl should be permitted *to* testify.

ANSWER B TO QUESTION 3

1. Peter v. Al

For A to prevail, he must somehow establish a right *to* the unobstructed *view* and sunlight and "country atmosphere" that is now being destroyed by the billboards.

Nuisance Theory

One legal theory P may argue is the doctrine of nuisance. Nuisance allows recovery where the adjoining landowner unreasonably interferes with P's enjoyment and use of his property. In this instance it is plain that P's enjoyment of his property's use is restricted. The billboards cut off the *view,* they present an "urban" image of commercialization, and they cut off the sunlight onto part of P's property. The question is if this is an unreasonable interference. Also has a property right to use his land in its most beneficial use. There seems to be no express limitation of that use, as, for example, equitable covenants or an express air and light easement. The question does state that A owns "extensive highway frontage." Extensive, in a rural area, can mean anything from ; mile and up. An argument is possible that B may just have easily built his signs several hundred yards removed from A's property, without any detriment. The close proximity of the signs to the restaurant may well be an unreasonable use of A's land in vio-

lation of P's property rights. No landowner may use his property to unreasonably detract from neighboring landowners' use of their property.

Remedy for Nuisance

If a court determines that A and B's conduct constitutes a nuisance, it may grant P either damages or an injunction. From the facts it is evident that P would rather have an injunction so that he may continue his 25-year-old business as previous. Also, damages would be difficult to ascertain in amount. An injunction will issue if there is no adequate remedy at law, there is a property interest to protect, and no defenses apply. Here the remedy at law is inadequate because of unascertainability of damages and because the signs constitute an irreparable harm to P (his view and peace are obstructed) .

The property interest is P's enjoyment of the land. Whether the injunction should issue depends upon a weighing of the burdens of the two parties. The question does not show that either party shows any malice. The detriment of P is clear: his obstructed view, sunlight, and ruin of the "atmosphere." The harm to A, to force B to move the billboards, would be the cost of removing the fully erected billboards, at considerable cost. To be fair the court may require A to force B to remove the two or three closest billboards to a more distant spot--especially the one blocking the sunlight. However, the facts state that B fully *completed* his signs. If P knew of the magnitude of the harm and failed to do anything about their construction, he may be estopped by the doctrine of laches. The facts are insufficient to make a determination of the adequacy of this defense. In all, the court should afford limited equitable relief as stated above due to the

unreasonable interference with P's property right. B was obviously aware of the nature of the property, including P's.

Implied Easement

P may also argue that he has a right to the view and sunlight by virtue of an implied easement. However, this argument was struck down in the Florida Fountainbleu Hotel case, which represents the majority American view.

2. Bret v. Al

A gave B a license to use his property for the construction of the signs. This license is not coupled with any consideration, so it will be revocable when a substitute for consideration will be found. The license is analogous to an oral contract. Here we have the offer, given after prolonged discussion, that B may construct the billboards.

To make the license not revocable at will, there must be a detrimental reliance, an assertion given by A to B, with the intent or knowledge that B would reasonably rely upon that assertion, and actual and reasonable reliance by B. A's offer would allow a reasonable person to rely upon it. B did in fact rely upon the offer and constructed the billboards. This reliance will make the license irrevocable. There is a split of authority on the duration of the license in this instance, with one theory allowing B to recoup his investment, and the other theory allowing B a reasonable return on his investment, including expectation of profits.

Equitable Covenant

B will also argue that A's offer created an equitable covenant running with the land. For an equitable covenant to run with the land, both the benefit and the burden must run with the land. Although the burden touches and concerns the land (because A may "maintain" the **signs) ,** there is no intent that it run with the land. The rule is that if the burden is not yet in existence, there has to be a showing of express intent, in writing. This is missing, because the offer was oral.

In addition, the benefit does not run with any land (B is not an adjoining or nearby landowner) , so this argument would fail.

In conclusion, B's best argument is that he is the holder of a license that is irrevocable until he recoups his investment.

Easement

B may also argue that he is the holder of an express easement on A's land to construct and maintain 10 billboards. However, an express easement is a conveyance of an interest in land, and is thus governed by the Statute of Frauds. A's defense on the basis of the Statute of Frauds may be rebutted, however, because part or full performance will take the contract out of the Statute. Here the facts show full performance by A. But this defense is only available for the sale of goods. Thus, the easement argument fails because the agreement is not enforceable under the Statute.

3. Carl's Testimony

A cannot claim that the statement is not probative, because it clearly tends to prove a material issue, i.e., the offer of A to B.

A may claim the attorney /client privilege. This privilege protects the communication between an attorney and his client, if the communication is confidential, and it pertains to the attorney /client relationship. Here the facts show that the communication pertained to the relationship, but that is all. First, the communication was not to the attorney, but overheard by him. Thus, it was not a communication to the attorney. Second, even if the words were to the attorney, it seems here that both A and B asked C to represent them. The attorney/client privilege will not protect joint parties, or where 2 parties use the same attorney. For the foregoing, the privilege does not apply.

Hearsay

A will argue that the statement was an out of court assertion to prove the matter asserted. Here, however, the testimony that C would give is not offered to prove the literal intent of the words, but to prove the operative fact of contract formation. Thus, the statement is excluded from hearsay.

Even if not excluded, the statement may come in as an admission brought in against a party-opponent. Here the statement is used against A, the declarant, at the time of trial.

The statement may also be received under the present mental state exception. It would be used to prove the mental state of the declarant, A, of his intent to make a contract.

For the foregoing, hearsay is not applicable and the statement may be admitted.