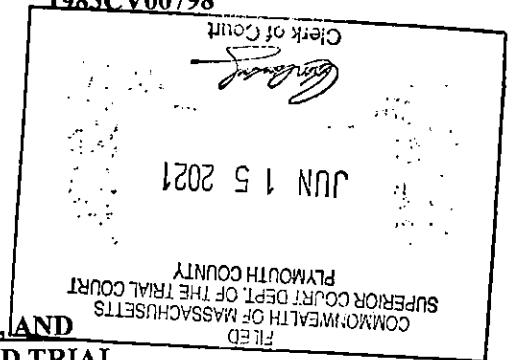


COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
1983CV00798JOSEPH SINKIEWICZ,
Plaintiff

vs.

PIERRE LOUIS,
Defendant**FINDINGS OF FACT, RULINGS OF LAW, AND
ORDER FOR JUDGMENT ON JURY-WAIVED TRIAL****INTRODUCTION**

Plaintiff Joseph Sinkiewicz ("Sinkiewicz") filed this action against defendant Pierre Louis ("Louis") seeking recovery for damages arising out of Louis's keeping of domesticated animals on his property. The complaint seeks recovery for: Breach of Quiet Enjoyment and Privacy;¹ Nuisance; Trespass; Injunctive Relief; "Negligence OR Intentional Tort;" and "Tort of Outrage."² Louis filed a Counterclaim alleging Harassment in violation of G.L. c. 258E, and violation of "Quiet Enjoyment and Privacy."

FINDINGS OF FACT

Based on the credible evidence adduced at the trial on this matter as well as the reasonable inferences drawn therefrom, the court finds the following facts:

Sinkiewicz resides in Brockton, Massachusetts at 349 North Carey Street, the family home which he inherited and in which he has resided for over 66 of his 76 years of

¹ Styled by the plaintiff as "Quiet Enjoyment and Privacy."

² No such cause of action exists in Massachusetts law. Rather the element of "outrage" is subsumed into the cause of action of Intentional Infliction of Emotional Distress.

life. His companion, Diana Winchoba (“Winchoba”), resides with him at that address.

Sinkiewicz is extremely proud of his home and its “pristine” yard, which are situated on a three-acre lot. One acre is cleared near the home and the remaining two acres are wooded. Sinkiewicz loves nature and all animals and welcomes indigenous wildlife such as wild turkeys, geese, birds of all sorts, opossums, deer, and other animals upon his land without restriction.

Louis resides at the abutting property at 25 Clemens Avenue in Brockton. Louis and his family are Haitian immigrants who purchased the abutting property in 2007.³ The parties resided harmoniously together from 2007 until 2016 when Louis placed a “new” chicken coop upon his property. This “new” coop was larger than the original and replaced a chicken coop of smaller size. Louis is the sole individual responsible for cleaning the coop and caring for the animals, as his wife and children rarely do so.

The First Chicken Coop

In 2012, Louis first erected a chicken coop which sat approximately 25 feet from the property boundary. Sinkiewicz admits that while walking the property boundary, he observed Louis building a structure on Louis’s land. It was not apparent at that time that the structure was a chicken coop. Despite the fact that the structure was on Louis’s

³ At the outset of the case, Louis’s attorney characterized the case as one involving racial animus or discrimination. Such a charge arose from Sinkiewicz’s plethora of written complaints about Louis, his “culture,” and how he was letting his property ruin the neighborhood, making the area look like a “third world hell hole.” The court makes no finding concerning racial discrimination or animus. While Sinkiewicz’s written statements could be open to interpretation involving racial animus, the court finds that the conflict between the parties is best characterized as “NIMBY”- simply put, Sinkiewicz objects to the installation of a chicken coop on Louis’s property and does not believe that it is suitable for a residential neighborhood.

property, Sinkiewicz saw it as his right as an abutter to ensure that the structures on Louis's land complied with building codes and regulations.⁴ Sinkiewicz asked Louis if he had a "permit" to erect the structure. Louis stated that he did not have a permit, and what he was building was for his kids. Ultimately, the first chicken coop was approximately 8x8 feet in size, housed a small number of chickens, and was located at the southeast corner of Sinkiewicz's three-acre property, approximately 25 feet from his property line. At times, some of the chickens would leave the coop and enter upon Sinkiewicz's property. However, from 2012 until 2016, Sinkiewicz made no complaints about the coop, any alleged rooster or animal noises, foul smells, or any other generalized complaints to either Louis, his family, or City of Brockton officials.

The 2016 Chicken Coop

In 2016, Louis erected another chicken coop in the same area where the first coop had been installed.⁵ However, the new chicken coop was set approximately 20 feet from the property line and is approximately three times larger than the original coop. With this second coop, Louis installed additional animals including ducks, guinea hens, turkeys, and more chickens.⁶ The penned area for the chicken coop is not covered at the top to keep the

⁴ Louis has never been cited for building code violations.

⁵ Exhibit B shows the chicken coop and is an accurate representation generally of how the coop looks.

⁶ At times, when purchasing baby chickens, Louis could have approximately 30 chickens at most; however, as the chickens grew, he would give many away to family and friends. Generally, he kept his stock of chickens at 17. Further, within the purchase may be a chick which develops into a rooster rather than a hen. The roosters, once discovered, are removed from his property and given away.

animals inside. As with the first coop, some of the animals, on occasion, would “escape” to Sinkiewicz’s property.

In 2017, Sinkiewicz installed a chain link fence of approximately 175 feet in length for the purpose of stopping Louis’s fowl from entering his property, and to stop predator kills which were left on his property. The chain link fence replaced a stone wall which had been located on Sinkiewicz’s property for as long as he can remember. The chain link fence which replaced the stone wall boundary was installed solely by Sinkiewicz for his own purposes, to keep Louis’s animals off his land.

In September 2019, Louis erected a wooden stockade fence of approximately six feet in height which runs parallel to Sinkiewicz’s chain link fence. Louis installed this fence to prevent the chickens and ducks from going on Sinkiewicz’s property, as well as to give Louis privacy and to end Sinkiewicz’s constant surveillance and photographing of his yard. To prevent the ducks from entering on Sinkiewicz’s property, Louis clipped the ducks’ wings, preventing them from flying any distance. However, the coops have openings at the bottom to allow the animals to enter and exit, and there are no coverings atop the coops to keep the animals fully enclosed.

Despite the erection of the wooden fence, Sinkiewicz continued to surveil and photograph Louis’s property. Louis’s fence has small gaps which allow one to see into the penned coop area. However, the gaps in the holes are not so wide as to show a full view of activities in the penned area on Louis’s property. In order to accomplish his constant surveillance, Sinkiewicz placed either a chair or a small step ladder against his

chain link fence, to allow him to climb up and get a full view into Louis's property so he and/or his weekend helper, Kyle Shiffer ("Shiffer"), could take photographs of Louis's property and the animals in the coop.

Sinkiewicz's home is situated approximately 300 feet from the location on Louis's property where the current (and past) chicken coops are sited. Winchoba and Sinkiewicz love to walk their dog upon the acreage and spend time sitting outside on the patio in the rear of their residence. They sit outside for an hour "or so" at night during the good weather and enjoy the natural setting. When seated at the patio, Louis's chicken coop is not readily visible as there is a small rise in the topography of the land. Winchoba described Sinkiewicz's land as "undulated" and credibly testified that it is only when one walks from the patio, up the incline, and stands at the crest of the incline that Louis's property and the chicken coop are first visible.

Sinkiewicz and Winchoba are employed full time at the VA in Brockton and work 40 hours a week, 6 a.m. to 4:30 p.m. Their commute is approximately 10 to 15 minutes in length depending on traffic. With his work schedule, Sinkiewicz has limited time to make observations of Louis's property and the activities on that property.

Sinkiewicz has significant hearing difficulties; by his testimony he hears "high and low tones" better than words. At trial, he used court-assisted hearing devices, along with his hearing aids,⁷ so that he could hear the lawyers and court. However, even with

⁷ On the first day of trial, Sinkiewicz did not arrive with his hearing aids.

the court-assisted hearing devices, Sinkiewicz could not hear questions posed by counsel. Because of the continued difficulty in hearing, Sinkiewicz requested that the lawyers stand (masked) within only a few feet of him on the witness stand so that he could hear the questions asked.⁸ Even with the lawyers standing close, he still had great difficulty in hearing and understanding the questions posed, which resulted in many restatements by the interrogator and Sinkiewicz of the question before an answer was given. Given this experience, the court does not credit Sinkiewicz's testimony that he can hear the animal noises from Louis's chicken coop, which is more than 300 feet from the rear of his property, nor does the court credit his testimony that such noise causes him disturbance, annoyance, or upset. Further, even if Sinkiewicz can hear some animal noises, with the level of hearing difficulties demonstrated during the ten-day trial of this case, it is incomprehensible for the court to believe that the animal sounds are so disturbing that it causes him to avoid sitting outside or doing his yard work. Indeed, none of his neighbors whose homes are closer to Louis's property testified to limiting any outdoor activities or being disturbed by animal noises.

The Louis and Sinkiewicz properties are abutted in one corner by the property of a neighbor, Stanley Johnson ("Johnson"). Despite living in his home for over 22 years, Johnson only spoke with Sinkiewicz for the first time in 2012. Since that date, he has spoken with Sinkiewicz on only two other occasions prior to appearing in court as a witness. The first conversation took place in the back area where the three properties

⁸ This request was allowed by the court.

bound, and involved Louis, Sinkiewicz, and Johnson. In that conversation, Johnson requested of both Sinkiewicz and Louis that they remove the debris at the back of the properties which was laying in the area where fencing was to be installed. The debris was made up of old tree stumps, small metal items, papers, etc. Johnson had a complete absence of knowledge about the contentious issues between Sinkiewicz and Louis.⁹

However, the court notes that although Johnson's home is situated much closer to the location of the current (and earlier) chicken coop on Louis's property, Johnson has never complained to Louis or his wife about noise, noxious odors, or a "stench" from the chickens and coop. Indeed, at trial, Johnson did not testify to any smells emanating from Louis's property or any impairments in the use of his own land due to any odors or noises from Louis's property. At best, the only "annoyance" he felt is with the noise from a rooster, which he thinks sounds like it comes from Louis's property.¹⁰ While he testified that the rooster makes noises, "all day and night," Johnson was unable to specify the time period of the noises, or indeed, the date, time, month, or even year when he last heard a rooster noise coming from Louis's property. Notably, despite the "annoyance" of the rooster noises, Johnson has never complained to Louis, nor has he restricted his outdoor

⁹ Johnson is an African American man. It is clear to the court that the singular purpose of this witness's testimony was to rebut Louis's claims of racial discrimination. Johnson had extremely limited information, knew nothing about the issues in this case, and by his testimony, has only spoken with Sinkiewicz three times since 2012. During the trial, however, Sinkiewicz's counsel spent significant time on direct examination inquiring about Johnson's impressions of Sinkiewicz and whether he expressed any racial animus toward Johnson or Louis. Johnson testified that he knows nothing about how Sinkiewicz interacts with Louis or others. He described Sinkiewicz as a good neighbor and described their conversations as "pleasant." He had no firsthand information about Sinkiewicz's complaints with Louis and his home, and himself had no complaints about Louis or his property except for the "annoyance" at an unspecified time of hearing rooster noises which he believed emanated from Louis's property.

¹⁰ Johnson did not testify to seeing a rooster on Louis's property.

activities. He has never complained to any City officials, lawyers, or Sinkiewicz about the unconfirmed rooster noises.

John Harrington, another witness for Sinkiewicz, also offered testimony about the rooster. The court finds that Harrington is a biased witness who has his own complaints about Louis and his property,¹¹ and credits the limited testimony stated herein.

Harrington, who now lives in Bridgewater, previously resided at 331 North Carey Street, three doors down from Sinkiewicz's property and across the street from Louis's property. Part of North Carey Street is paved, but it becomes an unpaved road directly in front of the Harrington residence. After Louis moved into his residence, Harrington had four or five conversations with Louis about issues related to his parked vehicles, fence, and shrubs, which Harrington alleged blocked his access to a right of way. Harrington had absolutely no conversations or complaints relative to the chicken coop, smells, or noise from domesticated animals. The court does not credit Harrington's testimony that at "times" he has heard rooster noises which he attributes to Louis. On cross-examination, Harrington testified that another neighbor in the area also has chickens and roosters, so he is not sure which bird is making the noises. Harrington, like Johnson, offered only vague testimony about rooster noises but offered no evidence about the dates, times, or even years when he last saw or heard a rooster from Louis's property.¹²

¹¹ At trial on cross-examination, Harrington expressed a desire to litigate his own complaints, which diverge from the issues in this trial, against Louis.

¹² Harrington testified that he has another neighbor who also has chickens and roosters, and that the roosters would call to each other. Given the lack of actual viewing by this witness of a rooster on Louis's property, and the fact that another neighbor has roosters, the court does not credit this witness's testimony that any rooster noises he heard were from Louis's property.

Sinkiewicz complains of smells so noxious emanating from Louis's property that they disturb his enjoyment of his property and he cannot sit outside. However, Winchoba testified that they sit outside most nights and that the smells are not continuous; "it depends on the day." In addition, the "noxious odors" do not prevent Sinkiewicz from electing to walk his dog along the property perimeter at least twice a day. The court does not credit the allegation of noxious smells, especially because the closer abutting neighbors make no such complaints. Additionally, while it is reasonable that some odors could develop from the animal feces, the court credits Louis's testimony that when he cleans out the coops, he mixes the fecal material with soil, puts it in barrels, and uses it for fertilizer for his gardens, and while at times a small pile may be in existence, it is mixed with soil. Further, as confirmed by the credible testimony of the City of Brockton Board of Health and Animal Inspector, Mary Drake ("Drake"), Louis places chemicals, pine powder and lime powder, on the surfaces of the coop and yard area to ameliorate any odors from urine or feces. The court does not credit Winchoba's testimony about the "stench" as the court finds her to be a biased witness. Equally, while Shiffer also testified to at times smelling a horrible stench from Louis's property, the court finds his testimony vague as to how often he experiences the "stench." In addition, Shiffer is a biased witness because he is in a relationship with Winchoba's granddaughter, and is employed weekly by Sinkiewicz to perform yard maintenance. Notably, Harrington, a closer neighbor, has never restricted any outdoor activities or the enjoyment of his property due to any odors emanating from Louis's property.

At trial, counsel for Sinkiewicz introduced through his client two photographs of extremely poor quality which Sinkiewicz took and identified as a pile of manure approximately 6 feet in length and 3 feet in height. Sinkiewicz testified that the pile is there “all the time.”¹³ Louis denied that he kept “manure piles” and testified that he would clean the chicken coops as needed, maybe once a week, and would gather the manure and mix it with earth to use in his gardens and compost. Exhibit 5, a photograph Sinkiewicz took to show the manure pile, is uncorroborated, and Louis has denied that it is a manure pile or that it is on his land. The photograph is useless and lacks markings that would allow, absent an admission which did not occur here, a finding that the pile is of manure and is on Louis’s land. The court does not credit Sinkiewicz’s testimony that a 6 foot by 3 foot manure pile is “constantly” on Louis’s property.

While Sinkiewicz welcomes “wildlife” upon his property, he is unwilling to allow Louis’s turkeys or chickens upon his property or to sit in his trees. Exhibit 3, introduced at trial by Sinkiewicz’s counsel, shows a photograph of two turkeys, a darker-colored wild one and a white domesticated one. Sinkiewicz testified that he took the photograph to show (at an unidentified date, time, and year) Louis’s turkey upon his land and testified that while he would “invite” wild animals upon his property and would permit the wild turkey on his land, he was unwilling to allow Louis’s domesticated turkey to enter on his land. With pride, Sinkiewicz testified how much he loves wildlife, birds,

¹³ Again, there was a lack of specificity about the last time the alleged manure pile was observed on Louis’s property.

and all creatures. However, it is clear that this love of wildlife does not extend to Louis's domesticated animals.

Sinkiewicz testified that he has seen numerous beheaded chickens and ducks on his land which he believes are animals belonging to Louis. While this is in dispute, the court credits that, despite Louis's erection of a six foot fence in addition to Sinkiewicz's chain link fence, occasionally predators have taken Louis's domesticated birds as prey and dead animals have been found on both Louis's and Sinkiewicz's properties. However, the court does not credit Sinkiewicz's estimate of the number of deceased birds he has observed on his property and finds that his estimate is exaggerated. Louis admits that he has lost some chickens over the course of ten years due to "prey" kills, but he could not estimate the number. Sinkiewicz introduced only one photograph at trial which showed a bird carcass. As with many of the photographs offered by Sinkiewicz, the quality was so grainy it was impossible for Louis to identify whether the bird was his.¹⁴

Sinkiewicz is also bothered by the chicken and bird feathers from Louis's property that blow onto his land and that he cleans up on a regular basis. He claims these feathers are a nuisance and a trespass upon his land. However, Sinkiewicz welcomes all other types of wildlife on his property, including birds and wild turkeys. As such, there is no way to assess whether what he believes to be animal feathers from

¹⁴ This corroborates the court's finding that Sinkiewicz documented only one animal "prey" kill on his property despite the fact that he has taken a multitude of photographs over the years of Louis's property and animals.

Louis's property originated from Louis's birds or other animals welcomed freely on Sinkiewicz's property.

In his crusade to stop Louis's keeping of domesticated animals upon his property, Sinkiewicz has filed more than twenty-six complaints with various agencies, City Council members, the Mayor, and others in the City administration. In 2019, Sinkiewicz complained so frequently to the City that Louis received visits from the Health Inspection Department so often that he would just leave his gate open so that they could easily access and inspect the premises. Despite this intense inspection, Louis never received any fines or citations, and he was never ordered to make any corrections or tear his structure down. Indeed, Drake testified for over two days of trial, and confirmed that Louis has never been cited for any violations.

Drake first began in her position with the City of Brockton in 2017. Previously, she was the Animal Control Officer for the Town of Hanson, and she is a certified Animal Control Officer by the Commonwealth. Drake is a leader in the 4-H Association and runs the "chicken barn" at the annual Marshfield Fair. Prior to 2017, the City of Brockton had no rules or regulations for the keeping of domesticated farm animals. Since that year, the City has worked, albeit slowly, to implement regulations. In March of 2018, while at Louis's premises for an inspection, Drake left an application for the keeping of domesticated animals. It was not unusual for her to drop off such an application to citizens of Brockton who had domesticated farm animals prior to the adoption of the regulations. When she went to the property for that March inspection, she

found there were chickens, turkeys, rabbits, and ducks (no goats) at Louis's premises and indeed, there were two fewer chickens than allowed on the application. Louis completed the application and sent it in with the required fee. On May 30, 2018, Drake inspected the property and gave Louis a verbal license.¹⁵ The City of Brockton does not give out paper licenses and has not yet developed any standardized forms.

In her inspections of the coop and pen area, Drake determined that there is plenty of square footage for the number of animals on Louis's property, and that the animals can "comfortably fit" into Louis's structure. She also determined that Louis's elevation of the structure was helpful in keeping predators from getting into the coop. At no time has Drake had concern for the safety of the animals. On all of her many visits to the premises, Drake never saw any dead animals. Drake testified that Louis's structure is secure, and in her experience, "keeping predators out is like stopping the wind" because "if animal predators want to get in they can burrow, climb, rip netting or plywood." In her opinion, Louis took all necessary steps to secure his animals from predators. Drake did suggest that Louis implement "deer netting" to keep predators from flying into the coop, but that was only a suggestion, not a requirement.

In her many visits,¹⁶ Drake never observed a manure pile on Louis's property. Although she did smell some odors of urine, she testified that all animal feces has an odor and it is common practice, such as Louis does, to mix the manure with dirt and put down

¹⁵ In 2018, the process was for an application to be created and the fee paid, and upon passing a barn inspection, a verbal permit was granted.

¹⁶ Drake made at least 13 visits, 8 documented and 5 undocumented.

chemicals to lessen any odors. Further, while Drake has often heard the chattering of guinea hens and noises of other birds, those sounds have not been unusual in their volume or level. After all her visits, she would leave a note (door tag) at Sinkiewicz's property informing him that she had visited Louis's property in response to a complaint. Drake had multiple conversations with Sinkiewicz, as well as visits from him to her office. She also received a seven-page letter of complaints written by Sinkiewicz. In all of her dealings, Drake has informed Sinkiewicz that there have been no citable violations and that Louis's animals are permitted. In addressing Sinkiewicz's incessant complaints, Drake has assured him that Louis is in compliance with the City Board of Health regulations, which were entered into evidence. Those regulations allow for a 25% increase in flock without notice to the BOH. Drake has never received any emails, letters, or communications from other neighbors complaining about Louis's animals, his coop, noise, odors, or any other manner of complaint.

On cross-examination, Sinkiewicz's attorney attempted to establish that Drake, who appeared under subpoena as a witness for Louis, was biased in favor of Louis and was friendly with him, impliedly suggesting some untoward connection. The court specifically finds that there was no such evidence at trial and that plaintiff's counsel's attempt to besmirch a civil servant who has simply followed the mandates of her position is unacceptable and without merit.

Sinkiewicz often yelled insulting comments to Mrs. Louis and her children who were in the yard, telling them that they should "go back to your county" as well as other

insults. Mrs. Louis and her children were at times frightened and upset by this conduct. As a result, Louis sought and was granted in the Brockton District Court a temporary harassment order in May of 2019. At the 10-day hearing, the District Court declined to extend the order, but instructed Sinkiewicz to not file with the City any further complaints against Louis.

The court does not credit Sinkiewicz's contention that his home has lost value due to Louis's chicken coop. There was no expert or other evidence to corroborate that opinion, and Sinkiewicz testified that it is only his "guess" and what he "believes." On cross-examination, Louis introduced evidence which showed that other properties in the general area which are similar to Sinkiewicz's have increased in value beyond the figure Sinkiewicz attaches to his realty.

Sinkiewicz presented no evidence of any physical injuries, property damage, treatment, or medical bills for any emotional or physical injury causally connected to Louis's activities on his property.

Similarly, Louis has not offered any evidence to causally connect a "seizure" he suffered at work to anything having to do with this case. Nor has he shown that he has had treatment or incurred medical bills for any emotional or physical injury causally connected to Sinkiewicz's conduct.

RULINGS OF LAW

SINKIEWICZ'S CLAIMS

Quiet Enjoyment and Privacy

Count I of the complaint alleges that Louis's maintenance of the chicken coop violates Sinkiewicz's quiet enjoyment of his property and his privacy. In the landlord-tenant context, there is a covenant of "quiet enjoyment" in every lease which protects the tenant from conduct by the landlord that constitutes a serious interference with the tenancy and impairs the character and value of the leasehold. See G.L. c. 186, § 14; Goreham v. Martins, 485 Mass. 54, 66 (2020). However, that principle does not apply to this dispute between neighboring property owners.¹⁷ Accordingly, this Court treats Count I as asserting an invasion of Sinkiewicz's right to privacy on his property.

One has "a right against unreasonable, substantial or serious interference with his privacy." G.L. c. 214, § 1B. This protection includes the right to be left alone, and the plaintiff may prevail if he proves that a defendant has unreasonably intruded on his solitude or seclusion. Polay v. McMahon, 468 Mass. 379, 382 (2014); Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 637 (1996). Whether an intrusion qualifies as unreasonable and substantial or serious presents a question of fact. Polay v. McMahon, 468 Mass. at

¹⁷ A similar concept of the "quiet enjoyment" of property is implicated in tort actions for trespass and nuisance, which Sinkiewicz alleges separately in the complaint.

383. Relevant factors include the location of the intrusion, the means used, the frequency and duration of the intrusion, and the underlying purpose behind it. Id.

Sinkiewicz claims an intrusion into his right of solitude in his back yard through noise from Louis's chicken coop. However, Sinkiewicz failed to prove that the noise from the coop is so unusual in volume or level as to be unreasonable.¹⁸ In addition, he failed to prove that the frequency and duration of any noise from the coop constitutes a substantial or serious intrusion on his right of solitude when sitting on his patio or spending time in his yard. Indeed, the noise has not disrupted his daily routine. Further, Louis's maintenance of a chicken coop has a legitimate purpose and does not violate any City ordinance or regulation. See Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 409 Mass. 514, 519 (1991) (infrequent business calls, which had legitimate purpose and were not intended to harass, did not create substantial or serious intrusion on solitude where they did not disrupt plaintiff's daily routine or interfere with his law practice).

Moreover, the occasional intrusion of Louis's domesticated fowl into Sinkiewicz's back yard is entirely unintentional by Louis, who has taken reasonable steps to confine his birds in the coop. On the credible evidence, such an intrusion occurred on only one occasion, when a domesticated turkey sat in a tree in Sinkiewicz's yard. Sinkiewicz failed to prove that the frequency and duration of any invasion of fowl constitutes a substantial or serious intrusion on his right of solitude. Accordingly, Sinkiewicz has failed to prove an invasion of privacy by a preponderance of the evidence.

¹⁸ As noted *supra*, Sinkiewicz failed to prove that any rooster noises originated from Louis's property.

Cf. Polay v. McMahon, 468 Mass. at 384-385 (defendant's conduct, for purpose of harassment, in directing at neighbor's property a surveillance camera that recorded continuously and viewed inside neighbor's home was actionable invasion of privacy). Louis is entitled to judgment in his favor on Count I of the complaint.

Nuisance

Count II of the complaint alleges that Louis's maintenance of the chicken coop creates a nuisance that interferes with Sinkiewicz's enjoyment of his own property. A private nuisance is actionable when one property owner creates, permits, or maintains a condition or activity on his property that creates a substantial and unreasonable interference with the use and enjoyment of the property of another. Rattigan v. Wile, 445 Mass. 850, 856 (2006); Doe v. New Bedford Hous. Auth., 417 Mass. 273, 288 (1994). A plaintiff alleging nuisance bears a heavy burden, as the law of nuisance does not concern itself with the trifles or petty annoyances of everyday life. Rattigan v. Wile, 445 Mass. at 856. To constitute a nuisance, the injury or annoyance must substantially interfere with the ordinary comfort of human existence or cause a substantial detriment to the reasonable use or value of another's property. Id.

A nuisance may arise from offensive sounds or noise. Rattigan v. Wile, 445 Mass. at 858. Whether noise rises to the level of a nuisance depends on all the facts and circumstances. Stevens v. Rockport Granite Co., 216 Mass. 486, 488 (1914). However, noise will constitute a nuisance only if it is harmful or annoying to persons of ordinary sensibility to sound, and not just a person of peculiar temperament or sensibilities. Id. at

489; Davis v. Sawyer, 133 Mass. 289, 290 (1882). As discussed *supra*, the credible evidence shows that the noise from the coop is not so unusual in volume or level as to be unreasonable. See Gollon v. Carmazza, 2016 WL 5787334 at *2 (Mass. App. Ct. Rule 1:28), rev. den., 476 Mass. 1105 (2016) (allegation that single dog in adjacent condominium barked for more than ten minutes at a time did not state claim for nuisance). In addition, neighbors whose properties are located closer to the coop than Sinkiewicz's property are not disturbed by the noise. Sinkiewicz failed to prove that the frequency and duration of any noise from the coop constitutes a substantial and unreasonable interference with his use of his patio or yard. Indeed, the noise has not disrupted his daily routine or prevented him from enjoying his property.

A nuisance also may arise from offensive odors. Rattigan v. Wile, 445 Mass. at 858. Whether an unpleasant odor rises to the level of an actionable nuisance constitutes a question of fact. Loosian v. Goudreault, 335 Mass. 253, 255 (1957). Here, the credible evidence shows that any odor from Louis's chicken coop does not exceed the odor normally attendant to the keeping of domesticated fowl, which is permitted by the City of Brockton. In addition, Louis takes reasonably effective steps to minimize the odor of feces and urine from the coop. The credible evidence did not establish that there is a continuous "stench" emanating from Louis's property. Indeed, neighbors whose properties are closer to the coop do not complain of any offensive odor. See Wade v. Miller, 188 Mass. 6, 6 (1905) (odor from hen house did not constitute nuisance where defendant was shown to maintain it in clean condition, and it was not injurious to normal persons living in residential neighborhood). Cf. Pendoley v. Ferreira, 345 Mass. 309, 311

(1963) (nauseating stench from operation of 850-animal piggery was nuisance to large number of residential neighbors). Sinkiewicz has failed to prove by a preponderance of the evidence that Louis's chicken coop has created a substantial and unreasonable interference with the use of his own property. Accordingly, Louis is entitled to judgment in his favor on Count II of the complaint.

Trespass and Injunctive Relief

Count III of the complaint alleges that Louis caused a trespass on Sinkiewicz's property. Trespass is an invasion, without privilege, of the plaintiff's interest in the exclusive possession of his land, as by entry upon it. Amaral v. Cuppels, 64 Mass. App. Ct. 85, 90-91, rev. den., 445 Mass. 1102 (2005). A defendant may be liable for trespass where he causes or permits an object to invade the property of another. Fenton v. Quaboag Country Club, Inc., 353 Mass. 531, 538 (1968); Amaral v. Cuppels, 64 Mass. App. Ct. at 91. One who negligently allows an animal to escape from his land and stray onto the land of another is liable in trespass for any injury caused. Walker v. Nickerson, 291 Mass. 522, 524-525 (1935).

Sinkiewicz proved that on a single occasion, one of Louis's domesticated turkeys escaped and sat in his tree. However, he failed to prove that this trespass was the result of Louis's negligence, as the credible evidence established that Louis took reasonable measures to contain his fowl in the coop and prevent their escape. Sinkiewicz failed to prove that Louis knew or should have known that his fowl was likely to escape and become a trespasser on another's land. In addition, Sinkiewicz failed to prove that the

escaped turkey caused him any injury. Cf. Walker v. Nickerson, 291 Mass. at 525 (defendant was liable for personal injury caused when, due to his failure to properly maintain fence, his cow escaped onto plaintiff's property and knocked her to the ground).

Insofar as Sinkiewicz claims trespass from the invasion of bird feathers onto his property, he failed to prove that those feathers originated with Louis's fowl as opposed to the many wild birds that he welcomes onto his land. Accordingly, Sinkiewicz has failed to prove an actionable trespass by a preponderance of the evidence.

Count IV of the complaint seeks injunctive relief to enjoin Louis's alleged trespass. A plaintiff who proves a continuing trespass is entitled to an injunction to abate it. Fenton v. Quaboag Country Club, Inc., 353 Mass. at 538; Amaral v. Cuppels, 64 Mass. App. Ct. at 91. Here, however, Sinkiewicz proved only that on one occasion, a domesticated turkey sat in a tree on his property. Having failed to establish any continuing trespass by Louis's fowl, Sinkiewicz is not entitled to injunctive relief. See Sarvis v. Tucker, 2018 WL 3826243 at *2 (Mass. App. Ct. Rule 1:28), rev. den., 480 Mass. 1110 (2018) (where plaintiff showed only two isolated incidents of trespass by neighbor, he had no plausible claim to equitable relief). Judgment must enter for Louis on Counts III and IV of the complaint.

Negligence or Intentional Tort

Count V of the complaint alleges "negligence or intentional tort." The nature of Sinkiewicz's intentional tort claim is unclear, given that he has separately asserted claims for nuisance, trespass, and infliction of emotional distress.

Count V further alleges that Louis's maintenance of the chicken coop on his property is negligent. To prevail on a negligence claim, the plaintiff must prove that the defendant owed him a duty, the defendant breached that duty, and the breach caused the injury or damage suffered by the plaintiff. Helfman v. Northeastern Univ., 485 Mass. 308, 315 (2020). Negligence is the failure to act as a reasonably prudent person would have acted in all the circumstances. Gilhooley v. Star Market Co., Inc., 400 Mass. 205, 207 (1987). In addition, every person has a duty to refrain from acts that unreasonably expose others to a risk of harm. Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629 (1989). Sinkiewicz failed to prove that Louis acted unreasonably with respect to the maintenance of the chicken coop. Drake's credible testimony established that Louis complied with all regulatory requirements for the keeping of domesticated animals in the City of Brockton, and took reasonable steps to minimize the negative impact of the coop on his neighbors. Cf. Walker v. Nickerson, 291 Mass. at 525 (defendant was liable for personal injury caused when, due to his failure to properly maintain fence, his cow escaped to plaintiff's property and knocked her to the ground). Thus, Sinkiewicz failed to prove that Louis breached any duty of care owed to him.

In addition, Sinkiewicz failed to prove that he sustained any damages that were proximately caused by Louis's conduct. Sinkiewicz presented no evidence of any physical injury, property damage, or medical bills for any emotional or physical injury or treatment causally connected to Louis's maintenance of the chicken coop. Nor did he prove through credible evidence that the value of his own property diminished due to the

presence of the coop on Louis's land.¹⁹ Thus, Sinkiewicz failed to prove negligence by a preponderance of the evidence, and Louis is entitled to judgment in his favor on Count V.

Tort of Outrage

Finally, Count VI of the complaint alleges the tort of outrage. No such independent tort exists in Massachusetts. Accordingly, this Court interprets Count VI to assert a claim for intentional infliction of emotional distress. To prevail on such a claim, the plaintiff must show that the defendant's conduct was extreme and outrageous, the defendant intended, knew, or should have known that his conduct would cause emotional distress, and his conduct in fact caused the plaintiff severe emotional distress. Polay v. McMahon, 468 Mass. at 385. The standard for making such a claim is high, and liability cannot be predicated on mere indignities, annoyances, or petty oppressions. Id. Conduct qualifies as extreme and outrageous only if it goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community. Id. at 386; Padmanabhan v. Cambridge, 99 Mass. App. Ct. 332, 342, rev. den., 487 Mass. 1106 (2021).

Louis's maintenance of a chicken coop on his property, with its ordinary and expected noise and odor and the occasional trespass of escaped fowl onto neighboring property, simply does not rise to the level of extreme and outrageous conduct required to hold another liable for intentional infliction of emotional distress. See Polay v.

¹⁹ In any event, purely economic loss cannot be recovered on a negligence claim, absent proof of personal injury or property damage. Passatempo v. McMenimen, 461 Mass. 279, 302 (2012).

McMahon, 468 Mass. at 387-388 (defendant's conduct in verbally attacking neighbor and engaging in constant video surveillance of neighbor's home did not rise to level of extreme and outrageous).

Moreover, Sinkiewicz failed to prove that he in fact suffered severe emotional distress of such a nature that no reasonable person could be expected to endure it. See id. at 388. See also Sarvis v. Tucker, 2018 WL 3826243 at *2 (emotional distress claim against neighbor failed where plaintiff failed to offer any evidence of emotional distress beyond his conclusory statement). Thus, Sinkiewicz did not prove intentional infliction of emotional distress by a preponderance of the evidence, and Louis is entitled to judgment in his favor on Count VI of the complaint.

Attorney's Fees and Costs

Sinkiewicz filed a "Post Trial Submission and Motion For Attorney's Fees" seeking to recover \$49,280 in legal fees "as part of his damages." This request for fees is accompanied by the detailed billing records of Attorney Albert Grady. Sinkiewicz cites no authority in support of his request for fees.

Sinkiewicz's claims in this lawsuit are not the type in which attorney's fees may be recovered as an element of compensatory damages. Cf. Millennium Equity Holdings, LLC, 456 Mass. 627, 645 (2010) (abuse of process); Columbia Chiropractic Group, Inc. v. Trust Ins. Co., 430 Mass. 60, 63 (1999) (unfair and deceptive act under Chapter 93A that forced plaintiff to incur litigation expenses); Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 98 (1997) (action by insured to establish insurer's duty to defend under

homeowner's policy). Further, "[t]he sine qua non for most fee awards is success."

Ventresca v. Town Manager of Billerica, 68 Mass. App. Ct. 62, 65 (2007). Sinkiewicz did not prevail on any of his claims in this action.

Moreover, Massachusetts generally follows the "American Rule" and denies recovery of attorney's fees unless a contract between the parties or a statute or court rule authorizes a fee award. John T. Callahan & Sons, Inc. v. Worcester Ins. Co., 453 Mass. 447, 449 (2009); Styller v. National Fire & Marine Ins. Co., 95 Mass. App. Ct. 538, 544, rev. den., 483 Mass. 1102 (2019). This rule is justified because no person should be penalized for defending or prosecuting a lawsuit, and the threat of having to pay an opponent's fees and costs might unjustly deter those of limited resources from engaging in litigation. Police Comm'r of Boston v. Gows, 429 Mass. 14, 17 (1999). Here, the only statute under which Sinkiewicz filed suit, G.L. c. 214, §1B, does not authorize the recovery of attorney's fees. In any event, Sinkiewicz is not a prevailing party on the statutory claim or any of his other claims in this action. See Ventresca v. Town Manager of Billerica, 68 Mass. App. Ct. at 65. Accordingly, he must bear the cost of his own expenses, including attorney's fees.

LOUIS'S COUNTERCLAIMS

Violation of Chapter 258E

Count I of Louis's counterclaim alleges civil harassment in violation of General Laws Chapter 258E. That statute provides in relevant part:

A person suffering from harassment may file a complaint in the appropriate court requesting protection from such harassment. A person may petition the court under this chapter for an order that the defendant:

- refrain from abusing or harassing the plaintiff . . .
- refrain from contacting the plaintiff . . .
- remain away from the plaintiff's household or workplace . . .
- pay the plaintiff monetary compensation for the losses suffered as a direct result of the harassment . . .

G.L. c. 258E, § 3(a). The statute defines “harassment” in relevant part as: “3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property.” G.L. c. 258E, § 1. Under the statute, “abuse” means “attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm.” G.L. c. 258E, § 1. Intimidation, although undefined by the statute, is understood to mean putting in fear for the purpose of compelling or deterring conduct. A.T. v. C.R., 88 Mass. App. Ct. 532, 536 (2015), rev. den., 473 Mass. 1108 (2016).

It is unclear from Louis’s pleading whether he seeks a harassment prevention order, damages, or both. Louis contends that he is entitled to relief under Chapter 258E based on Sinkiewicz’s conduct of filing twenty-six complaints with the City about his chicken coop, surveilling and photographing his activities over the fence, telling his wife and children on several occasions to “go back to your country,” and filing this lawsuit against him. Foremost, Chapter 258E does not apply to speech that is protected by the First Amendment. Van Liew v. Stansfield, 474 Mass. 31, 37 (2016); O’Brien v. Borowski, 461 Mass. 415, 425 (2012). Accordingly, the only speech that can permissibly

constitute harassment is fighting words that are inherently likely to provoke violence, or true threats that cause a fear of imminent physical harm. Id. Sinkiewicz's directives to Louis's wife and children that they "go back to your country," although obnoxious and offensive, do not qualify as predicate acts under Chapter 258E.

Further, a critical element of civil harassment under Chapter 258E is intent to cause fear, intimidation, abuse or damage to property. Seney v. Morhy, 467 Mass. 58, 63 (2014). In addition, the plaintiff must prove a second layer of intent: that defendant's conduct was malicious, meaning motivated by cruelty, hostility, or revenge. Id.; Ellis E. v. Finn F., 96 Mass. App. Ct. 433, 440 (2019), rev. den., 483 Mass. 1109 (2020). Louis has not proved by a preponderance of the evidence that Sinkiewicz's conducting surveillance over the fence, while intrusive and unneighborly, was malicious and intended to cause fear, intimidation, or abuse. See F.W.T. v. F.T., 93 Mass. App. Ct. 376, 378-379 (2018) (repeated flying of drone over plaintiff's property to videotape it, although a trespass, was not harassment); C.F.R. v. P.C., 91 Mass. App. Ct. 124, 127 (2017) (playing loud music at night, using strobe lights, and installing video camera pointed at property was not intimidation). Similarly, he failed to prove that Sinkiewicz's incessant filing of complaints about the coop and prosecution of this lawsuit were malicious and intended to cause fear, intimidation, or abuse. See R.L. v. T.N.F., 2021 WL 1569011 at *2 (Mass. App. Ct. Rule 23) (repeated reports to DCF, resulting in several home inspections and investigations, did not constitute harassment); Gassman v. Reason, 90 Mass. App. Ct. 1, 9 (2016) (repeated complaints to police about noise from neighbor's apartment were not intimidation). Rather, it appears to this Court that Sinkiewicz's

conduct was motivated by a stubborn belief that Louis's chicken coop was inappropriate in a residential neighborhood, despite repeated assurances by the City that the coop was permitted. See Ilan I. v. Melody M., 96 Mass. App. Ct. 639, 645 (2019), rev. den., 484 Mass. 1101 (2020) (defendant's motive and intent under Chapter 258E is a question for the finder of fact).

Finally, Louis did not prove by a preponderance of the evidence that Sinkiewicz's conduct, although genuinely distressing, in fact caused him fear, intimidation, abuse or damage to property. Chapter 258E is not a remedy for conduct that is harassing in the colloquial sense of being chronically vexing, troublesome, or annoying. Gassman v. Reason, 90 Mass. App. Ct. at 8. Accordingly, Louis has not demonstrated his entitlement to relief under Chapter 258E and judgment must enter in favor of Sinkiewicz on Count I of the counterclaim.

Quiet Enjoyment and Privacy

Count II of Louis's counterclaim alleges that Sinkiewicz interfered with Louis's quiet enjoyment of his property and invaded his privacy by filing twenty-six complaints about his chicken coop with the Board of Health. As discussed *supra*, one has "a right against unreasonable, substantial or serious interference with his privacy." G.L. c. 214, § 1B. This protection includes the right to be left alone, and the plaintiff may prevail if he proves that a defendant has unreasonably intruded on his solitude or seclusion. Polay v. McMahon, 468 Mass. at 382; Ellis v. Safety Ins. Co., 41 Mass. App. Ct. at 637.

Whether an intrusion qualifies as unreasonable and substantial or serious presents a

question of fact. Polay v. McMahon, 468 Mass. at 383. Relevant factors include the location of the intrusion, the means used, the frequency and duration of the intrusion, and the underlying purpose behind it. Id.

Sinkiewicz's incessant complaints to the City about the chicken coop led to numerous inspections of Louis's property by the Board of Health. Those complaints were unreasonable, given the City's repeated assurances that the maintenance of the coop was permissible. Nonetheless, this Court concludes that the intrusion on Louis's right to be left alone was not so substantial or serious as to violate his right to privacy under G.L. c. 214, § 1B. In so concluding, this Court gives weight to the fact that Sinkiewicz's intrusive conduct was motivated not by an intent to harass but by a genuine, albeit unfounded, concern for the legality of the chicken coop and its impact on his property. Because Louis has failed to prove by a preponderance of the credible evidence that Sinkiewicz violated his right to privacy, Sinkiewicz is entitled to judgment in his favor on Count II of the counterclaim.

Attorney's Fees and Costs

Louis filed a "Motion For Fees and Costs Related to Plaintiff's Complaint" seeking to recover \$38,796.26 in attorney's fees and costs pursuant to G.L. 231, § 6F, which states in relevant part that if the court determines that all or substantially all the claims made by a party "were wholly insubstantial, frivolous, and not advanced in good faith," the court "shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in

defending against such claims.” G.L. 231, § 6F. Notably, a judge who declines to award attorney’s fees under § 6F is not required to make specific findings as to the reasons for refusing to do so. Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 781 n. 13 (1986).

A claim is wholly insubstantial and frivolous where there is a total absence of evidentiary or legal support for the claim and it lacks even a colorable basis in law. Fronk v. Fowler, 456 Mass. 317, 329 (2010). The proper vantage for evaluating whether a claim is frivolous is the time the claim is brought and over the course of the litigation. Id. (award of fees proper where plaintiff’s claim was frivolous from inception of litigation). Sinkiewicz’s claims, although ultimately unsuccessful, were not wholly insubstantial and frivolous, with a total absence of evidentiary support or colorable legal basis. See Stephens v. Naps, 70 Mass. App. Ct. 676, 686, rev. den., 450 Mass. 1106 (2007) (merely because argument is unsuccessful does not make it frivolous). Cf. O’Leary v. The Educ. Resources Inst., Inc., 61 Mass. App. Ct. 653, 654-655, rev. den., 442 Mass. 1112 (2004) (claim was frivolous where contrary to clearly established law).

Further, this Court does not conclude that Sinkiewicz advanced his claims in bad faith. Bad faith means ill will, insincerity or a design to defraud or seek an improper advantage, as opposed to poor judgment. Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 338 (1988). The standard for bad faith under § 6F is neither wholly subjective nor wholly objective, and the court examines whether the plaintiff had reason to believe in his claim. Massachusetts Adventura Travel, Inc. v. Mason, 27 Mass. App. Ct. at 297-299.

See Danger Records, Inc. v. Berger, 444 Mass. 1, 13 n.12 (2005) (bad faith may be shown by party's utter lack of credibility in testifying about important issue); Miaskiewicz v. LeTourneau, 12 Mass. App. Ct. 880, 880-881 (1981) (bad faith shown where party lied under oath). A claimant's absence of good faith reasonably may be inferred from the circumstances. Fronk v. Fowler, 456 Mass. at 335; Massachusetts Adventura Travel, Inc. v. Mason, 27 Mass. App. Ct. 293, 299, rev. den., 405 Mass. 1203 (1989). This Court cannot conclude that Sinkiewicz litigated his claims in bad faith. Accordingly, the court declines to award fees under G.L. c. 231, § 6F.

Fraud on the Court

Louis further requests that this Court exercise its discretion to award attorney's fees in response to what he characterizes as a fraud on the court. See Wong v. Luu, 472 Mass. 208, 216 (2015) (court has inherent authority to sanction party or attorney by the award of attorney's fees as necessary to secure the full and effective administration of justice). Louis alleges that Attorney Grady committed fraud on the court when he unilaterally added documents to the uncontested exhibit binder even though the exhibits were contested, and when he added dates to the list of photographs and exhibits.

Fraud on the court occurs where it can be clearly and convincingly demonstrated that a party has intentionally set into motion an unconscionable scheme calculated to interfere with the court's ability to impartially adjudicate a matter, by improperly influencing the trier or unfairly hampering the opposing party's presentation of a claim or defense. Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994).

Louis has failed to demonstrate such egregious wrongdoing in this case. Accordingly, this Court, in its discretion, declines to award attorney's fees. See Wong v. Luu, 472 Mass. at 218 (court must exercise restraint in awarding attorney's fees as sanction).

ORDER FOR JUDGMENT

For the foregoing reasons, it is hereby **ORDERED** that judgment enter for defendant Pierre Louis on all counts of plaintiff Joseph Sinkiewicz's complaint. It is further **ORDERED** that judgment enter for plaintiff Joseph Sinkiewicz on both counts of the counterclaim.

Finally, it is **ORDERED** that Plaintiff's Post Trial Motion For Attorney's Fees and Defendant's Motion For Fees and Costs Related to Plaintiff's Complaint be **DENIED**.

Elaine M. Buckley
Justice of the Superior Court

DATED: June , 2021