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IN THE COMMON PLEAS COURT
GREENE COUNTY, OHIO

RAY POWERS, *et al.*

Plaintiffs.

vs.

WESLEY TINCHER, *et al.*

Defendants.

Case No.: No. 99-CV-181

(Judge M. David Reid)

JUDGMENT ENTRY

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This matter comes before the Court on Defendants' request for injunctive relief. Two issues are before this Court. The first issue is whether Plaintiffs' roosters constitute a nuisance and, if so, should Plaintiffs be enjoined from raising them. The second issue is whether Plaintiffs should be enjoined from using a video camera that is pointed at both the Plaintiffs' property and Defendants' property.

Defendants argue that Plaintiffs' roosters constitute a nuisance and that Plaintiffs should be enjoined from raising them. "The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which property is put is a reasonable use under the circumstances, and whether there is 'an appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort.'" Rautsaw v. Clark, 22 Ohio App.3d 20, 21 (1985) (quoting Antonik v. Chamberlain, 81 Ohio App. 465, 476 (1947)). Whether a particular fact pattern constitutes a private nuisance "cannot be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act." Rautsaw, 22 Ohio App.3d at 21 (quoting Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392, 399 (1861)).

If the court finds there is a private nuisance, it has the discretion to abate the nuisance. Miller v. Horn, 1996 WL 354756 (Ohio 2 Dist.). However, the mode and extent of abatement

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may not exceed what is necessary to protect the property from which the nuisance is originating. Id.

In Forrester v. Webb, 1999 WL 74543 (Ohio App. 12 Dist.), several plaintiff-neighbors brought a private nuisance action against a defendant-neighbor who **raised and bred approximately one hundred roosters for the primary purpose of cockfighting.** The plaintiffs' homes were within four hundred yards from the defendant's home. Id. The evidence showed that the roosters would crow from approximately 4:30 a.m. until sunset, and made continuous and overwhelming noise. Id. In balancing the rooster noise against **the use of the defendant's property to raise cockfighting roosters,** the trial court found that the **roosters** constituted a private nuisance and ordered the defendant to maintain less than six roosters **on his property.** Id. The defendant appealed arguing that the roosters did not constitute a nuisance **and,** alternatively, that the abatement order of the trial court was overly **restrictive.** Id.

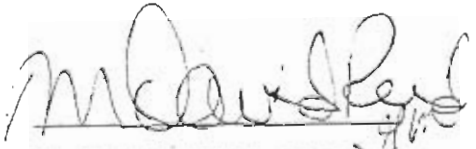
The court of appeals affirmed the trial court. Id. "Due to the **sheer number of roosters,** the evidence at trial strongly indicates that the noise at issue is **not the normal** sounds of a farm or the country." Id. The court held that the finding of a private nuisance was within the discretion of the trial court and that the order to abate the nuisance to six or less roosters was proper. Id.

Similar to the rooster-raising neighbor in Forrester, **Plaintiffs** admit raising over one hundred roosters on their property for the primary purpose of cockfighting. Plaintiffs do not dispute that their roosters crow from early morning until sunset. Furthermore, Plaintiffs do not dispute that **Defendants' house is within a couple hundred yards of where Plaintiffs keep their roosters.** **Finally, this Court finds credible Defendants' testimony that the crowing of the roosters is irritating and annoying.** As such, and **following Forrester,** this Court **finds that Plaintiffs' roosters constitute a private nuisance.**

In order to abate the nuisance, this Court follows Forrester and enjoins Plaintiffs from keeping more than six roosters on his property. See also Miller, 1996 WL 354756, *6 (finding that the party responsible for the nuisance only has a right to "retain a reasonable number of pets"). Furthermore, this Court enjoins Plaintiffs from keeping the roosters on the property directly adjacent to Defendants' house.


With respect to the second issue, this Court declines to enjoin Plaintiffs from using their video camera for two main reasons. First, this Court finds credible Plaintiffs' testimony that his video camera is pointed *directly* at his chicken boroughs and only *indirectly* at Defendants' property. Second, and legally more important, Defendants cannot claim an invasion of privacy to that which is open to the public and not of a private nature. See Pollock v. Rashid, 117 Ohio App.3d 361 (1996) (holding plaintiff could not successfully claim invasion of privacy to that which plaintiff leaves open to the public eye); see also Haynik v. Zimlich, 30 Ohio Misc.2d 16 (holding defendant did not intrude on plaintiff's privacy when plaintiff was photographed in a public area).

SO ORDERED



M. DAVID REID, JUDGE

Copies of the above were sent to:
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GAYLE L. MANKER
Assignment Commissioner

