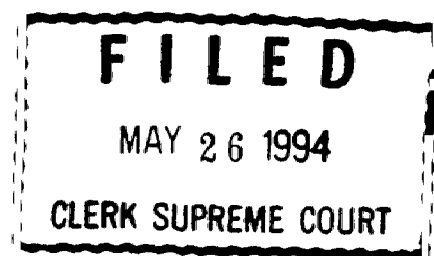


IN THE COURT OF APPEALS OF IOWA

No. 4-104 / 93-432



RANDY AHRENS, JUDITH AHRENS, RUSSELL
J. ASKLAND, MICHAEL BUCKLIN, LULA
BUCKLIN, DOUGLAS HERRICK, JANICE
HERRICK, GEORGE KARWOSKI, PENNELIYA
MOORMAN, MARVIN PROESCH, LILLA
PROESCH, DONALD PROKOP, JEAN
PROKOP, KENNETH R. SHUEY, JULIA
SHUEY, and PARKER WINTERS,
Plaintiffs-Appellees,

vs.

McANINCH CORPORATION,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County,
Joel D. Novak, Judge.

The defendant appeals the judgment entered upon a
jury's verdict in the plaintiffs' favor on theories of
nuisance and trespass. **AFFIRMED.**

Michael D. Huppert and Jeffrey A. Boehlert of
Patterson, Lorentzen, Duffield, Timmons, Irish, Becker &
Ordway, Des Moines, for appellant.

Steven L. Nelson and David A. Tank of Davis,
Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines,
for appellees.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J. 000002

Defendant McAninch appeals the district court's entry of judgment on the jury's verdict for the plaintiffs on theories of nuisance and trespass. McAninch also appeals the court's denial of its motions for judgment notwithstanding the verdict and new trial. Plaintiffs cross-appeal the court's directed verdict on the negligence claim. We affirm.

In 1990 the City of Boone contracted with McAninch Corporation for sanitary and storm sewer improvements including the construction of a new storm sewer line. During the installation process, flooding occurred in the improvement areas causing damage to the plaintiffs' homes. The plaintiffs contend McAninch's use of a twelve-inch diameter sewer line to connect a seventy-two-inch line and a twenty-six-inch line led to clogging and resulted in flooding in the vicinity of First and Division Streets in Boone. The plaintiffs also claim McAninch's use of a twelve-inch line to assist in the drainage of storm water along Mamie Eisenhower Street caused flooding which damaged nearby homes.

The district court granted McAninch's motion for directed verdict on the plaintiffs' negligence and punitive damage claims. Over the defendant's objections, the court submitted the issues of nuisance and trespass to the jury. The court also refused to admit an exhibit offered by McAninch.

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). The movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of the claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). The same rule applies to a motion for judgment notwithstanding the verdict. See Valadez v. City of Des Moines, 324 N.W.2d 475, 477 (Iowa 1982).

Iowa Code section 651.1 (1989) defines a nuisance as:

Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property

The common law defines a nuisance as an actionable interference with a person's interest in the private use and enjoyment of their land. Mel Foster Co. Prop. v. American Oil Co., 427 N.W.2d 171, 173 (Iowa 1988) (citations omitted).

McAninch contends a claim based on a private nuisance requires proof of wrongful conduct or intent. We disagree. In Ryan v. City of Emetsburg, 232 Iowa 600, 603, 4 N.W.2d 435, 438 (1942), the Iowa Supreme Court stated:

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Nuisance is a condition, and not an act or failure to act on the part of the person responsible for the condition. If the wrongful condition exists and the person charged therewith is responsible for its existence, he is liable for the resulting damage to others though he may have used the highest possible degree of care to avoid its deleterious effects

Our supreme court has expressly rejected the same argument McAninch makes in Mel Foster Co. Prop. v. American Oil Co., 427 N.W.2d 171 (Iowa 1988). In Mel Foster the court stated, "It is well established that the existence of a nuisance is not affected by the intention of its creator to injure anyone." Id. at 173 (citations omitted).

We acknowledge Section 825 of the Restatement of Torts (Second) includes wrongful conduct and intent as an element of a nuisance claim. This section, however, conflicts with the foregoing case law and is therefore not controlling.¹ See e.g. Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980). Since intent is not an element of the plaintiffs' nuisance claim, no evidence of intent was required to support submitting this claim to the jury.

McAninch also contends plaintiffs failed to generate substantial evidence on the proximate cause and resulting damage required to submit plaintiffs' claims to the jury. It argues that expert testimony was required to establish causation. We disagree.

1. We recognize Section 825 of the Restatement of Torts presents the preferred analysis of nuisance claims in a number of jurisdictions; however, we cannot apply this section without clear authority from our supreme court.

The jury heard the testimony of McAninch's project superintendent, John Herold, and Wilbur Kotz, the project inspector for the City of Boone. These two witnesses had sufficient experience in storm sewer construction to testify as to the possible effects of the obstruction. In addition, eyewitnesses testified as to the effect the removal of the obstruction had on the water drainage. In a nuisance action, it is for the jury to determine, as a question of fact, whether the defendant's acts were the proximate cause of the plaintiffs' injury. See Hartzler v. Town of Kalona, 218 N.W.2d 608, 610 (Iowa 1974). We find there was substantial evidence showing McAninch's conduct was a proximate cause of the nuisance.

Our courts have recognized flooding as well as the disturbance of comfort by unpleasant odors as typical examples of private nuisances. See Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7, 10 (Iowa 1992) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 86, at 616-17 (5th ed. 1984)); see also Iowa Code § 657.2 (1989). We conclude there was substantial evidence for the district court to submit the nuisance theory to the jury for consideration.

The submission of the trespass claim to the jury is also challenged by McAninch on grounds similar to those advanced above. A trespass is a physical invasion by tangible matter of the interest of one or more individuals in the exclusive possession of their real property which

causes them injury. See Ryan, 4 N.W.2d at 438 (1942). The elements of trespass are set out in the Restatement (Second) of Torts Section 158. As a matter of law intent is required in order to find a trespass.

There was sufficient evidence indicating McAninch knew with substantial certainty that a trespass would occur as a result of the obstruction and that there would be damage. The jury answered a special verdict form on the trespass claim and found McAninch had trespassed. There was sufficient evidence to support submission of the trespass theory to the jury.

The instructions given by the district court on nuisance and trespass both contained elements of intent. As stated previously, intent is not a required element of nuisance in Iowa. We recognize an error in giving or refusing to give an instruction is not reversible unless the error was prejudicial. Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866, 868 (Iowa 1989). We determine this error did not prejudice either party and did not change the result.

McAninch also argues the court erred in failing to admit its exhibit A. Exhibit A was a written application for community development block grant funding which was prepared by Marsha Cory, a partner with a consulting firm retained by the City of Boone to assist it in obtaining financing for the storm sewer improvement project. The exhibit contained summaries of neighborhood surveys

indicating flooding had occurred in these areas in the past. The exhibit did not identify which Boone residents completed the surveys or recalled past flooding.

We review rulings on the admissibility of evidence for an abuse of discretion. Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d 78, 80-81 (Iowa 1992) (citing State v. Harmon, 238 N.W.2d 138, 145 (Iowa 1979)). We will not find an abuse of discretion unless such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. Hutchinson v. Smith Labs., Inc., 392 N.W.2d 139, 141 (Iowa 1986).

McAninch argues exhibit A qualifies as an exception to the hearsay rule under any of the following: (1) the business records exception under Iowa Rule of Evidence 803(6); (2) a commercial publication under Iowa Rule of Evidence 803(17); (3) a document regarding reputation as to events of general history to the community under Iowa Rule of Evidence 803(20); and the catch-all exception under Iowa Rule of Evidence 803(24). We disagree.

Exhibit A is not an exception under 803(6) because this report was a compilation of recollections by unidentified residents of Boone who were not in the business of monitoring water or sewage levels. In addition there was no showing the report was made at or near the time of the flooding they recalled.

Second, exhibit A is not an exception under 803(17) because it is not a publication such as market quotes in a

newspaper and it is not a telephone or a city directory. Rather, the exhibit contains esoteric research and opinions which are not allowed under this exception. See State v. Galloway, 275 N.W.2d 736, 743 (Iowa 1979).

Exhibit A is not admissible as "reputation concerning boundaries or general history" under 803(20) because boundary disputes are not involved, nor does the past flooding of residential basements qualify as "general history important to the community" as required by the exception.

Finally, exhibit A is not admissible under the catch-all provision of 803(24) because the comments of the unidentified residents of Boone lack any guarantee of trustworthiness. Testimony provided by residents of Boone would have been better evidence than the report, and the interests of justice are not served if the exhibit was admitted. We find the district court did not abuse its discretion in ruling exhibit A inadmissible.

Plaintiffs cross-appealed, contending the court erred in failing to submit their theory of negligence to the jury. We determine this failure did not prejudice the plaintiffs, and we decline to disturb the decision of the district court.

In summary we conclude (1) there was sufficient evidence to submit the nuisance and trespass theories to the jury; (2) the instructions on nuisance, although incorrectly stating Iowa law, did not prejudice either

party and did not change the result; (3) the district court did not abuse its discretion in ruling exhibit A inadmissible; and (4) the failure to submit the negligence theory to the jury did not prejudice the plaintiffs.

For the reasons stated above, we affirm judgment of the district court. Costs of this appeal are assessed to McAninch.

AFFIRMED.