

IN THE COURT OF APPEALS OF IOWA

DARLENE MOORE, )

Plaintiff-Appellee, )

vs. )

TERMINIX INTERNATIONAL, INC., )

Defendant-Appellant. )

Filed October 28, 1987

7-304  
86-1853

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Scott County (No. 70923), David J. Sohr, Judge.

The defendant appeals from the jury verdict for the plaintiff on her claim of nuisance and from the trial court's denial of its motion for a new trial.

**AFFIRMED.**

William J. Koehn and David A. Tank of Davis, Hockenberg, Wine, Brown, Koehn & Shors, Des Moines, for defendant-appellant.

Rand S. Wonio of Lane & Waterman, Davenport, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ. Snell, J., takes no part.

**OXBERGER, C.J.****163**

The defendant, Terminix International, Inc. (Terminix) appeals a jury verdict for the plaintiff, Moore, on her *claim of nuisance and the trial court's denial* of its motion for a new trial. Terminix claims: (1) the trial court erred in instructing the jury to find strict liability for a nuisance condition where the evidence demonstrated plaintiff invited defendant onto her property; and (2) the trial court erred in failing to grant the defendant's motion for a new trial when there was insufficient evidence at the time of trial which would sustain the verdict of \$50,000.00. We affirm.

The facts in this case are generally undisputed. In the Spring of 1984, Darlene Moore discovered evidence of termites around her home. She called Terminix and a representative inspected the property. He explained that Terminix would treat her home by drilling holes in the slab and injecting chemical termiticides. He also stated that the location of the heating ducts would be ascertained in order to avoid contaminating them. After the first treatment, Mrs. Moore was not satisfied and Terminix returned and treated a portion of the home. In treating the house, Terminix injected a chemical termiticide, Dursban T.C., into the slab and also into a bathroom wall.

Since strong odors remained after the treatment, Mrs. Moore called Terminix and asked them to correct the problem. Terminix made several attempts to neutralize the odors. Mrs. Moore also took separate measures, including installing a new furnace, to alleviate the problem. These collective efforts met with some success until July 1986 when the odors returned. Mrs. Moore then left her home because the situation was intolerable.

The scope of our review in law actions is limited to correcting errors of law. Iowa R. App. P. 4. The jury's finding of fact are binding upon us if

supported by substantial evidence. Iowa R. App. P. 14(f)(1). We must view the evidence in the light most favorable to the one in whose favor the verdict was rendered. Poulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981); Cedar Falls Bldg. Center v. Vietor, 365 N.W.2d 635, 638 (Iowa App. 1985). It is for the jury to act as the trier of facts, and the court cannot substitute its view of the evidence for that of the jury. Vietor, 365 N.W.2d at 638.

Appellant's first assignment of error is that the trial court erred in instructing the jury to find Terminix strictly liable for the nuisance condition where the evidence is undisputed that Mrs. Moore invited Terminix onto her property. Terminix argues that, absent a showing of an intentional invasion, Moore must show Terminix was negligent in order to recover. Moore claims Terminix did not properly preserve error and, if error was preserved, negligence is not a necessary element of nuisance actions in Iowa.

Without addressing the error preservation issue, we examine Terminix's challenge to the jury instruction. Terminix objects to the following portion of the court's instruction number 15:

In this case, if you find by a preponderance of evidence that any of the above conditions existed, and if you further find that the Defendant is responsible for the existence of that condition, then Defendant is liable for the resulting damage to the Plaintiff, even though Defendant may have used the highest possible degree of care to prevent the condition from occurring or to minimize its effects.

Terminix claims the nuisance doctrine in Iowa is unsettled and urges us to clarify the law by adopting section 822 of The Restatement (Second) of Torts. Terminix argues that in a nuisance action where intentional conduct is lacking, strict liability is not appropriate, and a showing of conduct "otherwise actionable,"

negligence in this case, is required for recovery.<sup>1</sup> Based on section 822 and defendant's interpretation of Iowa case law, Terminix argues negligence is a necessary element of Moore's claim because the odors in Moore's home could only be the result of Terminix's negligence.

The principles governing consideration of nuisance claims are well established. A private nuisance is an actionable interference with a person's interest in the private use and enjoyment of his or her property. Page County Appliance Center v. Honeywell, 347 N.W.2d 171, 175 (Iowa 1984); Carsen v. McDonald, 212 N.W.2d 505, 508 (Iowa 1973). In Ryan v. City of Emmetsburg, 232 Iowa 600, 603, 4 N.W.2d 435, 439 (1942), the court stated:

The terms 'private nuisance' and 'negligence' are in different classes. Negligence is a type of liability forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. It has been called a type of harm.

The existence of a nuisance is not affected by the intention of its creator not to injure anyone. Honeywell, 347 N.W.2d at 175; Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 560-61 (Iowa 1972). An action for nuisance need not be predicated upon negligence. Honeywell, 347 N.W.2d at 176; Claude v. Weaver Construction Co., 261 Iowa 1225, 1229, 158 N.W.2d 139, 143 (1968). Nuisance ordinarily is considered as a condition, and not as an act or failure to act on the part of the responsible party. Honeywell, 347 N.W.2d at 176; Sparks v. City of Pella, 258 Iowa 187, 190, 137 N.W.2d 909, 911 (1965). A person responsible

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<sup>1</sup>Section 822 of the Restatement (Second) of Torts states:

General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

for a harmful condition found to be a nuisance may be liable even though that person has used the highest possible degree of care to prevent or minimize the effect. Honeywell, 347 N.W.2d at 176; Ryan, 232 Iowa at 605, 4 N.W.2d at 439; Bowman v. Humphrey, 132 Iowa 234, 236-37, 109 N.W.714, 715 (1906).

Applying these principles to the facts in the present case, it is immediately apparent Terminix's position is contrary to the well-established law in Iowa. The cases are clear that negligence is not an essential element in a private nuisance action. It is also clear that liability can be assigned without fault, regardless of the efforts taken to prevent or minimize any damage. The trial court's instruction embodied the foregoing principles and was a correct statement of Iowa law. We hold the trial court did not err in instructing the jury to find Terminix strictly liable for the nuisance condition.

Terminix also contends the trial court erred by denying its motion for a new trial. Terminix argues there was insufficient evidence at the time of trial to justify an award of \$50,000.00. They ask us to order a new trial on damages or, alternatively, to reduce the award.

We may set aside or alter an award that is flagrantly excessive or unsupported by the evidence. Gail v. Clark, No. 86-493, slip op. at 31 (Iowa, July 22, 1987); DeBurkarte v. Louvar, 393 N.W.2d 131, 139 (Iowa 1986). The assessment of damages is traditionally a jury function and courts intervene only for compelling reasons. Where a verdict is within sufficient evidence we will not disturb the jury's award. Gail, slip op. at 36; Haumerson v. Ford Motor Co., 257 N.W.2d 7, 16 (Iowa 1977). The evidence is viewed in the light most favorable to the plaintiffs. Gail, slip op. at 31.

The jury was instructed it could award damages for loss in value to the property, amounts spent by Moore to abate the nuisance, and if a permanent nuisance, for any annoyance, inconvenience and disturbance resulting from

the nuisance. During the trial uncontroverted evidence was introduced by plaintiff's experts. Mr. Willits, an appraiser, testified the pre-nuisance value of the Moore home was \$36,500.00; and, the loss in value, in his opinion, was the cost to cure the situation. Plaintiff's second expert, Dr. Carr, then testified the costs of further investigation to determine the source of the odors and to alleviate the problem could range between \$10,000.00 and \$50,000.00, depending on the repairs. Carr also testified that Dursban T.C. could last up to eighteen years depending on a number of variables. The jury also had evidence of the nearly \$6,000.00 Mrs. Moore spent trying to eliminate the odor problem. As noted earlier, the jury could also award damages for annoyance, inconvenience and disturbance resulting from the nuisance.

We cannot speculate as to how the jury apportioned the damages, and we decline to do so. Viewing this evidence in the light most favorable to the plaintiffs, we hold the evidence was sufficient to support the jury's award and we affirm the trial court.

**AFFIRMED.**