

IN THE COURT OF APPEALS OF IOWA

No. 9-327 / 98-0889

Filed July 23, 1999

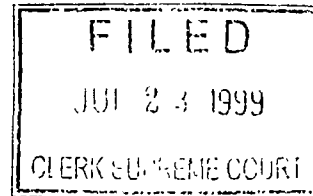
JAMES SELKE and MARY SELKE,

Appellees,

vs.

CITY OF WATERLOO,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch,
Judge.

The City of Waterloo appeals a jury verdict in favor of homeowners James and Mary Selke which found that the City was liable for a sewer backup in their home.

REVERSED AND REMANDED WITH DIRECTIONS.

Jeffrey C. Peterzalek and David A. Roth of Gallagher, Langlas & Gallagher,
P.C., Waterloo, for appellant.

Aaron K. Hawbaker of Randall, Griffin, Nelson & Hawbaker, P.L.C.,
Waterloo, for appellees.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

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VOGEL, J.

The City of Waterloo appeals a jury verdict in favor of homeowners James and Mary Selke which found that the City was liable for damage to their home caused by a sewer backup. As we find that the Selkes failed to prove that the City created a nuisance, we reverse and remand with directions.

Background facts. James and Mary Selke are residents of Waterloo, Iowa. On three separate occasions, June 17, 1993, July 17, 1993 and February 2, 1995, sewage backed up from the Waterloo sewer system into the basement of the Selke home. The Selkes filed suit against the City of Waterloo, seeking damages under theories of nuisance and negligence. The district court granted the City's motion for summary judgment on the negligence claim and the case proceeded to trial on the nuisance theory alone. A jury found the City liable for the second of the three backups and awarded the Selkes \$20,000 in damages. The trial court denied the City's motion for judgment notwithstanding the verdict and motion for a new trial. The City now appeals.

Scope of review. We review the court's denial of a motion for judgment notwithstanding the verdict for correction of errors at law. Iowa R. App. P. 4.; *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). In reviewing the court's denial of the motion for judgment notwithstanding the verdict, we view the evidence in the light most favorable to the Selkes. See *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 541 (Iowa 1997). We consider every legitimate inference that may fairly

and reasonably be deduced from the evidence. *Id.* Our sole inquiry is whether there was sufficient evidence presented to justify submitting the case to the jury. *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 622 (Iowa 1998): If reasonable minds could differ on the issue, it was proper for the district court to submit it. *Id.*; *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992).

Operation of sewer line as a nuisance. The City first contends the district court erred in denying its motion for judgment notwithstanding the verdict because the Selkes failed to prove that the sewer line was a nuisance.¹

A nuisance has been statutorily defined as: “[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property” Iowa Code § 657.1 (1995). Iowa Code section 657.2 outlines certain conditions which have been deemed nuisances. However, these statutory provisions have not superseded the common law of nuisance. *See Guzman v. Des Moines Hotel Partners, Ltd. Partnership*, 489 N.W.2d 7, 10 (Iowa 1992). These provisions are skeletal in form, and we look to the common law to fill in the gaps. *See Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996).

¹ We note that the City captioned its first issue as a challenge to the court’s denial of its motion for summary judgment. However, the argument within the brief discussed the facts presented at trial and the issues raised in the City’s combined motion for judgment notwithstanding the verdict and new trial. Furthermore, the notice of appeal was from the final judgment. Therefore, despite the erroneous caption, we determine that the issues were properly preserved for our review.

At trial, James and Mary Selke testified that they believed the backups were caused by a lack of maintenance on the part of the City. However, because the district court dismissed the Selke's claim of negligence on summary judgment, they could not rely on this "lack of maintenance" theory. Instead, they had the immense burden to prove that the existence of the sewer line was in and of itself a nuisance. We conclude that they did not meet that burden.

The operation of a sanitary sewer system is one of many public services offered by municipalities, and is essential to the health and general welfare of their residents. It is clearly not a nuisance per se. *Cf. Hartzler v. Town of Kalona*, 218 N.W.2d 608, 609-10 (Iowa 1974) (finding that a sewage disposal facility is not a nuisance per se). None of the witnesses at trial, including the Selkes, testified that the Waterloo sewer system was in and of itself inherently dangerous. *Cf. Sparks v. City of Pella*, 137 N.W.2d 909, 911 (Iowa 1965) ("To constitute a nuisance there must be a degree of danger, likely to result in damage, inherent in the thing itself, beyond that arising from mere failure to exercise ordinary care."). The City's expert testified that while backups are an expected occurrence with any sewer system, a properly functioning backup valve should prevent sewage from entering a home.

The unrefuted testimony was that one of the Selke's three backup valves was not functioning at the time of the second backup, and could have prevented the sewage from coming into their basement. The Selkes were aware of the condition of the broken valve but had not replaced it prior to the second backup. Nonetheless, the

jury found the City liable for creating the nuisance for the second backup. There is no evidence to support the conclusion that the City was operating a nuisance at the time of the second backup, but not at the time of the first or third backups. Again, the district court's ruling on summary judgment precluded the Selkes from arguing that the City was somehow negligent in the operation of the sewer system at the time of the second backup. For all of these reasons, the City's motion for judgment notwithstanding the verdict should have been granted.

As we are reversing on these grounds, we need not address the City's additional arguments, nor its claim that the award of damages was excessive.

For the reasons stated above, we hereby reverse the district court's judgment and remand for an order granting the motion for judgment notwithstanding the verdict and dismissing the case. Costs of this appeal are assessed to the Selkes.

REVERSED AND REMANDED WITH DIRECTIONS