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Nuisance Law—Lack of Criminal Intent and Use of Reasonable Care Are No Defense to Statutory Nuisances—State v. Lloyd A. Fry Roofing Co., ____ Minn. ___, 246 N.W.2d 692 (1976)

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Nuisance law is one area of law that has traditionally been used to deal with environmental concerns. The law concerning public nuisance has served as a flexible and convenient tool for public officials in controlling a wide range of social problems. The case of State v. Lloyd A. Fry Roofing Co. is a recent example of the use of public nuisance law to control smoke emissions within a city. In Fry, the Minnesota Supreme Court upheld the criminal conviction of the Fry Company on five violations of a city ordinance that prohibited, as a nuisance, the emission of substances into the open air if "by reason of their objectionable properties . . . they . . . create an obnoxious odor in the atmosphere."

The major issue on appeal was whether the state must prove that the defendant had intended to commit the violations and had failed to do all that it reasonably could to avert the nuisance. The Fry Company operated an asphalt roofing plant in a mixed industrial-residential area of northern Minneapolis, zoned for heavy industry. The company has been operating in the area since 1947 and has been the subject of other litigation concerning the emission of smoke and asphalt odors from its smokestack. See, e.g., State v. Lloyd A. Fry Roofing Co., Minn., 246 N.W.2d 696 (1976) (action brought to compel defendant to conduct stack emission tests); State v. Lloyd A. Fry Roofing Co., 280 Minn. 265, 158 N.W.2d 851 (1968) (defendant found guilty of violating ordinance prohibiting emission of obnoxious odors). In the present case, defendant was convicted in a municipal court and fined $1,000. The conviction was appealed to and affirmed by the district court.


2. Nuisance law has been used as a social control regarding such diverse problems as air pollution, see, e.g., State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 125-26, 130 N.W. 545, 546-47 (1911), and disorderly houses, see, e.g., State v. Wheeler, 131 Minn. 308, 311, 155 N.W. 90, 92 (1915). See note 13 infra and accompanying text.

3. Id. The complaint was based on air pollution emanating from defendant’s smokestack; smoke had settled in the surrounding residential and recreational areas. Id. at 694.

4. Id. The court concluded that the evidence presented to the lower courts was
argued that the mere fact that obnoxious odors were emitted from its smokestack did not establish a violation because the state must prove criminal intent and lack of due care. The state contended that the obnoxious smoke emissions were violations per se, regardless of the Fry Company's intent or steps taken to avert the nuisance. The court adopted the state's position, concluding that the company's conduct was a nuisance per se.

At common law, nuisances can be private or public. Private nuisance involves the interference with an individual's use and enjoyment of his private property. Public nuisance involves the interference with interests common to the general public. Actionable nuisance requires a substantial and unreasonable interference with either the use and enjoy-

sufficient to sustain the conviction, id., and that the agreement between defendant and the city inspector was not binding upon the city and could not circumscribe the city's power to prosecute, id. at ___, 246 N.W.2d at 696.

8. Id.

9. Id.

10. See id. at ___, 246 N.W.2d at 695.


Private nuisances include interferences with the physical condition of the land, such as blasting, flooding, or water pollution; interferences with the comfort or convenience of the occupant, such as foul odors, excessive noise or light, and repeated telephone calls; and interferences with the occupant's health and peace of mind, such as a malarial pond and the depressing effect of a funeral parlor. W. PROSSER, supra, at 591-92.


Public nuisances include interferences with the public health, such as the keeping of a hogpen, diseased animals, or a malarial pond; interferences with public safety, such as storing explosives, shooting fireworks in the streets, keeping dangerous animals, and the unlicensed practice of medicine; interferences with public morals, such as houses for prostitution or gambling, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; and interferences with public peace, comfort, and convenience, such as loud disturbances, foul odors, smoke, and the blocking of a public highway or navigable stream.

W. PROSSER, supra note 12, § 88, at 583-84.
ment of private property rights or the public welfare; a substantial and unreasonable interference is determined by such factors as the nature and extent of the harm, the possibility of averting the harm, the social utility of the conduct, and the setting in which the conduct took place.

Today most state legislatures have enacted general public nuisance statutes that essentially restate the common law. In addition, a state

14. See, e.g., Fish v. Hanna Coal & Ore Corp., 164 F. Supp. 870, 872 (D. Minn. 1958) (interference must be material and substantial, as measured by sensibilities of ordinary people of that locality); Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229, 4 N.W.2d 326, 328 (1942) (only the substantial and material phase of a nuisance, as compared to the ordinary discomforts to living in the area, may be enjoined); Heller v. American Range Corp., 182 Minn. 286, 288, 234 N.W. 316, 317 (1931) (zinc oxide dust considered a serious interference with enjoyment of property); Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 477, 177 N.W. 641, 641 (1920) (conduction must interfere materially to be actionable); F. Harper & F. James, supra note 11, § 1.26, at 79 (annoyance caused by air pollution must be material and substantial to be unreasonable); Boger, supra note 11, at 368 (unreasonable and substantial invasion).


16. See Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 230-31, 4 N.W.2d 326, 329 (1942) (industry has the duty to use devices which minimize the effect of the alleged nuisance; "[T]he cost of a change, the probability of betterment and the effect upon performance were all factors which any industry should consider in determining whether to experiment with devices other than those now in use."); cf. Note, supra note 15, at 159 (impracticability of preventing the invasion is equitable consideration in action for injunctive relief).

17. See Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924) (whether defendant's business is lawful and useful are to be considered in determining the existence of an abatable nuisance); Note, supra note 15, at 159.

18. See Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 230, 4 N.W.2d 326, 328 (1942) (smoke, cinders, and coal dust from defendant's plant located in heavily industrialized area held not to constitute a nuisance; residents living in areas zoned for industry cannot expect the same freedom from air pollution as those who live in residential areas); City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) (existence of public nuisance depends on locality and surroundings); Note, supra note 15, at 159. See generally Comment, Enjoining Private Nuisances: Consideration of the Public Interest, 43 U. Colo. L. Rev. 225 (1971).

19. Prosser, supra note 13, at 999. For example, Minn. Stat. § 561.01 (1976) provides in part, concerning a private nuisance: "Anything which is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance . . . ."

Similarly, Minn. Stat. § 609.74 (1976) provides in part, concerning public nuisance:

Whoever by his act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

(1) Maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public . . . .
legislature may declare specific actions to be public nuisances, and may empower municipalities to pass and enforce ordinances to the same effect. The legislatures are limited, however, in that they cannot declare something to be a nuisance which could not in fact be a nuisance, nor can they create arbitrary classifications in passing such legislation.

At common law, the commission of a public nuisance constituted a crime. Similarly, once the legislative body declares an act to be a nuisance, conduct in violation of that law constitutes a criminal nuisance, nuisance per se, or nuisance at law. This was the position taken by the Minnesota court in Marshall v. Consumers Power Corp., where a future nuclear power plant was deemed not to violate any law or ordinance, and hence could not be a nuisance in fact. The court concluded that although a future nuclear power plant would not violate any law or ordinance, and hence could not be a nuisance per se, it remained to be seen whether the plant would constitute a nuisance in fact.
by the Fry court in rejecting the Fry Company's defenses of its lack of intent to commit the crime and its exercise of reasonable care. In discussing the intent issue, the court recognized the power of the state legislature to define crimes without regard to criminal intent or motive. This is consistent with Minnesota case law, which has generally held that the legislature need not include criminal intent or motive as an essential element of a crime. When intent is not a part of the statutory

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26. See Minn. at 243, 246 N.W.2d at 695. A number of other courts have rejected reasonable care as a defense in a nuisance action. See, e.g., Ryan v. City of Emmetsburg, 232 Iowa 600, 604, 4 N.W.2d 435, 439 (1942) (defendant is liable for creating a nuisance notwithstanding the exercise of skill and care to prevent any damage); Robinson v. Westman, 224 Minn. 105, 111, 29 N.W.2d 1, 6 (1947) (due care is not a defense where business operation seriously affects public health and nearby property rights); Johnson v. City of Fairmont, 188 Minn. 451, 453, 247 N.W. 572, 573 (1933) (nuisance does not depend on the degree of care used); Lead v. Inch, 116 Minn. 467, 471-72, 134 N.W. 218, 219 (1912) (reasonable care in operation of horse barn in residential area is no defense if the operation still results in obnoxious odors); Pearson v. Kansas City, 331 Mo. 885, 894, 55 S.W.2d 485, 489 (1932) ("Negligence is the failure to exercise the degree of care required by the circumstances. . . . A 'nuisance' does not rest on the degree of care used, but on the degree of danger existing with the best of care.") (emphasis in original); Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. Ct. 496, 509, 353 A.2d 471, 478 (1976) (elements of negligence do not apply to nuisance law), aff'd, 472 Pa. 115, 371 A.2d 461 (1977). But see Power v. Village of Hibbing, 182 Minn. 66, 72, 233 N.W. 597, 599 (1930) (nuisance does not depend on the degree of care used, but on the degree of danger existing with the best of care.).

27. See Minn. at 246, 246 N.W.2d at 695.


The United States Supreme Court stated the rationale for imposing strict criminal liability for certain statutory violations as follows:

The accused, if he does not will the violation, is usually in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morissette v. United States, 242 U.S. 246, 256 (1915). However, in State v. Kremer, 262 Minn. 190, 192, 114 N.W.2d 88, 89 (1962), where defendant did not violate a traffic law intentionally, the court found that the conviction for the violation was unjustified despite the absence of a requirement of intent in the statutory language. The court held that the above quoted language from Morissette did not apply to that situation. See also Haddad, The Mental Attitude Requirement in Criminal Law—and Some Expectations, 59 J. CRIM. L.C. & P.S. 4, 17-21 (1968); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 55-84 (1933). According to one authority, mens rea, or criminal intent, may not be necessary where the prohibition is merely regulatory, as opposed to being designed to maintain the social order, and where the possibility of incarceration for the offense is minimal. Id. at 72. Public nuisance has traditionally been punishable without a showing of mens rea. See id. at 73.
prohibition, what must be shown to prove the violation is that the defendant intended to do the act which constituted the crime, not that he intended to commit the crime. Therefore, in Fry the court required the state to prove only that the company intentionally operated a plant which produced obnoxious smoke emissions as a normal incident to its operation.

The court rejected the Fry Company's argument of reasonable care as irrelevant. The court based its decision on the distinction between negligence and nuisance, concluding that the Fry Company ignored this distinction in its argument. Whereas negligence is a form of action based on fault or breach of duty, nuisance action is based on an interference with another's use and enjoyment of his land or with some public interest. Negligence law emphasizes how the defendant has acted; nuisance law is concerned primarily with the result of the defendant's activity. One source of confusion between these concepts is the reasonableness factor. Conduct must create an unreasonable risk of harm in

29. See DeLahunta v. City of Waterbury, 134 Conn. 630, 634, 59 A.2d 800, 802-03 (1948) ("intent" refers to the intent to bring about the conditions causing the nuisance rather than the intent to create the nuisance); State v. Everson, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970) (to prove intent, it is sufficient that defendant intends the act which constitutes the crime); Comment, supra note 11, at 407.

30. See ___ Minn. at ___, 246 N.W.2d at 695.

31. See id.


33. See City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) ("Anything is a nuisance... which renders the enjoyment of life and property uncomfortable."); Minn. Stat. § 561.01 (1976) (nuisances); J. MacDonald & J. Conway, supra note 13, § 2.07; W. Prosser, supra note 12, § 86; Boger, supra note 11, at 368. Compare Randall v. Village of Excelsior, 258 Minn. 81, 85, 103 N.W.2d 131, 134 (1960) (the repeated sales of intoxicating liquor to minors, where the plaintiff was injured by an intoxicated minor, held not a wrongful invasion of a legal right or interest) and Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393-94, 77 N.W.2d 188, 192-93 (1956) (house-to-house solicitation of bakery goods held not an annoyance within the meaning of public nuisance) with Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229-30, 4 N.W.2d 326, 328 (1942) (cinders, smoke, and ashes from smokestack held to be a substantial interference with plaintiff's enjoyment of life) and Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 476-77, 177 N.W. 641, 641 (1920) (noise, smoke, and dust from operation of limestone quarry held to interfere materially with physical comfort of neighboring residents) and State v. Chicago, M. & St. P. Ry., 114 Minn. 226, 230, 359, 225 N.W. 292, 293 (1929).

34. See Culwell v. Abbott Constr. Co., 211 Kan. 359, 364, 506 P.2d 1191, 1196 (1973) ("[N]uisance is a result and negligence is a cause and they cannot be distinguished otherwise."). Thus, negligence may be thought of as one type of conduct, in addition to intentional conduct and abnormally dangerous conduct, that can give rise to a nuisance. W. Prosser, supra note 12, § 87, at 573-74; see Mokovich v. Independent School Dist. No. 22, 177 Minn. 446, 449, 225 N.W. 292, 293 (1929).

order to constitute negligence, whereas a nuisance involves an unreasonable interference with the use and enjoyment of another's property rights. Reasonableness of the interference has long been a factor in determining the existence of a common law nuisance. This often requires a balancing of interests: the severity of the injury in light of the social utility of defendant's conduct and the cost of eliminating the alleged nuisance. The Fry Company's argument appears to have been based on the negligence concept of reasonable care rather than on the nuisance concept of an unreasonable interference with a public interest.

In holding violations of criminal nuisance statutes to be nuisances per se, the Fry court highlighted and clarified the distinction between common law and statutory nuisances. In holding a defendant liable for the commission of a common law nuisance, the court must determine the existence of a substantial interference, the unreasonableness of that interference, and the appropriate remedy. In statutory nuisance cases, the court applies the negligence concept, looking to the reasonableness of the conduct and the harm it causes.

36. W. Prosser, supra note 12, § 31, at 145.
37. See, e.g., Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393, 77 N.W.2d 188, 192 (1956); Jednek v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229-30, 4 N.W.2d 326, 328 (1942); Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 476-77, 177 N.W. 641, 641 (1920); State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 126, 130 N.W. 545, 547 (1911); City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886); Minn. Stat. § 609.74(1) (1976); W. Prosser, supra note 12, § 87, at 580. The Iowa Supreme Court explained the difference between unreasonableness as it applies to negligence law and unreasonableness as it applies to nuisance law:

The unreasonableness of the use, which causes the harm, and the unreasonableness of the injury are, to some extent, related and must be determined by reference to all the circumstances. The unreasonableness of the conduct is determined largely by the character and gravity of the resulting injury rather than the injury threatened. In determining whether conduct is unreasonable in a nuisance case, the test is not unreasonable risk or foreseeability as those terms have been used in cases based on negligence. If the conduct causes an unreasonable amount of harm there may be a nuisance even though it created no unreasonable risk of harm.

Ryan v. City of Emmetsburg, 232 Iowa 600, 605, 4 N.W.2d 435, 439 (1942).
38. See, e.g., City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) (whether or not dense smoke emitted from chimney is a nuisance depends on the "locality and surroundings").
39. See Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393, 77 N.W.2d 188, 193 (1956) ("public convenience and reasonable necessity are controlling considerations, and regard must be given to the time, place, and all the other circumstances of a particular case"); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924) (operation of ice crusher and milk delivery wagon during normal sleeping hours held to be a nuisance, despite social utility of the business); notes 15-18 supra and accompanying text.
41. See, e.g., United States v. Reserve Mining Co., 380 F. Supp. 11, 55 (D. Minn.), modified on other grounds, 490 F.2d 688 (8th Cir.), motion for stay of injunction granted, 498 F.2d 1073 (8th Cir.), successive motions to vacate stay denied, 418 U.S. 911, 419 U.S.
however, one could argue that the legislative body has already determined which public interests are worthy of protection and that interferences with those interests are presumptively unreasonable. Therefore, the court's function is limited to the determination of a violation of the statute, the constitutionality of the statute, and the selection of a remedy. Once an activity is codified as a nuisance and the literal terms of the ordinance are violated, no other factors need be examined by the court. Following the Fry decision, a manufacturer will be guilty of a violation regardless of attempts to avoid the nuisance, if in the end the nuisance still occurs.

Although the Minnesota courts will not consider a defendant's attempts to avoid the nuisance in determining whether the criminal nuisance statute has been violated, presumably reasonable attempts to avoid the nuisance would have an effect on the court's determination of appropriate punishment. Likewise, the defendant's exercise of due care might bear on the remedy chosen by the court in a civil action for nuisance.


In the law of real property, abandonment refers to the voluntary relinquishment of an interest in land. Although a perfect legal title may not...