

*Thomsen v. Greve*  
Court of Appeals of Nebraska  
550 N.W.2d 49 (1996)

[HANNON](#), Judge.

This is a nuisance action brought by the plaintiffs, Elmer Thomsen and Phyllis Thomsen, to enjoin the defendants, Ron Greve and Nancy Greve, from using a wood-burning stove to **\*744** heat their home and for damages resulting from the smoke originating from the stove....

**\*\*52** I. PLEADINGS AND FACTS

...The evidence produced at that trial may be summarized as follows: The parties own and live in adjacent homes in Pender, Nebraska. The Greves have lived in their home since 1973. In 1990, the Thomsens moved into the house situated 15 feet west of the Greves' home. For approximately the first 2 years, the Thomsens and the Greves had a friendly relationship. Phyllis Thomsen and Nancy Greve visited in each other's homes on a frequent and regular basis. The parties have had some disputes, such as the location of their boundary line west of the Greves' fence and the Greves' practice of raising rabbits, which led to **\*745** the demise of their friendship. Nancy Greve testified she has not spoken to the Thomsens since August 1992.

In August 1992, the Thomsens complained to the Greves about the odor and smoke from the wood-burning stove, claiming that it smelled dirty. The Greves both testified that in the 6 years in which they had been operating the stove, this was the first time anyone complained about the smoke. The Greves both testified that Phyllis Thomsen told them that the smoke made the Thomsens' house smell dirty, but that Elmer Thomsen stated that it only had happened once and that it was not that bad. The Thomsens agree that in August they complained to the Greves about the smoke, but they deny that Elmer Thomsen stated it happened only once. They testified that Nancy Greve told them to just keep their windows and doors shut.

Ron Greve is a licensed electrician who owned his own business. In 1986, the Greves put an addition on their home, at which time they installed a wood-burning stove. Since 1986, the wood-burning stove has been the primary source of heat in the Greves' home; prior to that time they had a gas furnace and then electrical baseboard heat. The Greves claim to have burned only "dry, hard wood" in their stove and that Ron has cleaned the chimney once a month to prevent the buildup of creosote. The Greves supplement the wood-burning stove with electrical heat only on days when the temperature is below zero. They claim to never have burned garbage or railroad ties or anything else containing creosote....

**\*746** The Greves also testified that the smoke was not malodorous and that they burn nothing but clean, dry wood, usually ash, in their stove....

Phyllis Thomsen testified that during the previous 4 years, the smoke entered her house about 140 times in total and that the smoke entered under certain weather conditions. The air has to be "moist" and the wind either still or from the northeast in order for the smoke to get into the Thomsens' **\*\*53** home. The Thomsens described the smoke as "unbearable." They claimed that it was a creosote smell, which was a "rotten smell." They both testified that when the weather was right, the smoke would surround their house and creep inside. The smell made them physically ill. Phyllis Thomsen testified that besides making her distraught, the smoke gets in her throat and nose, causing a burning and scratchy sensation. She testified that at times the odor is so bad she would be forced to leave her home to escape it, and at times it causes them to not be able to sleep at night. Elmer Thomsen testified that he gets a bad cough as a result of the smoke, which forces him to leave his house on occasion to clear it up. The smoke and odor have prevented the Thomsens from having family get-togethers and visitors over to their home. They

testified that the smoke and odor infiltrate their home to such a degree that even their clothes dryer fills with the smoky odor.

Frank Appleton, chairman of the Pender Village Board, went to the Thomsens' home on two separate occasions, and he testified that the smoke smelled like wood burning. The Pender chief of police also visited the Thomsens, as did another board member, and both testified that the smoke smelled like wood burning, and it was not an offensive odor. On cross-examination, it was revealed that Ron Greve served on the village board for some time prior to the filing of the petition in this case.

The Thomsens called family members and a neighbor to testify on their behalf. The Greves also called several neighbors **\*747** who testified that the smoke from the Greves' chimney did not smell like creosote. The witnesses for both sides were impeached to a degree by a showing of friendship or other reasons for their partiality to the party calling them.

After the trial, the court found the smoke to be a nuisance and ordered the Greves to raise the height of the chimney by 3 feet and to burn only "clean dry firewood." The court also found that the Thomsens failed to prove with specificity the actual monetary loss or damage, and thus awarded no damages. [The Thomsens appeal from this order, and the Greves cross-appeal.]...

### III. STANDARD OF REVIEW

This is an appeal of a nuisance action for both an injunction and damages, and as such, the Supreme Court has stated the following standard of review applies:

An action for an injunction sounds in equity. [County of Dakota v. Worldwide Truck Parts & Metals, \[245 Neb.\] 196, 511 N.W.2d 769 \(1994\)](#). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact **\*748** that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See [Lange Indus. v. Hallam Grain Co., 244 Neb. 465, 507 N.W.2d 465 \(1993\)](#).

**\*\*54** [Goeke v. National Farms, Inc., 245 Neb. 262, 264, 512 N.W.2d 626, 629 \(1994\)](#).

### IV. DISCUSSION

#### 1. EXISTENCE OF NUISANCE

The Greves argue that the Thomsens failed to meet their burden to show the wood-burning stove was a nuisance. Since this issue is an issue of fact, we will consider the Greves' arguments on the weight of the evidence in a de novo trial of the factual issue later in this opinion. The Greves also argue that their conduct did not create a nuisance as a matter of law. They argue that they are unable to find any case where a court has been asked to determine that using a wood-burning stove created a nuisance, and they argue that under the principles set forth in [§§ 826 through 828](#) of the Restatement (Second) of Torts (1979), the trial court should have determined their activity did not create a nuisance as a matter of law...

Could Greves' Conduct Create Nuisance?

[\[2\]](#)  A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. [Hall v. Phillips, 231 Neb. 269, 436 N.W.2d 139 \(1989\)](#). The Nebraska Supreme Court has expressly adopted the Restatement (Second) of Torts (1979) as the law of private nuisance actions in Nebraska, specifically citing [§ 822](#) as expressing a "suitable **\*749** standard to determine when one may be subject to liability...." [Kopecky v. National Farms, Inc., 244 Neb. 846, 851, 510 N.W.2d 41, 47 \(1994\)](#) (quoting *Hall v. Phillips, supra*)....

[Section 822](#) provides in significant part: "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...."

The Supreme Court has recognized that the principles stated in the [Restatement, supra, §§ 826](#) through [831](#), are to be used by judges as a guide to determine whether an intentional interference is unreasonable as a matter of law. *Kopecky v. National Farms, Inc., supra*. Section 826 defines what constitutes an unreasonable invasion and provides in significant part: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct...."

The following sections further refine the definition of "unreasonable" and assist in determining whether the gravity of the harm suffered by the Thomsens is outweighed by the utility of the Greves' conduct. [Section 827](#) provides:

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) The extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.

Section 828 provides:

**\*750** In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) the social value that the law attaches to the primary purpose of the conduct;
- \*\*55** (b) the suitability of the conduct to the character of the locality; and
- (c) the impracticability of preventing or avoiding the invasion.

....In applying these principles to the instant case to determine whether or not the Greves' conduct could create a nuisance, we must necessarily assume that the Greves' conduct on their land interferes with Thomsens' enjoyment of their land in the manner that the Thomsens claim. Whether as a matter of fact the Thomsens have suffered the damages they claim is an issue of fact that need only be determined if the Greves' conduct under the Thomsens' version of the facts could be a nuisance.

The evidence shows that the parties live in a residential neighborhood in a small Nebraska town. Both their homes appear to be small one-story homes of a type that has been built since the 1950's. Pictures in evidence show both parties' homes to be attractive and in an attractive setting insofar as grass, trees, bushes, flowers, and other amenities.

[3]  The Thomsens testified that in a 4-year period the smoke entered their home approximately 140 times, which has made their house smell of creosote, a "rotten smell." It affected their **\*751** use of their home and affected them physically. We have no trouble concluding that, at least in our society, to have the use and enjoyment of one's home interfered

with by smoke, odor, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odor or smoke from a neighbor cannot avoid such harm except by moving. One should not be required to close windows to avoid such harm.

On the other hand, aside from the simple right to use their property as they wish, it is difficult to assign any particular social value to the Greves' wood-burning stove. This method of heating does save on fossil fuels, but assuming that the stove used by the Greves emits foul-smelling smoke, society is certainly blessed if only a few people avail themselves of the opportunity to save fuel by using such stoves. The Greves could avoid invading the Thomsens' property by using other means of heating.

Under the [Restatement \(Second\) of Torts § 822 \(1979\)](#), we therefore conclude that if the Thomsens' evidence is true, the Greves' invasion of the Thomsens' land in the manner claimed by the Thomsens is unreasonable....

Did Greves' Conduct Create Nuisance?

[5]  The facts adduced by both parties are in direct conflict on the issue of whether the Greves have actually created a nuisance. The trial court heard and observed the witnesses and their manner of testifying, and it necessarily accepted the Thomsens' version of the facts to the extent necessary to find that a nuisance existed. In concluding that the Greves have created a nuisance by their conduct, we rely heavily upon the trial court's determination, but not entirely.

The fact that the chairman of the village board smelled smoke in the Thomsens' house on two occasions, when there was no source other than the Greves' wood-burning stove for that smell, is significant. The Pender chief of police was called as a witness by the Greves. He testified to seeing smoke down between the parties' homes and to similar observations about smoke from another home in Pender that burns wood. On one occasion, the police chief was called to the Thomsens' residence in regard to the smoke. He reported smelling the strong odor of **\*753** smoke in the Thomsens' home, but said that it smelled like wood burning. When the judge asked him if he found the odor in the Thomsens' home offensive, he said, "Well, it was just a heavy wood-burning," but he stated it did not smell of creosote. Another member of the village board went to the Thomsens' home, and he testified, "It smelled to me like they had a wood-burning stove in their house." He also testified "it stunk" outside of the house. He took the complaint seriously enough to contact the State Fire Marshal and others in an attempt to solve the problem. These witnesses characterized the Thomsens' smoke problem differently than the Thomsens and their witnesses, yet they support the Thomsens' claim to the extent that the Thomsens had a significant smoke odor in their house, and the source of that odor had to be outside....

We conclude that the Greves have created a nuisance which the Thomsens are entitled to have abated....[The court directed that the trial court's decree be amended to provide (a) a damages award to the Thomsens in the amount of \$4,000 and (b) that "the Greves are ordered to abate the nuisance of smoke and odor emanating from their home."]