

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS WHITE,

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Appellant,

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Filed March 14, 1977

v.

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GEORGE FULCHER,

)

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2-57872

Appellee.

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)

Appeal from Pocahontas District Court - R. K. Richardson,
Judge.

Appeal from jury verdict for defendant in farm employment
liability action. Certain instructions to jury held to be
erroneous. Reversed and remanded.

Hamilton, Connell, Duffy and Hamilton, of Storm Lake, Iowa,
for appellant.

Pendleton and Pendleton, of Storm Lake, Iowa, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and
Carter, JJ.

CARTER, J.

This is an appeal from a judgment for defendant on a jury verdict in a farm employee's action against his employer.

Plaintiff while employed on defendant's farm was assigned to help lead Belgian draft horses from an open pasture to the barn. There was evidence offered at the trial tending to show that on October 16, 1971, while so engaged plaintiff was directed by defendant's foreman to hold the halter ropes on two of the horses. While he was doing this two other horses ran by passing close to the horses plaintiff was holding. One of the horses plaintiff was holding then reared up jerking plaintiff into that horse. Thereupon, that horse twisted, ran and in so doing kicked up its heels striking plaintiff in the face.

The petition asks recovery of money damages for permanent bodily injury, medical expense, loss of earnings, and pain and suffering alleged to have been caused by defendant's failure to provide plaintiff a safe place to work and failure to provide safe equipment for plaintiff's use in performing his work. Because we agree with plaintiff's contention that the trial court's instructions to the jury were misleading as to plaintiff's right to recovery, we reverse and remand for a new trial.

The single issue presented on this appeal concerns the propriety of giving instruction number 10 over plaintiff's objection. That instruction provides:

"The defendant was possessed of certain Belgian mare draft horses which shall be considered by you part of the equipment furnished by the employer together with halters and halter ropes furnished by the employer."

"In order to impose liability upon the employer for injuries sustained because of furnishing the horse which kicked the plaintiff, the plaintiff must establish that the animal was vicious and, in addition thereto, that the employer had knowledge of its vicious propensities."

"If you find that the employer did furnish a vicious animal knowing that said animal had vicious propensities, this would constitute negligence."

Consideration of instruction number 10 necessarily involves reference to instruction number 13, providing in part:

"The plaintiff charges in his petition that Mr. Fulcher has failed to provide him with:
(a) A safe place to work and (b) In failing to provide this plaintiff with safe equipment."

"The law provides that an employer must use reasonable care to provide and maintain for his employees a reasonably suitable and safe place to work and reasonably suitable and safe machinery, tools and equipment with which to work."

"The employer is not required to provide machinery, tools and equipment which are absolutely safe nor required to maintain the same in such condition that an accident to the employee could not happen. The employer is not an insurer of the employees' safety but must exercise the degree of care which a person of ordinary care and prudence would use under all of the circumstances and conditions to provide a place which is reasonably safe to work and machinery, tools and equipment which are reasonably safe."

"If you find from a preponderance of the evidence that the defendant failed to use reasonable care to provide his employees either with a reasonably safe place to work or with reasonably safe machinery, tools and equipment with which to work as herein defined, then such failure would constitute negligence on his part."

I. Plaintiff in the trial court made timely objection to the giving of instruction 10 on the basis that his right of recovery, if any, was not dependant on showing that the horse in question was vicious. He advised the trial court

that the instruction in question required "plaintiff to prove and present evidence far in excess of that which would be required under the reasonably safe doctrine or reasonably safe equipment doctrine" and that "the only showing that plaintiff has to make is that the animal was unreasonably safe for the use of the employee." While this objection could well have been articulated with more particularity, we believe, despite defendant's contention to the contrary, that it was sufficient to alert the trial court to the infirmities in the instruction upon which we base our reversal. See *Froman v. Perrin*, 213 N.W.2d 684, 690 (Iowa 1973); *Harrington v. Fortman*, 233 Iowa 92, 101, 8 N.W.2d 713, 718 (1943).

II. In its marshalling instruction the court required plaintiff, in order to recover, to establish the defendant was negligent in one or more of the particulars "which I submit for your consideration." The only instructions submitted which relate in any manner to the theories of negligence upon which plaintiff might recover were instructions 10 and 13. If instruction 10 were only a statement of the law pertaining to one of several theories of recovery available to plaintiff it might be considered harmless. But the vice in instruction 10 lies in the fact that the jury might well construe the words "in order to impose liability upon the employer" as precluding any recovery against the employer unless it was established that the horse which kicked plaintiff was vicious and his employer realized this. More specifically, the jury may have inferred it was not free to impose liability under the theories of negligence embraced in instruction 13 absent proof of the conditions specified in instruction 10.

The theory of plaintiff's case as disclosed by both his pleadings and the evidence which he presented is not necessarily dependant on any claim that the horse which kicked him was vicious. At the time of this occurrence, the law placed a general obligation upon defendant, as the employer of the plaintiff, to provide and maintain a reasonably safe place for plaintiff to work and reasonably safe instrumentalities with which to work. This obligation was grounded in both the common law and statute. See, e.g., Van Aernam v. Nielsen, 261 Iowa 1115, 1122, 157 N.W.2d 138, 143 (1968); § 38A.1, The Code, 1971 (Acts 1965, 61st. G.A. Ch. 107 § 1). The obligation imposed by the cited statute also extends by its express terms to the arrangement or method of operation for doing the work. Cf. Dobson v. Jewell, 189 N.W.2d 547 (Iowa 1971).

In the present case plaintiff offered testimony by a witness qualified as having considerable experience in the handling of Belgian draft horses. This witness testified that it was not safe for plaintiff to hold two horses by their halter ropes at the same time as he had been directed to do by defendant's foreman; that the halter rope on the horse which injured plaintiff was too short and as a result unsafe for holding or leading a 1600 pound horse; and that there were alternative methods for getting the horses from the open pasture to the barn which provided a greater degree of safety.

From this evidence we believe a jury question was presented concerning whether defendant was negligent (a) in the method by which plaintiff was required to perform the task of rounding up these horses; and (b) with respect to the safety of the halter ropes employed for leading the horses. We believe recovery could be allowed under either

of these theories without regard to whether or not the horses were vicious or the employer knew them to be vicious. It is fairly to be inferred from the evidence that even in the absence of a vicious disposition there is some danger in the known normal characteristics of Belgian draft horses that requires a certain degree of caution in working with or around them.

III. Thus we believe plaintiff is entitled to a new trial wherein the jury may consider plaintiff's claim under more appropriate instructions relating the defendant's obligation to provide plaintiff with a reasonably safe place to work, reasonably safe instrumentalities with which to work, and the closely related obligation not to direct the plaintiff to perform his work in a manner which is not reasonably safe.

Unless plaintiff relies upon some contention that the horse or horses involved had some abnormal propensities not common to animals of this general type and breed which render them unreasonably dangerous to defendant's employees we do not deem scienter with respect to the horses' individual propensities to be an essential element of plaintiff's case. The employer's knowledge, actual or constructive, of the conditions under which the work in question was being performed at the time of plaintiff's injury is merely one of the facts and circumstances to be considered by the jury in determining whether or not the proper care has been exercised. See Blackburn, Farm Accidents in Iowa, 18 Drake L. Rev. 155, 162 (1969).

IV. In reaching the result which we do, we have considered the authorities cited and relied on by the defendant and are

not convinced that they are contrary to our holding. In Hansen v. Jensen, 204 Iowa 1063, 216 N.W. 677 (1927), plaintiff pleaded and sought to prove his case on a theory that he was furnished a "vicious and runaway team" of horses by his employer.. A verdict was directed because he failed to prove these allegations and this was affirmed on appeal. In Nikolas v. Kirner, 247 Iowa 231, 73 N.W.2d 7 (1955), plaintiff, who was thrown from a horse he was exercising for his employer, alleged negligence of the employer in (a) failure to warn him that the horse was wild and dangerous and (b) in walking ahead of the animal and jerking the lead rope. On appeal a directed verdict for defendant was reversed. The court held that a jury issue existed on both theories of negligence. The issue of the employer's knowledge of the horse's propensities involved only the alleged duty to warn, an issue not present in the instant appeal. In In re Estate of Howorth, 250 Iowa 752, 94 N.W.2d 779 (1959), plaintiff alleged that defendant's decedent, his employer, furnished him with a horse which said decedent knew or should have known was lame and unsafe for riding. A jury verdict for plaintiff was reversed because of insufficient evidence to establish this allegation. The case of Coakley v. Dairy Cattle Congress, 228 Iowa 1130, 293 N.W. 457 (1940), is not a farm employee liability case and involves the liability of the owner of the horse to a stranger.

We have also considered the decision in Dobson v. Jewell, 189 N.W.2d 547 (Iowa 1971). This was an action by a farm worker who was injured when a calf waiting in a temporary pen to be castrated stuck his front feet through the gate of the pen knocking plaintiff down and injuring him. Plaintiff alleged his employer had failed to provide him a safe place

to work and, in addition, was negligent in failing to provide facilities which would have permitted plaintiff to safely assist in sorting the calves. A directed verdict for the defendant was affirmed for failure of plaintiff to establish in what way the facility was not safe. There is no indication in the *Dobson* opinion that plaintiff had to show the calf was vicious in order to recover.

For the reasons stated we reverse and remand this action to the trial court for a new trial.

REVERSED AND REMANDED.