JAN 25 1979
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

FRANCIS FISHER and MYRTLE FISHER,

Appellees,

vs.

HARRY CHRISTIANSEN,

Appellant.

Filed January 25, 1979

765
2-61472

Appeal from Tama District Court - Louis W. Schultz, Judge.

Defendant appeals trial court's award of damages for crop damage caused by cattle running at large in violation of § 188.2, The Code. - Affirmed.

Daniel Rathjen and John J. Willett, of Willett & Rathjen, Tama, for Appellant.

Jared O. Bauch, Traer, for Appellees.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Harry Christiansen appeals from an adverse judgment on plaintiffs' claim for damages in an action tried to the court. Plaintiffs Francis and Myrtle Fisher brought suit alleging that cattle owned by defendant had escaped and/or were running at large and had trespassed upon 14 and 1/2 acres of farmland leased by plaintiffs, totally destroying their growing corn crop in violation of §§ 188.2 and 188.3, The Code. The amended petition sought damages for the 1975 crop year in addition to the damages originally claimed for 1974.

The trial court found plaintiffs failed to establish by a preponderance of the evidence that defendant's cattle damaged their corn in the year 1975. However, the court did find plaintiffs established by a preponderance of the evidence that defendant's cattle were not restrained by their owner from running at large as required by § 188.2 and that defendant's cattle did in fact destroy plaintiffs corn crop in the year 1974. Further, defendant did not rebut the prima facie evidence of negligence, as interpreted by the case law of § 188.2, by showing that he used usual and ordinary care in restraining his animals. The trial court also found plaintiffs established defendant's negligence in failing to keep his portion of a partition fence in reasonable repair. Accordingly, the trial court rendered judgment in favor of plaintiffs.

Initially, defendant argues the trial court erred in entering judgment against him where plaintiffs' landlord failed to maintain a partition fence along the property line where the trespass of cattle allegedly occurred. Plaintiffs leased the 14 and 1/2 acres in question from Homer Sears. Between the land leased by plaintiffs and the land owned by defendant was an area of pasture land owned by Sears and of which he retained control. It is this common boundary between Sears and defendant which was covered by a fencing agreement pursuant to Chapter 113, The Code, that the trial court found was in disrepair.

Section 188.1, The Code, defines "owner", when used with reference to lands, as meaning "the person having title thereto, or the lessee or occupant thereof." Therefore, for the purposes of Chapter 188, plaintiffs are the "owners" of the 14 and 1/2 acres and Homer Sears is the "owner" of the pasture land located between

plaintiffs' and defendant's properties.

In Jacobs v. Stover, 243 N.W.2d 642, 644-5 (Iowa 1976), the supreme court stated that Chapter 188, and particularly §§ 188.3 and 188.4, deal "solely with the rights and duties of adjoining landowners towards each other for trespassing farm animals." In the instant case, Fisher and Christiansen, the plaintiffs and defendant herein, are not adjoining landowners, their properties being separated by the property retained by Sears. Therefore, the decision of the trial court cannot be supported on the basis of any violation of § 188.3, The Code.

Although the trial court found defendant failed to properly maintain his fence, it also found defendant violated § 188.2, The Code. That section states "all animals shall be restrained by the owners thereof from running at large." In Wenndt v. Latare, 200 N.W.2d 862, 865-8 (Iowa 1972), the court stated that proof of the owner's failing to restrain his animals in violation of § 188.2 constitutes prima facie evidence of negligence, not negligence per se, and such prima facie evidence of negligence, may be rebutted by evidence the owners exercised reasonable and ordinary care in restraining his animals. 200 N.W.2d at 868. See also Leaders v. Dreher, 169 N.W.2d 570, 573 (Iowa 1969).

In Wenndt, the court distinquished §§ 188.2 and 188.3. "Section 188.2 may thus be properly described as a 'fencing in' statute, section 188.3 as a 'fencing out' statute." 200 N.W.2d at 869. While § 188.3 puts the onus on plaintiffs' landlord, Sears, to jointly "fence out" defendant's cattle in accordance with his agreement with defendant, § 188.2 conversely requires defendant to "fence in" those same cattle. A violation of § 188.3 runs to the benefit of Sears only, as an adjoining landowner. Leaders, supra.

However, an affirmative defense to § 188.3, the fact that Sears had not maintained his portion of the fence in accordance with the agreement, is not available as a defense to § 188.2. That section has been said to create an independent duty which gives rise to a common law negligence action, but does not itself create a separate civil liability. See Wenndt, supra at 873-4 (Uhlenhopp, J., dissenting).

Upon a review of the evidence and the findings of fact and conclusions of law

of the trial court, we find the trial court did not base its decision upon a finding of a violation of § 188.3 and the resulting strict liability discussed in Wenndt v. Latare, supra. Rather, the court based its decision upon a finding of a violation of § 188.2, The Code. Initially the court found there was prima facie evidence of negligence and that defendant failed to overcome this presumption. However, setting that presumption aside, the court found plaintiffs established defendant's negligence in allowing his cattle to run at large by defendant's failing to maintain a proper fence to restrain his animals. We find no error.

Defendant's second complaint is that the trial court overruled his motion to dismiss at the close of plaintiffs' evidence. First, in considering defendant's claim he was essentially entitled to a directed verdict, we view the evidence in the light most favorable to plaintiffs. Leaders, supra, at 573; Rules 14(f)(2), Rules of Appellate Procedure. Secondly, there was testimony that defendant's cattle were unrestrained, that cattle tracks and manure were found in the 14 and 1/2 acres leased by plaintiffs, and that a neighbor thought it looked like cattle damage. Evidence that animals are unrestrained is prima facie evidence of negligence which defendant may rebut. Wenndt, supra. Thirdly, questions of negligence are for the jury, or in this case, the trial court, and it is only in the exceptional cases that it can be decided as a matter of law. Rule 14(f)(10), R. App. P. Without defendant's evidence, plaintiffs' evidence generates a jury question on the issue. Leaders, supra. The court did not err in overruling defendant's motion.

Third, the defendant alleges the court erred in entering judgment in favor of plaintiff based upon an action brought under Chapter 188 where plaintiffs were neither the owners nor occupants of adjacent land. Defendant cites Jacobs v. Stover, 243 N.W.2d at 644 in support of his argument. We have reviewed the language contained in that case as well as the cases of Wenndt v. Latare and Leaders v. Dreher. We have also reviewed the case of Weber v. Madison, 251 N.W.2d 523 (Iowa 1977). It is our conclusion that while § 188.3 is strictly limited to adjoining landowners, § 188.2 is not so limited. There is nothing in that section which limits its applicability to any specific parties or adjoining properties. See also Ritchie v. Schaefer, 254 Iowa 1107, 120 N.W.2d 444 (1963); Stewart v. Wild, 196

Iowa 678, 195 N.W. 266 (1923). As a result, the trial court did not err.

Finally, defendant alleges that the court erred in finding it was his cattle that caused damage to plaintiffs' crops. Findings of fact in a law action tried to the court are binding upon the appellate court if supported by substantial evidence. Rule 14(f)(1), R. App. P. The evidence indicates that there were cattle tracks and manure in plaintiffs' fields. A neighbor testified that he looked at the damaged crop and thought it was cattle damage; another neighbor testified of the propensity of defendant's cattle to break through fences and to be a little short of grazing pasture. Plaintiff Francis Fisher stated that defendant admitted to him that defendant's cattle had been in plaintiffs' corn. Finally there was testimony that there were no other cattle in the immediate vicinity at that point in time. Although defendant testified he saw Holsteins and Herefords in plaintiffs' field which did not belong to defendant in the same time period, we find the substantial evidence to support the trial court's findings even in light of defendant's testimony. The judgment of the trial court is affirmed.

AFFIRMED.