

FILED

AUG 27 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

A. RICHARD DUGAN,	)	
Plaintiff-Appellant,	)	75
vs.	)	Filed August 27, 1986
BENTON COUNTY AGRICULTURAL	)	
SOCIETY and WARREN WITTMER,	)	
Defendants-Appellees.	)	
BENTON COUNTY AGRICULTURAL	)	
SOCIETY,	)	<u>6-227</u>
Cross-Petitioner,	)	85-1042
vs.	)	
WARREN WITTMER and EILEEN	)	
WITTMER,	)	
Cross-Defendants.	)	

Appeal from the Iowa District Court for Benton County (1364-12-82)

- Thomas M. Horan, Judge.

Plaintiff was injured by an unrestrained horse at a county fair and sued the county fair association and one of the two co-owners of the horse. The county fair association sought contribution or indemnity from the other co-owner.

AFFIRMED.

Thomas M. Wertz and Mary K. Hoefer of the Tom Riley Law Firm, Cedar Rapids, Iowa, for the plaintiff-appellant.

Mark Mossman of Mossman & Mossman, Vinton, Iowa, for defendant-appellee Benton County Agricultural Society.

Ralph Gearhart and Douglas R. Oelschlaeger of Shuttleworth & Ingersoll, Cedar Rapids, Iowa, for defendant-appellee Wittmer.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Plaintiff, Richard Dugan, suffered a thumb injury when he attempted to restrain a horse which was wandering loose at the Benton County Fair. The horse was owned by both Warren Wittmer and his daughter, Eileen Wittmer.

Plaintiff filed suit against Warren Wittmer and the Benton County Agricultural Society (BCAS), which operated the Benton County Fair. At no time did plaintiff assert any claim against Eileen Wittmer. However, the Benton County Agricultural Society did file a cross-petition seeking indemnity and contribution against both Warren Wittmer and Eileen Wittmer.

The case was tried to a jury, which returned a special verdict finding that defendants and plaintiff were all free of negligence. The jury did find that Eileen Wittmer, defendant to the cross-petition, had been negligent. Her negligence was found to be the proximate cause of plaintiff's injuries and she was found to be 100 percent responsible for the accident. The jury assessed plaintiff's damages at \$10,341. Since neither of the defendants were found liable, the district court entered a judgment against plaintiff.

Our scope of review is on assigned errors only. Iowa R. App. P. 4. The plaintiff asserts that: 1) Iowa law provides that owners are liable for damage done by animals which are not properly restrained; 2) the jury's verdict is inconsistent and contrary to the evidence; and 3) the court should correct an inconsistent verdict.

Plaintiff contends that Iowa Code section 188.2 (1985) imposes vicarious liability upon the owner of an animal. Section 188.2 provides: "All animals shall be restrained by the owners thereof from running at large." Therefore, Eileen's negligence should allegedly be assessed to Warren, the co-owner.

In Hickey v. Freeman, 198 Iowa 465, 198 N.W. 769 (1924), plaintiff was injured by a trespassing buck sheep, while in her farm yard. The court stated,

"Under these statutes [sections 2312 and 2315, The Code, 1897] we have held that the owner of certain male animals, as a bull, or in this case a buck, is liable, and it is not necessary to show knowledge of vicious propensities or negligence." Id., 198 Iowa at 470-71, 198 N.W. at 771. This premise was rejected in Wenndt v. Latare, 200 N.W.2d 862, 868 (Iowa 1972), where the court held:

[T]he proper rule of law in actions seeking damages for injuries to persons or their property alleged to have been proximately caused by trespassing animals dictates that proof of the owner's failure to restrain his animal in violation of section 188.2, The Code, constitutes prima facie evidence, not negligence per se, and proof of such violation does not impose strict liability on the owner.

Id.

In his brief plaintiff stated that Iowa Code section 188.2 imposes strict liability on the owner of domestic animals and cited Hickey v. Freeman as support. Such assertion is clearly erroneous and is thereby rejected by this court. The court correctly instructed the jury. Since an owner's failure to restrain an animal is not negligence per se, it was correct for the jury to find that defendant Warren Wittmer rebutted such evidence and was not negligent.

Defendant further contends that the jury's verdict was inconsistent and contrary to the evidence and that we should correct this error.

Upon review we examine the evidence in a light most favorable to the judgment. Johnson v. Svoboda, 260 N.W.2d 530, 534 (Iowa 1979) (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 54 (Iowa 1977)). The questions of negligence and proximate cause are for the trier of fact. Iowa R. App. P. 14(f)(10); Iowa Power and Light Co. v. Board of Water Works Trustees of Des Moines, 281 N.W.2d 827, 831 (Iowa Ct. App. 1979). The jury acts as the trier of facts, and the court cannot substitute its view for that of a jury. Cedar Falls Building Center, Inc. v. Vietor, 365 N.W.2d 635, 638 (Iowa Ct. App. 1985).

The jury found Eileen Wittmer 100% negligent. The right to contribution in Iowa is conditioned upon the existence of common liability. Speck v. Unit Handling Division a Division of Litton Systems, Inc., 366 N.W.2d 543, 548 (Iowa 1985). The jury found defendant, Benton County Agricultural Society, zero percent negligent. Eileen Wittmer was not a defendant but a cross-petition defendant, in court only on BCAS's allegation of contribution and/or indemnity. Since no negligence was found on BCAS's part, Eileen Wittmer is not liable for plaintiff's damages. We will not disturb the trial court's findings in this case, therefore we affirm.

AFFIRMED.