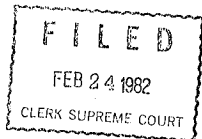


IN THE COURT OF APPEALS OF IOWA



FRANKLIN D. HENDERSHOT AND
JOYCE K. HENDERSHOT,

)

Plaintiffs-Appellants,

)

)

vs.

)

PAUL PIPPERT, HOWARD E. IRVINE,
DAVID H. IRVINE, AND DAVID H.
IRVINE II,

)

)

Defendants-Appellees.

Filed February 24, 1982

237

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2-64847

Appeal from Tama District Court, August F. Honsell, Judge.

Plaintiffs appeal the dismissal of their petition contending (a) there was not substantial evidence in the record to support the trial court's conclusion defendant exercised reasonable and ordinary care in restraining his cattle and (b) the trial court erred in considering evidence relating to the "act of God" defense given the defense had not been pleaded. AFFIRMED.

An C. Bergstrom of McCrindle, Bergstrom & Sindlinger, Cedar Falls, and Dennis G. Larson of Strand, Anderson & Larson, Decorah, for plaintiffs-appellants.

David J. Dutton and James R. Hellman of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for defendant-appellee Pippert.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, for defendants-appellees Irvine.

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

PER CURIAM

Plaintiffs appeal the dismissal of their petition contending (a) there was not substantial evidence in the record to support the trial court's conclusion defendant exercised reasonable and ordinary care in restraining his cattle and (b) the trial court erred in considering evidence relating to the "act of God" defense given the defense had not been pleaded. We affirm the trial court's dismissal of plaintiff's petition.

On June 13, 1976, Franklin Hendershot, sustained personal injuries when the pickup truck he was driving struck one or more black Angus steers owned by defendant, Paul Pippert. The cattle had escaped from the feedlot owned by co-defendants, Howard E. Irvine, David H. Irvine and David H. Irvine, II, and operated by co-defendant Pippert. Apparently, the cattle escaped through a door on the defendant's barn as the trial court found no other opening sufficiently large to permit the escape of the cattle.

Plaintiff Franklin Hendershot sued defendants for damage done to plaintiff's truck and for medical expenses, lost wages and pain and suffering. Plaintiff Joyce Hendershot sued for loss of consortium. Plaintiff claimed defendant's failure to restrain the cattle, in violation of section 188.2, The Code 1975, constituted prima facie evidence of defendants' negligence and was the proximate cause of Franklin's injuries. Defendants denied generally the plaintiffs' allegations of negligence.

At trial defendant attempted to introduce evidence of a strong storm system that had passed through the area on the night of the accident. Defendant claimed the storm caused the barn door, through which the cattle escaped, to be opened. Plaintiffs objected to the admission of the evidence, contending defendants' failure to plead act of God as an affirmative defense precluded admission of

evidence of the weather conditions. Defendants countered with the argument the evidence should be admitted to (a) negate plaintiffs' claim that defendants' presumed negligence was the sole proximate cause of plaintiffs' injuries; (b) impeach plaintiff's testimony concerning the weather conditions on the night of the accident and (c) show defendants exercised due care in the restraint of their cattle under the circumstances. Since the case was tried to the court, the evidence on weather conditions was received subject to the objections. In its subsequent ruling, the trial court indicated "the evidence pertaining to the act of God defense where objected to by plaintiffs has been excluded from consideration by the court in rendering its opinion except where same was admissible for the purposes of impeachment." The court then concluded plaintiffs failed to meet "their burden of proof in establishing the negligence of defendant Paul Pippert by a preponderance of the evidence as he exercised reasonable and due care in the restraint of his animals."

Initially, we note the trial court adequately addressed the issue of the open barn door. The court stated in its findings of fact and conclusions of law:

In July of 1975 Mr. Pippert had repaired and refurbished the fence enclosing the feedlot. Additionally in 1974 or 5 defendant Pippert had made repairs to the barn located in the northwest corner of the feedlot including securing of the southeast barn door in a fashion so that it would not open. On June 12, 1976, defendant Pippert fed his cattle between 5:30 and 6 p.m. and in so doing observed the fence enclosing the feedlot to be in good shape and condition. The next day after the accident there were no holes in the fence nor had it been trampled down in any area. Additionally it was observed that all fence gates were appropriately closed and in good condition.

The Court makes the following findings of ultimate fact: all of the fence enclosing the feedlot at the times material herein was in good and adequate condition; the other means of enclosing the feedlot were in good and adequate condition; all fences and enclosures were in good repair; none were in a dilapidated condition or in any state of disrepair; and defendant Paul Pippert had taken and exercised reasonable care in restraining the animals kept in the feedlot. (emphasis added).

We think the clear interpretation of, and intent implicit in the trial court's findings of fact, indicate the barn door was in a good state of repair and closed on the night of the accident. Consequently, the assertion by plaintiffs that we should view the record de novo to determine whether the barn door was open or closed, to remedy the fact the trial court did not adequately address the issue, is without merit.

This case was tried to the court at law and we review it as such. The trial court's findings of fact have the effect of a special verdict. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 340 (Iowa 1979). We are bound by the trial court's findings of fact only if they are supported by substantial evidence in the record. Briggs Transportation Company v. Starr Sales Company, 262 N.W.2d 805, 808 (Iowa 1978). A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence even though we would have decided the case differently. Id. In evaluating the sufficiency of evidence, we view it in the light most favorable to sustaining the court's judgment. Id. Furthermore, we need only consider evidence favorable to the judgment, whether or not the evidence is contradicted. Id. Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975). Applying those well-settled principles, we conclude there was substantial evidence in the record to support the trial court's findings of fact that defendant exercised reasonable care in the restraint of his cattle, which rebuts the presumption of negligence. Since we find defendant introduced sufficient evidence to rebut the presumption of negligence and plaintiffs failed to introduce any evidence indicative of any negligence attributable to defendant, plaintiffs have failed in proving negligence by a preponderance of the evidence.

We reach our conclusion without consideration of any evidence of the weather conditions the night of the accident. Although we do not agree with plaintiffs' assertion that the trial court considered the evidence of act of God as bearing on the negligence issue, we make no statement on whether the evidence could have been considered by the trial court on that issue when defendant failed to affirmatively plead act of God defense. We find no error in this case.

Given we have found plaintiffs failed to prove negligence by a preponderance of the evidence, we affirm the trial court's dismissal of plaintiffs' complaint as to all defendants. Our decision makes it unnecessary to consider the issues of lessor's duty to third parties to restrain animals of lessees and the duty to repair dangerous conditions on leased property.

AFFIRMED.