



IN THE COURT OF APPEALS OF IOWA

LISBON DEVELOPMENT CORPORATION)
and CHARLES FRANKS,)

Appellants,)

v.)

WAYNE NOVAK and WALTER NOVAK,)

Appellee.)

Filed September 21, 1978

619
2-61450

Appeal from Linn District Court - Harold D. Viator, Judge.

Plaintiffs appeal from jury verdict for defendants claiming error in the court's submission of the defense of act of God. Affirmed.

John C. Monroe, of Lynch, Dallas, Smith & Harman, Cedar Rapids, for appellants.

Tom Riley, of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellees.

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

PER CURIAM

Plaintiffs Lisbon Development Corporation and Charles Franks appeal an adverse jury verdict in favor of Wayne and Walter Novak on their petition for damages to plaintiffs' corn and bean fields as a result of the Novaks' failing to restrain their cattle. At the close of the evidence, defendants moved to amend to conform to the proof by adding act of God as an alternative defense. Plaintiffs objected on the grounds that there was insufficient evidence in the record to generate a jury question on the defense of act of God. The only issue on appeal is whether there was sufficient evidence to submit the alternative defense of act of God to the jury for consideration.

Generally, issues which have no evidentiary support should not be submitted to a jury for determination. *Ackerman v. Lauver*, 242 N.W.2d 342, 346 (Iowa 1976). A mere scintilla of evidence is insufficient to authorize an instruction on an issue allegedly arising out of that evidence. *Wiedenfeld v. Chicago & N.W. Transp. Co.*, 252 N.W.2d 691, 695 (Iowa 1977). However, the trial court does have a duty to instruct with reasonable fullness on pleaded issues which have evidentiary support. *Wiedenfeld, supra*.

"An 'act of God' . . . is such an unusual and extraordinary manifestation of the forces of nature that it could not, under normal conditions, have been anticipated or expected. However, the occurrence need not be unprecedented. . . . If it could not have been anticipated or expected under normal conditions, that is sufficient." *Oakes v. Peter Pan Bakers, Inc.*, 258 Iowa 447, 454, 138 N.W.2d 93, 98 (1966). The question of precedent relates to the matter of reasonable anticipation and opportunity to avert the consequences, and it is in that sense the term 'unprecedented' is used with regard to the nature of the catastrophe. 258 Iowa at 455.

In the instant case, the issue is close, but we think the issue of act of God and proximate cause was rightly submitted to the jury. Walter Novak testified he had walked the fence line in 1974, 1975 and the spring of 1976 and the fence was in good repair. At that time, there were no trees lying on top of the fence. When the cattle were discovered in plaintiffs' field, the tree in question was found leaning out of plaintiffs' property over defendants' fence; the fence having been broken down to the ground. The tree limb or young sapling was estimated at between six to eight inches in

diameter. Although the ground was dry and hard when the cattle were discovered, plaintiffs testified that in the area where the cattle came into their field, there were tracks in the yellow clay approximately three to four inches deep. Finally, there was testimony of a three-quarter inch rain sometime in June, which may have accounted for the wet field at the time the tree fell and the cattle entered. We find the jury could have determined the falling tree could not have been anticipated or expected under normal conditions and the evidence justified submission of the defense of act of God to the jury. Oakes, supra.

AFFIRMED.