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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD C. EDLER,)
Appellant,) Filed March 29, 1978
vs.)
LEONARD D. REED,) 416 / 2-60447
Appellee.)

Appeal from Warren District Court - M. C. Herrick, Judge.

Plaintiff appeals trial court's judgment for defendant notwithstanding the jury verdict awarding him personal injuries sustained while riding defendant's race horse. Reversed and remanded for reinstatement of jury's verdict.

Mark Mossman, of Mossman & Grote, Vinton, for Appellant.

Dan Stamatelos, of Stamatelos & Smith, West Des Moines, for Appellee.

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

PER CURIAM

Plaintiff Richard C. Edler appeals the trial court's judgment for defendant Leonard D. Reed notwithstanding the jury verdict of $7500 awarded for personal injuries sustained as a result of Reed's alleged negligence. We reverse.

Edler urges reinstatement of the jury verdict. Our review is consequently restricted to the two issues submitted to the jury; that is, whether the evidence generated a jury question regarding the whip instructions or the failure to restrain.

Edler claimed that Reed told him to "wake up" the horse by using the whip and that when he did so the horse reared up and fell over backwards upon him. We hold that a jury, finding such instruction was given and followed, could find it was the proximate cause of the injury sustained. Even if Edler did continue to pull on the reins, causing the horse "literally" to fall over upon him, the jury could find the original "rearing" was occasioned by the whipping commenced at Reed's direction. The trial court erred in ruling that as a matter of law the whipping instructions were those customarily and usually given for the purpose of controlling a balking horse. Edler testified without Reed's direction he would not have used the whip to urge the balking horse forward. We rule the weight and credence to be accorded such testimony was for the jury. The jury could conclude Reed should have anticipated, with his knowledge of Monte Mystery's proclivities for lunging, that the whipping would startle and alarm the animal. See Nikolas v. Kirner, 247 Iowa 231, 238, 73 N.W.2d 7, 9 (1955). In so instructing, Reed failed to exercise his duty of ordinary care for Edler's protection. We need not reach the other issue submitted; whether Reed was negligent in restraining of the horse or prematurely released his restraint of the horse.

Reed on appeal urges that the trial court erred in instructing the jury on the whip and the restraint issues since the pleadings did not contain these specifications of negligence and no subsequent amendment conformed the pleadings to proof. Mora v. Savereid, 222 N.W.2d 417, 419 (Iowa 1974); Cronin v. Hagan, 221 N.W.2d 748, 754 (Iowa 1974). He urged this ground before the trial court in objecting to the instructions and in his subsequent motion for new trial. Under rule 248, Rules of Civil Procedure, Reed did not waive reliance on his motion for new trial by filing his rule 243 motion for judgment notwithstanding the verdict.

However, we find no merit in Reed's argument that the instruction regarding the use of the whip was not warranted by the pleadings and stated a wholly different ground of negligence than the pleadings. We find the original petition included an allegation that Reed was negligent in that he: ". . . having undertaken to direct plaintiff in use of the instrumentality (Monte Mystery), fail(ed) to exercise reasonable care in giving instructions." This allegation would encompass the whip instructions.

Having found the evidence generated a jury question regarding Reed's whip instructions, we reinstate the jury's verdict on this question since we find no other basis for invalidating the jury's deliberations. We thereby overrule necessarily Reed's motion for new trial.

Reversed and remanded for reinstatement of the jury's verdict. Costs assessed to the defendant.

All judges concur, except Donielson, J., who dissents.

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Because I believe that the trial court was correct in granting defendant's motion for judgment notwithstanding the verdict, I must dissent. As the trial court so aptly put it, there is no evidence in the record "to prove that defendant was negligent in any particular or respect which was the proximate cause of the plaintiff's injuries."

The record establishes that plaintiff, a 20 year old who had been riding horses in race meets in Iowa for approximately seven years, had been employed by defendant to ride one of his quarter horses in a race at the state fairgrounds. Just prior to the race, the mare was unloaded near a gate leading to the race track and saddled and bridled by plaintiff with the assistance of defendant.

According to plaintiff's testimony which was not disputed by defendant, prior to mounting the horse, defendant told him that "the horse wouldn't buck or wouldn't rear, but it would lunge forward." Defendant assisted plaintiff in mounting and the defendant's brother held the bridle at the head of the mare. After plaintiff mounted, the defendant's brother released the bridle and at this point, the mare balked, apparently not wanting to go forward onto the track, and defendant instructed plaintiff to "wake him up with the whip," according to plaintiff's testimony. Although defendant could not remember exactly what he said, he did not deny plaintiff's testimony in this regard.

Thereafter, the mare lunged forward as defendant had predicted, whereupon plaintiff pulled back on the bridle reins, at which point the mare reared up in the air. According to the findings of the trial court, plaintiff apparently continued pulling back on the reins, causing the mare to come over backwards and fall upon him, which was the cause of his injuries.

In granting defendant's motion for judgment notwithstanding the verdict, the trial court found that the record was devoid of any evidence which would indicate that defendant's mare had ever reared or fallen on a rider prior to this occasion, either while engaged in a race or during training. The only peculiarity of the animal as demonstrated by the evidence was her habit of lunging forward rather suddenly. This fact was clearly communicated to the plaintiff by defendant. Further, there is no evidence in the record whatsoever to indicate that the use of the whip by the plaintiff would have any unexpected or unforeseen consequences.

I agree with the trial court's conclusion that there was no evidence in the record to sustain any of the pleaded allegations contained in plaintiff's petition from which the jury could find the defendant negligent. In its well reasoned ruling, the trial court stated:

> . . . This is not a case similar to a livery stable or riding stable furnishing riding horses to the public for hire, which is a form of bailment. In this situation plaintiff was an experienced racing jockey and it is a matter of common knowledge that horses about to enter a race and during the race become excited and are apt to do unusual and unexpected things. . . .
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> . . . [I] t is the opinion and conclusion of the Court that there was no evidence in this record to prove that defendant was negligent in any particular or respect which was the proximate cause of the plaintiff's injuries. The accident occurred either as a result of an unexpected and unavoidable act on the part of the mare or as the result of the plaintiff's negligence in failing to release the bridle reins and leap clear of the horse. The other expert jockies in the case all testified that it was not wise or proper to continue grasping the reins after a horse rears and that the natural tendency of the horse would be to follow its head and if it is pulled backwards to come on over, and this is apparently what happened in this case.

The purpose of rule 243(b), Rules of Civil Procedure, which permits a judgment notwithstanding the verdict if the movant was entitled to a directed verdict at the close of all evidence and moved therefor and the jury did not return such a verdict, is to afford the trial court an opportunity to correct its error in failing to sustain the motion for a directed verdict. Dutcher v. Lewis, 221 N.W.2d 755, 759-760 (Iowa 1974); Dobson v. Jewell, 189 N.W.2d 547, 555 (Iowa 1971). When considering motions for directed verdict and judgment notwithstanding the verdict, the court is required to view the evidence in the light most favorable to the party against whom the motions are made regardless of whether it is contradicted and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. Winter v. Honeggers' and Co., Inc., 215 N.W.2d 316, 321 (Iowa 1974); Champlin v. Walker, 249 N.W.2d 839, 840 (Iowa 1977). However, even viewing the evidence in the light most favorable to plaintiff, I am unable to find any evidence which would support a finding of defendant's negligence in this case. Consequently, I would affirm the district court.