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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

GLORIA D. LOONEY,)

Appellant,)

Filed September 9, 1977

vs.)

ROBERT D. KING and)

MARION M. KING,)

Appellees.)

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2-582II

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Appeal by plaintiff-passenger in car that collided with horse claiming improper admission of evidence by expert on the cause of the horse getting loose. - Reversed and remanded for new trial.

Samuel T. Beatty, of Mosier, Thomas, Beatty, Dutton, Braun & Staack, of Waterloo, for Appellant.

George Lindeman, of Lindeman & Yagla, of Waterloo, for Appellees.

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

PER CURIAM

This is an appeal from a jury verdict for defendants. Plaintiff was a passenger in a car that collided with one of two horses of defendants' that was loose on the highway. Plaintiff claimed defendants' negligence was established under §188.2, The Code, which provides: "All animals shall be restrained by the owners thereof from running at large." Plaintiff relied on the statute to prove defendants' negligence. Defendants introduced evidence of what measures had been taken to prevent the horses from getting loose.

Plaintiff claims error occurred in Instruction 9. Plaintiff complains that by the use of the words "although" and "only" the court removed from plaintiff's case the benefit of the statute. Under the statute, a violation constitutes prima facie evidence of negligence. Plaintiff further claims the burden of proof shifts to defendants after plaintiff proves the facts necessary to satisfy §188.2.

A violation of §188.2 has been held to be prima facie evidence of negligence, not negligence per se, and may be rebutted by evidence of reasonable and ordinary care under the circumstances. *Klunenberg v. Rottinghaus*, 256 Iowa 731, 735, 129 N.W.2d 68 (1964); *Ritchie v. Schaefer*, 254 Iowa 1107, 120 N.W.2d 444 (1963).

Rule 14(f)(8), Rules of Appellate Procedure, provides: "The party who so alleges must, unless otherwise provided by statute, prove negligence and proximate cause by a preponderance of the evidence." The general rule is stated in 29 Am. Jur.2d, Evidence, §126:

"A presumption which operates in the plaintiff's favor casts upon the defendant the burden of producing evidence to meet the plaintiff's prima facie case, and not the burden of proof in the sense of the risk of nonpersuasion which remains with the plaintiffs throughout the trial. Where the plaintiff makes out a prima facie case for himself sufficient to take the case to the jury, the defendant has the option of taking the risk of an adverse verdict or offering evidence to rebut or meet the prima facie case which the plaintiff has made out, but he does not assume the burden of proof in the sense of the ultimate risk of nonpersuasion."

We find no authority or analogous situations that persuade that the burden of proof is shifted to defendants by the application of §188.2, The Code. The trial court instructed that plaintiff has the burden of establishing defendants' negligence by a preponderance of the evidence. The instruction was proper.

Further, we do not believe the instruction eliminated the prima facie evidence of negligence to which plaintiff was entitled. The instruction must be read in its entirety, not focusing solely on the sentence containing the words "although" and "only". As such, we find no error. All instructions must be considered together and related to each other. *Leaders v. Dreher*, 169 N.W.2d 570 577 (Iowa 1969).

Plaintiff's second contention is that an unqualified expert witness expressed an opinion not supported by the record. The witness gave his opinion that the horses got loose because they were spooked by some unknown species that probably came through the area. Plaintiff objected that the subject was a matter of common observation upon which experts are not permitted to state their conclusions. The characteristics and habits of a horse have long been held to be a proper subject of testimony by an expert. See *Delfs v. Dunshee*, 143 Iowa 381, 122 N.W. 236 (1909).

Plaintiff made timely objections both to the witness's qualifications as an expert on this particular subject and to the foundation necessary to express the opinion. The Iowa court has committed itself to the liberal admission of opinion evidence. However, liberality does not mean an expert opinion may be admitted if it is based on nothing more substantial than conjecture or guess. *Tiemeyer v. McIntosh*, 176 N.W.2d 819 (Iowa 1970). Although the witness Gruber was raised on a farm and testified he did a lot of breaking of horses, we find no factual basis to support his opinion the horses were spooked. The admission of this opinion testimony was error and was prejudicial to plaintiff since it allowed the jury to find the accident occurred from a cause unrelated to the alleged negligence of defendants and unsupported by evidence. See *Bernal v. Bernhardt*, 180 N.W.2d 437 (Iowa 1970). Plaintiff's motion for new trial on these grounds should have been granted.

In light of our conclusion plaintiff's final assignment of error citing insufficiency of evidence need not be determined. Reversed and remanded for new trial.