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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

LESLIE OAKES and FLORENCE OAKES,

Appellants,

vs.

TERRY J. BEMAN d/b/a BEMAN DRAINAGE,

Appellee.

Filed March 22, 1979

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Appeal from the District Court of Fayette County - Frank Elwood, Judge.

Plaintiffs appeal from a judgment for defendant in personal injury tort action entered after trial to the court. Affirmed.

R. L. Donohue of West Union for appellants.

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

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Plaintiffs appeal from judgment for defendant in a personal injury action based on negligence which was tried to the court. Plaintiffs allege their motion for new trial should have been granted due to: 1) trial court's application of an erroneous standard of care in defining defendant's duty toward plaintiff, Leslie Oakes; 2) trial court's failure to find as a matter of law that defendant's warnings were negated by defendant's subsequent invitation to ride; and 3) irregularities of proceedings within the meaning of Iowa R. Civ. P. 244.[1] We affirm.

Plaintiff, Leslie Oakes, a tenant farmer, suffered a broken leg while riding on the rear of a backhoe driven by defendant, Terry Beman, a tiling contractor, who had been hired by plaintiff's landlord to do drainage work. Plaintiff had ridden from the farmyard to the tiling area on the rear of the backhoe, dismounting only to open some gates. The injury occurred on the return trip when the backhoe boom swung into plaintiff's leg.

Our review of an action tried to the court at law is on assigned error only. Findings of fact in a jury-waived case have the effect of a special verdict and are equivalent to a jury verdict. Iowa R. App. P. 4; Northrup v. Foster, 204 N.W.2d 889, 890 (Iowa 1973). Such findings will not be disturbed on appeal if supported by substantial evidence and justified as a matter of law, even though we might arrive at a different conclusion from the evidence. We will not weigh the evidence or pass on the credibility of witnesses. Thomas Truck & Cast. Co. v. Buffalo Cast. & W. H. Corp., 210 N.W.2d 532, 536 (Iowa 1973); Northrup v. Foster, 204 N.W.2d 889, 890 (Iowa 1973). The findings of trial court are to be liberally construed and, in case of ambiguity, construed to uphold rather than defeat the judgment. Hammer v. County of Ida, 231 N.W.2d 896, 900 (Iowa 1975).

Based on these premises, and a careful review of the record, we find trial court's factual determinations to be supported by substantial evidence. We then must determine whether trial court erred either by applying an erroneous principle of law or by erroneously applying an otherwise proper principle of law to the facts of this case.

I. In negligence actions, Iowa has long followed the position that there are no degrees of care. The standard is always that one person owes another a duty to exercise that degree of care in his or her conduct which an ordinarily prudent person would use

[1] Plaintiff, Florence Oakes, sought recovery for loss of services, support, society and companionship of plaintiff, Leslie Oakes. References in Divisions I and II of the opinion will be to plaintiff, Leslie Oakes, only.

under the circumstances. Werthman v. Catholic Order of Foresters, 257 Iowa 483, 492, 133 N.W.2d 104, 109 (1965). Part of that standard of care is the duty of one with superior knowledge of foreseeable injury to adequately warn one who is less knowledgable of danger.

Trial court factually concluded that defendant warned plaintiff not to ride on the back portion of the backhoe because there was no place to ride, there were levers and pedals back there, it was not a safe place to ride, and invited him to ride on the front portion with defendant. The court found that no specific warning as to danger was given but that the general warnings, which were repeated even though defendant waited at each gate for plaintiff to remount, were adequate. The court found the evidence nonspecific on the issue of contributory negligence as to how or under what circumstances the plaintiff pushed or depressed a lever or pedal which may have caused the boom to swing.

Plaintiff asserts that a person with superior knowledge of an allegedly dangerous instrumentality has a greater duty to protect or warn a less knowledgable person and argues trial court should have found defendant's warning to be inadequate as a matter of law. Plaintiff, however, does not allege that the backhoe had concealed harmful properties as have chemicals[2] or defective instrumentalities.[3] Rather, plaintiff bases his argument on the defendant's superior knowledge of a backhoe's actual operation which plaintiff claims were not apparent to him and required more specific warnings.

Based on defendant's alleged superior knowledge, plaintiff would impose a duty on defendant approaching strict liability if he proceeded without forcing plaintiff to comply with his warnings not to ride on the backhoe. Neither the law nor the evidence supports plaintiff's position. Plaintiff was a farmer, an adult and intelligent. He had operated hydraulic equipment and was presumed to be exercising reasonable care for his own safety under the circumstances. Glandon v. Fiala, 261 Iowa 750, 755, 156 N.W.2d 327, 331 (1968). When told that riding the backhoe was unsafe and when given the alternative of riding on the tractor with Beman, he showed disregard for his own safety by climbing upon the backhoe. Under these facts, we agree with trial court's conclusion that defendant met the standard of care required of him.

[2] See, e.g., Lakatosh v. Diamond Alkali Co., 208 N.W.2d 910 (Iowa 1973); Holladay v. Chicago B. & Q. Ry., 255 F.Supp. 879 (S.D. Iowa 1966).

[3] Geffrey v. Langshan Const. Co., 58 So.2d 698 (Fla. 1952).

II. Plaintiff also alleges that, even assuming the warnings were adequate, defendant negated their effect through implied invitation by subsequently allowing plaintiff to continue to ride upon the rear of the backhoe. Trial court found that defendant conducted himself as an ordinarily prudent person would under like circumstances. The legal standard was met by his actions in warning plaintiff, an intelligent, adult farmer experienced with equipment, of potential danger. Once the warning was given, a prudent person would not consider himself or herself under a continuing duty to recite the warning with greater specificity each time the listener ignored it. Trial court appropriately found that defendant met the required standard of care and the harm resulting to plaintiff was the result of plaintiff's own contributory negligence.

III. Plaintiffs finally argue that irregularities occurred which justify a new trial under Rule 244, Iowa R. Civ. P. Even though the nine-month period between trial and judgment is lengthy, plaintiffs have made no showing on appeal that the trial court did not possess the ability to recall the appearance and demeanor of witnesses. Further, it must be pointed out that part of the delay was a result of plaintiffs' failure to file the final brief, which they had requested, until two and one-half months after trial. No irregularities amounting to prejudice have been shown. See Schall v. Lorenzen, 166 N.W.2d 795, 798 (Iowa 1969).

The judgment of trial court is affirmed.

AFFIRMED.