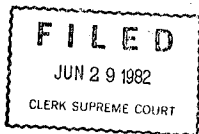


IN THE COURT OF APPEALS OF IOWA



SHARON KIRK,

Plaintiff-Appellant,

vs.

LARRY SEEMAN and  
GARY FINESTEAD,

Defendants.

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Filed June 29, 1982

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Appeal from Boone District Court, R. K. Richardson, Judge.

Plaintiff appeals from judgment entered on jury verdicts for defendants in her action to recover for injuries sustained when the car she was driving hit cattle which had escaped from confinement onto a road. AFFIRMED.

Jerry L. Jones, Ames, for appellant.

Kirke C. Quinn, Boone, and William L. Chaplin, Des Moines, for appellees.

Considered by Oxberger, C.J., and Danielson and Johnson, JJ.

## PER CURIAM

Plaintiff appeals from judgment entered on jury verdicts for defendants in her action to recover for injuries sustained when the car she was driving hit cattle which had escaped from confinement onto a road. Plaintiff asserts the trial court erred in submitting to the jury defendants' affirmative defenses of contributory negligence and act of God and in allegedly withdrawing a disputed question of fact from the jury's consideration. We affirm.

In the early morning hours of October 19, 1979, plaintiff was driving on a rural Boone County road when her car struck some cattle that had escaped from a nearby field. There is no dispute that defendant Seeman owned the cattle and that they had escaped through a fence under defendant Finestead's control. Finestead claimed that he maintained any fence he was responsible for and asserted the defense of act of God, claiming that the cattle were frightened by a severe thunder and lightning storm which occurred during the night. After a March 1981 trial, the jury found in favor of both defendants and judgment was entered accordingly. Plaintiff brought this appeal.

I. Plaintiff first alleges error in submission to the jury of defendants' theories of contributory negligence; specifically, in plaintiff's failure to have her vehicle under control, failure to keep a proper lookout, and in driving at a speed greater than would allow her to stop within the assured clear distance ahead. Although plaintiff admits the instructions correctly stated the law regarding contributory negligence as an abstract proposition, she claims there was insufficient evidence to support submission of these instructions.

We need not decide this evidentiary issue. The trial court also submitted two special interrogatories to the jury asking if defendants were negligent in failing to restrain the cattle and in failing to properly maintain the fence. The

jury answered both interrogatories in the negative. Therefore, any error in the submission of the instructions on contributory negligence was rendered nonprejudicial. Everhard v. Thompson, 202 N.W.2d 58, 61 (Iowa 1972).

II. Plaintiff also argues there was insufficient evidence to justify the submission of act of God as an affirmative defense. We disagree. "In considering whether there was evidentiary support for an instruction, we must give the evidence the most favorable construction it will reasonably bear." Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 399 (Iowa 1977). There is no dispute that there was a severe electrical storm the night before the accident with very loud thunder. Marion Oviatt, Seeman's lessor, testified that he had seen cattle frightened by thunder and lightning before and that no enclosure fence could contain cattle once they are so frightened. There was also a good deal of evidence that the damaged portion of the fence was in good condition before the storm. Under these circumstances, we find sufficient evidence to justify submission of the act of God instruction.

Plaintiff questions whether a thunderstorm is such an unusual occurrence as to fall within the "act of God" concept. No argument or authority is given on the question; we deem the issue waived. Iowa R. App. P. 14(a)(3).

III. Plaintiff's final argument concerns the propriety of a portion of Instruction No. 22 in which the court defined as "lawful fence." The issue relates to the last sentence of the instruction which read: "There is no evidence before this Court that the fence in question was not a lawful fence." Plaintiff claims this statement removed a factual issue from the jury and had the effect of establishing that having a legal fence is a complete defense to plaintiff's action.

We find no cause to reverse. Again, plaintiff cites no authority for the proposition that a gratuitous comment on the evidence such as this is reversible error. Even on the merits, plaintiff's argument fails. The instructions read as a

whole correctly placed the burdens of proof regarding plaintiff's allegations and defendants' affirmative defenses. Nowhere do the instructions intimate that maintaining a lawful fence is a complete defense to plaintiff's allegations. This issue is without merit.

AFFIRMED.