

FEDERAL COURT

Agri-West Partners and Torske Cattle vs. Benda Harvesting et al, 24 MFR 339, 1/26/99

BENCH JUDGMENT: \$55,391 (50/50) to one Plaintiff, \$19,275 to another, combine-caused wheat/hay fires... Anderson .

Agri-West contracted with Benda Harvesting and its partners LeRoy Benda, Rodney Timm, and Mike Benda to cut grain on its Fly Creek Farm in Big Horn Co. in 1996. The contract did not address firefighting responsibilities.

The crew consisted of 8 combines. Harvest conditions were exceptionally hot and dry. On 8/1/96 a stubble fire started behind or under a combine owned by Timm. Although it probably resulted in some manner from Defendants' combining operations, there is insufficient evidence to find that it was a result of any negligence by them. The fire was initially containable had Defendants effectively used water tanks carried on the combines.

However, the 2 operators who were in a position to do so while the fire was relatively small did not try to put it out using water tanks. Subsequent firefighting efforts by Defendants were chaotic and ineffective, resulting primarily in spreading the fire because smoldering chaff and straw stuck to the combines dropped off as they were leaving the field.

After several combines had caught fire Defendants evacuated the field and parked their combines on the road; they had to abandon one in the field. The combiners then returned to fight the fire with shovels and shirts. While their efforts may have been ineffective, they were not negligent in this respect.

Agri-West recognized its firefighting responsibilities as a landowner and had 2 tractors and disks between the 3 fields that were being combined. This ``strategic" positioning made the equipment virtually useless for timely firefighting due to the time it took to retrieve it in the event of a fire.

Agri-West had other tractors and cultivators that could have been used for firefighting but were not. Had Agri-West had men and equipment more readily available the fire could have been contained and substantial damages avoided.

Defendants' failure to cut wheat ahead of the fire did not constitute negligence under the circumstances of a fire burning out of control, numerous combines already on fire, and extreme heat and dryness. Prudence and legitimate safety concerns justified Defendants' decision to halt combining until instructed to continue by Agri-West.

There is insufficient evidence that the losses suffered by Agri-West and neighboring Torske Cattle would have differed and to what extent had Defendants immediately continued combining.

Agri-West incurred stipulated \$77,641 damages. It has not proven moisture loss or diminished future yield. Defendants' expert

Neal Fehringer rebutted Agri-West's ``rule of thumb" of 1% of moisture to 6 bushels by showing that moisture depths between fields and between burned and non-burned areas were consistent. He also testified that there was no decline in yield in the years immediately following the fire. Agri-West claims damages for 12.5 miles of lost fence at new replacement cost of \$5,000/mile.

However, Fehringer's estimate of \$2,336/mile for replacement of half the posts is accepted as reasonable for restoring the fence to a functional condition. It is entitled to \$29,200 for lost fence. It is also entitled to \$3,941 for applying herbicide to destroy spontaneous regrowth of grain. Agri-West's total damages are \$110,782.

The parties stipulated the Torske incurred firefighting expenses of \$2,180. It is also entitled to \$14,175 for replacement hay and \$2,920 for lost fence, for a total of \$19,275.

Irrespective of existence or not of a formal partnership agreement Defendants were engaged in a joint venture for providing custom combining on Fly Creek Farm. They were acting in concert and are jointly & severally liable for Plaintiffs' damages.

Defendants did not violate MCA 50-63-103 because they did not deliberately or intentionally ``set or leave any fire." Defendants were negligent in failing to extinguish the fire in the first few minutes when it was readily containable and then in carrying and spreading it with their own combines. Defendants' negligence was a cause of damage to Plaintiffs.

Agri-West was negligent in failing to have heavy firefighting equipment readily available for short-notice use, as a result of which the initially containable fire was allowed to spread. Agri-West and Defendants had shared and mutual duties to use reasonable care in fire prevention and containment. MCA 27-1-701. Negligence attributable to Agri-West and Defendants is 50% to each. \$55,391 net judgment for Agri-West plus costs. \$19,275 judgment plus costs for Torske (Defendants will now assert a contribution & indemnity claim against Agri-West for 50% of Torske's damages.)

Plaintiffs' Expert: Jerry Koch (Fire Suppression)

Defendants' Experts: Terry Langstraat, Billings (Custom Combining); Agronomist Neal Fehringer, Billings

Original demand, \$273,000; original offer, \$0. Final demand, \$135,000 for Agri-West, \$20,000 for Torske; final offer, \$30,000 from Timm, \$12,000 from Bendas, according to Plaintiffs, \$58,000 from both Defendants, according to Timm. Mediator, Gary Zadick.

Defendants filed an agricultural lien against Agri-West in the amount of \$80,000. In 4/98 Agri-West made an offer of judgment of \$67,954 plus fees & costs associated with foreclosing the lien, which was accepted.

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Norman Newhall (Linnell, Newhall, Martin & Schulke), Great Falls , for Plaintiffs; Kelly Varnes (Hendrickson, Everson, Noennig & Woodward), Billings , for

Benda Harvesting, Mike Benda, and LeRoy Benda; Randall Nelson & Elizabeth Honaker (Nelson Law Firm), Billings , for Timm (Oklahoma Farm Bureau Ins.).