FILED
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IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM STETHEM,

Plaintiff-Appellant,

vs.

GLEN L. HAMBLY,
d/b/a ROCKWELL AUTO PARTS,

Defendant-Appellee.

Filed November 19, 1979

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2-63153

Appeal from Cerro Gordo District Court - L. E. Plummer, Judge.

Plaintiff appeals judgment for defendant in negligence action asserting evidence and instructions on defendant's alleged violation of state fire marshall regulations should have been permitted. - Reversed and remanded.

Herman P. Folkers, of Nelsen & Folkers, Mason City, for plaintiff-appellant.

Warren L. DeVries, Mason City, for defendant-appellee.

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

PER CURIAM

Plaintiff William Stethem appeals judgment for defendant Glen L. Hambly, d/b/a Rockwell Auto Parts, in negligence action. Reversed and remanded.

Plaintiff William Stethem brought this negligence action to recover for injuries sustained when a propane gas heater in defendant Glen L. Hambly's business office exploded. On appeal, plaintiff asserts the trial court erred by refusing to admit evidence on state fire marshall regulations concerning the storage of propane tanks and by further refusing to instruct the jury on those regulations and the legal effect of their violation. Defendant claims the trial court properly excluded the evidence and instructions on his alleged negligent storage of the propane tank since that issue was not raised by the pleadings.

Generally, an issue will not be considered by the court unless it fairly is raised by the pleadings, Buda v. Fulton, 261 Iowa 981, 989, 157 N.W.2d 336, 341 (1968) and it is reversible error to submit an issue not raised by the pleadings and proof. Adams v. Deur, 173 N.W.2d 100, 113 (Iowa 1969). However, pleadings are to be simple, concise, and direct, Iowa R. Civ. P. 69 (b), and it is prejudicial error not to instruct on theories or claims supported by the pleadings and substantial evidence. Doser v. Interstate Power Co., 173 N.W.2d 556, 559 (Iowa 1970). Here, plaintiff's petition alleged defendant was negligent "in failing to properly install and connect said heater to its fuel supply." We think, under the concept of notice pleading, defendant was adequately advised of plaintiff's claim the propane tanks were negligently located. The word "install" gave defendant notice of that claim since "install" contemplates placement in a specific location. To install is "to establish in an indicated place . . . to set up for use or service." Webster's New Collegiate Dictionary (1976). We think the negligent placement issue was sufficiently raised in the pleadings and substantial evidence was introduced in support of the pleading. Therefore, the trial court erred by denying plaintiff's requested instruction on that issue. Doser, 173 N.W.2d at 559.

Additionally, even if we were to find the pleading did not raise the issue of negligent storage, the record establishes that issue was tried by consent. In its statement of issues to the jury, the trial court specifically advised that defendant could be held liable for "failing to properly install and connect the heater to its fuel supply by

failing to locate the propane container . . . outside the building." (emphasis added.) Since the issue of negligent storage was tried by consent, the court was obligated to treat the issue as if it had been pleaded when ruling on plaintiff's motion for new trial. Iowa R. Civ. P. 249. The trial court failed to do so and it erred by denying plaintiff's motion for new trial since the requested instructions should have been given. Doser, 173 N.W.2d at 559; Iowa R. App. P. 244(a), (h).

Plaintiff also asserts the trial court erred by refusing to admit fire marshall regulations into evidence. Administrative rules and regulations are proper subjects of judicial notice if they were adopted pursuant to statutory authority. State v. Berch, 222 N.W.2d 741, 745 (Iowa 1974); Socony Vacuum Oil Co. v. State, 170 N.W.2d 378, 381 (Iowa 1969). Here, the trial court did not err by refusing admittance of the state fire marshall rules since they were proper subjects of judicial notice. The court, however, did err by failing to instruct the jury on the requirements of those regulations and the legal effect of their violation.

Since the trial court erred in its instructions, new trial is warranted.

REVERSED AND REMANDED.