FILED
MAY 30 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-584 / 94-226

HERBERT J. TURIN, Trustee of the HERBERT P. TURIN TRUST,
Plaintiffs-Appellants.

vs.

HARTFORD FIRE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the Iowa District Court for Sac County, Ronald H. Schechtman, Judge.

Plaintiff appeals from a judgment of the district court, following a jury trial, dismissing plaintiff's claims under his insurance policy for the theft of cattle. **AFFIRMED.**

Steve Hamilton of the Hamilton Law Firm, Storm Lake, for appellants.

James R. Van Dyke of Van Dyke & Werden, P.C., Carroll, and E. Lawrence Oldfield of E. Lawrence Oldfield & Associates, Oak Brook, Illinois, for appellee.

Considered by Sackett, P.J., Huitink, J., and Perkins, S.J.

*Senior judge from the 5th judicial district serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Herbert J. Turin (Turin) is the trustee of the Herbert P. Turin Trust (Trust). The Trust was created by the last will and testament of Herbert P. Turin. As trustee, Turin operates a livestock business, Turin Feedlots.

On December 26, 1989, Turin obtained a casualty insurance policy from Hartford Fire Insurance Company for the cattle. The policy provided insurance for:

> B. Loss directly caused by or resulting from theft, which shall mean an act of stealing where there is physical evidence of forcible entry to the premises. Theft as insured hereunder shall not be construed to mean:
>
> > (1) Mysterious disappearance or shortage;
> > (2) Any occurrence where there is a voluntary surrender of livestock;
> > (3) Any occurrence where there is involved either as principal or an accessory to the theft any owner of the livestock or any partner, member or employee of such owner; nor where there is involved either as principal or accessory any person having custody or control of the animals at the time of the theft or any partner, member employee or bailee of such person or organization having custody or control of the animals.

Turin filed a claim with Hartford based on the theft of eighty-seven cattle, worth $68,165, on the night of September 22-23, 1991. Turin reported the loss to the sheriff's department. He showed the department a lock had been cut on a holding pen. The department was not able to find any evidence of the missing cattle.

Hartford denied the claim on the ground that the claim was for cattle which did not exist. Hartford obtained an aerial photograph taken on September 19, 1991, which showed 409 cattle at the Trust's feedlot. Turin claimed there was 524 cattle at the feedlot on that date.

The Trust filed the present suit against Hartford alleging breach of contract. Before the case was submitted to the jury, the Trust objected to Instruction Number 15. Plaintiff requested the court to add a sentence to specify that it had to prove its case by a preponderance of the evidence. The court denied the request because it

believed plaintiff was required to show substantial evidence of the theft. The jury returned a verdict for defendant. The Trust has appealed.

On a claim of failure to properly instruct the jury, our scope of review is for the correction of errors of law. *Kirk v. Union Pacific Railroad*, 514 N.W.2d 734, 736 (Iowa App. 1994)

On appeal, the Trust contends Instructions 12, 14, and 15 are improper when considered together. The Trust believes it was improperly required to present substantial evidence of the theft, when it should have to prove its case by only a preponderance of the evidence.

We first note the Trust has failed to preserve error on its contentions concerning Instructions 12 and 14. The Trust raised no objections to Instructions 12 and 14 before the instructions were submitted to the jury. We may only consider on appeal only those objections to the instructions previously raised with the trial court. *Morgan v. Perlowski*, 508 N.W.2d 724, 729 (Iowa 1993). A failure to make a timely objection to an instruction waives the right to assert error on appeal; the instruction, right or wrong, becomes the law of the case. *Kiner v. Reliance Insurance Co.*, 463 N.W.2d 9, 14 (Iowa 1990).

We determine the Trust did preserve error on its objections to Instruction Number 15. This instruction provided:

> The plaintiff, Herbert J. Turin, Trustee, must prove all of the following propositions:
>
> 1. Turin was insured for loss for theft of cattle on the date of the loss by Hartford.
> 2. Turin had a loss resulting from theft of cattle on the date of the loss by Hartford.
> 3. Turin gave Hartford notice of loss as required by the policy.
> 4. Hartford did not pay Turin's claim.
> 5. The amount of damage.

> If Turin has failed to prove any of these propositions, he is not entitled to damages. If Turin has proved all of these propositions, then you will consider the defenses of mysterious disappearance, shortage, and custodian/employee involvement as explained in Instruction No. 16.

We note this instruction, taken alone, does not require plaintiffs to prove their claim by substantial evidence. However, we consider jury instructions as a whole. *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986).

Jury instructions must reflect the correct rule of law. *Kirk*, 514 N.W.2d at 736. We find the instructions given here, taken as a whole, reflect the correct rule of law. In the case of *Long v. Glidden Mutual Insurance Association*, 215 N.W.2d 271, 273 (Iowa 1974), the supreme court held the plaintiffs had the burden, by law, to present substantial evidence of loss through theft. The court noted proof of theft requires more than proof of mere disappearance. *Id.*

We determine plaintiff has failed to show the district court erred by issuing Instruction Number 15 to the jury. We affirm the decision of the district court. Costs of this appeal are assessed to the Trust.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., specially concurs without opinion.