FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID E. BIRD and BRENDA J. BIRD, Husband and Wife,

Plaintiff-Appellees, Cross-Appellant,

vs.

ARTHUR PRIES, JR. and JOHN J. SMITH,

Defendant-Appellants, Cross-Appellee.

Filed April 26, 1979

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2-61070

Appeal from Black Hawk District Court - Joseph C. Keefe, Judge.

Defendants appeal from the trial court's order granting plaintiffs' motion for a new trial, alleging inter alia that the trial court erred as a matter of law in finding that it had failed to allow testimony and to instruct the jury that violations of OSHA and IOSHA regulations constitute negligence per se. - AFFIRMED.

James E. Walsh, Jr., of Clark & Butler, Waterloo, for Defendants-Appellants.

Thomas L. Staack, of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for Plaintiffs-Appellees.

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

SNELL, J.

Defendants appeal from the trial court's order granting plaintiffs' motion for a new trial. Plaintiffs' motion followed a jury verdict in favor of the defendants. Defendants allege several errors in the granting of the motion. We affirm the trial court's order.

Plaintiffs' principal contention in their motion for a new trial was that the trial court erred in finding that violations of OSHA/IOSHA regulations do not constitute negligence per se but can be used only as evidence of negligence. Because of its finding, the trial court refused to allow testimony that Production Metal Spinning (PMS) was required to comply with OSHA/IOSHA standards and failed to instruct the jury that violations of OSHA/IOSHA regulations in this case constituted negligence per se. The trial court based its grant of a new trial on the grounds that it erred in its finding of law, in its refusal to allow the above testimony, and in its Jury Instruction No. 13 which stated only that violations of OSHA/IOSHA regulations could be used as evidence of negligence. Defendants on appeal assert that the trial court improperly granted a new trial on this particular ground since plaintiffs had not objected to Jury Instruction No. 13, since, under the particular facts of this case, violations of OSHA/IOSHA regulations are not negligence per se, and since the trial court's error, if any, in its original ruling on the testimony and in its instruction to the jury was immaterial and non-prejudicial to the plaintiffs.

A party must object to the trial court's proposed jury instructions within a reasonable amount of time allowed by the court. "No other grounds or objections shall be asserted thereafter or considered on appeal." Julian v. City of Cedar Rapids, 271 N.W.2d 707, 708-09 (1978); Iowa R. Civ. P. 196. Here plaintiffs did not specifically object to Instruction No. 13. A trial court's grant of a motion for a new trial based on an error in instructions not previously objected to would normally be improper. Julian, 271 N.W.2d at 709. But in this case the court had advised counsel at trial that it was the court's position that violations of OSHA/IOSHA regulations would constitute evidence of negligence and not negligence per se. Plaintiffs' counsel objected at trial to this position of the court. Because counsel had made clear plaintiffs' position and because the court clearly rejected that position and disallowed testimony that supported

plaintiffs' position, we cannot say that plaintiffs' later failure to object to the court's Instruction No. 13 precluded plaintiffs from raising the issue before us on appeal. See State v. Grimme, 274 N.W.2d 331, 337 (Iowa 1979). Compare case at bar with Louisville v. Nashville Railroad Co. v. Farmer, 220 F.2d 90, 96, rehearing denied 224 F.2d 599 (6th Cir. 1955), and Keen v. Overseas Tankship Corp., 194 F.2d 515, 518-19 (2nd Cir. 1952), cert. denied 343 U.S. 966, 72 S. Ct. 1061, 96 L.Ed. 1363 (1952), and Sweeney v. United Feature Syndicate, Inc., 129 F.2d 904, 906 (2nd Cir. 1942). Our finding is additionally supported by the fact that Koll v. Manatt's Transportation, 253 N.W.2d 265 (Iowa 1977), a case which lends primary support to plaintiffs' legal contention, was not decided until after the jury had been instructed concerning the applicable law of the case.

Defendants further claim that the trial court's granting of a new trial was improper in that violations of OSHA/IOSHA regulations are not negligence per se under the particular facts of this case. In reviewing the trial court's order, we note that an appellate court is normally slow to interfere with the grant of a new trial. Iowa R. App. P. 14(f)(4). But when the trial court's grant of a new trial is based on an alleged error of law occurring in the course of trial, the court's order is not a matter of discretion and is fully subject to review by an appellate court. Julian, 271 N.W.2d at 709.

In reviewing the trial court's order, we conclude that it did not err as a matter of law in finding the holding of Koll v. Manatt Transportation applicable to the case at bar. In Koll the Iowa Supreme Court held that violations of OSHA or IOSHA regulations by an employer constitute negligence per se as to the employee; the same violations are evidence of negligence as to all other persons who are likely to be exposed to injury as a result of the violations. Koll, 253 N.W.2d at 270. Defendants Pries and Smith maintain that since they were merely co-employees and not the employers of plaintiff Bird, violations of OSHA/IOSHA regulations by them can only be evidence of negligence and not negligence per se. We disagree.

An employer can be found negligent as a matter of law to his employees for violations of OSHA/IOSHA regulations when that employer is duty-bound to comply with such regulations for the safety of its employees. Likewise, a co-employee can be held liable for injuries suffered by another co-employee if the first employee had been personally charged with a duty, neglect or violation of which resulted in injury to the

second employee. Brigdon v. Brandrup, 267 N.W.2d 396, 400 (Iowa 1978); Davis v. Crook, 261 N.W.2d 500, 503 (Iowa 1978); Kerrigan v. Errett, 256 N.W.2d 394, 396 (Iowa 1977). Consequently, a co-employee is negligent as a matter of law in failing to comply with OSHA/IOSHA regulations if that co-employee had accepted a company-imposed responsibility to monitor compliance with OSHA/IOSHA standards. Id. The four criteria outlined in Kerrigan must be met before liability is imposed. Id.

Thus, in this case, defendants could be negligent per se as to plaintiffs if the Kerrigan criteria are satisfied. And yet, even though the trial court's order granting a new trial is correct as a matter of law, defendants further maintain that the jury's answers to special interrogatories show that the jury found defendants were not personally responsible for the safety of the employees of PMS. The trial court, in denying defendant's motion to reconsider the order for a new trial, stated that the jury's answers to special interrogatories were clearly in opposition to uncontradicted testimony by both defendants that they did have an ongoing obligation and duty regarding safety in the plant. It is true that testimony by defendants Pries and Smith indicated an acknowledgment that all people at the plant, including themselves, had a general responsibility to assure safe working conditions. But the testimony did not clearly show that both defendants had been assigned and personally accepted responsibility for maintaining proper safety conditions pursuant to OSHA/IOSHA regulations. "[P]ersonal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment." Brigdon, 267 N.W.2d at 400; Kerrigan, 256 N.W.2d at 397. On the contrary, testimony was given that one other than the defendants had responsibility for OSHA/IOSHA compliance. If a defendant's general responsibility has been delegated with due care to a responsible subordinate, the defendant is not personally liable for the negligent performance of this responsibility. Id.

We need not decide whether the trial court was correct in this matter, since we determine the order for new trial was, nonetheless, proper. We conclude that the issues of whether PMS was subject to OSHA/IOSHA regulations, whether defendants or someone other than defendants were personally responsible for assuring compliance with OSHA/IOSHA, and whether OSHA/IOSHA violations did occur resulting in the injury to

the plaintiff were not properly presented at the trial below largely due to the trial court's original error of law. We find that the trial court did not err as a matter of law in its order granting a new trial, nor did it abuse its discretion in granting plaintiffs' motion.

The fact that Koll was decided after the trial of this case and on the same day that the jury returned its verdict does not preclude granting a new trial based upon the legal principle announced in its holding. Decisions of the Supreme Court are not necessarily prospective only. Here counsel had stated a position at trial which was overruled by the trial court but supported by Koll. Because counsel had attempted to argue this principle at trial and because the Supreme Court did not state that its holding was to have prospective application only, plaintiffs and the trial court were not precluded from relying on the Koll decision.

We also do not agree with defendants that in concluding that in certain situations violations of OSHA/IOSHA regulations by one employee may be negligence per se as to another creates a new cause of action in contravention of the stated policies of OSHA/IOSHA law. Recovery in negligence is a common law right which is not barred by OSHA/IOSHA regulations. 29 U.S.C. § 653(b)(4) (1975); § 88.20, The Code 1977. To say that violations of a statute are negligence per se does not widen the scope of liability. A plaintiff to recover must still prove that the defendant had a duty, that defendant violated that duty, and that such violation was the proximate cause of his injury.

For all the reasons stated above, the trial court's order granting a new trial is affirmed.

AFFIRMED.

All judges concur, except Carter, J., who dissents.

CARTER, J. (dissenting)

I dissent. The granting or refusal of a new trial for alleged errors of law is not a matter of discretion and is fully subject to review by the appellate court. Julian v. City of Cedar Rapids, 271 N.W.2d 707, 709 (Iowa 1978).

The majority seeks to predicate reversible error on (1) failure to allow testimony concerning OSHA requirements, and (2) failure to instruct the jury that a violation of said standards, where applicable, would be negligence per se. As to the first point the issue is not preserved as a result of a failure to make an offer of proof. As to the second point the omission, if any, in the instructions are harmless in view of the jury's special finding that defendants had not been charged with any duty to maintain plaintiffs' safety, did not accept any such duty, and that plaintiffs did not rely on any such duty.

Contrary to the trial court's conclusion in ruling on the motion for new trial that finding has full support in the evidence. This finding defeats plaintiffs' right to recover under Kerrigan v. Errett, 256 N.W.2d 394, 397 (Iowa 1977). And, contrary to the conclusion of the majority there is no reason to assume that the jury's finding on this issue was in any manner tainted by the lack of a negligence per se instruction. Such an instruction would in no way relate to the existence of defendants' duty under Kerrigan.

I would reverse the order granting a new trial and remand for entry of judgment for defendants on the verdict of the jury.