

CARL KINTZLE,

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Plaintiff-Appellant,

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Filed August 25, 1981

vs.

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EDWARD PEGARIEK,

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1-114
2-65128

Defendant-Appellee.

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Appeal from Linn District Court - Harold J. Swailes and August F. Honsell, Jr.,
Judges.

Plaintiff appeals from an adverse judgment in his negligence action, asserting trial court erred in its instructions to the jury by 1) issuing an instruction on plaintiff's burden of proof which conflicted with "the law of the case" as established by an earlier ruling on plaintiff's motion for adjudication of law points under Iowa R. Civ. P. 105, and 2) issuing an instruction which unduly emphasized the possibility of "mere accident" and plaintiff's burden. AFFIRMED.

Gerald J. Kucera of Keyes, Bennett & Kucera, Cedar Rapids, Iowa, for plaintiff-appellant.

John K. Von Lackum of Elderkin, Prinie & Von Lackum, Cedar Rapids, Iowa, for defendant-appellee.

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

Plaintiff, Carl Kintzle, appeals from an adverse judgment in his negligence action against defendant, Edward Pegarik, in which plaintiff sought damages for death of some of his cattle. On appeal plaintiff asserts 1) that trial court's instruction as to plaintiff's burden of proof conflicted with the "law of the case" as established by an earlier ruling on plaintiff's motion for adjudication of law points under Iowa R. Civ. P. 105, and 2) that trial court's "mere accident" instruction unduly emphasized the defense and plaintiff's burden of proof. We affirm.

Plaintiff filed his petition on January 31, 1978, alleging that his cattle died from overeating soybeans stored in defendant's dilapidated grain bin. He subsequently filed a pretrial motion to adjudicate law points seeking to establish that defendant had a duty to keep the grain bin in good repair. The court ruled that defendant had a duty to use reasonable care in regard to his use of the premises in respect to plaintiff and plaintiff's use of the premises. At trial, plaintiff unsuccessfully objected to instructions given by trial court. The jury returned a verdict for defendant and this appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. The "Law of the Case." In its ruling on plaintiff's motion for adjudication of law points, the court found "that defendant [a licensee] has a duty to use reasonable care in regard to his use of the premises in respect to plaintiff [also a licensee] and plaintiff's use of the premises." At trial, the court instructed the jury in instruction no. 10, over plaintiff's proper objection, that plaintiff had the burden of proof to establish by a preponderance of the evidence that defendant knew, or in the exercise of ordinary care should have recognized, that the bin's condition was such that it involved an unreasonable risk of physical harm to others or their property. On appeal, plaintiff asserts that trial court's prior ruling on the motion for adjudication of law points, from which defendant took no appeal, established the law of the case and required plaintiff merely to prove that defendant did not exercise reasonable care in his use of the premises. He further contends that instruction no. 10 changes that burden of proof and should not have been given. We disagree.

While we agree with plaintiff's argument that a law point which has been adjudicated, and from which no appeal has been taken, becomes the law of the case, State v. Marti, 290 N.W.2d 570, 580 (Iowa 1980), Berger v. Amana Society, 253 Iowa 378, 382, 111 N.W.2d 753, 755 (1962), Litchford v. Iowa-Illinois Gas & Electric Co., 247 Iowa

947, 952, 75 N.W.2d 346, 348 (1956), the thrust of plaintiff's argument is that once the "law" has been established, trial court must instruct the jury in the exact language of the prior ruling. We believe plaintiff's interpretation of the "law of the case" is too restrictive.

The effect of the court's ruling on law points was that plaintiff, as a licensee, owed a legal duty of reasonable care to plaintiff, also a licensee. The essence of negligence is a breach of that duty of reasonable care through conduct which creates an unreasonable risk of harm. As the court said in Lewis v. State, 256 N.W.2d 181, 188 (Iowa 1977), negligence is "the breach of legal duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks. It has been defined as conduct which falls below the standard established by law for the protection of others against unreasonable risks of harm." See also Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978), quoting M. Prosser, Torts § 31 at 145-49 (4th ed. 1968). We are also guided by the principle that a trial court may choose its own language for instructions so long as those instructions cover the legal principles involved in the case. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978).

We thus conclude trial court did not err in giving instruction no. 10.

III. "Mere Accident" Instruction. Plaintiff also asserts that trial court erred in giving instruction no. 7, which stated in part that "[t]he fact that plaintiff's cattle died and that plaintiff sustained damages is not, in itself, sufficient to show that defendant was negligent," because it unduly emphasized defendant's defense and plaintiff's burden. Again, we disagree, although we agree with plaintiff's contention that giving instructions unduly emphasizing either the defense or plaintiff's burden is erroneous. Greninger, 264 N.W.2d at 617; Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974); Andrews v. Struble, 178 N.W.2d 391, 400 (Iowa 1970); Wagaman v. Ryan, 258 Iowa 1352, 1362, 142 N.W.2d 413, 419 (1966). Greninger also provides that trial court can properly refuse to give the "mere accident" instruction, assuming it is a correct statement of the law, if giving it would unduly emphasize a defense and a plaintiff's accompanying burden. 264 N.W.2d at 617.

After reviewing all the instructions given in this case, we find no error. While instruction no. 4 defined "preponderance of evidence", instruction no. 9 set forth the general elements which must be established by a preponderance of the evidence, and

instruction no. 10 set forth what constituted negligence in this specific case, together with the requisite burden, we do not believe instruction no. 7's reference to plaintiff's burden, in conjunction with a statement setting forth what did not constitute negligence in this case, is improper. We thus conclude trial court did not err in giving the instruction.

Finding no error, we affirm trial court's judgment. We also assess costs for printing appellee's appendix against appellee, since it appears to be a supplement to the appendix filed by appellant and accomplished without appellant's consent or leave of court. Other costs of this appeal are assessed against appellant.

AFFIRMED.