IN THE COURT OF APPEALS OF IOWA

No. 2-539 / 92-239

FILED
DEC 29 1992
CLERK SUPREME COURT

DONALD PALMER and ILLIA PALMER,

Plaintiffs-Appellants/Cross-Appellees,

vs.

DENNIS ELDRIDGE,

Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Plaintiffs appeal from the judgment entered, following a jury trial, in defendant's favor. **AFFIRMED.**

Patrick W. Brick of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellants.

Valerie A. Landis of Hopkins & Huebner, Des Moines, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ. Schlegel, J., takes no part.

PER CURIAM

Plaintiffs-appellants/cross-appellees Donald Palmer and Illia Palmer appeal the judgment entered, following a jury trial, dismissing their claim against Donald's coemployee, defendant-appellee/cross-appellant Dennis Eldridge. We affirm.

The Palmers sought damages for personal injuries allegedly sustained by Donald Palmer when Donald was struck on the back of his knee by Eldridge. Palmers contend Eldridge's gross negligence during the course of employment caused Donald Palmer to sustain injuries. Palmers contend the trial court erred in overruling their motion to amend their pleading to conform to the proof offered, in failing to properly instruct the jury, and in overruling Palmers' objection to Eldridge's counsel's closing argument. Eldridge cross-appeals contending the trial court abused its discretion in excluding evidence of Donald's prior workers' compensation claims, workers' compensation awards and medical benefits, and in denying Eldridge's motion to amend his answer, in failing to submit a requested instruction, and denying Eldridge's motions for summary judgment and directed verdict. We affirm the trial court decision not to allow an amendment to conform to proof and in refusing to instruct on negligence. We find it unnecessary to address the other issues raised on appeal.

On September 28, 1989, Eldridge struck the back of Donald's knee. Eldridge and Donald Palmer are coemployees. The incident occurred on the premises of their employer, the Herman M. Brown Company.

Palmers brought suit against Eldridge and the Herman Brown Company seeking damages for the injuries Donald sustained as a result of Eldridge's conduct and loss of consortium. Palmers allege Eldridge's conduct amounted to gross negligence while in the course of employment. Eldridge denied gross negligence on his part. Palmers dismissed their cause of action against the Herman Brown Company. Eldridge then filed a motion for summary judgment which the trial court denied.

Before trial, Palmers filed a motion in limine seeking to prohibit any reference to Donald's prior workers' compensation claims, workers' compensation awards or medical benefits. Eldridge resisted on the grounds that the evidence was relevant to several issues and admissible pursuant to Iowa Code section 668.14. The trial court sustained Palmers' motion and found the evidence was irrelevant and highly prejudicial.

Also prior to trial, Eldridge moved to amend his answer to include an affirmative defense based upon Palmers' failure to mitigate damages. This motion was denied.

At trial, plaintiff Donald Palmer testified the accident occurred at 4:30 p.m., during the course of

Donald's employment. There was also testimony that the accident occurred at 7:00 a.m., before working hours. At the close of Palmers' evidence, Palmers moved to amend their pleading to conform to the proof that the alleged negligence may not have occurred during the course of employment. Palmers' motion was overruled. Eldridge then moved for a directed verdict contending Palmers had not established gross negligence on his part. Eldridge's motion was denied.

Palmers contend the trial court erred in failing to allow them to amend their petition at the close of all evidence, when they requested an instruction that in the event the jury found the occurrence did not occur while in the course of employment, then Palmers must only prove Eldridge was negligent in striking the back of Donald's knee.

Our review is for corrections of errors at law. See Cedar Falls Bldg. Ctr., Inc. v. Vietor, 365 N.W.2d 635, 638 (Iowa App. 1985).

Palmers contend because during trial there was testimony the accident occurred before working hours, the trial court abused its discretion in denying the motion. The trial court denied Palmers' motion on the basis that it was untimely and would have resulted in prejudice to Eldridge and the court because of previous rulings concerning the exclusion of evidence.

It is within the trial court's sound discretion to determine whether amendments to conform to the proof should be allowed in light of all circumstances of the case. See Vietor, 365 N.W.2d at 639. Amendments filed well after suit is commenced and after deadlines set by the court which would substantially change the nature of the case are properly denied. See Bennett v. City of Redfield, 446 N.W.2d 467, 475 (Iowa 1989). We will find an abuse of discretion only when the trial court's reasons are clearly unreasonable. See Steckelberg v. Randolph, 448 N.W.2d 458, 460 (Iowa 1989).

Eldridge advanced a number of reasons why the trial court did not abuse its discretion. We consider the reasons advanced by Eldridge that we consider dispositive of the issues. Eldridge had earlier moved to amend his answer to allege as an affirmative defense. Palmers' failure to mitigate damages and Palmers' amendment were denied. In a negligence action, an unreasonable failure to mitigate damages is fault. See Iowa Code § 668.1(1); see also Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193, 196 (Iowa 1991); Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988). Eldridge also had sought to introduce and made an offer of proof of evidence payment Donald Palmer received from the workers' compensation carrier insuring his employer. The payments made to Donald Palmer by the carrier were for time off work and medical expenses. Iowa

Code section 668.14, which modifies the collateral source rule, only applies to negligent actions and does not cover actions for gross negligence. See Carson v. Webb, 486 N.W.2d 278, 280 (Iowa 1992); State v. Wagner, 484 N.W.2d 212, 216 (Iowa App. 1992).

The trial court's prior decision precluding Eldridge from amending his answer to allege failure to mitigate damages and the fact that the collateral source rule applies in a negligence action but not a gross negligence action provided a reasonable basis for the trial court to deny Palmers' motion to amend to conform to proof. The trial court did not abuse its discretion in denying the motion.

Palmers' next contention is the trial court erred in failing to submit instructions regarding ordinary negligence to the jury. No jury instructions were required on this issue, as this issue was not timely raised or pleaded. See Knauss v. City of Des Moines, 357 N.W.2d 573, 576 (Iowa 1984).

We have considered the other issues raised by both parties. They have been disposed of by our decision or are without merit.

AFFIRMED.