FILED
MAY 25 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

286

DENNIS BIRD,

Plaintiff-Appellant,

vs.

WILLIAM M. GIBBONS, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company,

Defendant-Appellee.

Filed May 25, 1982

2-88
2-66531

Appeal from Scott District Court, Margaret S. Briles, Judge.

Plaintiff appeals from the amount of damages awarded in a personal injury suit against his employer under the Federal Employers Liability Act. Plaintiff contends (1) the court should not have admitted evidence that plaintiff lied about a thirteen-year-old felony conviction on his employment application completed three years before the accident and (2) the jury instructions erroneously placed the burden of proving mitigation of damages on plaintiff. AFFIRMED.

James M. Hood, Davenport, for plaintiff-appellant.

B. A. Webster and Arthur E. Gamble of Gamble, Riepe, Burt, Webster & Davis, Des Moines, and Edward B. Harris of Nagle, Blair, Sohr & Harris, Davenport, for defendant-appellee.

Considered by Donielson,P.J., and Snell and Carter, JJ.

PER CURIAM

Plaintiff appeals from the amount of damages awarded in a personal injury suit against his employer under the Federal Employers Liability Act. Plaintiff contends (1) the court should not have admitted evidence that plaintiff lied about a thirteen-year-old felony conviction on his employment application completed three years before the accident and (2) the jury instructions erroneously placed the burden of proving mitigation of damages on plaintiff. The trial court did not abuse its discretion in admitting evidence of plaintiff's prior felony conviction and the jury instruction properly placed the burden of proving mitigation of damages on defendant.

Plaintiff, Dennis Bird, was injured while working for defendant, the Chicago, Rock Island and Pacific Railroad, when a two-thousand-pound locomotive fan hatch assembly fell on his foot. The nerves in his foot were crushed, causing plaintiff to complain of continuing pain and a substantial restriction in the use of his foot. Plaintiff was treated at the University of Iowa Hospitals Pain Clinic, where the doctors recommended injection of pain killers near the spine to block sympathetic nerves that transmit pain sensations. That treatment was a prelude to surgery to sever the sympathetic nerves. Plaintiff, however, refused to permit the sympathetic nerve block treatment.

The trial court gave two instructions on plaintiff's duty to mitigate his damages. Neither instruction referred to the allocation of the burden of proof on the issue of mitigation of damages. Plaintiff objected to the instructions, contending there should have been some mention of the allocation of the burden of proof. The court overruled the objection. After deliberation, the jury requested an additional instruction to clarify the initial instruction on mitigation. The court

instructed the jury they could award full damages up to the time plaintiff failed to mitigate and damages for the time thereafter, to the extent they could not have been mitigated. That instruction expressly placed the burden to prove failure to mitigate upon defendant. Plaintiff did not object to the supplemental instruction.

The jury returned a verdict of $63,487.04 for plaintiff and found he was fifty-one percent at fault for the injury. The award was then reduced to $31,108.65.

I. Felony Conviction.

Plaintiff contends the trial court abused its discretion by admitting testimony plaintiff had been convicted of a felony, interstate transportation of stolen property, thirteen years ago. The details of the felony conviction were elicited from plaintiff during a hearing held to determine whether the trial court would admit evidence of the conviction for impeachment purposes. Defendant's counsel intended to impeach plaintiff's credibility by showing plaintiff lied about the conviction on the employment application he filed with defendant three years ago. The trial court ruled the fact of plaintiff's prior felony conviction, but not the details, were admissible at trial. The court applied section 622.17, The Code 1979, and the balancing process used in State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974), to conclude the prejudicial effect of admitting the prior conviction was outweighed by its probative value. We conclude the trial court did not abuse its discretion in admitting evidence of plaintiff's felony conviction.

Section 622.17, The Code, 1979, provides: A witness may be interrogated as to his previous conviction for a felony. No other proof is competent, except the record thereof. In Gaskill v. Gahman, 255 Iowa 891, 896, 124 N.W.2d 533, 536 (Iowa 1963), the court held section 622.17 applied to both civil and criminal cases. In State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974), the court abrogated the effect of section 622.17, by requiring the court to balance the probative value of the prior felony conviction against its prejudicial effect. The court in Martin committed the admissibility decision to the sound discretion of the court. Id. at 544.

This case is unique as the prior felony conviction tends to impeach plaintiff in two ways. First, there is the fact plaintiff committed an act of dishonesty, i.e. theft, see State v. Miller, 229 N.W.2d 762, 769 (Iowa 1975). Second, plaintiff lied about the felony conviction on his employment application, which is a separate and distinct act impairing his credibility. The trial court in this case restricted defense counsel's use of the felony conviction to show plaintiff had recently lied on his employment application and prevented any further elaboration. We think the determination of the trial court, that any prejudicial effect of the felony conviction was outweighed by the insight into plaintiff's credibility, was clearly proper. We find no abuse of discretion.

II. Mitigation of Damages Instruction.

Plaintiff contends the trial court's instructions on mitigation of damages were improper since they failed to place the burden of proof upon defendant. Mitigation of damages is an affirmative defense to be plead and proved by defendant. §§ 619.7, 18, The Code 1979; Vorthman v. Keith E. Myers Enterprises, 296 N.W.2d 772, 777 (Iowa 1980); Ackerman v. Lauver, 242 N.W.2d 342, 346 (Iowa 1976). Defendant in this case did not plead the mitigation issue. The trial court, however, is permitted to instruct on the issue of mitigaiton of damages, despite defendant's failure to plead the issue, if evidence of mitigation is raised by plaintiff's evidence. See Vorthman v. Keith E. Myers Enterprises, 296 N.W.2d 772, 777 (Iowa 1980); § 619.8, The Code 1979. While the trial court's instructions 27 and 28 may have been incomplete, to the extent they did not specifically place the burden of proving mitigation of damages on defendant, we think supplemental instruction 27A clearly cured any possible defect. It is clear that giving a correct instruction on an issue does not obviate error in giving incorrect ones upon that issue. Wheatley v. Heideman, 251 Iowa 695, 713, 102 N.W.2d 343, 354 (Iowa 1960);

Plumb v. Minneapolis & St. Louis Railway Co., 249 Iowa 1187, 1193, 91 N.W.2d 380, 384-85 (Iowa 1958). Those cases, however, are premised on the notion it is impossible to tell whether the jury relied upon the correct or incorrect instruction. Id. Since instruction 27 and 28 were silent on the issue of burden of proving mitigation of damages, instruction 27A, which expressly placed the burden of proof on defendant, only clarified instructions 27 and 28. Instruction 27A was not inconsistent with instructions 27 and 28. Reading the instructions together as an integrated whole, see id.; Clarke v. Hubbell, 249 Iowa 306, 314, 80 N.W.2d 905, 910 (Iowa 1957), the jury was not given an incorrect statement of the law, but initially only an incomplete statement of the law, which was elaborated upon and completed by instruction 27A. Accordingly, we find no error in the instructions.

AFFIRMED.