

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT OLIVER,

Plaintiff-Appellant,

v

GRIFFIN BEVERAGE COMPANY,

Defendant-Appellee.

UNPUBLISHED

February 29, 2000

No. 214989

Ogemaw Circuit Court

LC No. 97-901496-CK

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff Scott Oliver appeals as of right a judgment for defendant Griffin Beverage Company entered after a two-day jury trial. In a special verdict, the jury found that Griffin Beverage did not discharge Oliver from employment. Therefore, there was no cause of action. On appeal, Oliver argues that the trial court abused its discretion in granting Griffin Beverage's motion in limine to exclude certain documentary evidence of discharge for both substantive and impeachment purposes. We agree and reverse.

I. Basic Facts And Procedural History

This case arises out of a suit by Oliver for retaliatory discharge in violation of MCL 418.301(11); MSA 17.237(301)(11) and MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Oliver alleged that after an injury he was denied worker's compensation benefits, forcing him to file suit to obtain those benefits. He claimed that his employer, Griffin Beverage, was aware of the suit and that Griffin Beverage discharged him in retaliation in violation of his statutory rights. Griffin Beverage filed a motion in limine to exclude Oliver's unemployment file, which contained a document filed with the Michigan Employment Security Commission (the "MESC"). On this form (the "MESC document"), the owner of Griffin Beverage stated that the reason for Oliver's separation was "lack of work." In support of its motion, Griffin Beverage argued that the MESC document was not relevant, it would be prejudicial, and would cause jury confusion. Its counsel stated:

Apparently, the plaintiff filed a couple times with unemployment after he left and worked someplace then was off again. I don't see that the file has any relevance to whether or

not he was terminated by my client. I don't think it has any relevance at all, and I think it would be prejudicial, again, and cause confusion to the jury in that regard.

* * *

I think it is irrelevant. He [Robert Griffin, the owner of Griffin Beverage] will say he told him [Oliver] that day there was no work. He will tell him that he already testified to that in his deposition. I am sure it will be the same today when he will testify.

I think anything with the unemployment, again, is confusing to the jury. It is a side issue. I think it is prejudicial.

Oliver opposed the motion in limine and sought to admit the MESC document as an admission of a party-opponent and for impeachment purposes. His counsel stated:

That's the crucial issue in this case. Mr. Griffin is saying "I didn't lay him off. I didn't terminate him. I just told him that I didn't have work."

My client is going to testify Mr. Griffin told him "Your position is filled. I don't have any work for you. Go look someplace else."

So that's going to be a critical issue in this case, whether or not my client was terminated. The unemployment forms clearly indicate, they ask: Give the reason why you separated the claimant from your employment. Give the date you separated him, and give the reason why.

Mr. Griffin signed a form that said I separated him from my employment on 4-1-96. The reason was lack of work.

So if his testimony is there was no termination, there was no layoff, there was no nothing, this form goes directly to contradict his testimony and to support my client's testimony that in fact he was terminated on that date. And, plus, since he signed that form then as a representative of Griffin Beverage, that's an exception to the hearsay rule; it is an admission.

The trial court, after summarizing what it thought the testimony might be, stated, "Well, it seems to me like these unemployment records aren't going to really be probative of anything unless one of the parties testifies differently than what I just briefly indicated." The trial court then, without making any specific findings regarding relevancy, hearsay, prejudice or confusion, granted Griffin Beverage's motion to exclude the MESC document but reserved the issue of the MESC document's use for impeachment purposes until the time when inconsistent testimony was given. During trial, trial court ruled the MESC document inadmissible for impeachment purposes.

II. Preservation Of The Issue And Standard Of Review

A. Preservation Of The Issue

Generally, issues are not preserved for appeal if not raised before and addressed by the trial court. MRE 103(a)(1). Objections to evidence must be timely and must specify the same ground for challenge as the party seeks to assert on appeal. *Id.* Under MRE 103(a)(2), the proponent of the excluded evidence must make an offer of proof to preserve the issue for appeal. *Phinney v Perlmutter*, 222 Mich App 513, 529; 564 NW2d 532 (1997), citing *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992).

Here, Griffin Beverage moved the trial court to exclude the MESC document from evidence and the trial court granted the motion. In response, Oliver’s counsel said “okay” and made no further objection. From this standpoint, the issue is not preserved for appeal. However, whether there was a termination was central to this case and the trial court did address the issue while considering Griffin Beverage’s motion in limine after Oliver informed the trial court of the substance of the evidence. Therefore, this issue is preserved for appeal under MRE 103(a)(2), which specifically states:

- (a) Error may not be predicated upon a ruling, which admits or excludes evidence unless a substantial right of the party is affected, and

* * *

- (1) In case the rule is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

B. Standard Of Review

Whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). “An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made,” *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or that “the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias,” *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. MRE 103(a); MCR 2.613(a); *Ellsworth, supra* at 188.

III. The Motion In Limine

A. Relevant Provisions Of The Michigan Court Rules

(1) Relevant Evidence

MRE 401 provides that:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

(2) Hearsay Evidence And The Party Agent Exception

MRE 801(d)(2) provides exceptions to the definition of hearsay concerning admissions by a party-opponent:

The statement is offered against a party and is . . . (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

(3) Exclusion Of Relevant Evidence

MRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

B. Relevant Evidence

Generally speaking, relevant evidence is admissible and irrelevant evidence is not. MRE 402; *Ellsworth, supra* at 188-189. Relevant evidence is evidence that has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. MRE 401; *Ellsworth, supra* at 188. Here, the MESC document asked Griffin Beverage to state the reason for Oliver’s separation from employment, the first and last days he worked, and the date his name was removed from the payroll. The statements Griffin Beverage made on these topics had some tendency to make it more probable that Griffin Beverage separated Oliver as opposed to

Griffin Beverage's theory that Oliver quit. This fact was of consequence to Oliver's action because, in order to prevail, Oliver needed to prove that Griffin Beverage actually separated him before he could proceed to prove that it was in retaliation for seeking his worker's compensation benefits. Therefore, contrary to the inference of irrelevancy that might be drawn from the trial court's generalized statement that the statements in the MESC document were not "probative," the MESC document was relevant.

C. Hearsay Evidence

We also conclude that the MESC document was not hearsay because it was an admission of a party-opponent made by the party's agent or servant concerning a matter within the scope of agency or employment during the existence of the relationship. Therefore, it was not hearsay. MRE 801(d)(2)(D); *Shields v Reddo*, 432 Mich 761, 774-776; 443 NW2d 145 (1989).

D. Exclusion Of Relevant Evidence

Otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or other factors not at issue here. MRE 403. However, the probative value must be *substantially outweighed*, not merely outweighed by one or more of the listed factors. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Here, the trial court made no findings regarding unfair prejudice or confusion. Moreover, our review of the record reveals no basis on which the trial court could have come to the conclusion that the MESC document could have caused unfair prejudice or confusion.

On appeal, however, Griffin Beverage argues, in essence, that the MESC document was cumulative, stating that Robert Griffin's testimony through trial was consistent while Oliver's testimony was not. This was not the basis upon which Griffin Beverage argued to the trial court in support of its motion in limine; rather, Griffin Beverage argued that admission of the MESC document would be prejudicial and confusing to the jury. Further, this was not the basis upon which the trial court granted the motion in limine; other than its one generalized reference to the "probative" value of the evidence, the trial court gave no specific reason for granting the motion. Finally, we note that there is some discrepancy in logic in this argument. If, at the trial level the MESC document would be prejudicial and confusing to the jury, it is hard to comprehend how, on appeal, the same document would be merely cumulative.

E. Conclusion

Overall, this evidence was admissible in Oliver's case-in-chief because it was relevant, not hearsay, and not substantively more unfairly prejudicial than probative.

IV. Impeachment

The credibility of a witness may be attacked by any party. MRE 607. The rules of evidence provide for certain procedures when introducing extrinsic evidence of prior inconsistent statements. MRE 613(b). However, these provisions are not applicable to admissions of a party-opponent as defined in MRE 801(d)(2). *Id.* Because we have held that the MESC document was admissible in

Oliver's case-in-chief as an admission of a party-opponent under MRE 801(d)(2)(D), the procedural safeguards of MRE 613(b) are not at issue here. Further, we can discern no reason why a statement made to an administrative agency that Oliver was separated for "lack of work" is consistent with the trial testimony that the president of Griffin Beverage thought Oliver quit. Nor did the trial court set forth any reason why these statements are consistent. Surely, if agents of Griffin Beverage thought Oliver voluntarily left his employment with Griffin Beverage, such a reason would have been indicated on the MESC document. In its special verdict form, the jury specifically found that Oliver was not discharged. If the jurors had been allowed to hear this contradictory evidence, even if only for impeachment purposes, the outcome of their deliberations might well have been different.

V. Oliver's Substantial Rights

We find no justification or excuse for the rulings made, *Ellsworth, supra* at 188, and therefore conclude that the trial court abused its discretion in excluding the MESC document. Because whether Griffin Beverage discharged Oliver from employment was a central issue in this case, and the jury was deprived of evidence relevant to this issue, we hold that the trial court's ruling affected Oliver's substantial rights, meriting reversal of the judgment. MRE 103(a); MCR 2.613(a); *Ellsworth, supra* at 188.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck