STATE OF MICHIGAN

COURT OF APPEALS

TIM W. FREER,

Plaintiff-Appellant,

v

ROBERT A. SINGLER, JR.,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 201517
Midland Circuit Court
LC No. 95-004410 NI

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

In this suit for noneconomic damages under the no-fault automobile insurance act, MCL 500.3101 *et seq*.; MSA 24.13101 *et seq*., plaintiff appeals by right from a judgment in favor of defendant entered following a jury trial. We reverse.

I. Admissibility of Evidence of Non-Issuance of Traffic Ticket

A. Relevance

Plaintiff argues that defense counsel committed prejudicial error by eliciting during trial and then repeating during his closing argument, the fact that defendant did not receive a traffic ticket for the accident that caused plaintiff's injuries. Citing *Dudek v Popp*, 373 Mich 300; 129 NW2d 393 (1964), defendant argues that because the expert testimony of plaintiff's accident-reconstructionist implied that defendant had violated two provisions of the Motor Vehicle Code, MCL 256.1 *et seq*.; MSA 9.1431 *et seq*., he was allowed to introduce for impeachment purposes evidence that he did not receive a traffic ticket.

In *Brownell v Brown*, 114 Mich App 760; 319 NW2d 664 (1982), this Court observed that evidence of the issuance or non-issuance of a traffic ticket is inadmissible as substantive evidence in a civil trial because neither is relevant to the issues to be tried. Although *Dudek* does allow for impeachment purposes evidence of the non-issuance of a traffic ticket, the circumstances under which

this evidence can be used are limited. According to *Dudek*, evidence of the non-issuance of a traffic ticket is admissible only to impeach an *investigating* officer who did not issue a traffic ticket at the time of the accident, and then offers at trial "opinion evidence . . . which clearly imports a violation of the motor vehicle code or a traffic ordinance causally related to an issue of negligence." *Id.* at 308. The *Dudek* Court reasoned that

> [i]t would be an anomaly indeed if an officer were to be permitted by the effect of his opinion evidence to imply that one participant in an accident violated a causally related motor vehicle operation regulation, state or local, but at the same time be foreclosed from any inquiry as to whether he issued a violation ticket therefor, and if he did not, why not. [*Id.*]

In the case at hand, plaintiff's accident-reconstructionist was not an investigating officer at the accident scene. Indeed, the witness is self-employed as a private investigator, and had been retired from the Michigan Department of State Police for ten years as of trial. *Dudek* is inapplicable under these circumstances. Accordingly, the admission of evidence regarding the non-issuance of a traffic ticket was error. *Ilins v Burns*, 388 Mich 504, 510; 201 NW2d 624 (1972).

B. Harmless Error

MCR 2.613 states in pertinent part: "An error in the admission . . . of evidence . . . is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment . . . unless refusal to take this action appears to the court inconsistent with substantial justice." In *Ilins*, the Michigan Supreme Court listed three factors it considered to be relevant to the question of the harmful effect of improperly admitted evidence concerning a traffic ticket in a trial for damages:

> In general, if the testimony is inadvertent, if proper instructions are given to the jury, and if the effort to introduce the prejudicial testimony is not repeated, we would uphold the assessment of a trial judge that the error, though potentially prejudicial, was harmless. [*Ilins, supra* at 511.]

We conclude that the error was not harmless. The record shows that defense counsel's references to the non-issuance of a traffic ticket were not inadvertent. Twice, defense counsel brought up the matter during the presentation of evidence. And even after the trial court had ruled that the officer's motivation in not issuing a ticket was unknown and inadmissible, defense counsel stated in his closing argument, ". . . most telling . . . is the fact that he didn't get a ticket. The officer in charge of investigating this accident apparently satisfied himself there wasn't any fault to divide between the parties because he found that [defendant] didn't do anything wrong." These circumstances show that defendant was deliberately attempting to influence the jury by placing before the jury the supposed opinion of a non-testifying witness charged with the responsibility of assessing responsibility for the accident. *Id.* at 510. No jury instruction could have erased the indelible impression left by this evidence on the jury. *Id.* at 511-512. Therefore, because plaintiff's substantial rights were improperly affected by the error, reversal is warranted. *Id.* at 511.

II. Remaining Issues

Plaintiff also argues: (1) that he is entitled to a new trial because the jury's verdict was against the great weight of the evidence; and (2) that he is entitled to a judgment notwithstanding the verdict. Because we are remanding this case for a new trial, we need not address these issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie