# STATE OF MICHIGAN

# COURT OF APPEALS

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ALPHONSO C. WILSON,

Plaintiff-Appellant,

v

JIM H. BRIDGES, JR., and CHRYSLER TRANSPORT, INC.,

Defendants-Appellees.

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UNPUBLISHED
March 17, 2000

No. 207735
Wayne Circuit Court
LC No. 96-608726-NI

Before: White, P.J., and Sawyer and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

I agree with the majority that the trial court erred by admitting, over plaintiff's objection, evidence of defendant Bridges' prior driving history, including safety awards indicating Bridges had never caused any accidents and had not been at fault in any prior accidents. Such evidence was clearly inadmissible under MRE 406 and the cases relied on by the majority.

I disagree and respectfully dissent from the majority's holding that the error of the trial court did not affect the substantial rights of plaintiff and therefore was harmless error.

This is a personal injury action arising out of an automobile collision. It is undisputed that at an intersection in the City of Detroit, defendant Bridges turned left in front of the oncoming plaintiff Alphonso C. Wilson. The determinative issue on plaintiff's claim of defendant's[1] negligence was whether the traffic light had turned red at the time defendant Bridges turned left or whether the light was green, thereby affording plaintiff the right of way. There were no witnesses to the collision and neither side presented any expert accident reconstruction testimony. In sum, the issue of negligence was closely drawn.

To bolster his case, defendant improperly introduced into evidence his past driving record including numerous safe driving awards from the American Trucking Association. During both opening and closing arguments, defense counsel advised the jury of defendant's fault-free driving history, thereby implying the jury should infer that because defendant had been a safe driver in the past it was unlikely he was negligent for the accident at issue. Although the majority recognizes the error, it seizes upon a

statement made by the trial judge in denying plaintiff's motion for a new trial that in the court's view "the jury didn't believe him [plaintiff]" and plaintiff's "credibility was extremely, extremely questionable."

While the jury found no negligence by defendant, such a verdict merely indicates the jury determined plaintiff did not sustain his burden of proof on the issue of negligence. Defendant's exemplary prior driving record was most likely the determinative factor that tipped the jury's verdict in favor of defendant. There is no indication on the record that the jury did not believe plaintiff or found his credibility to be questionable. In this regard, the Supreme Court has recently disapproved of the trial judge sitting as the "thirteenth juror." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) ("absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination therefor.'")

In this case, the issue whether plaintiff suffered a serious impairment of body function was also a close question. This was not a minor motor vehicle collision. On the contrary, plaintiff's automobile suffered extensive damage from the collision of over $7,000 and was declared a total loss.

Immediately after the accident, plaintiff was extremely excited and angry. He approached defendant Bridges yelling defendant had "totaled his car" and what was he going "to do about it." Bridges did not respond, offering no explanation for the accident. Thereafter, the following improper and highly inflammatory evidence was introduced by defendant:

> *Q.* [*defense counsel*] And he [plaintiff] came over and he said that you were standing outside of our truck?
>
> *A.* [*defendant Bridges*] Yes.
>
> *Q.* What did he say to you then?
>
> *A.* He said, "if my kids had been in this car you'd be a dead nigger." So that scared me.

Although there was no objection or motion to strike, I would instruct the trial court to order defendant Bridges to delete the offensive derogatory term from his testimony on retrial. MRE 403.

After his confrontation with defendant, plaintiff proceeded to the emergency room where he sought treatment for injuries to his neck, back, and ribs. He spent three to fours hours in the emergency room. The next day plaintiff sought treatment from Laran Lerner, D.O., for complaints of severe lower back and neck pain together with hand and wrist swelling. Dr. Lerner ordered plaintiff to commence a program of physical therapy five days a week for the next six months. Thereafter, an EMG conducted by Dr. Lerner tested positive for lumbar radiculapathy. Plaintiff was later diagnosed as having a pinched nerve in his lower back, which was confirmed by a CAT scan revealing a bulging disc at L4-L5 and L5-S1. A myelogram ordered by Dr. Lerner also confirmed plaintiff's complaints:

> *Q. [plaintiff's counsel]* . . . What is the significance of this myelogram?

*A. [Dr. Lerner]* A myelogram indicates evidence of a lot of post-traumatic degenerative changes in a very young man who was thirty-six years of age. At thirty-six years of age he should not have this degree of degenerative changes affecting his cervical and lumbar spine indicating that they have progressed post-traumatically as a result of the trauma from the prior motor vehicle collision. Also, Mr. Wilson had suffered severe mechanical forces on his discs in the cervical and lumbar spine. These mechanical forces from the prior motor vehicle collision caused one of the discs in the neck to be ruptured or herniated. It caused some of the other discs in the lumbar spine to be bulging outward or pushing outward.

*Q.* Are the results of this myelogram consistent with his complaints?

*A.* Yes.

In view of the objectively manifested neck and lower back injuries, plaintiff's treating physicians restricted him from engaging in heavy lifting and repeated bending and twisting.

During the course of the litigation, defendant's insurance company hired private investigators who conducted sixty-one hours of surveillance video on plaintiff. Only a few minutes of the video were shown to the jury. Although the few minutes of video impressed the trial judge, even defense counsel characterized the surveillance tape as "not a blockbuster." In his opening statement, defense counsel summarized the surveillance tape as follows:

Let me tell you something, ladies and gentlemen, this video is not a blockbuster. You're not going to see Mr. Wilson playing a full court basketball game, you're not going to see him break dancing or spinning on his head. You're not going to see that but what you will see is a man who's substantially healthy. You're going to see Mr. Wilson's medical records where he tells his doctors he has forward flexion to 30 degrees which is like that, but you'll see him bend right down in his car and pick things up like that. That will directly affect that pinched nerve in his back that he's supposed to have.

You'll see him walk up stairs, no problem. You'll see him take normal steps like anyone else. I'm not saying you'll see him run, you'll also, ladies and gentlemen, you'll see that on a day that Mr. Buckfire mentioned he goes to a house in Detroit on Keating Street and that's where he said he went over there. It was the day after Christmas 1996 and he's comes over to that house at 10:30 in the morning. Now, this house, as Mr. Buckfire told you, is owned by a man named Otis Sanders whom you're also going to hear from. Mr. Sanders is a business acquaintance of Mr. Wilson's and they've worked together for five years.

Mr. Sanders, owns homes – about 16 to 20 shows around Detroit that the rents out and he rehabs them. He's going to tell you that Mr. Wilson just came over to that house that they were rehabbing to sell him some cologne; that's what you heard. He

didn't come over there to do any work. And he's going to tell you that he came over there to sell cologne and then he just happened to stay there for five hours. Because he was in the house for five hours.

The video will show you that and during that five hours he just happened to go out to his car about three times to get power tools. Now, you'll have to ask yourself is Mr. Sanders telling me the truth or was Mr. Wilson in that house doing work for his old business associate? Because if they're not good friends and he says they're not, why were they in the house for five hours talking? And what were they talking about for five hours and why did he need power tools at the same time you're bringing cologne and why did they have to come over there?

Why did he come over to his house instead of going to his regular house? He's going into the house where he's doing work. It doesn't make sense.

The majority apparently concludes that if plaintiff were found to have exaggerated the extent of his injuries, plaintiff must have also lied about the facts of the accident and therefore reasonable jurors could not find defendant Bridges to be at fault for the accident. I cannot agree. First, the few minutes of the sixty-one hours of surveillance tape shown to the jury did not conclusively demonstrate that plaintiff lied about his objectively manifested injuries. Rather, defendant's video exhibit number twenty merely shows plaintiff tying his shoe and walking in an apparently normal gait. Video exhibit number nineteen depicts plaintiff walking repeatedly back and forth from a residence (presumably Mr. Sander's) to the trunk of plaintiff's vehicle.

At trial, plaintiff admitted to being at his friend Otis Sander's house for five hours on the day the video was taken. Further, plaintiff testified to walking from the house to his truck to retrieve some tools for Mr. Sander's use. Plaintiff stated he is capable of lifting objects as heavy as twenty-five to thirty pounds, but he tries to refrain from doing so out of fear of reinjuring himself. The videos are simply inconclusive on the collateral issue whether plaintiff lied regarding the extent of his injuries.

Second, even if the record were to establish that plaintiff embellished his symptoms, I disagree with the majority's inference that under such circumstances no reasonable juror could find defendant negligent. In my view, a genuine issue of material fact exists regarding negligence which cannot be resolved on this appellate record based on character evidence.

In *Solomon v Shuell*, 435 Mich 104; 457 NW2d 669 (1990) (opinion by Boyle, J.), the basic tenants of the doctrine of harmless error in civil cases are set forth:

The threshold for reversal based on evidentiary error is stated in MCR 2.613:

(A) Harmless Error. An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

> An error which does not prejudice a party, therefore, is not ground for reversal. An error is prejudicial when it affects the substantial rights of the party. *Ilins v Burns*, 388 Mich 504, 510-511; 201 NW2d 624 (1972); *Swartz v Dow Chemical Co*, 414 Mich 433; 326 NW2d 804 (1982).[2] The burden is on the appellant to show that the error was prejudicial and that the failure to reverse would be inconsistent with substantial justice. *Henson v Veterans Cab Co*, 384 Mich 486, 494; 185 NW2d 383 (1971).

In addition, I recognize that recently in *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998), the Supreme Court made reference to the criminal case of *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996), in assessing harmless error in a civil context:

> An error in the admission of evidence will be found if it affects a substantial right of a party. MRE 103. Further, such an error is not harmless if the error was prejudicial. An error in the admission or exclusion of evidence is ground for granting a new trial if refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996).

In my view, plaintiff has sustained his burden of demonstrating that the error in admitting defendant's prior exemplary driving record was prejudicial to plaintiff and affected his substantial rights. MCR 2.613(A). Applying by analogy *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), I would hold that it is "more probable than not" that the error affected the jury's verdict of no negligence by defendant. For this reason, I would reverse and remand for a new trial.

/s/ Richard Allen Griffin

[1] Bridges' employer, Chrysler Transport, Inc., is also named as a defendant under a theory of respondeat superior. Because no independent acts of negligence are alleged against Chrysler Transport, Inc., I refer to the defendants collectively as "defendant."

[2] *Ilins v Burns*, 388 Mich 504, 510-511; 201 NW2d 624 (1972), and *Swartz v Dow Chemical Co*, 414 Mich 433; 326 NW2d 804 (1982), hold that once prejudicial error is found, reversal is automatic. Although never overruled, these decisions are inconsistent with the Supreme Court's harmless error doctrine applied in criminal cases. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).