FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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ROBERT B. MICHELSON,	)	
Plaintiff-Appellee,	)	
vs.	)	
DAVID LYNN RHODES, NATIONWIDE CARRIERS, INC., and **BALTIC TRUCKING COMPANY, INC.,**	)	Filed August 27, 1986
Defendants-Appellants.	)	
DAVID LYNN RHODES, NATIONWIDE CARRIERS, INC., and **BALTIC TRUCKING COMPANY, INC.,**	)	6-31 85-851
Third-Party Plaintiffs-Appellants,	)	
vs.	)	
ESTATE OF BRADLEY R. CARPENTER *and* **RODNEY A. HATFIELD, d/b/a Hoot's,**	)	
Third-Party Defendants-Appellees.	)	

Appeal from the Iowa District Court for Dubuque County (No. 32995) - L. John Degnan, Judge.

Defendants appeal from judgment upon a verdict for the plaintiff in this negligence action arising from a traffic accident. **AFFIRMED BY OPERATION OF LAW.**

David L. Hammer and *David A. Tank* of O'Connor & Thomas, P.C., Dubuque, for defendants-appellants.

John K Von Lackum of Elderkin, Pirnie, Von Lackum & Elderkin, Cedar Rapids, and William Stuart Charlton, *Manchester, for plaintiff-appellee.*

Donald R Breitbach of Reynolds, Kenline, Breitbach, McCarthy, McKay, Nigg & Maiers, Dubuque, and Gerry M Rinden of Klockau, McCarthy, Ellison & Rinden, Rock Island, Illinois, for the third-party defendants

Heard by Snell, P J , and Schlegel and Sackett, JJ , but considered en *banc*

On this appeal the judges of this court have evenly divided on the result they would reach. Chief Judge Oxberger and Judges Schlegel and Sackett would affirm; Judges Donielson, Snell, and Hayden would reverse. Accordingly, the decision of the trial court is affirmed by operation of law.

Judge Snell would reverse and remand for new trial for the following reasons:

Plaintiff was injured in a motor vehicle accident. He alleged the cause to be that defendant Rhodes' truck was illegally on the wrong side of the road. Rhodes defended claiming he was legally excused from negligence for being on plaintiff's side. The deputy sheriff who investigated the accident was called as a witness for plaintiff. Plaintiff's counsel asked him, "Did you cite the driver--truck driver for any violation of the Motor Vehicle Code?" Defendant moved for a mistrial, which was denied. The jury awarded plaintiff $175,000 damages. Defendant's motion for new trial was denied.

Iowa Code section 321.489 states:

> No record of the conviction of any person for any violation of this chapter shall be admissible as evidence in any court in any civil action.

This section has been a part of the statutory law of Iowa since 1939. There is no excuse for asking a question that so blatantly violates the statutory interdiction and spirit of fair trial. It is not something newly sprung on unaware lawyers. Its purpose is to assure a fair trial to all the litigants in a civil matter by excluding problems frequently inherent in the criminal conviction that are not relevant to the civil case. For a general discussion, see Comment, Evidence--Plea of Guilty to a Traffic Infraction--Admissibility In A Subsequent Civil Suit, 51 Iowa L. Rev. 212 (1965). Here, the question was directed not to whether a conviction had occurred, but to whether an arrest was made. Is this also pernicious? In commenting on the prohibition of admitting evidence that an arrest

was not made, the Hawaii Court of Appeals, in Ferreira v. General Motors Corp., 657 P 2d 1066 (Hawaii App. 1983), said:

> The policy reason for the rule is that the effect of admitting such evidence is comparable to telling the jury that one party is at fault and the other is not. Chewakin v St. Vincent, supra. Proof or absence of arrest should not serve as a basis for an inference of negligence or lack of negligence respectively in an accident case. (citation omitted) Thus, such evidence is irrelevant and prejudicial in misleading the jury to focus on a false issue. Brown v. Royalty, 535 F.2d 1024 (8th Cir. 1976).

Id at 1069 In Anderson v. Saunders, 113 N.W.2d 831 (Wis. 1962), it was held that the trial court erred in admitting evidence of the defendant's arrest and that such error constituted grounds for reversal. The Wisconsin Supreme Court stated

> It was error to admit testimony regarding the arrest. Plaintiff was inquiring into the arrest for the purpose of establishing the negligence of the defendant. ... The fact a person is arrested upon a certain charge is as consistent with innocence as with guilt, and to admit the arrest as evidence would be to accept the fact based upon the police officer's opinion as to the defendant's guilt. ...
>
> In auto negligence cases on facts similar to those at bar, it has been held the admission of testimony of arrests, of convictions, or of filing a complaint by a police officer, is not only error but prejudicial error requiring reversal.

Id at 832-33

Similarly, in Chewakin v. St. Vincent, 275 N.W.2d 300 (N.D. 1979), the North Dakota Supreme Court held that the issuance or non-issuance of a traffic citation is inadmissible and prejudicial. The court stated:

> Generally, in those jurisdictions that have considered the question, testimony concerning the issuance or non-issuance of a traffic citation is inadmissible because it is irrelevant and potentially prejudicial to the issues in a personal injury action. (citations omitted) The testimony may be prejudicial because "the fact that the officers may or may not have performed their duty is no evidence that defendant was or was not negligent." (citation omitted) The effect of admitting testimony

> about a traffic arrest is comparable to telling the jury that the defendant is at fault and that plaintiff is not. (citation omitted) In addition, permitting this testimony allows the officer to express an opinion on the ultimate question before the jury. (citation omitted)

Id at 301; see also Allen v. Ellis, 380 P.2d 408 (Kan. 1963); 61 C.J.S. Motor Vehicles § 516(15) (1970); 8 Am.Jur.2d Automobiles and Highways § 1030 (1980).

But plaintiff points out that the question was never answered, so no harm occurred. The problem with this rationale is that the question to the investigating officer whether he had cited defendant Rhodes for a traffic violation carried with it the answer. Jurors know that questions are asked for a reason. Thus, they can only conclude that plaintiff's counsel knew Rhodes had been given a traffic citation by the officers.

In Gabus v. Harvey, 678 P.2d 253 (Okla. 1984), the court discussed the effect of a police officer's opinion.

> The vice of admitting such testimony is that it permits the jury to substitute the opinion of the officer for the combined judgment of the jury, encouraging a contest by experts rather than a trial by witnesses.
>
> In Maben v. Lee, 260 P.2d 1064, 1067 (Okla. 1953), this court emphasized the prejudicial effect of the admission of an investigating officer's opinion as to the fault in an automobile collision case:
>
> > ". . . Such testimony given by a witness occupying an official position assuredly must have greatly impressed the jury, particularly since the average layman undoubtedly would be inclined to place the stamp of authenticity upon testimony by such an officer. . . ."

Harvey, 678 P.2d at 257. In Maland v. Tesdall, 232 Iowa 959, 969, 5 N.W.2d 327, 332 (1942), the court stated: "Incompetent questions which assumed the existence of damaging facts were frequently asked. The questions and not the answers seemed to have been considered important."

Plaintiff argues that the question was not deliberately asked to prejudice he jury. Whether it was or not matters not. The good or bad faith of counsel s immaterial if the fairness of trial has been tainted.

> It seems to be the invariable quality of questions the asking of which may require a reversal that in themselves, and without any answers made, they call to the attention of, or suggest to, the jury some fact or claim prejudicial to the opposite party and concerning which counsel has no right to inquire, and in almost every instance of such misconduct, opposing counsel is necessarily placed in the false light of suppressing significant circumstances in attempting to deceive the jury and to rendering an unjust verdict.

75 Am. Jur. 2d Trial, § 194 at 277 (1974).

Plaintiff suggests next that it is unlikely the jury remembered the question. This is speculative and wishful thinking.

Finally, plaintiff says that the question was merely cumulative since the evidence clearly showed defendant Rhodes was on the wrong side of the road. This argument misapprehends defendant's position. The issue is not whether he was on the wrong side, but why he was there. Defendant's claim of legal excuse is effectively parried, if not thwarted, if the jury is told the investigating officer rejected it and issued him a citation. Where improper evidence is admitted, prejudice is presumed unless the contrary is affirmatively established. Vine St. Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (Iowa 1974).

In ruling on the motion for mistrial, the trial judge expressed great concern that defendant Rhodes was being robbed of his chance to have his case fairly heard. The court admitted "that I feel like I'm making a mistake." Because the defendant was prejudiced by the introduction of inadmissible evidence, the court abused its discretion in denying the motion for mistrial. See Yeager v Durflinger, 280 N.W.2d 1, 7 (Iowa 1979) (appellate review of trial court's decision to deny a mistrial is on abuse of discretion).

I would reverse and remand for new trial.