STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

BRIAN HOOGERHYDE,
Plaintiff/Appellant,

v

File No. 95-6543-AV
HON. THOMAS G. POWER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant/Appe1lee .

Douglas J. Donaldson (P37557)
Attorney for Plaintiff/Appellant

Thomas Rizzo (P32357)
Attorney for Defendant/Appellee

DECISION AND ORDER

This matter is an appeal from a verdict in favor of Defendant entered after a jury trial in 87th District Court in Antrim County. Plaintiff appeals alleging four errors.

Plaintiff's action was on the comprehensive portion of his automobile insurance policy to recover the value of various automobile parts that were stolen from his automobile one evening. The pickup truck belonging to Karen Root, with whom he lived, also disappeared from their driveway the same night. Defendant answered by denying most of the complaint's allegations and by asserting that the Defendant had made a false claim and was, in fact, involved in the disappearance of the auto parts. The case did not involve any claim concerning Karen Root's pickup truck.

Plaintiff's first claim of error is the trial court's denial of Plaintiff's motion for new trial based upon newly discovered evidence. Apparently, within days of the trial, Karen Root's truck was, in fact, discovered out in the woods by a bow hunter. Plaintiff maintains that this is important newly discovered evidence and that the trial court was wrong to deny his motion for a new trial.

The granting of a new trial based upon newly discovered evidence is not mandatory but, rather, is in the trial court's discretion. MCR 2.611(A)(l)(f).

The standard for deciding a motion for new trial based upon

newly discovered evidence is set forth in Canfield v City of Jackson, 112 Mich 120, 123 (1897) as follows:

> A motion for a new trial, upon the ground of newly-discovered evidence is not regarded with favor. The policy of the law is to require of parties care, diligence, and diligence in securing and presenting evidence. Elliott, Appellate Procedure, §857. To entitle one to a new trial upon this ground it should be shown: First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be no cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at trial. (Emphasis added)

The new evidence must be such as to render a different result Probable on a retrial of the cause. This is sometimes stated that the new evidence would make a different result likely in the event of a retrial. Regardless, the Plaintiff must show that had the jury been presented with evidence that Karen Root's stolen truck, in fact, was found in the woods that this would likely or probably have made a difference in the outcome.

After reviewing the case, the court file and the transcripts, this Court fails to see how the fact that the truck disappeared, but was then discovered subsequently, would make it less likely that the Plaintiff and Karen Root were involved in the theft than as if the truck disappeared and was not discovered subsequently. This newly discovered evidence, therefore, does not satisfy the requirements for a new trial based upon newly discovered evidence.

The second issue is whether the trial court erred in denying Appellant rebuttal closing argument as mandated by MCR 2.507(E).

MCR 2.507(E) states:

> Final Arguments. After the close of all the evidence, the parties may rest their cases with or without final arguments. The party who commenced the evidence is entitled to open the argument and, if the opposing party makes an argument, to make a rebuttal argument not

beyond the issues raised in the preceding arguments.

As the trial was in fact conducted, the Plaintiff did open the case by presenting his proofs first followed by the Defendant's proofs. Neither side appeals this order of the presentation of proofs. While there was much discussion whether, under MCR 2.507(B), this order of proofs was correct or not, the issue is not before this Court on appeal.

Since, however, the Plaintiff did go first in the presentation of evidence, the explicit language of MCR 2.507(E) states the Plaintiff was "entitled to open the argument, and if the opposing party makes an argument, to make a rebuttal argument." Thus, failure of Plaintiff to have a rebuttal argument is contrary to the court rule and is error.

While refusing to permit counsel any closing argument whatsoever has been deemed "reversible error", United Coin Meter Co v LaSala, 98 Mich App 238, 242 (1980), it is not clear that such a blanket rule extends to an abridgement of a party's right to make a rebuttal argument in closing. Neither party cites a case in this regard.

This Court will hold, therefore, that if the Court's great power and wide discretion concerning the conduct of a trial does not include the right to abridge a party's right to rebuttal closing argument, People v Green, 34 Mich App 149, 152 (1971), at the very least, there must be a showing that this error was not harmless and, in fact, was prejudicial.

At oral argument, it appeared that the Plaintiff's reasons for believing that this error (if that is what it was) was prejudicial is that the Defendant's attorney in closing argument, misstated what the evidence had been and that Plaintiff, who had given his closing argument first, did not have an opportunity to respond and correct. Plaintiff did object on several occasions to these alleged misstatements of the evidence, however. The trial judge did respond and address those objections, including advising the jury that arguments by the attorneys were not evidence and that they should rely only on the evidence that they had heard in the case. The trial court, on at least one occasion, also indicated that the jurors should not rely on what the attorneys said, but rather, rely upon their own collective memories.

After reviewing the defense counsel's closing argument,

including the alleged misstatements of the evidence, this Court finds that, in view of the trial court's addressing the issues appropriately, the error of denying Plaintiff rebuttal argument is harmless.

The third error alleged is that the trial court erred in allowing a police officer who investigated the theft of the auto parts to testify as an expert witness and state his opinion regarding the legitimacy of the Plaintiff's claim. The permitted scope of the officer's expert testimony was the subject of several objections by Plaintiff's counsel, bench conferences and an offer of proof outside the presence of the jury.

The officer was qualified and permitted to testify as an expert in the investigation of alleged thefts pursuant to MRE 702. Pursuant to MRE 704, the officer, upon a showing of sufficient factual basis, could testify by opinion or inference in regard to an ultimate issue to be decided by the jury. The officer was not permitted to answer the question: "Based upon your investigation, your conversations, your observations of Ms. Root, did you draw a conclusion as to the legitimacy of this incident they reported to you?" The officer did testify, on direct examination, as follows:

Q Do you know who was responsible for the disappearance of the truck and the car parts? Yes or no.

A No.

Q Do you have an opinion of -- OK. You don't know who did it?
A Right.

Q Now, let me ask you this. Based upon what you saw out there, you mentioned the demeanor of Ms. Root. You mentioned the tires and the door marks. Did you find those things consistent with what they had reported to you?

A No.

Q OK. Did that cause you to question whether or not that this was a legitimate true theft?

A I questioned it.

Q OK. Did you share those concerns with State Farm at some point in time?

A Yes, I did.

During direct examination, the officer did not identify Plaintiff as "the prime suspect." The officer's testimony was limited to his opinion that he "questioned" the reported theft. The reference to Plaintiff as "the prime suspect" was not interjected into the testimony until after Plaintiff's counsel, on cross examination of the officer, extensively questioned him regarding other "suspects."

This Court finds no reversible error. The initial opinion was that the officer found the report of the theft to be questionable. The "prime suspect" testimony was presented in rebuttable testimony and in response to Plaintiff's counsel's "suspect" questioning. But for the cross examination of the officer, the references to "suspects" would not have even been presented. Finally, there was more than sufficient testimony from the officer that the jury could have found that Plaintiff did not stage a theft.

The fourth error alleged is that the defense counsel made improper argument in his closing.

This Court's review of defense counsel's closing argument reveals no error in this regard or, if there was error, it was harmless. The jury was properly instructed regarding arguments of counsel.

The judgment of the District Court is affirmed.

IT IS SO ORDERED.

HONORABLE THOMAS G. POWER
Circuit Court Judge
Dated: 12//21/95