

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT EARL WINDHAM,
Plaintiff-Appellee,

UNPUBLISHED
June 15, 2004

and

TARA REED,
Plaintiff,

v

No. 244665
Wayne Circuit Court
LC No. 00-029188-NI

OTIS SABBATH,
Defendant-Appellant,

and

TITAN INSURANCE COMPANY,
Defendant.

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

A jury awarded plaintiff Robert Windham damages of \$80,000 for injuries he sustained in an automobile accident when his vehicle was struck by a vehicle driven by defendant Otis Sabbath. Judgment was entered on the verdict and defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict. Defendant maintains that the evidence failed to show that plaintiff suffered a serious impairment of body function under MCL 500.3135. We disagree.

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We must review the evidence in the light most favorable to the nonmoving party, and resolve any conflict in the evidence in favor of the nonmoving party, to determine whether a question of fact existed.

Kubczak v Chemical Bank & Trust Co, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

The no-fault act, MCL 500.3101 *et seq.*, generally abolished tort liability in connection with the ownership, maintenance, or use of a motor vehicle. Pursuant to MCL 500.3135(3), however, tort liability remains for noneconomic loss if the injured person suffered a “serious impairment of body function.” MCL 500.3135(1). “Serious impairment of body function” is defined in the no-fault act as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). Pursuant to MCL 500.3135(2)(a), the trial court must make factual findings before determining whether the plaintiff sustained a serious impairment of body function or whether the defendant is entitled to judgment as a matter of law. *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000).

In this case, although we agree with defendant that the trial court did not make all the requisite findings, it is apparent that the denial of defendant’s motion was proper because there was a question of fact whether plaintiff sustained a serious impairment of body function.

Regarding the requirement of an objectively manifested impairment, for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). At trial, plaintiff presented evidence that Dr. Teklehaimonot diagnosed, and an MRI confirmed, a “C7 radiculopathy,” or “a pinched nerve at that level.” In addition, there was evidence that plaintiff was diagnosed with cervical neuralgia in February or March 2002. Further, an MRI revealed that plaintiff suffered from a disc protrusion. The trial court thus properly found that plaintiff satisfied the “objectively manifested impairment” requirement.

As for the requirement that the impairment be of an important body function, an important body function “is a function of the body that affects the person’s general ability to live a normal life.” *Kern v Blethen-Coluni*, 240 Mich App 333, 340; 612 NW2d 838 (2000). Defendant concedes, and this Court has held, that the back and neck involve important body functions.¹ See e.g., *Chumley v Chrysler Corp*, 156 Mich App 474, 480; 401 NW2d 879 (1986) (back); *Harris v Lemicex*, 152 Mich App 149, 153; 393 NW2d 559 (1986) (movement of one’s back is important body function).

Regarding the requirement that the [serious] impairment affect a person’s general ability to lead his or her normal life, in *Kreiner v Fischer*, 468 Mich 885; 661 NW2d 234 (2003), the Court stated, “[a]lthough a serious effect [on one’s general ability to lead his life] is not required, any effect does not suffice either. Instead, the effect must be on one’s general ability to lead his normal life.”

¹ Defendant’s appellate brief contends that plaintiff did not establish an objectively manifested impairment, but adds that should this Court conclude that a question of fact existed whether there was an objectively manifested impairment, he concedes that back and neck are important body functions.

[I]n determining whether the impairment of the important body function is ‘serious,’ the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. [*Kern, supra* at 341.]

The extent of the injury is determined by comparing one’s lifestyle before and after the injury. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). An injury does not need to be permanent to be considered serious. *Kern, supra* at 341.

The evidence in this case discloses that a question of fact existed with regard to whether plaintiff’s impairment affected his general ability to lead his normal life. Plaintiff testified that he experiences chronic neck and back pain, and the problems are aggravated when he either sits or stands for long periods. He further testified that he experiences problems with both of his shoulders, and a toe on his left leg is always numb. He is also uncomfortable sleeping due to his back pain. He takes medication daily to alleviate his pain, which is sometimes “unbearable,” requiring hospitalization. Additionally, plaintiff testified that his injuries affected his work because, before the accident, “I loaded the steel in the machine. I just had a regular job. And I didn’t have a boring job sitting there pushing buttons. I was in the action.” Plaintiff was now restricted to light duty at work. Regarding the effect of his injuries on his personal life, plaintiff testified:

My lifestyle has changed. I used to be, you know, the type of fellow that was out in the street. I like to pitch horseshoes; I liked horseback riding. I liked to play a little basketball with the kids on the block. I used to go bicycle riding, but all that now I’m unable to do. I liked to go hunting. I can’t do the walking.

Viewed in a light most favorable to plaintiff, there was sufficient evidence that plaintiff’s impairment affected his general ability to lead his normal life.

Defendant further contends that even if there was a question of fact concerning a “serious impairment of body function,” plaintiff’s impairment was caused by a second automobile accident in which plaintiff was involved. Viewed most favorably to plaintiff, however, there was sufficient evidence linking plaintiff’s impairments to the injuries sustained in the accident with defendant. Dr. Teklehaimonot testified at deposition that plaintiff’s injuries most likely were caused by the accident involving defendant on March 14, 1999, and plaintiff testified that he suffered no new injuries in the second accident, but that pain that he suffered from the accident with defendant returned.

II

Next, defendant argues that plaintiff’s counsel violated MCL 500.3030 and MRE 411 by making repeated references to Allstate Insurance Company (and other insurance companies) during the testimony of Dr. Kneiser, and also during his closing argument. We disagree.

We review the trial court’s evidentiary decisions for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Dr. Kneiser testified about her independent medical examination of plaintiff. On cross-examination, plaintiff's counsel, over defendant's objection, questioned Dr. Kneiser about whether she performed examinations at the request of automobile insurance companies and defense attorneys. Plaintiff's counsel also questioned Dr. Kneiser about the fact that she faxed her report to defense counsel and "Allstate."

The trial court did not abuse its discretion in determining that the questioning was relevant to Dr. Kneiser's credibility and for the purpose of showing bias, a purpose expressly permitted by MRE 411. Furthermore, the court gave a cautionary instruction to the jury, advising it that the question of insurance had no bearing on any issue in the case and that it must refrain from any inference, speculation, or discussion about insurance. To the extent counsel's questions or comments implicated MCL 500.3030, the court's instruction was sufficient to cure any perceived prejudice.

III

We also reject defendant's argument that plaintiff's counsel's remarks during closing argument denied him a fair trial. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999). The record does not reveal a deliberate course of conduct aimed at preventing a fair and impartial trial. Indeed, defendant never objected to the remarks that he now claims were improper. Any prejudice that did result was sufficiently cured by the trial court's instructions that the attorneys' statements are not evidence and that the jury should disregard anything said by an attorney which is not supported by the evidence. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001); *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 65; 454 NW2d 188 (1990).

IV

Defendant also argues that the trial court erred in allowing Dr. Jeffrey Sagala to testify as a rebuttal witness.

This Court reviews a trial court's decision regarding rebuttal testimony for a clear abuse of discretion. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 655; 517 NW2d 864 (1994); *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). Rebuttal evidence is evidence which explains, contradicts, or otherwise refutes an opponent's evidence. Its purpose is to undercut the opponent's case and not to merely confirm that of the proponent. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 348; 480 NW2d 623 (1991). Generally, rebuttal evidence must relate to a substantive rather than a collateral matter, and contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). A trial court may admit evidence offered in rebuttal even if it incidentally tends to show a matter as to which evidence is not usually admissible. *Nolte v Port Huron Area School Dist Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986).

It is apparent from defendant's summary of Dr. Sagala's testimony and the transcript of Dr. Sagala's deposition, that the testimony was properly received to rebut Dr. Kneiser's opinion, after reviewing plaintiff's medical tests and chiropractic treatment, that there was no clinical evidence that plaintiff was suffering from the effects of a herniated disc in his cervical spine.

Finally, the trial court did not abuse its discretion when it allowed plaintiff's counsel to ask defendant, on cross-examination, about the make, model and ownership of the car that he was driving when he struck plaintiff's vehicle. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). The evidence was relevant, albeit minimally, because the size of the vehicle was probative of the extent of the impact and amount of force that plaintiff was subject to during the collision. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

Affirmed.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kirsten Frank Kelly