

STATE OF MICHIGAN
COURT OF APPEALS

LEE ANNA MARTRATT,

Plaintiff,

and

BENNIE BINNS WILSON,

Plaintiff-Appellant,

v

LINDIRA ANN HENRY,

Defendant-Appellee,

and

GENERAL MOTORS CORPORATION and RED
HOLMAN PONTIAC COMPANY,

Defendants.

UNPUBLISHED

August 8, 2000

No. 213363

Wayne Circuit Court

LC No. 96-619197-NI

Before: O'Connell, P.J., and Kelly and Whitbeck, J.

PER CURIAM.

In this automobile negligence action, plaintiff Bennie Binns Wilson appeals as of right from a judgment of no cause of action entered against him in favor of defendant Lindira Henry following a jury trial. We affirm.

Plaintiff Wilson was injured while riding as a passenger in a vehicle driven by plaintiff Lee Anna Martratt, which was struck by a vehicle driven by defendant Lindira Ann Henry, who had run a red light. The air bags in Martratt's vehicle failed to deploy, and Wilson's seat belt broke loose. The jury

found that plaintiff Wilson was injured in the collision and that Henry's negligence was a proximate cause of those injuries, but that Wilson had not suffered a serious impairment of a body function.¹

On appeal, plaintiff Wilson (hereafter plaintiff) first argues that the jury disregarded the great weight of the evidence in reaching its decision.² However, because plaintiff did not raise this issue in a motion for a new trial before the trial court, the issue is not preserved for appeal. *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997), citing *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993). Nevertheless, this Court may review the issue if failure to do so would result in a miscarriage of justice. *Hyde, supra* at 525. A jury's verdict will be overturned on appeal based on an argument that the verdict is against the great weight of the evidence only when the verdict "was manifestly against the clear weight of the evidence." *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996).

We are satisfied that a miscarriage of justice will not occur if we decline to review this issue. The jury was entitled to consider plaintiff's lack of medical testimony in deciding whether he had suffered a serious impairment of body function. The verdict was not "manifestly against the clear weight of the evidence." *Id.*

Next, plaintiff argues that the trial court erred by not allowing him to mention that Martratt's automobile insurance provider had refused to provide him with first-party medical insurance benefits, despite its alleged obligation to do so under her policy. Plaintiff claims that this evidence was admissible to explain to the jury "why he had not gone to the doctor more and why he had not had operations and therapy earlier than he actually did." We review the trial court's decision regarding the admission of evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Generally, the fact that any party to a lawsuit has recourse to an insurance policy cannot be raised at trial. *Kokinakes v British Leyland Ltd*, 124 Mich App 650, 652; 335 NW2d 114 (1983). Plaintiff contends that cases discussing exceptions to the "collateral source" rule are instructive in the present case. These cases present the situation where the defendant wants to show that the plaintiff's medical expenses are being paid by another source in an attempt to reduce damages. Generally, the collateral source rule bars evidence of other insurance coverage when introduced for the purpose of

¹ The jury found that plaintiff Martratt suffered a serious impairment of a body function and awarded her damages of \$50,000.

² Because the complaint was filed before March 28, 1996, the 1995 amendments to the no-fault act (1995 PA 222) are not applicable. See MCL 500.3135; MSA 24.13135. Rather, the resolution of this case is governed by the standards set forth in *DiFranco v Packard*, 427 Mich 32; 398 NW2d 896 (1986), and the question whether plaintiff suffered a serious impairment of body function was properly submitted to the jury, *Id.* at 58.

mitigating damages. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990). However, such evidence is admissible in the trial court's discretion if it bears on an injured person's incentive to work. *Nasser, supra* at 58-60; *Richards v Pierce*, 162 Mich App 308, 318; 412 NW2d 725 (1987).

While it would have been within the trial court's discretion to admit evidence that plaintiff did not have other insurance available to pay his medical expenses, for the limited purpose of explaining why plaintiff did not seek additional or earlier medical attention or physical therapy, we find that no error requiring reversal occurred in this case. Despite the trial court's ruling, plaintiff was able to present evidence regarding his financial difficulties in obtaining medical attention, explaining at one point that he did not see any doctors for a while "because of the insurance problems" and later testifying that he had tried to obtain further medical treatment but could not afford the type of medical care that he wanted. Under these circumstances, we cannot see how further testimony about plaintiff's dispute with the insurer would have improved his argument that he suffered a serious impairment of a body function.

Plaintiff next argues that the trial court abused its discretion in restricting use of his deposition testimony, on redirect examination, after allowing defense counsel to use the deposition testimony when cross-examining plaintiff. On cross-examination, plaintiff testified that, on the day of the accident, he informed a police officer at the scene, an EMS driver, and people at the hospital emergency room that he was experiencing medical problems. Defense counsel introduced a portion of plaintiff's deposition wherein plaintiff was asked whether he told the police that he was injured and plaintiff's responded, "No, I didn't." Plaintiff was again asked in his deposition whether he told anyone at the scene that he was injured, and, according to the deposition transcript, he replied, "No." On re-direct examination, plaintiff's counsel attempted to introduce another portion of the deposition wherein plaintiff stated that he did tell the police that he had been injured, but the court interrupted and would not allow plaintiff's counsel to read further. Over plaintiff's objection, the court ruled that the deposition could be used only for impeachment of the deponent, unless the deponent was not present.

MCR 2.308(A) provides that "[d]epositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." Under MRE 106, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Under this rule, plaintiff's counsel should have requested during cross-examination that the other portions of plaintiff's deposition, which contradicted those portions chosen by defense counsel and ought in fairness be considered contemporaneously with them, be read to the jury. Counsel did not make this request, but in fairness to plaintiff we believe the trial court should have allowed limited use of the deposition on redirect examination to introduce the statements that contradicted the portions used by defense counsel during cross-examination. See *Moody v Pulte Homes Inc*, 423 Mich 150, 162; 378 NW2d 319 (1985). The trial court abused its discretion in denying plaintiff this opportunity.

However, an error in the exclusion of evidence is not grounds for granting a new trial or setting aside a verdict "unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). Here, plaintiff's counsel was allowed to question plaintiff on redirect

examination about his statements to the police at the scene of the accident. Counsel also questioned plaintiff with regard to his deposition answer, which plaintiff maintained was inaccurately transcribed, and plaintiff was allowed to explain what he believed to be his actual answer to the question. Under these circumstances, the trial court's ruling excluding further use of the deposition during redirect examination did not lead to an injustice, and this Court's decision to deny appellate relief on this ground is not inconsistent with substantial justice.

Finally, plaintiff contends that the trial erred in denying his request to rebut the deposition testimony of the independent medical examiner, Dr. Buszek. The admission or exclusion of rebuttal testimony is within the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent a clear abuse of discretion. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). "Rebuttal evidence is evidence that explains, contradicts, or otherwise refutes a defendant's evidence. Its purpose is to undercut the defendant's case and not merely to confirm that of the plaintiff." *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 348; 480 NW2d 623 (1991). Evidence that could have been introduced during the plaintiff's case in chief is not usually admissible as rebuttal. *Id.* Rebuttal evidence must be related to a "substantive matter rather than a collateral one." *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). "Rebuttal is limited to the refutation of relevant and material evidence, that is, evidence bearing on an issue properly raised in a case." *Bettistea, supra* at 126.

As the trial court indicated, plaintiff's counsel could have questioned the doctor on this point during his deposition. Plaintiff also could have had Dr. Buszek's deposition testimony admitted in his case in chief if he had properly listed the doctor on his amended witness list or on the joint pretrial order. More significantly, plaintiff was not attempting to refute Dr. Buszek's testimony about plaintiff's medical condition, but only his testimony regarding what plaintiff told him about his injuries. Dr. Buszek's deposition testimony about plaintiff's physical complaints was not inconsistent with plaintiff's trial testimony. The admission of non-medical rebuttal evidence would not, therefore, be justified. Accordingly, the trial court did not abuse its discretion in excluding plaintiff's proffered rebuttal testimony.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Kelly

/s/ William C. Whitbeck