

STATE OF MICHIGAN
COURT OF APPEALS

ATHEER SALIM,

Plaintiff-Appellant,

v

CLARENCE C. BUCHANAN, JR., and
CHRISTINE S. BUCHANAN,

Defendants-Appellees.

UNPUBLISHED

January 22, 2002

No. 224338

Macomb Circuit Court

LC No. 97-002665-NI

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

In this automobile negligence case, plaintiff appeals as of right from the judgment of no cause for action for defendants. Following a three-day trial, the jury rendered a verdict of no cause for action under the Michigan No-Fault Act, MCL 500.3135. On appeal, plaintiff argues that the trial court committed reversible error when it denied plaintiff's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial because the jury verdict was against the great weight of the evidence. We affirm.

I

Plaintiff argues that the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV) because there was no evidence to rebut or refute plaintiff's proofs that he sustained a temporomandibular joint ("TMJ")¹ injury as a result of the automobile accident in question. We disagree. A trial court's decision on a motion for JNOV is reviewed de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 638 (1999). We review the evidence and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party to determine whether there was insufficient evidence presented to create an issue for the jury. *Id.* If reasonable minds could differ regarding issues of fact, JNOV is improper. *Farm Credit Services of Michigan's Heartland PCA*, 232 Mich App 662, 672; 591 NW2d 438 (1998).

Under the Michigan No-Fault Act, a person remains subject to tort liability for non-economic damages caused by his or her ownership, maintenance, or use of a motor vehicle only

¹ TMJ is the joint connecting the jaw with the temple.

if the injured person sustained a serious impairment of body function, permanent serious disfigurement, or death. MCL 500.3135(1); *Gunsell v Ryan*, 236 Mich App 204, 208; 599 NW2d 767 (1999). MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." In *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), this Court set forth a "non-exhaustive" list of factors to consider when determining whether the impairment of an important body function is serious within the meaning of MCL 500.3135(7). These include the extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. *Id.*

Plaintiff presented evidence, including his own testimony and that of two of his treating doctors, that he suffered TMJ from the date of the accident in 1996 up to the time of trial, and claimed that the injury was caused by the accident when his forehead struck the dashboard in front of him as a result of the impact of the collision. Defendants presented the testimony of a medical expert witness, whose medical examination of plaintiff revealed no objective injury. At the conclusion of the parties' proofs, the jury was asked to answer the following questions, in order: (1) whether plaintiff sustained injury or damage and, if so, (2) whether defendants' negligence was a proximate cause of the injury and, if so, (3) whether the injury amounted to a serious impairment of body function. The jury answered "no" to the first question, indicating that the jury reached the conclusion that plaintiff either did not suffer from TMJ, or his TMJ was not a result of the accident.

The jury is allowed to weigh the credibility of witnesses and to accept or reject all or part of the testimony of a witness. *Kelly v Builders Square Inc*, 465 Mich 29, 39-40; ___ NW2d ___ (2001). Here, the record indicates that the parties presented conflicting evidence that gave rise to fact questions regarding the accuracy of plaintiff's medical diagnoses and the credibility of plaintiff's and his experts' testimony.

Plaintiff's dentist, Dr. Fred Fischer, testified that the TMJ injury was caused by trauma from the accident; however, he could not rule out the fact that it could have been caused by a contemporaneous sinus infection that the CAT scan revealed. Further, it became apparent during cross-examination that Dr. Fischer was under the impression that plaintiff's injury resulted from the jaw directly hitting the dashboard of the car, contrary to what his office manager noted in plaintiff's medical report and contrary to plaintiff's own testimony.

In addition, the report of an EMG performed on plaintiff was questionable because it erroneously indicated that plaintiff was mentally retarded. Further, the testimony of plaintiff's family physician, Dr. Wafie Roumayah, regarding plaintiff's alleged injuries was called into question by inconsistencies and contradictions in Dr. Roumayah's records that were revealed on cross-examination, and by the testimony of defendants' independent medical expert examiner, Dr. S.A. Colah.

The record also revealed that plaintiff's written complaints to the police officer who arrived at the accident scene was of dizziness, a hurt back, a hurt left leg and a numb shoulder. He did not mention that his forehead hit the dashboard, or that when he hit the dashboard, he was rendered temporarily blind or unconscious for up to a minute, as he testified. The police officer who arrived at the scene of the accident almost one-half hour after the collision testified that he did not see any physical signs of injury to plaintiff, nor did he see any blood, fractured tooth,

bumps or bruises. The police officer concluded that the damage to the car in which plaintiff was a passenger was minimal, and plaintiff testified that he was wearing a seatbelt.

Finally, the jury could have reasonably viewed plaintiff's testimony as evasive and contradictory. Plaintiff only cursorily testified to the TMJ injury. He did not use the plastic acrylic mouth appliance designed to relieve his TMJ injury pains, attributing his noncompliance to a gagging reflex. Plaintiff attempted to establish that while he held a regular job before the 1996 accident, he could perform only sporadic odd jobs since the time of the accident, due to his complaints of pain, fatigue and sleeplessness. However, it became apparent during cross-examination that for at least ten years prior to the accident, he held a series of the same type of sporadic odd jobs that he had held since the accident. The jurors could have reasonably inferred that plaintiff's medical condition existed before the accident, explaining why plaintiff failed to maintain gainful employment.

Considering the evidence and inferences in a light most favorable to plaintiff, the jurors could have reasonably concluded that plaintiff's diagnosis of a TMJ injury was doubtful or that the TMJ was not a result of the accident. Because there was sufficient evidence to create an issue for the jury, the trial court properly denied plaintiff's motion for judgment notwithstanding the verdict.

II

Plaintiff next argues that, with respect to the TMJ dysfunction, the jury's finding that he had no injury was against the great weight of the evidence and the trial court abused its discretion by denying his motion for a new trial. We disagree. In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). We review the trial court's determination for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). The jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

As discussed above, the case was fraught with conflicting medical opinions regarding plaintiff's condition which required the jury to assess the credibility of several doctors and the reliability of the medical tests upon which they relied. Plaintiff's own testimony was evasive and, at times, inconsistent. The trial court, itself, opined that the issue of credibility had been seriously called into question. Clearly, there were factual issues for the jury, and the trial court in a jury case cannot substitute its judgment for that of the factfinders. *Ellsworth, supra* at 194. A thorough review of the record shows that the jury's verdict was supported by competent evidence, and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

III

Plaintiff next argues that comments made by defendants' counsel during closing arguments that the TMJ dysfunction may not have been caused by the accident were improper because there was no evidence to support such claims. We disagree. When reviewing alleged improper comments by an attorney, this Court must first determine whether the attorney's action

was error and, if it was, whether the error requires reversal. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999). There is no cause for reversal unless the attorney's comments indicate a deliberate course of conduct designed to prevent a fair and impartial trial, a studied purpose to inflame or prejudice the jury, or an attempt to deflect the jury's attention from the issues involved. *Id.* Here, viewing the comments in context, it is apparent that defense counsel was merely summarizing the evidence presented at trial and was focusing on the credibility issues raised by the evidence. There was no error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen