

STATE OF MICHIGAN
COURT OF APPEALS

SARI KATRINA LAUKKANEN,
Plaintiff-Appellee,

UNPUBLISHED
January 22, 2008

v

ANDREW MICHAEL JASON,
Defendant-Appellant.

No. 274998
Ingham Circuit Court
LC No. 06-000176-NI

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered following a jury verdict awarding plaintiff damages in her third-party automobile negligence case arising from injuries sustained when defendant rear-ended plaintiff's vehicle that was stopped at a traffic light. We affirm.

Defendant first claims that the trial court erred in denying his motions for summary disposition, brought under MCR 2.116(C)(10), and directed verdict which were premised on the ground that plaintiff did not suffer a serious impairment of a body function. After de novo review, considering the evidence in a light most favorable to plaintiff, we disagree. See *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

To succeed in a claim for noneconomic loss under the no-fault act, the plaintiff must establish that she suffered a threshold injury—in this case, a serious impairment of body function which is defined 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(1), (7). Defendant claims that plaintiff’s injuries to her neck, back, and left upper extremity were not objectively manifested and did not affect her general ability to lead her normal life.

Generally, to be “objectively manifested,” an injury “must be capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing.” *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). “Subjective complaints that are not medically documented are insufficient.” *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004).

We have reviewed the evidence in this case and conclude that there was at least a genuine issue of material fact as to the issue whether plaintiff’s injuries were “objectively manifested.”

Plaintiff was seen by a number of physicians, including specialists, who completed physical examinations of her and documented plaintiff's range of motion limitations, muscle tightness, tenderness, and spasms, as well as upper extremity numbness and weakness. MRI and EMG were ordered and conducted with results revealing abnormalities that were apparently consistent with plaintiff's medical conditions and led to additional treatment. Plaintiff was prescribed and underwent several types of, as well as extensive, medical treatment, including orthopedic manipulative, massage and physical therapies, acupuncture, and medication therapy. A back brace was prescribed and her physical activities were physician-restricted. In light of the evidence we cannot conclude that defendant was entitled to judgment as a matter of law with respect to this issue. See *Reed, supra*; *Dressel, supra*.

And, we reject defendant's argument that he was entitled to summary dismissal or directed verdict on the ground that plaintiff failed to establish a genuine issue of material fact as to whether her injuries affected her general ability to lead her normal life. In *Kreiner, supra* at 133, our Supreme Court set forth some factors that may be considered when determining whether the plaintiff's general ability to lead her normal life has been affected, including: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery."

In considering whether plaintiff's general, overall ability to lead her preaccident life was affected, we look to her functional abilities and activities to see how long and pervasively they were affected. See *id.* at 134-135. Plaintiff is a physical therapist. In brief, the evidence presented illustrated that because of her back, neck, and upper extremity injuries plaintiff was unable to perform her work duties without substantial accommodation by her employer, including being assigned a limited number of patients and only patients that needed little physical assistance. She was required to work under physician-imposed physical restrictions for several months. There was also extensive testimony related to plaintiff's difficulties driving a car, sitting for prolonged periods, caring for her children, and performing household tasks, such as cleaning, sewing, and laundry duties. Her recreational activities have also been significantly impacted, including that she is unable to mountain bike or roller ski as she did before the accident. As indicated above, plaintiff underwent extensive medical treatment for her conditions and even through the date of the trial, she had not been able to resume her normal preaccident activities. Considering the totality of the circumstances, we cannot conclude that the trial court erred when it determined that plaintiff demonstrated a factual issue for the jury with regard to this issue. See *id.* at 134.

Finally, defendant argues that the trial court abused its discretion in granting plaintiff's motion in limine precluding him from introducing surveillance videotape and photographs of plaintiff. We disagree. See *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986).

On the eve of trial, defendant served on plaintiff his supplemental answers to plaintiff's interrogatories which indicated that he had surveillance videotapes and photographs of plaintiff. During the course of discovery, plaintiff served both interrogatories and requests for the production of documents specifically concerning videotape and photographic evidence of plaintiff. The discovery was timely placed and staggered to discover such evidence. Notwithstanding the specific requests by plaintiff of defendant, defendant denied the existence of

such evidence and when the sought after evidence was in defendant's possession, some for over 4 months prior to trial and within days of the request for production of such evidence, he failed to provide, supplement, amend, or otherwise make the discovery. To compound the offense of defendant's stratagem, evidence was produced in response to the discovery requests, while the critical evidence was withheld. Plaintiff moved in limine to prevent their admission into evidence and the motion was granted on the ground that defendant violated his duty to timely supplement his discovery responses under MCR 2.302(E)(1). Defendant argues that he should have been allowed to admit this evidence which could not have unfairly surprised plaintiff because she was aware of her own physical limitations. But, MCR 2.302(E)(2) authorizes the trial court to issue a "just" discovery sanction and it does not require that plaintiff actually be surprised by the evidence.

This Court has reasoned that, when determining an appropriate sanction for a party's discovery violation, "[t]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Here, the record clearly indicates that the trial court carefully considered the context in which defendant's discovery violation occurred before deciding to preclude his proffered evidence. Specifically, the court noted that defendant had willfully withheld the evidence until the eve of trial for the explicit purpose of keeping plaintiff unaware that she had been under surveillance and confronting her with the evidence at trial. While other discovery sanctions may have been available, the trial court's choice of sanction was not outside the range of reasonable and principled outcomes in response to defendant's gamesmanship and blatant violation of the discovery rule. See *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Therefore, we conclude that the trial court did not abuse its discretion in precluding defendant from proffering the evidence. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh