STATE OF MICHIGAN

COURT OF APPEALS

JANET K. HOLLINRAKE, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 25, 2008
v	No. 274229 Kent Circuit Court
MICHAEL HOLLINRAKE, Defendant-Appellant/Cross-Appellee.	LC No. 04-009472-NI

Before: Fort Hood, P.J., and Talbot and Servitto, JJ

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff following a jury trial. We affirm.

Defendant and plaintiff, husband and wife respectively, were traveling in a vehicle on the highway when weather conditions started to change. Although conditions were dry at the start of the trip, the parties encountered rain, sleet, and ultimately snow. Defendant was traveling in the right lane when he decided to pass in the left lane. The left lane was covered in slush and snow. Defendant lost control of the vehicle, hit a guardrail, and the vehicle rolled over several times. Plaintiff suffered from severe injuries including broken ribs and broken vertebrae. She required three surgeries and the insertion of rods and screws over a three-year period to correct her back problems. The trial court granted summary disposition in favor of plaintiff, holding as a matter of law that she suffered a temporary serious impairment of a body function. The jury found that defendant was negligent and rendered an award of $200,000 in plaintiff's favor. Defendant appeals as of right.

Defendant first alleges that the trial court erred, as a matter of law, by ruling that plaintiff had sustained a temporary serious impairment of an important body function without examining plaintiff's life before and after the accident. We disagree.

In the no-fault automobile insurance act, MCL 500.31031 *et seq.*, tort liability for noneconomic losses is permitted when the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000). A 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). The issue

of whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the trial court, unless there is a material factual dispute concerning the nature and extent of the person's injuries. MCL 500.3135(2)(a); *Kriener v Fischer*, 471 Mich 109, 120; 683 NW2d 611 (2004).

A multi-step analysis was developed by the Michigan Supreme Court for trial courts to utilize to determine whether a plaintiff, alleging a serious impairment of body function, meets the statutory threshold for third-party tort recovery. *Kreiner, supra* at 131. First, the trial court must "determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Id*. at 131-132. If the court so concludes, then it may decide the issue as a matter of law and continue to the next step. *Id*. at 132. Next, it must determine if an important body function has been impaired and, if so, whether the impairment was objectively manifested. *Id*. Finally, if the impairment of an important body function was objectively manifested, the court must decide whether the impairment affected the plaintiff's general ability to lead a normal life. *Id*. at 132-133.

For an impairment of an important body function to be objectively manifested, there must be a medically identifiable injury or condition which has a physical basis, *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), and the injury must be capable of objective verification by qualified medical personnel, either as visually apparent or as detectable by medical testing, *Netter v Bowman*, 272 Mich App 289, 296; 725 NW2d 353 (2006). To determine whether the course of a plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, "comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life." *Kreiner, supra* at 132-133. The following nonexhaustive list of objective factors may be considered in evaluating this question: (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. *Id*. at 133. "While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life." *Id*. at 135.

Defendant contends that the trial court failed to address the factors set forth by the *Kreiner* Court, and therefore, plaintiff was not entitled to judgment "as a matter of law when [the judge] failed to conduct the required analysis." Irrespective of the detail set forth by the trial court in its opinion and order, there was sufficient evidence of a temporary serious impairment of body function submitted by plaintiff through her medical records and deposition testimony. That record evidence demonstrated that plaintiff endured three surgeries, brief hospitalizations, and physical therapy for weeks after the surgeries because of the automobile accident. Plaintiff was in need of assistance from family members for bathing and dressing. Although plaintiff led an active lifestyle before the accident, she had to limit the duration of activities such as running and walking after the accident.

Defendant contends that plaintiff failed to establish that her lifestyle before and after the accident was impacted particularly when her limitations were self-imposed. However, review of the medical records and the nature of the extensive injuries revealed that plaintiff made progress and suffered setbacks. Although she reported doing well at one medical visit, she also reported suffering from muscle spasms that required her to utilize a heating pad almost constantly. In order to return to work, plaintiff obtained a special chair that required her to rest her neck and

head. At one point, although plaintiff was not placed on medication, she did call her physician for medication. Additionally, after the final surgery and rehabilitation period, the medical report revealed that although plaintiff would not be scheduled for additional visits, she would be seen "when necessary" because the scar tissue would require an additional year to heal. Thus, plaintiff had a medical identifiable condition that had a physical basis that was documented by medical personnel. *Netter, supra*; *Jackson, supra*. The fact that the doctor did not recently delineate in a report that plaintiff should limit her physical activities does not alter the deposition testimony and medical records clearly indicating that plaintiff's life had been affected by the accident.[1] Accordingly, the challenge to the trial court's ruling is without merit.

Defendant next alleges that the trial court erred by admitting evidence of insurance benefits. We disagree. The decision to admit or exclude evidence rests within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). A party may not obtain appellate relief based on an alleged evidentiary error to which he contributed by plan or neglect. *Lewis v Legrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Review of the record reveals that counsel for defendant expressly stated "we don't have a problem with the insurance coming in." Accordingly, the challenge to the admission of evidence regarding insurance benefits is without merit.[2]

Defendant next alleges that the trial court erred by admitting evidence regarding his payment of his deductible. Although we agree that the admission of this evidence was erroneous, reversal is not required. The elements of a negligence claim are duty, breach of that duty, causation, and damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). An insurer is entitled to charge a deductible that may be waived if the operator of the vehicle is not "substantially at fault" in the accident. MCL 500.3037(1). The term fault was not defined by statute. Moreover, there is no indication that the insurer's definition of the term "fault" is the

---

[1] Moreover, we would not penalize a patient for exercising common sense by limiting activities in light of a clearly documented injury in order to prevent a medical visit and written orders to limit activity.

[2] On appeal, it is asserted that although defendant did not object to the admission of insurance benefits, counsel for the insurance company did object to the admission. Therefore, defendant contends that this issue should be reviewed on appeal. However, a party must cite authority in support of their position. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). A party may not merely announce its position and expect this Court to discover and rationalize the basis for the claims. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Defendant failed to brief the issue of an unnamed party raising an issue on appeal to which a party assented. Moreover, we note that MRE 411 provides that evidence "that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." MRE 411 further provides that it does not require the exclusion of evidence when it was offered for a proper purpose. In the present case, the trial court noted that the evidence would merely explain to the jury why a married couple that was not estranged would be involved in litigation. It was not admitted to demonstrate that defendant acted negligently or wrongfully. Therefore, this issue is without merit.

equivalent of the elements required to establish a negligence action. However, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Although defendant asserts that the issue of insurance and the deductible permeated the trial, the clear focus of the trial was defendant's driving in light of the weather conditions and the injuries sustained by plaintiff and the impact upon her lifestyle. Accordingly, this issue is without merit.

Lastly, defendant asserts that the trial court erred in failing to provide a sudden emergency instruction. We disagree. An appellate court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The jury instructions are examined as a whole to determine if error requiring reversal occurred. *Id*. "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id*. We will reverse based only instructional error only when the failure to do so is inconsistent with substance justice. *Id*.; see also MCR 2.613(A). Upon request, the trial court must give a standard jury instruction if it is applicable and accurately states the law. *Lewis*, *supra* at 211. However, the trial court's determination regarding the applicability and accuracy of a standard instruction is reviewed for an abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The sudden emergency doctrine provides:

> One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence. [*Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946), quoting Huddy on Automobiles (8th ed), p 359.]

To apply the sudden emergency doctrine, the circumstances surrounding the accident must be "unusual" or "unexpected." *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971). An event is "unusual" when it varies from the everyday traffic routine confronting a motorist; an event associated with a phenomenon of nature, such as a blizzard. *Id*. at 232. An event is "unsuspected" when "the potential peril had not been in clear view for any significant length of time, and was totally unexpected." *Id*.

In *Moore v Spangler*, 401 Mich 360, 383; 258 NW2d 34 (1977), the Supreme Court held that it was erroneous to instruct the jury regarding the sudden emergency doctrine where the factual circumstances surrounding the accident did not create an "unusual" situation. In that case, the police officer that arrived at the accident site testified that the sky was cloudy, the traffic was light, the pavement was wet, but the temperature was above freezing. *Id*. Although the defendant had testified that the pavement was icy, the Supreme Court held that an icy

condition was not unusual for a January day in Michigan. *Id.*[3] In *Hughes v Polk*, 40 Mich App 634, 641-642; 199 NW2d 224 (1972), this Court held that it was error to instruct regarding the sudden emergency doctrine where the icy condition of the road was not "unusual" for a December day when there had been a heavy snowfall the prior evening. Moreover, the conditions were not unexpected where the evidence established that the defendant had a clear view of the plaintiff's car for 300 feet, the defendant was aware of the snow on the ground, and consequently, the defendant should have expected icy conditions.

In the present case, we cannot conclude that the trial court abused its discretion by denying the sudden emergency instruction. At trial, meteorologist Jeff Andresen testified that, in the area of the accident, precipitation began at 9:00 a.m., changed to snowfall at approximately 10:45 a.m., and continued at various intensities for the next couple of hours. The snow was constant for the hour preceding the accident at approximately 12:30 p.m. The ground was not frozen at the time of the accident, and "a lot" of the snowfall melted because of the ground temperature. A snowfall on October 6, 2001, was considered early for the season. Similarly, at trial, defendant testified that they were driving to Mackinaw City to catch the 1:30 p.m. boat. After passing Reed City, it started to rain, began to sleet, and the sleet turned to snow. Near the city of Gaylord, it began to snow harder, and the right lane was wet with a mild dusting of snow. Because the left lane of traffic was not heavily traveled, the lane was snow and slush covered. Defendant admitted that the road condition of the left lane did not happen suddenly. Despite the condition of the roadway, he attempted to pass by entering the left lane. He lost control of the vehicle and hit the guardrail. Defendant did not know if snow, ice, or slush caused him to slide across the roadway.

The testimony of these two individuals did not establish an unusual or unexpected event. Although a snowfall on October 6, 2001, may have been early for the season, its onset was a gradual event. Defendant did not testify that a sudden blizzard occurred. Rather, defendant was aware of the change in weather conditions from dry to wet and snowy. Further, he was able to view the condition of the slush and snow covered roadway. The meteorologist confirmed that the weather change was at a graduated level occurring over a period of time. Consequently, the

[3] Although the Supreme Court concluded that sudden emergency instruction was erroneous, there was no evidence of prejudice from the instruction. *Id*. at 383-384.

trial court did not abuse its discretion in denying the request for the sudden emergency instruction.[4]

Affirmed.[5]

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

---

[4] An issue is not preserved for appellate review unless it is raised in the statement of questions involved. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Furthermore, an issue is not preserved for appellate review unless it is raised, addressed, and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Within the discussion section of the issue challenging the denial of the sudden emergency instruction, defendant asserts that the trial court erred in addressing the assured clear distance statute because it did not apply. However, review of the lower court record reveals that this issue was raised for the first time on appeal. A party may not harbor error as an appellate parachute by consenting to action at trial and objecting on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

[5] In light of our resolution of the issues raised in the appeal, we need not address the cross appeal.