

STATE OF MICHIGAN
COURT OF APPEALS

MARY LOU WILFONG,

Plaintiff-Appellee,

v

MICKALICH & ASSOCIATES, INC.,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 290949

Oakland Circuit Court

LC No. 2007-087068-NI

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

K. F. KELLY, J. (*dissenting.*)

I respectfully dissent. I do not disagree with my colleagues' conclusion that the trial court properly granted defendant's motion for a directed verdict on plaintiff's claim for economic damages. However, I cannot agree with the majority's conclusion that the trial court properly granted plaintiff a new trial on plaintiff's claim for non-economic damages. In my view, plaintiff failed to sustain her burden of showing that she suffered a serious impairment of body function under MCL 500.3135(1) because she failed to produce evidence showing an "objectively manifested impairment," MCL 500.3135(7). I would reverse.

I. BASIC FACTS

Plaintiff was in a car accident on March 29, 2005, when another driver ran red light and struck the passenger side of her car. After a responding officer cleared the scene, plaintiff went to a hospital where she was treated and released. Several days later, plaintiff again sought medical treatment due to severe pain in the sacroiliac¹ area. Subsequently, plaintiff left her job as a Wendy's restaurant manager and obtained a clerical position. Before the accident, in November 2004, plaintiff had undergone spinal surgery of her lower back to correct a ruptured disc.

In November 2007, plaintiff filed this lawsuit seeking economic damages for loss of wages and non-economic damages for pain and suffering under the no-fault act, MCL 500.3101,

¹ The sacroiliac is a joint in the pelvis.

et seq. The trial court denied defendant's motion for summary disposition and the matter went to trial. At trial, which was presided over by a visiting judge, plaintiff presented video depositions of her treating physicians.

Dr. Jeffrey S. Fischgrund, the surgeon who performed plaintiff's spinal operation in November 2004, testified that he examined plaintiff after the car accident. He performed a CAT scan and an electromyogram (EMG). The CAT scan showed that the spinal fusion from the previous surgery was still intact and the EMG was normal and "showed no evidence of an acute problem" and "nothing new." He testified that he could find no objective manifestation of an injury, but that plaintiff "just was not moving like she used to." Plaintiff was referred to Dr. Gino R. Sessa, a physical medicine and rehabilitation doctor, who testified that he saw plaintiff in August 2005. Dr. Sessa indicated that plaintiff was complaining of pain and weakness in her lower back and tingling down her legs. He testified that she had a "positive straight leg raise." This test is conducted with the patient lying flat on her back while the physician extends the leg upward in a "kicking fashion." Dr. Sessa testified that when he performed this test on plaintiff, it produced pain in plaintiff's back.² Believing that plaintiff might have been suffering from a pinched nerve, Dr. Sessa also performed an EMG. This test showed that plaintiff had changes "consistent with a chronic or an older nerve problem at lumbar 5" that preceded, and were not caused by, the 2005 car accident.

At the close of plaintiff's proofs, defendant moved for a directed verdict. The visiting judge granted the motion. Subsequently, the original trial court granted plaintiff's motion for a new trial. It is this order that defendant now appeals.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on motion for a new trial for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

III. OBJECTIVELY MANIFESTED IMPAIRMENT

MCL 500.3135(1) states in relevant part:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, *serious impairment of body function, or permanent serious disfigurement*. [Emphasis added.]

"Serious impairment of body function" 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(7) (emphasis added). Thus, to prevail on her claim, plaintiff must establish that an important body function has been impaired, such that she is not able to lead a normal life, and

² On cross-examination, Dr. Sessa testified that the straight leg test is a "combination of a subjective and objective [test]" because the doctor must depend on the patient to tell the doctor whether he or she experienced pain as a result of the test.

that the impairment is objectively manifested. *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004). “[I]n order 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) (quotation marks omitted). The 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) (footnote omitted). This Court has found the results of x-rays and MRIs to constitute objective medical evidence, see *id.*, but not range of motion tests that rely on a patient’s subjective sensations of pain, *Franz v Woods*, 145 Mich App 169, 175; 377 NW2d 373 (1985); *Salim v Shepler*, 142 Mich App 145, 149-150; 369 NW2d 282 (1985). Simply put, “[s]ubjective complaints that are not medically documented are insufficient.” *Kreiner*, 471 Mich at 132.

Here, Dr. Fischgrund performed a CAT scan and an EMG. Both tests showed that nothing was new in comparison to plaintiff’s condition before the accident. Similarly, Dr. Sessa also performed an EMG, which came back “normal” consistent with plaintiff’s condition before the accident. In other words, no objectively manifested impairment was found by any of these tests. Further, it is my view that the positive straight leg test is not an objective manifestation of injury. This is because, as Dr. Sessa’s testimony confirms, the doctor must rely on the patient’s subjective experience of the test and, under such circumstances, a plaintiff can control the test results based on her subjective experience of the movement. See *Franz*, 145 Mich App at 175; *Salim*, 142 Mich App at 149-150. The results of this test cannot be objectively verified. Given that all of plaintiff’s medical tests were otherwise normal, I would conclude that plaintiff has failed to demonstrate an objective manifestation of injury.

Further, the majority wrongly relies on *Netter*, *supra*, for the proposition that plaintiff provided evidence of an objectively manifested injury because it was “visually apparent” to her doctors that her mobility had decreased. The *Netter* Court’s statement that a plaintiff may satisfy the objective manifestation requirement if the impairment is “visually apparent” is not applicable here. *Netter*, 272 Mich App at 305-306. A closer reading of the *Netter* Court’s opinion reveals that this type of evidence would satisfy the objective manifestation requirement only if the injury itself was actually apparent, such as a compound fracture or a third degree burn. Tellingly, the footnote accompanying the *Netter* Court’s statement cites a portion of our Supreme Court’s *Kreiner* opinion that defines the terms “objective” and “manifest.” See *Netter*, 272 Mich App at 305 n 71 citing *Kreiner*, 471 Mich at 141-142. The *Kreiner* Court defines “objective” as “having [an] actual existence . . . based on observable phenomena” *Kreiner*, 471 Mich at 141-142. Thus, the *Netter* Court’s statement in regard to “visually apparent” is responsive to visually existing injuries, not visually apparent symptoms. As the *Netter* Court stated, “This interpretation comports with the Legislature’s intent that the ‘serious impairment of body function’ requirement to be as significant an obstacle to recovery as that posed by the requirement of permanent serious disfigurement and death.” *Netter*, 272 Mich App at 305-306. Here, plaintiff’s alleged injury was not “readily apparent” to her doctors because it could not be confirmed, by observable phenomena or otherwise, that it had an “actual existence.” Her doctors could not see the actual injury; rather, they could only observe plaintiff’s reactions to her symptoms. No verifiable evidence exists on the record to show that plaintiff suffered an actual impairment, other than her own subjective complaints. This is not enough to satisfy her burden under MCL 500.3135. See *Kreiner*, 471 Mich at 132.

Accordingly, I would reverse the trial court's decision granting plaintiff a new trial and re-instate the trial court's previous order entering a directed verdict in defendant's favor.

/s/ Kirsten Frank Kelly