

CITATION: Zeller v. Volpe-Scornaienchi, 2021 ONSC 813
OSHAWA COURT FILE NO.: CV-18-3114
DATE: 20210201

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: George Zeller, Plaintiff

AND:

Guseppina Volpe-Scornaienchi, Defendant

BEFORE: The Honourable Madam Justice J. Speyer

COUNSEL: William Harding, for the Plaintiff
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Aryeh Samuel, for the Defendant
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HEARD: January 28, 2021

ENDORSEMENT

- [1] The plaintiff, riding his bicycle, collided with the rear of the defendant's van, which was parked in a bicycle lane. The plaintiff claims that he suffered various injuries as a result of the collision. Both liability and damages are at issue in the litigation.
- [2] The defendants are in possession of two investigation reports from Xpera Investigations pertaining to the plaintiff. The reports are dated December 20, 2017 and June 8, 2018. The reports were listed in the defendant's affidavits of documents.
- [3] During the examination for discovery of Ms. Scornaienchi, counsel for the plaintiff requested a summary of the surveillance of the defendant. Counsel for the defendant declined to provide those particulars, stating: "I don't wish to provide it before your client's discovery takes place. It may cause him to tailor his evidence"; and, "I've reviewed the medical reports and the surveillance and based on that, I fear that he may tailor his evidence."
- [4] The parties agree that the defendants are required to provide particulars of the surveillance to the plaintiff. The issue for determination is not whether the particulars of the surveillance will be provided by the defendants to the plaintiff, but when. The defendants say that they should not be required to produce those particulars until after the plaintiff's examination for discovery has been concluded to mitigate the risk that the plaintiff would tailor his evidence at his examination for discovery. The plaintiff argues that the governing jurisprudence supports its position that it is entitled to receive those particulars prior to the plaintiff's examination for discovery.

- [5] The parties agree on the legal test to be applied to determine this motion. Production of the particulars of surveillance is, in the ordinary course, to be provided prior to the discovery of the party who is the subject of the surveillance. Production may be delayed until the conclusion of that party's examination for discovery where there is "a real likelihood that the plaintiff will tailor evidence if disclosure is made": *Ceci v. Bonk*, 7 O.R. (3d) 381 (Ont.C.A.). In *Ceci*, the Court of Appeal described this as "a very strict standard for interrupting the normal discovery process".
- [6] This motion thus turns on the application of settled legal principles to the factual matrix of this case.
- [7] In support of their position that there is a real likelihood that the plaintiff will tailor his evidence at his examination for discovery if he is aware of the particulars of the surveillance, the defendants say there are inconsistencies between the observations of the plaintiff made during the surveillance and the contents of three reports: 1) two reports of a clinical neuropsychologist; and 2) the report of an occupational therapist.
- [8] The surveillance reports were filed as a sealed exhibit on this motion, without objection by the plaintiff. I have reviewed those reports.
- [9] The reports of the clinical neuropsychologist say that the plaintiff's score on the Structured Inventory of Malingered Symptomatology provides "indication of symptom over-endorsement". The neuropsychologist also reported that the plaintiff "over-reported experiencing emotional distress, somatic and cognitive complaints". However, in relation to the validity of another test, the neuropsychologist concluded that: "He passed several internal validity checks associated with the neurocognitive measure assigned to him. Overall, there appears to be a concerted effort to engage in the testing process. Thus, confidence can be placed in the validity and reliability of the neuropsychological data generated in the assessment."
- [10] My review of the entirety of the reports of the neuropsychologist revealed no contradictions between the psychological reports and the surveillance reports. The latter are relevant to the plaintiff's physical abilities. The psychological reports assess his mental health and cognitive abilities. Moreover, the neuropsychologist had sufficient confidence in the data generated in the assessment to make a diagnosis and prescribe treatment. My comparison of the neuropsychological reports and the surveillance reports reveals no basis upon which it can be reasonably inferred that the plaintiff will tailor his evidence if he knows generally what is in the surveillance reports.
- [11] Similarly, the report of the occupational therapist does not contain anything that is obviously inconsistent with the observations contained in the surveillance reports. My comparison of the occupational therapist's report and the surveillance reports reveal no basis upon which it can be reasonably inferred that the plaintiff will tailor his evidence if he knows generally what is in the surveillance reports.
- [12] Based on my cumulative review of the materials filed on this application, I conclude that there is no real likelihood that the plaintiff will tailor his evidence if disclosure is made.

The motion for an order compelling the defendant, Giuseppina Volpe-Scornaienchi, to disclose the identity of the individual(s) who conducted surveillance of the plaintiff, the dates of the surveillance, a summary of what was observed during the surveillance and a description of what is depicted in any videos or photographs obtained during the surveillance, is granted, and an order will issue in the terms of the draft order provided by the plaintiff. The disclosure is to be made within seven days of the release of this endorsement to counsel.

[13] If counsel are unable to agree on costs, I will receive written submissions from each party, not to exceed two pages in length, in addition to any bill of costs, within three weeks of the release of this endorsement to be submitted to my assistant, Jessica Sabiston.



Justice J. Speyer

Date: February 1, 2021