

CANADA / JUDGMENT

Kherani v. Da Silva

2024 BCSC 1778

COURT

Supreme Court of British Columbia

DECIDED

27 June 2024

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2024 BCSC 1778 Kherani v. Da Silva IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kherani v. Da Silva, 2024 BCSC 1778 Date: 20240627 Docket: M193001 Registry: Vancouver Between: Femida Kherani Plaintiff And: Max Antonio Da Silva and Keith Rollins Defendants Before: The Honourable Justice G.C. Weatherill Oral Ruling Re: Admissibility of Video Surveillance Counsel for the Plaintiff: A.E. Maragos K. Hennebery R. Powell Counsel for the Defendants: J.P. Cahan B. Devlin A. Alimadad Place and Date of Trial: Vancouver, B.C. June 27, 2024 Place and Date of Judgment: Vancouver, B.C. June 27, 2024

- [1] THE COURT: This is my decision on the defendants' application to introduce video surveillance evidence on day 15 of trial.
- [2] Eleven days after completion of his cross-examination of the plaintiff, defendants' counsel sought to introduce in evidence a 14-minute video comprising extracts from 90 minutes of video surveillance of the plaintiff taken over the course of several days in July 2023.
- [3] Counsel submitted that the video is admissible in order to provide context for the plaintiff's functionality, and that the rules of evidence do not require that it had to be put to the plaintiff during her cross-examination. He relies on the decision of the Ontario Court of Appeal in *Nemchin v. Green*, 2019 ONCA 634.
- [4] The defendants submit that the purpose of the video surveillance is not in any way to impeach the plaintiff's credibility, but rather to show the plaintiff's true day-to-day functionality in substantive terms in order to assist the Court's understanding of the nature and extent of the plaintiff's injuries and her physical capabilities. Counsel submits that the video will help put the plaintiff's alleged physical limitations in context.
- [5] I have reviewed the proposed video evidence. In general, it depicts the plaintiff walking about, moving, and swinging her right arm, holding and lifting small items with, and driving a vehicle. Any context it purports to show is minimal at best. In my view, the plain purpose of the video is to enable defence counsel to suggest that the plaintiff is exaggerating her functional limitations and, thereby, attempt to impugn her credibility.

- [6] In a case like this where one of the critical issues to be determined is the extent to which an injured plaintiff continues to suffer pain and functional limitations, the credibility of the plaintiff herself is paramount. In my view, the video raises more questions than it answers: · What had she been doing in each excerpt? · Had she been resting that day, attending physiotherapy or other rehabilitation sessions? · Had she received trigger point or Botox injections? · Had she been working, and if so, at her clinic or at the hospital? · If so, how many patients had she seen and for what? · Was it a good day or a bad day for her functionality?
- [7] In the circumstances of this case, the video should have been put to the plaintiff during her cross-examination in order to give her an opportunity to explain what she was doing and put her movements that are depicted in context.
- [8] On its own, the video evidence has little or no probative value. In my view, its admission into evidence without giving the plaintiff an opportunity to explain the events depicted in it would offend the principle of procedural fairness.
- [9] The defendants' application to adduce this evidence is dismissed. "G.C. Weatherill J."

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