Case No. 123156

IN THE
SUPREME COURT OF ILLINOIS

WILLIAM KEVIN PEACH,	)	
	)	
Plaintiff-Appellee,	)	On Appeal from the Fifth District
	)	Court of Appeals,
	)	No. 5-16-0264
v.	)	
	)	There Heard on Appeal from the Circuit
	)	Court of Marion County, Illinois,
	)	No. 14-L-28
LYNSEY E. McGOVERN,	)	
	)	The Honorable Kevin S. Parker,
Defendant-Appellant.	)	Judge Presiding

BRIEF OF APPELLANT LYNSEY E. McGOVERN

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TABLE OF POINTS AND AUTHORITIES

NATURE OF THE ACTION

The Plaintiff, William Kevin Peach ("Plaintiff"), was involved in a motor vehicle accident with the Defendant, Lynsey E. McGovern ("Defendant") in July of 2010 in Marion County, Illinois. Defendant's theory at trial was that Plaintiff was not injured as a result of the accident. The trial court directed a verdict for Plaintiff on the issue of "negligence," that is, duty and breach and the jury was instructed solely on the issues of proximate cause and damages. The jury returned a verdict in favor of Defendant and against Plaintiff. The trial judge denied Plaintiff's post-trial motion seeking a new trial and a judgment notwithstanding the verdict (hereinafter "judgment n.o.v.") and entered judgment for Defendant.

On appeal to the Appellate Court of Illinois, Fifth Judicial District (hereinafter "Appellate Court"), Plaintiff argued that the jury's verdict in favor of Defendant was against the manifest weight of the evidence. Despite evidence in the record tending to show that Plaintiff was not injured as a result of the accident, the Appellate Court reversed the trial court, overturned the jury's verdict, and essentially entered a judgment n.o.v. against Defendant on causation and the existence of damages despite the jury's decision. The Appellate Court left only the *amount* of damages for jury determination in a retrial, with the amount of his emergency room bills as a minimum.

The Appellate Court also decided that the trial court abused its discretion in admitting post-accident vehicle photographs, finding that expert testimony was required before the photos could be admitted.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE APPELLATE COURT ERRED IN EFFECTIVELY ENTERING A JUDGMENT NOTWITHSTANDING THE VERDICT ("JUDGMENT N.O.V.") WHILE APPLYING THE "AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE" STANDARD IN VIOLATION OF *MAPLE* AND *PEDRICK*

II. WHETHER PLAINTIFF WOULD BE ENTITLED TO A NEW TRIAL UNDER THE MANIFEST WEIGHT OF THE EVIDENCE STANDARD WHERE THERE WAS EVIDENCE TO SUPPORT THE JURY'S VERDICT

III. WHETHER THE APPELLATE COURT ERRED IN REVERSING THE JURY'S VERDICT ON PROXIMATE CAUSE AND THE EXISTENCE OF DAMAGES, WHERE SUBSTANTIAL ISSUES OF FACT AND CREDIBILITY OF THE WITNESSES WERE AT ISSUE

IV. WHETHER THE APPELLATE COURT ERRED IN FINDING THAT THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE ADMISSION INTO EVIDENCE OF POST-ACCIDENT VEHICLE PHOTOGRAPHS WHERE TRIAL COURT DETERMINED THEY WERE RELEVANT

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 315 as Defendant timely filed her Petition for Leave to Appeal from the Opinion of the Appellate Court of Illinois, Fifth District, which this Court allowed on March 21, 2018.

SUPREME COURT RULES INVOLVED

Illinois Rule of Evidence 401
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Illinois Rule of Evidence 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.

STATEMENT OF FACTS

Plaintiff was involved in a motor vehicle accident with the Defendant in Marion County, Illinois in 2010. Plaintiff claimed that he sustained injuries which were caused when his Nissan pickup truck was struck in the rear by Defendant's vehicle.

The Trial

Trial was held in Marion County Circuit Court in January of 2016. According to the Plaintiff's testimony, the impact was hard enough to actually "push" his vehicle forward from its stopped position. (R. V III, SP C85) Plaintiff told his treating physician Dr. Templer that he was rear-ended by a vehicle going an estimated speed of 25-30 miles per hour (R.V II, SC C81) Defendant testified that she was fully stopped behind Plaintiff's vehicle, and that her foot slipped off the brake and her vehicle rolled into or "tapped" the rear of Plaintiff's truck (R. V III, SP C77-78). She testified that after she had stopped behind Plaintiff's vehicle, she never depressed the gas pedal (R. V III, SP C78). The damage to Defendant's car was limited to a damaged license plate (R. V III, SP C79). Plaintiff testified that his bumper was "dented in." (R. V III, SP C87) Shortly after the accident Plaintiff acknowledged that "there was minimal damage to both vehicles." (R. V III, SP C103).

Plaintiff testified that he went to the emergency room and subsequently sought medical treatment from his family physician. (R. V III, SP C70) Plaintiff then went to see Dr. Templer almost three months after the accident. (R. V III, SPC 72, 89) Dr. Templer testified that the matters for which he treated the Plaintiff "could have" or "may not have" been caused by the accident with Defendant as stated in the following deposition testimony which was read to the jury:

Q. The objective—would you agree with me that the objective findings did not tell you in and of themselves whether they were related to this automobile collision or not?

A. No. . . .

Q. O.K. So there could have been some other event—

A. Of course.

Q. –that caused that – that – those findings?

(R. V II, SC C83).

Q. Okay. Now, Doctor, you testified that he had multiple abnormalities in parts of your final diagnosis; is that correct?

A. Yes it is.

Q. And you told—and you testified they could have been caused by this accident; is that correct?

A. Yes.

Q. It's also true they may not have been caused by this accident; isn't that correct?

A. Yes, that's true. It might not have been caused by the accident.

(R. V II, SC C83) Plaintiff introduced into evidence medical bills in excess of $21,000. (R. V III, SP C92-94) Plaintiff also testified at the trial held in 2016 that his neck still hurt. (R. V III, SP C90)

Photographs of the vehicles which were admitted into evidence depicted very minor damage to both Defendant's vehicle and Plaintiff's vehicle. (R. V II, SC C133-138; R. V III, SP C81). The photographs show that Defendant's license plate was bent. No other damage to the front of Defendant's vehicle is apparent from the photograph although Plaintiff testified that there may have been a crack in the bumper. (R. V III, SP

C88) The photographs of Plaintiff's vehicle do not appear to reflect any damage to the rear of Plaintiff's truck.[1] Plaintiff acknowledged that the photograph of his vehicle accurately depicted its condition after the accident (R. V III, SP C96).

At the close of the evidence, the trial court directed a verdict for Plaintiff on the issue of Defendant's "negligence," that is, duty and breach. (R. V III, SP C148) The trial court instructed the jury solely on the issues of proximate cause and damages. (R. V II, SC C17, 19) The instructions on the issues of proximate cause and damages were tendered by Plaintiff. (R. V III, SP C162) The jury deliberated and returned a verdict in favor of Defendant and against Plaintiff (R. V II, SC C54) and the trial court entered judgment in favor of Defendant. (R. V I, C232) Plaintiff filed a post-trial motion asking the trial court to set aside the jury verdict, grant a new trial and enter judgment in favor of Plaintiff (R. V I, C233) which the trial court denied. (R. V I, C247)

Appeal to Fifth District Court of Appeals

Plaintiff filed a notice of appeal to the Appellate Court of Illinois, Fifth Judicial District (hereinafter "Appellate Court") (R. V I, C248) Plaintiff argued on appeal that the jury's verdict in favor of Defendant was against the manifest weight of the evidence; and that the trial court erred in allowing admission of the photographs of the vehicles absent expert testimony interpreting the photos. The Appellate Court agreed with both points and reversed the trial court, effectively entering a judgment against Defendant on causation and the existence of damages, leaving only the amount of damages for jury determination in a retrial. *Peach v. McGovern*, 2017 IL App (5th) 160264. Based on the

[1] The damage on the top portion of the tailgate of Plaintiff's truck was preexisting damage.

Appellate Court's ruling, the sole issue for the jury on remand will be the amount of Plaintiff's damages, which the Appellate Court determined must be *at least* the amount of his hospital expenses. *Peach*, 2017 IL App (5th) 160264, at ¶21.

STANDARD OF REVIEW

An Appellate Court can order a new trial if a jury's verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill.2d 445, 454, 603 N.E.2d 508, 177 Ill. Dec. 438 (1992) quoting *Mizowek v. De Franco*, 64 Ill.2d 303, 310, 356 N.E.2d 32, 1 Ill. Dec. 32 (1976). A verdict is against the manifest weight of the evidence where the opposite conclusion is "clearly evident" or where the findings of the jury are "unreasonable, arbitrary, and not based upon any of the evidence." *Maple*, 151 Ill.2d at 454. The Appellate Court will only reverse a trial court's decision denying a new trial in those instances where it is affirmatively shown that the court clearly abused its discretion. *Maple*, 151 Ill.2d at 455.

An Appellate Court can grant a motion for judgment notwithstanding the verdict only "in those limited cases where all of the evidence when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Maple*, 151 Ill.2d at 453 citing *Pedrick v. Peoria & Eastern R.R. Co*., 37 Ill.2d 494, 510, 229 N.E.2d 504 (1967)

ARGUMENT

I. THE APPELLATE COURT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN MAPLE, IN THAT THE APPELLATE COURT ESSENTIALLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT WHILE APPLYING THE INCORRECT "AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE" STANDARD

Plaintiff's credibility and whether or not his alleged injuries were caused by this accident was the primary issue at trial. The jury heard the following evidence: Plaintiff's testimony that Defendant was traveling at 25 to 30 mph when her vehicle struck his vehicle; Plaintiff's testimony that he was pushed into the intersection by the force of the impact; Defendant's testimony that her foot slipped off the brake causing her vehicle to tap the rear of Plaintiff's vehicle; Defendant's testimony that only her license plate was damaged and that there was minor damage to the rear of plaintiff's truck; Plaintiff's testimony that there was minimal damage to both vehicles; photographs showing very minor damage to both vehicles; and Plaintiff's treating physician's testimony that the accident "could" have caused Plaintiff's injuries, or that the accident "might not" have caused his injuries. Based on the totality of the foregoing evidence, the jury returned a verdict against the Plaintiff and in favor of the Defendant, agreeing with Defendant's theory that Plaintiff was not injured as a result of this very minor auto accident. Again, the Plaintiff's credibility was a key factor in the trial and the jury obviously did not believe that Plaintiff sustained any injuries in the accident. The jury was presented with two diametrically opposed versions of the facts and the jury chose not to believe the Plaintiff's version of the facts that he involved in a major impact which caused him to sustain serious injuries.

There are well-established standards to be used in determining whether a new trial or a judgment notwithstanding the verdict should be granted following a jury verdict. If a jury verdict is to be reversed and a new trial granted, it must be shown that the verdict was "against the manifest weight of the evidence." For a verdict to be "against the manifest weight of the evidence," it must be shown that "the opposite conclusion is clearly evident" or that "the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." *Maple,* 151 Ill.2d at 454 citing *Villa v. Crown Cork & Seal Co*., 202 Ill.App.3d 1082, 1087, 560 N.E.2d 969, 148 Ill. Dec. 372 (1990) If a verdict is to be reversed and a judgment notwithstanding the verdict ("judgment n.o.v.") or a directed verdict is to be entered, then a higher standard is required: it must be shown that "the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Maple,* 151 Ill.2d at 453, citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d at 510.

The Appellate Court below erred in applying the "manifest weight of the evidence" standard and not applying the *Pedrick/Maple* standard which is required in order to enter a judgment n.o.v. Any citation to the stricter judgment n.o.v. standard is conspicuously absent from the Appellate Court's opinion. Instead, the Appellate Court applied the lesser "against the manifest weight of the evidence" standard which is used for determining a party's right to a new trial. The opinion of the Appellate Court is in direct conflict with *Pedrick* and *Maple.* The Appellate Court decision failed to follow *Pedrick* and *Maple* by reversing a jury's determination and entering a judgment n.o.v. based solely on its finding that the verdict was against the manifest weight of the

evidence. The Appellate Court utilized the wrong standard in entering a judgment in favor of Plaintiff on causation and entitlement to damages, repeating the error that this Court addressed in *Maple* over 25 years ago.

The Appellate Court's decision blurs the distinction between the two standards. In *Maple*, this Court clearly held that in order to enter judgment n.o.v., "a more nearly conclusive evidentiary situation ought to be required before a verdict is directed than is necessary to justify a new trial" *Maple*, 151 Ill.2d at 454 (citing *Mizowek*, 64 Ill.2d at 310, quoting *Pedrick*, 37 Ill.2d at 509-510) The Appellate Court below proceeded to enter a judgment n.o.v. without this "more nearly conclusive evidentiary situation." In fact, this Court in *Maple* made crystal clear that "[m]ost importantly, a judgment n.o.v. may not be granted merely because a verdict is against the manifest weight of the evidence." *Maple*, 151 Ill.2d at 453.

The Appellate Court ignored established law as expressly set forth in *Pedrick* and reaffirmed in *Maple* by reversing a jury's determination which had been upheld by the trial court, while finding only that the verdict was "contrary to the manifest weight of the evidence." Because the Appellate Court did not undertake the correct analysis, the Appellate Court erred in entering a judgment notwithstanding the verdict in favor of Plaintiff.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL UNDER THE "MANIFEST WEIGHT OF THE EVIDENCE" STANDARD

Applying the "manifest weight of the evidence" standard, it is abundantly clear that Plaintiff was not entitled to a new trial on the issues of causation and damages. A trial court's ruling on a motion for new trial will not be reversed except in those instances

where it is affirmatively shown that it clearly abused its discretion. *Maple*, 151 Ill.2d at 455 citing *Reidelberger v. Highland Body Shop, Inc*. 3 Ill.2d 545, 548, 48 Ill. Dec. 237,416 N.E.2d 268 (1981). In determining whether the trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Maple*, 151 Ill.2d at 455. In *Maple*, this Court noted that it is important to keep in mind that the trial judge "in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying and of the circumstances aiding in the determination of credibility." *Maple*, 151 Ill.2d at 456. According to Maple, the question of whom to believe and what weight to be given all of the evidence was a decision for the trier of fact, whose determinations should not be upset on review unless manifestly erroneous. *Maple*, 151 Ill.2d at 460. In order to reverse the jury's decision, the Appellate Court had to find that the jury's findings were "not based upon any of the evidence." *Maple*, 151 Ill.2d at 455. The jury's decision below was supported by ample evidence, including the equivocal (not "absolute" as plaintiff claims) testimony of Plaintiff's physician that the accident may or may not have caused Plaintiff's injuries, the testimony of the parties, and the photographic evidence showing minor damage and therefore granting a new trial would be improper. Viewed in a light most favorable to the Defendant, the jury's verdict was supported by the evidence and the Appellate Court should not have interfered with and usurped the determination of the jury and the trial judge.

III. EVEN ASSUMING THE APPELLATE COURT HAD APPLIED THE CORRECT STANDARD PLAINTIFF WAS NOT ENTITLED TO A JUDGMENT N.O.V. WHERE SUBSTANTIAL ISSUES OF FACT AND CREDIBILITY OF THE WITNESSES WERE AT ISSUE

Rather than remanding for a new trial on the issues of causation and damages, which would have been the appropriate remedy assuming *arguendo* the verdict was found to be against the manifest weight of the evidence, the Appellate Court went even further and effectively entered a judgment n.o.v. in favor of Plaintiff on the issue of proximate causation and the existence of damages, leaving only the amount of damages (with the amount of the emergency room bills as the minimum) for determination by a subsequent jury on remand. The Appellate Court completely deprived Defendant of the opportunity to argue on remand that the minor accident caused no injuries to the Plaintiff.

Even assuming the Appellate Court had undertaken the correct analysis, judgment n.o.v. would not be proper here. Judgment n.o.v. cannot be granted if there is *any* evidence demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple,* 151 Ill.2d at 454. This Court held in *Maple,* "unquestionably, it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." (citations omitted) *Maple,* 151 Ill.2d at 452. The question of whom to believe was a decision for the jury. Maple also recognized that "a trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable." (citations omitted) *Maple,* 151 Ill.2d at 452. In addition, an appellate court "should not usurp the function of the jury and substitute its judgment on questions

of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." (citations omitted) *Maple,* 151 Ill.2d at 452-453. The Appellate Court's decision ignores these precepts and disregards the proper role of the jury, the trial court and the appellate court.

Here there *were* conflicts in the evidence and moreover, the assessment of credibility of the witnesses was critical to the jury's determination. Foremost is the testimony of Dr. Templer, the plaintiff's treating physician. He testified that the injuries sustained by the Plaintiff either could have or may not have been caused by the accident. "*It might not have been caused by this accident."* (R. V II, SC C83) (emphasis added). This equivocation by Plaintiff's treating physician on the issue of causation raised a jury question. Contrary to plaintiff's contention, the jury did not "disregard the doctor's undisputed testimony." Rather, the jury verdict indicates the opposite: that the jury heard and understood the doctor's equivocation over the cause of Plaintiff's alleged injuries. The testimony of Dr. Templar was not "undisputed" because the doctor himself acknowledged that it was possible that the accident did not cause Plaintiff's claimed injuries. The doctor's testimony was far from "absolute" as Plaintiff contends, it was equivocal. The jury could have concluded from the circumstances and this testimony that the accident did not cause Plaintiff's alleged injuries. *Hawn v. Fritcher,* 301 Ill.App.3d 248, 703 N.E.2d 109, 234 Ill. Dec. 497 (1988).

The jury also heard conflicting testimony about the impact. First, from the Plaintiff they heard that Defendant's vehicle hit Plaintiff's vehicle from the rear at 25-30 mph and that the force of the impact actually pushed Plaintiff's vehicle forward. They also heard evidence from the Defendant that Defendant's vehicle merely tapped

Plaintiff's vehicle. They also heard testimony from both parties that there was minor damage to both vehicles and the jury saw photos depicting very minimal damage to *both* vehicles.[2] The jury heard evidence that Plaintiff was complaining of pain in his neck six years later. The foregoing evidence, taken together, undermined the Plaintiff's theory that he was rear ended by a vehicle estimated to be traveling 25-30 mph and thus undermined Plaintiff's credibility. The question of whom to believe was a decision for the jury. It is axiomatic that it is:

> "the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which is considered most reasonable. * * * That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Dowler v. New York, C. & S. L. R. Co., 5 Ill. 2d 125, 130, 125 N.E.2d 41 (1955) citing *Tennant v. Peoria and Pekin Union Railway Co*., 321 U.S. 29 (1944). If the jury did not find Plaintiff to be credible, it was within their discretion to disbelieve any aspect of his testimony and return a verdict in favor of Defendant. If the jury did not find the Plaintiff credible, it was within their discretion and their right not to award damages to Plaintiff.

The jury had the right to judge the credibility of the Plaintiff and disregard Plaintiff's testimony regarding the level of the impact and the need for medical care following the collision. In addition, the jury could certainly accept the testimony of Dr.

[2] As discussed further in Point III below, the admission of the post-accident vehicle photographs was within the discretion of the trial court. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 648; 924 N.E.2d 531, 540; 338 Ill. Dec. 325 (2010).

Templer that the accident might not have caused Plaintiff's injuries. But according to the Appellate Court a verdict in favor of Plaintiff on the issues of causation and damage "*should have followed*" based on all the evidence. *Peach*, 2017 IL App. 160264 at ¶ 21. The Appellate Court found that the jury "*should have concluded"* that Defendant's negligence proximately caused Plaintiff's injuries" thereby effectively preempting the jury's decision and directing a verdict on causation against Defendant. *Peach*, 2017 IL App 160264 at ¶ 21. Moreover, the Appellate Court even set a minimum amount of damages that *must* be awarded upon remand, the amount of the hospital bills, by finding that it was "unreasonable that any jury, under the circumstances and the evidence presented, would not have at least awarded recovery for plaintiff's hospital expenses incurred immediately after the collision." *Peach*, 2017 IL App. 160264 at ¶ 21. While purporting to recognize that "the jury can disbelieve any testimony, at any time, even when uncontradicted" the Appellate Court clearly did not permit the jury to disbelieve the Plaintiff. The Appellate Court substituted its own judgment on the issue of causation and the existence of damages and negated the jury's determination that the accident did not cause Plaintiff's claimed injuries in violation of the directive of *Maple*. It was the province of the jury to resolve conflicts in evidence and pass upon the credibility of witnesses. The Appellate Court usurped the function of the jury and simply entered its own judgment on the issues of proximate cause and existence of damages, leaving only the *amount* of damages for consideration by the jury on remand.

Finally, the practical result of the Appellate Court's decision, that is, if there is an impact between two automobiles, and the plaintiff claims to be injured, then the jury *must* award some monetary damages, is unacceptable. If the Appellate Court's decision is

allowed to stand, causation and damages are to be presumed by virtue of every motor vehicle accident, no matter how minor, with the sole issue for the jury to be the amount of plaintiff's damages.

IV. THE APPELLATE COURT ERRONEOUSLY DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE ADMISSION OF POST-ACCIDENT VEHICLE PHOTOGRAPHS WITHOUT EXPERT TESTIMONY BECAUSE THE TRIAL COURT HAS DISCRETION TO ADMIT PHOTOS WITHOUT EXPERT TESTIMONY WHERE TRIAL COURT DETERMINES PHOTOS ARE RELEVANT

The Appellate Court also erroneously decided that the trial court abused its discretion in admitting post-accident photographs of the vehicles, finding that expert testimony was required before these photos could be admitted. The Appellate Court concluded that "the trial court erred at the outset in failing to grant plaintiff's motion in limine with respect to the admissibility of the photographs for the purpose of attempting to relate plaintiff's injuries to the vehicular damage depicted in the photographs, without expert testimony to support such an inference." *Peach*, 2017 IL App. 160264 at ¶19 This ruling is in conflict with clearly established Illinois precedent that allows the trial court discretion to admit photos without expert testimony where the trial court deems the photos to be relevant. "Evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Ford v. Grizzle*, 398 Ill. App. 3d 639, 924 N.E.2d 531, 338 Ill. Dec. 325 (2010); Illinois Rule of Evidence 401. The general rule for photographs is that a photograph is admissible "if it has a reasonable tendency to prove a material fact at issue in the case." *Smith v. Baker's Feed & Grain, Inc.*, 213 Ill.App. 3d 950, 952, 572 N.E.2d 430, 157 Ill. Dec. 361 (1991) With respect to

automobile accidents, "[i]t seems elementary that photos depicting the condition of a vehicle after an accident, whatever damage they show, are relevant to facts in issue in an auto negligence case." Morrissey, "*The Appellate Court Administers a Healthy Dose of Common Sense to the Vehicle Photograph Admissibility Issue*" IDC Quarterly Volume 19, Number 1 (2009) at 32. One of the facts at issue here was the severity of the impact and whether the impact was sufficient to have caused Plaintiff's claimed injuries. The photographs admitted into evidence had a tendency to make the issue of whether the accident caused Plaintiff's injuries "more probable or less probable" in light of logic and the common experience of jurors and therefore were relevant under Illinois Rule of Evidence 401. And under Illinois Rule of Evidence 402, "all relevant evidence is admissible except as otherwise provided by law."

Rather than follow common sense and the recent Fifth District *Ford* decision, and without even mentioning *Ford*, the Appellate Court determined that the post-accident vehicle photographs were inadmissible absent expert testimony to explain them.

The trial court had the discretion to admit evidence which it found to be relevant. Recent Fifth District cases addressing the issue have held that expert testimony is *not* necessary for such photographs to be admissible. Most recently, in *Ford*, the court recognized that whether a jury could properly relate the vehicular damage depicted in the photos to the injury without the aid of an expert was an evidentiary question left to the discretion of the trial court. *Ford*, 398 Ill.App.3d at 640. In *Ford*, the photographs depicted some damage to the defendant's vehicle and no damage to the plaintiff's vehicle. Because the trial court "could have properly found that the photographs were relevant to prove that the plaintiff's injury was more or less probable" the trial court did not abuse its

discretion in admitting the photos. *Ford*, 398 Ill.App.3d at 640. Precisely the same reasoning applies to the instant case.

Ford is consistent with the earlier Fifth District decisions in *Fronabarger v. Burns*, 385 Ill.App.3d 560, 895 N.E.2d 1125, 324 Ill. Dec. 410 (2008) and *Jackson v. Seib*, 372 Ill.App.3d 1061, 866 N.E.2d 663, 310 Ill. Dec 2 (2007). In *Fronabarger*, the Fifth District held that post-accident vehicle photographs showing minimal damage to the vehicles were relevant to the nature and extent of the plaintiff's claimed injuries. *Fronabarger*, 385 Ill.App.3d at 565. As in *Ford*, the court in *Fronabarger* held that a jury could assess the relationship between the damages to the vehicles and the injury to the plaintiff without an expert. *Fronabarger*, 385 Ill. App. 3d at 565. Therefore, the trial court did not abuse its discretion in finding the photos relevant and allowing for their admissibility. Likewise, in *Jackson*, the court held that the trial court did not abuse its discretion in admitting photos of vehicles after an accident without expert testimony where a review of photographs revealed that plaintiff was not rear-ended at anywhere near the speed he suggested, similar to the instant case. The admission of the photographs "by themselves, without expert testimony, were relevant to prove whether the injury was more or less probable" and therefore were held to be properly admitted. *Jackson*, 372 Ill. App. 3d at 1070-1071. "Jackson wisely reaffirms that photographs illustrate, corroborate and impeach and in so doing, educate the jury." Morrissey, IDC Quarterly, Volume 9, Number 1 at 34.

Significantly, the Appellate Court below did not attempt to distinguish or even mention the 2010 decision in *Ford*, in its discussion on the admissibility of the photographs. It simply followed *Baraniak v. Kurby*, 371 Ill.App.3d 310, 862 N.E.2d

1152, 308 Ill. Dec. 949 (1st Dist. 2007) a First District decision requiring expert testimony on the correlation between vehicular damage and plaintiff's injuries before admitting photos of vehicle damage. The Appellate Court utilized the standard set forth by the First District in *Baraniak* as expressing the so-called "better view" *requiring* expert testimony regarding correlation between the amount of damages relative to the speed involved and plaintiff's injuries before admitting photographs depicting damage. In *Baraniak,* the court had asserted in dicta that absent expert testimony on the correlation between vehicular damage and the plaintiff's injuries, photos of the parties' vehicles should be excluded. However, in *Ford* the Fifth District appellate court had discussed and specifically declined to follow *Baraniak,* instead reaffirming the rationale set forth in *Fronabarger*. *Ford,* 398 Ill.App. 3d at 648.

It should also be noted that the First District Appellate Court in *Cancio v. White,* 297 Ill.App.3d 422, 433, 697 N.E.2d 749, 232 Ill. Dec. 7 (1998) held that photos of plaintiff's vehicle "were relevant to the nature and extent of plaintiff's damages. They were relevant because they showed little or no damage, which is something the jury could consider in determining what, if any, injuries plaintiff sustained as a result of the accident." The Third District Appellate Court has also held that photographs were admissible where the photos demonstrated a low speed impact which tended to show that plaintiff's injury was more or less probably. *Ferro v. Griffiths,* 361 Ill.App.3d 738, 836 N.E.2d 925, 297 Ill. Dec. 194 (2005).

The trial court below did not abuse its discretion by admitting post-accident photographs of the Plaintiff's and Defendant's vehicles depicting little, if any, damage because those photos had a tendency to make the existence of plaintiff's injury more or

less probable, that is, they were relevant. Post-accident photographs of vehicles are admissible because they assist the jury and allow the jury to "gauge the event and the credibility of witnesses describing the event." Morrissey, IDC Quarterly, Volume 9, Number 1 at 34. The trial court obviously found that the post-accident photographs of the vehicles were relevant to prove that the Plaintiff's injury was more or less probable. In deciding whether this was an abuse of discretion, the proper question is not whether the reviewing court would have made the same decision if it were acting as the trial court. An "abuse of discretion" occurs only when *no reasonable person* would take the position adopted by the trial court. *Ford,* 398 Ill.App.3d at 647 (emphasis added) The Appellate Court did not make an express finding that no reasonable person would believe the photographs were relevant to prove that Plaintiff's injury was more or less probable, and clearly such a finding would have been improper.

Finally, even assuming *arguendo* the admission of the photographs was improper, improperly admitted evidence is harmless where it is duplicative of other properly admitted testimony**.** *Gulino v. Zurawski*, 2015 IL App. (1st) 131587 ¶84 (2015). The photographs were merely duplicative evidence of the minor damage to both vehicles, consistent with Defendant's testimony that the only damage to her vehicle was a bent license plate and consistent with Plaintiff's statement that there was minimal damage to both vehicles.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Court reverse the judgment of the Appellate Court of Illinois, Fifth Judicial District and reinstate and affirm the jury's verdict in favor of Defendant.

GOFFSTEIN, RASKAS, POMERANTZ,
KRAUS & SHERMAN, LLC

By: /s/Edward L. Adelman
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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that this Appellant's Brief conforms to the requirements of Supreme Court Rules 315(c) and 341(a) and (b). The length of this Brief, excluding the Appendix is 25 pages.

/s/ Edward L. Adelman

PROOF OF SERVICE

The undersigned certifies that on or before 5:00 p.m. on the 25th day of May, 2018, he caused the foregoing Appellant's Brief to be electronically filed with the Supreme Court of Illinois, and a copy of the Appellant's Brief to be served by electronic mail upon counsel for Plaintiff at george@ripplingerlaw.com.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Edward L. Adelman

APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

State of Illinois
In the Circuit Court of Judicial Circuit #4
Marion County

Tort-Damages
PEACH, WILLIAM KEVIN P 001
VS.
MC GOVERN, LYNSEY E D 001

Case number: 2014-L -000028

Notice to:

ADELMAN, EDWARD L	
7701 CLAYTON ROAD	ST LOUIS, MO 63117-1371
RIPPLINGER, GEORGE	
2215 WEST MAIN STREET	BELLEVILLE, IL 62226-0000

Take notice that the following entry was made on Tuesday, February 23, 2016

SUA SPONTE, COURT ENTERS JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST THE PLAINTIFF ON RETURN OF THE JURY'S VERDICT; NO REASON EXISTS TO DELAY THE ENFORCEMENT OF OR APPEAL FROM THIS FINAL JUDGMENT; THE CLERK OF COURT IS DIRECTED TO PROVIDE A COPY OF THIS DOCKET ENTRY TO COUNSEL OF RECORD. KSP

Ronda Yates

Circuit Clerk, RONDA YATES CIRCUIT CLERK

This notice mailed on Tuesday, February 23, 2016.

Debbie Hildreth

Deputy

RIPPLINGER, GEORGE
2215 WEST MAIN STREET
BELLEVILLE, IL 62226-0000

DAH

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

William Kevin Peach,

Plaintiff,

-v-

Lynsey E. McGovern,

Defendant.

Case No. 14-L-28

Notice of Appeal

Plaintiff, William Kevin Peach appeals to the Appellate Court of Illinois, Fifth District, from the Jury verdict and judgment thereon entered February 23, 2016, wherein the Court entered judgment against Plaintiff and in favor of Defendant and the denial of Plaintiff's Post Trial Motion on May 27, 2016. A copy of the Order is attached as Exhibit A.

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Proof of Service

The undersigned attorney hereby certifies that on the 20th of June, 2016, copies of the foregoing was served upon the attorneys of record of all parties to the above case by depositing same in the United States mail in Belleville, Illinois, with proper postage affixed thereto and addressed to:

Edward Adelman
Goffstein Raskas Pomerantz
Kraus & Sherman, LLC
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St Louis MO 63117-1371

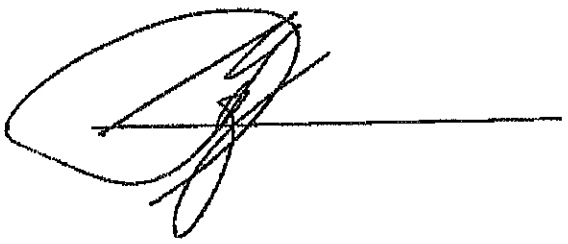

TABLE OF CONTENTS TO RECORD ON APPEAL
WILLIAM PEACH V LYNSEY MCGOVERN
CASE NO. 14-L-28

2017 IL App (5th) 160264

NO. 5-16-0264

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM KEVIN PEACH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Marion County.
	)	
v.	)	No. 14-L-28
	)	
LYNSEY E. MCGOVERN,	)	Honorable
	)	Kevin S. Parker,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court, with opinion.
Justices Goldenhersh and Chapman concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, William Kevin Peach, brought suit against defendant, Lynsey E. McGovern, for personal injuries he sustained in an automobile accident. The jury returned a verdict in favor of defendant, and the circuit court of Marion County entered judgment on that verdict. Plaintiff appeals, contending the jury verdict was against the manifest weight of the evidence, especially where defendant was adjudged negligent as a matter of law. Plaintiff further asserts that the trial court erred in allowing defense counsel, over objection, to present evidence pertaining to the relative amount of damage sustained by the vehicles and argues that there was a direct correlation between the amount of damage to the vehicles, as depicted in photographs, and plaintiff's injuries. We reverse and remand.

¶ 2 The evidence revealed that plaintiff was on his way home around 10 p.m. after visiting with his girlfriend on the evening of July 17, 2010. As he was driving home, he had to stop at the intersection of North Shelby Street and East Main Street in Salem, Illinois, to allow traffic to clear. While waiting at the stop sign, the rear of plaintiff's 1985 Nissan pickup truck was struck by another vehicle. Plaintiff testified that even though he had his foot on the brake, his truck was pushed some 5 to 10 feet into the intersection. When the collision occurred, plaintiff's head hit the back window of his truck and his neck began hurting immediately. The vehicle that rear-ended plaintiff's truck was a 2001 Mitsubishi Eclipse driven by defendant, who was also on her way home. Defendant claimed she was fully stopped behind plaintiff, when her foot slipped off the brake. She further testified that her vehicle simply rolled into the rear of plaintiff's truck. Plaintiff, on the other hand, estimated defendant's speed to have been 20 to 25 miles per hour at the time of the impact. He also noticed that defendant was on her cell phone.

¶ 3 After the accident, both plaintiff and defendant got out of their vehicles to inspect the damage. The back bumper of plaintiff's truck was dented, and the front bumper of defendant's Eclipse was cracked. Defendant was unwilling to call the police or exchange information with plaintiff. Instead, defendant decided to leave the scene. As she was leaving, plaintiff was able to get the license plate number from defendant's car. Plaintiff drove back to his girlfriend's house because his neck was hurting so badly. He testified that it was as if somebody suddenly set a match to his neck. Plaintiff also had a headache and felt like he was in a daze. The girlfriend testified that plaintiff came back to her house about 15 minutes after he left. Because plaintiff appeared to be a bit disoriented, and was complaining of a severe headache and neck pain, the girlfriend indicated she took plaintiff to the emergency room at a nearby hospital.

¶ 4 While plaintiff was in the emergency room undergoing various tests, the police were contacted so that a police report could be made. Plaintiff gave the license plate number he had recorded from defendant's car to the police. When the police contacted defendant, she admitted she had been involved in a vehicular accident. Defendant was subsequently ticketed for failure to reduce speed to avoid an accident and pled guilty to the offense.

¶ 5 Plaintiff testified that since the accident, he has had chronic neck pain. A few days after the accident, plaintiff visited his regular physician, Dr. Luecha. Plaintiff was given steroids and a neck brace, and he underwent therapy, but nothing helped with the pain. He was then referred to Dr. Templer, a pain management specialist in Mount Vernon. Plaintiff underwent an MRI of his cervical spine in September and began treatment with Dr. Templer in October of 2010. The MRI revealed that plaintiff was not suffering from degenerative changes that had accumulated over the years, but rather from more recent injuries, consistent with having been rear-ended in a motor vehicle collision. Specifically, the MRI showed a straightening of the normal lordosis, consistent with muscle spasm and pain, and a right disc protrusion at C3-4, with foraminal narrowing on the right, compression of the right lateral recess, compression of the dural sac, and compression of the anterior margin of the spinal cord. Plaintiff was diagnosed with cervical sprain or strain, consistent with whiplash.

¶ 6 Plaintiff further stated he was suffering from pain radiating down into his right arm and tenderness in the upper trapezius muscle. He indicated that he still has to rest his neck every three to four days because of the pain. Plaintiff testified that prior to the collision, he had experienced no problems with his neck. By the time of the trial, his medical bills had exceeded $23,000. Plaintiff's final diagnosis was whiplash syndrome, chronic neck pain, cervical facet

arthropathy, cervical disc herniation, cervical annular tear, and possible cervical radiculopathy, cervical foraminal stenosis, and cervical degenerative disc disease.

¶ 7 Dr. Templer, the pain management physician, testified that with whiplash, the neck moves beyond its typical range of motion, and the overextension and flexion of the neck is the mechanism that causes the chronic pain. Dr. Templer noted that even very low speed collisions can cause hyperflexion/hyperextension injuries. Dr. Templer further opined that the accident caused the whiplash, annular tear, and loss of integrity of disc space reported in plaintiff's medical records.

¶ 8 Plaintiff also testified that the dented bumper was not the only damage to his truck caused by the collision. According to plaintiff, a few days after the accident, the brackets on the truck bed failed. As a result, plaintiff's vehicle was no longer drivable.

¶ 9 At the close of the evidence, the court directed a verdict for plaintiff on the issue of negligence and reserved the questions of causation and damages for the jury. The jury subsequently returned a verdict in favor of defendant, awarding plaintiff no damages. This appeal followed.

¶ 10 Plaintiff first argues on appeal that the jury verdict was against the manifest weight of the evidence. The only evidence of damages and causation came from plaintiff, his girlfriend, and Dr. Templer. Both plaintiff and his girlfriend testified that plaintiff received medical care and treatment immediately after being involved in the motor vehicle accident. Both also testified that ever since the accident, plaintiff was suffering from pain in his neck. The MRI revealed injuries consistent with whiplash. Dr. Templer also testified that plaintiff's injuries were consistent with whiplash. Dr. Templer further stated that low speed impact could cause such injuries.

¶ 11 Defendant did not put on any witnesses to contradict plaintiff or the medical evidence. Instead, during defendant's closing argument, she relied on photographs to defeat plaintiff's claims. As plaintiff points out, defense counsel was allowed, over objection, to present photographs depicting damage to the two vehicles involved and to argue that plaintiff exaggerated the impact between the two vehicles in order to relate his neck injuries to the rear-end collision. While it may have been possible that some other event caused plaintiff's injuries and medical findings, there was no substantive evidence introduced during trial to suggest the occurrence of any such events. Nor was there any testimony, even during cross-examination, regarding a correlation between the amount of vehicular damage, relative to the speed of the vehicles involved, and plaintiff's injuries.

¶ 12 Analysis

¶ 13 We recognize that it is the function of the trial court to determine the admissibility and relevance of evidence, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 647, 924 N.E.2d 531, 540 (2010). Additionally, we note that evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Ford*, 398 Ill. App. 3d at 648; Ill. R. Evid. 401 (eff. Jan. 1, 2011). Photographs are used at trial for a variety of purposes. Some require the testimony of an expert witness, while others may not. The general rule is that a photograph is admissible if it has a reasonable tendency to prove a material fact at issue in the case. *Smith v. Baker's Feed & Grain, Inc.*, 213 Ill. App. 3d 950, 952, 572 N.E.2d 430, 431 (1991). Here, plaintiff filed a motion *in limine* to preclude the introduction of the photographs of the vehicles. Plaintiff made no claim

for property damage, and the fact of the impact was uncontested. The question then became why the photographs were relevant, and thus admissible, at all.

¶ 14 During the evidence deposition of Dr. Templer, he indicated that he did not have the expertise to relate the damage depicted in the photographs to the various medical findings in plaintiff's neck, such as the overextension and flexion of plaintiff's neck, which allegedly caused plaintiff's chronic pain, the right disc protrusion of C3-4, with foraminal narrowing, the annular tear, and the loss of integrity to the disc space. Defendant had no other witness who could testify that the damage depicted in the photographs did not cause the various injuries testified to by Dr. Templer. The only evidence regarding the photographs was that they depicted the damage to the vehicles. While the court initially deferred a ruling on the admissibility of the photographs, plaintiff's motion *in limine* to bar their use was ultimately denied, and the photos were admitted.

¶ 15 When faced with cases involving rear-end collisions between two vehicles, courts often refer to *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 895 N.E.2d 1125 (2008), in resolving whether to admit photographs depicting damage to the vehicles involved in a collision. The court in *Fronabarger* declined to accept a rigid rule that photographs depicting damage to the vehicles were always admissible or that expert testimony was always necessary for such photographs to be admissible. See *Fronabarger*, 385 Ill. App. 3d at 564. Rather, according to the court, the critical question in admitting such photographs into evidence is whether the jury can properly relate the vehicular damage depicted in the photos to the injury, without the aid of an expert. *Fronabarger*, 385 Ill. App. 3d at 564-65. In reaching this decision, the court in *Fronabarger* declined to follow the earlier holding of *Baraniak v. Kurby*, 371 Ill. App. 3d 310, 862 N.E.2d 1152 (2007), which concluded that, absent expert testimony on the correlation between vehicular

damage and a plaintiff's injuries, photographs of the parties' damaged vehicles should be excluded.

¶ 16 Here, while the photographs may have been relevant to allow the jury to infer the relative speed of the vehicles, there was clearly no evidence at trial relating the damage depicted in the photographs as the proximate cause of plaintiff's overextension and flexion of his neck, the annular tear, the right disc protrusion at C3-4, or the loss of the integrity of plaintiff's disc space. Indeed, these kinds of injuries, as described by Dr. Templer, are not within the ken of the ordinary juror and require the testimony of an expert witness. Therefore, under the circumstances of this case, we believe the rule expressed in *Baraniak* is a better view than that adopted in *Fronabarger*. We reach this conclusion after noting that the cases relied upon in *Fronabarger* all involved evidence from expert witnesses on the very issue of the correlation between vehicular damage and a plaintiff's injuries. Even *Fronabarger* had an expert witness who opined that if a vehicle does not sustain any evidence of impact, it is therefore likely that the people in the vehicle are not going to have significant evidence of an impact. *Fronabarger*, 385 Ill. App. 3d at 563. That expert was proffered by the defendant to relate the lack of vehicular damage relative to the injuries claimed by the plaintiff. See also *Jackson v. Seib*, 372 Ill. App. 3d 1061, 866 N.E.2d 663 (2007) (expert relied on photographs of vehicles in order to reach an opinion regarding the nature and severity of the impact); *Ferro v. Griffiths*, 361 Ill. App. 3d 738, 836 N.E.2d 925 (2005) (photographs relevant because of expert testimony regarding the nature and extent of injury). Such is not the case here.

¶ 17 The facts in *Baraniak* are strikingly similar to those before us. In *Baraniak*, the plaintiff was stopped at a red light when the car she was driving was struck in the rear by a car being driven by the defendant. The plaintiff described the impact as "hard" and claimed that it caused

her head to strike the back of her headrest. As a result, the plaintiff immediately complained of a headache, pain in her neck, and lack of sensation in her hands. She went to the hospital and was treated and released. Six days later, she saw her personal physician, who diagnosed the plaintiff with a spinal cord injury and whiplash. The plaintiff sought medical treatment for over a year and amassed medical bills in excess of $50,000. The defense admitted liability, but challenged the nature and extent of the plaintiff's injuries. The defendant offered the testimony of an expert witness, who indicated that the plaintiff's injuries were resolved by the time she was discharged by her first neurosurgeon. The plaintiff offered the testimony of three of her treating physicians who related her medical treatment and injuries to the accident. The plaintiff argued that it was an abuse of discretion to allow defense counsel to use the photographs during closing argument to argue the lack of injury to the plaintiff, as no expert had related the damage illustrated by the photographs to the nature and extent of the plaintiff's injuries. The defendant argued that she was not using the photos to show a lack of damages, but was using the photos to argue which party was more "credible."

¶ 18 The *Baraniak* court held that to allow the use of photos to argue credibility would be an "end run around the relevancy rule, and photographs of damaged vehicles would always be admissible in trials of this nature on the grounds that credibility is always an issue. The effect of such a ruling would be to allow parties to accomplish indirectly what the courts have already determined is improper absent expert testimony, *i.e.*, to argue or even imply that there is a correlation between the extent of vehicular damage and the extent of a person's injuries caused by an accident." *Baraniak*, 371 Ill. App. 3d at 317-18. The *Baraniak* court recognized the rule set forth in *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 794 N.E.2d 875 (2003), that "no Illinois case stands for the proposition that photographs showing minimal damage to a vehicle are

automatically relevant and must be admitted to show the nature and extent of a plaintiff's injuries. There simply is no such bright-line rule that photographs depicting minimal damage to a post-collision vehicle are automatically admissible to prove the extent of a plaintiff's bodily injury or lack thereof." *DiCosola*, 342 Ill. App. 3d at 535. The court therefore reversed the judgment of the lower court and remanded for a new trial. Upon remand, the court held that, absent expert testimony on the correlation between the vehicular damage and plaintiff's injuries, the photographs of the parties' damaged vehicles shall be excluded. We believe this reasoning is sound in the case before us as well.

¶ 19 Here, the trial court, relying on *Fronabarger*, denied plaintiff's motion *in limine* to bar use of the photographs at trial. Defense counsel was allowed, over objection, to admit the photographs of the vehicles and then argue that there was a direct correlation between the amount of damage to the vehicles and plaintiff's damages. As previously noted, defense counsel presented no expert or medical evidence to support his argument. Instead, defense counsel waited until closing argument to present the photographs to the jury and argue that plaintiff could not have been injured to the extent claimed because the photos of the vehicles showed minimal damage. Closing argument is the opportunity for the lawyers to comment on the evidence introduced at trial. "Comments on the evidence during closing argument are proper if proven by direct evidence or if reasonably inferable from the facts." *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 396, 728 N.E.2d 797, 814 (2000). Here, defense counsel provided his own testimony regarding the relationship of the damage depicted in the photographs to plaintiff's injuries. Under the circumstances presented here, to allow defendant's counsel to make such an argument, wholly unsupported by any evidence, was an abuse of the trial court's discretion. We also conclude that the court erred at the outset in failing to grant plaintiff's motion

in limine with respect to the admissibility of the photographs for the purpose of attempting to relate plaintiff's injuries to the vehicular damage depicted in the photographs, without expert testimony to support such an inference. Plaintiff suffered cervical injuries that required the testimony of a physician expert. Without this expert testimony regarding a relationship between what was seen in the photos and the injuries suffered by plaintiff, the photographs were simply not relevant to any issues in the case, and irrelevant evidence is not admissible. *DiCosola*, 342 Ill. App. 3d at 533-35, 538.

¶ 20 In addition to this abuse of the court's discretion, we also believe the jury's verdict is against the manifest weight of the evidence. Dr. Templer testified that he was not able to correlate the vehicle damage and plaintiff's injury, as he was not qualified to make such an analysis, and not all of the facts that would be necessary to make the calculations were available. Dr. Templer did opine, however, that a low speed vehicular impact can cause the type of injuries plaintiff was suffering from and that plaintiff's injuries were related to the rear-end impact. Plaintiff's MRI was consistent with Dr. Templer's opinion, as was the testimony from both plaintiff and his girlfriend pertaining to plaintiff's injuries immediately after the accident. We therefore conclude that the jury's verdict in this instance was against the manifest weight of the evidence.

¶ 21 A verdict is against the manifest weight of the evidence when the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based on the evidence. *Ford*, 398 Ill. App. 3d at 651. Here, the court had found defendant negligent as a matter of law, but left the issue of causation and damages for the jury. A verdict in favor of plaintiff on the issues of causation and damages should have followed, given the testimony and medical evidence presented at trial. From the evidence, it is clear that the jury should have

concluded that defendant's negligence proximately caused plaintiff's injuries. We find it unreasonable that any jury, under the circumstances and the evidence presented, would not have at least awarded recovery for plaintiff's hospital expenses incurred immediately after the collision. We recognize that the jury can disbelieve any testimony, at any time, even when uncontradicted, but we conclude that, in this instance, the jury's findings are unreasonable and not based on the evidence presented at trial. We therefore reverse the judgment in favor of defendant.

¶ 22 Finally, we must address one other issue before remanding this cause back to the circuit court. Defendant filed a motion to strike plaintiff's appendix and all related argument pertaining to the appendix. That motion was ordered to be taken with the case. The appendix consists of two articles on the relationship between the damage to vehicles and injuries to the occupants of those vehicles. Neither article was submitted to the trial court as evidence in support of any argument asserted by plaintiff. Consequently, neither article is part of the record on appeal. Because the introduction of new evidence on appeal is improper, any evidence that was not presented to the trial court should not be considered on appeal and should be stricken. *People ex rel. Madigan v. Leavell*, 388 Ill. App. 3d 283, 287-88, 905 N.E.2d 849, 854 (2009). Defendant's motion to strike that portion of plaintiff's appendix and any argument in the brief referencing those articles is therefore granted.

¶ 23 For the foregoing reasons, we reverse the judgment entered by the circuit court of Marion County and remand this cause for further proceedings. Defendant's motion to strike, taken with the case, is hereby granted.

¶ 24 Reversed and remanded; motion to strike granted.

2017 IL App (5th) 160264

NO. 5-16-0264

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM KEVIN PEACH, Plaintiff-Appellant, v. LYNSEY E. MCGOVERN, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Marion County. No. 14-L-28 Honorable Kevin S. Parker, Judge, presiding.

Opinion Filed: December 12, 2017

Justices: Honorable Judy L. Cates, J.

Honorable Richard P. Goldenhersh, J., and
Honorable Melissa A. Chapman, J.,
Concur

Attorney for Appellant George R. Ripplinger, Ripplinger & Zimmer, LLC, 2215 West Main Street, Belleville, IL 62226-6692

Attorney for Appellee Edward L. Adelman, Goffstein, Raskas, Pomerantz, Kraus & Sherman, LLC, 7701 Clayton Road, St. Louis, MO 63117

07/26/2010 at 07:23 AM File# 300726-0000089 Claim#
Owner: PEACH,WILLIAM Estimator: Cory Thorsen
1985 NISS STANDARD 4X2 4-2.4L 2D SHORT Int:

LANDERS TOWING AND COLLISION CENTERS
2 Mills Cart Road
Salem, IL 62881
Business: (618)548-3309

IMAGE REPORT

07/20/2010: EST01:

07/20/2010: EST01:

07/20/2010: EST01: