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,
	) Cause No. 14-L-28
	)
LYNSEY E. McGOVERN,	) The Honorable Kevin S. Parker,
	) Judge Presiding
Defendant/Appellant.	)

REPLY BRIEF OF DEFENDANT/APPELLANT LYNSEY E. McGOVERN

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ARGUMENT

I. Trial Court Properly Found that Photos and Testimony Relating to Vehicle Damage was Relevant

In stark contrast to the jury's verdict in favor of Defendant, the foundation of Plaintiff's Response Brief is his view that this case is about "severely injured Plaintiffs receiving little or no compensation." (Appellee Brief, p. 14) Plaintiff seeks to disregard the jury's verdict and deprive the trial court of its discretion to admit what it found to be relevant evidence.

In his Response Brief, Plaintiff claims that the photos and evidence of vehicle damage was irrelevant to the issues in this case. According to Plaintiff, photos must always be introduced through expert testimony. Plaintiff contends that routine photos of vehicles in accidents constitute scientific evidence which must always be introduced through expert testimony and subjected to the *Frye* test.

In support of his argument, Plaintiff misses the mark in citing *Whiting v. Coultrip*, 324 Ill.App. 3d 161, 258 Ill. Dec. 111, 755 N.E.2d 494 (2001) and *Clemente v. Blumenberg*, 183 Misc. 2d 923, 705 N.Y.S.2d 792 (1999) a New York decision which held that "the use of repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact is not a generally accepted method in any relevant field of engineering." Plaintiff argues that the "correlation between vehicle damage and occupant injury" is a scientific question. According to Plaintiff, vehicle damage photos and perhaps even any evidence of damage at all cannot be admitted absent expert testimony.

Plaintiff utterly mischaracterizes the issue before this court. The question presented here is basic *relevance*, not the admission of scientific testimony. The trial court determined that the vehicle photos were "relevant." That is, they "tended to prove that a fact was more or less likely to be true." This case never featured an issue of expert opinion testimony based on vehicle photographs. Plaintiff ignores the true issue before this Court. The trial court found that based on all the evidence presented to the jury, the evidence of damage as reflected in the photos, was relevant for their consideration. Contrary to Plaintiff's argument, the vehicle photos alone were not used to "prove or disprove" an injury. The photos represented one factor, along with the other evidence in the case, that the jury should be entitled to consider.

Plaintiff cites *DiCosola v. Bowman,* 342 Ill. App. 3d 310, 794 N.E.2 875 (2003) and argues 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 extend of a plaintiff's injuries." But Defendant has not argued that photos "are automatically relevant" or "must be admitted." Plaintiff ignores *Ford* which leaves it to the trial court's discretion to determine whether photos should be admitted without expert testimony. The trial court determined that the photos were relevant in light of all the evidence which he oversaw during the trial. This included Plaintiff's version of the accident that Defendant crashed into him at 25-30 mph, so hard that he was pushed into the intersection; Defendant's version that her foot slipped off the brake and she rolled into Plaintiff's truck; evidence that Plaintiff initially sought medical treatment in the emergency room and followed up with Dr. Templer three months after the accident; evidence that Plaintiff incurred medical bills in excess of $21,000; and evidence that

Plaintiff complained of neck pain at the time of trial some six years later. The photos showed a bent license plate on Defendant's car and the damage to Plaintiff's bumper was not apparent on the photos. Plaintiff testified that his bumper was "bent." Based on his evaluation of the totality of the evidence, the trial court determined that the photos were relevant and could be considered by the jury.

Plaintiff seeks to simply ignore established Illinois law that a photograph is admissible if it has "any tendency to make the existence of any fact … more probable or less probable than it would be without the evidence." Plaintiff's argument would eliminate the trial court's discretion in matters relating to vehicle damage. Illinois courts have long held that the trial court has discretion to admit photos without expert testimony where the trial court finds that the photos are relevant. When a trial court decides whether to admit vehicle damage photos, it has to determine whether the photo has any tendency to make the resulting injury to the plaintiff more or less probable. Plaintiff fails to include in his Brief any discussion whatsoever or to distinguish the 2010 decision by the Fifth Circuit in *Ford v. Grizzle*, 398 Ill. App. 3d 639, 338 Ill. Dec. 325, 924 N.E.2d 531 (2010).

Plaintiff contends that "common sense" has no place in the analysis of whether to admit photos of the vehicles involved in the accident. But Plaintiff attacks the "common sense" argument by referencing medical publications that were never presented to the trial court. Under the facts as presented to the trial court, photographs showing minimal damage, together with the parties' testimony, could easily have caused the jury to believe that plaintiff was not injured as seriously as he contended. Defendant should be entitled

to defend the case against her and to impeach Plaintiff's testimony with any relevant evidence, including photographs.

People v. New, 386 Ill. Dec. 643, 21 N.E.3d 406 (2014) cited at page 14 of Plaintiff/Appellee's Brief is not applicable since that case involved a novel legal theory of mental illness, which the court found must have scientific evidence to support. *People v. New* has no bearing on the issue of admission of post-accident vehicle photos.

According to Plaintiff's position here, every motor vehicle accident case in Illinois would require retaining an expert if the defendant wants to submit photos or even describe the vehicle damage sustained in the accident.

II. The Appellate Court applied an Incorrect Standard to Reverse the Jury's Verdict where the Jury's Verdict was Supported by the Evidence

Plaintiff does not appear to oppose Defendant's argument that the Appellate Court used the wrong standard to essentially enter a judgment in favor of Plaintiff. Rather, Plaintiff argues that even if the Appellate Court used the wrong standard, the Appellate Court's decision was correct because the evidence supported judgment in favor of Plaintiff as a matter of law. That is, Plaintiff argues that "the evidence, when viewed in its aspect most favorable to the defendant, so overwhelmingly favors plaintiff that no contrary verdict based on that evidence could ever stand." (Appellee's Brief, p.25) However, in reaching this conclusion, Plaintiff would of course exclude testimony about speed and force of impact and the extent of damage to the vehicles and the photographs, all as irrelevant. Plaintiff claims that whether or not the defendant's speed on impact was 5 m.p.h. or 30 m.p.h. is irrelevant to any issue in the case. But Plaintiff's argument fails to acknowledge the fundamental right of a jury to decide the credibility of witnesses and

the right of a jury to decline to accept injury claims when they are based largely upon plaintiff's subjective complaints.

Plaintiff devotes a substantial portion of his Brief to setting out the direct testimony of Dr. Templer. However, Plaintiff ignores Defendant's cross examination of Dr. Templer where the doctor equivocates. Dr. Templer's testimony on cross examination was that the multiple abnormalities identified in his final diagnosis "could have been caused by the accident and they might not have been caused by the accident." Plaintiff may not like his doctor's testimony, but he cannot escape it.

At its core, Plaintiff essentially argues that Defendant should have been precluded from offering any evidence as to how the accident happened. Once we know there is an impact and the plaintiff claims injuries, plaintiff is entitled to recover. In such a scenario, a verdict against the plaintiff could never stand. According to Plaintiff, once the fact of an accident is established, plaintiff is entitled to recover damages in some amount - at least the amount of the emergency room bills. According to Plaintiff, there must always be a damages award whenever vehicles make contact. Under Plaintiff's analysis, the jury was not entitled to *disbelieve* Plaintiff or his doctor. According to Plaintiff, any impact between vehicles removes the issue of proximate cause from the jury's consideration.

Finally, Plaintiff wants to frame the facts as involving virtually no disputes. In fact there was a significant dispute as to whether Plaintiff sustained an injury. Plaintiff claims and the Appellate Court agreed, that damages are presumed when there is an impact. Plaintiff claims that whether or not the speed on impact was 5 mph or 30 mph is irrelevant "because speed on impact is only one of many variables that determine extent

of injury," citing a medical journal article. But that argument proves *why* the speed on impact *is* relevant. Speed is one of many variables that the jury should be permitted to consider. Defendant is not arguing that a plaintiff can never sustain an injury from a low speed impact; rather, Defendant submits that the jury should hear all the evidence and make a common sense conclusion from all the evidence. Contrary to Plaintiff's argument, jurors are generally able to use their general knowledge, common experience, and common sense in reaching a verdict. *People v. Beard*, 356 Ill. App. 3d 236, 242, 825 N.E.2d 353, 359, 292 Ill. Dec. 97 (2005). The jury can be asked to use its common sense in looking at evidence. *People v. Dat Tan Ngo,* 388 Ill. App. 3d 1048, 1055, 904 N.E.2d 98, 105, 328 Ill Dec. 336, 343 (2008).

III. Plaintiff is not Entitled to a New Trial Because the Jury's Verdict was in fact Supported by the Evidence

Plaintiff argues that if he is not entitled to a new trial on damages only, then he is entitled to a new trial on all issues and that if a new trial is required, Defendant should be barred from using photographs, barred from using any testimony regarding speed on impact, barred from using evidence of vehicle damage and barred from asking the doctor to speculate on other causes of injury. Plaintiff simply argues that if the facts do not justify the appellate court's decision below (new trial on damages only) then the jury's verdict was clearly not supported by the admissible evidence and Plaintiff was clearly denied a fair trial. Plaintiff's argument appears to be, that if plaintiff claims he is injured and a doctor testifies that the plaintiff was injured, that is the end of discussion. The jury

must believe the treating doctor and the jury *must* believe the plaintiff. Defendant cannot challenge the credibility of the doctor or the plaintiff with any other evidence.

The Appellate Court decision gave lip service to the proposition that "the jury can disbelieve any testimony, at any time, even when uncontradicted." But its decision reversing the jury verdict belies that proposition. Plaintiff's argument appears to be on all fours with the prediction offered by Defendant: If Plaintiff's argument is accepted, causation and damages are to be presumed by virtue of every motor vehicle accident no matter how minor. The sole issue for the jury is not whether plaintiff sustained damages, but how much damage was sustained.

IV. Plaintiff's Request for Cross Relief Should be Denied

In his request for "cross relief" Plaintiff contends that the Appellate Court erred in striking two scientific research articles that Plaintiff had attached to its Brief in the Appellate Court but had not submitted to the trial court. Plaintiff doubles down and attaches to his Brief filed in this Court not only the two articles that were stricken by the Appellate Court, but two *additional* scientific articles. Defendant has filed a Motion to Strike all four scientific articles and any reference to those articles contained in the argument portion of Plaintiff/Appellee's Brief.

The Appellate Court correctly noted that "neither article is part of the record on appeal" and held that 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. *Peach* citing *People ex rel. Madigan v. Leavell*, 388 Ill.App.3d 283, 2897-288, 905 N.E.2d 849, 329 Ill. Dec. 11 (2009).

There is abundant authority for the proposition that articles from scientific journals that were not presented to the trial court should not be considered on appeal. Evidence which is not part of the formal record on appeal should not to be considered by a reviewing court. *People v. Bosley,* 197 Ill.App.3d 215, 223, 553 N.E.2d 1187, 1193, 143 Ill. Dec. 201 (1990). Similarly stated, attachments to briefs on appeal, not otherwise before the reviewing court, cannot be used to supplement the record. *People v. Blanchette,* 182 Ill.App.3d 396, 397-98, 538 N.E.2d 237, 238, 131 Ill. Dec. 49 (1989). This is precisely what Plaintiff seeks to do. While Plaintiff seeks to characterize the scientific articles as something other than "evidence," Plaintiff is flat wrong. Plaintiff is indeed attempting to interject expert testimony into the record. There is no doubt that Plaintiff is requesting this Court to consider substantive evidence which was never presented to the trial judge. See also, *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32, 618 N.E.2d 1168, 188 Ill. Dec. 598 (1993) (citations to such studies on appeal constituted "an attempt to interject expert-opinion evidence into the record" that was neither subject to cross-examination by the State nor considered by the trial court.)

The purpose of appellate review is to evaluate the record presented in the trial court, and review must be confined to what appears in the record. *People v. Majer,* 131 Ill.App.3d 80, 83, 475 N.E.2d 269, 271, 86 Ill. Dec. 272 (1985). The appellate courts should consider only that which appears in the record on appeal. See, *Ashland Savings & Loan Association v. Aetna Insurance Co.*, 18 Ill.App.3d 70, 309 N.E.2d 293, 299 (1974); *People v. Gacho,* 122 Ill.2d 221, 254, 522 N.E.2d 1146, 1162, 119 Ill. Dec. 287 (1988); *People v. Heaton*, 266 Ill. App. 3d 469, 477, 640 N.E.2d 630, 203 Ill. Dec. 710 (1994).

People v. Schaap, 274 Ill. App. 3d 497, 501, 654 N.E.2d 1084, 1086, 211 Ill. Dec. 274, 276 (1995) cited in Plaintiff/Appellee's Brief is distinguishable. In that case involving a proceeding for involuntary administration of psychotropic medication, the Appellate Court found that since there was no evidence of the wishes of the defendant while competent presented in the trial court, the Court would consider "secondary authority" found in medical treatises as support for an objective standard of reasonableness. Moreover, the single case cited in *Schaap* for the proposition that the appellate court can consider "secondary authority" was *SK Handtool Corp. v. Dresser Industries, Inc.* 246 Ill. App. 3d 979, 986, 189 Ill. Dec. 233, 619 N.E.2d 1282 (1993) which involved the appellate court's consideration of federal law and ABA rules, not scientific literature. *Dresser* does not support the proposition that scientific journal articles which were not admitted or even referenced at trial can be submitted for the first time to the Illinois Supreme Court for consideration.

There is no doubt that Plaintiff seeks to offer these articles as evidence to support his argument that there is no correlation between vehicle damage and bodily injury, which goes far beyond the arguments presented to the trial court. The Appellate Court below correctly refused to consider the articles offered by Plaintiff and this Court should do the same.

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.

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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 341(a) and (b). The length of this Brief is 10 pages.

/s/ Lori R. Koch

PROOF OF SERVICE

The undersigned certifies that on or before 5:00 p.m. on the 27th day of July, 2018, she caused the foregoing Appellant's Reply 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 and counsel for Illinois Association of Defense Trial Counsel at mmorrissey@reedarmstrong.com and counsel for Illinois Association of Defense Trial Counsel at home.law-dorn@statefarm.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/ Lori R. Koch