APPEAL NO. ED106216

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DENISE KAPPEL and WILLIAM KAPPEL,

Plaintiffs-Appellants,

v.

FREDRIC PRATER,

Defendant-Respondent.

Appeal from the Circuit Court of the City of St. Louis, Missouri

Cause No. 1422-CC00747

The 22nd Judicial Circuit, Division 2

The Honorable David L. Dowd

APPELLANTS' BRIEF

GRAY, RITTER & GRAHAM, P.C.
Patrick J. Hagerty #32991
phagerty@grgpc.com
701 Market Street, Suite 800
St. Louis, MO 63101
314 241-5620 Office
314 241-4140 Fax

Counsel for Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

This appeal arises out of a trial in the Circuit Court of the City of St. Louis, which arose over a motor vehicle collision that occurred therein. The jury awarded $20,000 to the plaintiffs, and the plaintiffs appeal. Jurisdiction over this appeal lies in this Court because the Circuit Court of St. Louis City is within the boundaries of this Court, and none of the bases for jurisdiction of the Supreme Court under Article V, Section 3 of the Missouri Constitution are presented in this case.

STATEMENT OF FACTS

The operative Petition in this case was filed on December 17, 2014. (D3). Plaintiff Denise Kappel alleged a cause of action against defendant Fredric Prater over a car crash occurring in the City of St. Louis on May 8, 2009. (D3). William Kappel joined as plaintiff for his loss of consortium. (D3). The case was tried to a jury, which returned a verdict in favor of Dense Kappel in the amount of $20,000. (D8; A1). The trial court entered judgment thereon on November 3, 2017. (D9; D10; A1-2).

Plaintiffs filed a Motion for New Trial on Damages and Alternative Motion for Additur (D11), and this was denied on December 14, 2017. (D14; A3).

This timely appeal followed.

A. The Collision

On May 8, 2009, Denise Kappel was driving on Manchester Road in the City of St. Louis when she came to a stop, waiting to make a left turn. (Tr. 121-22). She looked in her rearview mirror and saw headlights coming on fast. She gripped the steering wheel and held on as the following car hit her rental car in the rear. (Tr. 122-23). The impact knocked her car into the opposing lane at an angle, and her body twisted as the seatbelt pulled hard against her left shoulder. (Tr. 123).

Kappel estimated the other driver's speed at 35 mph. (Tr. 124). When she and the other driver pulled into a nearby parking lot, the hitting driver, Fredric Prater, told Denise that he didn't see her and that he was arguing with his wife. (Tr. 125). Denise went into the restaurant where her business partners were located but didn't stay because of the pain she was in. (Tr. 125). She cut her business trip short and returned the next day to her hometown

of Chicago. (Tr. 126-27).

B. Medical Treatment Resulting from Collision

Denise went straight to the emergency room upon landing in Chicago. (Tr. 128). She had follow-up care over the next several years with Dr. Mohammed Alawad. (Tr. 129). Dr. Alawad testified by video deposition at trial that Denise had sustained injuries to her shoulder and her back as a result of the car crash. (Tr. 74; Ex. 47A, p. 11). Further, the physical therapy, diagnostic studies, and referrals made by Dr. Alawad were necessitated by these very shoulder and back problems. (*Id.*).

Both the back and the left shoulder injuries were present since the accident, however, Denise had actually put off definitive treatment for those conditions despite ongoing pain. She did have considerable physical therapy in the intervening years. (Tr. 130). Much of her therapy was done at home, including medication, exercise pulleys and cervical stimulation machines. (Tr. 132-33).

She first went to see a shoulder specialist, Dr. Brian Cole, on October 30, 2014. (Tr. 141). Dr. Cole administered cortisone injections and ordered physical therapy. (Tr. 142). When these failed to provide relief, he took Denise to surgery for her left shoulder. (Tr. 143-44). Despite the surgery, Denise continued to see Dr. Cole and received injections and more therapy for her shoulder. (Tr. 149).

Dr. Cole testified by video deposition at trial that Denise's injury, adhesive capsulitis of the shoulder, and the follow up treatment and surgery, were related to the May 8, 2009 collision. (Tr. 113-14; Ex. 48A, p. 6).

Dr. Randall Otto testified at trial on plaintiffs' behalf. He is an orthopedic surgeon

with special training in shoulder and elbow surgery. (Tr. 82-84). He testified that the crash led to Denise developing shoulder problems, and to her surgery for adhesive capsulitis. (Tr. 93-95). He explained that the time interval between the initial trauma and Ms. Kappel's eventual shoulder surgery, which was about five years, did not undermine his opinion on medical causation. (Tr. 97). In fact, many patients with similar injuries try to manage them on their own until the condition becomes something only a surgeon can fix. (Tr. 97-99).

As to Denise's low back injury, this also resulted in numerous steroid injections and physical therapy. She continued to treat for her back troubles up to the time of trial, and she explained that her back pain limits her ability to lift, to drive, to travel, and to be a caregiver for her grandchildren. (Tr. 151-52).

Dr. Kathleen Weber testified by video deposition regarding the substantial treatment she'd provided for Denise Kappel's back injury. She testified that the treatment administered was related to the May 8, 2009 collision. (Tr. 112; Ex. 49A, p. 9).

Plaintiffs introduced exhibits summarizing the medical treatment over the several years as well as the medical charges. Exhibit 1, admitted at page 183 of the Transcript, showed 131 total healthcare visits. Exhibit 2A, admitted at page 183, reflected total medical expenses billed as $104,846.37.

Defendant Prater had a Rule 60.01 physician, Dr. Richard Rende, testify by deposition. (Tr. 248; Ex. X). He admitted that Denise Kappel sustained injury to her lower back (Ex. X, p. 12). Further, it was his opinion that the injuries from the collision would have resolved within 8 to 12 weeks. (Ex. X, p. 14). However, he denied that the shoulder surgery was related to the collision. (Ex. X, p. 12).

C. Photographs of the Kappel Vehicle

The central issue in this appeal centers on the trial court's admission, over plaintiffs' objection, of photographs purporting to show damage to the Kia, a rental car Denise Kappel was driving. Some context is important.

The day after the accident, Denise returned the vehicle to Enterprise Rental Car and advised she was in a collision. (Tr. 126-27). The Enterprise representative advised her that the company was already aware of the incident due to its association with a representative of the defendant. (Tr. 127). No paperwork was needed, Denise had no opportunity to photograph the vehicle, and the day after the crash was the last time she saw it. (Tr. 126-27).

When suit was filed in this case, plaintiffs served on defendant a request for all photographs of either vehicle. (D7, p. 11). At that time defendant responded that he had photographs of his own vehicle, but none of the rental Kia. (D10-12). Two years later, however, in October 2016 – over seven (7) years after the crash – Prater advised that he actually did have Xerox copies of the Kia the plaintiff was driving. (D7, p. 13-27).

Further, defendant's counsel admitted at trial that these were in counsel's possession all along:

> Ms. Herold: They would have been in my file the entire time, I just didn't realize that they were there and as soon as I discovered them I produced them and identified them. (Tr. 15).

Plaintiff moved *in limine* to exclude all photographs at trial from evidence. (D7, p. 1). Plaintiffs argued not only that the late disclosure severely prejudiced plaintiffs' ability to prepare their case, but that the photographs were poor quality, incomplete and

misleading. Further, any probative value was outweighed by prejudice and confusion. (D7, p. 1; Tr. 10-11).

The trial court overruled plaintiffs' motion *in limine* and indicated it would admit both the photographs of the Kia and Prater's vehicle. (Tr. 14). In an attempt to lessen the prejudice to Kappel, the court stated:

> However, Mr. Hagerty (counsel for plaintiffs) will be able to make an explanatory statement to the jury as to – without any inflammatory comments – about this evidence was hidden from us or anything along those lines, sort of an explanatory statement as to why the jury is looking at poor quality pictures. (Tr. 14).

In defendant's opening statement, counsel advised the jury that it would "see photographs in this case that will show you that the damage to Dr. Prater's car was minimal, as was the damage to Mrs. Kappel's car." (Tr. 41). The photographs were then brought up during direct examination of Prater, and plaintiff received a continuing objection to their use. (Tr. 202). The exhibits specific to the Kia were defendant's Exhibits F1-F4, (Tr. 211-13), and plaintiffs' objection again was continuing as to these. They were admitted into evidence over plaintiffs' objection at the conclusion of defendant's case. (Tr. 246-47).

In closing argument, counsel for defendant again emphasized the photographs were reflective of a "minimal" collision. First, defendant's counsel stated:

> If all you had to go on was her story versus their story, it might be difficult. It might be difficult to decide his version of what happened is the most accurate. But the thing is, that's not all you have to go on. There's objective evidence that tells you something about this incident. You've seen the photographs. The photographs of Rick Prater's car show the front of it and the very minor damage to it. The photographs that show the rear of the Kia that Denise Kappel was driving, granted not

> great quality, they do tell you something. And but both sets of photos tell you is that the accident described by Denise Kappel doesn't jive with the accident shown by the photographs. (Tr. 274-75).

Counsel returned to this theme a short time later:

> Not denying this accident happened. What we are saying is that it was not a very hard impact. And again, we are not just saying it. This isn't just based on Rick's testimony, or Karen's testimony, but also on the objective evidence that you have seen in this case. The photographs don't have a dog in this fight. The police officer doesn't have a dog in this fight. What they both point to is a relatively minor impact. It's unfortunate that it happened, no question about that, but this car accident didn't cause the damage that plaintiffs are claiming here. (Tr. 276).

Finally, counsel concluded her closing argument by again highlighting the photographs for the jury:

> When you walk back up to the jury room, you aren't supposed to check your common sense at the door, you get to use it in determining the outcome in this case. So ask yourselves, which of the two accidents you heard described in this case aligns with the objective evidence that you have seen and heard? There was an accident 8 1/2 years ago. This is what both of the cars look like afterwards. What does your common sense tell you? (Tr. 290).

After deliberations, despite the expensive, extensive medical treatment described above, the jury returned a verdict of only $20,000. (D8, p. 1; A1).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ADMITTING EXHIBITS F1-F4, THE KIA PHOTOGRAPHS, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON DAMAGES, IN THAT THE PHOTOGRAPHS WERE DISTORTED, ILLEGIBLE AND LACKED A FOUNDATION, WERE IRRELEVANT TO ANY ISSUE IN THE CASE, AND THUS INADMISSIBLE, OR THEIR RELEVANCE WAS OUTWEIGHED BY PREJUDICE, CONFUSION AND MISLEADING OF THE JURY.

Curl v. BNSF Railway Co., 526 S.W.3d 215 (Mo. App. W.D. 2017)

Howard v. City of Kansas City, 332 S.W.3d 772 (Mo. banc 2011)

DiCosola v. Bowman, 342 Ill. App. 3d 530, 794 N.E.2d 875 (Ill. App. 1st Dist. 2003)

Jordan v. Abernathy, 845 S.W.2d 86 (Mo. App. E.D. 1993)

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EXHIBITS F1-F4, THE KIA PHOTOGRAPHS, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON DAMAGES, IN THAT THE PHOTOGRAPHS WERE DISTORTED, ILLEGIBLE AND LACKED A FOUNDATION, WERE IRRELEVANT TO ANY ISSUE IN THE CASE, AND THUS INADMISSIBLE, OR THEIR RELEVANCE WAS OUTWEIGHED BY PREJUDICE, CONFUSION AND MISLEADING OF THE JURY.

A. Standard of Review

The standard of review for a trial court decision on admission by evidence is abuse of discretion. "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Curl v. BNSF Railway Co.*, 526 S.W.3d 215, 225-26 (Mo. App. W.D. 2017); *Howard v. City of Kansas City*, 332 S.W.3d 772, 785-86 (Mo. banc 2011).

B. The Error was Preserved for Review.

Plaintiffs preserved the error alleged above throughout the case. Plaintiffs filed a Motion *in Limine* on the point (D7, p. 1-3), which was denied after oral argument at trial. (D7, p. 3; Tr. 9-15). Objection was raised at the time defendant Prater began to discuss the photographs (Tr. 210), and when they were admitted in evidence. (Tr. 247). Error in admission of the photographs was raised in the Kappels' Motion for New Trial. (D11, points 3-8).

C. Abuse of Discretion in this Case

Kappel suggests that the operative phrase of the standard of review for this case is "the logic of the circumstances." The circumstances were these: Kappel was in a rental car owned by a large rental agency that assured her that, because the defendant's own representatives had already notified the company of the collision, there was no need for her to submit any paperwork. In pain and a plane ride from home, she left St. Louis and never saw the vehicle again.

Once suit was brought, she properly sought production of any photographs that defendant had. Under oath, Prater denied having any photographs of the Kia. (D7, p.10-12). Two years later, defendant produced photographs of the Kia of abysmal quality. (D7, p.13-27). This was long after plaintiffs could have obtained better quality photographs had they known such had been taken. Further, it was impossible to obtain any documents or repair records that might have shown damage to the undercarriage in this rear-end collision. Prater himself admitted there wasn't a single photograph that showed the full back end with any clarity. (Tr. 228).

At trial, counsel for Prater candidly admitted the photographs had been in her possession from the moment she received the file. (Tr. 15). No doubt her client's insurance company had them long before then.

The logic of the circumstances should have compelled the trial court to exclude the Kia photographs to keep the playing field at least somewhat level. Instead, the trial court decided it would admit the photographs but would allow Kappel's attorney to "make an explanatory statement to the jury as to – without any inflammatory comments – about this

evidence was hidden from us or anything along those lines, sort of an explanatory statement as to why the jury is looking at poor quality pictures." (Tr. 14).

Faced with this decision, counsel for Kappel announced just as Prater was about to refer to the Kia photographs:

> Your Honor, I would like the record to reflect and advise the jury that at the time plaintiffs first requested photographs of the Kia their existence by the defendant was denied. We are not suggesting willful withholding of photographs, however, two years later, last year, about 18 black-and-white photographs were produced by defendant which had been in their possession when the first answer of no photos was given. I would also like to ask the record to reflect the photographs that would be used with Dr. Prater of the Kia are actually enhanced from the black-and-white small grainy the pictures that were given to us. (Tr. 210).

Then during the cross-examination of Prater, counsel walked a tightrope to avoid mentioning insurance and had this exchange:

> Q. And finally Dr. Prater, we talked a little bit about the photographs of your vehicle which you had from a long time before and then the photos you were shown of the Kia were actually enhanced to make them larger and to show particular areas of the vehicle itself, would you agree?
>
> A. Yes.
>
> Q. Okay and with regard to Denise's vehicle she was driving and the damage to the trunk where the items were, did Ms. Herold show you any pictures of a cross view of what the trunk looked like?
>
> A. No.
>
> Q. And the photographs that you had of the Kia, you and your representatives had of the Kia at the time we first asked for them were -- they were there, right? (Tr. 225).
> . . . .

Q. Dr. Prater, at the time we first asked for photographs from your side, their existence was denied, wasn't it?

A. I don't know – Their existence was denied, I guess.

Q. And then two years later, would you agree with me, that these are the pictures that were produced of the Kia?

A. Yes.

Q. That's her Kia, right?

A. Yes.

Q. Supposedly. Do you know what that is on the right side? Do you have any idea?

A. No, you can't tell from the photograph.

Q. And you wouldn't expect us to have any idea what it is either, would you?

A. Not the close-up.

Q. Okay. And again, any idea of what we're looking at there?

A. It looks like it could be a trunk, but I'm not sure. (Tr. 226-27).

. . . .

Q. And we've looked at a number of them, Dr. Prater, and I'll get to the last one and just ask the rounding up question here, do you see any that show an even close to clear view of the full back end of the Kia that you ran into in May of 2009?

A. I don't see a full back view. (Tr. 228).

While Prater's own testimony reveals how unclear the photos are, the trial court's remedy here was no remedy at all. The jury could have easily disregarded what plaintiffs'

counsel "announced;" it could have considered it akin to an opening statement, which Instruction No. 1 (MAI 2.01) instructs jurors is not evidence. (D8, p.3).

Moreover, the questioning of Prater on this issue clearly fell flat. Neither he nor plaintiffs' counsel could talk about what his insurance company had in its files.

Despite the broad discretion accorded trial judges ruling on evidence, in this case the Kappels submit the trial court committed prejudicial error in allowing such inadmissible evidence.

D. The Kia Photographs were Irrelevant; or any Slight Relevance was Outweighed by Prejudice and Confusion.

Photographs are only admissible if they fairly and accurately represent what they purport to depict. *State v. Sperling*, 353 S.W.3d 381, 383 (Mo. App. S.D. 2011). "Photographic evidence must be practical, instructive and calculated to assist both the jury and the court in understanding the case." *Jordan v. Abernathy*, 845 S.W.2d 86, 88 (Mo. App. E.D. 1993). Photographs should be excluded where they are irrelevant or immaterial. *Gignoux v. St. Louis Public Service Co.*, 180 S.W.2d 784, 786 (Mo. App. 1944). Finally, if the probative value of photographs is substantially outweighed by their tendency to confuse or mislead the jury, they should not be admitted into evidence.

Here, neither the circumstances of the photographs' production nor what they depict was "fair." Only one side to this case had access to them and the opportunity to get better ones. The photographs barely depict anything, as F1-F4 in the Appendix show. (A14-17). It is virtually inconceivable that in a rear-end collision a defending party could introduce such incomplete photographs of such poor quality. It is not enough that a person says magic

words like "fair and accurate" when the logic of the circumstances plainly shows the exhibits have no place in the courtroom.

Second, the photographs were not "practical, instructive, and calculated" to facilitate understanding the case. *Jordan*, 845 S.W.2d at 88. They were not instructive of anything. What the defense intended, and what it achieved, was some bare foothold on an argument that this must have been the proverbial "fender-bender." Counsel for defendant mentioned the minimal damage/ minimal impact position in opening statement and several times in closing argument, yet no witness testified that such an impact couldn't cause the injuries Denise Kappel sustained. There was obviously no claim for property damage to a rental car. This was simply a means to let the jury use its imagination to conclude – without evidence – that Kappel was exaggerating her injuries because damage to the vehicle was so minor.

Few if any cases in Missouri address the issue of admission of vehicle damage photographs to correlate what they show to the extent of the plaintiffs' injuries. However, Illinois courts have addressed this issue. In *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 794 N.E.2d 875, 871 (Ill. App. 1st Dist. 2003), the court held that, without expert testimony, defendant was not entitled to admit photographs showing minimal damage in order to then assert a "commonsense inference" that plaintiff's claims were not credible. The Illinois court looked for guidance to *Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001) in which the Delaware Supreme Court stated that "any inference by the jury that minimal damage to plaintiff's car translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation."

In this case, of course, defendant latched on to this "common sense inference" and drew the jury's attention to the photographs several times. In closing argument Prater's counsel told the jury that "[t]he photographs don't have a dog in this fight" (Tr. 276); that the accident described by Denise Kappel "doesn't jive (sic: "jibe") with the accident shown by the photographs" (Tr. 275); and that the jury should use its "common sense" in viewing the "objective evidence" of the photographs. (Tr. 290).

This extended discussion of this point is precisely because the standard of review is abuse of discretion. This Court's analysis would be entirely different had the photographs been properly and timely disclosed, been of a reasonable clarity and quality, and if the defendant had even some evidence that vehicle damage relates to causation of any of the injuries Denise sustained. The facts of this case show, however, that Prater was rewarded for keeping the evidence from the Kappels, was able to admit evidence several orders of magnitude below the "best evidence," and then had free rein to argue – without any evidence – that these photographs disproved Denise Kappel's injuries.

Reversal is required with a new trial on damages only.

CONCLUSION

The photographs were irrelevant and immaterial and should have been excluded. Any slight relevance they may have had was dwarfed by their tendency to mislead and confuse the jury. Their admission prejudiced the plaintiffs' case.

Here, it is obvious that the full extent of Denise's injuries developed over time. In fact, more than five years passed between the time of the accident and the date of her shoulder surgery. (Pltf. Ex. 48A, p.7-8). This was a hurdle plaintiff had to overcome.

Yet the trial court's ruling on the photographs made plaintiffs' job far harder than it should have been. Admission of the photographs rewarded the defendants for keeping them from plaintiffs – negligently or otherwise – and allowed defendant to argue virtually anything about what the photographs showed. Again, this was without any evidence that a serious shoulder or back injury could not result from the kind of impact caused entirely by Prater.

Respectfully, Appellants request this Court's Order of reversal, and an Order for a new trial on damages.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Patrick J. Hagerty

Patrick J. Hagerty #32991
phagerty@grgpc.com
701 Market Street, Suite 800
St. Louis, MO 63101
314-241-5620 Office

ATTORNEY FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE

The undersigned certifies Appellants' Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure and Local Rule 360 of this Court. This Brief was prepared in Microsoft Word and contains approximately 4,418 words (exclusive of the cover, table of contents, table of authorities, certificate of service, certificate of compliance, signature block and appendix). The font is Times New Roman 13-point type.

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Patrick J. Hagerty

Patrick J. Hagerty #32991
phagerty@grgpc.com
701 Market Street, Suite 800
St. Louis, MO 63101
314-241-5620 Office

ATTORNEY FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, the foregoing Appellants' Brief was electronically filed with the Clerk of Court using the Missouri eFiling System, to be served by operation of the Court's electronic filing system upon the following counsel of record:

Jeffrey K. Suess #35336
jsuess@rssclaw.com
Susan M. Herold #44497
sherold@rssclaw.com
Jennifer L. Woulfe #64252
jwoulfe@rssclaw.com
RYNEARSON, SUESS
SCHNURBUSCH & CHAMPION, LLC
500 N. Broadway, Suite 1550
St. Louis, MO 63102

ATTORNEYS FOR DEFENDANT-RESPONDENT

/s/ Patrick J. Hagerty
Patrick J. Hagerty #32991