

NO. SC98010

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**IN THE  
SUPREME COURT OF MISSOURI**

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**DENISE KAPPEL and WILLIAM KAPPEL**

Plaintiffs-Appellants,

v.

**FREDRIC PRATER**

Defendant-Respondent.

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APPEAL FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT  
AND THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI  
TWENTY-SECOND JUDICIAL CIRCUIT  
THE HONORABLE DAVID L. DOWD

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... 3**

**STATEMENT OF FACTS ..... 5**

**ARGUMENT ..... 7**

**I. THE TRIAL COURT DID NOT ERR IN ADMITTING THE PHOTOS OF APPELLANTS’ VEHICLE OR IN DENYING APPELLANTS’ MOTION FOR A NEW TRIAL ON DAMAGES IN THAT THE PHOTOS WERE AUTHENTIC, RELEVANT, AND ADMISSIBLE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, AND EVEN IF IT DID, THEIR ADMISSION WAS AT WORST HARMLESS ERROR AND NOT OUTCOME DETERMINATIVE..... 7**

**A. STANDARD OF REVIEW..... 7**

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE PHOTOGRAPHS OF THE PLAINTIFFS’ VEHICLE..... 7**

*i. Missouri’s standard for admitting photographs. .... 8*

*ii. The issue of the photographs’ authenticity is not properly before this Court, but the requirement is in any case satisfied. .... 9*

*iii. The photographs were relevant and admissible. .... 12*

*iv. It was not an abuse of discretion to admit the photographs. .... 17*

*v. Even if there was an abuse of discretion, it was not outcome determinative. . 23*

**CONCLUSION ..... 29**

**TABLE OF AUTHORITIES**

**Cases**

*Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373 (Mo. App. E.D. 2018)..... 21

*Bowolak v. Mercy East Communities*, 452 S.W.3d 688 (Mo. App. E.D. 2014)..... 21, 26

*Curl v. BNSF Railway Co.*, 526 S.W.3d 215 (Mo. App. W.D. 2017)..... 7, 18, 24

*DiCosola v. Bowman*, 342 Ill. App. 3d 530, 794 N.E.2d 875  
 (Ill. App. 1<sup>st</sup> Dist. 2003)..... 12, 13

*Eisenmann v. Podhorn*, 528 S.W.3d 22 (Mo. App. E.D. 2017) ..... 27

*Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. banc 2011) ..... 7, 19, 21

*Jackson v. Mills*, 142 S.W.3d 237 (Mo. App. W.D. 2004) ..... 9

*Jordan v. Abernathy*, 843 S.W.d 86 (Mo. App. E.D. 1993)..... 9, 12

*Kearbey v. Wichita Se. Kan.*, 240 S.W.3d 175 (Mo. App. W.D. 2007)..... 26

*Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83 (Mo. 1985) (en banc)..... 8

*Mason v. Lynch*, 878 A.2d 588 (Md. Ct. App. 2005)..... 23

*Peach v. McGovern*, 2019 IL 123156 (Il. 2019)..... 20, 21, 23, 27

*Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235  
 (Mo. App. W.D. 2016)..... 7, 18, 19, 22

*Rust & Martin, Inc. v. Ashby*, 671 S.W.2d 4 (Mo. App. S.D. 1984)..... 9

*State v. Brown*, 337 S.W.3d 12 (Mo. banc 2011)..... 16

*State v. Cannady*, 389 S.W.3d 306 (Mo. App. S.D. 2013)..... 8

*State v. Clay*, 225 S.W.3d 462 (Mo. App. W.D. 2007)..... 9

*State v. Clemmons*, 753 S.W.2d 901 (Mo. 1988) ..... 9

*State v. Ervin*, 835 S.W.2d 905 (Mo. 1992) ..... 9

*State v. Evans*, 455 S.W.3d 452 (Mo. App. E.D. 2014) ..... 24

*State v. Hampton*, 959 S.W.2d 444 (Mo. 1997) (en banc) ..... 9

*State v. Isa*, 850 S.W.2d 876 (Mo. 1993) (en banc) ..... 9

*State v. Jaco*, 156 S.W.3d 775 (Mo. 2005)..... 8,10

*State v. Mease*, 842 S.W.2d 98 (Mo. 1992)..... 9

*State v. Miller*, 208 S.W.3d 284 (Mo. App. W.D. 2006) ..... 9

*State v. Proctor*, 546 S.W. 544 (Mo. App. 1977)..... 17

*State v. Schlup*, 724 S.W.2d 236 (Mo. 1987) ..... 9, 17

*State v. Sumowski*, 792 S.W.2d 381 (Mo. App. E.D. 1990)..... 9

*State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002) ..... 10

*State v. Weekley*, 621 S.W.2d 256 (Mo. 1981)..... 9

*State v. Weems*, 840 S.W.2d 222 (Mo. 1992) (en banc)..... 8

*Szasz v. Tella*, 984 S.W.2d 129 (Mo. App. W.D. 1998)..... 17

*Urbach v. Okonite Co.*, 514 S.W.3d 653 (Mo. App. E.D. 2017) ..... 26

*Wilson v. P.B. Patel, M.D., P.C.*, 517 S.W.3d 520 (Mo. banc 2017) ..... 21, 23

*Wood River Pipeline Co. v. Sommer*, 757 S.W.2d 265 (Mo. App. E.D. 1988)..... 8, 11

**Rules**

Mo.R.App.Pro. 84.13..... 11

## STATEMENT OF FACTS

Respondent takes no issue with Appellants' Statement of Facts other than noting that a number of the facts included therein are irrelevant to the issue on appeal. However, Respondent includes the following additional pertinent facts:

In his Opening Statement, Appellants' counsel described the Respondent's vehicle as having "slammed" into the Appellants' vehicle. (Tr., pg. 27), while Respondent's counsel described the accident as a "relatively mild impact" where "Dr. Prater was going, at most, 15 miles an hour at the time of the accident and that neither of the cars' airbags deployed." (Tr., pg. 40). Dr. Prater and his wife, Karen McDaniel, testified he was going somewhere between 15-20 miles per hour at the time of the accident." (Tr., pg. 199, 234). Dr. Prater described the collision as feeling "a jolt and that was it," and his wife described it as a "minor bump." (Tr., pg. 199, 235). Dr. Prater's airbags did not deploy. (Tr., pg 201). He also testified that he had the opportunity to briefly observe both vehicles, including the Appellants' vehicle, after the accident and that "[t]here appeared to be minor damage of some sort to the bumper." (Tr., pg 208). Dr. Prater testified that all four of the photographs of the vehicle driven by Mrs. Kappel were fair and accurate representations of the vehicle as it appeared following the accident. (Tr. pgs. 211-212). Additionally, photos of Dr. Prater's vehicle following the accident, including the front bumper, were received in evidence. (Tr. Pg. 247).

Dr. Rende testified that it was his opinion that what Mrs. Kappel had suffered as a result of the accident were soft tissue injuries – specifically, muscle strains – that would have resolved within 8-12 weeks for a patient such as her with arthritic changes, and that

the diagnosis of adhesive capsulitis in the shoulder and accompanying shoulder surgery occurring five years later were unrelated to the accident. (Trial Exhibit X, pg. 12). He specifically noted that “it’s well known that adhesive capsulitis is not a, a injury-related disease.” (Trial Exhibit X, pg. 12). Dr. Rende also testified extensively regarding his examination of Mrs. Kappel and how his objective findings revealed little to no remaining physical abnormality while she subjectively complained of severe pain. (Trial Exhibit X, pg 9). He also testified that his review of the CT scans done shortly after the accident revealed degenerative changes and an “age appropriate amount of disc bulging and facet arthropathy [arthritis.]” (Trial Exhibit X, pg. 10).

## ARGUMENT

**I. ADDRESSING APPELLANTS’ ONLY POINT RELIED ON: THE TRIAL COURT DID NOT ERR IN ADMITTING THE PHOTOS OF APPELLANTS’ VEHICLE OR IN DENYING APPELLANTS’ MOTION FOR A NEW TRIAL ON DAMAGES IN THAT THE PHOTOS WERE AUTHENTIC, RELEVANT, AND ADMISSIBLE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, AND EVEN IF IT DID, THEIR ADMISSION WAS AT WORST HARMLESS ERROR AND NOT OUTCOME DETERMINATIVE.**

**A. Standard of Review**

The standard of review for a trial court decision on admission of 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. A judgment will be reversed only if the prejudice from the improper admission or exclusion of evidence is outcome determinative.” *Curl v. BNSF Railway Co.*, 526 S.W.3d 215, 225-26 (Mo. App. W.D. 2017) (citing *Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 240 (Mo. App. W.D. 2016)) (emphasis added); *Howard v. City of Kansas City*, 332 S.W.3d 772, 785-86 (Mo. banc 2011). Moreover, “[i]f reasonable persons can differ about the propriety of the trial court’s action, it cannot be said that the court abused its discretion.” *Reed*, 504 S.W.3d at 240.

**B. The trial court did not abuse its discretion in admitting the photographs of the Appellants’ vehicle.**

In their Brief, Appellants first address the trial court’s purported abuse of discretion and then address the admissibility of the underlying evidence. Because whether or not the trial court abused its discretion is dependent upon the exercise of that discretion

in relation to the admission of the evidence, we will address the issues in the opposite order.

Under the law of Missouri and the facts of the case, the admission of the photographs of Appellants' vehicle was proper. Even if admission of the photos was improper, however, it would still fall far short of the exacting standard required to demonstrate an abuse of the trial court's discretion. Indeed, even if the admission was improper, and *even if the trial court abused its discretion*, this Court should still affirm because the admission of the evidence was not outcome determinative.

*i. Missouri's standard for admitting photographs.*

Under Missouri law, photographs are admissible as demonstrative evidence if they are properly authenticated, which requires that they fairly and accurately represent what they purport to show. *See, e.g., State v. Cannady*, 389 S.W.3d 306, 312 (Mo. App. S.D. 2013). "This authenticity may be established by any witness who is familiar with the subject matter of the photo and is competent to testify from personal observation." *Wood River Pipeline Co. v. Sommer*, 757 S.W.2d 265, 269 (Mo. App. E.D. 1988).

Assuming they are validly authenticated, photographs must also be relevant, which can be established via a variety of bases, including (1) by reason of their tendency to prove or disprove some material fact,<sup>1</sup> (2) because they illustrate or corroborate the

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<sup>1</sup> *See, e.g., State v. Jaco*, 156 S.W.3d 775, 778–79 (Mo. 2005); *State v. Weems*, 840 S.W.2d 222, 229 (Mo. 1992) (en banc) (upholding relevance of numerous described photographs); *see also Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 88–89 (Mo. 1985) (en banc) (holding that photos of scene after hotel skywalk collapse were "relevant, material, and appropriate").



testimony of a witness,<sup>2</sup> (3) they assist a witness in explaining his or her testimony,<sup>3</sup> or (4) they otherwise assist the jury in understanding the evidence.<sup>4</sup> It has also been stated, as cited by Appellants, that photographic evidence must be “practical, instructive and calculated to assist both the jury and the court in understanding the case.” *Jordan v. Abernathy*, 843 S.W.2d 86, 88 (Mo. App. E.D. 1993). This requirement is commonly referred to as “logical relevance,” and the threshold for logical relevance is a “very low standard that is easily met.” *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. App. W.D. 2004). Any tendency, however slight, to make any fact of consequence more or less probable is sufficient to render the evidence logically relevant. *See, e.g., State v. Miller*, 208 S.W.3d 284, 287 (Mo. App. W.D. 2006) (“Each piece of logically relevant evidence need not be a slam dunk.”).

**ii. *The issue of the photographs’ authenticity is not properly before this Court, but the requirement is, in any case, satisfied.***

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<sup>2</sup> *See, e.g., State v. Hampton*, 959 S.W.2d 444, 453 (Mo. 1997) (en banc) (no abuse of discretion in admitting autopsy photos); *State v. Ervin*, 835 S.W.2d 905, 917–18 (Mo. 1992); *State v. Clemmons*, 753 S.W.2d 901, 907 (Mo. 1988); *State v. Schlup*, 724 S.W.2d 236, 242 (Mo. 1987) (photographs were properly admitted because they tended to corroborate witness’ testimony); *State v. Weekley*, 621 S.W.2d 256, 261 (Mo. 1981) (“the photographs corroborated, and enabled the jury to better understand the testimony of those witnesses who described the scene”).

<sup>3</sup> *State v. Clay*, 225 S.W.3d 462, 464–65 (Mo. App. W.D. 2007).

<sup>4</sup> *See, e.g., State v. Isa*, 850 S.W.2d 876, 890–91 (Mo. 1993) (en banc); *State v. Mease*, 842 S.W.2d 98, 108–109 (Mo. 1992); *State v. Sumowski*, 792 S.W.2d 381, 386 (Mo. App. E.D. 1990) (photos were “relevant to give the jury a complete and coherent picture of the events”); *Rust & Martin, Inc. v. Ashby*, 671 S.W.2d 4, 9 (Mo. App. S.D. 1984) (photos were properly admitted because they “would have been of aid to the jury in understanding the type of floor laid, and the condition of it.”).

In Subsection “D” of their brief, the Kappels first strike at the law’s requirement that a photo be authenticated as a “fair and accurate representation” of what it purports to show. Appellants argue that “neither the circumstances of the photographs’ production nor what they depict was ‘fair.’” (Appellants’ Brief, pg. 13). The reason for this unfairness, the Kappels allege, is that “[o]nly one side to this case had access to them and the opportunity to get better ones.” (Appellants’ Brief, pg. 13). Moreover, the Kappels claim that “[t]he photographs barely depict anything, as F1-F4 in the Appendix show.” (Appellants’ Brief, pg. 13). Appellants go even further and claim that “[i]t 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.” (Appellants’ Brief, pgs. 13-14).

As a preliminary matter, it should be noted that the authenticity of the photos – i.e., whether they fairly and accurately represented what they purported to show – was not an issue raised before the trial court, and therefore is not properly before this Court. *See, e.g.,* Mo.R.App.Pro. 84.13(a). As such, Respondent requests that this Court disregard in their entirety any complaints regarding the authenticity of the photos and whether they “fairly and accurately” represent the Appellants’ vehicle.

To the extent this Court deems the issue of the photographs’ authenticity properly before it, however, the matter is expeditiously resolved. Specifically, it appears that Appellants seek to inject as an additional requirement for the authenticity of a photograph

that it be produced during discovery at a sufficiently early date.<sup>5</sup> This is of course irrelevant to whether a photograph is a fair and accurate representation of what it purports to show. Appellants further cite no law for the proposition that *when* a photo is produced should have bearing on its authenticity, relevance, or admissibility. Moreover, Appellants (or their counsel) attempt to provide their own assessment of the quality of the photographs as a means of undermining the authenticity or relevance of the photos; yet again, the *opinions* of Appellants or their counsel of the quality of the photographs are totally irrelevant and go to the *weight* of the evidence, not to questions of their authenticity, relevance, or admissibility.

As stated by the cases cited above, the authenticity of a photograph “may be established by any witness who is familiar with the subject matter of the photo and is competent to testify from personal observation.” *Wood River Pipeline Co. v. Sommer*, 757 S.W.2d 265, 269 (Mo. App. E.D. 1988). Here, Dr. Prater, who was involved in the accident and personally saw the appearance and condition of the Appellants’ vehicle, authenticated all four of the photographs of the vehicle by stating that they were fair and accurate representations of the vehicle as it appeared following the accident. (Tr. pgs. 211-212). As such, Appellants’ complaints with regard to the timeliness of the disclosure

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<sup>5</sup> To the extent Appellants are aggrieved by the timing in which they received the photographs, Respondent simply notes that these photographs were produced over a year prior to trial and were taken of a vehicle in the possession of a third party (Enterprise) totally within the realm of Appellants’ counsel’s subpoena power during the preceding seven-year period. As such, Appellants’ counsel was fully capable of taking photos of a clarity acceptable to him if he had been so inclined. As such, it simply is not true that “only one side” had the opportunity to “get better ones.” (Appellants’ Brief pg. 13.)

of the photographs and with regard to their quality are both red herrings: they are absolutely irrelevant to whether the photos were properly authenticated and admitted at trial. At best, they go to the weight of the evidence, not its admissibility. Because Dr. Prater was involved in the accident and witnessed the condition of the Kappels' vehicle immediately afterward, his authentication of the photographs was valid.

*iii. The photographs were relevant and admissible.*

Appellants next seize upon the standard for the relevance of a photograph articulated in *Jordan v. Abernathy*. Employing the *Jordan* standard, they argue that the photos were “not ‘practical, instructive, and calculated’ to facilitate understanding of the case.” (Appellants’ Brief, pg. 14). Specifically, Appellants contend that “[the photos] were not instructive of anything[.]” and they surmise that their admission was for the purpose of arguing that the accident “must have been the proverbial ‘fender-bender.’” (Appellants’ Brief, pg. 14). Appellant then argues that admission of the photos and argument by Respondent’s counsel 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.” (Appellants’ Brief, pg. 14).

Appellants then take umbrage with their characterization of what the photos were “calculated” to do, within the meaning of the *Jordan* standard. Appellants note that Missouri courts have not addressed the issue and cite to an Illinois case, *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 794 N.E.2d 875, 871 (Ill. App. 1<sup>st</sup> Dist. 2003), for the proposition that expert testimony is required in order to admit photographs of a vehicle showing minimal damage if for the purpose of asserting a “commonsense inference” that

a plaintiff's claims are not credible. (Appellants' Brief, pg. 14). However, *DiCosola* is distinguishable from our case and should therefore be disregarded in favor of an analysis under Missouri law. Moreover, as acknowledged by both parties at the argument of this matter before the Court of Appeals, subsequent to the filing of the parties' briefs in the Court of Appeals, the Illinois Supreme Court explicitly overruled *DiCosola* in *Peach v. McGovern*, 2019 IL 123156 (Ill. 2019) (discussed more fully below). Consequently, Respondent will truncate the discussion of *DiCosola*.

Additionally, the defense *did* have a medical causation expert, Dr. Richard Rende, who examined Denise Kappel and testified by evidence deposition which was presented to the jury at trial. (Trial Exhibit X, pg. 12). It was Dr. Rende's opinion that Mrs. Kappel's back injuries from the collision would have resolved within 8-12 weeks, and Dr. Rende denied that Mrs. Kappel's shoulder surgery was related to the collision. (Trial Exhibit X, pg. 12). As such, much of the argument by defense counsel was based on Dr. Rende's trial testimony that the injuries complained of years later were unconnected to the accident at issue.

Ultimately, in many cases of evidentiary disputes, the question is: "*For what purpose* is the evidence being admitted?" Some purposes are legitimate, while others are not, and evidence may even be admitted for multiple purposes. Appellants' contention is, in effect, that the only reason to admit photographs of one of the vehicles involved in the accident was to allow the Defense to argue that because the photos demonstrate minimal injury to the vehicle, Plaintiff must be exaggerating her damages.

However, as articulated in Subpart “i”, above, there are a host of reasons photographs are relevant and validly admissible, including to prove or disprove a material fact, to corroborate the testimony of a witness, to assist a witness in explaining his or her testimony, or to otherwise assist the jury in understanding the evidence.<sup>6</sup>

First, the photos of Appellants’ vehicle have a tendency to make a plethora of facts more or less probable, recalling that logical relevance is a very low, easily satisfied standard—the evidence need not be a “slam dunk.” For example, the photos serve as physical evidence which makes it more probable that the incident occurred, that the vehicles in question were involved, and that the plaintiff and defendant were the drivers. The photos also serve as evidence of what sort of collision occurred and allow the jury to visualize whether the collision was severe and catastrophic or relatively minor. In that sense, the photos could serve to render less probable any contention that the collision was severe, as, contended by the Appellants, or to render more probable those facts asserted by the Respondent.

For example, in his Opening Statement, Appellants’ counsel described the Respondent’s vehicle as having “slammed” into the Appellants’ vehicle. (Tr., pg. 27), while Respondent’s counsel described the accident as a “relatively mild impact” where “Dr. Prater was going, at most, 15 miles an hour at the time of the accident and that neither of the cars’ airbags deployed.” (Tr., pg. 40). Denise Kappel testified that the impact “twisted me and the car put me into the other – over the line into the other lane on an angle,” and that Dr. Prater was driving 30-35 miles per hour at the time of the

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<sup>6</sup> See sources cited *supra* notes 1-4.

accident. (Tr., pg. 123-24). Dr. Prater and his wife, Karen McDaniel, testified he was going somewhere between 15-20 miles per hour at the time of the accident.” (Tr., pg. 199, 234). Dr. Prater described the collision as feeling “a jolt and that was it,” and his wife described it as a “minor bump.” (Tr., pg. 199, 235). The photographs assisted the jury in squaring the verbal testimony based on the memories of the witnesses with the objective evidence.

In that same way, the photos served also to corroborate the testimony of Dr. Prater and Karen McDaniel regarding the nature and severity of the collision, to assist the parties by allowing the jury to visualize Denise Kappel’s vehicle in its post-collision state, and in other ways known only to the jurors themselves. The photos similarly assisted the witnesses in explaining precisely the nature and extent of the collision and, in all of the foregoing particulars, assisted the jury in understanding the basic facts of the accident. In short, the photos of Appellants’ car and its condition after the accident are an integral part of the story. Indeed, if one were to make a list of the most important and relevant pieces of evidence in relation to the trial of an auto accident, photographs of the vehicles involved following the collision would be at or near the top of that list.

Appellants may object, as they did in their Brief, that the photos of Denise Kappel’s vehicle were so poor in quality that they could not possibly help the jury understand the case, and therefore they are not relevant. We would first simply direct the Court’s attention to Defendant’s Exhibits F1-F4, the photos of Mrs. Kappel’s car, for first-hand edification. (Appendix to Appellants’ Brief, A14-A17). The law does not and has never demanded that photographs be perfect to be relevant; the law merely demands

that they be authentic and satisfy one of the several bases for establishing simple logical relevance articulated and cited in detail in Subpart “i”, above. Matters of the photos’ quality go to the *weight* of the evidence, not to its admissibility, and where the low threshold for logical relevance is satisfied, the only remaining question is whether the photos are legally relevant.

Appellants use language characteristic of the tests for legal relevance in their Point Relied On but make virtually no mention of the tests or application of the principles throughout their argument. “Legal relevance requires assessing the logical probative value of the evidence and balancing that value against its costs --‘relative to the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.’” *State v. Brown*, 337 S.W.3d 12, 15 (Mo. banc 2011). Appellants have not made a showing as to how, if at all, the admission of the photos of Denise Kappel’s vehicle following the accident *unfairly* prejudiced them, how it confused the issues, misled the jury, unduly delayed, wasted time, or was cumulative. On the contrary: although the photos probably did prejudice the Appellants’ case before the jury, it cannot be said that they *unfairly* did so. Nor can it be said that the photos confused the issues as the nature, cause, and severity of the crash were central to the case. In the same way, jurors cannot be misled by seeing physical, photographic evidence of one of the vehicles involved in the accident that is the subject matter of the litigation; if anything, they would be misled by being deprived of the photographs. Lastly, the photographs did not waste significant time in that they did not generate minitrials on the issue and, being only four photographs, were not unduly cumulative. In any case, “[d]oubts as to the relevancy of



evidence should be resolved in favor of the admissibility of the evidence.” *State v. Proctor*, 546 S.W.2d 544, 545 (Mo. App. 1977). “Before evidence can be excluded upon the ground that it is irrelevant, it is essential that it should appear so beyond doubt.” *State v. Schlup*, 724 S.W.2d 236, 242 (Mo. banc 1987). At worst, their admission constituted harmless error, discussed in more detail in the section below regarding the requirement that evidence be outcome determinative before warranting reversal for abuse of discretion. *See, e.g., Szasz v. Tella*, 984 S.W.2d 129, 132 (Mo. App. W.D. 1998) (discussing the standard for the admission of irrelevant evidence and the requirement that it be prejudicial/outcome determinative before warranting reversal for abuse of discretion).

In light of the foregoing, it is clear that the photos of the Kappels’ vehicle were both logically and legally relevant. As a result, Appellants’ contention in their sole Point Relied On that it was error to find that they were relevant and not outweighed by the risk of prejudice, confusion, or misleading of the jury is without merit and the ruling of the trial court should be affirmed.

***iv. It was not an abuse of discretion to admit the photographs.***

However, even if the foregoing were incorrect and the photographs should not have been admitted, the decision of the trial court must still be affirmed because the decision was not so unreasonable as to shock one’s sense of justice or to indicate a lack of careful, deliberate consideration. Rather, reasonable persons could disagree about the admissibility of these photos. As such, there was no abuse of discretion.

In addressing the first piece of the abuse of discretion standard, the Kappels assert that it was against the “logic of the circumstances” to have admitted the photographs of the Appellants’ vehicle into evidence and that the photos should have been excluded to “keep the playing field at least somewhat level.” (Appellants’ Brief, pg. 10.) Appellants raise the fact that the photos in Respondent’s possession were not produced until a year prior to trial as evidence that it was against the logic of the circumstances to permit their admission. Appellants complain that they could have obtained better quality photographs had they known that the photos at issue had been taken. As discussed in footnote 5, above, Appellants do not explain why they were in any worse position to have obtained their own photographs or other documentation via subpoena from Enterprise during the seven years following the accident and preceding the trial.

In any event, the trial court took Appellants’ complaints seriously when it heard the motions in limine of the parties (Tr. pgs. 9-14) and, as Appellants note in their briefing, the court permitted Appellants’ counsel to “make an explanatory statement to the jury so 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., pg 14.) However, the standard is not merely concerned with whether the ruling was against the logic of the circumstances: it states that the ruling must be against the logic of the circumstances “and [be] 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) (citing *Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 240 (Mo. App. W.D.

2016)) (emphasis added); *Howard v. City of Kansas City*, 332 S.W.3d 772, 785-86 (Mo. banc 2011). The trial court in this case heard the motion and the arguments of counsel as to the relevance and appropriateness of the photographs, and it permitted their admission with certain conditions. In no way does this conduct by the trial court shock one's sense of justice or suggest a lack of careful, deliberate consideration. At the very least, since "reasonable persons can differ about the propriety of the trial court's action, it cannot be said that the court abused its discretion." *Reed*, 504 S.W.3d at 240.

An appellate court must follow the standard of review for abuse of discretion by a trial court for admitting evidence at trial. This requires taking into account the other evidence adduced that the jury could have relied upon in support of their verdict, as well as other issues for which the evidence in question could have been used. Other evidence not found to be improper or prejudicial (and not part of Appellants' appeal) included, for instance, five color photographs of the damage to Respondent/Defendant's vehicle following the accident. (Appendix to Appellants' Brief, A4-A11). Other issues in the case for which the photographs could have been used included helping the jury understand the accident itself beyond just the descriptions given by the parties which were contradictory and assessing the reliability of those descriptions, as well as the credibility of the parties and witnesses.

The Appellate Court does not take into account the other evidence given to the jury as to the impact, including photographs of the damage to Respondent's vehicle, Respondent's testimony, the testimony of Respondent's wife (who was a passenger in his vehicle at the time of the accident), and Appellant's testimony that she was able to drive

her vehicle after the accident and did not seek immediate medical treatment. Further, the jury could have taken into account the medical testimony that was presented, including the evidence of the significant gaps in Appellant's treatment, to determine their award of damages. In determining that these black and white photographs were determinative of the jury award, the Appellate Court put itself in the place of the jury without the benefit of hearing the witnesses testify and assessing their credibility as the jury was able to do.

The Court of Appeals Opinion states that Respondent's counsel mentions the photographs at issue several times in closing arguments but fails to note that those arguments included the photographs of Respondent's vehicle as well, the admission of which was not appealed. *Opinion*, p. 11; *Appellant's Brief*, p. 6-7. Respondent relied on the photographs of *both* vehicles in closing argument, not just the black and white photographs of Appellant's vehicle. Further, the photographs were primarily used to explain the accident to the jury and to assist the jury in assessing the credibility of the parties in their respective descriptions of the accident, which the Opinion also fails to take into account. Respondent's counsel in closing argument contended that the testimony of the parties was not the only evidence of the accident and they could also use the photographs to determine how the accident occurred. *See Opinion*, p. 11.

Again, the jury was there to weigh all the evidence given to them and to assess the credibility of the witnesses. The issue of liability also had to be determined by the jury and the location of the damage to the vehicles, as shown by testimony and the photographs, assisted the jury in that determination. *See Peach v. McGovern*, 2019 IL 123156 (Docket No. 123156 Ill. January 25, 2019). The Court of Appeals Opinion

assumes the photographs could have been used by the jury for only one purpose and ignores the fact that the jury had to determine liability and assess the credibility of the witnesses as to their descriptions of the accident. The jury could have used the photographs for those reasons as well. *See id.* In *Peach*, the Illinois Supreme Court recently addressed the issue of whether photographs of damage to vehicles were relevant and admissible without expert testimony. The Court held that if a jury were to consider testimony about vehicle speed and impact forces, it should be permitted to consider photographs that depict damage. *See id.*, p. \*7. In this case, Appellant was allowed to testify as to the speed she believed Respondent was traveling and the impact to her vehicle. *Appellant's Brief*, p.2. Therefore, the photographs were relevant as well to show the impact from the accident. *Peach*, 2019 IL 123156.

As noted in the Appellate Court's Opinion: "[a] trial court has broad discretion in admitting or excluding evidence, and we will reverse the trial court's decision only if the court clearly abused its discretion." *Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373, 384 (Mo. App. E.D. 2018). The rule is that the admission of evidence needs to shock the sense of justice and indicate a lack of careful deliberate consideration as well as be outcome-determinative in order to overrule it. *Wilson v. P.B. Patel, M.D., P.C.*, 517 S.W.3d 520, 523 (Mo. banc 2017); *Bowolak v. Mercy East Communities*, 452 S.W.3d 688, 703 (Mo. App. E.D. 2014).

In finding that the admission of these photographs shocked the sense of justice and indicated a lack of careful deliberate consideration, the Appellate Court notes that there was no testimony that the collision could not have caused Appellant's complained of

injuries. *Opinion*, p. 8. However, the Court fails to note that Dr. Rende testified that her injuries would have resolved within 8-12 weeks; not still be on-going 10 years later. *Trial Exhibit X*, p. 12. Further, Dr. Rende also testified that he saw no evidence of a shoulder injury on Appellant's MRI and explained that adhesive capsulitis is typically not a trauma-related disease. *Trial Exhibit X*, p. 12. Denise Kappel also testified that she did not seek immediate medical treatment and instead met her business colleagues for dinner and flew home to Chicago before seeking any treatment. *Appellants' Brief*, p. 2-3. Finally, there is evidence of numerous gaps in time in Appellant's treatment. From this testimony, a reasonable juror could have inferred that not all of her injuries were caused by the accident. There was certainly evidence that a jury could rely on, beyond the photographs of Appellant's vehicle, that her complained of injuries (or the extent of them) were not caused by the accident. The photographs were one piece of evidence as to how the accident occurred and what the vehicles looked like after the accident; not the only piece of evidence.

The Appellate Court's Opinion then surmises that "[t]he photographs of the exterior of Mrs. Kappel's vehicle in this case likely could have caused the jury to focus on the allegedly-minor damage to the vehicle instead of the physical injuries that Mrs. Kappel sustained-which was the central issue in the case." *See Opinion*, p. 9. It is just as likely, though, that the jury relied on all the other evidence presented in support of its decision and only used the photographs to assess the credibility of the parties and to determine how the accident occurred. The jury had the ability to assess all the evidence as well as the credibility of the witnesses before coming to their verdict which fact the

Appellate Opinion is not taking into account as required by the law. The Court of Appeals is putting itself in the place of the jury without the benefit of being able to assess the credibility of the parties and weighing all the evidence.

The admission of these photographs was not a clear abuse of discretion on the part of the trial court as their admission was not so unreasonable and arbitrary to shock the sense of justice and show a lack of careful deliberate consideration. *See Wilson*, 517 S.W.3d at 523. The quality of the photographs would go to the weight of the evidence and not to their admissibility. The photographs themselves could be relevant for other facts than just the extent of Appellant's injuries. They were legally relevant to explain the accident to the jury, just as the testimony of Denise Kappel was in her description of the accident and the testimony of Respondent and his wife. *See Peach*, 2019 IL 123156; *Mason v. Lynch*, 878 A.2d 588, 598 (Md. Ct. App. 2005). The photographs are also relevant to refute or help explain the testimony of the people involved in the accident. They are one piece of evidence given to the jury in this case and it does not shock the sense of justice that they were admitted. It was not a clear abuse of discretion and the Court of Appeals failed to follow that standard in finding that it was.

**v. *Even if there was an abuse of discretion, it was not outcome determinative.***

Even if the foregoing analysis regarding the authenticity, relevance, and admissibility of the photographs were totally incorrect, and *even if the trial court abused its discretion in admitting those photos*, this Court must still reverse the Court of Appeals' decision and affirm the trial court's judgment because the admission of the

photos was not outcome determinative. *See, e.g., State v. Evans*, 455 S.W.3d 452 (Mo. App. E.D. 2014) (finding that the trial court abused its discretion in admitting a photograph of the defendant with a group of friends making gang signs, but finding that the error was not outcome determinative since significant evidence existed to demonstrate that the defendant, contrary to his protestations, in fact severely beat the victim); *Curl*, 526 S.W.3d at 226 (citing *Reed*, 504 S.W.3d at 240).

In this appeal, Appellants make no attempt to argue that the admission of the photos of the Appellants' vehicle was outcome determinative. Appellants quote in their Standard of Review paragraph the abuse of discretion standard as recited in *Curl v. BNSF Railway Co.*, 526 S.W.2d 215 (Mo. App. W.D. 2017), but cut their quotation short just before the sentence which reads "A judgment will be reversed only if the prejudice from the improper admission or exclusion of evidence is outcome determinative." *Curl*, 526 S.W.3d at 225-26.

A review of the record below demonstrates that there was substantial evidence aside from the photographs of the Appellants' vehicle regarding the accident, its severity, the condition of the Appellants' vehicle thereafter, and the extent to which the accident caused Mrs. Kappel's injuries which preclude any possible claim that the photos were outcome determinative. For example, Dr. Prater testified that he was going only 15 to 20 miles per hour at the time of the accident. (Tr., pg 199). In describing the accident, he stated that "I felt a jolt and that was it." (Tr., pg 199). Dr. Prater's airbags did not deploy. (Tr., pg 201). He also testified that he had the opportunity to briefly observe both vehicles, including the Appellants' vehicle, after the accident and that "[t]here appeared



to be minor damage of some sort to the bumper.” (Tr., pg 208). Additionally, photos of Dr. Prater’s vehicle following the accident, including the front bumper, were received in evidence, the admission of which were not made the subject of appeal. (Tr., pg. 247). The photos of Dr. Prater’s vehicle, like the photos of the Appellants’ vehicle, indicate minimal damage.

In addition to Dr. Prater’s testimony, Dr. Rende testified that it was his opinion that what Mrs. Kappel had suffered as a result of the accident were soft tissue injuries – specifically, muscle strains – that would have resolved within 8-12 weeks for a patient such as her with arthritic changes, and that the diagnosis of adhesive capsulitis in the shoulder and accompanying shoulder surgery occurring five years later were unrelated to the accident. (Trial Exhibit X, pg. 12). He specifically noted that “it’s well known that adhesive capsulitis is not a, a injury-related disease.” (Trial Exhibit X, pg. 12). Dr. Rende also testified extensively regarding his examination of Mrs. Kappel and how his objective findings revealed little to no remaining physical abnormality while she subjectively complained of severe pain. (Trial Exhibit X, pg. 9). He also testified that his review of the CT scans done shortly after the accident revealed degenerative changes and an “age appropriate amount of disc bulging and facet arthropathy [arthritis.]” (Trial Exhibit X, pg. 10). As such, a reasonable jury could quite easily have agreed with Dr. Rende or with any other piece of evidence in the case, in finding in favor of Appellants and in rendering the verdict they did. Thus, there is no reason to believe, and Appellants make no attempt to argue, that the photos of the Appellants’ vehicle following the accident were determinative to the outcome of the case.

The Appellate Court's Opinion makes a further assumption in finding that admitting the photographs into evidence was prejudicial as outcome-determinative and materially affecting the merits of the case. *See Bowolak*, 452 S.W.3d at 703. As noted by the Court, "[a] determination of prejudice by the erroneous admission of evidence depends largely upon the facts and circumstances of the particular case." *See Kearbey v. Wichita Se. Kan.*, 240 S.W.3d 175, 184 (Mo. App. W.D. 2007). Further, "[e]vidence is prejudicial if it tends to lead the jury to decide the case on some basis other than the established propositions in the case." *See Urbach v. Okonite Co.*, 514 S.W.3d 653, 660 (Mo. App. E.D. 2017). However, the Appellants have failed to show that the photographs of Appellant's vehicle led the jury to decide the case on some basis other than the established propositions in the case. The jury, in fact, returned a verdict of damages *for* Appellant. As noted above, there was other testimony and other photographic evidence that the jury could have relied upon in coming to the same conclusion as it did regardless of the photographs of Appellant's vehicle. If the photographs were of such poor quality as to not be relevant, then it defies logic to assume that the jury would be misled by them.

The Appellate Court's Opinion further states that "no limiting instruction or additional testimony was provided on the issue of whether the minimal damage allegedly depicted in the photographs could not have caused or contributed to cause Mrs. Kappel's injuries". *Opinion*, p. 11. However, this overlooks all the evidence pertaining to Appellant's medical treatment both on her behalf and in refuting her assertions. It further ignores the fact that the photographs also went towards how the accident occurred and to assess the credibility of the parties' respective descriptions of how the accident occurred.

Therefore, no such limiting instruction could be given as the photographs went towards other facts in the case and their weight was for the jury to determine in light of the other evidence. Appellant testified to how the accident occurred and the impact she felt. Therefore, Respondent had a right to refute that testimony by his own testimony and by properly verified photographs of the vehicles involved in the accident. *Peach*, 2019 IL 123156.

Certainly, in this case, Appellant had ample medical testimony before the jury that the accident caused or contributed to cause her injuries, as well as her own testimony. The jury's job though, under the law, is to take all the evidence given to it and come to its determination based on the instructions. Part of all the evidence the jury could rely on in this case included testimony by Respondent and his wife of how the accident occurred, the nature of the impact, photographs of Respondent's vehicle, Dr. Rende's testimony, and significant gaps in time in Appellant's medical treatment. The jury could come to the conclusion it did without relying on the photographs at issue on appeal and, as such, Appellant could not be prejudiced by their admission.

Again, the Appellate Court failed to follow the proper standard in finding whether the evidence was outcome-determinative and materially affected the award. Respondent relied on many pieces of evidence to argue Appellant's injuries were not to the extent that she claimed; not just the photographs of her vehicle. Effectively, the Court of Appeals is putting itself in the place of the jury to determine that the jury was confused by that evidence. *See Eisenmann v. Podhorn*, 528 S.W.3d 22, 38 (Mo. App. E.D. 2017). Unlike in *Eisenmann*, this jury did not bring back inconsistent verdicts, nor did the jury find

against Appellant. Rather, the jury simply did not award Appellant the amount that she requested. The ultimate finding of damages, though, shows that the jury was not confused by the instructions given to it or the evidence put before it. The appellate courts do not have to speculate as to the verdict the jury intended to enter as it entered an award of damages for Appellant. *Id.* at 39. The amount of the award was for the jury to decide and an appellate court should not put itself in the place of the jury in determining that the award was not sufficient.

In light of the foregoing, it is clear that not only was there other evidence which gave the jury at least some idea of what the Appellants' vehicle looked like after the accident and the severity of the crash without even referring to the photos, the rest of the record demonstrates the impossibility of Appellants' showing that the photos were somehow solely responsible for the jury's verdict as to liability or damages. As such, even if the admission of the photos of Appellants' vehicle after the crash was improper, and even if the trial court abused its discretion in doing so, their admission was in no way outcome determinative. Therefore, the trial court's ruling must be affirmed.

## CONCLUSION

The admission of the photos of Appellants' vehicle following the accident, Appellants' sole point on appeal, was proper in that the photos were authenticated, logically relevant, and legally relevant. Additionally, even if they were not relevant, it was not an abuse of discretion for the trial court to admit them because a reasonable person could disagree as to the relevance of the photos, because their admission, particularly in view of the trial court's proviso allowing Appellants' counsel to advise the jury regarding the delay in receiving the photos and their poor quality, does not shock one's sense of justice or demonstrate a lack of careful, deliberate consideration. Even if the photos were irrelevant or otherwise improperly admitted, and even if the trial court abused its discretion in admitting the photos, the trial court's ruling should still be affirmed because admission of the photos was at worst harmless error and in no way outcome determinative.

Respectfully, Respondent requests this Court's Order Affirming the decision of the trial court.

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### CERTIFICATE OF COMPLIANCE

The undersigned certifies Respondents' 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. This Brief was prepared in Microsoft Word and contains approximately 7,588 words. The font is Times New Roman 13-point type.

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### CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, the foregoing Respondent's Substitute 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 all counsel of record.

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/s/Susan M. Herold