

No. 1-11-1854

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

NORBERT PRZYBYCIEN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 08 L 001312
)	
SALLY LIU and ENTERPRISE LEASING)	
COMPANY OF CHICAGO,)	The Honorable
)	Michael R. Panter,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment and order.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in denying plaintiff's motion *in limine* and admitting photographs depicting vehicular damage in an accident, where the evidence was relevant to show severity of impact which was a disputed issue at trial.]
- ¶ 2 Plaintiff, Norbert Przybycien, appeals the order of the circuit court entering judgment after a jury trial for plaintiff on his negligence claim. The court directed a verdict of negligence

against defendant, Sally Liu, and the jury awarded plaintiff damages in the amount of \$7,500.

On appeal, plaintiff contends the trial court erred in denying his motion *in limine* to exclude photographs taken after the accident depicting damage to his vehicle. Plaintiff seeks a new trial on the issue of damages only. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered its judgment in favor of defendant on December 10, 2010. Plaintiff filed a posttrial motion on February 9, 2011 to vacate the judgment, which was denied on June 3, 2011. Plaintiff filed a notice of appeal on June 29, 2011. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 Prior to trial, plaintiff filed a motion *in limine* requesting that defendants not mention, among other things, "any testimony, argument or reference to the dollar amount of property damage or showing the jury photographs of the amount of property damage to the vehicles." The trial court denied the motion, but ordered that "defendant cannot argue relation between the damage and the nature and extent of injury."

¶ 7 At trial, plaintiff testified that on March 1, 2006, he was driving southbound on River Road in Des Plaines, Illinois, when he stopped at a red light. While stopped, a vehicle operated by defendant Liu struck plaintiff's vehicle from behind. The vehicle driven by Liu was owned,

managed, and maintained by defendant Enterprise Leasing Company of Chicago (Enterprise).¹ Upon impact, plaintiff testified that his body was propelled forward causing his hands to go up in the air. He felt as if his body had been shaken and he was nauseous. Both parties got out of their vehicles and exchanged information. According to plaintiff, Liu told him that the sun bothered her eyes while she was driving and when she adjusted the visor something fell and poked her in the foot. Her vehicle then struck plaintiff's vehicle. No one called the police and both parties drove their vehicles from the scene after the accident. After arriving at his parents' house, plaintiff did not feel well so his mother drove him to the emergency room at Lutheran General. The doctor examined plaintiff's neck, and plaintiff also received a CT scan before he was discharged later that day. Plaintiff stated that after the accident, simple tasks such as cooking and cleaning presented a challenge to him, and his participation in the athletic activities was severely limited. As a student, he also spent significantly more time learning course material because he took frequent breaks due to his inability to sit in class for a length of time.

¶ 8 On cross-examination, plaintiff stated that his bumper was scratched and cracked. He identified without objection photographs which he agreed fairly depicted damage to his vehicle after the accident, and he also stated that his car sustained side damage and other scratches not shown in the photographs. The photographs were shown to the jury. When asked to characterize the impact, plaintiff described it as "heavy." Plaintiff and Liu met at the police station two days after the accident to fill out a police report.

¹Enterprise filed a motion for summary judgment which was granted on March 6, 2009. The cause continued as to defendant Liu.

¶ 9 Liu testified that on March 1, 2006, she was stopped at a red light behind plaintiff's vehicle. She saw plaintiff's car start to move so she took her foot off the brake to move. She stated that "eventually [she] ran into him." She did not accelerate, but only took her foot off the brake pedal. She testified that her vehicle was moving very slowly and she described the contact with plaintiff's vehicle as "very light."

¶ 10 Dr. Steven Sclamberg, a board-certified orthopedic physician, testified that plaintiff sought treatment after the accident. He told Dr. Sclamberg that he was "rear ended at quite a high velocity." Dr. Sclamberg performed various examinations on plaintiff over the course of five appointments, and with the exception of one appointment in which plaintiff experienced "mild paraspinal tenderness," his condition was completely normal. When asked whether he found "any objective signs to support any of his complaints of pain," the doctor responded, "no."

¶ 11 Dr. Todd Sinai, a chiropractor, testified that he also treated plaintiff. Plaintiff received both chiropractic treatment and physical therapy. He stated that he examined plaintiff and found that the range in motion in his lower back was significantly diminished. Dr. Sinai ordered more tests and diagnosed plaintiff with a bulging two-millimeter annular disk. He referred plaintiff back to Dr. Sclamberg for a second opinion. Plaintiff tested negative for a pinched nerve, but in February 2007, MRI results showed a mild disc protrusion. Although Dr. Sclamberg agreed that trauma could cause the discs to bulge, he could not tell from the MRI whether plaintiff's bulging disc resulted from the accident.

¶ 12 After presentation of the evidence, plaintiff moved for a directed verdict on the issue of negligence which the trial court granted. Plaintiff's counsel objected to the admission of

photographs and references to the property damage and any attempt to equate the amount of damage to the severity of plaintiff's injuries. The trial court responded that there was an issue regarding the amount of impact sustained in the accident, and the velocity at which the impact occurred. Therefore, the trial court ruled that "strictly as to the amount of the impact the photographs are evidentiary, and so therefore they can go back to the Jury."

¶ 13 During closing argument, plaintiff's counsel referred to the photographs and the damage shown, and reiterated plaintiff's testimony that the impact was "heavy." Defense counsel in closing argument also referred to the photographs and argued against the notion that impact occurred at a high velocity. The jury found in favor of plaintiff and awarded damages in the amount of \$7,500. Plaintiff filed a posttrial motion to vacate the judgment and grant a new trial on damages only, arguing that the trial court erred in not granting his motion *in limine* to bar photographs depicting vehicular damage. The trial court denied plaintiff's posttrial motion and plaintiff filed this timely appeal.

¶ 14

ANALYSIS

¶ 15 Plaintiff contends the trial court erred in denying his motion *in limine* to exclude photographs taken after the accident depicting damage to his vehicle. Liu argues that plaintiff waived this issue on appeal because he failed to object "at trial at the time defense counsel moved to admit [the photographs] and to publish them to the jury," citing *First National Bank v. Lowrey*, 375 Ill. App. 3d 181, 211 (2007) (contemporaneous objection at trial is required even when the issue was raised in a motion *in limine*). Plaintiff's counsel did not object when the photographs were used during trial thus forfeiting review of this issue on appeal. However, the

"waiver rule is an admonition to the litigants, not a limitation on the jurisdiction of the reviewing court." *Zekman v. Direct American Marketers, Inc.*, 182 Ill. 2d 359, 368 (1998). Here, we find it appropriate that we examine the trial court's admission of photographs depicting vehicular damage.

¶ 16 The trial court has broad discretion to grant or deny a motion *in limine* "as part of its inherent power to admit or exclude evidence." [Citation.]" *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1005 (2003). Its determination regarding the admissibility of photographic evidence (*Ferro v. Griffiths*, 361 Ill. App. 3d 738, 742 (2005)), as well as its decision on a motion *in limine* (*Hawkes*, 336 Ill. App. 3d at 1005), will not be disturbed on appeal absent an abuse of discretion. *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 536 (2003). Under this standard, a reviewing court will find an abuse of discretion only if "no reasonable person would take the position adopted by the trial court." [Citation.]" *Id.*

¶ 17 Plaintiff argues that the trial court erred because the evidence was not relevant to any issue before the court and served only to show a relationship between the extent of vehicular damage and the injuries sustained in the accident. Plaintiff contends that no expert testified as to the link between vehicular damage and injury, and such evidence is barred absent expert testimony on the issue. As support, he cites to *DiCosola*.

¶ 18 Initially we note that in denying plaintiff's motion *in limine*, the trial court ordered that "defendant cannot argue relation between the damage and the nature and extent of injury." There is no indication in the record that defense counsel attempted to make that correlation. Even if the evidence was used for such purpose, *DiCosola* does not support plaintiff's argument. In

DiCosola, 342 Ill. App. 3d at 534-538, this court found no abuse of discretion where the trial court excluded photographs showing vehicular damage on the basis that there was no expert testimony on the relationship between the extent of damage and injuries sustained in an accident. However, *DiCosola* explicitly stated it was not creating a bright line rule that "expert testimony must always be required for such photographic evidence to be admissible." *DiCosola*, 342 Ill. App. 3d at 537. Instead, it based its decision on the trial court's discretion to determine the relevance of evidence, including photographs depicting vehicular damage. *Id.* at 538. See also *Cancio v. White*, 297 Ill. App. 3d 422, 433 (1998) (admission of photographs showing minimal damage to plaintiff's vehicle was proper absent expert testimony because they "were relevant to the nature and extent of plaintiffs' damages).

¶ 19 Furthermore, in cases following *DiCosola* courts did not accept a rigid rule regarding the admissibility of photographs depicting vehicular damage without expert testimony. See *Jackson v. Seib*, 372 Ill. App. 3d 1061 (2007); *Ford v. Grizzle*, 398 Ill. App. 3d 639 (2010). These cases determined that "[t]he critical question in admitting those photographs into evidence is whether the jury can properly relate the vehicular damage depicted in the photos to the injury without the aid of an expert." *Ford*, 398 Ill. App. 3d at 648. This question is an evidentiary issue for the trial court to resolve. *Ferro*, 361 Ill. App. 3d at 743.

¶ 20 The trial court in the case at bar determined that the photographs were relevant "strictly as to the amount of impact" and admitted the evidence to the jury. At trial, plaintiff described the impact as "heavy, "propelling his body forward and causing his hands to go up in the air." Dr. Sclamberg testified that plaintiff said he was "rear ended at quite a high velocity." Liu, however,

testified that she merely had taken her foot off the brake and had not pressed on the accelerator at the time of impact. She described the impact with plaintiff's vehicle as "very light." Evidence is relevant if it tends to make the proof of a fact more or less probable than it would be without the evidence. *DiCosola*, 342 Ill. App. 3d at 535.

¶ 21 Although the record on appeal does not contain the photographs at issue, the parties agree that the photos depict minimal damage to plaintiff's vehicle. Since the photographs show damage to plaintiff's vehicle resulting from the impact they are relevant. The jury in this case could assess the relationship between plaintiff's injuries and the amount of impact to the vehicle in the accident without the aid of expert testimony. Under these facts, the trial court did not abuse its discretion in admitting the photographs into evidence.

¶ 22 Lastly, plaintiff argues that photographs depicting vehicular damage may be excluded if "their purposes is merely to aid the jury in assessing the plaintiff's credibility," and cites *Baraniak v. Kurby*, 371 Ill. App. 3d 310 (2007) as support.² In *Baraniak*, the appellate court found that the trial court's failure to answer the deliberating jury's question was prejudicial error warranting a new trial. *Baraniak*, 371 Ill. App. 3d at 315-16. Although the appellate court decided to remand for a new trial based on the jury question issue, it unnecessarily addressed the photographic evidence issue because "it may arise on remand." *Id.* at 316. The court stated that photographic evidence depicting vehicular damage may not be used to aid the jury in assessing the plaintiff's

²Plaintiff also cites to a Delaware case, *Davis v. Maute*, 770 A. 2d 40 (Del. 2001), as support. As plaintiff acknowledges in his brief, cases from other jurisdictions are not binding on this court. Since Illinois law adequately addresses the issue, we need not consider this case any further.

credibility that the impact was "hard." *Id.* at 317. It reasoned that "credibility is always an issue" and allowing the photographs for such a purpose would "allow parties to accomplish indirectly what the courts have already determined is improper absent expert testimony, *i.e.*, to argue or even imply that there is a correlation between the extent of vehicular damage and the extent of a person's injuries caused by the accident." *Id.* at 317-18.

¶ 23 This issue was not necessary to the disposition of the *Baraniak* case and is *dicta*. *People v. Harrison*, 226 Ill. 2d 427, 435 (2007). Furthermore, to the extent it conflicts with *DiCosola*, *Cancio*, *Jackson*, and *Ford* on the issue of whether expert testimony is required before the trial court can admit photographs to show a relationship between the extent of vehicular damage and the injuries sustained, we decline to follow *Baraniak*. The trial court here determined that the photographs were relevant "strictly as to the amount of impact" and admitted the evidence to the jury. We cannot say that no reasonable person would have taken the position adopted by the trial court. Therefore, it did not abuse its discretion in denying plaintiff's motion *in limine*, and denying his subsequent motion for a new trial on damages.

¶ 24 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.