Court Rules Photos Can't Speak for Themselves
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Over the past several years, there has been an alarming increase in Illinois Appellate decisions favoring the Plaintiff's bar in bodily injury actions. This trend now seems to have reached an extreme with the release of the decision of the First District Appellate Court in the case of Dicosola v. Bowman, 1-02-1699 (July 11, 2003). According to the Dicosola decision, juries may now be prohibited from viewing photographs of vehicles displaying post collision damage. Why? According to the First District Appellate Court allowing a jury to view such photos, without the assistance of an "expert" explaining what they mean, might confuse them or cause them to question whether a plaintiff was really injured.

In our April, 1999 column, "Old Injuries Can Mean New Profits For Medical Experts" we explored three Appellate Court decisions which signaled the demise of the "same part of the body rule" which allowed admission of evidence of a prior injury to the same part of the body without the necessity of medical testimony establishing a causal connection between the two injuries. We focused upon the First District Appellate Court decision in the case of Cancio v. White, 297 Ill. App. 3d 422, 697 N.E. 2d 749, 232 Ill. Dec. 7 (1st Dist 1998) in which the Court held that evidence of a prior injury is inadmissible unless the defendant produces medical proof or testimony establishing a direct causal link between the injuries. This trend culminated in the Illinois Supreme Court decision in Voykin v. Estate of DeBoer, 192 Ill. 2d 49, 733 N.E. 2d 1275, 248 Ill. Dec. 277 (2000) in which the Illinois Supreme Court held that due to the complexity of the human body, expert testimony would be required in order to establish the required causal link. In Voykin, the Court held as follows:

In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the same part of the body or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the natures of the prior incurred injuries are such that a layperson can readily appraise the relationship, if any, between those injuries without expert assistance. Voykin, 248 Ill. Dec. at 282.

Of interest, the Illinois Supreme Court in Voykin did allow the trial court at least some discretion to allow evidence of a prior injury without expert testimony in appropriate circumstances. Justice Heiple also filed a dissent based upon his essential faith in both the common sense and intelligence of juries. Justice Heiple stated "Unlike the majority, I am confident that jurors are quite capable of understanding a plaintiff's argument that his primary injury has long since healed. . . and is therefore distinguishable from the injury for which he presently seeks money damages." Voykin, 248 Ill. Dec. at 284. Although the propriety of the Cancio and Voykin

decisions is debatable, they are at least defensible, given the fact that they both involved medical and physiological issues which, arguably, require expert medical testimony. Unfortunately, in Dicosola v. Bowman, the First District utilizes the Voykin decision as a basis for insulating a Plaintiff from the most basic function of a jury; making common sense decisions as to the credibility of a plaintiff and the extent of his or her injuries.

In Dicosola, the Plaintiff was stopped in a Dominick's parking lot when his vehicle was struck by the Defendant's vehicle. The Plaintiff did not seek medical treatment for a period of four weeks. Ultimately, an orthopedic surgeon diagnosed the Plaintiff with medial epicondylitis, commonly referred to as "golfer's elbow". The Plaintiff sought conservative treatment and declined surgery. His medical specials totaled $1,763.00 and no wage loss claim was asserted. Of some interest, in her dissent, Justice O'Mara Frossard provides additional factual background (which was omitted from the majority opinion). Following the impact, the Plaintiff could not testify whether he hit his elbow on the steering wheel or in any way strained his elbow. The Plaintiff was not cut or bleeding and mentioned no injury to the police. Immediately following the accident, the Plaintiff departed on a three week vacation to Florida and drove his own vehicle. Nothing in the surgeon's notes indicated whether Plaintiff his elbow and the doctor conceded that the Plaintiff's medical condition might be the result of a work related injury caused by repetitive movement. The totality of the Plaintiff's medical treatment consisted of cortisone shots, twelve physical therapy sessions, and the use of an elbow brace.

At trial, the Plaintiff's attorney presented a motion in limine seeking to exclude testimony or photographs regarding the extent of damage to the vehicles. Obviously (and as noted by the Appellate Court) the photographs of the Plaintiff's and Defendant's vehicle revealed little, if any damage. The trial judge, Thomas L. Hogan, granted the motion and the jury returned a verdict of $47,063 plus costs. The Defendant appealed.

On appeal, the Defendant relied primarily upon the Cancio case. Ironically, and as noted above, although Cancio substantially modified the "same part of the body rule" the Court did allow photographs of the Plaintiff's vehicle to be admitted into evidence. In Cancio, the First District Appellate Court held as follows:

[T]he photos of plaintiff's vehicle were relevant to the nature and extent of plaintiffs' damages. They were relevant because they showed little or not damage, which is something the jury could consider in determining what, if any injuries [the plaintiffs] sustained as a result of the accident. Cancio, 232 Ill. Dec. at 14.

As such, it would seem that the Cancio decision would be dispositive of the issues framed by the appeal. To the contrary, and although the Appellate Court conceded that the Cancio Court ruled that photographs of the Plaintiff's vehicle were relevant and admissible, it noted that the admissibility of the photographs (like any other evidence at trial) lies within the discretion of the trial court. The Court went on to state as follows:

Thus, contrary to defendant's contention, no Illinois case stands for the proposition that

photographs showing minimal damage to a vehicle are automatically relevant and must be admitted to show the nature and extent of a plaintiff's injuries. There simply is no such bright-line rule that photographs depicting minimal damage to a post-collision vehicle are automatically admissible to prove the extent of a plaintiff's bodily injury or lack thereof. The trial court here was not required to automatically admit the photographic evidence of the minimal damage to plaintiff's vehicle. We reject defendant's argument that the trial court here abused its discretion because its decision requiring expert testimony rested on an erroneous conclusion of law.

The error in the Court's analysis is clearly displayed in the final sentence of the quote above. If the Appellate Court simply ruled that the trial court acted within its discretion in barring admission of the photographs applying a relevancy standard, the damage inflicted by the Court's decision would have been limited to the case at bar. Although the Court would still have been required to reverse and remand based upon the trial court's additional requirement of expert testimony, the Appellate Court could have simply returned the case to the trial court with instructions to revisit the issue of the admissibility of the photographs based solely upon a relevance standard, without superimposing the necessity of expert testimony.

It is here that the true flaw in the decision lies. The Court stated as follows:

A reviewing Court will not disturb a trial court's decision to grant a motion in limine absent a clear abuse of discretion. Hawkes, 336 Ill. App. 3d at 1005, 785 N.E. 2d at 516. In determining whether there has been an abuse of discretion, this Court may not substitute its judgment for that of the trial court, or even determine whether a trial court exercised its discretion wisely. Simmons v. Garces, 198 Ill. 2d 541, 568, 763 N.E. 2d 720, 737 (2002).

The issue, however, is not whether the trial court abused its discretion in barring the admission of the photographs but, rather, whether the trial court erred, as a matter of law, in requiring expert testimony to admit the photographs. Unfortunately, once the Appellate Court started down this path, it had to justify its predetermined holding with case precedent and then turned to the decision of the Illinois Supreme Court in Voykin. As noted above, however, Voykin does not deal with the issue of the admissibility of photographic evidence but, rather, whether medical testimony is required in order to establish a causal link between a preexisting and current injury. In so doing, the Court makes a huge, and unsupportable, empirical leap in its holding:

The same principles apply to the relationship between damage to a plaintiff's vehicle and the nature and extent of a plaintiff's personal injuries. Nonetheless, contrary to the dissent's assertion, we are not creating a bright-line rule. To hold, as the dissent suggests, that such photographs are always relevant and admissible, is to create a bright-line rule that expert testimony is never required. We do not hold that expert testimony must always be required for such photographic evidence to be admissible. We hold that the trial court *in this case* did not abuse its discretion in requiring expert testimony to show a correlation between the extent of the vehicular damage and the extent of plaintiff's injuries.

As Justice O'Mara Frossard succinctly states in her lengthy dissent, the majority opinion does exactly what it claims it does not; create a bright-line rule which, given the lack of direction provided by the Appellate Court, creates an almost insurmountable barrier to the admission of photographs which reveal little, or no, collision damage to plaintiff's vehicle. As Justice O'Mara Frossard states:

The majority opinion will be interpreted as requiring expert testimony if a defendant wishes to challenge plaintiff's personal injury by showing the minor damage to plaintiff's vehicle. Based on that interpretation, in every case regardless of whether the plaintiff calls an expert, if the defendant wants to admit photographic evidence to challenge the injury to plaintiff's person by showing minor damage to plaintiff's vehicle, defendant will be required to present expert testimony regarding the correlation between plaintiff's injuries and damage to plaintiff's vehicle or risk exclusion of that evidence. Under this rule, if defendant wants to elicit direct testimony from the parties about the nature of the impact, defendant will be required to present expert testimony regarding the correlation between plaintiff's injuries and the nature of the impact, or risk exclusion of that evidence. This rule flies in the face of common sense and experience.

The Dicosola decision flies not only in the face of common sense and everyday experience, it impugns both the integrity and intelligence of juries. Although the human body is complex, neither the testimony of the plaintiff nor the plaintiff's treating physicians should be immune from attack or impeachment based upon that complexity. There is obviously a correlation between the speed and severity of an impact and the nature and extent of injuries sustained therefrom. A vehicle which strikes a concrete wall at 60 mph as opposed to 5 mph is much more likely to result in injury. This correlation is certainly well within the understanding of a jury. While some injuries may be caused by a low impact collision, and while some plaintiffs maybe more susceptible to injury, this correlation can be addressed in the plaintiff's case in chief.

Jurors should be allowed to independently weigh the credibility of the plaintiff's testimony concerning the severity of the impact and the injuries sustained, as well as the testimony of the plaintiff's attending physicians. Jurors should also be allowed to apply their own common sense and life experiences in ascertaining whether the plaintiff has either overstated his injury or, indeed, has been injured at all. The use of photographic evidence without expert testimony is certainly within the ken of a layperson.

The implications of the Dicosola case cannot be overstated. We anticipate Dicosola being utilized not only to bar the admission of photographs depicting the vehicles involved in a collision, but also to limit or prevent cross-examination and impeachment of the plaintiff concerning the nature and severity of the impact itself. Despite the protestations of the Court to the contrary, defendants will routinely be required to address the issue of whether or not to retain expert witnesses at the risk of having the most basic photographic evidence barred. The increased cost of litigating even the simplest soft-tissue "bump and bruise" case will have a pronounced chilling effect on the defense bar and the insurance industry. The decision will also hinder efforts to combat staged accident rings, inflated medical bills, chiropractic mills and unethical attorneys. In summary, the Dicosola decision is a classic example of an Appellate

Court over-thinking, over-analyzing, and over-reaching. We can only hope that the Sixth Division of the First District Appellate Court modifies its decision substantially prior to its formal publication.

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