# Civil Practice and Procedure: Trial Practice 2017 Demonstrative Evidence

Timothy J. Cavanagh
Cavanagh Law Group
161 N. Clark Street, Suite 2070
Chicago, IL 60601
Ph: 312.425.1900
www.CavanaghLawGroup.com
tjc@CavanaghLawGroup.com

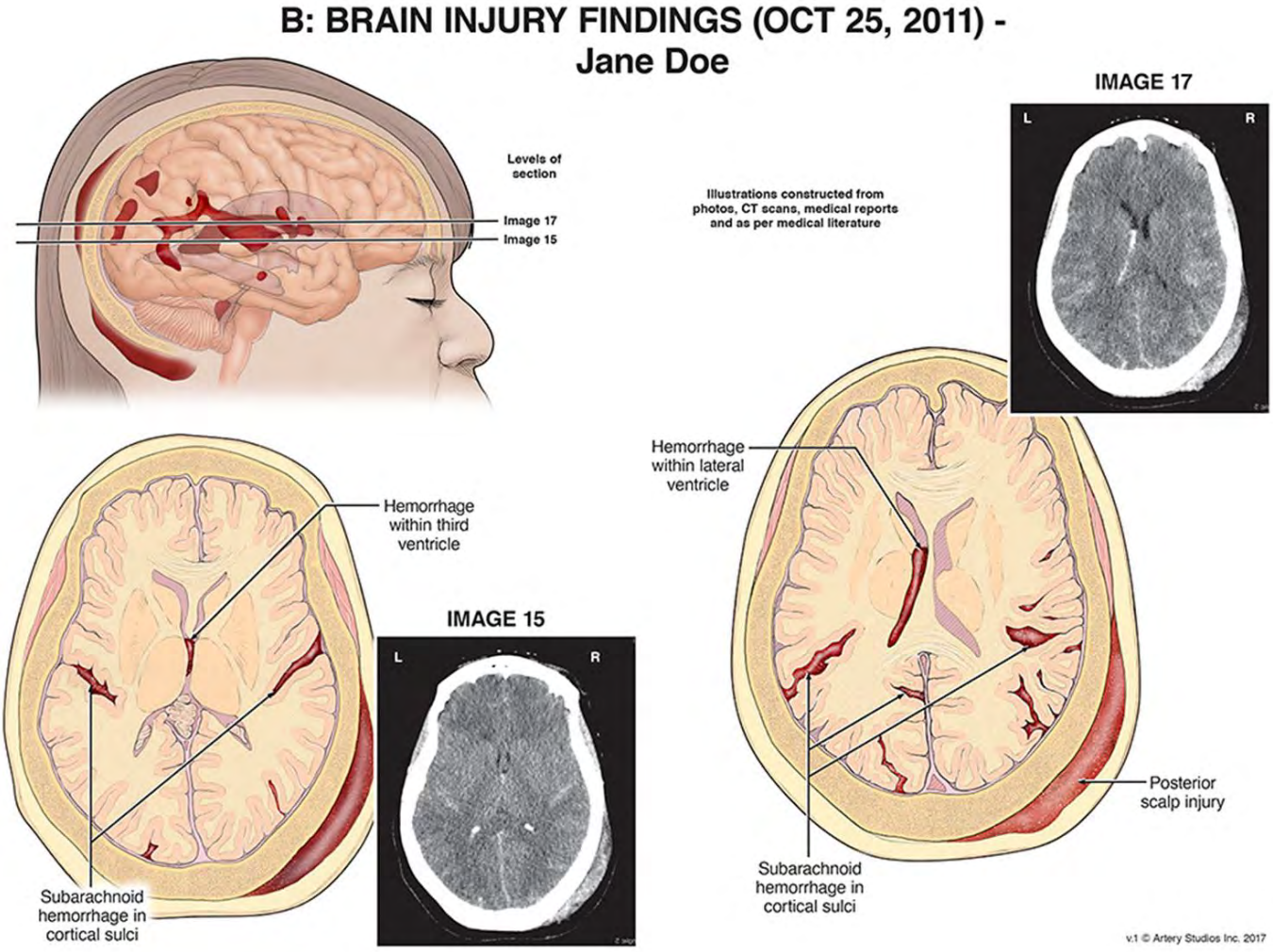
## I. Introduction

Demonstrative evidence is a powerful litigation tool. Demonstrative evidence can be used to bring cases to life before jurors' eyes. By incorporating pictures, videos, and animations into presentations and testimonies, you can put the jury in your client's shoes and tell your story in a manner that is both impactful and compelling. This presentation will cover the legal and practical aspects of demonstrative evidence as well as tips for creating highly effective demonstratives.

## II. How Demonstrative Evidence Works

Demonstrative evidence is effective because it fills the gaps left by verbal testimony. For example, studies have shown that when information is presented in a way that involves more than one sense, a listener's ability to recall that information and recall it accurately dramatically increases. Furthermore, showing a picture, diagram, or chart lends credibility to the information you are trying to convey and increases the likelihood that the juror will believe what you are saying. Lastly, jurors can become confused and overwhelmed by the voluminous amount of information presented at trial. Highlighting key information in

demonstratives is a way for you to help jurors sort out what information is important and what is not, ensuring that the key points of your case do not get lost in the weeds.




## III. The Admissibility of Demonstrative Evidence

Evidence comes in two types: substantive and demonstrative. Substantive evidence is generally admissible if it tends to make a fact of consequence more or less probable. Illinois Rule of Evidence 401. Demonstrative evidence explains or illustrates the already admitted substantive evidence in a case. Typically, demonstratives are the visual representations of verbal testimony.

A. Fair and Relevant Demonstrative Evidence is Admissible

The trial court has discretion over the admission of demonstrative evidence. *Preston ex rel. Preston v Simmons*, 321 Ill.App.3d 789, 801, 747 N.E.2d 1059, 254 Ill.Dec. 647 (2001) (citing *Schuler v. Mid-Central Cardiology*, 313 Ill.App.3d 326, 729 N.E.2d 536, 256 Ill.Dec. 163 (2000); *Hernandez v. Schittek*, 305 Ill.App.3d 935, 713 N.E.2d 203, 246 Ill.Dec. 163 (1999)). Relevancy and fairness are the primary considerations in determining whether demonstrative evidence is admissible. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, 12 N.E.3d 530. Demonstrative evidence is relevant if it is used to illustrate or explain the relevant verbal testimony of a witness. *Id*. It is fair, if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id*. Additionally, any photographic and video demonstratives must also be properly authenticated to be admissible at trial. *Id*.

B. Inaccurate or Misleading Demonstrative Evidence will be Excluded

Due to the inherently compelling nature of demonstrative exhibits, courts are careful of counsels' tendency use demonstratives purely for dramatic effect. The courts warn one another to be watchful for abuse of demonstrative evidence. *Sharbono*, 2014 IL App (3d) 120597. Demonstratives that are found to be inaccurate or misleading to the jury will be excluded. *Id*.

Devastating consequences can result when attorneys are not careful in their creation and use of demonstratives. For example, an Illinois appellate court recently overturned a jury verdict in favor of a defendant-doctor on the basis that the defendant's exhibit was not

properly classified as a demonstrative. In *Sharbono v. Hilborn*, the plaintiff alleged that the defendant negligently failed to timely diagnosis her breast cancer, resulting in numerous surgeries and lymphedema in her left arm. At trial, the defendant presented a PowerPoint presentation that contained images that were taken from a learned treatise along with copies of the plaintiff's own mammogram and ultrasound images. The headings of certain slides were labeled "benign appearing lesions," "benign appearing lesions," and "benign shadowing" and showed pictures from the learned treatise alongside images from the plaintiff's mammograms and ultrasound. The court held that because the defendant placed images from the plaintiff's mammograms under headings containing the word "benign," the PowerPoint went beyond merely aiding understanding of the defendant's testimony, but instead was being used to show the basis of the defendant's medical opinions and support his diagnosis of the plaintiff's lesion as benign.

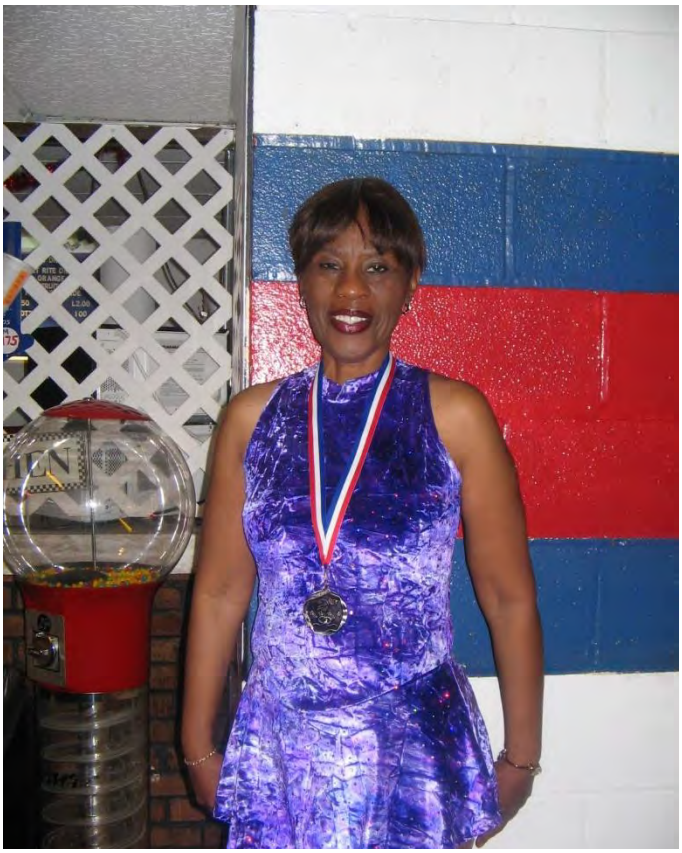
The Court went on to write that at no point during the trial did any witness testify from personal knowledge that the learned treatise images in the PowerPoint accurately portrayed the diagnostic condition that they purported to show. Therefore, even absent the misleading language, the PowerPoint could not have been properly admitted.

## IV. Types of Demonstratives

### A. Photographs

Photographs are the most commonly used demonstrative. Photographs not only help tell a story more clearly, but also can break up witness testimony to keep jurors engaged throughout a trial.

It is recommended that you obtain photographs from you client, as well as his or her family and friends early on. You can also look for photographs in police and fire department reports, as well as newspapers and medical examiner reports.



***A. Plaintiff Pre-Incident***

***B. Plaintiff Post-Incident***

B. Videos

Videos are effective because they can convey more information to the jury than a picture alone. As mentioned above, video evidence is admissible on the same basis as photographic evidence. This means that proper foundation must be laid and the video's probative value cannot be substantially outweighed by the danger of unfair prejudice. *Cisarik v. Palos Community Hosp.*, 144 Ill.2d 339, 341-2, 479 N.E.2d 873, 162 Ill.Dec. 59 (1991) (citing *People v. Donaldson*, 24 Ill.2d 315, 319, 181 N.E.2d 131 (1962); *Barenbrugge v.*

*Rich*, 141 Ill.App.3d 1046, 96 Ill.Dec. 163, 490 N.E.2d 1369 (1986); *Georgeacopoulous v. University of Chicago Hospitals & Clinics*, 152 Ill.App.3d 596, 105 Ill.Dec. 545, 504 N.E.2d 830 (1987)).

Day-in-the-life videos, in particular, are some of the most compelling demonstratives available. Day-in-the-life videos can show not only a client's day-to-day life, but also his or regular physical therapy visits or other care regimens. However, because of the profound effect these videos can have on jurors, defendants are often quick to object to their use.

As with any other video evidence, proper foundation must be laid to admit a day-in-the-life video. Proper foundation must be laid by a person with knowledge of the filmed activities. This does not mean that the defendant has a right to be present during filming; they do not. *Cisarik*, 24 Ill.2d at 342. Admissibility of the video is tested when it is offered into evidence, not before. *Id*. Likewise, the outtakes from filming are protected work product and are not discoverable. *Id.* Finally, since the purpose of the video is to show the Plaintiff's condition at the time of trial, the finished video is not subject to 213 disclosures deadlines. *Id*.

When plaintiff's attorneys follow the controlling caselaw, the admissibility of day-in-the-life videos has been repeatedly upheld. For example, in *Velarde v. Illinois Central Railroad Company*, a driver and two passengers of the car suffered severe injuries after their car was broadsided by train that proceeded through an intersection without stopping after dispatcher mistakenly advised the train's engineer that an earlier signal problem had been fixed and it was safe for the train to proceed through the intersection. 354 Ill.App.3d 523 (2004). On appeal, the defendant argued that a day-in-the-life video had been improperly admitted because it was unfairly prejudicial and resulted in an excessive damages award for the plaintiffs. The Court held that a "video cannot be characterized as unfairly prejudicial

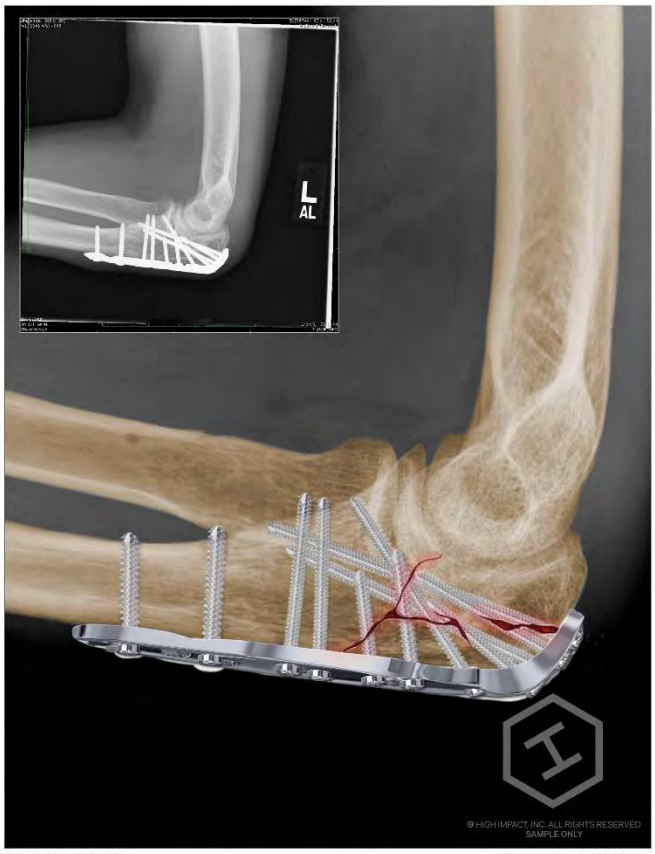
when it was approved by defense counsel, [defense counsel] raised no object, and [the video] is actually bland and innocuous." *Id*. at 542.

Similarly, in *Donnellan v. First Student, Inc*., the plaintiff suffered a traumatic brain injury after a school bus rear-ended his truck causing equipment stored in the back of his truck to fly forward and strike the back of his head. 383 Ill. App.3d 1040, 891 N.E.2d 463, 322 Ill.Dec. 448 (2008). An appellate court held that the trial court properly admitted a day-in-the-life video of the plaintiff because while the video showed the plaintiff wincing during physical therapy, it was not enough to find that the probative value of the video was substantially outweighed by the danger of unfair prejudice. The court held that the video was "tastefully" produced and "simply focuse[d] on a typical therapy session that the evidence at trial indicated would be required for the rest of the plaintiff's life."

LEFT ARM PRE & POST-OP COLOR DIAGNOSTICS

PRE-OP X-RAY MEDIAL VIEW 11/1/14

1. Left comminuted olecranon fracture



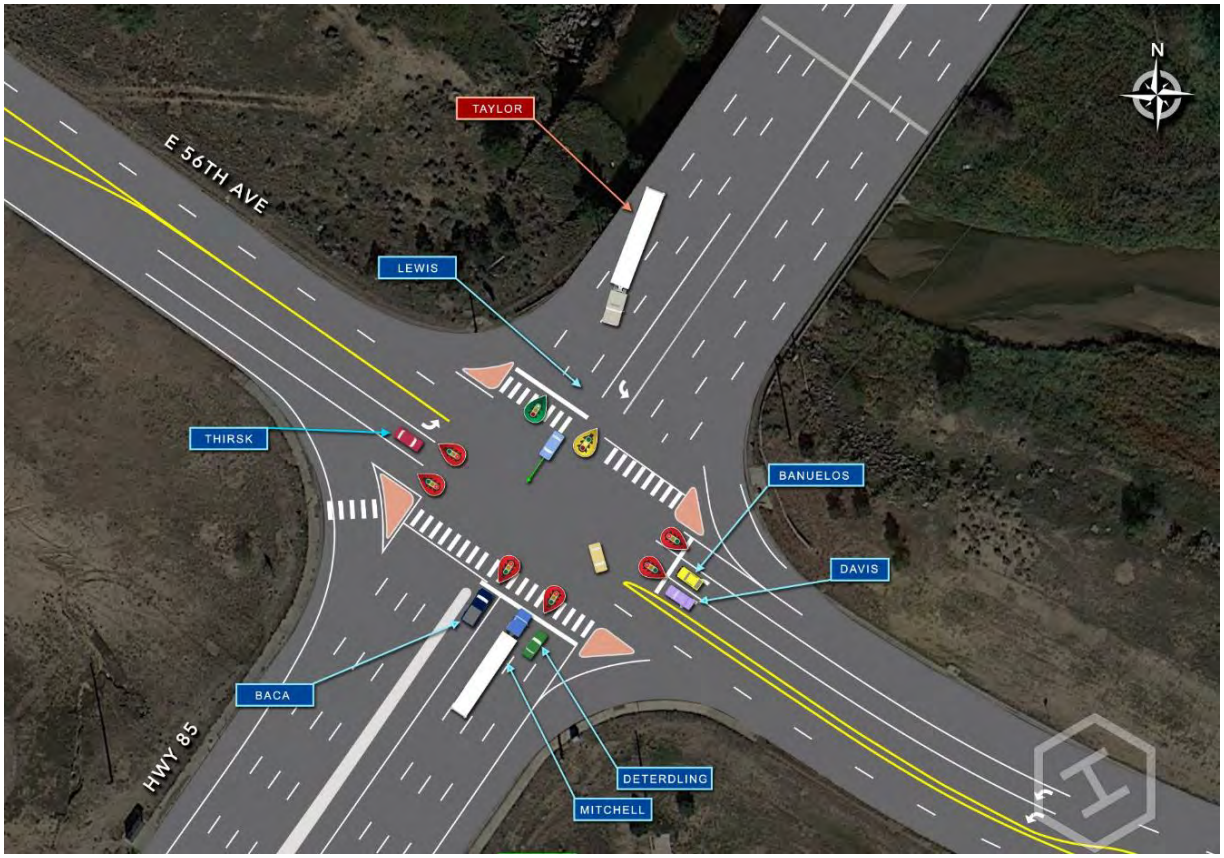

POST-OP X-RAY MEDIAL VIEW 2/2/15

2. Plate and screw fixation

C. Charts and Illustrations

Charts and illustrations can be a straightforward way to help the jury understand complex cases as well as expert testimony. Often an expert's testimony will contain language and concepts that are unfamiliar to an average juror. Using a chart to aid in the explanation of expert testimony will help maintain juror attention and recall of the otherwise unfamiliar information. Additionally, in cases with multiple defendants, a chart mapping out who each defendant is and what their role is in the case can help the jury keep the parties straight throughout the trial.

There are many demonstrative exhibit companies that specialize in making charts and illustrations. For example, High Impact created the aerial view (below) of a car crash to help illustrate to the different parties to the jury. Be sure all charts and illustrations are clearly labeled and easily readable at a distance. A chart or illustration that is confusing or too hard for the jury read will not serve its intended purpose.



D. Models

In certain cases, models can be extremely effective. For example, in product liability cases, a model might be used to show a safer design was available. Additionally, an exemplar of a product might be worked into expert testimony, if space in the courtroom allows. If the jury can see the actual product at issue, this lends credibility to the expert's testimony and conveys the information more clearly to the jurors.

E. Computer Animations

Computer animations have many benefits that simply cannot be duplicated or matched by any other demonstrative. Computer animations can show a three-dimensional

perspective that is not subject to the limitations of real life. For example, a computer animation can show a 360-degree view of a spinal surgery or the seconds leading up to a motor vehicle crash from a driver's perspective. Moreover, computer animations can also show large scale operations and detailed views of the scene that might otherwise only be available to the jury through a jury view. Although creating computer animations can be expensive, giving the jury the ability to sit behind the driver's seat at the moment of impact in a crash or see the medical procedures performed step by step could be invaluable to a case.

## V. Tips for Effective Use of Demonstrative Evidence

### A. Turn the Key Points of Your Case into Demonstratives

Demonstrative exhibits are effective not only in their ability to aid understanding for what otherwise could be complex testimony or to engage the jurors in otherwise monotonous testimony, but also because they can help jurors remember key pieces of information and recall them later in the deliberation room. People naturally remember visuals more easily than words. Therefore, by turning the key elements of your case into visuals, it is likely the jury will be more easily able to recall those points later when they are deliberating.

### B. Incorporate Demonstratives at All Points During Litigation

Demonstratives can be incorporated into every point during litigation, and should not be used only at trial. For example, demonstratives can be incorporated into depositions, hearings, and mediations.

Using demonstratives early in the litigation process has a few benefits. First, incorporating a demonstrative is an effective way to reinvigorate testimony, particularly in long depositions. Keep in mind that if that deposition is videotaped and you decide to show

the videotaped deposition at trial, it might be helpful to consider using video editing software to split the screen when a demonstrative is shown to a deponent so the jury can see what the deponent is looking at or being questioned about. Second, by spending the time and money to create demonstratives early, you are sending a message to opposing counsel about the resources and energy you are willing to expend on a case. Finally, using demonstratives early can be a way to gage their effectiveness and make necessary changes before you get to trial. It can also help you review the evidence and test weaknesses in your case early on.

Demonstratives should be incorporated during every stage of trial. Using demonstratives during an opening statement is often the most difficult. Because no substantive evidence has been admitted at this point, you will need agreement of the court and counsel to use demonstrative evidence during your opening. Nonetheless, you might consider creating a checklist of the elements you must prove or a visual aid that reinforces your themes, something that will be memorable for the jury and immediately give them a sense of what the case is about.

C. Engage as Many Senses as Possible

Demonstratives can be as simple as using a projector to show a PowerPoint presentation or poster board with a few key phrases or as elaborate models of vehicles or trains. Demonstratives are often incorporate visuals into otherwise oral testimony, but the use of demonstratives does not need to be limited this sense. For example, if your plaintiff was struck by a falling brick, bring in a brick and drop it to the ground, let the jury hear what a falling brick sounds like.

In a catastrophic injury case, you might also consider having your life care planner bring in the modified tools required for your client's day-to-day life, such as modified silverware or writing utensils. Pass around the modified tools to the jury. Let them feel what it is like to hold them and work with them. The point of the demonstratives is to help the jury remember key information, so by engaging another yet another sense, touch, a juror will be able to recall the information more easily during deliberations.

D. Familiarize Yourself with the Technology

If you decide to use technology during trial, make sure you are familiar with how it works. Practice going through a PowerPoint or a computer animation multiple times before presenting it to the jury. Occasionally technology malfunctions and there is nothing to be done about it, but user error can cause unnecessary delays that will distract and detract from your presentation. For this reason, it is imperative that you know how to use your technology proficiently before you are in front of the jury.

## VI. Additional Resources

A. Illinois Rules of Evidence 401, 402, and 403

B. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597

C. *Cisarik v. Palos Community Hosp.*, 144 Ill.2d 339, 479 N.E.2d 873, 162 Ill.Dec. 59 (1991)

D. *Preston ex rel. Preston v. Simmons*, 321 Ill.App.3d 789 (2001)

E. *Velarde v. Illinois Cent. R.R. Co.*, 354 Ill.App.3d 523 (2004)

F. *Donnellan v. First Student*, Inc., 383 Ill.App.3d 1040 (2008)

G. High Impact: http://highimpact.com/

H. OrthoClick: https://orthoclick.com/

Page 873

**579 N.E.2d 873**
**144 Ill.2d 339, 162 Ill.Dec. 59**
**Kelly Lynn CISARIK, a Minor, by Nancy CISARIK, her Mother and Next Friend, et al.,**
**v.**
**PALOS COMMUNITY HOSPITAL et al. (Ann Herbert, Contemnor-Appellee; Palos Community Hospital, Appellant).**
**No. 69807.**
**Supreme Court of Illinois.**
**Sept. 26, 1991.**

Page 874

[144 Ill.2d 341] [162 Ill.Dec. 60] Lunn M. Egan, Hinshaw & Culbertson, Chicago, for Palos community hosp.

Martha A. Churchill, Mid-America Legal Foundation, Chicago, for amici curiae Illinois Chamber of Commerce, Illinois Mfrs. Assoc., and Mid-America Legal Foundation.

Barry D. Goldberg, Goldberg & Goldberg, David A. Novoselsky, Chicago, for Ann Herbert.

Wildman, Harrold, Allen & Dixon, Pretzel & Stouffer, Chartered, Chicago.

Justice HEIPLE delivered the opinion of the court:

This is a medical malpractice case brought by a brain-damaged infant against a hospital and others. As part of plaintiff's case in chief, her counsel intends to produce a motion picture of plaintiff which would depict a typical day in her life. The purpose of the movie is to give the jury a grasp of the full extent of plaintiff's disabilities and handicaps.

Defense counsel asked for and obtained from the trial court a protective order giving them advance notice of the filming, the right to be present at the filming, and a copy of the finished film as well as all edited out and unused footage. The appellate court modified the protective order in some respects. 193 Ill.App.3d 41, 140 Ill.Dec. 189, 549 N.E.2d 840.

Viewed in its proper light, a so-called "Day in the Life Movie" is merely a type of demonstrative evidence. In such respect, it is comparable to a still photograph, a graph, a chart, a drawing or a model. The preparation of such evidence falls within the work product of the lawyer who is directing and overseeing its preparation.

Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness. (M. Graham,[144 Ill.2d 342] Cleary & Graham's Handbook of Illinois Evidence § 401.2 (5th ed.1990).) Because a "Day in the Life" film is a form of motion picture it is admissible evidence on the same basis as photographs. (Amstar Corp. v. Aurora Fast Freight (1986), 141 Ill.App.3d 705, 96 Ill.Dec. 31, 490 N.E.2d 1067.) Consequently, before a "Day in the Life" film can become evidence at trial it must first pass a two-prong test. First, a foundation must be laid, by someone having personal knowledge of the filmed object, that the film is an accurate portrayal of what it purports to show. (People v. Donaldson (1962), 24 Ill.2d 315, 319, 181 N.E.2d 131.) Second, the film is only admissible if its probative value is not substantially out-weighed by the danger of unfair prejudice. Barenbrugge v. Rich (1986), 141 Ill.App.3d 1046, 96 Ill.Dec. 163, 490 N.E.2d 1368; Georgacopoulos v. University of Chicago Hospitals & Clinics (1987), 152 Ill.App.3d 596, 105 Ill.Dec. 545, 504 N.E.2d 830.

Defense counsel argues that since "Day in the Life" films are intended "to demonstrate a parade of horribles," they should be subjected to more stringent discovery guidelines than other types of evidence, in order to afford all



fastcase

parties a measure of fairness. We disagree. As correctly pointed out by plaintiff's counsel at oral argument, defense counsel has the right to bring before a trial court anything that is objectionable about the film. Indeed, Illinois courts, including this court, have been willing to exclude motion pictures that are unfairly prejudicial. See, e.g., Amstar Corp. v. Aurora Fast Freight (1986), 141 Ill.App.3d 705, 96 Ill.Dec. 31, 490 N.E.2d 1067 (videotape taken properly excluded from evidence since it offered vantage point different from that of witness whose testimony was sought to be impeached); French v. City of Springfield (1976), 65 Ill.2d 74, 2 Ill.Dec. 271, 357 N.E.2d 438 (error to admit plaintiff's film of accident scene that is prejudicial where

Page 875

[162 Ill.Dec. 61] it is inaccurate and tends to support plaintiff's theory).

We believe that opposing counsel has no right to intrude into the production of this demonstrative evidence. [144 Ill.2d 343] The test of this evidence will occur when and if it is offered into evidence. That is the proper time for the trial court to deal with its admissibility.

Accordingly, we reverse both the trial court and the appellate court as to the appropriateness of the protective order. We affirm the appellate court as to the reversal of the contempt order which was entered against plaintiff's counsel for refusal to comply with the trial court's order. The cause is remanded to the circuit court of Cook County for further proceedings consistent with the views expressed herein.

Appellate court affirmed in part and reversed in part; circuit court reversed; cause remanded.

BILANDIC, J., took no part in the consideration or decision of this case.

Chief Justice MILLER, dissenting:

The majority opinion ignores the proper role of discovery in the litigation process and inexplicably denies the present defendants certain minimal pretrial safeguards traditionally afforded litigants under our well-established rules of discovery. For those reasons, I respectfully dissent.

This appeal arises from a pretrial order entered by the circuit court concerning defendants' discovery rights with respect to a day-in-the-life film that plaintiff intends to prepare for use at trial. A brief review of the history of this case will demonstrate precisely what is at issue here. Both the trial and appellate courts in the case at bar recognized the proposed day-in-the-life film as a distinct type of evidence, and each court formulated guidelines intended to ensure the defense appropriate discovery opportunities with respect to the film. The major [144 Ill.2d 344] difference between the guidelines issued by the trial court and those issued by the appellate court was that the latter did not require that defense counsel be allowed to attend the filming. By reversing the protective order in its entirety, today's decision eliminates even the appellate court's reduced set of guidelines and seemingly cuts the present proceeding loose from fundamental discovery requirements.

The trial judge aptly noted that a day-in-the-life film is "vital and valuable evidence" that may have a "serious impact" on all the parties to an action. In a written order, the trial judge provided that plaintiff give 14 days' notice to the defendants of the date, time, and place of filming; that counsel for each of the defendants be permitted to be present during filming and, furthermore, be allowed to cross-examine, at that time, anyone questioned by plaintiff's counsel during filming; and that all footage be preserved and made available upon the request of any party.



fastcase

Although the appellate court did not agree with the trial judge that defense counsel should be allowed to be present during filming, the appellate court recognized the need for discovery guidelines for preparation of the proposed film. The appellate court required plaintiff to preserve and make available to defendants all of the film taken, including any footage not included in the final edited presentation. (193 Ill.App.3d 41, 45, 140 Ill.Dec. 189, 549 N.E.2d 840.) The appellate court also determined that defendants were entitled to take discovery depositions of plaintiff's authenticating witnesses and to offer as evidence any otherwise admissible film not used by plaintiff. (193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d 840.) The appellate court granted plaintiff the same discovery opportunities with respect to any film that defendants intended to prepare for use at trial. 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d 840.

[144 Ill.2d 345] Before this court, plaintiff makes no challenge to the discovery guidelines fashioned by the appellate court and asks that the court's judgment be affirmed. Indeed, plaintiff relies extensively on the appellate court's guidelines in arguing against the additional requirement, imposed by the circuit judge, that defense counsel be allowed to be present during filming. In plaintiff's view, counsel's presence at filming is unnecessary

Page 876

[162 Ill.Dec. 62] because the appellate court's guidelines are sufficient to ensure adequate discovery opportunities for the defendants. Nonetheless, by reversing that portion of the appellate court's judgment pertaining to the protective order, the majority opinion effectively discards those guidelines as well, which simply reflect well-established principles of discovery.

The majority opinion misidentifies the issue in the present appeal, eliminating defendants' discovery rights on the ground that the proposed film must ultimately satisfy tests for admissibility at trial. The defects of this logic are at once apparent. Under the majority's reasoning, litigants should have virtually no discovery rights, for all evidence is subject to tests of admissibility at trial; furthermore, if evidence is later deemed admissible, then it may be introduced even though the opposing party has had no opportunity to discover it.

The majority's decision contravenes our policy of encouraging a broad scope of discovery. It is clear from our case law that tests of admissibility are not a substitute for discovery rights and, moreover, that compliance with discovery will not guarantee the admission of an item of evidence at trial. Our rules of discovery reflect principles of fairness, and are designed to further the efficient and expeditious administration of justice. (Monier v. Chamberlain (1966), 35 Ill.2d 351, 357, 221 N.E.2d 410.) Liberal discovery rights were originally developed "in response to prevailing dissatisfaction with procedural doctrines which had [144 Ill.2d 346] exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the truth." (Krupp v. Chicago Transit Authority (1956), 8 Ill.2d 37, 41, 132 N.E.2d 532.) The current provisions reflect our State's continued adherence to the same policy of broad discovery. Supreme Court Rule 201 specifically requires "full disclosure of not only those things which are admissible at trial, but also that which leads to admissible evidence." (134 Ill.2d R. 201(b)(1).) It is difficult to comprehend what compels the majority to depart from these settled principles in the present case. We should not now, at this late date, begin to reduce the role of discovery in litigation and revert to the kind of trial by ambush that can result when discovery rights are ignored.



fastcase

In support of its holding, the majority asserts that a day-in-the-life film is simply a species of demonstrative evidence, one that is comparable in effect to a still photograph, chart, or graph. Even demonstrative evidence, however, is subject to discovery. (See 134 Ill.2d R. 201(b).) And in making this comparison, the majority opinion overlooks the special nature of day-in-the-life films. Although such a film may be used demonstratively, the majority's conclusion that evidence of this type is "comparable to a still photograph, a graph, a chart, a drawing or a model" is misleading, if not inaccurate. As defendants observe, the suggested analogy is appealing in its simplicity but fails to acknowledge the powerful and distinctive nature of the evidence. See Comment, Plaintiffs' Use of "Day in the Life" Films: A New Look at the Celluloid Witness, 49 UMKC L.Rev. 179, 182 (1981).

For example, in Bolstridge v. Central Maine Power Co. (D.Me.1985), 621 F.Supp. 1202, 1204, a case in which a day-in-the-life film was excluded from evidence, the court characterized the film as "troublesome because it dominates evidence more conventionally adduced simply[144 Ill.2d 347] because of the nature of its presentation." In Haley v. Byers Transportation Co. (Mo.1967), 414 S.W.2d 777, 780, the Missouri Supreme Court upheld the exclusion of a day-in-the-life film from evidence because its "very obvious impact * * * would have been to create a sympathy for the plaintiff out of proportion to the real relevancy of the evidence." In Pisel v. Stamford Hospital (1980), 180 Conn. 314, 324, 430 A.2d 1, 8, the Connecticut Supreme Court held that a particular day-in-the-life film was admissible but cautioned that courts, in ruling on the admissibility of this type of evidence, should carefully consider the "danger that the filmmaker's art may blur reality in the minds of the jury."

In the present case, plaintiff has stated that a physician or other medically trained

Page 877

[162 Ill.Dec. 63] expert might narrate the film and question the injured minor or appear with her as she performs her daily activities. Before the trial court, plaintiff's counsel explained that the expert will perhaps subject the child to a "psychomotor test for the purpose of eliciting a response indicating the lack or the amount of acuity or awareness or attention or knowledge." Although this evidence would certainly be demonstrative of plaintiff's disabilities, it would also pose certain hearsay problems, through either the statements or conduct of the participants. See Bolstridge, 621 F.Supp. at 1204 ("admission of the [day-in-the-life film] into evidence will create the risk of distracting the jury and unfairly prejudicing the Defendant, principally though not exclusively, because the benefit of effective cross examination is lost"); Haley, 414 S.W.2d at 780 (day-in-the-life film "constituted in reality testimony from plaintiff which was not subject to cross examination"); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 401.8, at 12 (Supp.1991) (conduct depicted in day-in-the-life films might implicitly constitute testimonial assertions).

[144 Ill.2d 348] As the above discussion demonstrates, a day-in-the-life film is a distinct type of evidence, one that is not simply equivalent to still photographs, charts, and graphs, as the majority would have it. Indeed, there might be circumstances in which a film will not be admissible unless opposing counsel has been afforded the opportunity to attend its preparation. We need not determine here, however, what conditions must be met to secure its eventual admission into evidence. By the same token, it should also be clear that the possibility that certain evidence might later fail to be admissible does not mean that an opposing party is not entitled to the full range of pretrial discovery opportunities with respect to it.



fastcase

In sum, I disagree with the majority's misplaced reliance on tests of admissibility to resolve the discovery issue presented in this appeal. The court's conclusion that the proposed film is not subject to discovery because it will eventually be tested for admissibility at trial is at odds with our established rules of discovery. The majority opinion ignores the proper role of discovery in the litigation process and, as a result, strips the defendants here of the full range of discovery opportunities to which they are entitled. I would affirm the judgment of the appellate court.

FREEMAN, J., joins in this dissent.

**891 N.E.2d 463**
**Vincent DONNELLAN, Plaintiff-Appellee,**
**v.**
**FIRST STUDENT, INC., Defendant-Appellant.**
**(Earl F. McClendon, Defendant.).**
**No. 1-06-2418.**
**Appellate Court of Illinois, First District, Fourth Division.**
**June 19, 2008.**
**Rehearing Denied July 24, 2008.**

[891 N.E.2d 466]

Edward M. Kay, Paula M. Catstensen, Clausen, Miller P.C., Chicago, IL, for Plaintiff-Appellant, First Student, Inc.

William J. Harte, Ltd., and The Healy Law Firm, (Martin J. Healy, Jr., Kevin T. Vuegeler, William J. Harte, Joan M. Mannix, of counsel), Chicago, IL, for Plaintiff-Appellee, Vincent Donnellan.

Justice MURPHY delivered the opinion of the court:

On February 11, 2002, plaintiff Vincent Donnellan's cargo van was rear-ended by a school bus driven by an employee of defendant First Student, Inc. Plaintiff, 31 years old on the date of the accident, had no adverse health issues at the time. Plaintiff alleged in his complaint that, as a result of the accident, he suffered numerous permanent physical and mental injuries. Defendant conceded its negligence in the accident, but disputed that the accident was the proximate cause of plaintiff's alleged injuries.

On April 7, 2006, following several days of trial, the jury returned a verdict in favor of plaintiff for $6 million. Defendant seeks reversal of the jury verdict or, alternatively, reversal of the damages award and remand for new trial on damages or substantial remittitur. Defendant argues that the trial court abused its discretion and committed prejudicial error in allowing plaintiff's day-in-the-life video as demonstrative evidence but barred defendant's surveillance video. Defendant also argues that it was prejudiced by several evidentiary errors and the trial court's instructions to the jury. For the following reasons, we affirm the verdict of the jury.

[891 N.E.2d 467]

I. BACKGROUND

On September 11, 2002, plaintiff filed a complaint against defendant and Earl F. McClendon for injuries allegedly suffered due to defendant's negligence in the February 11, 2002, accident. At the time, McClendon was defendant's employee and driving the school bus that rear-ended plaintiff. Prior to trial, McClendon was voluntarily dismissed and defendant admitted negligence.

Prior to the commencement of trial on the issues of causation and damages, the trial court heard the parties' motions *in limine*. At issue on appeal are the trial court's decisions regarding plaintiff's day-in-the-life video, a surveillance video completed for defendant, and, following a hearing pursuant to *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), testimony on the results of a "Single Photon Emission Computer Tomography" (SPECT) scan of plaintiff's brain.

A. Plaintiff's Day-In-The-Life Video

The parties and the trial court watched the day-in-the-life video that the trial court described as a 4.5-minute video of plaintiff arriving at his therapist's office and going through physical therapy. Defendant argued that the video was not demonstrative, but substantive medical evidence, and that the audio and video depicted plaintiff in pain during his therapy session. Defendant claimed that it was at a disadvantage from the late disclosure as it could not depose the therapist or videographer before trial. The



fastcase

trial court found that, with the proper foundation from someone with personal knowledge that the video truly and accurately depicts what it shows, the video would be allowed as demonstrative evidence without audio. The trial court further granted defendant the right to depose the physical therapist in the video.

B. Defendant's Surveillance Video

Plaintiff sought to bar the use of a surveillance video defendant had taken of plaintiff less than two months before trial. Two days before the case was assigned for trial, defendant produced a copy of the video to plaintiff. Plaintiff asserted that the video was produced at such a late date that he was prejudiced by his inability to explore the content of the video with any witnesses. Furthermore, plaintiff argued that the videotape was edited from the total film taken and sped up in such a way that it was not an accurate portrayal of plaintiff's physical abilities.

Defendant argued that the surveillance video was relevant to the jury's determination of the effect of the injury on plaintiff's daily lifestyle. Defendant also argued that the late disclosure was not an issue, especially in light of the day-in-the-life video that was produced the day before trial. The trial court granted the motion to bar the surveillance video at that time to allow an opportunity for the court to review the video. The parties agreed not to mention the video during opening argument.

At the end of plaintiff's case, the trial court revisited the issue and held a foundational hearing. Defendant presented the testimony of Michael Kobliska, the private investigator who conducted the surveillance of plaintiff on February 9, 2006. Kobliska testified that he took the video with a Super 8 camera and the original tape was then converted to compact disc format by a third party. Kobliska did not know if the video was compressed or edited. However, he admitted that some actions noted in his report were not shown in the video.

In response, plaintiff offered the testimony of Steven Grant, a media expert. Grant testified to the effect of converting a Super 8 tape to MPEG computer file on compact disc. Grant indicated that this

[891 N.E.2d 468]

process compresses a file from 10,000 megabytes to 400 megabytes. He opined that this results in "tremendous changes" in the file.

In rendering its decision, the trial court first noted that there were issues with defendant's failure to disclose Kobliska as a witness during discovery and to seasonably supplement discovery. The trial court stated that it would not consider the copied videos because it had the original and the copies had been altered by the compression process. The trial court barred the original video solely on a balancing of the probative value of the video and the possibility of prejudice to plaintiff.

The trial court noted that defendant was offering the video as demonstrative evidence, but, pursuant to *People ex rel. Sherman v. Cryns,* 203 Ill.2d 264, 284-85, 271 Ill.Dec. 881, 786 N.E.2d 139 (2003), it could not allow the video if the threat of prejudice substantially outweighed the probative value of the video. The trial court found that the video had no probative value because it did not prove or disprove any facts at issue. However, the threat of prejudice was determined to be substantial because throughout the video, the view is obstructed. The trial court found that it is impossible to determine what activity is going on and if plaintiff is doing any work. It opined that this could prejudicially give the jury the impression that plaintiff was able to complete extensive work without pain.

C. The *Frye* Hearing



fastcase

Defendant also objected to the use of the SPECT scan and testimony regarding the analysis of the scan. Defendant requested a *Frye* hearing on the SPECT scan technology. Plaintiff presented the testimony of Dr. Dan G. Pavel, who testified that he was board certified in nuclear medicine. Pavel testified that he was currently affiliated with the University of Illinois at Chicago Hospital as a professor and had served an 11-month sabbatical with the National Institute of Health from 1995 to 1996.

Pavel explained that a SPECT scan measures the amount of activity over an organ, in this case the brain, by detecting tracer compounds injected into the patient. Pavel testified that he had been involved with SPECT scans for about 14 years, including lecturing and publishing articles on their use in brain trauma, and that they have been in wide use in hospitals throughout the country for more than 20 years. Pavel testified that several articles on SPECT scans and brain trauma had been written over that time but that the technology was continually evolving.

Because of his years of experience, Pavel was able to identify abnormalities in plaintiff's SPECT scans and make a differential diagnosis as to potential causes. Pavel testified that, with the patient's history and the SPECT scan results, he concluded that the injuries were consistent, within a certain level of probability, with a traumatic brain injury. Pavel admitted that he did not compare plaintiff's scan with that of a "normal" baseline scan, but stated that no such scan exists and he could only base his conclusion on his years of experience of reviewing SPECT scans.

Pavel also admitted that he could not opine that a traumatic brain injury caused the abnormalities, but only that they were consistent with such an injury. Pavel responded that false positives could, theoretically, be caused by a patient's medication but, practically, this was very unlikely. Accordingly, the trial court found that Pavel could not testify that the SPECT scan allowed him to opine on a causal connection, but would be limited to stating, based on studies, literature and his own experience, that the scan was consistent

[891 N.E.2d 469]

with a patient with a traumatic brain injury.

D. Plaintiff's Testimony

Plaintiff testified that he was born in Ireland in 1971 and moved to the Chicago area in 1996 where he found work as a carpenter. In 2000, plaintiff started an excavating company with a friend. In addition, he started a business that framed out residential buildings. At the time of the accident, plaintiff was driving his cargo van, which contained various tools and a generator separated from the front seats by a metal cargo cage. Plaintiff was stopped in the left lane, preparing to make a left turn. When plaintiff bent down to pick something up, McClendon rear-ended the van with the school bus. Plaintiff was hit in the back of the head by either the generator or a power tool that broke through the cargo cage and hit plaintiff. The van was pushed through the intersection and down into a ditch and rendered inoperable.

Plaintiff testified that he was dizzy and had a headache, but he refused treatment at the scene of the accident. A friend drove him home, where he went to bed. Later that day, plaintiff felt great pain and continued to have a headache so he went to the emergency room. Plaintiff was diagnosed with a cervical strain. Two days later, plaintiff returned to the emergency room due to pain in the lower back and neck.

Plaintiff testified to the years of consultations, treatments, and physical therapy he had received, and continued to receive, to treat his headaches and pain and sleep and vision problems and to work on



fastcase

regaining mobility. Plaintiff takes several medications but could not recall which types. For a period of time, plaintiff received painful steroid shots in the base of his neck to treat his headaches. While these treatments seemed to work, they were discontinued as plaintiff began to feel pain beyond the treatment time in the area that he received the shots. Plaintiff also continued to receive Botox treatments to try and strengthen his leg.

Plaintiff testified to his typical day and week. On Monday and Thursday, plaintiff attends therapy. On the other days of the week, plaintiff works for his friend Gavin Nicholas, as his health allows. Plaintiff works in a supervisory capacity at construction sites, assuring that the laborers, tradesmen and contractors are coordinated. After the accident, plaintiff obtained his commercial driver's license on his fourth attempt. While he still drives his car short distances, plaintiff can no longer drive trucks or operate heavy machinery. Plaintiff testified that he often has to close one eye and tilt his head to see properly when driving.

Plaintiff's wife, Rosanne Donnellan, a pediatrician, testified that she and plaintiff were engaged on December 24, 2001, and married on May 25, 2002, and that she was pregnant with their first child. Rosanne testified that she first noticed plaintiff's leg starting to turn in a few months after the accident until it eventually was turned in at all times. Rosanne stated that plaintiff had regular headaches, back spasms, vomiting due to pain, and sleep problems. In addition, plaintiff complained of double vision and, as a result, he no longer reads for enjoyment.

Rosanne testified that plaintiff suffers serious memory lapses. She testified that she was worried that this was a danger to plaintiff and their household. Rosanne also testified that plaintiff's problems have resulted in a drastic decrease in the couple's attendance at social functions because plaintiff does not want to suffer pain or people looking at him.

[891 N.E.2d 470]

Gavin Nicholas, a contractor, met plaintiff in 1999 and remains his close friend. Nicholas testified that plaintiff continues to work for him as a supervisor at construction sites. Plaintiff does not complete any labor or operate machinery, but he coordinates laborers and tradesmen to assure that work is getting done. Nicholas stated that plaintiff works as he is physically able and that he frequently takes breaks during the day, sometimes returning home or to Nicholas' home to take a nap.

E. Plaintiff's Diagnosis and Treatment

Dr. Gary M. Yarkony, board certified in physical medicine and rehabilitation since 1982, first saw plaintiff on July 12, 2002. Plaintiff complained of neck and back pain when he visited Yarkony. Yarkony suspected that plaintiff was suffering from a brain injury, including a cranial nerve injury that was causing a problem with plaintiff's eye muscle. Yarkony stated that this type of injury is typically associated with traumatic brain damage and he ordered an MRI of plaintiff's brain. Yarkony testified that the MRI did not demonstrate any issues and he utilized the later SPECT scan, which identified a brain injury, in his diagnosis. Yarkony also noted that he first observed plaintiff walking with an unusual gait on July 16, 2003, during his visit. Using a "little rehab doctor trick," he observed plaintiff walking in the parking lot as he left the examination to assure it was not an act.

Yarkony testified that plaintiff suffered a *coup contre coup* injury, meaning an injury to the brain at the site of impact, the back of plaintiff's brain, and the opposite side, the front of his brain. In addition, Yarkony diagnosed plaintiff with fourth nerve palsy, dystonia, myofascial pain, allodynia, occipital



fastcase

neuralgia, and depression. The result of these ailments are hypersensitivity to pain, cognitive dysfunctions, double vision, headaches, sleeping and mood problems and decreased ability to walk. Yarkony opined that plaintiff's symptoms will all naturally worsen as plaintiff ages and his body deteriorates.

Yarkony admitted that he did not diagnose dystonia or allodynia without input from plaintiff's wife. Yarkony stated that Rosanne first suggested that both of these ailments were possible and he admitted that he ultimately diagnosed plaintiff with them, because "she was right." Yarkony also admitted that he referred plaintiff to a movement disorder specialist in Chicago, but Rosanne took plaintiff to see a specialist at the Cleveland Clinic who did not diagnose plaintiff with dystonia.

Dr. Michelle Muellner of the Rehabilitation Institute of Chicago (RIC) testified that she treated plaintiff from April 2003 to July 2004 at the RIC chronic pain center. Plaintiff initially complained principally of neck and lower-back pain. Muellner initially concluded that plaintiff suffered chronic low-back pain with severe myofascial pain with both physical and psychological components. Muellner explained that chronic myofascial pain arises when the brain replicates the pain signal for the myofascial pain, pain between the muscle and connective tissues and ligaments, into a continual pain.

Muellner did not find evidence of neurologic compromise in her original diagnosis. Muellner testified that she was concerned that plaintiff was simulating or magnifying the symptoms and that he had exhibited several signs that triggered this fear, a concern that plaintiff's prior treating physician had shared with Muellner. However, she opined that he was not consciously exaggerating his symptoms.

Muellner testified that she was concerned that pending litigation was a stressor that could increase pain and prolong treatment. Muellner also was concerned

[891 N.E.2d 471]

that plaintiff's wife had too much of an active a role in his treatment. She feared that this could inhibit his treatment as plaintiff would less readily take on his recovery, accept his injuries and move on in his rehabilitation. Muellner also advised plaintiff, who continued to work full-time during the early phase of her treatment of him, to pace himself or he would not have successful treatment.

Upon plaintiff's discharge from Muellner's care on July 13, 2004, her concluding diagnosis of plaintiff's injuries remained chronic myofascial pain and traumatic brain injury. Muellner opined that plaintiff's conditions resulted from the automobile accident at issue in this case. Muellner also testified that plaintiff would continue to suffer pain and memory loss as a result of his injuries and that he would not be able to return to his prior jobs as an excavator and carpenter.

Plaintiff presented the evidence deposition of Dr. James Kelly, a board-certified neurologist who, upon referral from Dr. Muellner, saw plaintiff twice in April and May 2003. Kelly testified that he diagnosed plaintiff with fourth cranial nerve palsy, which causes plaintiff's right eye to drift down, affecting plaintiff's motor skills and ability to read and drive. Kelly also determined that plaintiff suffered from a mild form of concussion or mild traumatic brain injury due to the symptoms he presented including headaches, migraine headaches, occipital neuralgia, dystonia, memory loss, sleep disturbances and personality changes. Kelly opined that these conditions were a result of the biomechanical injury suffered in the accident. Kelly did not believe that plaintiff was exaggerating his symptoms or



fastcase

that he was a malingerer. Kelly prescribed medications in addition to those prescribed by Muellner.

From November 11, 2003, to December 2005, Drs. Anita Rao and Santhanam Suresh, anesthesiologists at Children's Memorial Hospital, treated plaintiff for his headaches caused by occipital neuralgia. Rao testified at trial that Suresh, a pediatric specialist, had administered about 12 occipital nerve blocks to plaintiff. Rao related that these blocks involve several injections of local anesthetic into the base of the skull where the occipital nerve lies and they provide temporary relief of head and neck pain. These treatments were successful, but Suresh referred plaintiff to her so he could see an adult pain specialist.

Rao testified that she administered five additional occipital nerve blocks to plaintiff. In addition, Rao performed a radio frequency thermal ablation procedure in the hope of providing longer-lasting relief to plaintiff. This procedure involves insertion of a small needle with a current attached to it into the area of the nerve that heats up the area and slows down the firing of the nerve causing the pain. Rao testified that these treatments helped decrease plaintiff's pain but that at the end of the treatment period he was still suffering from headaches.

Dr. Pavel testified about the relationship of blood flow to the function of the brain and the SPECT scan that was administered in September 2004. Pavel testified at length about symptoms that result from decreased function in different areas of the brain. Consistent with the court's ruling on defendant's motion *in limine* following the *Frye* hearing, Pavel testified that the SPECT scan of plaintiff's brain presented some of these abnormalities and that they were consistent with a traumatic brain injury. Pavel testified over objection that it was his opinion the abnormalities identified in the SPECT scan were permanent in nature.

[891 N.E.2d 472]

Plaintiff presented the evidence deposition of Dr. J. Jerry Rodos, a board certified osteopathic physician practicing psychiatry, who first saw plaintiff on August 24, 2006. Rodos prescribed a brain SPECT scan to help determine what was happening in plaintiff's brain. Rodos testified that Dr. Pavel found that plaintiff's SPECT scan revealed a pattern of blood flow consistent with a traumatic brain injury.

Rodos ultimately diagnosed plaintiff as having headaches, chronic pain, double vision, memory and personality changes, and dystonia, a nerve injury that caused plaintiff's posture to tilt and his left foot to point inward. In addition, as a result of these conditions, Rodos found that plaintiff suffers from depression. Rodos concluded that all of these conditions resulted from the traumatic brain injury suffered in the car accident.

Rodos prescribed aquatherapy, neurobiofeedback, acupuncture, and various topical creams to treat these conditions. Rodos utilized additional medication and therapy to treat plaintiff's depression. Rodos also recommended vocational therapy to plaintiff, but he has not been willing to embrace that therapy. Although Rodos opined that plaintiff has not made great progress in understanding the nature of his injuries, he affirmatively stated that he was not a malingerer.

Dr. Robert Kohn, a neuropsychiatrist and board-certified neurologist, testified that he saw plaintiff in January and April of 2005 as a consulting physician at Rodos' request. Kohn testified that he had experience in using SPECT scans and that he had authored several articles with Pavel on the subject. Kohn explained the SPECT process and testified that he reviewed plaintiff's SPECT scan and, over objection, that it was consistent with a *coup contre coup* brain injury.



fastcase

Kohn also testified that both plaintiff and his wife were present for the first examination and he interviewed both of them regarding plaintiff's health issues and history. Kohn testified that plaintiff appeared physically uncomfortable with dystonic posturing. After physical examination, review of plaintiff's file, scans, and medical and family history during his two office visits, Kohn concluded that plaintiff suffered from post-traumatic brain injury and dystonia, fourth cranial nerve palsy, and possibly occipital neuralgia. Kohn opined that the likely cause of plaintiff's conditions was the impact to the back of the head during the accident.

The evidence deposition of Dr. Jennifer Pallone, a board-certified neurologist, who was referred by Dr. Rodos to treat his pain and muscle spasms, was also presented. Pallone testified that she first saw plaintiff on September 19, 2005, and diagnosed him as suffering from closed head trauma, chronic headaches, and segmental dystonia. Pallone prescribed Botox injections to treat his dystonia and headaches. Pallone testified that the Botox injections help reduce muscle spasms and provide temporary relief of dystonia symptoms.

F. Defendant's Witness

As its sole witness, defendant presented the testimony of Dr. Robert Heilbronner, a clinical neuropsychologist, who examined plaintiff on December 8, 2005. Heilbronner testified that he reviewed the file of Dr. Jerry Sweet, a neuropsychologist at CRI who evaluated plaintiff on May 21, 2003, and May 28, June 2, and June 4, 2004. Sweet concluded that he could not properly estimate plaintiff's abilities because plaintiff had given a variable or insufficient effort during his evaluations. He also opined that plaintiff had somatization disorder — a preoccupation with physical symptoms without a physical cause.

[891 N.E.2d 473]

Heilbronner concurred with Sweet's opinions and concluded that plaintiff suffered from conversion disorder, a psychiatric condition, and not a brain injury or other medical condition. Heilbronner bolstered this diagnosis with his conclusion that Rosanne was overly nurturant to the point of co-dependency and the issue of litigation caused plaintiff's complaints to persist. Heilbronner did not claim that plaintiff did not suffer the various symptoms identified above, but opined these symptoms were exacerbated and continued due to the psychosocial reinforcers. Heilbronner admitted that plaintiff suffered the fourth cranial nerve injury and symptoms of left leg pain, neck pain and headaches as a result of the accident. However, he testified that comprehensive psychiatric treatment would significantly improve all aspects of plaintiff's condition.

G. Jury Instructions and Verdict

During the jury instruction conference, defendant sought to instruct the jury to not consider or include any amounts for loss of earnings, profits, salaries or benefits in any award for damages. The trial court refused defendant's tendered instruction regarding any evidence of a wage loss claim, stating that defendant could argue the issue in closing. The jury deliberated and returned a verdict of $6 million for plaintiff. The jury itemized the award on the jury form as $82,500 for the stipulated past medical expenses, $3,417,500 for disability experienced and expected in the future, $500,000 for disfigurement, and $2 million for past and future pain and suffering. The trial court denied defendant's posttrial motion and this appeal followed.

II. ANALYSIS

A. Evidentiary Issues

1. *Plaintiff's Day-in-the-Life Video*

Defendant first argues that the trial court erred in admitting plaintiff's physical therapy video as demonstrative evidence. Defendant asserts that the video was not timely



fastcase

disclosed, an insufficient foundation was laid, and it improperly focused on plaintiff's discomfort to elicit sympathy from the jury. Defendant argues that the failure to bar the video, especially in light of the trial court's decision to bar defendant's surveillance video, discussed below, resulted in reversible error. We review a trial court's admission of a day-in-the-life video for an abuse of discretion, which occurs only when no reasonable person would agree with the decision of the trial court. *Velarde v. Illinois Central R.R. Co.,* 354 Ill.App.3d 523, 529, 289 Ill.Dec. 529, 820 N.E.2d 37 (2004).

Plaintiff's video, shot on March 17, 2006, is approximately five minutes long and contains footage of plaintiff exiting his car, walking into the rehabilitation center, and undergoing therapy on his leg and foot. Plaintiff produced the video to defense counsel on March 29, 2006, the day before trial proceedings began. Defendant argues that because the video was not disclosed until such a late date, in addition to the failure to disclose the physical therapist as a trial witness, it was deprived of any opportunity to challenge the evidence. Defendant contends that this evidence should have been barred pursuant to Rule 219(c). 210 Ill.2d R. 219(c).

Defendant continues to argue that plaintiff's video was not a day-in-the-life video as it did not simply demonstrate plaintiff's daily tasks and functions. *Velarde,* 354 Ill.App.3d at 535, 289 Ill.Dec. 529, 820 N.E.2d 37. Defendant points to several instances in the video where plaintiff grimaces and presents expressions of pain while his foot is manipulated by the therapist. Accordingly, defendant contends that the video was not demonstrative in any way but, rather was substantive evidence

[891 N.E.2d 474]

improperly presented to bolster plaintiff's case and claim for damages, prejudicing defendant's case. *Spyrka v. County of Cook,* 366 Ill.App.3d 156, 169, 303 Ill.Dec. 613, 851 N.E.2d 800 (2006); *French v. City of Springfield,* 65 Ill.2d 74, 82, 2 Ill.Dec. 271, 357 N.E.2d 438 (1976).

Defendant points out that this case is unlike *Georgacopoulos v. University of Chicago Hospitals & Clinics,* 152 Ill. App.3d 596, 105 Ill.Dec. 545, 504 N.E.2d 830 (1987). In *Georgacopoulos,* this court affirmed the admission of a day-in-the-life video that included a portion where the plaintiff undergoes a painful physical therapy session. The court noted that the therapy session was only a portion of the 19-minute video and that the trial court described the tape as "`tasteful.'" *Georgacopoulos,* 152 Ill.App.3d at 599, 105 Ill.Dec. 545, 504 N.E.2d 830. The court further distinguished that case from a federal case that found a day-in-the-life video more prejudicial than probative because it only showed a physical therapy session of the plaintiff that had suffered severe burns. *Georgacopoulos,* 152 Ill.App.3d at 599, 105 Ill.Dec. 545, 504 N.E.2d 830, citing *Thomas v. C.G. Tate Construction Co.,* 465 F.Supp. 566, 569 (D.S.C.1979). Defendant argues that, as in the *Thomas* case, plaintiff's video was only of his physical therapy session and the display of pain by plaintiff was therefore more prejudicial than probative.

Finally, defendant argues that no proper foundation was laid for the video as required in *Spyrka. Spyrka,* 366 Ill.App.3d at 167, 303 Ill.Dec. 613, 851 N.E.2d 800. The video was shown during Rosanne's testimony. She was not present during the filming and she did not explain what was contained in the video. Defendant asserts that the fact that Rosanne had been to prior therapy sessions was not sufficient to lay a proper foundation. *Cryns,* 203 Ill.2d at 284-85, 271 Ill.Dec. 881, 786 N.E.2d 139.

Plaintiff responds that as demonstrative, not substantive, evidence, a day-in-the-life video is not subject to the same disclosure requirements as substantive evidence and



fastcase

therefore there was no discovery violation. *Velarde,* 354 Ill.App.3d at 530-31, 289 Ill. Dec. 529, 820 N.E.2d 37. Furthermore, plaintiff asserts that the physical therapist was listed in plaintiff's discovery responses and the trial court granted defendant the opportunity to depose her. The therapist appeared in response to plaintiff's trial subpoena, yet defendant did not question her. In addition, plaintiff notes that defendant had every opportunity to question plaintiff himself on cross-examination but did not.

Plaintiff asserts that the trial court properly rejected defendant's argument that the video was more documentation of a medical examination than demonstrative day-in-the-life evidence. Plaintiff notes that our courts have stated that day-in-the-life videos constitute demonstrative evidence which helps jurors understand witness testimony. *Cisarik v. Palos Community Hospital,* 144 Ill.2d 339, 341, 162 Ill. Dec. 59, 579 N.E.2d 873 (1991); *Velarde,* 354 Ill.App.3d at 530-31, 289 Ill.Dec. 529, 820 N.E.2d 37. Plaintiff contends that defendant's argument rests on the inaccurate claim that the video so focused on plaintiff's pain and effort that it was prejudicial as the video distinguished by *Georgacopoulos.*

Plaintiff concludes that a proper foundation was laid by Rosanne, who testified that she had attended two physical therapy sessions in the past. She testified that the video accurately depicted how plaintiff exits his car, how he walks, and how his physical therapy is administered. Plaintiff argues that this is all that is required by

[891 N.E.2d 475]

*Spyrka* and *Cryns* to properly lay a foundation for demonstrative video evidence.

First, we agree that *Velarde* provides that, pursuant to *Cisarik,* day-in-the-life videos are demonstrative and not substantive videos. In addition, the very purpose of these videos is to illustrate evidence regarding a party's life at the time of trial. Accordingly, the disclosure prior to trial was not prejudicial. *Velarde,* 354 Ill.App.3d at 531-32, 289 Ill.Dec. 529, 820 N.E.2d 37. As succinctly outlined in *Cisarik,* a day-in-the-life video is akin to a photograph and admissible if a foundation is laid by someone having personal knowledge of the filmed object and that the video is an accurate portrayal of that. The video's probative value also must not be substantially outweighed by the danger of prejudice. *Cisarik,* 144 Ill.2d at 342, 162 Ill.Dec. 59, 579 N.E.2d 873.

Rosanne certainly knew plaintiff and could testify to his ability to drive, get out of a car and how he walked. She testified that she had attended plaintiff's sessions with the physical therapist twice and that the video was an accurate depiction of plaintiff and his therapy session. As with a photograph, Rosanne had personal knowledge of the contents of the video and the trial court properly accepted this as a foundation.

The trial court also found the danger of any prejudice did not outweigh its probative value. The video in this case is unlike those in *Spyrka* and *French.* In *Spyrka,* the video that was found to be prejudicial was a step-by-step animation of what happened to the plaintiff, not a general demonstrative exhibit to understand the medical condition suffered. Furthermore, the testifying doctor stated that he could not say the video accurately represented what happened to the plaintiff. *Spyrka,* 366 Ill.App.3d at 168-69, 303 Ill.Dec. 613, 851 N.E.2d 800. Likewise, in *French,* the video in question purported to familiarize the jury with the scene of an accident that occurred at night. The video, however was filmed in the day and in a fashion that mirrored the alleged chain of events in the case. Accordingly, in both cases, the videos were prejudicial because they preconditioned the minds of the jury to accept the plaintiffs' theories in each case. *Spyrka,* 366 Ill.App.3d at 169, 303 Ill.Dec. 613, 851 N.E.2d 800;



fastcase

*French,* 65 Ill.2d at 82, 2 Ill.Dec. 271, 357 N.E.2d 438.

As in *Georgacopoulos,* the video in this case was "tastefully" produced. The video was not produced to improperly precondition the jury on plaintiff's theory. Having viewed the video, it does not present a focus on plaintiff's pain and discomfort to the exclusion of anything else. While plaintiff does wince and/or grimace in different spots in the video, he also smiles and talks with the therapist. There is no undue focus on his pain, it simply focuses on a typical therapy session that the evidence at trial indicated would be required for the rest of plaintiff's life.

2. *Defendant's Surveillance Video*

Defendant argues that the trial court's error in admitting plaintiff's day-in-the-life video was compounded by its failure to allow the surveillance video. Defendant highlights that the trial court indicated during the hearing on defendant's motion to bar the day-in-the-life video that if it was going to be liberal about letting in video evidence for plaintiff it would have to be liberal for both sides. Defendant claims that the surveillance video was relevant to rebut plaintiff's video and the trial court erred in barring its surveillance video. Again, under *Velarde,* we review the admission of video evidence for an abuse of discretion. See also *Warrender v. Millsop,* 304 Ill.App.3d 260, 270, 237 Ill.Dec. 882, 710 N.E.2d 512 (1999).

[891 N.E.2d 476]

Defendant argues that surveillance videos are relevant and admissible substantive evidence concerning the extent of a plaintiff's injuries in a personal injury suit. *Shields v. Burlington Northern & Santa Fe Ry. Co.,* 353 Ill.App.3d 506, 509, 288 Ill.Dec. 916, 818 N.E.2d 851 (2004). Defendant contends that the surveillance video tended to disprove plaintiff's claims regarding the nature of his injuries and his inability to maintain a level of employment. Defendant argues that the trial court did not properly conduct a balancing test because it found that the probative value did not outweigh the danger of prejudice. Defendant contends that the test requires exclusion only if the probative value is substantially outweighed by the danger of prejudice. *Spyrka,* 366 Ill.App.3d at 167, 303 Ill.Dec. 613, 851 N.E.2d 800.

Defendant asserts that this court's ruling in *Carney v. Smith,* 240 Ill.App.3d 650, 181 Ill.Dec. 306, 608 N.E.2d 379 (1992), is controlling. In *Carney,* the plaintiff was injured in a car accident and presented various witnesses that testified to his persistent pain and disability, including dragging his foot. *Carney,* 240 Ill.App.3d at 651-54, 181 Ill.Dec. 306, 608 N.E.2d 379. The defendant introduced two surveillance videos of the plaintiff moving effortlessly, carrying numerous objects and performing various tasks. *Carney,* 240 Ill.App.3d at 657, 181 Ill.Dec. 306, 608 N.E.2d 379.

The trial court overruled the plaintiff's objection to these videos. While the plaintiff admitted that many parts of the videos were consistent with his presentation of evidence and theory of the case and the videos did not show the plaintiff engaging in any vigorous activity, the court found that they did rebut the inference that the plaintiff was in constant pain. Accordingly, this court affirmed the admission of the videos because their probative value outweighed any prejudicial effect. *Carney,* 240 Ill.App.3d at 657-58, 181 Ill.Dec. 306, 608 N.E.2d 379.

In addition, defendant argues that the late disclosure of the surveillance video did not warrant exclusion as a discovery sanction pursuant to Rule 219. 210 Ill.2d R. 219(c). Defendant highlights that the purpose of a discovery sanction is not to punish a party, but to ensure fair proceedings. *Smith v. P.A.C.E.,* 323 Ill.App.3d 1067, 1075, 257 Ill.Dec. 158, 753 N.E.2d 353 (2001). Defendant argues that plaintiff was not



fastcase

prejudiced by the late disclosure of the video because Kobliska was deposed and available to testify at trial and the original tape was also available to alleviate concerns regarding distortion. However, defendant maintains that it was prejudiced by allowing plaintiff's day-in-the-life video at such a late date, without a chance for it to provide rebuttal.

Plaintiff responds that the trial court properly denied showing defendant's copied versions of the video because the testimony of both Kobliska and Grant identified issues whether these versions accurately portrayed what they purported to show. As for the original version, plaintiff notes that, at trial, defense counsel argued that the surveillance videos were offered as demonstrative evidence in conjunction with Kobliska's testimony, while on appeal, defendant argues that the video is admissible as substantive evidence. Plaintiff argues that defendant has therefore waived this issue for its failure to stand on the theory presented at trial. *Shannon v. Boise Cascade Corp.,* 208 Ill.2d 517, 527, 281 Ill.Dec. 845, 805 N.E.2d 213 (2004).

Plaintiff argues that, waiver notwithstanding, the trial court properly determined that the surveillance video was not probative of the issue being contested. Therefore it concluded that its probative

[891 N.E.2d 477]

value did not outweigh the possible prejudice. Plaintiff concludes that the cases cited by defendant are factually inapposite and actually support his case. Plaintiff argues that in each case, the surveillance video at issue captured the plaintiffs acting inconsistent with their claims at trial. Furthermore, each case resulted in affirmance of the trial court's discretionary decision.

Plaintiff contends that the trial court was correct in concluding that there was no probative value to the video because it only demonstrated activity that plaintiff admitted. Plaintiff admitted that he can drive and works overseeing construction sites when capable. The surveillance video, plaintiff argues, by its very nature is prejudicial because it suggests that he had been caught doing something he claimed he could not. Plaintiff contends that defendant misrepresents the content of the video because views are obscured for moments that defendant argues plaintiff walks without his cane and over uneven ground. Furthermore, the video could improperly give the impression that plaintiff was capable of constant activity and, thus, was correctly determined to be prejudicial. *Carroll v. Preston Trucking Co.,* 349 Ill. App.3d 562, 285 Ill.Dec. 611, 812 N.E.2d 431 (2004).

First, if the surveillance video is substantive evidence as defendant argues, it was properly excluded. Neither Kobliska nor the video was disclosed by defendant during discovery. Kobliska testified that he filmed the video in February 2006, informing defendant on February 9, 2006, that he had made a videotape. The fact that defendant did not receive the final copy of the video until March 21, 2006, does not remove the requirement of disclosure or the duty to seasonably supplement disclosure pursuant to Rule 214. 166 Ill.2d R. 214. However, the video was offered as demonstrative evidence and, despite defendant's arguments, it was not barred by the trial court as a discovery sanction. The trial court simply prefaced its holding by noting defendant's failures to promptly supplement disclosures and disclose Kobliska as a trial witness.

The trial court then weighed the probative value of the video against the possible prejudice pursuant to *Cryns*. We agree that the trial court did not abuse its discretion in barring the video as demonstrative evidence. The video did not counter any claims made by plaintiff. Plaintiff maintained that he worked and drove when he was physically able. The video shows just



fastcase

that. However, the danger of undue prejudice outweighed any probative value.

In *Carroll,* the defendant offered a surveillance video of the plaintiff, who had made a worker's compensation claim, walking without a cane, moving a ladder, operating a chainsaw, and completing other labor-intensive work in his yard. *Carroll,* 349 Ill.App.3d at 564-65, 285 Ill.Dec. 611, 812 N.E.2d 431. The *Carroll* court opined that the video was probative to show the extent of the plaintiff's incapacitation and that the defendant could have used the plaintiff as a foundational witness. *Carroll,* 349 Ill.App.3d at 566, 285 Ill.Dec. 611, 812 N.E.2d 431. However, it held that the trial court did not abuse its discretion because the unfair prejudice that resulted from the editing showing the plaintiff completing physical tasks. This left the impression that he could maintain such activity for long periods of time when they were completed over a short time period. *Carroll,* 349 Ill.App.3d at 567, 285 Ill.Dec. 611, 812 N.E.2d 431.

While, under *Carney* and *Carroll,* it could be said that the trial court erred in saying that the video was "not probative to any issue" because the video was probative

[891 N.E.2d 478]

to counter plaintiff's claims of constant pain, the harm of prejudice outweighed any probative value. Despite defendant's contention that Kobliska testified that the video was not edited to demonstrate only the period plaintiff was working and that he filmed at every moment that he could, the video leaves the impression that plaintiff was working for extended periods of time. Unlike *Carney,* there is no direct rebuttal of plaintiff's claims to boost its probative value.

The trial court highlighted that the video is obscured frequently and there were other times where the plaintiff is just sitting in a car. The trial court opined that it was impossible to determine if these obscured moments were downtime or active and, as in *Carroll,* determined this could lead to the impression that plaintiff was actively working on the site. Under *Carroll,* this conclusion was not an abuse of discretion.

3. *Frye Hearing on the SPECT Scan and Related Testimony*

Defendant argues that the trial court erred in concluding that the SPECT scan was generally accepted scientific evidence under *Frye*. Defendant also contends that even if the trial court's ruling on the SPECT scan was correct, plaintiff's witnesses improperly testified regarding their use of the scan in treating plaintiff. The admissibility of evidence is a matter that typically rests squarely within the discretion of the trial court. *Agnew v. Shaw,* 355 Ill.App.3d 981, 988, 291 Ill.Dec. 460, 823 N.E.2d 1046 (2005). However, in reviewing a trial court's *Frye* analysis, we conduct *de novo* review and may rely on materials outside the record, including legal and scientific articles and opinions from courts of other jurisdictions. *In re Commitment of Simons,* 213 Ill.2d 523, 530-32, 290 Ill.Dec. 610, 821 N.E.2d 1184 (2004).

First, defendant argues that this court should adopt the test set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), because it constitutes a clarification of the standard for admission of scientific evidence. Plaintiff asserts that defendant waived this issue for its failure to raise it until the posttrial motion. However, defendant discussed *Daubert* in both its motion *in limine* seeking to bar the SPECT scan evidence and in its posttrial brief.

While our supreme court has recently noted that Illinois courts have not addressed the issue of whether *Daubert* should supplant *Frye,* it has continued to hint that this issue is ripe for its consideration. See *People v.*



fastcase

*McKown,* 226 Ill.2d 245, 247, 314 Ill.Dec. 742, 875 N.E.2d 1029 (2007). However, Illinois case law is replete with references that Illinois law is "unequivocal" in that the exclusive test for the admission of expert testimony is the general acceptance test of *Frye*. *Donaldson v. Central Illinois Public Service Co.,* 199 Ill.2d 63, 76, 262 Ill.Dec. 854, 767 N.E.2d 314 (2002). Although we are bound to precedent until our supreme court adopts a new test, the issue bears quick review. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.,* 347 Ill.App.3d 828, 836, 283 Ill.Dec. 324, 807 N.E.2d 1165 (2004).

Under the general acceptance test of *Frye,* scientific evidence is admissible if the methodology underlying the opinion is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye,* 293 F. at 1014. The focus of this test is on the underlying methodology of the opinion and not the ultimate conclusion. *Agnew v. Shaw,* 355 Ill.App.3d 981, 988, 291 Ill.Dec. 460, 823 N.E.2d 1046 (2005). For federal cases however, *Daubert* held that the *Frye* standard

[891 N.E.2d 479]

was superseded by the adoption of the Federal Rules of Evidence. *Daubert,* 509 U.S. at 587, 113 S.Ct. at 2793-94, 125 L.Ed.2d at 479.

Like *Frye, Daubert* seeks to determine the soundness of an expert's methodology. Unlike the simple and open general acceptance requirement of *Frye, Daubert* provides "general observations" to consider in determining whether a standard of evidentiary reliability has been reached that would assist the trier of fact in understanding the fact at issue. *Daubert,* 509 U.S. at 591-93, 113 S.Ct. at 2795-97, 125 L.Ed.2d at 481-83. Though "flexible" and not exhaustive, *Daubert* listed the following considerations to be examined: whether the methodology has been tested; whether the theory or technique has been submitted for peer review or publication; if there is a known or knowable rate of error; if the theory or practice has been generally accepted in the proper scientific community; and the existence of standards controlling the technique. *Daubert,* 509 U.S. at 593-95, 113 S.Ct. at 2796-98, 125 L.Ed.2d at 482-84.

Accordingly, it is plain that *Daubert* provides additional guidance to courts in determining the standard of evidentiary reliability of scientific evidence. As the *Daubert* court noted, debate and scholarship on the merits of the *Frye* test are legion. Over the 85 years of developing law since the decision in *Frye,* many established tests have been supplanted by the courts and legislature. While we are in no position to make such a change, we agree it may be due time for our supreme court's worthy consideration, though the facts of this case are likely insufficient for a proper challenge to the rule.

As noted above, the trial court in this case properly followed *Donaldson* and conducted a *Frye* hearing. The trial court concluded that testimony could be heard on plaintiff's SPECT scan, but limited to the conclusion that it was consistent with a finding of traumatic brain injury and not that it could prove causation. Defendant argues that the trial court erred in this conclusion because it rested on Pavel's testimony alone. In addition, it argues that the trial court erred in allowing other experts to testify in violation of this ruling. For further support, defendant also cites to scientific articles and case law from foreign jurisdictions.

The two 1996 scientific journal articles cited by defendant opined that the few controlled experimental studies in using SPECT scans have left the use of the technology in forensic situations speculative. See Society of Nuclear Medicine Brain Imaging Council, *Ethical Clinical Practice of Functional Brain Imaging,* 37 J. of Nuclear Med. (July 1996); American Academy of



fastcase

Neurology, *Assessment of Brain SPECT,* 46 Neurology 278-285 (1996). Defendant also relies heavily on case law from the court of appeal of California. See *People v. Yum,* 111 Cal. App.4th 635, 637-39, 3 Cal.Rptr.3d 855, 855-57 (2003). The *Yum* court found that, based on the testimony of the defendant's expert and the prosecution's expert witness, the defendant had not shown that SPECT scans had achieved general scientific acceptance to diagnose brain trauma and post-traumatic stress disorder. *Yum,* 111 Cal.App.4th at 639, 3 Cal.Rptr.3d at 857.

Defendant also argues that Pavel's testimony during the *Frye* hearing was insufficient. Defendant cites to Pavel's admissions that there is no data on the known error rate for false positive scans, that double-blind studies have not been conducted, that it is possible that drug use might skew the results of a scan, and that there is no accepted methodology in using a SPECT scan for diagnostic purposes.

[891 N.E.2d 480]

Defendant notes that Pavel did not conduct a blind assessment of plaintiff's scan as he was informed of plaintiff's history. In addition, Pavel did not compare plaintiff's scan to a "normal" scan to identify abnormalities.

Finally, defendant argues that the trial court erred in allowing Rodos, Yarkony and Kohn to testify regarding the scan. Yarkony testified that he reviewed the SPECT scan and Pavel's report. Yarkony testified that, as he was not a neuroradiologist, he would have to rely on the report interpreting the scan, but opined that the scan confirmed the diagnosis of traumatic brain injury. Likewise, Rodos testified he was not an expert in SPECT scans, but, as with Yarkony, he was allowed to testify that Pavel's interpretation showed the scan was diagnostic. Rodos further opined that he told plaintiff to halt the medications he was taking before the scan because they could skew the results. Kohn testified that plaintiff's SPECT scan showed damage to both hemispheres of the brain, specifically identifying a *coup contre coup* injury.

Defendant contends that, with respect to Kohn, plaintiff violated Rule 213(f)(2) in failing to disclose that Kohn would testify to the SPECT scan. Official Reports Advance Sheet No. 26 (December 20, 2006), R. 213(f)(2), eff. January 1, 2007. Defendant admits that Kohn was disclosed by plaintiff and defendant did not notice his deposition, even though it had every opportunity to do so. Defendant maintains that the spirit of the amended rule was violated because plaintiff did not specifically state Kohn would testify to the SPECT scan. See *White v. Garlock Sealing Technologies, LLC,* 373 Ill.App.3d 309, 323-24, 311 Ill.Dec. 570, 869 N.E.2d 244 (2007). Defendant concludes that plaintiff's tactical gamesmanship surprised and prejudiced defendant in direct violation of the spirit of open disclosure because Kohn's trial testimony went far beyond what it expected from the disclosure.

We agree with plaintiff's response that, while it is questionable that a *Frye* hearing was necessary in this case because SPECT scans are not novel science, the trial court prudently conducted a hearing. Perhaps 10 years ago there would be no question that a hearing was required and defendant's proffered scientific articles would have been cause to deny the evidence. Certainly, if *Daubert* were the test, this case would have been considerably closer based on a full review of the enunciated "considerations" of that test. However, as it stands, Pavel testified during the *Frye* hearing that, at the date of trial, the SPECT technology had been widely used for over 20 years and that virtually all university hospitals and many larger hospitals conduct SPECT scans.

Pavel testified to his personal experience of almost 15 years with SPECT scans, almost entirely with brain SPECT scans. Pavel has authored scientific articles on its use in this



fastcase

capacity as well. As to the methodology, Pavel indicated SPECT scan analysis is similar to X-ray or other imaging analysis. Students are taught what normal scans look like in medical school, and based on this, continuing literature and gathered experience, Pavel makes determinations regarding the scan result. Pavel admitted that he could not conclude what caused an injury, but reviewing a scan, he could identify abnormalities consistent with certain injuries.

The trial court actively questioned Pavel during the hearing, specifically on his process and the conclusions that he could make. As a result, the trial court ultimately limited his testimony to whether the SPECT scan was consistent with a traumatic brain injury. Pavel's testimony about the extensive use of SPECT scans

[891 N.E.2d 481]

and detailed explanation about the process of analyzing the scans was sufficient to support the introduction of the evidence. Pavel was not discredited as a witness and supported his testimony to the trial court's satisfaction. It was not an error to find this testimony sufficient and that the 1996 articles defendant relied on at trial, and here on appeal, were dated and did not diminish Pavel's testimony. Furthermore, unlike in *Yum,* where the testimony of two doctors did not support introduction of SPECT scans as a diagnostic tool for brain trauma and traumatic stress disorder, here Pavel's testimony was extensive and sufficient. The trial court's limitation on the testimony against statements that the scans were diagnostic further distinguishes this case from *Yum.*

We also note plaintiff's citation to Illinois courts that have allowed SPECT scan evidence in various cases. See *People v. Urdiales,* 225 Ill.2d 354, 312 Ill.Dec. 876, 871 N.E.2d 669 (2007); *Matuszak v. Cerniak,* 346 Ill.App.3d 766, 282 Ill.Dec. 62, 805 N.E.2d 681 (2004). In addition, other jurisdictions have accepted this evidence after applying the *Daubert* test. See *Rhilinger v. Jancsics,* 1998 WL 1182058, 8 Mass. L. Rep. 373 (1998). Similar to this court, the *Rhilinger* court was presented with evidence regarding the use of SPECT brain scans for 15 years and determined that under *Daubert,* their use at trial would aid the trier of fact in determining if abnormalities in brain function existed. We believe that, even if the trial court followed *Daubert,* as defendant contends would have been proper, its motion *in limine* would still have been properly denied. Pavel testified that he has submitted articles for publication, SPECT scans are in wide use throughout the profession, and baseline images are presented in medical schools teaching this technology. Furthermore, three additional doctors — Yarkony, Rodos and Kohn — testified to their use of SPECT scans in this type of case.

With respect to the testimony of these doctors, plaintiff asserts that these doctors were not subject to the *Frye* hearing. As treating doctors, plaintiff argues, each witness simply presented medical opinion testimony regarding their diagnoses of plaintiff and were outside the reach of *Frye. Noakes v. National R.R. Passenger Corp.,* 363 Ill.App.3d 851, 857-58, 300 Ill.Dec. 593, 845 N.E.2d 14 (2006). Furthermore, plaintiff argues that each witness was disclosed during discovery and their treating records were also disclosed. In particular, plaintiff points to the medical records of Kohn and Rodos that indicated Kohn reviewed the SPECT scan and opined there was under perfusion in the anterior and posterior areas. Plaintiff concludes that defendant was fully apprised of the fact these doctors were witnesses and the records upon which they would testify and defendant's failure to depose Kohn cannot be cured by arguing disclosure was improper.

We agree that the trial court did not abuse its discretion in allowing the treating doctors to discuss their use of the SPECT scan. As the *Noakes* court stated, where opinion testimony is based on the physician's



fastcase

personal knowledge and practical experience and not "studies and tests," it is not subject to a *Frye* test. *Noakes,* 363 Ill.App.3d at 857-58, 300 Ill. Dec. 593, 845 N.E.2d 14. Each doctor's experience and qualifications were presented to the jury and each testified to how the SPECT scan was used in their determination that plaintiff had suffered a traumatic brain injury. The fact that some relied on Pavel's report does not remove the fact that is how each doctor diagnosed and treated plaintiff. *Frye* hearings establish whether the process or methodology is generally acceptable, not an ultimate conclusion or opinion as these doctors provided. Defendant was afforded

[891 N.E.2d 482]

the opportunity to review the doctors' records in full and was free to fully depose each of these doctors and present countering opinions to persuade the jury of its case.

B. Jury Instructions

Defendant contends that the trial court committed reversible error by refusing its requested instruction advising the jury that lost wages, profits or income was not at issue in the case. A particular jury instruction is proper if it is sufficiently clear, fairly and correctly states the law, and is supported by some evidence in the record. *Rios v. City of Chicago,* 331 Ill. App.3d 763, 776, 265 Ill.Dec. 71, 771 N.E.2d 1030 (2002). In determining whether jury instructions were inadequate, we will remand for a new trial only if the trial court clearly abused its discretion. *Villa v. Crown Cork & Seal Co.,* 202 Ill. App.3d 1082, 1087, 148 Ill.Dec. 372, 560 N.E.2d 969 (1990).

We find that the trial court did not abuse its discretion in refusing defendant's requested jury instruction. Defendant argues that the trial court granted its motion *in limine* barring the wage loss claim and asserts that this "directed finding" required the limiting instruction. Defendant does not cite to this motion in the record, and this court could not locate the motion. The record indicates the trial court granted this motion without objection or further detail.

Plaintiff correctly notes that at the outset of trial he informed the judge that there was no wage loss claim. Plaintiff reiterated during defendant's motions *in limine* that there was no lost wage claim and added it was withdrawn because with plaintiff's new company, it was too difficult to prove. Defendant then argued during closing that it was curious that plaintiff had not made a lost wage claim. Plaintiff responded during rebuttal that no lost wage claim was filed because it would be too speculative.

Both parties also argued during closing that the jury was not to consider any income or lost future income during deliberations. The trial court tendered instructions detailing what elements of damage it could consider. The trial court found no reason to confuse the jury with an instruction on an issue not before it Instead, it stated that defendant could argue the point to the jury.

Defendant's presentation and reliance on *Wille v. Navistar International Transportation Corp.,* 222 Ill.App.3d 833, 165 Ill. Dec. 246, 584 N.E.2d 425 (1991), are misguided. In *Wille,* the trial court denied the plaintiff's motion *in limine* to bar evidence or argument that he assumed the risk of injury. At the close of evidence, the trial court entered a directed verdict on that issue, but refused to instruct the jury on the directed verdict, noting that plaintiff's counsel could cover that issue in closing. Defense counsel proceeded to extensively argue in closing, over objection, that plaintiff's actions were the proximate cause of the injury. *Wille,* 222 Ill.App.3d at 837, 165 Ill.Dec. 246, 584 N.E.2d 425. This court reversed for the trial court's failure to fully instruct the jury as to the applicable law because it did not instruct the jury of the directed finding. This error was



fastcase

especially prejudicial because the defendant's closing argument on this issue covered 11 pages of trial transcripts. *Wille,* 222 Ill.App.3d at 839-40, 165 Ill.Dec. 246, 584 N.E.2d 425.

In this case, there was no need for a directed verdict or directed finding as plaintiff withdrew any lost wage claim. Although the motion is not of record, defendant apparently moved to bar any discussion or evidence of lost earnings, past or future. No evidence on lost wages was presented because plaintiff had withdrawn the claim. *Wille* is also distinguishable

[891 N.E.2d 483]

because, here, defendant raised the issue in closing and plaintiff limited his rebuttal comments to a brief paragraph responding that he did not advance a lost wage claim as it would be speculative and overreaching. This in no way is comparable to an extensive argument on causation. The jury was informed by both parties there was no lost wage claim and the jury instructions clearly provided the elements of damage the jury could consider.

C. Improper Damages Award

Finally, defendant contends that the jury award of $6 million was excessive and should be reversed with remand for further proceedings on that issue or a substantial remittitur must be entered. The question of damages is specifically reserved for the trier of fact, and we will not substitute our judgment lightly. We may reverse or modify a damages award as excessive only if it is unfair and unreasonable, if it results from passion or prejudice, or it is so excessively large that it shocks the conscience. *Mikolajczyk v. Ford Motor Co.,* 374 Ill.App.3d 646, 671, 312 Ill.Dec. 441, 870 N.E.2d 885 (2007), appeal allowed 225 Ill.2d 637, 314 Ill.Dec. 826, 875 N.E.2d 1113 (2007).

Defendant argues that the jury's award is radically disproportionate to the economic loss such that the award bears no relationship to plaintiff's losses. Defendant notes that the noneconomic loss determined by the jury was over 70 times greater than the economic loss of the stipulated medical bills. Defendant argues that this fact alone makes the verdict shocking and excessive as a matter of law. In support of remittitur, defendant cites a case from the Mississippi Supreme Court where a substantial remittitur was affirmed due to hugely disproportionate noneconomic damages. Defendant also argues that this court should reverse where the award bears no relationship to the loss suffered. *Gill v. Foster,* 157 Ill.2d 304, 315, 193 Ill.Dec. 157, 626 N.E.2d 190 (1993).

Defendant notes that damages must be proved to be recovered. *Chrysler v. Darnall,* 238 Ill.App.3d 673, 680, 179 Ill.Dec. 721, 606 N.E.2d 553 (1992). Furthermore, defendant argues that the jury may make a just estimate of damages and it may not base its award purely on guesswork. *Levin v. Welsh Brothers Motor Service, Inc.,* 164 Ill.App.3d 640, 655, 115 Ill.Dec. 680, 518 N.E.2d 205 (1987). Defendant argues that plaintiff's counsel "pulled figures from the air" for the verdict request to the jury of $8 million for disability, $500,000 for disfigurement, $5 million for future pain and suffering, and $82,500 for medical costs.

Defendant argues that plaintiff merely suffered a mild traumatic brain injury resulting in a cranial nerve injury, headaches, back and shoulder pain, a movement disorder, and depression. Defendant points out that plaintiff still works as a construction supervisor, still walks, talks, eats, sees, hears, tastes, smells, carries trays of coffee, drives, shops, pumps gas, operates a cell phone, and attends rehabilitation. Defendant further notes that plaintiff was not rendered a paraplegic or quadriplegic, incontinent or bed-ridden. Accordingly, defendant concludes



fastcase

that the noneconomic damages award lacks support in the record.

Plaintiff responds by highlighting the great discretion granted to the jury in setting the amount of a verdict. *Velarde,* 354 Ill.App.3d at 539-40, 289 Ill.Dec. 529, 820 N.E.2d 37. Plaintiff notes that *Velarde* also cites several factors that may be used in reviewing compensatory damages, including the permanency of the condition, the possibility of future deterioration, the extent of medical expenses, and the restrictions imposed due to the injuries suffered. *Velarde,* 354 Ill.App.3d at 540, 289 Ill.Dec. 529, 820 N.E.2d 37. Plaintiff also

[891 N.E.2d 484]

argues that Illinois does not require any particular ratio of economic loss to noneconomic loss and that the evidence presented at trial supported the jury's award.

First, as we affirmed the trial court's evidentiary findings above, we need not consider defendant's argument that the alleged errors also demonstrate the damages award resulted from passion, prejudice and improper considerations. In addition, we need not consider the foreign jurisdiction case cited by plaintiff when Illinois case law sufficiently covers this subject. Next, we agree with plaintiff that *Gill* supports plaintiff's argument. *Gill* reiterates the principle that the jury is vested with great discretion in fashioning an award in rejecting a claim damages were disproportionate to the loss suffered. In addition, we note that defendant has argued that more than mere guesswork is required to fix damages based on *Levin;* however, that case specifically discusses the computation of lost earning capacity. *Levin,* 164 Ill.App.3d at 655, 115 Ill.Dec. 680, 518 N.E.2d 205.

While a damage award for noneconomic damages such as those suffered by plaintiff is subject to even less precision than economic damages or lost wages, it still must be a product of the evidence and not passion such that it is shockingly excessive. As defendant indicated, a "plethora of medical evidence," was presented at trial. That evidence indicated plaintiff's life will be negatively affected for the remainder of his life, with a life expectancy of more than 40 years.

While it is true that plaintiff has retained a certain amount of ability to function since the accident as defendant enumerates, the evidence also showed that each of those activities listed by defendant is limited by plaintiff's lost mobility, increased pain, and depression. Furthermore, testimony was given indicating that, as plaintiff aged and his body deteriorated, his symptoms would likely worsen. While $6 million is a large sum, it is by no means so large as to shock the conscience as compensation for the lifetime of consequences that plaintiff and his family face due to the physical and mental limitations posed by his injuries.

III. CONCLUSION

Accordingly, for the aforementioned reasons, the decision of the trial court is affirmed.

Affirmed.

NEVILLE, P.J., and CAMPBELL, J., concur.



fastcase

**2014 IL App (3d) 120597**

**LEE ANN SHARBONO, Plaintiff-Appellant,**
**v.**
**MARK HILBORN, M.D., Defendant-Appellee.**

**3-12-0597**

**APPELLATE COURT OF ILLINOIS**
**THIRD DISTRICT**

**A.D., 2014**
**Opinion filed January 21, 2014**
**Modified upon denial of rehearing**
**June 11, 2014**

Appeal from the Circuit Court
of the 13th Judicial Circuit
La Salle County, Illinois

Appeal No. 3-12-0597
Circuit No. 06-L-199

Honorable
Joseph P. Hettel,
Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court, with opinion.

Justices McDade and Schmidt concurred in the judgment and opinion.

Justice Schmidt also dissented upon denial of rehearing, with opinion.

**OPINION**

¶ 1 Plaintiff, Lee Ann Sharbono, filed an action for medical negligence against defendant, Dr. Mark Hilborn, a board-certified radiologist, alleging that defendant had failed to timely diagnose her breast cancer. After a trial, the jury found for defendant and against plaintiff. Plaintiff filed posttrial motions for judgment notwithstanding the verdict, for new trial, and for rehearing, all of which the trial court denied. Plaintiff appeals, arguing that the trial court erred

Page 2

in: (1) denying her posttrial motion for judgment notwithstanding the verdict or for new trial; (2) allowing the defense to present a certain PowerPoint presentation as demonstrative evidence during defendant's testimony at trial; (3) providing the jury with an erroneous instruction on standard of care; and (4) instructing the jury on mitigation of damages. We agree with plaintiff's second assertion and find that the error was reversible error. Therefore, we reverse the trial court's judgment and remand this case for a new trial.

¶ 2 FACTS

¶ 3 In August 2006, plaintiff was diagnosed with breast cancer in her left breast, which had spread to the nearby lymph nodes under her left arm. Plaintiff underwent extensive treatment, including a modified radical mastectomy of her left breast, removal of several of the lymph nodes in her left under arm area, and numerous rounds of chemotherapy and radiation. Although plaintiff's cancer has been in remission now for several years, she still suffers from lymphedema in her left arm as a result of the cancer surgery and from the constant fear that her cancer will return.

¶ 4 The lawsuit in this case arose out of a diagnosis that was made by defendant in November 2004. Plaintiff, who was 39 years old at the time, initially went to see her primary care doctor, Dr. Daisy Chacko, a family physician, because she was experiencing fatigue, weight gain, and aches and pains. Dr. Chacko ordered a screening mammogram. Plaintiff had a previous mammogram done in July 1998 when she was 32 years old and lived in Texas, and, although plaintiff had what she described as hard

ridges under her breasts, nothing abnormal was found in the mammogram.

¶ 5 Defendant was the radiologist who interpreted the images from the tests of plaintiff's left breast that were conducted in October and November 2004 (the November 2004 tests). In the

Page 3

initial screening mammogram, defendant observed an abnormality or a lesion in plaintiff's left breast that was not present in the 1998 mammogram and recommended that a diagnostic mammogram be completed. The diagnostic mammogram also showed a lesion in plaintiff's left breast, so an ultrasound was ordered. Following an evaluation of the ultrasound images, defendant ultimately concluded that the lesion in plaintiff's left breast was benign. No biopsy was ordered or recommended by defendant at that time.

¶ 6 In 2005, plaintiff went back to see Dr. Chacko, complaining of cramping in her left breast. Dr. Chacko reassured plaintiff that the 2004 mammogram showed that everything was fine and that there was nothing to worry about.

¶ 7 In May 2006, plaintiff returned to her family physician's office, complaining of cramping in her left breast and pain in her shoulder, and requested that another mammogram be done. The mammogram was not conducted, however, until August 2006, just prior to plaintiff's forty-first birthday, because of a miscommunication between the hospital and the doctor's office.

¶ 8 Defendant interpreted the August 2006 mammogram and, after evaluating the images, recommended that plaintiff obtain another ultrasound of her left breast. The ultrasound indicated that the lesion in plaintiff's left breast was likely malignant, and a biopsy was ordered. All three procedures—the mammogram, the ultrasound, and the biopsy—were done on the same day. The biopsy confirmed that plaintiff had breast cancer.

¶ 9 In December 2007, plaintiff brought the instant action against defendant and the hospital for which defendant provided services, alleging, primarily, a negligent failure to timely diagnose her breast cancer. The hospital was later dismissed from the instant action based upon a settlement with plaintiff. The complaint against defendant was amended several times over the following four years, and the case eventually proceeded to a jury trial in November 2011.

Page 4

¶ 10 The evidence presented at the trial can be briefly summarized as follows. Plaintiff testified about her symptoms and her history of medical tests and procedures leading up to the cancer diagnosis, including the 1998 mammogram, the 2004 tests, and the 2006 tests; described the treatment that she received after the diagnosis of cancer was made; and explained in detail the lasting lymphedema and other complications that she experienced as a result of having to undergo the level of cancer treatment that was required. As for the results of the November 2004 tests, plaintiff stated that she was personally told by defendant that "everything was fine" and that "there was nothing there." In addition, according to plaintiff, she was not provided with any specific follow-up recommendation by defendant, other than a form letter that she later received from defendant's office or the hospital, which stated that her results did not show any suspicious abnormalities and suggested that she start obtaining annual mammograms at the age of 40, consistent with the recommendations of the American Cancer Society. Plaintiff indicated that she complied with that recommendation by going to see her doctor to schedule a mammogram when she was 40 years old. Plaintiff stated



fastcase

further that had she known that there was an abnormality present in the images of her left breast, she would have gotten a second opinion.

¶ 11 Dr. Michael Foley, a physician who was board-certified in diagnostic radiology, nuclear medicine, and interventional radiology, provided testimony for plaintiff on the standard of care as an expert witness. After describing his background and experience to the jury, Dr. Foley testified about the four evaluative characteristics that were used by radiologists in evaluating images of breast lesions: margins, shadowing, axis of orientation, and internal echo consistency. Dr. Foley also described for the jury the Breast Imaging Reporting and Database System (BI-RADS), a system that was used by radiologists to classify breast images, and discussed the follow-up treatment that was dictated by each particular classification. During his testimony, Dr.

Page 5

Foley opined that defendant breached the standard of care in several respects as to defendant's review of the 2004 images and defendant's diagnosis in 2004 that the lesion in plaintiff's left breast was benign. Dr. Foley discussed at length the areas in which defendant breached the standard of care and explained to the jury the reasons for his opinion in that regard.

¶ 12 Dr. Gillian Maclaine Newstead, a radiologist who specialized in breast imaging and who was involved in plaintiff's cancer treatment, also testified as an expert witness for plaintiff. After describing her education and experience to the jury, Dr. Newstead was asked about a certain portion of the 2004 ultrasound images of plaintiff's left breast. Dr. Newstead stated that those images showed abnormal breast tissue, a mass, or a lesion. In Dr. Newstead's opinion, the lesion needed further evaluation, such as additional imaging or a biopsy, to determine whether it was benign or cancerous. Dr. Newstead acknowledged in her testimony, however, that she did not review all of the 2004 ultrasound images; that "abnormal" did not mean "malignant"; and that she had no opinion as to whether defendant complied with the standard of care, whether plaintiff had cancer in 2004, or whether a cancer diagnosis in 2004 would have changed plaintiff's prognosis.

¶ 13 Dr. Mark Kelley, a board-certified surgeon who specialized in surgical oncology and who was asked to review the records in this case, testified for plaintiff as an expert witness on the issues of causation and damages. After describing his education and experience for the jury, Dr. Kelley opined, based upon his review of the record, that: (1) plaintiff's lesion in the November 2004 ultrasound should have been classified as at least a BI-RADS 3 (probably benign), rather than a BI-RADS 2 (benign); (2) plaintiff had cancer in 2004; (3) plaintiff did not have lymph node involvement in 2004; (4) if plaintiff had been diagnosed with cancer in 2004, her treatment would have been less extensive—plaintiff would have received a lumpectomy or partial

Page 6

mastectomy, rather than a mastectomy, plaintiff would not have needed chemotherapy, plaintiff would still have needed radiation therapy but would have had fewer side effects, plaintiff's prognosis for survival would have been better, both at the time of diagnosis and at the time of trial, and plaintiff would not have been likely to develop lymphedema; (5) a modified radical mastectomy, and not a lumpectomy, was the most appropriate surgical treatment for plaintiff's cancer in 2006, regardless of whether plaintiff had chemotherapy before or after the surgery; and (6) plaintiff's prognosis for survival at the point of trial was 90% or greater, since plaintiff had not had a recurrence of cancer within the first five



fastcase

years. Dr. Kelley explained the reasons for his opinions to the jury. During his testimony, however, Dr. Kelley acknowledged that it was possible that if plaintiff had obtained a follow-up mammogram within a year (by November 2005), as she was allegedly told to do by defendant, plaintiff might not have had lymph node involvement at that time and that the lesion might still have been small enough for plaintiff to have a lumpectomy, although chemotherapy would have been required under those circumstances.

¶ 14 Defendant was called to give testimony as an adverse witness in plaintiff's case-in-chief and, immediately thereafter, to provide testimony in his own case-in-chief.[1] After describing his background and experience to the jury, defendant testified about his evaluation of plaintiff's 2004 images and his diagnosis in 2004 that the lesion in plaintiff's left breast was benign. Defendant ultimately opined that he did not breach the standard of care and explained to the jury the reasons for his conclusion in that regard. As part of that explanation, defendant described to the jury the four evaluative characteristics and how he interpreted those characteristics as to plaintiff's lesion. Defendant stated that based upon his evaluation of plaintiff's 2004 images using the four

Page 7

evaluative characteristics, he classified plaintiff's breast lesion in 2004 as benign or as a BI-RADS 2. According to defendant, with a BI-RADS 2 classification, there was a 98% chance that the lesion was benign. Defendant stated further that after the November 2004 procedures, he told plaintiff that the results were benign and specifically recommended to plaintiff that she obtain a follow-up mammogram within a year, which was the appropriate level of follow-up treatment for a BI-RADS 2 diagnosis. Defendant also reported his findings to plaintiff's primary care doctor by letter and recommended in that letter that plaintiff obtain a follow-up mammogram within a year. According to defendant, it was the responsibility of plaintiff's primary care doctor to go over the findings and recommendations with plaintiff. Defendant acknowledged, however, that a different letter was sent by his office or the hospital to plaintiff personally and that the letter that was sent to plaintiff did not specifically state that plaintiff was to obtain another mammogram within a year or indicate that there was still a possibility that the plaintiff's breast lesion was cancer.

¶ 15 During defendant's direct testimony in his own case-in-chief, the defense sought to use as demonstrative evidence a PowerPoint presentation that it had prepared. The evidence, defendant's exhibit No. 18, consisted of several screens of drawings or images that were taken from a learned treatise, along with copies of plaintiff's own images from the 2004 mammograms and ultrasound and from the 2006 ultrasound. The name of the particular treatise that was used was noted on the screen, allegedly for copyright purposes. Above the treatise images were headings such as "benign appearing lesions," "benign cyst," and "infiltrating ductal carcinoma."[2] The exhibit was allegedly being used by the defense to help the jury understand the complicated

Page 8

medical testimony that was being given by defendant as to the four characteristics used for evaluation of breast lesions.

¶ 16 Plaintiff objected to the use of the demonstrative exhibit for various reasons and had claimed earlier that the defense had not properly disclosed the exhibit as required by the supreme court rules. The defense asserted that it had e-mailed the presentation to plaintiff at the start of the trial as required by the trial court in its order regarding demonstrative exhibits. Plaintiff maintained that he had never received the exhibit and was unaware of the exhibit until it was being



fastcase

tendered during defendant's testimony in the presence of the jury. The trial court allowed defendant to utilize exhibit No. 18 over plaintiff's objections and instructed the jury briefly that during the presentation of the exhibit, the defense was going to be doing two things at once: (1) trying to teach the jury about the types of breast lesion margins; and (2) transitioning from a known carcinoma in this case to the case itself. When the testimony resumed, defendant went through the drawings and images with the jury and explained to the jury what was significant about each image relative to the four characteristics. During the questioning of defendant, defense counsel was careful to point out when the images in the exhibit were those from the treatise, rather than plaintiff's own images, and stressed numerous times in the context of the questions that he was asking defendant that the treatise images were only being used for demonstrative purposes.

¶ 17 Dr. Michael Racenstein, a board-certified radiologist and mammographer, testified for the defense on the standard of care as an expert witness. After describing his qualifications and experience for the jury, Dr. Racenstein explained the four evaluative characteristics and the BI-RADS system. Dr. Racenstein opined that defendant did not breach the standard of care in this case and explained the reasons for his opinion in that regard to the jury. During his testimony,

Page 9

Dr. Racenstein acknowledged, however, that he would have classified plaintiff's lesion in 2004 as a BI-RADS 3 (probably benign), rather than a BI-RADS 2 (benign) lesion, but indicated that the classification to be assigned on the BI-RADS scale was more of a personal preference, rather than a strict rule.

¶ 18 Defendant's other expert witness, Dr. Bruce Kaden, who was board-certified in internal medicine, medical oncology, and hematology, gave testimony on the issue of causation. After describing his qualifications and experience to the jury, Dr. Kaden testified that at the time of plaintiff's cancer diagnosis in 2006, a different treatment that plaintiff could have received was to have chemotherapy first and a lumpectomy second, if necessary, after the size of the lesion had decreased. With that treatment modality, according to Dr. Kaden, plaintiff could have avoided a mastectomy. Dr. Kaden testified further that from his review of the case, he believed that plaintiff had breast cancer and lymph node involvement in 2004 and that her treatment, therefore, would have been similar, regardless of whether she was diagnosed in 2004 or 2006. Thus, according to Dr. Kaden, even if plaintiff had been diagnosed with cancer in 2004, she still would have undergone essentially the same treatment and she still would have developed lymphedema. Dr. Kaden acknowledged, however, that there was nothing in the records that indicated that plaintiff had lymph node involvement in 2004 and, that if there was no lymph node involvement when the cancer was discovered, plaintiff would have had a much smaller risk of developing lymphedema from the treatment modality that would have been required. Dr. Kaden also acknowledged that a mastectomy was the treatment modality that was recommended by plaintiff's treatment providers and that he did not disagree with that treatment recommendation or believe that it was negligent. As for plaintiff's prognosis, Dr. Kaden opined that plaintiff was

Page 10

completely cured of her cancer, that the cancer would not return, and that the cancer would not have a negative impact on plaintiff's life expectancy.

¶ 19 After the evidence had concluded and the attorneys had made their closing arguments, the trial court instructed the jury on the law. One of the instructions that the trial court



fastcase

gave the jury was Illinois Pattern Jury Instructions, Civil, No. 105.01 (2005) (hereinafter, IPI Civil (2005) No. 105.01) on the standard of care in a professional-negligence case. That instruction had been submitted by the defense. During the jury instruction conference, which had occurred earlier, plaintiff's attorney had submitted to the trial court the 2006 version of IPI Civil No. 105.01 (hereinafter, IPI Civil (2006) No. 105.01) and had commented to the court that the instruction would have to be modified to comply with the Illinois Supreme Court's decision in *Studt v. Sherman Health Systems,* 2011 IL 108182, ¶ 46. The trial court rejected plaintiff's proposed instruction and gave defendant's proposed instruction instead. The trial court also gave the jury defendant's proposed mitigation of damages instruction (Illinois Pattern Jury Instructions, Civil, No. 105.08 (2011) (hereinafter, IPI Civil (2011) No. 105.08)) over plaintiff's objection.

¶ 20 At the conclusion of deliberations, the jury returned a general verdict for defendant and against plaintiff. Plaintiff filed posttrial motions for judgment notwithstanding the verdict, for a new trial, and for rehearing, all of which the trial court denied. This appeal followed.

¶ 21 ANALYSIS

¶ 22 On appeal, plaintiff raises several issues. Although not necessarily in the order raised by plaintiff, we will first address plaintiff's argument that the trial court erred in denying her posttrial motion for judgment notwithstanding the verdict or for a new trial. Plaintiff asserts that her motion should have been granted as to either one form of relief or the other because of the

Page 11

strength of the evidence in her favor.[3] In support of that assertion, plaintiff claims that: (1) both defendant and his attorney admitted that defendant violated the standard of care, an admission that was ignored by the jury at the trial and also by the trial court in ruling upon the posttrial motions; (2) all of the experts in this case agreed that plaintiff had an asymmetrical density in her left breast, that such a density could be evidence of cancer, and that a biopsy in 2004 would have conclusively determined whether plaintiff had cancer in her left breast at that time; (3) an asymmetrical density, such as the one plaintiff had been diagnosed with, should never have been cleared as noncancerous or benign without a biopsy having been done; and (4) despite defendant's conclusion to the contrary, the evidence in this case, including defendant's own testimony, indicated that plaintiff's lesion was "probably benign" or BI-RADS 3, rather than "benign" or BI-RADS 2, and that the appropriate recommendation, therefore, was for plaintiff to return for more testing in six months, a recommendation that defendant, by his own admission and the admission of his attorney, never made. Defendant disagrees with plaintiff's claims and assertions, or the significance of those assertions, and contends that there was ample evidence to support the jury's verdict. Thus, defendant argues that the trial court properly denied plaintiff's posttrial motion for judgment notwithstanding the verdict or for a new trial.

¶ 23 A trial court's ruling on a motion for judgment notwithstanding the verdict is subject to a *de novo* standard of review on appeal. *Lawlor v. North American Corp. of Illinois,* 2012 IL 112530, ¶ 37. A motion for judgment notwithstanding the verdict raises a question of law and asserts that even when all of the evidence is considered in the light most favorable to the party

Page 12

opposing the motion, there is a total failure or lack of evidence to prove a necessary element of the opposing party's case. *Id.* The burden on the party seeking a judgment notwithstanding the verdict is a high one as



fastcase

the motion may be granted only under a very limited set of circumstances—when all of the evidence, viewed in the light most favorable to the party opposing the motion, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. See id.; *Maple v. Gustafson,* 151 Ill. 2d 445, 453 (1992). In ruling upon a motion for judgment notwithstanding the verdict, the court does not weigh the evidence or concern itself with the credibility of the witnesses and must consider the evidence, and any reasonable inferences therefrom, in the light most favorable to the opposing party. *Maple,* 151 Ill. 2d at 453. A court has no right to enter a judgment notwithstanding the verdict if the evidence demonstrates a substantial factual dispute or if the outcome of the case depends upon an assessment of credibility or a determination regarding conflicting evidence. *Id.* at 454.

¶ 24 In ruling upon a motion for new trial, on the other hand, the trial court will weigh the evidence and will set aside the jury's verdict and order a new trial only if the verdict is against the manifest weight of the evidence. *Lawlor,* 2012 IL 112530, ¶ 38. A verdict is against the manifest weight of the evidence only if it is clear from the record that the jury should have reached the opposite conclusion or if the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence presented. *Id.* On appeal, the trial court's ruling on a motion for new trial will not be reversed unless the trial court committed an abuse of discretion in making its ruling. *Id.* In determining whether an abuse of discretion has occurred, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Maple,* 151 Ill. 2d at 455-56.

Page 13

¶ 25 Having reviewed the evidence presented at the trial in the present case, we find that the trial court properly denied plaintiff's posttrial motion for judgment notwithstanding the verdict or for a new trial. Contrary to plaintiff's claim on appeal, we do not read this record as containing any admissions by defendant or his attorneys that defendant breached the standard of care in either his interpretation of plaintiff's 2004 images or in his 2004 diagnosis that the lesion in plaintiff's left breast was benign. In fact, defendant and one of his expert witnesses both specifically testified that defendant did not breach the standard of care. In addition, we find no support in the record for plaintiff's claim that an asymmetrical density should never be ruled benign without a biopsy having been done. No expert witness testified to that effect and, as with the previous claim, defendant and one of his expert witnesses specifically testified that a biopsy was not required in 2004 under the facts of this case and the applicable standard of care. Nor do we agree with plaintiff's characterization of the testimony regarding the BI-RADS classification of plaintiff's lesion. The testimony to which plaintiff refers appears to be a description in general terms as to whether the observed characteristic was an indication of a benign lesion or a malignant lesion and not a more specific description as to the appropriate BI-RADS classification. Indeed, it was very clear from defendant's testimony that when it was time to put all of the diagnostic information together and form a conclusion, defendant concluded, using his expertise, that plaintiff's lesion was benign or BI-RADS 2. The fact that defendant's expert witness, Dr. Racenstein, testified that he would have classified plaintiff's lesion in 2004 as a BI-RADS 3 lesion does not alter our conclusion but, rather, was merely another piece of information for the jury to consider.

¶ 26 Ultimately, this case involved a classic battle of expert witness testimony. The testimony of plaintiff's expert witnesses supported plaintiff's side of the case and the testimony of defendant

Page 14

and his expert witnesses supported defendant's side of the case. It was the jury's role to determine whether each expert witness was credible and how much weight to give to each expert's testimony. See *Maple,* 151 Ill. 2d at 452; *Walski v. Tiesenga,* 72 Ill. 2d 249, 260 (1978). Under the circumstances present in the instant case, plaintiff's motion for judgment notwithstanding the verdict or for a new trial was properly denied. See *Lawlor,* 2012 IL 112530, ¶ 37; *Maple,* 151 Ill. 2d at 455-56.

¶ 27 Next, we will address plaintiff's claim regarding defendant's use of the PowerPoint presentation, defendant's exhibit No. 18. Relevant PowerPoint presentations are commonly allowed in the trial courts, when the proper steps have been taken for their admission. Plaintiff argues that the trial court committed reversible error by allowing the defense to present exhibit No. 18 as demonstrative evidence during defendant's testimony at trial. Plaintiff asserts that the use of the exhibit was improper because: (1) the necessary foundation for the ultrasound images in the exhibit, which contained images from a learned treatise, was never established (although there was no objection to the diagrams, plaintiff did object to the use of the ultrasound images from the text); (2) such an exhibit could only be presented in cross-examination, not in direct examination, as it was in the present case; (3) the exhibit was not timely disclosed to plaintiff as required by the supreme court rules on discovery; and (4) the exhibit was not actually being used by the defense as demonstrative evidence but, rather, was being used by the defense to try to corroborate defendant's medical opinion that he correctly diagnosed plaintiff's lesion as benign from plaintiff's imaging tests. Plaintiff asserts further that the erroneous admission of exhibit No. 18 was highly prejudicial in this case and that it warrants a reversal of the trial court's judgment on the jury verdict and a remand for new trial. Defendant disagrees with plaintiff's various assertions and contends that the trial court properly exercised its discretion in ruling that

Page 15

exhibit No. 18 was admissible as demonstrative evidence. In the alternative, defendant contends that even if the trial court's ruling was incorrect, reversal in this case is not warranted because plaintiff cannot show that the alleged error caused substantial prejudice that affected the outcome of the trial. Defendant argues, therefore, that the trial court's judgment should be affirmed.

¶ 28 At trial, plaintiff objected to the treatise's ultrasound images in a sidebar and in a number of other occasions. Plaintiff objected to the treatise's ultrasound images because there was no information provided as to who made the diagnosis regarding the images, there was no information as to what the images indicated, and there was no information or indication as to what other images may have been shown with the images in question to allow the person who made the diagnosis to conclude that the images represented cancerous or benign cells. At one point in the trial, plaintiff renewed his objection to the ultrasound images, arguing that there was no record as to from where the images came. The trial judge indicated that he would take the objections as a standing objection, which he overruled. At another point in the trial, the trial judge noted the objections and basically asked plaintiff's attorney not to object again. A party who has objected, such as plaintiff in the instant case, is not required to repeat the same objection each time the evidence in question is offered when the attitude of the trial court as to the objection is clear. See *Spyrka v. County of Cook,* 366 Ill. App. 3d 156, 165 (2006). Contrary to the arguments by defendant in the petition for rehearing, plaintiff did object to the ultrasound images for a number of different reasons, including no record where the images came from, which was an



fastcase

objection to the foundation for the evidence. Defendant in the petition for rehearing made no argument regarding the lack of foundation testimony as to the treatise or as to the ultrasound images from the treatise. It is also noted that the rules of forfeiture and waiver are

Page 16

limitations on the parties and not on the court (see *In re Madison H.,* 215 Ill. 2d 364, 371 (2005)).

¶ 29 A trial court's ruling on the admissibility of evidence, including demonstrative evidence, will not be reversed on appeal absent an abuse of discretion. See *In re Leona W.,* 228 Ill. 2d 439, 460 (2008); *Schuler v. Mid-Central Cardiology,* 313 Ill. App. 3d 326, 337 (2000). The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *Blum v. Koster,* 235 Ill. 2d 21, 36 (2009); *Leona W.,* 228 Ill. 2d at 460. If a trial court commits an abuse of discretion in the admission of evidence, a new trial should be ordered only if the trial court's ruling appears to have caused substantial prejudice affecting the outcome of the trial. See *Leona W.,* 228 Ill. 2d at 460; *Troyan v. Reyes,* 367 Ill. App. 3d 729, 732-33 (2006).

¶ 30 Physical objects that are admitted into evidence or used at trial (physical evidence) fall into one of two categories, real evidence or demonstrative evidence. *Smith v. Ohio Oil Co.,* 10 Ill. App. 2d 67, 74 (1956); see Ill. R. Evid. 401 (eff. Jan. 1, 2011). A physical object that has a direct part in the incident at issue such that it has probative value in and of itself is considered to be real evidence. *Smith,* 10 Ill. App. 2d at 74-76; Michael H. Graham, Graham's Handbook of Illinois Evidence § 401.2, at 159 (10th ed. 2010). On the other hand, a physical object that does not have a direct part in the incident at issue and is only being used to help explain or illustrate to the trier of fact the verbal testimony of a witness or other evidence is considered to be demonstrative evidence. *Id.* Demonstrative evidence has no probative value in and of itself and is merely admitted or used as a visual aid to the trier of fact. *Id.*; *Cisarik v. Palos Community Hospital,* 144 Ill. 2d 339, 341-42 (1991). The great value of demonstrative evidence "lies in the

Page 17

human factor of understanding better what is seen than what is heard." *Smith,* 10 Ill. App. 2d at 75. The use of demonstrative evidence, therefore, is looked upon favorably by the courts because it allows the trier of fact to have the best possible understanding of the matters before it. *Id.* at 75-76; *Schuler,* 313 Ill. App. 3d at 337. However, the same human factor that makes demonstrative evidence valuable—that people learn and understand better what they see, rather than what they hear—also makes it possible for parties to abuse the use of demonstrative evidence by giving a dramatic effect or undue or misleading emphasis to some issue, at the expense of others. *Smith,* 10 Ill. App. 2d at 76. Thus, in ruling upon the admissibility of demonstrative evidence, the trial court must be ever watchful to prevent or eliminate that abuse. See id. at 76-77.

¶ 31 The primary considerations in determining whether demonstrative evidence is admissible or may be used at trial are relevancy and fairness. See Ill. R. Evid. 401, 402, 403 (eff. Jan. 1, 2011); *Schuler,* 313 Ill. App. 3d at 337; *People ex rel. Sherman v. Cryns,* 203 Ill. 2d 264, 283-84 (2003); *Smith,* 10 Ill. App. 2d at 74-77. As for relevancy, for demonstrative evidence to be admissible, it must actually be used to illustrate or explain the verbal testimony of a witness as to a matter that is relevant in the case in question. See id; Graham, *supra* § 401.3, at 160. With regard to fairness, even if the relevancy test



fastcase

has been satisfied, demonstrative evidence may still be excluded by the trial court if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See Ill. R. Evid. 403 (eff. Jan. 1, 2011); *Sherman,* 203 Ill. 2d at 284; *Cisarik,* 144 Ill. 2d at 342.

¶ 32 In addition to the above, before demonstrative evidence may be presented or admitted at trial, a proper foundation for the use of the evidence must be established. See *Sherman,* 203 Ill.

Page 18

2d at 283-84; *Cisarik,* 144 Ill. 2d at 342. If the demonstrative evidence that the proponent seeks to admit is a filmed or photographed image, such as in the present case, to establish the necessary foundation, the proponent must have a witness with personal knowledge of the filmed or photographed object testify that the film or image is an accurate portrayal of what it purports to show, unless, of course, the parties have made a stipulation to that effect. See *id.* Absent such a foundation, the demonstrative evidence may not be presented or admitted at trial. See *Sherman,* 203 Ill. 2d at 283-85.

¶ 33 Having reviewed the record in the present case, we do not believe that defendant's exhibit No. 18 was properly classified as demonstrative evidence. The use of the exhibit at trial went well beyond merely trying to teach or educate the jury about the four evaluative characteristics that radiologists use to evaluate breast lesions, a matter about which three of the expert witnesses in this case testified. Rather, it appears from the record that the treatise images and diagrams contained in exhibit No. 18 were used to help show the basis of defendant's own medical opinion in this case and to support his diagnosis in 2004 that plaintiff's lesion was benign. Our opinion in that regard is best illustrated by certain screens of the PowerPoint presentation which contained main or side headings referencing the word, "benign," such as "benign appearing lesions," "benign shadowing," or "benign appearing echoes," and on the same screens showed images from plaintiff's November 2004 tests. We see no reason why plaintiff's 2004 images were placed under or to the side of such headings, other than to try to support, and show the basis for, defendant's medical opinion that the 2004 images were correctly interpreted as benign.

¶ 34 In reaching that conclusion, we must note that even if defense exhibit No. 18 was properly classified as demonstrative, we would still have to find that the use of the treatise images from the exhibit was erroneous because defendant failed to present an adequate

Page 19

foundation. See *Sherman,* 203 Ill. 2d at 283-84; *Cisarik,* 144 Ill. 2d at 342. At no time in this case did defendant or any other witness testify from personal knowledge that the sample images or diagrams contained in exhibit No. 18 from the treatise accurately portrayed the diagnostic condition (benign or cancerous) that they purported to show. Thus, exhibit No. 18 could not be properly admitted or used as a demonstrative exhibit under any circumstances. See *id.*

¶ 35 The use of an exhibit with an ultrasound image from a treatise to show the basis for an expert's opinion is permissible under *Wilson v. Clark,* 84 Ill. 2d 186 (1981), and Illinois Rule of Evidence 703 (eff. Jan. 1, 2011), if a proper foundation has been established and if there has been proper disclosure.[4] In this case, however, it was never established that the learned treatise, from which the ultrasound images were taken, was a reliable authority as required under *Wilson v. Clark* and Illinois Rule of Evidence 703. See *Wilson,*



fastcase

84 Ill. 2d at 192-96 (an expert may testify about facts or data upon which he or she has based his opinion if those facts or data are of the type reasonably relied upon by experts in the particular field in forming opinions on the subject, even if those facts or data are not admissible in evidence); Ill. R. Evid. 703 (eff. Jan. 1, 2011); Graham, *supra* § 703.1, at 677. Because a proper foundation was not established as provided for in *Wilson v. Clark,* it was error for the trial court to allow the defense to use exhibit No. 18 to show the bases of defendant's opinion that plaintiff's lesion was benign and not cancerous in 2004. See *id.*

¶ 36 The defendant argues that the plaintiff cannot prevail in her appeal because it cannot be shown that the evidence complained of affected the outcome of the trial (that the evidence was

Page 20

prejudicial). The defendant argues further in the petition for rehearing that the textbook images serve "to provide a classic easily recognizable example of how the drawn images of a benign or malignant tumor would appear on an ultrasound." However, without the proper foundation, the use of the conclusory images in exhibit No. 18 to show the basis of defendant's medical opinion was highly prejudicial in this case because it went right to the heart of the malpractice claim—that defendant failed to correctly interpret plaintiff's 2004 breast lesion images as malignant—and because it was not sufficiently disclosed in a timely manner as required under Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) and Rule 214 (eff. Jan. 1, 1996). When our supreme court adopted Federal Rules of Evidence 703 and 705 (Fed. R. Evid. 703, 705) in *Wilson v. Clark,* which are now incorporated into Illinois Rules of Evidence 703 and 705 (eff. Jan. 1, 2011), the supreme court noted that the burden was on the adverse party to elicit in cross-examination the facts underlying the expert's opinion. *Wilson,* 84 Ill. 2d at 194. The supreme court noted further that doing so did not place an undue burden on the cross-examining party in light of our state's extensive pretrial discovery procedure. *Id.* Nevertheless, with the burden upon the adverse party during cross-examination to elicit facts underlying the expert's opinion, it is a matter of fundamental fairness that the adverse party be given proper and timely disclosure so that it may have the opportunity to prepare for cross-examination. The importance of that requirement in cases such as this cannot be overemphasized. See *Leonardi v. Loyola University of Chicago,* 168 Ill. 2d 83, 104 (1995) (cross-examination is the principal safeguard against errant expert testimony); *People v. Safford,* 392 Ill. App. 3d 212, 224 (2009) (describing cross-examination as the "truth seeking engine"); 5 John H. Wigmore, Evidence § 1367, at 32-33 (Chadbourn rev. ed. 1974) (stating that cross-examination is "beyond any doubt the greatest legal

Page 21

engine ever invented for the discovery of truth" and recognizing "its efficacy as a fundamental test of truth").

¶ 37 On a number of occasions in this case, defendant, testifying as an expert, utilized the diagrams and images from the learned treatise and compared them to the plaintiff's images. Defendant described the ultrasound images during his testimony in a conclusive manner, such as a "biopsy-proven simple cyst" (exhibit No. 18-C), a "biopsy-proven one [carcinoma] from another case" (exhibit No. 18-E)[5], a "benign cyst" (exhibits No. 18-L and 18-P), a "fibroadenoma" (exhibits No. 18-Q and 18-R), and a "biopsy-proven infiltrating ductal carcinoma" (exhibit No. 18-U). Without timely disclosure, plaintiff was completely deprived of her ability to effectively cross-examine defendant as to such matters as the extent of his reliance on the treatise, whether the treatise was truly a



fastcase

reliable authority, whether the specific images and diagrams in question were reliable, and whether it was reasonable for defendant to rely on the treatise in this case. It might have been possible that vigorous adversarial cross-examination in this case may have impeached the importance or reliability of the treatise, its author, or the specific images and diagrams in question. However, it is not possible to know the extent of cross-examination because the lack of timely disclosure in this case deprived plaintiff of the opportunity to prepare for cross-examination and essentially deprived plaintiff of the right to cross-examine the basis of defendant's medical opinion. Given these circumstances, reversal of the trial court's judgment and remand for a new trial are required. See *Leona W.,* 228 Ill. 2d at 460; *Troyan,* 367 Ill. App. 3d at 732-33.

Page 22

¶ 38 Having determined that reversal of the trial court's judgment and remand for new trial is warranted, we need only address the two remaining issues regarding jury instructions to the extent necessary to prevent any possible error from re-occurring on retrial. In the first of those issues, plaintiff argues that the trial court committed reversible, or, at the very least, prejudicial error when it refused plaintiff's proposed instruction on the standard of care, which was based upon IPI Civil (2006) No. 105.01, and which plaintiff intended to modify to comply with the supreme court's ruling in *Studt,* after the matter had been argued before the court. The trial court rejected plaintiff's proposed instruction and gave the defendant's tendered version of IPI Civil No. 105.01, which was based upon the 2005 version of the instruction. We need not address the merits of plaintiff's claim on this issue because IPI Civil No. 105.01 has since been modified to comply with the supreme court's ruling in *Studt.* See IPI Civil (2012) No. 105.01, Comment; *Perkey v. Portes-Jarol,* 2013 IL App (2d) 120470, ¶ 73. We presume that the newest version of IPI Civil No. 105.01 will be given to the jury upon retrial.

¶ 39 As her second jury instruction issue on appeal, plaintiff argues that the trial court committed reversible, or, at the very least, prejudicial error when it instructed the jury on mitigation of damages (IPI Civil (2011) No. 105.08) over plaintiff's objection. Plaintiff asserts that such an instruction was improper and unwarranted because it was not supported by sufficient evidence in the record and that she was prejudiced by the improper instruction because it caused the jury to focus its attention onto plaintiff's own conduct—an issue that was not relevant. Defendant argues that the trial court's ruling on the mitigation of damages instruction was supported by the evidence, was proper, and should be upheld. In the alternative, defendant asserts that even if the trial court's decision to allow the instruction was erroneous, reversible

Page 23

error did not occur because the instruction did not result in serious prejudice to plaintiff since the jury never reached the issue of damages.

¶ 40 For a particular jury instruction to be warranted, it must be supported by some evidence in the record. *Heastie v. Roberts,* 226 Ill. 2d 515, 543 (2007); *Schuler,* 313 Ill. App. 3d at 336. The determination as to which issues are raised by the evidence presented and which jury instructions should be given rests in the sound discretion of the trial court and its decisions in that regard will not be reversed on appeal absent an abuse of discretion. *Id.; Schultz v. Northeast Illinois Regional Commuter R.R. Corp.,* 201 Ill. 2d 260, 273 (2002); *Studt,* 2011 IL 108182, ¶ 13. The standard for determining whether an abuse of discretion has occurred in the giving of jury instructions is whether the jury instructions, taken as a whole, were sufficiently clear so as not to mislead the jury and whether the instructions fairly and



fastcase

correctly stated the law. *Dillon v. Evanston Hospital,* 199 Ill. 2d 483, 505 (2002). Thus, reversal based upon the giving of a faulty jury instruction is warranted only if the faulty instruction clearly misled the jury and resulted in serious prejudice to the opposing party. *Schultz,* 201 Ill. 2d at 274.

¶ 41 After reviewing the record in the present case, we find that the mitigation of damages instruction was supported by the evidence and was, therefore, properly given. See *Heastie,* 226 Ill. 2d at 543; *Schuler,* 313 Ill. App. 3d at 336. Although evidence was presented to the contrary, defendant clearly testified that after the November 2004 tests, he told plaintiff to obtain a follow-up mammogram within a year. That same recommendation was contained in the letter that defendant sent to plaintiff's primary care physician after the November 2004 tests were completed. If the jury found that defendant's testimony in that regard was credible, it could have reasonably concluded that plaintiff had failed to follow defendant's recommendation and that plaintiff's failure in that regard may have delayed the discovery of her cancer and her treatment

Page 24

after defendant's alleged medical negligence had already occurred. Because defendant's mitigation of damages instruction was supported by at least some evidence, the trial court did not abuse its discretion in giving the instruction over plaintiff's objection. See *Heastie,* 226 Ill. 2d at 543; *Schuler,* 313 Ill. App. 3d at 336; *Fisher v. Slager,* 201 Ill. App. 3d 480, 487 (1990) (mitigation of damages instruction was supported by some evidence and was appropriately given).

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we reverse the judgment of the circuit court of La Salle County and remand this case for a new trial.

¶ 44 Reversed and remanded.

¶ 45 **SEPARATE OPINION UPON DENIAL OF REHEARING**

¶ 46 JUSTICE SCHMIDT, dissenting.

¶ 47 I write separately upon the court's denial of rehearing. I now conclude that rehearing should be allowed and the trial court should be affirmed.

¶ 48 In finding the trial court abused its discretion in admitting defendant's exhibit No. 18 as a demonstrative exhibit, the majority states "that even if defense exhibit No. 18 was properly classified as demonstrative, we would still have to find that the use of the treatise images from the exhibit was erroneous because defendant failed to present an adequate foundation." *Supra* ¶ 34. My review of the record reveals that at no point during defendant's testimony regarding exhibit No. 18 did plaintiff make an objection for lack of foundation. The plaintiff, therefore, waived that objection, and the trial court did not abuse its discretion in deeming exhibit No. 18 demonstrative. I respectfully dissent.

Page 25

¶ 49 Plaintiff made a total of five objections, one of which was a standing objection during Dr. Hilborn's testimony utilizing exhibit No. 18. Plaintiff first objected to the singling out of image No. 40 of plaintiff's 2004 ultrasound. Plaintiff's counsel characterized singling out that one image out of a total of 47 images as misleading. The court overruled the objection. Defense counsel asked Dr. Hilborn another question regarding image No. 40, and plaintiff again objected on the ground that singling out one image was misleading. The trial court held a brief bench conference, overruled plaintiff's objection, and made it clear to the jury that image No. 40 was one of 47 total images from plaintiff's 2004 ultrasound.



fastcase

¶ 50 Plaintiff next objected to image No. 18-E, which Dr. Hilborn explained was a biopsy-proven carcinoma from another case/patient, not Lee Ann Sharbono's. Plaintiff's counsel stated, "I have to object on the basis that that, again, is a single image taken from another case. We don't have any idea as to what the other images may have shown in that ultrasound and what other images may have caused a conclusion that this particular image is cancerous." The trial court overruled that objection.

¶ 51 Later, Dr. Hilborn testified that image No. 18-I was an infiltrating ductal carcinoma also from another case. Plaintiff's counsel again objected, stating "I'm going to have to object to any imaging not of Mrs. Sharbono, that we have no way of cross-examining, looking at the other images to see what they present." The trial court took that objection as a standing objection to any of the demonstrative films or images that were not plaintiff's and allowed defense counsel to continue.

¶ 52 Finally, plaintiff's counsel renewed several objections, arguing that it was "inappropriate to bring in someone else's records and reports and argue those reports as part of the case." Counsel also stated that the exhibit was hearsay, arguing that it was not a graphic, but rather, a

Page 26

diagnosis and that they could not know who made the diagnosis. Counsel argued, "[t]here was no record shown that these were Dr. Hilborn's patients or whether they came from other locations. Therefore we had no opportunity to cross-examine anybody who concluded that these were either benign, that they were inferior margins, or that they were irregular margins, or that they were hyperechoic."

¶ 53 None of these constitute a specific foundational objection to exhibit No. 18. "[A]n objecting party must identify the same basis for his objection in the trial court that he will argue on appeal." *York v. El-Ganzouri,* 353 Ill. App. 3d 1, 18 (2004) (citing *Gausselin v. Commonwealth Edison Co.,* 260 Ill. App. 3d 1068, 1079 (1994) ("when an objection is made, specific grounds must be stated and other grounds not stated are waived on review")). The majority finds that plaintiff's objection, including "no record where the images came from," was an objection to the foundation for the evidence. That is not the case.

¶ 54 Furthermore, when the majority states that rules of forfeiture and waiver are limitations on the parties and not on the courts (see *In re Madison H.,* 215 Ill. 2d 364, 371 (2005)), it appears it concedes that plaintiff did not make a foundational objection, but is choosing to overlook that forfeiture. While some cases say that forfeiture is a limitation on the parties and not the courts, it does not necessarily confer upon this court the authority to accept or reject forfeiture arguments willy nilly in order to achieve our own desired results. In *O'Casek v. Children's Home & Aid Society of Illinois,* 229 Ill. 2d 421, 437 (2008), our supreme court affirmed the appellate court's decision rejecting defendant's argument that plaintiff forfeited consideration of certain issues in her medical malpractice action, stating the oft-cited proposition that "forfeiture is a limitation on the parties and not the court." *Id.* However, the court went on to state:

Page 27

> "Our decision to overlook any forfeiture in this case is made with the recognition that the new issues plaintiff raised were all issues of law which involved no problem of proofs, and that defendants were not deprived of an opportunity to present argument on these issues in the



fastcase

circuit court. [Citation.]" Id. at 439.

¶ 55 The *O'Casek* court also noted that the law within the Fourth District on the issues plaintiff raised on reconsideration was confused and the potential existed for conflict among the appellate districts. *Id.* at 438. That is not the situation that confronted the majority here. "[W]here the ground for the objection is of a character that can be remedied such as a lack of proper foundation, the objecting party must make the objection in order to allow an opportunity to correct it." *Bafia v. City International Trucks, Inc.,* 258 Ill. App. 3d 4, 8 (1994) (citing *Central Steel & Wire Co. v. Coating Research Corp.,* 53 Ill. App. 3d 943, 945-46 (1977)). Plaintiff failed to do so. Even in criminal cases where a forfeited claim may be considered under plain-error analysis, the path is narrow and the defendant has the burden of proving that the underlying forfeiture should be excused. See *People v. Johnson,* 238 Ill. 2d 478, 485 (2010) (reversing appellate court's decision, holding there was no basis to excuse forfeiture of claim under plain error). It is not the function of this court to give counsel a "pass" for objections he or she failed to make during the course of a civil trial, particularly in light of the stringent requirements in criminal cases and the type of objection argued here. Plaintiff should not be awarded a new trial for a foundational objection that defendant did not have the opportunity to correct.

¶ 56 The argument that plaintiff's counsel had no way of cross-examining those images is similarly not a foundational objection. The images admittedly came from a treatise; cross-

Page 28

examination would have been impossible regardless. In reality, counsel's argument about the inability to cross-examine the images is just couching the argument that defendant did not properly disclose exhibit No. 18 in slightly different terms. The majority ignores the fact that after hearing argument on the subject, the trial court found that defendant had timely disclosed the exhibit.

¶ 57 As a brief aside, I find that plaintiff did have the opportunity to cross-examine or call into question those images in exhibit No. 18 that were not Lee Ann Sharbono's. Plaintiff called Dr. Hilborn first as an adverse witness. Dr. Hilborn then presented his own testimony for his casein-chief, as agreed to by the parties. Following Dr. Hilborn's testimony, plaintiff had the opportunity to rebut that testimony and the images of that exhibit with her own expert witness testimony. Dr. Foley, a board-certified physician in diagnostic radiology, could have easily reviewed those images used in exhibit No. 18 and opined whether or not he believed they showed an infiltrating ductal carcinoma, or benign lesion, *et cetera*. The same could be said for Dr. Newstead, also an expert witness for the plaintiff who specialized in breast imaging. Any question about the reliability of the treatise images could have been dispelled by plaintiff's expert witnesses.

¶ 58 The images were demonstrative, to show what it is that radiologists look for when reading films. It is difficult to imagine that at least one of plaintiff's two experts could not have called defendant out had the images not reflected what defendant said they did. In fact, even in posttrial matters and on appeal, plaintiff makes no representation that the images displayed anything other than that represented by defendant. Where is the prejudice? They will presumably come in at the new trial.

Page 29

¶ 59 Plaintiff waived any foundational objection to exhibit No. 18 and a new trial is not warranted. The trial court did not abuse its discretion in finding exhibit No. 18



fastcase

demonstrative. In overruling plaintiff's various, nonfoundational objections to the exhibit, the trial court specifically stated that, "I believe the photos show that they are the four characteristics [ ] absence of or the presence of. I don't believe it was confusing to the jury and I think we made the appropriate instructions, or the jury was appropriately instructed *** about teaching what these characteristics were." Discretion lies with the circuit court in determining whether a party may present demonstrative evidence to clarify an expert's testimony. *Schuler v. Mid-Central Cardiology,* 313 Ill. App. 3d 326, 337 (2000). I do not believe that it can be said that no reasonable person would take the view adopted by the trial court in this instance.

¶ 60 The exhibit effectively allowed Dr. Hilborn to explain to the jury what characteristics he looks for when reviewing mammogram films and ultrasounds, a task that would be considerably more difficult without the assistance of those images. See *Schuler,* 313 Ill. App 3d at 337-38 (finding the trial court did not abuse its discretion in permitting defendant's use of a risk stratification chart as demonstrative evidence, where both plaintiff's and defendant's expert witnesses acknowledged that such risk stratification protocols were commonly accepted in the medical community and that the chart was simply a visual aid used to explain the risk stratification process, a concept the witnesses would testify about with or without the exhibit). The fact that plaintiff's images were shown as a comparison does not serve to undermine the demonstrative nature of the exhibit, particularly when plaintiff's experts had the opportunity to view those images and rebut Dr. Hilborn's testimony. Furthermore, plaintiff does not even allege on appeal that the images were misleading in the respect that they did not show what defendant said they did. Plaintiff was simply not unfairly prejudiced by the demonstrative evidence. There is no reason to suspect a retrial will yield a difference result.

---

Notes:

[1.] Defendant's testimony in his own case-in-chief was presented out of order by agreement of the parties.

[2.] The capitalization has been removed from the quoted headings for the convenience of the reader.

[3.] Plaintiff also asserts that her motion for a new trial should have been granted because of the cumulative effect of certain procedural and evidentiary errors that were allegedly committed by the trial court during the trial of this case and pertained to such matters as the admission of evidence and jury instructions. Those errors will be specifically addressed later in this opinion.

[4.] Although plaintiff asserts that defendant could not properly bring out in direct examination the bases of defendant's medical opinion, the rulings of our supreme court would seem to indicate to the contrary, albeit in cases that did not involve the use of a learned treatise. See *People v. Anderson,* 113 Ill. 2d 1, 9-12 (1986); *People v. Pasch,* 152 Ill. 2d 133, 176 (1992).

[5.] The trial court noted as to exhibit 18-E that "we're transitioning from a known carcinoma in this case to the case itself."

---



fastcase

**820 N.E.2d 37**
**354 Ill. App.3d 523**
**289 Ill.Dec. 529**

**Fidel VELARDE and Francisca Velarde, Plaintiffs-Appellees (Rafael Apulello and The Northern Trust Company, as Co-Guardians of Lilia Apulello, a Disabled person, and Rafael Apulello, Individually, Plaintiffs-Appellees), v. ILLINOIS CENTRAL R.R. CO., d/b/a Canadian National/Illinois Central R.R. Company, an Illinois Corporation, and Chicago Central & Pacific R.R. Company, a Corporation, Defendants-Appellants.**

**No. 1-02-1859.**

**Appellate Court of Illinois, First District, First Division.**

**November 8, 2004.**

[820 N.E.2d 42]

Timothy J. Cavanaugh, of Lloyd & Cavanaugh, Michael W. Rathsack, Chicago, for Plaintiffs-Appellees Fidel and Francisca Velarde.

Terrence J. Lavin, of Lavin & Nisivaco, P.C., David A. Novoselsky, Leslie J. Rosen of Novoselsky Law Offices, Chicago, for Plaintiffs-Appellees Rafael Apulello and Northern Trust Co.

Weston W. Marsh, Tonita M. Helton, of Freeborn & Peters and Clausen Miller P.C. (James T. Ferrini, Edward M. Kay, Paula M. Carstensen, Paul V. Esposito, of counsel), Chicago, for Defendants-Appellants.

[820 N.E.2d 43]

Justice McBRIDE delivered the opinion of the court:

This appeal involves a collision between a freight train and an automobile which occurred just after noon on January 9, 2001, on Army Trail Road in Bloomingdale, Illinois. The owner and maintainer of the tracks, defendant Illinois Central Railroad Company d/b/a Canadian National/Illinois Central Railroad Company (CNIC or railroad), knew that snow and road salt had caused the intersection's warning gates and lights to malfunction and was using a stop-and-flag procedure there until the signals were repaired. On this particular dry, sunny Tuesday afternoon, however, a CNIC dispatcher mistakenly advised a northwestbound train's engineer that the signal problem had been fixed, and the train, consisting of three locomotives and 63 cars, proceeded through the intersection at 50 miles per hour. The passengers of the southbound automobile it struck, plaintiffs Fidel and Francisca Velarde, and the driver of the automobile, the Velardes' adult daughter, Lilia Apulello, sustained primarily internal and closed head injuries when their 1998 Ford Explorer was broadsided and then rolled several times. The Velardes filed a negligence action against CNIC and the owner and operator of the train, defendant Chicago Central & Pacific Railroad Company (CC & P). Lilia filed a separate action against the same two defendants, which was consolidated with her parents' suit. As a result of her head injuries, however, Lilia was subsequently declared a disabled person, and her co-guardians, The Northern Trust Company and her husband, Rafael Apulello, became the plaintiffs to her claim (Lilia or the Apulellos). Rafael also added a claim of his own for loss of consortium. A jury awarded more than $54 million to the occupants of the Ford Explorer and apportioned 60% liability to CNIC, 35% to CC & P, and 5% to Lilia, resulting in a slight reduction of the monetary awards. The jury also awarded Rafael $3.5 million. The trial judge entered judgment on the awards and



fastcase

denied motions for judgment notwithstanding the verdict and a new trial. On appeal, CNIC and CC & P contend (1) the use of a day-in-the-life video about Lilia, (2) the slight allocation of negligence to Lilia, (3) the large awards, and (4) improper closing arguments warrant a new trial on the issues of liability and damages, or damages alone, or alternatively, remittitur by $38 million.

The focus of defendants' appeal is their contention they were "ambushed" by the Velardes and Apulellos on the first day of trial with a 22-minute day-in-the-life video about Lilia. Defendants state they were surprised by the video's existence, vehemently and repeatedly objected to its presentation to the jury, and then suffered a predictable "bloodbath" in excessive damages and badly misallocated fault when the video unfairly elicited sympathy for plaintiffs. Defendants contend the case must be retried without the video.

The facts pertinent to this issue are as follows. In March 2001, defendants issued Rule 213 interrogatories (177 Ill.2d R. 213), which included a question as to whether any photographs, movies and/or videotapes had been taken of the accident scene or the vehicle or persons involved. In June 2001, Lilia answered this question, "None." Trial was scheduled for Monday, January 28, 2002. Fact and opinion discovery closed in mid-November 2001. The video was recorded on January 8 and 12, or on January 8 and 16, 2002 — the earlier dates appear in the transcripts and briefs, and the latter are marked on the copy of the video used during the trial. The Apulellos' attorney finished editing the raw video footage on Friday, January 25, 2002.

[820 N.E.2d 44]

On Monday, January 28, 2002, the Apulellos' attorney told defense counsel that he had the video and intended to use it at trial. The video was discussed for the first time on the record that day, during the presentation of numerous motions *in limine*. At that point, neither the judge nor defendants had viewed the recording, and the judge deferred ruling on its admissibility.

The video was next addressed immediately after jury selection, on Tuesday, January 29, 2002. The Apulellos' attorney again raised the subject, describing the film as "demonstrative" rather than substantive evidence of the nature and extent of Lilia's injuries and indicating the parties were still exchanging demonstrative exhibits. The defense attorney acknowledged the defense was still working on a diagram, but said he was objecting to plaintiffs' use of the video because it was "way past any discovery disclosure time" and contained "testimonial" audio and unnecessary scenes. The Apulellos' attorney then offered to use the video without the audio track, said he would take out scenes showing Lilia's sister and nephew cleaning the house, and suggested the attorneys could meet that evening to reach an agreement about what else to "take out." The trial judge said "Okay," and then proceeded to address other aspects of the trial. The attorneys met that evening. According to a sworn statement from the Apulellos' attorney, he edited scenes from the video immediately after the attorneys met, in "strict accordance" with defense counsel's requests, and this version of the video was used at trial. The record shows the Apulellos' attorney played a few minutes of the video without the audio track during his opening statements, without objection from defendants. There was also no objection when Lilia's sister and Rafael narrated portions of the silenced recording while they described Lilia's weekday and weekend activities.

However, at the end of the week, on Friday, February 1, 2002, defense counsel broached the topic with the judge, stating:



fastcase

> "[DEFENDANTS' COUNSEL]: [The Apulellos' attorney] and I met [Tuesday night] at my office. I said, Look, I'll withdraw my objection if A, you take the audio out, B, some other parts and the other thing I said is I want the outtakes, I wanted unedited tapes, that was my deal.
>
> I haven't gotten them, and my indication here today is I'm not going to get those unedited tapes. If that's the case then I'm going to renew my objection."

The Apulellos' counsel responded that according to the supreme court's opinion in *Cisarik v. Palos Community Hospital,* 144 Ill.2d 339, 162 Ill.Dec. 59, 579 N.E.2d 873 (1991), the Apulellos' outtakes from the original footage were privileged attorney work product, but that he had been willing to give the defense the edited version of the film which the Apulellos had intended to use at trial and the scenes defense counsel edited from that version when the attorneys met to review the prepared exhibit. The defense attorney countered:

> [DEFENDANTS' COUNSEL]: Judge, * * * I don't have it here because this issue just came up, [but] there is actually some [case law] that [indicates] * * * I'm even entitled to be there at the time these [scenes] are filmed. This is essentially no matter how you cut it, whether there is voice on it or no voice on it, a day in the life is a testimonial presentation. I can't cross examine the film.
>
> The only thing I can do is see what was pulled out. What was pulled out is in essence a way that I could cross examine * * *. * * * I'm renewing my objection if I don't get those outtakes."

[820 N.E.2d 45]

The Apulellos' attorney responded that *Cisarik* was case law directly on point and that it shielded the Apulellos' outtakes from discovery. He questioned whether he would be expected to bring in all the drafts of any other trial exhibit. The defense attorney admitted that he was unfamiliar with *Cisarik,* but stated, "I was withdrawing an objection * * * to the video because they agreed, A, to take out the audio, B, because they agreed to take out pieces of it, and I said C, I want the outtakes." The trial judge reassured defense counsel that he would receive plaintiffs' outtakes if the defense was legally entitled to them. However, after the defense attorney reviewed *Cisarik* during a break in the proceedings, he stated:

> "[DEFENDANTS' COUNSEL]: Judge, for the record, I am not going to disagree with what [the Apulellos' counsel] said *Cisarik* says. It does.
>
> I just want to make clear on the record my objection because, on the record, I disagree with *Cisarik*. I think it is wrong.
>
> My objection is A, that in my view it should have been produced during discovery so I am renewing that objection.
>
> B, I believe the outtakes are not work product, and that's it."

Nevertheless, in their combined posttrial motion for a new trial and judgment notwithstanding the verdict, defendants argued in part that the video should have been barred because defendants were



fastcase

wrongfully denied plaintiffs' outtakes. The Apulellos responded that the version used at trial was in fact "defense-approved." They summarized the proceedings quoted above and tendered the affidavit referenced above in which plaintiffs' counsel described his interaction with the defense attorney. Defendants moved to strike the attorney's affidavit, arguing that it contradicted an on-the-record statement of facts, and the trial judge denied the motion without comment.

Defendants' first specific contention about the video is that it contained fact and opinion testimony and was therefore "substantive evidence" which should have been barred from the trial because it was not timely disclosed in response to defendants' Rule 213 interrogatories. 177 Ill.2d Rs. 213(a), (d). Rule 213(i) imposes a continuing duty on a party to "seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." 177 Ill.2d R. 213(j). In addition to citing the various paragraphs of Rule 213 and a host of related cases, defendants cite *Wiker v. Pieprzyca-Berkes,* 314 Ill.App.3d 421, 430, 247 Ill.Dec. 376, 732 N.E.2d 92, 99 (2000), and *Warrender v. Millsop,* 304 Ill.App.3d 260, 264, 237 Ill.Dec. 882, 710 N.E.2d 512, 519 (1999), for the proposition that the video was untimely disclosed or improperly withheld evidence. The Apulellos respond that the video was properly admitted as demonstrative evidence, pursuant to *Cisarik,* 144 Ill.2d 339, 162 Ill.Dec. 59, 579 N.E.2d 873. Additionally, defendants' concerns about the video were accommodated when their attorney previewed and edited out certain footage, and the audio track was silenced while trial witnesses, whose testimony was subject to objection and cross-examination, provided narration. The Velardes add that they did not make, introduce, or use the video, and that defendants have cited no authority for the proposition that the Velardes had a duty to produce someone else's demonstrative evidence.

The admission of a film into evidence is within the sound discretion of the trial court (*Carney v. Smith,* 240 Ill.App.3d 650, 656, 181 Ill.Dec. 306, 608 N.E.2d 379, 383 (1992)), and an abuse of discretion occurs only where no reasonable person

[820 N.E.2d 46]

would agree with the trial court's conclusion. *Schwartz v. Cortelloni,* 177 Ill.2d 166, 226 Ill.Dec. 416, 685 N.E.2d 871 (1997).

Defendants' assertion that the day-in-the-life video was substantive evidence is refuted by the opinion which the Apulellos repeatedly cited at trial and defendants now almost ignore, *Cisarik,* 144 Ill.2d 339, 162 Ill.Dec. 59, 579 N.E.2d 873. That case involved a brain-damaged infant and allegations of medical negligence. *Cisarik,* 144 Ill.2d at 340, 162 Ill.Dec. 59, 579 N.E.2d at 874. The pertinent details are disclosed by opinions issued by the appellate and supreme courts. *Cisarik v. Palos Community Hospital,* 193 Ill.App.3d 41, 140 Ill.Dec. 189, 549 N.E.2d 840 (1989), *aff'd in part & rev'd in part,* 144 Ill.2d 339, 162 Ill.Dec. 59, 579 N.E.2d 873 (1991). The plaintiff's attorney decided to make a film depicting a typical day for the infant, in order to give the jury a grasp of the full extent of her disabilities. *Cisarik,* 144 Ill.2d at 341, 162 Ill.Dec. 59, 579 N.E.2d at 874. The defense persuaded the trial judge to issue a protective order permitting each party to have one lawyer present during the filming, a copy of the finished film as well as all edited-out and unused footage, and the right to depose any authenticating witnesses. *Cisarik,* 193 Ill.App.3d at 43-45, 140 Ill.Dec. 189, 549 N.E.2d at 841-42. The judge reasoned that a day-in-the-life film was like an evidence deposition, and therefore it was subject to similar treatment. *Cisarik,* 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d at 842. The plaintiff, however, did not want the defense present during filming and took an appeal.



fastcase

The appellate court disagreed only slightly with the trial judge's approach and found that because the film's preparation itself was not evidence, the plaintiff's attorney could make the film without opposing counsel in attendance. *Cisarik,* 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d at 842. The appellate court modified the protective order accordingly. *Cisarik,* 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d at 842. Notably, it did not disturb, and in fact it expressly reiterated the portions of the order requiring (a) that all the film, whether or not it was used in the plaintiff's final edited version, be preserved for the defendants' viewing and use at trial as their own evidence, and (b) that the plaintiff's authenticating witnesses were subject to deposition. *Cisarik,* 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d at 842.

On further appeal to the supreme court, however, the entire protective order was vacated. *Cisarik,* 144 Ill.2d at 343, 162 Ill.Dec. 59, 579 N.E.2d at 875. The supreme court determined that when viewed in its "proper light," a day-in-the-life film is "merely a type of demonstrative evidence," comparable to a still photograph, a drawing, a model, or even a chart, that it "has no probative value in itself," and that it serves only as a "visual aid to the jury in comprehending the verbal testimony." *Cisarik,* 144 Ill.2d at 341, 162 Ill.Dec. 59, 579 N.E.2d at 874. In addition, the "preparation of such evidence" is properly deemed "the work product of the lawyer who is directing and overseeing its preparation" (*Cisarik,* 144 Ill.2d at 341, 162 Ill.Dec. 59, 579 N.E.2d at 874), and "opposing counsel has no right to intrude into the production of this demonstrative evidence" (*Cisarik,* 144 Ill.2d at 342, 162 Ill.Dec. 59, 579 N.E.2d at 875). The supreme court was not swayed by the defendants' argument that day-in-the-life films are a "parade of horribles" which should be subject to more stringent discovery guidelines than other types of evidence. *Cisarik,* 144 Ill.2d at 342, 162 Ill.Dec. 59, 579 N.E.2d at 874. Instead, the court found that the standard two-prong test for admissibility

[820 N.E.2d 47]

of evidence such as still photographs, when and if the plaintiff offered the film into evidence at trial, would adequately protect the defendants. *Cisarik,* 144 Ill.2d at 342, 162 Ill.Dec. 59, 579 N.E.2d at 874. Under the first prong, a foundation would have to be laid that the film was an accurate portrayal of what it purportedly showed, and under the second prong, the film's probative value could not substantially outweigh the danger of unfair prejudice. *Cisarik,* 144 Ill.2d at 342, 162 Ill.Dec. 59, 579 N.E.2d at 874.

*Cisarik* makes clear that that day-in-life-films are considered demonstrative evidence which helps jurors understand witness testimony, rather than additional substantive evidence. Furthermore, it appears defendants'"substantive evidence" arguments more or less repeat *Cisarik's* dissent. For example, the dissent emphasized that pretrial discovery promotes fair, efficient, and expeditious proceedings leading to the truth, rather than "trial as a battle of wits" (*Cisarik,* 144 Ill.2d at 345-46, 162 Ill.Dec. 59, 579 N.E.2d at 876 (Miller, J., dissenting, joined by Freeman, J.)), and defendants here remark that the objectives of pretrial discovery include "enhanc[ing] the truth-seeking process," and "stop[ping] last minute trickery." The dissent stated that comparing a day-in-the-life film to other types of demonstrative evidence, such as a chart or graph, "overlooks the special nature" and "powerful and distinctive nature" of a day-in-the-life film (*Cisarik,* 144 Ill.2d at 346, 162 Ill.Dec. 59, 579 N.E.2d at 876 (Miller, J., dissenting, joined by Freeman, J.)), and defendants echo that a day-in-the-life video "is virtually unique in its probative impact," and "able to inform and promote a better understanding * * * *as no other evidence can do*" (emphasis in original). Based on these principles about discovery and the power of film, the dissent expressed concern that the opinion was "eliminating [the] defendants' discovery rights on the ground that the



fastcase

proposed film must ultimately satisfy tests for admissibility at trial" (*Cisarik,* 144 Ill.2d at 345, 162 Ill.Dec. 59, 579 N.E.2d at 876 (Miller, J., dissenting, joined by Freeman, J.)) and "revert[ing] to the kind of trial by ambush that can result when discovery rights are ignored" (*Cisarik,* 144 Ill.2d at 346, 162 Ill.Dec. 59, 579 N.E.2d at 876 (Miller, J., dissenting, joined by Freeman, J.)). Similarly, defendants now contend they were "ambushed" by the video and "in the age of full disclosure, the proceedings below are hard to fathom." Defendants' arguments do not persuade us to contravene *Cisarik* and conclude that the Apulellos' video should have been treated as additional testimony or substantive evidence, because it is not within our authority to overrule the supreme court or modify its decisions. *Walton v. Norphlett,* 56 Ill.App.3d 4, 5, 13 Ill.Dec. 886, 371 N.E.2d 978, 979 (1977); *Belden Manufacturing Co. v. Chicago Threaded Fasteners, Inc.,* 84 Ill.App.2d 336, 340, 228 N.E.2d 532, 534 (1967).

As for *Wiker,* it concerned a surveillance video that was never used at trial; therefore, it was only *dictum* when the court indicated a surveillance video must be disclosed before it can be used at a trial even for cross-examination. *Wiker,* 314 Ill.App.3d at 430, 247 Ill.Dec. 376, 732 N.E.2d at 99. We also point out that the court gave no indication when such disclosure must occur. *Wiker,* 314 Ill.App.3d at 430, 247 Ill.Dec. 376, 732 N.E.2d at 99. Therefore, *Wiker's* value here is nominal, at best. In defendants' other case, *Warrender,* the court found that a discovery violation occurred when the defendant kept a surveillance video of the plaintiff for two months before turning it over.

[820 N.E.2d 48]

*Warrender,* 304 Ill.App.3d at 270, 237 Ill.Dec. 882, 710 N.E.2d at 519. However, nothing comparable occurred here. The Apulellos' video was disclosed and tendered at the first opportunity. Filming began about three weeks before trial and took about one week to complete. The raw footage was then reviewed and edited by the Apulellos' attorney during the week preceding trial, and was finalized on a Friday. The Apulellos' attorney disclosed and tendered the video on the following Monday, supplementing the prior interrogatory answer that there was no video of the accident victims. Defendants' additional contention that the video should have been barred outright because the Apulellos delayed in creating it and did not disclose it at least 60 days before trial pursuant to Supreme Court Rule 218(c) (166 Ill.2d R. 218(c)) is unpersuasive, given that the record suggests the court modified the discovery deadline. Defendants do not deny the Apulellos' assertion that depositions were being taken by both sides until a week before trial. Moreover, since the purpose of the video was to illustrate the evidence regarding Lilia's life at the time of trial, it would make little sense to record her activities months in advance.

Thus, we are not persuaded by defendants' arguments that a retrial is warranted because the day-in-the-life video was disclosed and tendered too late in the proceedings.

Defendants' second main contention about the video is that they were entitled to discover the plaintiffs' outtakes but the trial judge erroneously read *Cisarik* as an indication that outtakes are protected by the attorney work product privilege and plaintiffs' counsel reneged on an agreement to surrender them. Defendants argue *Cisarik's*"true holding" does not support the judge's ruling, and urge this court to consider that the *Cisarik* briefs filed in the supreme court and now appended to defendants' reply brief did not ask the court to conclude that outtakes are privileged. Defendants also argue the trial judge should have stricken the affidavit of the Apulellos' attorney in which he described his interaction with defense counsel, because the affidavit contradicted an



fastcase

on-the-record statement that there was an agreement to tender all the outtakes. Defendants contend that the prejudice which resulted from their inability to use the outtakes entitles them to a new trial without the film.

The Apulellos respond that defendants already conceded on the record that *Cisarik* shielded the Apulellos' outtakes from discovery, and, therefore, the argument is waived on appeal. Further, the concession was correct; the trial judge's application of the case was also correct; and this intermediate court of appeal has no authority to contradict a higher court's opinion. In a motion ordered taken with the case, the Apulellos contend the *Cisarik* briefs are not properly before this court and should be stricken from defendants' reply brief. As for the accuracy of their attorney's affidavit regarding the extent of his agreement with defense counsel, according to the Apulellos, the record discloses they consistently refused to produce their own outtakes based on *Cisarik* and its indications about outtakes and the attorney work product doctrine. The Velardes add the record shows they were not involved in the dispute about the outtakes.

We find defendants waived any contention they were prejudiced by their lack of access to the Apulellos' outtakes, because defendants failed to object when the edited video was first shown to the jury during the Apulellos' opening statements and when it was used to illustrate witness testimony.

[820 N.E.2d 49]

*Chubb/Home Insurance Cos. v. Outboard Marine Corp.,* 238 Ill.App.3d 558, 573, 179 Ill.Dec. 591, 606 N.E.2d 423, 433 (1992) (failure to timely object waives question for purposes of review).

An additional reason for finding waiver is that defendants conceded on the record on February 1, 2002, that they were not entitled to the Apulellos' outtakes, based on *Cisarik* and the attorney work product doctrine. The transcript quoted earlier indicates defense counsel "disagree[d] with *Cisarik*" and thought the supreme court's determination was "wrong," but that he conceded the decision supported the Apulellos' position.

Furthermore, the concession about access to the outtakes was correct, because *Cisarik* plainly states that "opposing counsel has no right to intrude into the production of [a day-in-the-life film]." *Cisarik,* 144 Ill.2d at 342-43, 162 Ill.Dec. 59, 579 N.E.2d at 875. We disagree with defendants' new assertion that this means only that opposing counsel has no right to attend filming. If this were the case, the supreme court would have left intact some portion of the protective order it contemplated, instead of "revers[ing] both the trial court and the appellate court as to the appropriateness of the protective order." *Cisarik,* 144 Ill.2d at 343, 162 Ill.Dec. 59, 579 N.E.2d at 875. As already summarized above, the protective order entered by the trial court in *Cisarik* provided for the defense to be present when plaintiff filmed the infant and for the defense to receive a copy of every single frame recorded (*Cisarik,* 144 Ill.2d at 341, 162 Ill.Dec. 59, 579 N.E.2d at 874), and the appellate court reversed the requirement that defense counsel be present during filming but reiterated that the defendants were "entitled to view all of the film taken" and "may use any film taken and not used by the plaintiff." *Cisarik,* 193 Ill.App.3d at 45, 140 Ill.Dec. 189, 549 N.E.2d at 842. However, none of these provisions survived the supreme court's reversal. *Cisarik,* 144 Ill.2d at 343, 162 Ill.Dec. 59, 579 N.E.2d at 875. We also point out that the dissent — in a paragraph which defendants have chosen not to echo here — expressed concern that *Cisarik's* plaintiff was challenging only whether the defense had a right to be present during filming, yet the court was reversing *all* the lower courts' discovery guidelines (including the requirement that the defense receive footage edited-out and unused by the



fastcase

plaintiff's counsel). *Cisarik,* 144 Ill.2d at 345, 162 Ill.Dec. 59, 579 N.E.2d at 875 (Miller, J., dissenting, joined by Freeman, J.). Because of the dissent, there is no question that *Cisarik* intentionally excluded the plaintiff's outtakes from discovery by the defense. Accordingly, we have no reason to contemplate the *Cisarik* briefs attached to defendants' reply brief and will not consider the Apulellos' motion to strike the attachment as improper.

We are also unpersuaded that the trial judge erred by denying, without comment, defendants' motion to strike the sworn statement of the Apulellos' attorney regarding his meeting with defense counsel about use of the video at trial. See *Hartgraves v. Don Cartage Co.,* 63 Ill.2d 425, 428, 348 N.E.2d 457, 459 (1976) (an affidavit is insufficient to amend or correct the record). The transcripts, including irrelevant portions not summarized above, do not support defendants' assertion that the Apulellos' attorney expressly acknowledged in open court that he had agreed to relinquish his own outtakes, or implicitly acknowledged an agreement to that effect by failing to contradict defense counsel's on-the-record statements. The transcript of February 1, 2002, in particular indicates that the Apulellos' counsel (a) immediately countered the assertion that defendants were entitled to the original, unedited footage, and (b) even referenced specific legal

[820 N.E.2d 50]

authority, *Cisarik,* 144 Ill.2d 339, 162 Ill.Dec. 59, 579 N.E.2d 873, in support of his position that plaintiffs' outtakes were privileged under the attorney work product doctrine. Furthermore, the proceedings suggest that defense counsel initially believed he was legally entitled to plaintiffs' outtakes and, thus, no agreement to that effect was necessary. At first he characterized the film as a "testimonial presentation," contradicting *Cisarik's* clear indication that a day-in-the-life film is merely "demonstrative evidence." *Cisarik,* 144 Ill.2d at 341, 162 Ill.Dec. 59, 579 N.E.2d at 874. He also stated that he was entitled by law to be present during filming, demonstrating his lack of familiarity with *Cisarik's* facts. Then he admitted, after he supposedly negotiated release of plaintiffs' outtakes, that he was unfamiliar with *Cisarik,* which is a case directly on point. Accordingly, after reviewing *Cisarik* during a break in the proceedings, he conceded that he was mistaken about a defendant's right to a plaintiff's unused footage. The fact that only the Apulellos' counsel was familiar with pertinent case law when the attorneys met about the contents of the video makes it improbable that the supposed agreement to relinquish the Apulellos' outtakes ever occurred. In addition, it is arguable that the February 1, 2002, transcript includes a concession that the defense merely asked for the outtakes. The defense attorney "clarif[ied]" two things during the proceedings. First, that he had withdrawn his objection to the Apulellos' use of the video because the Apulellos' counsel agreed to "take out" the audio and certain scenes. Second, that he had *stated,*"I want the outtakes." For all these reasons, we reject defendants' assertion that the trial judge should have stricken the affidavit as an improper amendment or correction of the transcripts.

Defendants' next major contention about the video is that any probative value of the video was outweighed by the danger of prejudice to defendants. The Apulellos respond that the video cannot be characterized as unfairly prejudicial when it was approved by defense counsel, raised no objection, and is actually bland and innocuous. The Velardes suggest that any further response from them would be superfluous.

We have watched the exhibit at issue. It shows Lilia engaging in ordinary activities, including waking up, eating meals with her family, taking oral medication, dressing, brushing her hair, stripping linens from her



fastcase

bed, loading the clothes washer and dryer, putting on an overcoat, getting into the passenger's seat of a sport utility vehicle, and visiting her mother's house and a grocery market. We note that in many scenes, a family member prompts Lilia or helps Lilia in some other way to complete the activity, such as when she is encouraged to take the oral medication or do the laundry. Noteworthy exceptions to this pattern are at her mother's house, where Lilia rearranges the pillows on the living room sofa so that she can nap, and at the market where she strays away while her sister fills the shopping cart. Throughout the film, Lilia appears anxious and easily confused and she is frequently tearful. In our opinion, however, the film does not dwell on her discomfort. Additionally, the film seems to illustrate the impact of head trauma and possibly resulting medication on Lilia's life, consistent with witness testimony indicating, as examples, that Lilia took medication prescribed by her neurologist, had difficulty sustaining attention, needed someone to "cue her in" and give reminders, could not think flexibly or find solutions to problems, could not manage utensils, and was frustrated, fearful, anxious and extremely depressed. Testimony to that effect would have been given even

[820 N.E.2d 51]

if the illustrating video was never presented to the jury. Furthermore, the testimony regarding Lilia's life after the collision was not closely balanced and we cannot conclude that the video tipped the verdict in plaintiffs' favor. In addition, although defendants contend that some of the scenes were irrelevant and that the probative value of other scenes was destroyed because they were cut short, these contentions are unpersuasive, given that the video was edited to the satisfaction of defense counsel before it was used during opening statements. We also reject defendants' unsubstantiated suggestion that the video may have included exaggerated and self-serving behaviors. Defendants do not cite any portion of the record indicating they objected to use of the video on this basis at trial; thus, they cannot now complain of error. *Thomas v. Industrial Comm'n,* 78 Ill.2d 327, 336, 35 Ill.Dec. 794, 399 N.E.2d 1322, 1326 (1980). Furthermore, defendants chose not to have their own medical expert examine Lilia and never called upon Lilia to testify, giving up opportunities to discredit the staged evidence, if in fact, it was staged. Defendants now protest that calling Lilia herself would have made defendants "look cruel and heartless," actually lending credibility to a video in which Lilia appears to this court to be confused and easily upset. In addition, the silenced video was narrated by trial witnesses whose testimony was subject to additional objection, cross-examination, and curative instruction, if warranted, and defendants are not arguing that the trial judge improperly rejected defendants' attempts to limit the impact of the video through these means. We conclude it is most improbable that the jury was unduly influenced by a film which shows Lilia engaging in commonplace activities in a manner that conformed with trial testimony about her injuries and disabilities. It was not an abuse of discretion to allow the jury to see the video.

In summary, we are not persuaded by any of defendants' arguments regarding the Apulellos' use of the day-in-the-life video at trial.

Defendants' fourth main contention on appeal concerns the jury's allocation of negligence, 60%, 35%, and 5% to CNIC, CC & P, and Lilia, respectively. Defendants argue none of the responsibility should have been assigned to CC & P, since it operated the train with "due care," and that at least half of the responsibility should have been attributed to Lilia. In a negligence action, the plaintiff must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.,* 165 Ill.2d



fastcase

107, 114, 208 Ill.Dec. 662, 649 N.E.2d 1323, 1326 (1995). The existence of a duty is a question of law for the court to decide, while the issues of breach and proximate cause are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues. *Espinoza,* 165 Ill.2d at 114, 208 Ill.Dec. 662, 649 N.E.2d at 1326. Defendants assert that if fault is properly reallocated, Lilia will be statutorily barred from recovering damages from either defendant because her own contributory fault was more than 50% of the proximate cause of her injuries (See 735 ILCS 5/2-1116 (West 1994)), or at least CC & P will be apportioned less than 25% of the liability and therefore rendered only severally liable for Lilia's nonmedical damages (See 735 ILCS 5/2-1117 (West 1994)). The Apulellos and the Velardes respond that the evidence supported the jury's verdict and allocation of fault.

The defendants unsuccessfully presented their allocation of negligence arguments

[820 N.E.2d 52]

to the trial judge in a single motion seeking judgment notwithstanding the verdict for CC & P or a new trial for defendants. CC & P's motion for judgment notwithstanding the verdict (judgment n.o.v.) should have been granted if all the evidence, viewed mostly favorably to Lilia, so overwhelmingly favored CC & P that no contrary verdict based on that evidence could ever stand. *Maple v. Gustafson,* 151 Ill.2d 445, 453, 177 Ill.Dec. 438, 603 N.E.2d 508, 512 (1992). "This is clearly a very difficult standard to meet, limiting the power of the circuit court to reverse a jury verdict to extreme situations only." *People ex rel. Department of Transportation v. Smith,* 258 Ill.App.3d 710, 714, 197 Ill.Dec. 263, 631 N.E.2d 266, 269 (1994) (*Smith*). "Unquestionably, it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Maple,* 151 Ill.2d at 452, 177 Ill.Dec. 438, 603 N.E.2d at 511-12. "A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable." *Maple,* 151 Ill.2d at 452, 177 Ill.Dec. 438, 603 N.E.2d at 512. "The court has no right to enter a [judgment n.o.v.] if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple,* 151 Ill.2d at 454, 177 Ill.Dec. 438, 603 N.E.2d at 512. This court reviews *de novo* a trial judge's decision to grant or deny a motion for judgment n.o.v., but like the trial judge, must be careful not to usurp the function of the jury and substitute its own assessment. *Jones v. Chicago Osteopathic Hospital,* 316 Ill.App.3d 1121, 1125, 250 Ill.Dec. 326, 738 N.E.2d 542, 547 (2000).

On the other hand, when presented with CC & P and CNIC's motion for a new trial, the trial judge was expected to weigh the evidence. *Maple,* 151 Ill.2d at 454, 177 Ill.Dec. 438, 603 N.E.2d at 512. However, a new trial should not be granted merely because some evidence is conflicting. *Villa v. Crown Cork & Seal Co.,* 202 Ill.App.3d 1082, 1089, 148 Ill.Dec. 372, 560 N.E.2d 969, 973 (1990). Rather, the trial judge should set aside the jury's verdict if it was contrary to the manifest weight of the evidence, which occurs" `where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.'" *Maple,* 151 Ill.2d at 454, 177 Ill.Dec. 438, 603 N.E.2d at 512-13, quoting *Villa,* 202 Ill.App.3d at 1089, 148 Ill.Dec. 372, 560 N.E.2d at 973. This type of motion is reviewed for an abuse of discretion (*Maple,* 151 Ill.2d at 455, 177 Ill.Dec. 438, 603 N.E.2d at 513), as is a motion seeking reallocation of fault (*Usselmann v. Jansen,*



fastcase

257 Ill.App.3d 978, 982, 195 Ill.Dec. 885, 629 N.E.2d 193, 196 (1994)). A reviewing court should be mindful that when ruling on a motion for a new trial, the trial judge "`has the benefit of * * * [previously observing] the appearance of the witnesses, their manner in testifying, and the circumstances aiding in the determination of credibility.'" *Maple,* 151 Ill.2d at 456, 177 Ill.Dec. 438, 603 N.E.2d. at 513, quoting *Buer v. Hamilton,* 48 Ill.App.2d 171, 173-74, 199 N.E.2d 256, 257 (1964).

Defendants now summarize only certain evidence and related legal principles. This is not an effective means of establishing that all the evidence, viewed most favorably to Lilia, overwhelmingly favored CC & P, or that the

[820 N.E.2d 53]

manifest weight of the evidence favored CC & P and CNIC. For example, CC & P contends the evidence shows CC & P acted reasonably and that Lilia did not prove that CC & P negligently failed to keep an adequate lookout and negligently failed to decrease speed when the train crew saw vehicles continue to go over the track crossing. CC & P asserts the evidence showed the train's engineer, Dallas Harken, and conductor, John Snapp, were looking ahead for vehicles, while traveling at a lawful rate of speed. Further, engineer Harken saw vehicles continuing to cross when the train was still "a pretty far distance away," and conductor Snapp saw them when the train was about 600 feet from the crossing and stated it was not uncommon for cars to cross when a train was approaching. CC & P cites *Robertson v. New York Central R.R. Co.,* 388 Ill. 580, 585, 58 N.E.2d 527, 529 (1944), and *Brennan v. Wisconsin Central, Ltd.,* 227 Ill.App.3d 1070, 1084, 169 Ill.Dec. 321, 591 N.E.2d 494, 504 (1992), for the proposition that under these circumstances Lilia was under a duty to stop and that CC & P was under no duty to stop. Further, Harken saw another vehicle cross when the train was within 100 feet of the crossing, and then another, which was "not unusual" to see. A witness placed Lilia in the next lane and immediately behind this car. Snapp did not have sufficient time prior to the collision with Lilia to order Harken to stop, and Harken applied the emergency brake on impact. We conclude, however, that although this evidence indicates the train crew was looking for vehicles and decreased speed at impact, it does not indicate that it was necessarily reasonable for the train to continue at full speed to this particular intersection. Furthermore, the *Robertson* case that defendants rely upon indicates that a train stop is required when it is apparent that a motorist has not heard or will not heed a train's signal (*Robertson,* 388 Ill. at 584, 58 N.E.2d at 529; see also *Espinoza,* 165 Ill.2d at 115, 208 Ill.Dec. 662, 649 N.E.2d at 1327), yet defendants fail to address Snapp's admission that when he observed cars going over the crossing when the train was still 600 feet away, even he thought there might be something wrong ahead and that either he or Harken questioned, "Are those cars going to stop or not[?]" Defendants contend Lilia was under a duty to stop, but they fail to address the admitted fact that the intersection's warning gates and lights were not functioning properly. There was also evidence suggesting that the approaching train was all but invisible to Lilia because the tracks bisected Army Trail Road at such an angle that she could not have seen the rapidly approaching train unless she severely turned her head to the left, and that even if she had turned, her view would have been obstructed by bordering trees and bushes. Although defendants contend Lilia was under a heightened duty to proceed cautiously because her view was obstructed (see *Duffy v. Cortesi,* 2 Ill.2d 511, 518, 119 N.E.2d 241 (1954)), evidence of negligence can be rebutted by proof that the person acted reasonably under the circumstances. *Lindquist v. Chicago & Northwestern Transportation Co.,* 309 Ill.App.3d 275, 283, 242 Ill.Dec. 781, 722 N.E.2d 270, 276 (1999). In addition, whether a person acted reasonably under the circumstances is a



fastcase

question of fact, unless the facts are undisputed and reasonable minds could not disagree. *Lindquist,* 309 Ill.App.3d at 283, 242 Ill.Dec. 781, 722 N.E.2d at 276.

Defendants engage in a similarly incomplete and ineffective analysis of some of the evidence presented to the jury in support of plaintiffs' allegations that CC & P failed to obey an applicable operating rule and failed to sufficiently sound the train's horn.

[820 N.E.2d 54]

When considering all the evidence in a light most favorable to Lilia, we cannot say that it so overwhelmingly favored judgment for CC & P on plaintiffs' claims that the verdict against the train operator cannot stand. Nor can we say that the negligence verdict or the 60%, 30%, and 5% apportionment of fault amongst the various parties involved in the collision was against the manifest weight of the evidence. The record does not indicate that the opposite conclusions were clearly evident or that the jury's findings were unreasonable, arbitrary, or not based on any of the evidence. The jury's verdict was supported by the evidence and there was no apparent basis for the trial court to disturb it. Accordingly, the trial court's ruling as to CC & P's motion for judgment n.o.v. and defendants' motion for a new trial is affirmed.

We next address defendants' fifth main contention on appeal: the jury's noneconomic damage awards were excessive as a matter of law and should be subjected to a new trial or remitted. According to defendants, Fidel's $15.5 million award for pain and suffering and disability should be reduced by $11.5 million, and his wife Francisca's $5.5 million award for pain and suffering and disability should be reduced by $4 million. Also, Lilia's $28 million award for pain and suffering and disability should be reduced by $21 million, and her husband Rafael's $3.5 million award for loss of consortium should be reduced by $1.5 million. The Apulellos and Velardes respond that the damage awards were fair and reasonable in light of the permanent and catastrophic injuries that occurred.

The amount of a verdict is generally at the discretion of the jury. *Dahan v. UHS of Bethesda, Inc.,* 295 Ill.App.3d 770, 230 Ill.Dec. 137, 692 N.E.2d 1303 (1998). A damage award is not subject to scientific computation. *Schaffner v. Chicago & North Western Transportation Co.,* 161 Ill.App.3d 742, 759, 113 Ill.Dec. 489, 515 N.E.2d 298, 308 (1987). A question of damages is to be determined by the trier of fact, and "a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson v. Chapman,* 175 Ill.2d 98, 112-114, 221 Ill.Dec. 818, 676 N.E.2d 621, 627-29 (1997); *Epping v. Commonwealth Edison Co.,* 315 Ill.App.3d 1069, 248 Ill.Dec. 625, 734 N.E.2d 916 (2000). However, a court will order a remittitur, or, if the plaintiff does not consent, a new trial, if a verdict is excessive. *Best v. Taylor Machine Works,* 179 Ill.2d 367, 412-13, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1079-80 (1997). In *Richardson,* the supreme court indicated that an award may be viewed as excessive if it (1) exceeds the range of fair and reasonable compensation, (2) is the result of passion or prejudice, or (3) is so large that it shocks the judicial conscience. *Richardson,* 175 Ill.2d at 113, 221 Ill.Dec. 818, 676 N.E.2d at 628. But remittitur will not be ordered when an award "`falls within the flexible range of conclusions which can reasonably be supported by the facts.'" *Best,* 179 Ill.2d at 412, 228 Ill.Dec. 636, 689 N.E.2d at 1079, quoting *Lee v. Chicago Transit Authority,* 152 Ill.2d 432, 470, 178 Ill.Dec. 699, 605 N.E.2d 493, 510 (1992). The opinion also indicates that when reviewing an award of compensatory damages for nonfatal injuries, a court may consider, among other things, "the permanency of the plaintiff's condition, the possibility of future deterioration, the extent of the plaintiff's medical expenses, and the restrictions



fastcase

imposed on the plaintiff by the injuries." *Richardson,* 175 Ill.2d at 114, 221 Ill.Dec. 818, 676 N.E.2d at 628.

Defendants assert that the verdicts meet not just one but all three of the standards for construing the verdicts as "way out of line."

[820 N.E.2d 55]

Defendants cite *Richardson,* 175 Ill.2d at 113, 221 Ill.Dec. 818, 676 N.E.2d at 628, in particular, for the proposition that the jury's awards "fall[] outside the range of fair and reasonable" compensation. They argue an appropriate range may be determined by reviewing (a) reports of approximately 65 jury verdicts rendered in Cook County, and (b) published opinions from Illinois and other states, such as Louisiana, New York, and Texas, which supposedly involve injuries "similar to those suffered here." Defendants' reliance on *Richardson,* however, is not well placed. Although *Richardson* stated that an award may be deemed excessive if it falls outside a fair and reasonable range (*Richardson,* 175 Ill.2d at 113, 221 Ill.Dec. 818, 676 N.E.2d at 628), the court actually refused to engage in a comparison for a plaintiff who "suffered devastating, disabling injuries" in a two-car collision and indicated that Illinois courts have traditionally declined to make comparisons when determining whether a particular award is excessive. *Richardson,* 175 Ill.2d at 114, 221 Ill.Dec. 818, 676 N.E.2d at 628, citing *Tierney v. Community Memorial General Hospital,* 268 Ill.App.3d 1050, 1065, 206 Ill.Dec. 279, 645 N.E.2d 284 (1994); *Northern Trust Co. v. County of Cook,* 135 Ill.App.3d 329, 90 Ill.Dec. 157, 481 N.E.2d 957 (1985). See also *Carlson v. Dorsey Trailers, Inc.,* 50 Ill.App.3d 748, 8 Ill.Dec. 679, 365 N.E.2d 1065 (1977) (indicating that reference to other awards is of doubtful relevance); *Lawson v. Belt Ry. Co. of Chicago,* 34 Ill.App.3d 7, 27-28, 339 N.E.2d 381, 398 (1975) ("One wrongfully injured by another should be permitted to secure a recovery based upon the evidence of his own particular loss, rather than by consultation of a schedule of previous awards").

One of the cases *Richardson* relied upon, *Tierney,* was a medical malpractice case in which the plaintiff suffered "substantial" injuries and "unique" suffering after having a stroke, and was expected to have a "particularly difficult time adjusting to his new disabilities." *Tierney,* 268 Ill.App.3d at 1064, 206 Ill.Dec. 279, 645 N.E.2d at 294. The court refused to consider other jury verdicts, stating:

> "With regard to defendants' arguments that the jury's verdict should be compared to other similar awards and thereby found to be excessive, this is simply not the law in Illinois. [Citations.] It is not within our purview to establish a new standard of review for such cases when the clear weight of Illinois authority has been to reject the `comparison' concept." *Tierney,* 268 Ill.App.3d at 1065, 206 Ill.Dec. 279, 645 N.E.2d at 294.

Defendants cite two other cases for the proposition that we should examine prior verdicts to establish a comparative range. However, the court's "comparison" in *Johnson v. May,* 223 Ill.App.3d 477, 488, 165 Ill.Dec. 828, 585 N.E.2d 224, 231-32 (1992), was only a passing reference in support of the court's conclusion that judgment for the defendants was "contrary to the weight of the evidence." The court summarized extensive medical and psychiatric testimony which "overwhelmingly" supported plaintiff's acute-posttraumatic-stress-disorder claim (*Johnson,* 223 Ill.App.3d at 485, 165 Ill.Dec. 828, 585 N.E.2d at 230) and discredited the defendant's only medical expert (*Johnson,*



fastcase

223 Ill.App.3d at 486, 165 Ill.Dec. 828, 585 N.E.2d at 230). The court also pointed out various problems with other evidence which purportedly showed the plaintiff was only faking injury. *Johnson,* 223 Ill.App.3d at 487, 165 Ill.Dec. 828, 585 N.E.2d at 231. After engaging in this extensive factual analysis, the court also commented:

> "The reported case law shows that persons afflicted with posttraumatic stress
>
> [820 N.E.2d 56]
>
> disorder arising from accidents comparable in severity to [the plaintiff's] have received as much as a half a million dollars in noneconomic damages from the negligent party. While the magnitude of that award is scarcely controlling in other cases, we think that it is at least some indicia of just how far off the mark the jury's verdict [of $20,609.60 for noneconomic damages] was in this case." *Johnson,* 223 Ill.App.3d at 488, 165 Ill.Dec. 828, 585 N.E.2d at 231.

We do not read *Johnson* to mean that a bare comparison of dollar figures is an appropriate basis for deeming an award excessive.

Defendants' other case, *House v. Stocker,* 34 Ill.App.3d 740, 340 N.E.2d 563 (1975), is also only somewhat helpful. In that case, the plaintiff sustained relatively limited injuries to ligaments in his lower back and left knee which could be easily compared with the lower back and related injuries sustained by other plaintiffs. In fact, the court rejected certain cases cited by the appellee, as too factually dissimilar, because none of them "solely involve[d] soft tissue contusions, spasms, sprains and abrasion with possible cartilage tear in a knee." *House,* 34 Ill.App.3d at 746-48, 340 N.E.2d at 568-69. Based in part on its comparison with the injuries and verdicts disclosed in other cases, the court reduced the jury's award by about a third. In contrast to the limited injuries described in *House,* however, the Velardes and Apulellos sustained what are aptly characterized as "substantial" and "devastating" physical and psychological injuries and consequences that will be long-term, if not permanent, even with medical intervention. The evidence established, for example, that Lilia suffers from organic brain damage, post-concussion syndrome, posttraumatic stress disorder, severe and permanent depression, and "ahedonia," which is the inability to experience pleasure. In her early 40s, she has been declared incompetent and is no longer capable of undertaking her former responsibilities, such as managing the family finances and working as an assembly line supervisor. Her long-term prospects are poor. Her husband Rafael, who is about the same age, used to have "a wife, [a] best friend and [a] lover," but no longer has "any of that" and interacts with Lilia as if she is young child. Her father Fidel, who was found in the rear cargo area of the wrecked Ford Explorer, also suffers from permanent brain injury, resulting in depression and permanent memory problems, diminished attention span, decreased right side coordination, and an abnormal gait. Before the accident he was a retired landscaper who maintained a well-manicured yard, but he now needs ongoing physical, occupational, and speech therapy, and requires supervision because he poses a risk to his own safety. Francisca's permanent brain injury is more severe than her husband's, and she also suffers from severe depression and posttraumatic stress disorder. Although in her early 70s, she worked about 50 hours a week on an assembly line and was considered an exceptional and dependable employee. She was unable to return to work after the accident. Accordingly, we decline to depart from "the clear weight of Illinois authority [which] * * * reject[s] the



fastcase

`comparison' concept." *Tierney,* 268 Ill.App.3d at 1065, 206 Ill.Dec. 279, 645 N.E.2d at 294.

Defendants' additional contentions that the awards are so large they must have been the result of passion or prejudice on the part of the jury, and they shock the judicial conscience are adequately supported with citation to *Richardson*. *Richardson,* 175 Ill.2d at 112-14, 221 Ill.Dec. 818, 676 N.E.2d at 627-29. Nevertheless, defendants' contentions are not persuasive. Although the awards are substantial,

[820 N.E.2d 57]

we cannot say they are unsupported by the record on appeal. Furthermore, the figures were returned by a jury that heard all of defendants' evidence and arguments before adjourning for deliberations. The trial judge, who also heard all of defendants' evidence and arguments, was not persuaded by defendants' post-trial arguments that the awards were excessive. We also point out that there is no explanation as to why defendants chose the specific figures they suggest would be appropriately awarded to these plaintiffs. For instance, they contend Cook County juries generally return "awards in the mid-six figure range" on loss of consortium claims, yet they recommend that Rafael receive $2 million after remittitur. We decline to second-guess the jury and reduce the awards to figures that appear to have been randomly chosen by defendants.

Defendants' final contention is that despite defendants' failure to object, even in a sidebar, portions of the Apulellos' and Velardes' separate closing arguments were prejudicial to such an extent that a new trial is necessary. Defendants also remark upon some of the Apulellos' opening statements but have waived this contention by failing to support it with citation to any authority. *Avery v. State Farm Mutual Automobile Insurance Co.,* 321 Ill.App.3d 269, 277, 254 Ill.Dec. 194, 746 N.E.2d 1242, 1250 (2001). The Apulellos and Velardes respond that there is no merit to this final argument.

The scope of closing arguments is within the trial judge's sound discretion, and an argument must be prejudicial before a reviewing court will reverse on this basis. *Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.,* 217 Ill.App.3d 94, 110-11, 159 Ill.Dec. 995, 576 N.E.2d 918, 932 (1991). Further, attorneys are allowed broad latitude in drawing reasonable inferences and conclusions from the evidence (*Lewis,* 217 Ill.App.3d at 111, 159 Ill.Dec. 995, 576 N.E.2d at 932), and an opponent's failure to object to allegedly prejudicial remarks during closing arguments generally waives the issue for review (*Simmons v. University of Chicago Hospitals & Clinics,* 162 Ill.2d 1, 13, 204 Ill.Dec. 645, 642 N.E.2d 107, 113 (1994)).

A court of review should "strictly apply the waiver doctrine unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." *Gillespie v. Chrysler Motors Corp.,* 135 Ill.2d 363, 375-76, 142 Ill.Dec. 777, 553 N.E.2d 291, 297 (1990). If arguments were so egregious that they deprived a litigant of a fair trial and substantially impaired the integrity of the judicial process itself, they may be reviewed even though no objection was made. *Gillespie,* 135 Ill.2d at 375-77, 142 Ill.Dec. 777, 553 N.E.2d at 297-98. This standard has been applied in cases involving "blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice." *Gillespie,* 135 Ill.2d at 377, 142 Ill.Dec. 777, 553 N.E.2d at 298. A leading opinion on the standard is *Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249 (1956).

*Belfield* was a will contest involving allegations and evidence that only one of the various defendants exerted undue influence over the testator, yet the plaintiffs' attorneys



fastcase

referred to all of the defendants as "thieves," "usurpers," and "defrauders." *Belfield,* 8 Ill.2d at 312, 134 N.E.2d at 259. The plaintiffs' attorneys also belittled one of the defense attorneys, Samuel Saxon, by repeatedly referring to him as "Sammy," and implied that he was a disreputable lawyer. *Belfield,* 8 Ill.2d at 312, 134 N.E.2d at 259. At the same time, the plaintiffs' attorneys praised their own high

[820 N.E.2d 58]

ethics and conduct and injected the fact that one of them was a county judge from a neighboring county who had extensive experience with wills and was duty-bound to uphold wills, suggesting there was something wrong with the will at issue, otherwise the judge would not be in the circuit court representing the plaintiffs. *Belfield,* 8 Ill.2d at 312, 134 N.E.2d at 259. On review, the court concluded that so much of this closing argument was prejudicial and unwarranted that the trial judge should have halted the proceedings, despite the lack of objection, to insure that the litigants received a fair trial. *Belfield,* 8 Ill.2d at 312-13, 134 N.E.2d at 259.

The *Belfield* standard was also discussed in an appeal from a medical malpractice judgment, *Simmons,* 162 Ill.2d at 12-13, 204 Ill.Dec. 645, 642 N.E.2d at 112, after the plaintiffs' attorney drew attention to the defendants' failure to call as witnesses other physicians and hospital employees who were on duty at the time of the alleged medical error. The plaintiffs' attorney remarked at length about the hospital staff's failure to rally to the accused physician's defense, referred to their absence as the "`most glaring evidence of [the physician's] negligence,'" and concluded," `When your own people won't stand behind you and testify in your behalf, then you know you're wrong.'" *Simmons,* 162 Ill.2d at 11-12, 204 Ill.Dec. 645, 642 N.E.2d at 112. The court determined that the plaintiffs' closing arguments did not deny the defendants a fair trial or result in a deterioration of the judicial process, and it remarked upon the defendants' failure to raise an objection or seek a curative instruction, even through a sidebar. *Simmons,* 162 Ill.2d at 12-13, 204 Ill.Dec. 645, 642 N.E.2d at 113. It stated, "Because defendants failed to do these things, the issue has been waived. Defendants should not benefit by their failure to object or request a sidebar and wait for a jury verdict, only to raise this issue in a post-trial motion and on appeal in hopes of a new trial." *Simmons,* 162 Ill.2d at 13, 204 Ill.Dec. 645, 642 N.E.2d at 113.

We reach the same conclusions about the closing arguments which defendants now object to for the first time on appeal. The issue has been waived.

For instance, the jury was told that Lilia needed the supervision and guidance given to an eight- or nine-year-old, that her sister helped her use the washroom, bathe, and perform other hygiene, that Lilia could not return to her former occupation and was incapable of independently completing ordinary tasks such doing the household laundry, that she preferred to use her hands instead of a fork at meal time, and that she no longer engaged in meaningful conversations with her sister. Defendants now object, however, that the following statement to the jury was a mischaracterization of the facts:

> "[THE APULELLOS' COUNSEL]: Disability. Is she disabled? Can she do anything? Go to the bathroom? Eat food? She can't talk to anybody. She doesn't have any kind of life. Can't work anymore. She can't enjoy life. * * * She's not able to do anything without the assistance of others and she is a danger to herself. She needs somebody to watch her all the time. That's how disabled she is."



fastcase

Contrary to defendants' assertion, we find these remarks were merely permissible inferences or conclusions based on the evidence about Lilia's disabilities.

The jury was also told that Lilia's ability to report earlier memories began deteriorating, that she was no longer fluent in two languages, her intellectual functioning was blunted, and she had difficulty writing and remembering words and made mistakes copying from one sheet of paper to another.

[820 N.E.2d 59]

The jury was also told that Lilia's long-term prospects are poor. Nevertheless, defendants now object that the Apulellos' counsel mischaracterized the facts by making statements such as Lilia "will not get her brain back," she has a "broken brain, missing memories, [is] the shadow of a human being, a woman who, according to Dr. Fajardo is basically now heading for a vegetative state." We reject defendants' assessment of these remarks.

We are similarly unpersuaded that it was prejudicial for the Apulellos' counsel to say that because defendants "blame[ed] the driver" by eliciting testimony from accident witnesses who were not struck by the train, defendants' admission of responsibility was actually a "half truth." The "half truth" remark is an even milder characterization than the one made during the *Simmons* trial which did not warrant retrial:" `When your own people won't stand behind you and testify in your behalf, then you know you're wrong.'" *Simmons,* 162 Ill.2d at 12, 204 Ill.Dec. 645, 642 N.E.2d at 112. Defendants highlight other, even less significant characterizations, which do not warrant discussion.

Defendants also contend the Apulellos improperly appealed to the jury's emotions by referring to other family members during closing arguments. Defendants cite *LeMaster v. Chicago Rock Island & Pacific R.R. Co.,* 35 Ill.App.3d 1001, 1014, 343 N.E.2d 65, 76 (1976), for the proposition that referring to nonparty family members during closing arguments is prejudicial. The jury in *LeMaster* was told the plaintiff had a wife and two young children, even though his action was limited to damages for work-related injuries and did not include a claim for family support or loss of consortium. *LeMaster,* 35 Ill.App.3d at 1013-14, 343 N.E.2d at 76. The plaintiff testified that he was no longer able to go ice skating with his wife and young children, or go dancing with his wife, and that he needed her assistance to bathe, and then some of this testimony was emphasized during counsel's closing arguments. *LeMaster,* 35 Ill.App.3d at 1013-14, 343 N.E.2d at 76. The trial judge overruled the defendant's objections to both the testimony and closing arguments, and was affirmed on appeal, because no undue emphasis was placed on the plaintiff's family circumstances and the facts were relevant to the issue of the extent of his injuries. *LeMaster,* 35 Ill.App.3d at 1014, 343 N.E.2d at 77. Although the present defendants did not make an objection before the trial judge, they now take issue with a remark by the Apulellos' counsel that Lilia's sister, a nonparty, "would not get her sister back." We were unable to find this remark in the portion of the record cited by defendants, but did locate a similar reference, 64 pages earlier in the transcript of closing arguments. The Apulellos' counsel began closing arguments by stating, "Lil[ia] Apulello will not get her life back. Lil[ia] Apulello will not get her brain back. Her husband will not get his wife back. Her sister won't get her sister back." We point out that Lilia's sister was a prominent trial witness; thus, the jury was already well aware of her existence and was not abruptly burdened with an irrelevant or prejudicial fact. Further, in context, the reference is clearly a permissible description of the extent and permanent nature of Lilia's injuries and disabilities, rather than a prejudicial plea for damages on her sister's behalf. Defendants contend that the following



fastcase

final words to the jury were impermissible references to non-party family members:

> "[THE APULELLOS' COUNSEL]: You know, they're supposed to stop and protect this crossing. If they had stopped and protected it, of course, none
>
> [820 N.E.2d 60]
>
> of this would have happened, so what [Lilia] did or didn't do has nothing to do with what caused the accident. They set it all in motion. They did, the railroads.
>
> The stop and protect that really is at issue today is that you have to stop; you have to protect; you have to protect this family."

In light of the fact that all of the plaintiffs were indisputably "family" — husband Fidel, wife Francisca, daughter Lilia, and son-in-law Rafael — we construe this concluding remark as a permissible, non-prejudicial reference to parties before the jury, rather than to nonparty family members.

Finally, defendants address two aspects of the Velardes' closing arguments. Although defendants did not object in the trial court, they now argue "The Velarde[s'] counsel compared plaintiffs' losses to property damage — a $50 million Monet — effectively forcing the jury to award more out of sheer guilt [record citation]. The guilt trip was compounded by an incorrect statement that the law required a large award [record citation]." The following portion of the proceedings is pertinent:

> [THE VELARDES' COUNSEL]: Now, if this were an easier case and we weren't dealing with these types of injuries and this was a case of property damage, and if that train had come barreling through that crossing at 50 miles per hour and had hit a truck and that truck was carrying a painting, a Monet painting, an impressionistic painting, and it destroyed it, and there was a lawsuit that was ensued and every expert in the world testified this was one of the great paintings in the world, this Mr. Monet, who's been deceased for a lot of years, who was truly one of the great painters, and every expert testified that that painting had a value of $50 million and one of the jurors went back and said, you know, I don't like impressionistic paintings, I just don't appreciate it, I can't award $50 million, I could maybe award $25 million. Well, that wouldn't be full justice. It wouldn't be fair justice. It would be half justice.
>
> And wouldn't it be a shame in this case if this case were decided for any reason other than the law and the facts.
>
> Let's not confuse the two cases, a property damage case and a case like this, a case applicable to catastrophic, devastating injuries to Fidel and Francisca, which by necessity under the law have to be large.
>
> I want to talk a little bit about the elements of damages the Judge is going to instruct you on * * *."

We fail to comprehend defendants' argument regarding the analogy to a Monet painting. We do not see how referring to a skillful painter or expensive artwork could in



fastcase

any way cause jurors to feel "guilt" over injuries they had no hand in causing. Further, because none of the cited cases discuss a "guilt trip" standard, we construe defendants' argument as an assertion that the Monet analogy was, in some way, an appeal to emotion or prejudice. See *Gillespie,* 135 Ill.2d at 377, 142 Ill.Dec. 777, 553 N.E.2d at 298. Nevertheless, we read the quoted remarks as indications that the jurors should rely on the "expert [witness] testi[mony]" regarding the "value" of plaintiffs' losses and award the "full" and "fair" amount justified by "the law and facts" of the case, regardless of whether the jurors "like[d]" or "appreciate[d]" the plaintiffs personally. Accordingly, we do not consider the Monet analogy to be inappropriate or prejudicial. Additionally, it is less than clear what the Velardes' counsel intended to convey by the sentence regarding "a case applicable to catastrophic damages to Fidel and Francisca, which by necessity under the

[820 N.E.2d 61]

law have to be large." The jumbled statement did not elicit an objection and is potentially only a mistranscription of what was actually said. Even if we construe it as an inaccurate suggestion that the jurors were required by law to return large verdicts for the Velardes, we do not consider it prejudicial. It was only a vague, passing remark, which was not clarified or emphasized by subsequent argument. Furthermore, defendants participated in a jury instruction conference and are not contending that the trial judge followed the closing arguments with erroneous instructions about the applicable law. In addition, before the Velardes' counsel began closing arguments, the trial judge cautioned the jurors, twice, to remember that the attorneys' final arguments were "merely what they think the evidence has shown." In light of all these facts, we reject defendants' assertion that the Velardes' remark about damages warrants a new trial.

We conclude that the Apulellos' and Velardes' closing arguments did not deny defendants a fair trial or result in a deterioration of the judicial process. We also note that trial counsel, who heard the remarks firsthand and was able to observe their impact on the jurors, did not consider them worthy of contemporaneous objection, even through a sidebar, or necessitating a curative instruction.

Affirmed; plaintiffs' motion taken with the case not considered.

GORDON and McNULTY, JJ., concur.



fastcase

**747 N.E.2d 1059**
**321 Ill. App.3d 789**
**254 Ill.Dec. 647**

**Paige PRESTON, a Minor by Her Mother and Next Friend, Patricia PRESTON, Plaintiff-Appellee,**
**v.**
**Dr. Gayle SIMMONS, Dr. Mary Horan, and St. Joseph Hospital and Medical Center, Defendants-Appellants.**

**No. 1-98-4451.**

**Appellate Court of Illinois, First District, First Division.**

**March 30, 2001.**

[747 N.E.2d 1062]

Richard F. Mallen, Scott B. Wolfman and Michael W. Rathsack, of counsel, Michael W. Rathsack, Chicago, for Plaintiff-Appellee.

[747 N.E.2d 1063]

Timothy J. Ashe, Donald F. Ivansek and Morgan M. Strand, of counsel, Cassiday Schade & Gloor, Chicago, for Defendants-Appellants.

Justice TULLY delivered the opinion of the court:

This case concerns an action for medical malpractice brought by a minor plaintiff, Paige Preston, against defendants Dr. Gayle Simmons, Dr. Mary Horan, and St. Joseph Hospital, for injuries plaintiff suffered at the time of her birth. The jury returned a verdict in plaintiff's favor and awarded damages in the amount of $1,010,000. Defendants thereafter filed a posttrial motion, seeking a new trial or judgment notwithstanding the verdict, which the trial court denied. Defendants now appeal from that order, arguing a new trial is or judgement notwithstanding the verdict is warranted because: (1) the trial court improperly coerced the jury into rendering a verdict when the jury was deadlocked; (2) the trial court allowed the use of prejudicial demonstrative evidence; (3) plaintiff's counsel violated motions *in limine* barring certain evidence; (4) plaintiff's counsel improperly cross-examined defendants' medical expert; (5) the trial court improperly circumscribed defendants' cross-examination of plaintiff's witness; (6) plaintiff's counsel engaged in improper closing argument; (7) the trial court issued instructions on damages not supported by any evidence; (8) the jury awarded excessive damages; and (9) the verdict was against the manifest weight of the evidence. This court has jurisdiction pursuant to Supreme Court Rules 301 and 303 (155 Ill.2d Rs. 301, 303). For the reasons set forth below, we reverse and remand for a new trial.

***Background***

On May 15, 1991, Patricia Preston gave birth to plaintiff at St. Joseph Hospital. In the course of delivery, plaintiff's shoulder became impacted under Mrs. Preston's pelvic bone, a condition known as shoulder dystocia. Shoulder dystocia is a potentially emergent condition because the infant may be deprived of oxygen until the shoulder is released and the infant is delivered. Defendants, Dr. Gayle Simmons (Dr. Simmons), a board-certified obstetrician and gynecologist, and Dr. Mary Horan (Dr. Horan), a first-year obstetrics and gynecology resident, were in attendance during Mrs. Preston's labor and utilized several techniques to try to release plaintiff's shoulder. After several attempts, plaintiff was released and delivered, but she suffered an injury to the nerves in her left arm and shoulder, known as a brachial plexus nerve injury, permanently depriving her of some use of her left arm. Plaintiff thereafter brought a medical malpractice action alleging Dr. Simmons failed to properly supervise Dr.



fastcase

Horan, and Dr. Simmons and Dr. Horan failed to use the proper techniques when delivering plaintiff, thereby causing her injury. A jury trial commenced on March 24, 1998.

Dr. Simmons testified at trial that she had seven years' experience in labor, delivery and performing shoulder dystocia maneuvers, had trained residents to perform these maneuvers during her tenure as St. Joseph's assistant medical director, and had trained Dr. Horan in shoulder dystocia maneuvers and performed 50 deliveries with Dr. Horan prior to plaintiff's delivery. Dr. Simmons stated that when Mrs. Preston arrived at St. Joseph Hospital, she and Dr. Horan examined her to determine her stage of labor. At 11:30 a.m., Mrs. Preston was completely dilated and Dr. Simmons and Dr. Horan began the delivery of plaintiff. Mrs. Preston lay supine on a delivery bed, Dr. Simmons and Dr. Horan stood between her legs, guiding plaintiff's head down the birth canal, and Elmer

[747 N.E.2d 1064]

Preston, plaintiff's father and Mrs. Preston's husband, stood on the right side of Mrs. Preston. At 11:37 a.m., plaintiff's head was delivered and Dr. Simmons suctioned plaintiff's mouth and nostrils to remove fetal stool and amniotic fluid. Dr. Horan felt for the umbilical cord and informed Dr. Simmons that it was wound tightly around plaintiff's neck. Dr. Simmons cut the cord and placed her hands over Dr. Horan's hands to correctly position them for delivery. Dr. Horan attempted to deliver plaintiff, applying gentle downward traction, but discovered plaintiff's shoulder was impacted. When Dr. Horan alerted Dr. Simmons to this fact, Dr. Simmons pushed Ms. Preston's left leg back, applied supra pubic pressure, and told Dr. Horan to attempt delivery again. Dr. Simmons represented that in shoulder dystocia cases, supra pubic pressure is an appropriate procedure to dislodge an impacted shoulder, while progressively more invasive procedures are used if the shoulder cannot be freed. Dr. Horan tried gentle downward traction again, but plaintiff's shoulder remained impacted. When informed of this, Dr. Simmons called over two nurses to help perform a McRoberts maneuver. A McRoberts maneuver involves hyper-flexing both of the mother's legs, while applying supra pubic pressure to the mother and gentle downward traction to the infant. The maneuver facilitates delivery by flattening the mother's backbone and rotating the pelvic bone, creating a larger opening for the infant to be delivered through. Two nurses held both of Mrs. Preston's legs back, while Dr. Simmons applied supra pubic pressure, and Dr. Horan applied gentle downward traction to plaintiff. Plaintiff was delivered easily at 11:40 a.m., but in the process of delivery, the nerves in her left shoulder and arm were stretched, resulting in a brachial plexus nerve injury. In Dr. Simmons' opinion, plaintiff's injury was caused by the impaction of her shoulder under Mrs. Preston's pelvic bone, and Dr. Horan acted within the normal scope of expertise as a first-year resident in aiding in plaintiff's delivery.

Dr. Horan testified that she was a board-certified obstetrician and gynecologist, but at the time of plaintiff's delivery, she was in the tenth month of her first year of a four-year residency in obstetrics and gynecology. In her first year of residency, Dr. Horan performed roughly 270 deliveries, supervised by an attending physician, was trained in shoulder dystocia maneuvers, and was present during four to five shoulder dystocia deliveries, prior to plaintiff's delivery. Dr. Horan agreed that too much traction could cause a brachial plexus injury by stretching the nerves in an infant's neck and shoulders. Dr. Horan could not quantify in pounds the amount of force she used in delivering plaintiff because the proper amount of traction could only be measured by feel. Dr. Horan stated that the amount of traction used on an infant during delivery does not vary according to whether a



fastcase

delivery is normal or whether a shoulder dystocia delivery is indicated, because gentle downward traction is the only appropriate force. Dr. Horan testified that she used gentle downward traction at all times when attempting to deliver plaintiff.

Elmer Preston testified on behalf of plaintiff at trial. Prior to examination of Mr. Preston, the court granted plaintiff's motion *in limine,* over defendants' objection, to bar cross-examination of Mr. Preston concerning his estrangement from Mrs. Preston and the fact that he lived with another woman outside Illinois, so long as the direct testimony did not invite inquiry into these issues.

Mr. Preston testified that when plaintiff's delivery began, he stood on the right side of Mrs. Preston, while Dr. Horan and

[747 N.E.2d 1065]

Dr. Simmons stood between Mrs. Preston's legs. When plaintiff's head was delivered, Dr. Horan stated that the umbilical cord was around plaintiff's neck, at which point the doctors cut the umbilical cord and suctioned plaintiff. After the cord was cut, Dr. Horan began pulling on plaintiff's head, while Dr. Simmons pushed Mrs. Preston's leg back, but did not apply pressure to Mrs. Preston's abdominal or pubic area. Dr. Horan continued to pull on plaintiff's head, harder and harder, and at one point, put her leg up on the side of the bed to gain greater leverage when pulling on plaintiff's head. Mr. Preston told the doctors to go easy, but they ignored him. Some time later, Dr. Simmons and a nurse pulled both of Mrs. Preston's legs back, and plaintiff was delivered easily. Mr. Preston testified that he had an opportunity to observe plaintiff over the years at various times, and that a videotape and photographs shown at trial accurately depicted plaintiff's disabilities and disfigurement.

Mrs. Preston testified that at the time of plaintiff's delivery, Dr. Simmons and Dr. Horan stood between her legs, while Mr. Preston stood on her right side. After the doctors told Mrs. Preston to push for the second time, plaintiff's head was delivered. The doctors then told Mrs. Preston to stop pushing, and one of them said that the cord was around plaintiff's neck. From her position, Mrs. Preston could not see the doctor's hands, but she could see the upper part of their bodies and shoulders. After the cord was cut and plaintiff was suctioned, the doctors told Mrs. Preston to push again. At some point, someone said that plaintiff's shoulder was stuck, and the doctors again told Mrs. Preston to stop pushing. Dr. Simmons pushed Mrs. Preston's left leg back toward her chest, while Dr. Horan tried again to deliver plaintiff. Dr. Simmons did not apply pressure to Mrs. Preston's abdominal or pelvic area at any time during the delivery. Mrs. Preston asked the doctors if her husband could help, but they did not respond to her. Dr. Horan applied gentle pressure when first attempting to deliver plaintiff, but her movements became more vigorous and rapid after plaintiff's shoulder became stuck. At one point, Mrs. Preston heard Mr. Preston say, "Easy, easy, you're hurting the baby." Eventually, one of the nurses came to Mrs. Preston's left side and joined Dr. Simmons in pressing on Mrs. Preston's left leg. Mrs. Preston was uncomfortable with one leg pushed back, so she pulled her right leg back on her own, at which point, plaintiff delivered easily.

Dr. John Long, a board-certified obstetrician and gynecologist, testified on behalf of plaintiff. Dr. Long stated that Dr. Simmons breached the standard of care by pushing back only one leg when attempting to release plaintiff's impacted shoulder. Dr. Long stated that pushing back one leg compounds the problem in a shoulder dystocia case because this action does not raise the mother's pelvic bone, and instead tilts the pelvic bone, creating a kink in the birth canal and a smaller opening for the infant to be delivered through. Dr. Long



fastcase

represented that although pushing one leg back does not harm an infant, it hinders the delivery process. Dr. Long testified that a proper McRoberts maneuver, by contrast, which involves pushing both legs back to the chest and applying supra pubic pressure, facilitates delivery by changing the angle of the birth canal and the pelvic bone. Dr. Long stated that Simmons deviated from the standard of care by allowing Dr. Horan, a first-year resident, to perform the most difficult part of delivery in an emergency situation, and Dr. Horan, in turn, deviated from the standard of care by applying too much traction when attempting to deliver plaintiff. In Dr.

[747 N.E.2d 1066]

Long's opinion, too much traction was most likely the cause of plaintiff's brachial plexus injury.

At the prompting of plaintiff's counsel, Dr. Long stated that he had examined the mechanics of a human skeletal model and that the use of that model would help him to explain his testimony. Using the skeletal model, Dr. Long demonstrated what happens to the pelvic bone when one leg is pushed back. Defense counsel objected to the demonstration on the basis that the skeletal model distorted the movements of the pelvis because the model's legs were affixed with rubber ligaments on only one side, the spine was fixed to the pelvic region with screws, and the skeleton was of male rather than female, but the trial court allowed the demonstration. On cross-examination, Dr. Long admitted that the skeleton model used in his demonstration was probably of a male skeleton, because a woman's pelvis is rounder. Dr. Long also stated that unlike the model, an actual woman would have ligaments on both legs, and her spine would move when her leg was pushed back.

Dr. Michael Hughey, a board-certified obstetrician and gynecologist, testified on behalf of defendant. Dr. Hughey stated Dr. Simmons complied with the standard of care when delivering plaintiff because pushing one leg back and applying supra pubic pressure was an appropriate way to treat shoulder dystocia, separate and apart from the McRoberts maneuver. Dr. Hughey stated that Dr. Horan was qualified to participate to the extent she did in plaintiff's delivery, and that her application of mild to moderate downward traction, as she described, also conformed to the standard of care. Dr. Hughey testified that a brachial plexus injury may occur in a shoulder dystocia delivery, in the absence of any negligence, because maternal pushing and delivery maneuvers, even properly performed, may stretch the brachial plexus nerves. In Dr. Hughey's opinion, plaintiff's injury occurred while she was coming through the birth canal.

On cross-examination, plaintiff's counsel questioned Dr. Hughey concerning representations he made at the time of his deposition regarding the location of an instructional video on shoulder dystocia. The videotape itself was never introduced at trial and its location was not at issue. Defense counsel objected to this cross-examination on the basis it was irrelevant, and the issue of the tape's location entirely collateral. The trial court overruled the objection, finding Dr. Hughey's deposition answers had bearing upon his candor and credibility as a witness.

On cross-examination, plaintiff's counsel also asked Dr. Hughey if he had ever been represented by defense counsel's law firm, to which Dr. Hughey replied he had not. Plaintiff's counsel produced a notice of filing from a 1988 case, *Caftori v. Hughey,* showing that defense counsel's law firm filed an appearance on behalf of Dr. Hughey. When asked by plaintiff's counsel if the notice of filing was false, Dr. Hughey responded he had no knowledge of having been represented by defense counsel's firm in the past. In a sidebar conference, defense counsel objected to this line of questioning on the basis that



fastcase

neither Dr. Hughey nor defense counsel had any knowledge of the prior representation in the Caftori lawsuit, and plaintiff's counsel had failed to properly disclose this as a basis for impeachment prior to trial. After further investigation, the court determined that Dr. Hughey's insurance carrier had retained defense counsel's firm to file an appearance on behalf of Dr. Hughey, but it did not appear that Dr. Hughey ever had any contact with the firm, because the matter was settled and dismissed. The trial court ultimately overruled defense

[747 N.E.2d 1067]

counsel's objection to the impeachment, but instructed the jury not to infer anything negative about defense counsel's firm from the evidence.

Dr. Alan Free, plaintiff's pediatrician, testified concerning the extent of plaintiff's injury. Dr. Free stated that after diagnosing plaintiff's brachial plexus injury, he advised that she be enrolled in physical therapy. In the first six to nine months of therapy, plaintiff experienced good improvement, but reached a permanent plateau thereafter. Plaintiff had regained good strength in her lower arm, such that from her elbow down she was essentially normal. However, plaintiff still could not fully extend her arm from the elbow, her upper arm and shoulder continued to display marked weakness, and there was some disproportion between her left arm and her right arm because of the lack of muscle development in the left. Dr. Free believed that occupational therapy would be appropriate for plaintiff in the future.

Dr. Norris Carroll, a pediatric orthopedic physician, estimated that plaintiff had recovered roughly 75% from her original brachial plexus injury. Dr. Norris stated that although plaintiff's left arm would never be normal, it would serve as a good assist limb in daily living. Dr. Norris stated that plaintiff remained unable to lift her left arm over her head, could move her left arm away from her side to a 30 degree angle, and her left arm was shorter than her right arm, a discrepancy that would become more apparent as she aged. Dr. Carroll stated that although plaintiff would experience continuing functional impairment, she would be able to hold employment, with some occupational limitations. In Dr. Carroll's opinion, surgery was not appropriate to treat plaintiff's condition.

Dr. Robert Eilers, a board-certified physical rehabilitation physician, testified that plaintiff's nerve damage was a static, permanent injury. Dr. Eilers agreed with Dr. Carroll's rough estimate of a 75 % recovery, and that surgery, while an option, was not recommended in plaintiff's case. Dr. Eilers stated that plaintiff would remain unable to bear weight with her left arm, could experience lower back strain in the future, and would always exhibit asymmetry between her left and right shoulders. Dr. Eilers stated that plaintiff's fine motor coordination was normal, and she would be able to drive, use a keyboard or play piano with adaptations, although sports and activities involving balance or throwing overhead would be challenging. Dr. Eilers represented that plaintiff would have to continue to develop compensation techniques to deal with her left arm's deficits, and additional physical therapy would be appropriate in the future.

On Friday, April 3, 1998, jury instructions were tendered to the jury. Over defense counsel's objection, the trial court instructed the jury that it could award plaintiff damages for "the present cash value of earnings reasonably certain to be lost in the future." At 2:08 the jury began deliberations, which lasted until 8:15 p.m. that day. On Monday, April 6, at 10:15 a.m., the jury reconvened for deliberations. At 12:15 p.m., the jury foreman informed the trial judge that the jury could not reach an agreement. The trial judge informed counsel for both parties of the deadlock and stated his intention to



fastcase

issue Illinois Pattern Jury Instructions, Civil, No. 1.05 (3d ed.1995) (hereinafter IPI Civil 3d No. 1.05 ) as a deadlock jury instruction, as well as additional comments concerning the repercussions of a deadlock. Defense counsel objected to any instructions or comments beyond IPI Civil 3d No. 1.05 because the case was close. Over objection, the trial judge issued the following remarks to the jury:

> [747 N.E.2d 1068]
>
> "I have this instruction that I'm going to give you and then I'm going to require that you return to the jury room and continue your deliberations. And before I give that instruction I'm going to tell you that in roughly 14 years that I have sat as a judge presiding over jury trials I have had one other occasion in which a jury was not capable of reaching a unanimous verdict, that's referred to as a hung jury. The result of that is of course that you start all over again, pick a new jury and present all of your evidence once again. That is a very expensive undertaking to both sides [in] a contested lawsuit. It involves taking up the jury time of 12 other citizens and the Court's time instead of hearing another case that has not yet had its opportunity to be here.
>
> And in that one instance, let me tell you that the second jury reached a verdict and I did not perceive any variance in the evidence that was presented the second time from that which was presented the first time. And I asked myself what was the difference, and the only difference that I could understand because I was not part of the deliberations was that the second jury was able to take the same facts, filter it and make a determination of how the case should be decided.
>
> I'm very pleased with the composition of this jury. I believe that each one of you is an intelligent, fair-minded, honest human being who chooses to do the right thing. I'm not saying this to you so that you feel badly or that you question your own integrity or honesty nor am I attempting to influence your determination because if in fact you cannot reach a verdict then that is the law and that's what we'll live with and another jury will hear the case. If these cases were easy, we wouldn't need you."

After issuing these remarks, the trial judge issued IPI Civil 3d No. 1.05, as follows:

> "This is an instruction which the Court gives to you which you are to consider together with all the other instructions that the Court previously has provided to you.
>
> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it and your verdict must be unanimous. It is your duty as jurors to consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the



fastcase

> course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or affect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans, you are judges, judges of the facts, and your sole interest is to ascertain the truth from the evidence in the case. Bless all of you. I ask that you now please return to the jury room and continue your deliberations."

After the deadlock instructions were given, the jury deliberated for three more hours. At 3:05 p.m., the jury returned a verdict in favor of plaintiff. Defendants thereafter filed a posttrial motion, attaching the affidavits of six jurors, who represented that they felt coerced into returning a verdict by the judge's comments. The trial court struck the affidavits as an improper means of impeaching the verdict and denied the posttrial motion. This appeal followed.

**[747 N.E.2d 1069]**

***Discussion***

Defendants first contend that the trial court's instructions on the issue of deadlock were coercive and prejudicial. In conjunction, defendants maintain the trial court erred in failing to consider the affidavits of the jurors concerning the coercive impact the instructions had on the process of reaching a verdict.

As a preliminary issue, we find no error in the trial court's determination to strike the jurors' affidavits impeaching the verdict. The affidavits of jurors cannot be used to show that the jury misunderstood the instructions or the law. *Chalmers v. City of Chicago,* 88 Ill.2d 532, 539, 59 Ill.Dec. 76, 431 N.E.2d 361 (1982). Accordingly, we grant no consideration to these affidavits in resolving this issue and look solely to the language of the instruction itself and surrounding circumstances to determine if there was error.

When a jury communicates to the court its inability to reach a unanimous verdict, the court may, in its discretion, proffer some guidance, including the giving of a supplemental instruction. *People v. Lee,* 303 Ill.App.3d 356, 363, 236 Ill.Dec. 871, 708 N.E.2d 457 (1999). In *People v. Prim,* 53 Ill.2d 62, 289 N.E.2d 601 (1972), the Illinois Supreme Court set forth language to be used when instructing a deadlocked jury, and IPI Civil 3d No. 1.05 directly adopts the language endorsed by the court there. Defendants' claim of error is not directed to the giving of IPI Civil 3d No. 1.05, however, but to the court's supplemental, non-IPI deadlock instructions. Nevertheless, we must examine the court's supplemental instructions together with IPI Civil 3d No. 1.05, to determine if the instructions as a whole resulted in prejudice. *Paz v. Commonwealth Edison,* 314 Ill.App.3d 591, 601, 247 Ill.Dec. 641, 732 N.E.2d 696 (2000) (jury instructions must be considered as whole to determine if prejudice resulted to the complaining party).

Generally, amplification or clarification of IPI instructions is permitted, but only in limited circumstances, where an IPI instruction is inadequate and an additional instruction is appropriate. *Podoba v. Pyramid Electric, Inc.,* 281 Ill. App.3d 545, 552, 217 Ill.Dec. 374, 667 N.E.2d 167 (1996), citing *Lay v. Knapp,* 93 Ill.App.3d 855, 857-58, 49 Ill.Dec. 272, 417 N.E.2d 1099 (1981). Where an IPI instruction is adequate to charge the jury, the use of a non-IPI instruction is considered improper. *Hilst v. General Motors Corp.,* 305 Ill.App.3d 792, 797, 238 Ill.Dec. 853, 713 N.E.2d 99 (1999). If



fastcase

a court determines an IPI instruction is inadequate, Illinois Supreme Court Rule 239(a) (177 Ill.2d R. 239(a)) dictates that the instruction fashioned by the court be "simple, brief, impartial, and free from argument." Similarly, if a court determines to fashion an instruction specifically to instruct a deadlocked jury, the instruction must be "simple, neutral and not coercive." *People v. Gregory,* 184 Ill.App.3d 676, 681, 132 Ill.Dec. 932, 540 N.E.2d 854 (1989). In reviewing the propriety of a supplemental deadlock instruction, the test is whether, under the totality of circumstances, the language used actually coerced or interfered with the deliberations of the jury to the prejudice of the defendant. *People v. Branch,* 123 Ill.App.3d at 245, 250-51, 78 Ill.Dec. 749, 462 N.E.2d 868 (1984).

In this case, we agree it was improper for the trial court to issue the supplemental deadlock instructions. IPI Civil 3d No. 1.05 by itself was adequate to charge the jury with the importance of pursuing an agreement, and no further instructions were necessary or appropriate. Considering the deadlock instructions as a whole in the context of this case, we

[747 N.E.2d 1070]

believe the instructions also had the effect of impermissibly pressuring the jury to return a verdict. Although the jurors were instructed not to surrender their honest convictions, pursuant to IPI Civil 3d No. 1.05, and although trial judge pointedly advised the jurors he was not attempting to influence them and would "live with" their failure to reach a verdict, other comments made by the judge sent a very different message. To begin, we find the judge's emphasis on the time and expense invested by the parties and the judiciary laid undue stress on economic factors and the importance of returning a verdict. In addition, the judge's intimation that a failure to reach a verdict would deprive another case of the "opportunity" to be heard may well have led the jurors to believe it was their duty to return a verdict. The judge additionally commented that in his 14 years as a judge, he had only experienced one hung jury, and in his opinion, the only difference between the first trial and the second was that the second jury was able to "take the same facts, filter it and make a determination." Following this, the judge praised the jurors, stating he believed each of them to be an "intelligent, fair-minded, honest human being who chooses to do the right thing." The problem with these comments is that the jurors may have been left with the impression that a failure to return a verdict would prove the judge's appraisal of their intelligence and integrity wrong. In addition, the judge's disclosure regarding the rarity of hung juries, in his experience, may have impressed upon the jurors that a hung jury represented an aberration of the justice system. Considered collectively, we find the instructions worked to the prejudice of defendants and constitute reversible error.

In reaching this determination, we are cognizant that after the deadlock instructions were issued, the jury deliberated three more hours, a not insubstantial amount of time. However, although the length of time it took a jury to return its verdict after a supplemental instruction was given is a factor to be considered (*Palanti v. Dillon Enterprises, Ltd.,* 303 Ill.App.3d 58, 61, 236 Ill.Dec. 568, 707 N.E.2d 695 (1999)), this factor alone is not determinative of whether coercion occurred. *Gregory,* 184 Ill.App.3d at 682, 132 Ill.Dec. 932, 540 N.E.2d 854. Because it is extremely difficult for a reviewing court to determine a jury's subjective thoughts, the test of whether instructions are prejudicial ultimately must turn on whether the instruction imposed such confusion or pressure on the jury to reach a verdict that the accuracy of its verdict becomes uncertain. *Gregory,* 184 Ill. App.3d at 681-82, 132 Ill.Dec. 932, 540 N.E.2d 854; *People v. Pankey,* 58 Ill. App.3d 924, 927, 16 Ill.Dec. 339, 374 N.E.2d 1114 (1978). In cases, like the



fastcase

present one, however, where the question of liability is sufficiently close that a jury might reasonably return a verdict for either party, it is of even greater import that the trial be conducted in such a manner as not to improperly influence the jury. *Boasiako v. Checker Taxi Co.,* 140 Ill.App.3d 210, 214, 94 Ill.Dec. 673, 488 N.E.2d 672 (1986). Here, the deadlock instructions, at best, served to confuse the jurors and interfere with their deliberations; at worst, they served to pressure the jurors to yield their individual convictions for the sake of a verdict. Under either scenario, the integrity of the verdict is necessarily impugned, such that a new trial is warranted.[1]

[747 N.E.2d 1071]

Because we are reversing this matter and remanding for a new trial, we will address only the issues remaining which are likely to reoccur in a new trial.

Defendants also contend it was improper to allow the use of the skeletal model, in conjunction with Dr. Long's testimony, to demonstrate the effect of pushing one leg back on the rotation of the pelvic bone. Defendants maintain that certain of the model's characteristics, specifically, the model's male gender, the absence of rubber ligaments on one of the model's legs, and the attachment of the model's pelvic area to its spine by screws, rendered it so grossly distorted and inaccurate that its use as demonstrative evidence was *per se* error.

It is within the trial court's discretion to determine whether a party may present demonstrative evidence to clarify an expert's testimony, and a reviewing court will not disturb that determination absent a clear abuse of discretion. *Schuler v. Mid-Central Cardiology,* 313 Ill.App.3d 326, 337, 246 Ill.Dec. 163, 729 N.E.2d 536 (2000). Although demonstrative evidence has no probative value in itself, courts look favorably upon its use because it can help the jury to comprehend the verbal testimony of witnesses and understand the issues raised at trial. *Schuler,* 313 Ill.App.3d at 337, 246 Ill.Dec. 163, 729 N.E.2d 536. The primary considerations in determining whether demonstrative evidence should be allowed are relevancy and fairness. *Hernandez v. Schittek,* 305 Ill.App.3d 925, 931, 238 Ill. Dec. 957, 713 N.E.2d 203 (1999). Only where demonstrative evidence is inaccurate or tends to mislead the jury will its admission constitute an abuse of discretion. *Hernandez,* 305 Ill.App.3d at 932, 238 Ill.Dec. 957, 713 N.E.2d 203.

Having reviewed Dr. Long's testimony in relation to the skeletal model, we find the trial court did not abuse its discretion in allowing the model to be used for demonstrative purposes. Despite the differences pointed out by defendants between the skeletal model and an actual skeleton, the model does not appear to have been so substantially different in relevant characteristics to render its use *per se* error. Any distinctions between the model and an actual skeleton arguably impacted upon the weight of demonstration, not its admissibility. Moreover, defendants were free to explore the significance of any distinctions during the cross-examination of Dr. Long.

However, although we find no error in permitting the use of this model in demonstration, we agree with defendants that a clearer foundation should have been laid before the model was introduced. For a party to introduce demonstrative evidence, a foundation must be laid by a person having personal knowledge of the object that the object is an accurate portrayal of what it purports to show. *Webb v. Angell,* 155 Ill.App.3d 848, 861, 108 Ill. Dec. 347, 508 N.E.2d 508 (1987). Here, Dr. Long testified that he had examined the skeletal model and believed it would be useful to explain his testimony, but he omitted to testify as to the accuracy of the model's depiction of the



fastcase

movements of a human pelvis or, specifically, a female pelvis. Should the skeletal model be introduced in a new trial, this discrepancy in the foundation testimony should be rectified.

[747 N.E.2d 1072]

Defendants also maintain the trial court erred in allowing plaintiff to cross-examine Dr. Hughey concerning representations he made at his deposition regarding the whereabouts of an instructional videotape.

The record indicates that, at the time of his deposition, Dr. Hughey was asked by plaintiff's counsel if he had with him a copy of an instructional videotape on shoulder dystocia, which tape was at issue at that point in discovery but was no longer at issue at the trial. Dr. Hughey responded that he did not have the tape with him, although he apparently had given a copy of the tape to defense counsel at the deposition. At trial, plaintiff's counsel attempted to cross-examine Dr. Hughey on his failure to respond fully to the inquiry into the tape's location at his deposition. Defense counsel objected to the cross-examination on the basis that the tape's whereabouts was irrelevant and collateral. The trial court overruled the objection, however, finding Dr. Hughey's failure to give a complete and forthcoming answer to the deposition question reflected on his candor as a witness.

The scope of cross-examination rests within the broad discretion of the trial court. *Tsoukas v. Lapid,* 315 Ill. App.3d 372, 380, 248 Ill.Dec. 148, 733 N.E.2d 823 (2000). One of the purposes of cross-examination is to test the credibility of the witness. *McDonnell v. McPartlin,* 192 Ill.2d 505, 533, 249 Ill.Dec. 636, 736 N.E.2d 1074 (2000). Subject to the trial court's discretion in determining the relative value for such purpose, it is proper to allow inquiry into collateral matters revealing the past conduct of a witness which tend to impeach the witness' credibility. See *Poole v. University of Chicago,* 186 Ill.App.3d 554, 561, 134 Ill.Dec. 400, 542 N.E.2d 746 (1989). Thus, matters tending to show an interest, bias or motive to testify falsely of a witness may be brought out on cross-examination, even if those matters were not brought out on direct examination. *Batteast v. Wyeth Laboratories, Inc.,* 172 Ill.App.3d 114, 136, 122 Ill. Dec. 169, 526 N.E.2d 428 (1988). However, for deposition testimony to be admissible for impeachment, that testimony must contradict an in-court statement of the witness on a material matter. *Iser v. Copley Memorial Hospital,* 288 Ill.App.3d 408, 413, 223 Ill.Dec. 797, 680 N.E.2d 747 (1997).

In this case, Dr. Hughey never referred to the instructional videotape in his direct testimony, and the videotape itself, its location, contents, and existence were never at issue, as the tape was not in evidence. Although plaintiff contends Dr. Hughey's responses had bearing upon his interest, bias and motive to testify falsely, we fail to see this relationship. Even assuming Dr. Hughey's deposition responses concerning the tape's location had some bearing upon his credibility, the probative value of this evidence was outweighed by its potential for confusing and proliferating the issues. Under the circumstances presented, Dr. Hughey's deposition testimony was not admissible for impeachment.

Defendants also maintain the trial court erred in prohibiting cross-examination of Mr. Preston concerning his marital relations with Mrs. Preston and the fact that Mr. Preston lived with another woman in another state, rather than with plaintiff and Mrs. Preston. Defendants contend that inquiry into this matter was permissible and invited by Mr. Preston's testimony that he had the opportunity to observe plaintiff over the years, and a videotape and photographs of plaintiff accurately depicted plaintiff's disfigurement and disabilities, and Mr. Preston's intimations that he and Mrs.



fastcase

Preston enjoyed a traditional marital relationship.

[747 N.E.2d 1073]

Although the court may allow a broad scope for cross-examination, the scope cannot be so broad as to overcome the fundamental principle that only that which is relevant is admissible. *Glassman v. St. Joseph Hospital,* 259 Ill.App.3d 730, 756, 197 Ill.Dec. 727, 631 N.E.2d 1186 (1994). Here, Mr. and Mrs. Preston's marital relationship had no relevance to the issues in the case, and the trial court did not err in prohibiting this cross-examination. As the trial court succinctly noted, the case revolved around injury to a minor plaintiff, not the marital relations of her parents. Although defendants allege inquiry into these matters was invited by Mr. Preston's direct testimony, we find no indication of this under the record presented. Instead, it appears the trial court cautioned plaintiff's counsel that any testimony elicited on direct tending to misrepresent Mr. Preston's marital relationship would open the door to further inquiry, and plaintiff's counsel confined his examination accordingly.

Defendants also contend that the trial court erred in allowing plaintiff's counsel to impeach Dr. Hughey with evidence that defense counsel's firm filed an appearance on his behalf in 1988 in the case, Caftori v. Hughey. Defendants maintain that allowing the impeachment was improper because, among other things, the lawsuit was over ten years old and neither Dr. Hughey nor defense counsel had any knowledge of a past attorney client relationship between them.

The record indicates that although the trial court initially allowed impeachment on this matter, the court later concluded, at the posttrial hearing, that this determination was in error because the Caftori action was settled by Dr. Hughey's insurance company ten years earlier and Dr. Hughey apparently had no knowledge of having been represented by defense counsel's firm. Under these circumstances, it is unnecessary to address defendants' argument in depth. We note only that we agree with the trial court's posttrial assessment that this evidence was too remote and attenuated to reliably serve as impeachment.

Finally, defendants contend that the trial court erred in allowing the jury to be instructed on damages for the loss of future earnings because the evidence was insufficient to support an instruction on this issue.

The question of what issues have been raised by the evidence is within the discretion of the trial court. *LaFever v. Kemlite Co.,* 185 Ill.2d 380, 406, 235 Ill.Dec. 886, 706 N.E.2d 441 (1998). To be entitled to an instruction on future damages, a plaintiff need only cite to some evidence in the record to justify the theory of the instruction. *Mikus v. Norfolk & Western Ry.Co.,* 312 Ill.App.3d 11, 33, 244 Ill.Dec. 499, 726 N.E.2d 95 (2000). However, where evidence is adduced of some permanent injury to a minor child, the trier of fact may infer a future loss of earnings from the nature of an injury, and an instruction to that effect may be issued. *Alvis v. Henderson Obstetrics, S.C.,* 227 Ill.App.3d 1012, 1021, 170 Ill.Dec. 242, 592 N.E.2d 678 (1992), citing, *Hartseil v. Calligan,* 40 Ill.App.3d 1067, 1069, 353 N.E.2d 10 (1976).

Here, the uncontradicted testimony established that plaintiff's injury to her left arm was permanent. The testimony also set forth the range of plaintiff's functional impairment, including a permanent inability to fully extend, manipulate or bear weight with her left arm. On this record, we find the jury could properly infer a loss of future earnings from the nature of the injury, as revealed in the testimony. Accordingly, we find the giving of an instruction



fastcase

[747 N.E.2d 1074]

on the loss of future earnings was not error.

For the foregoing reasons, the trial court's judgment is reversed and this cause is remanded for a new trial.

Reversed and Remanded.

McNULTY, P.J., and FROSSARD, J., concur.

---

Notes:

1. We do not suggest that the trial judge intended to coerce the jury when issuing these supplemental instructions. The trial had gone on two weeks, and the judge clearly recognized it was in the best interests of all concerned that a verdict be returned, if possible. However, a verdict hastened by a judge, however worthy the motive, cannot be the result of that deliberation which the law guarantees. *Gregory,* 184 Ill.App.3d at 681, 132 Ill.Dec. 932, 540 N.E.2d 854.

---