Wrongful Death, Survival, and Catastrophic Injury Cases
OUR SUCCESS IS YOUR SUCCESS

In fiscal year 2014-2015, the IBF invested more than $767,000 to enhance access to justice and to assist lawyers and their families in need.

The IBF has **FOUR** programmatic components to further its mission:

- **Access to Justice Grants**
- **Warren Lupel Lawyers Care Fund**
- **Post-Graduate Legal Fellowships**
- **Illinois JusticeCorps**

**ILLINOIS BAR FOUNDATION’S MISSION**

Illinois Bar Foundation’s mission is to ensure meaningful access to the justice system, for those with limited means, and to assist lawyers who can no longer support themselves.

**ACCESS TO JUSTICE GRANTS**

This year, the IBF awarded 23 grants ranging from $5,000 to $15,000 to organizations across the state to provide legal aid, promote pro bono services, or provide legal information for those who can’t afford an attorney.

**WARREN LUPEL LAWYERS CARE FUND**

The IBF supported many attorneys and their families across Illinois to help them get back on their feet and maintain a modest standard of living. More than $90,000 went to support these attorneys and families.

**POST-GRADUATE LEGAL FELLOWSHIPS**

The IBF is excited to announce the 2015-2016 Fellowship participants! Calli Burnett is working at Loyola University Chicago’s Community Law Center, Bryan McIntyre is working at the University of Illinois’ Civil Litigation Legal Clinic, and Marishonta Wilkerson is working at Northern Illinois University’s Zeke Giorgi Law Clinic. Fellowships add more attorneys to the legal aid field and help recent law graduates hone the skills they need to practice law.

**JUSTICECORPS**

This innovative AmeriCorps program enlists student volunteers to serve as guides to make courts across Illinois more welcoming and less intimidating for people without lawyers. Illinois JusticeCorps recruits, trains, and provides the necessary support for college and law students to offer procedural and navigational assistance in courthouses statewide. This fiscal year, the program expanded from 3 to 9 courthouses in Illinois.

**SUPPORTED BY**

The IBF is supported by attorneys, law firms, and other businesses serving legal communities in Illinois. Thank you for your continued support of these very worthy causes.
WHERE THE FUNDS GO
45% First District Support
32% Second-Fifth District Support
23% Statewide Support

2015-2016 Grant Recipients

ADMINISTER JUSTICE
CABRINI GREEN LEGAL AID
CARPLS LEGAL AID
CENTER FOR DISABILITY AND ELDER LAW
CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION
CHICAGO LAW & EDUCATION FOUNDATION
CHICAGO VOLUNTEER LEGAL SERVICES
DOMESTIC VIOLENCE LEGAL CLINIC
FARMWORKERS & LANDSCAPER ADVOCACY PROJECT
ILLINOIS EQUAL JUSTICE FOUNDATION
ILLINOIS LEGAL AID ONLINE
LAND OF LINCOLN LEGAL ASSISTANCE FOUNDATION
LAWNDALE CHRISTIAN LEGAL CENTER
LAWYERS COMMITTEE FOR BETTER HOUSING
NATIONAL IMMIGRANT JUSTICE CENTER
NEIGHBORHOOD LAW OFFICE
PRAIRIE STATE LEGAL SERVICES
PRO BONO NETWORK
PUBLIC INTEREST LAW INITIATIVE
THE IMMIGRATION PROJECT
THE PARENT PLACE
THE CHICAGO LIGHTHOUSE
UPTOWN PEOPLES’ LAW CENTER
THE FELLOWS OF THE IBF

WHO WE ARE

CREATED IN 1983, THE FELLOWS PROGRAM CONSISTS OF A SPECIAL GROUP OF LAWYERS WHO HAVE COMMITTED, BY DIRECT PAYMENT OR PLEDGE OVER TEN YEARS, SUMS OF MONEY RANGING FROM $1,000 TO $25,000 TO HELP FUND THE FOUNDATION’S GRANTS PROGRAMS AND ASSIST LAWYERS IN NEED.

HOW IT WORKS

FELLOWS CAN MAKE MONTHLY, QUARTERLY, OR ANNUAL PAYMENTS TOWARD THEIR SELECTED PLEDGE VIA CHECK, CREDIT CARD, OR RECURRING AUTOMATIC PAYMENTS. ALL FELLOWS PAYMENTS ARE TAX DEDUCTIBLE TO THE EXTENT ALLOWED BY LAW.

WHAT WE DO

THROUGH THE GENEROUS SUPPORT OF OUR FELLOWS AND OTHER DONORS, THE ILLINOIS BAR FOUNDATION IS ABLE TO:

--Award Access to Justice Grants to organizations across the state to provide legal aid, promote pro bono services, or provide legal information for those who can’t afford an attorney

--Support lawyers and their families who have fallen on hard times through the Warren Lupel Lawyers Care Fund

--Fund Post-Graduate Legal Fellowships at three Illinois law schools’ legal aid clinics, giving recent law graduates the opportunity to hone skills they will use throughout their careers while adding more attorneys to the legal aid field

--Facilitate the Illinois JusticeCorps program, an innovative AmeriCorps program which enlists student volunteers to serve as guides to make courts across the state more welcoming and less intimidating for people without lawyers.
Membership Application

Deane B. Brown, Chair, The Fellows  
Susan Brazas, Vice Chair, The Fellows  
Lisa M. Nyuli, Secretary, The Fellows

The mission of the Illinois Bar Foundation is to ensure meaningful access to the justice system, and to assist lawyers and their families that have fallen upon hard times. This year, the Foundation will distribute more than $400,000 to programs that enhance our system of justice and as payments to lawyers or their survivors who have fallen on hard times due to age, illness or other tragedy.

Name 
Address 
City _______________ Zip _________ Phone ______________ Email ________________

Date of Birth __________________ Date of Admission to Illinois Bar ________________

Law School __________________

I want to join The Fellows at the following level:

- **Fellow** $1,000 or $100 per year
- **Silver Fellow** $2,000 or $200 per year
- **Gold Fellow** $5,000 or $500 per year
- **Diamond Fellow** $10,000 or $1,000 per year
- **Pillar of Profession** $15,000 or $1,500 per year
- **Pillar of Foundation** $25,000 or $2,500 per year

**Pledges may be payable over ten years.

I want to increase my Fellows membership to: (All previous Fellows pledge payments will be credited to the new level)

- **Silver Fellow** $2,000
- **Gold Fellow** $5,000
- **Diamond Fellow** $10,000
- **Pillar of Profession** $15,000
- **Pillar of Foundation** $25,000

**PAYMENT INFORMATION**

- My check, made payable to the Illinois Bar Foundation, for $_______ is enclosed.
- Please charge my Visa/MasterCard/American Express $___________.
  
  Account No: ___________________________ Exp. Date: ____________
  
  Signature ________________________________
  
  Amount $_______ Signature __________________________ Date ____________

- Please charge my card:

  *Your first installment will be charged immediately

  $_______ monthly (on the 1st of every month)
  
  $_______ quarterly (July 1st, October 1st, January 1st, April 1st)
  
  $_______ yearly (July 1st)

Complete this application and return it to: Illinois Bar Foundation  
20 South Clark, Suite 910, Chicago, IL 60603. Have a question? Call (312) 726-6072
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Statements or expressions of opinion made by continuing legal education presenters are those of the presenters and not necessarily those of the Illinois State Bar Association or program coordinators. Likewise, materials are provided by the presenters and do not necessarily reflect the opinion of the Association. Legal opinions and analyses provided by presenters, during programs, or in materials are not reviewed by the Association, and are not a substitute for independent legal research.
Wrongful Death, Survival, and Catastrophic Injury Cases
Presented by the ISBA Tort Law Section

Chicago
Friday, February 24, 2017
ISBA Regional Office
20 S. Clark Street, Suite 900
8:45 a.m. – 12:45 p.m.

3.75 hours MCLE credit, including 2.0* hours PMCLE credit

Learn how to develop and refute damages and build strong storytelling techniques with this half-day seminar. Plaintiffs’ and defendants’ counsel with all levels of practice experience who attend this seminar will learn:

- What to look for when deciding whether to accept a new case;
- How to tell your client’s story in a compelling way;
- How to weed out the “wrong” jurors;
- What is the interplay of product liability and wrongful death cases;
- The impact a video can make in showing quality-of-life of the injured victims, or loss of society/consortium in wrongful death cases;
- Which pitfalls to avoid when probating your case;
- What is considered “significant” pain, suffering, and disability in catastrophic injuries; and
- Much more.

Program Coordinator/Moderator:
Martin L. Glink, Law Office of Martin L. Glink, Arlington Heights

8:45 – 9:15 a.m. Case Selection and Intake - Plaintiff and Defendant Perspectives*
This segment describes what to look for when deciding whether to accept a new case, how to pinpoint what a good case selection entails, and what to do first once you accept the case.

Catherine L. Garvey, The University of Chicago Medical Center, Chicago
Brian Murphy, Hofeld and Schaffner, Chicago

9:15 – 9:45 a.m. The Art of Storytelling*
Every case has a theme – a story – that will stick with the audience. And it is your job to tell this story in a compelling and convincing way. Don’t miss this opportunity to hear from experienced trial attorneys as they explore the art of storytelling, including what information makes a good story, what’s worked for them, and what’s failed.

John W. Gilligan, Stellato & Schwartz, Chicago
Stephen I. Lane, Lane & Lane LLC, Chicago
9:45 – 10:15 a.m. Jury Selection and Deselection - Plaintiff and Defendant Perspectives
This presentation discusses a number of key issues in jury selection, including: the vital points to discuss with prospective jurors in handling death cases and cases with severe, disabling injuries; which jurors will probably identify with the chosen side; how to weed out the “wrong” jurors; and how to deal with the issues of sympathy, grief, and mental suffering.
Nicole D. Milos, Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago
Patrick A. Salvi, Salvi, Schostok & Pritchard, P.C., Chicago

10:15 – 10:30 a.m. Break (refreshments provided)
Sponsored by the Illinois Bar Foundation

10:30 – 11:00 a.m. Product Liability and Wrongful Death Cases
Learn how to tie in product liability themes, claims, and defenses in wrongful death, survival, and catastrophic injury cases with this informative session. Which elements are required and which are effective are also discussed.
Timothy J. Cavanagh, Cavanagh Law Group, Chicago
Edward B. Ruff, Pretzel & Stouffer, Chtd., Chicago

11:00 – 11:30 a.m. “Day in the Life” and Other Convincing and Helpful Videos*
Don’t miss this opportunity to hear from a professional videographer on how to make a poignant, powerful video of a client’s typical day as an injured victim and/or how to show loss of society and consortium in a wrongful death case. Additional topics include: how to show an effective family photo montage; what’s effective and what isn’t; and what to avoid when making a convincing video. Actual examples will be shown.
Gera-Lind Kolarik, Evidence Video, Chicago

11:30 a.m. – 12:00 p.m. Judicial Perspective: What’s Effective in the Courtroom
Join us as a seasoned trial judge shares her thoughts and experienced-based observations of what’s effective to jurors in the courtroom, including what doesn’t work, what could backfire, and which landmines to avoid.
Hon. Clare Elizabeth McWilliams, Cook County Circuit Court, Chicago

12:00 – 12:15 p.m. Probate Pitfalls and Requirements
This comprehensive overview explores the pitfalls to avoid when probating your case. Topics include: how to handle conflicts and conflicting heirs; knowing who is the “next of kin”; distribution differences between the Wrongful Death Act and Survival Act; understanding which case expenses are allowable and which aren’t; how a structured settlement gets treated in probate court vs. cash settlements; and what to look out for in finalizing your settlement in Probate Court. A discussion on the differences if the beneficiary is a minor versus an adult is also discussed.
Hon. Karen L. O’Malley, Circuit Court of Cook County, Chicago
12:15 – 12:45 p.m. Damages: Effective Presentations Portraying Loss and Effective Ways to Refute the Loss*
This segment explores the perspectives of both a plaintiff and defendant regarding damages, including how to effectively portray or refute a loss. Learn how to engage empathy and sympathy without asking for it; how to refute the natural sympathy inherent in wrongful death cases and cases with severe, disabling injuries; and what is considered significant pain, suffering, and disability in catastrophic injuries.

Shawn S. Kasserman, Tomasik, Kotin & Kasserman, LLC, Chicago
Donna Kaner Socol, Hughes, Socol, Piers, Resnick & Dym, Ltd., Chicago

*Professional Responsibility MCLE credit subject to approval
This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
What types of cases should prompt exploration of pre-suit request for settlement?

What to include with an attorney’s lien/demand letter:

1) Plaintiff’s full name, DOB, Medical Record number, and executed authorization of your client to allow claims person discuss claim with you.

2) Date of the occurrence? When will the statute run?

3) Summary of the care at issue. Include portions of the medical record you wish to highlight to describe your case.

4) Summary of your theories of liability. Include all basis of your theories:
   a) Be specific about who you are claiming is negligent.
   b) Provide a summary of specific claims of negligence.
   c) Have you obtained expert review? If so, provide report.
   d) Are you relying on literature, professional organization standards/guidelines, or policies? If so, provide copies.

5) Damages--What are you claiming? Calculate and itemize your claimed damages, and be specific.
   a) What specific injury are you claiming? (ie, fractured a hip, ongoing complaints of pain, etc.).
   b) Provide photos when indicated.
   c) Past and future medical expenses (provide bills and any report of physician that show care will be ongoing)
d) Out of pocket expenses (provide documentation)

e) Lost wages: Provide an amount of loss wages claimed. Include information about work history, documentation of salary, and amount of time lost from work.

f) Are any alleged injuries/damages permanent? If so, provide support.

g) What non-economic damages are you claiming?

6) Make a reasonable demand that is commensurate with the claims you are making.

   a) Provide JV/settlement search to support your demand.

   b) If your demand is unreasonable and unsupported by evidence, invoices or expert review, it is easy to deny your claim.

7) OTHER

   a) Provide sufficient notice to allow hospital to thoroughly investigate claim. If possible, do not send a demand to settle on the eve of the expiration of statute of limitations.

   b) If you have not gotten a response to your demand letter, and are approaching statute of limitations, do not hesitate to follow up.

   c) Decide best way to manage negotiations—on own, mediation? Does the plaintiff need his/her “day in court?” Does hospital’s counsel need to meet plaintiff?
ISBA – WRONGFUL DEATH, SURVIVAL AND CATASTROPHIC INJURY CASES

CASE SELECTION AND INTAKE – THE PLAINTIFF’S PERSPECTIVE

Brian Murphy
Hofeld and Schaffner
30 N. La Salle Street
Suite 3120
Chicago, Illinois  60602
312-372-4250
bmurphy@hofeldandschaffner.com

CHECK LIST

Plaintiff Background

Name
Address
Phone
e-mail

Married - when
Children – this spouse, other children, dates of birth
Siblings (if applicable)

Date of birth
Social Security Number

Date of Death
Will/Letters of Office

Name of any person who came to the office

Narrative of Complaint – Why is the client in your office?

What the prospective plaintiff feels went wrong and the injuries that occurred. Most plaintiffs are angry. Does their anger have a basis that can lead to recovery. Most importantly, how significant is the injury.

Is the plaintiff describing a simple “but for” incident or is there is a long chain of events that led to the ultimate injury.

How many potential defendants are there

Venue – State Court or Federal Court; which State Circuit Court
Reject the case or Accept it for Investigation – explain the process and manage expectations

Needed for Investigation

All medical records and bills ... oftentimes questions that arise from the records can be answered in the bills

All radiology images

Pathology specimens

Medical Literature

**STATUTE OF LIMITATIONS! – diary them ... and then diary them again**

Reject the case or Accept it for Expert Review

Experts

Triage your case. Should the first review be proximate cause and damages or should it be standard of care. Often, what I perceive to be the most difficult element to prove will be my first review.

Utilize the appropriate discipline of medicine or professional expertise

Organize your materials – do not just send a data dump.

You get what you pay for

Did you choose the right consultant – listen to the review; question the review; discuss what you believe to be your weak points

A positive review – Do you still take the case?

Concerns for any case:

Age of the plaintiff
Actual damages
Strength of the defenses – I always look to the potential defenses
Very complex causal link – are there too many dominoes?
Wrongful Death – weak family relationships
“Green Fever”
Plaintiff non-compliance with care
Accepted Cases: Advise the client and your referring attorney. Send your referral letter.

Rejected Cases: Talk with the client – offer face-to-face meeting. Get a clear rejection letter out to the client via certified mail or Federal Express.
The Art of Storytelling

- **John W. Gilligan**, Stellato & Schwartz, Chicago
  jgilligan@stellatoschwartz.com

- **Stephen I. Lane**, Lane & Lane LLC, Chicago
  stevelane@lane-lane.com

This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
The Art of Storytelling

JOHN W. GILLIGAN, III
STELLATO & SCHWARTZ, LTD.
120 N. LA SALLE, 34TH FLOOR
CHICAGO, IL 60602

EMAIL: JGILLIGAN@STELLATOSCHWARTZ.COM
WWW.STELLATOSCHWARTZ.COM
“The shortest distance between a human being and the truth is a story”

- Anthony de Mello
  Jesuit priest and psychotherapist
• Persuasion is an art form, not a science
• Storytelling is crucial to presenting a case that is:

  Clear  Compelling  Credible
Storytelling and Theme

- Storytelling is closely related to theme

Theme
- Theory of Everything
- A clear, succinct phrase that effectively illustrates your position
- Prism through which you distill all your facts and arguments
- Guidepost for your examinations of witnesses
- Frame of reference for jury as they hear information throughout trial
Importance of Theme

- Jurors are human beings—respond not just to facts but to a variety of factors
- The way the jury receives information is as important as the information itself

- An effective theme:
  - Aids jurors’ memory
  - Helps jurors organize challenging information
  - Bolsters case strengths, and minimizes weaknesses
  - Anticipates and accounts for helpful/problematic jury attitudes
• Theme will be a common thread that runs through:
  ○ Jury Selection
  ○ Opening
  ○ Witness examinations
  ○ Closing
Example 1

- Fatal accident between a motorcyclist and driver making a legal u-turn
- Decedent was firefighter, husband, and father
  - Decedent was speeding, and traveling in congested area near mall
- **Problems:**
  - Defendant made u-turn in front of his vehicle/right of way
  - Jurors’ counterfactual thinking – last best position to prevent accident
  - Sympathy – kids, a hero’s funeral
• Goals of theme:
  ◦ Acknowledge sympathy for decedent and his positive qualities
  ◦ Highlight decedent’s control over the situation and defendant’s lack of control (based on visibility and speed)

• Themes
  ◦ Decedent was a good man who made a bad mistake
  ◦ The same courage that made decedent an excellent firefighter caused him to take a risk on his motorcycle which ended in tragedy
  ◦ As defendant made a routine, legal u-turn, she had no idea that decedent had decided to speed through a heavily trafficked area filled with cars and pedestrians
Example 2

- Representing defendant Family Services entity who placed foster child with family
- Foster child fell from bunk bed and suffered catastrophic brain injury
- **Problems**
  - Innocent victim – incredibly tragic appearance/injury
  - Understandable desire of jury to blame someone
  - Overcome jury attitudes that Family Services should monitor and/or anticipate all potential problems
  - Juror resentment over unseemly finger-pointing by defendants
**Goals of Theme**
- Use affirmative words to minimize blame language
- Stress defendant’s powerlessness to prevent tragedy
- Physical absence
- Obvious possible danger which parents are in best position to guard against

**Theme**
- Defendant devoted itself to properly training plaintiff’s foster family and ensuring plaintiff’s well-being, but sadly, defendant was powerless to prevent plaintiff from climbing on a bunk bed in the privacy of his own home when his parents were present.
• **Remember**: Trial starts the day you get your file

• It is never too early to consider your theme, your story, and the potential attitudes of your future jury

• A trial theme influences the way you conduct discovery and how you develop your case in the early stages
Telling the Story - The Plaintiff’s Side

There is at least one good story to every case. Obviously, there are at least 2 versions of that story...yours and your opponent’s. Your case began with people and events that, over time, have evolved into the case you’ve brought. In communicating the story of your case, you want to inspire feelings in the jurors or judge who will decide it that will allow them to find the path of least resistance to your position. How can you best do this? The answer is different in each case, but here are some concepts to keep in mind in figuring out the best way for you to tell your story.

To illustrate some of these tips, I have borrowed liberally from a recent medical malpractice case which my partner, Scott Lane and I tried last year involving a 42 year-old working single mother of 5, one of whom was disabled. Please note that I am giving you these abbreviated facts in chronologic order to give you context, which is decidedly not how I would tell the story to a jury.

**Turner v. Mercy**

Several years before her admission, our client, “J”, had undergone a heart valve replacement, and as a result, was required to be on anticoagulant medications for the rest of her life in order to avoid the risk of clotting because of the artificial valve. She had developed a dental abscess which progressed to a potentially deadly infection of the soft tissues of her neck. The infection had progressed to the point where her airway was beginning to be compromised. She was admitted to the defendant hospital, where an emergent tracheotomy was performed.

She was in the ICU for a few days and then transferred to a step-down unit. The infection of her neck responded to IV antibiotics, and the swelling and white blood counts had gone down. From the day after the tracheotomy was placed, and for several days, there were no signs of bleeding, and no signs of anxiety or choking.

On the evening of the fifth post-operative day, the evening nurse noted that J was coughing up blood through the trach, but she had no discussion of this with any physician.

In the early afternoon the next day, J was scheduled for a cine-fluoroscopy in the cardiac catheterization lab to see if there had been a spread of the infection to her heart. When she arrived there at around 2 pm, the staff noted that there was active bleeding from the trach site. The ENT service was called, and an ENT resident came to the cardiac cath lab, cauterized the trach site with silver nitrate, and repacked the trach Vaseline gauze. He said the bleeding was “partially controlled” in his notes. At around 5 pm, the ENT attending physician saw J and said there was no active bleeding, and at 5:26 pm, the cardiologist who was doing the cine-fluoroscopy confirmed that there was no active bleeding.

J was returned to the step-down unit at about 5:30 pm, and at that time, her sister, “A”, was also present. A recalls that over the course of hours from the time that J was returned from the cath lab, she had complained of choking, and in particular, complained of “choking on blood clots”. A said she tried to get someone, nurses and doctors, to do something, that J was bleeding from the trach site and choking, and that she knew this couldn’t be “right”. At 6 pm, the ENT resident placed an order for the STAT transfusion of FFP (fresh frozen plasma) and PRBC’s (packed red blood cells), but at 7 pm, he wrote an order for just the FFP, although he did not rescind the previous directive to also administer PRBC’s.
According to A, who was present throughout the afternoon and evening, she noted that the patient was choking and complaining of choking on blood clots, and complained to the nurse about it. The nurse had very little, almost no experience in managing trach patients. Eventually, at around 11 pm, the nurse paged the medical resident on call, who was a second year resident. There are notes in the chart for 11 pm that showed that J was complaining of pain, and “choking on these clots”, that suggest that J was now able to vocalize through the trach, although she had not been able to do so before, as the trach was one which had an inflated cuff. The cuff was supposed to be inflated in order to protect against the aspiration of any fluids, including blood.

Although the nurse and resident both testified that the resident responded to the call within about 10 minutes, there are no notes that suggest that the resident did actually come. An hour and a half later, after continued complaints from the sister about the bleeding and choking, the nurse paged the MROC again. The nurse, medical resident on call and ICU resident who came later claim that they saw no bleeding from the trach site... just dried blood, although in a “late note”, the MROC wrote that she saw blood on the sister’s hands.

After the MROC was paged a second time, she then paged the senior resident, who came to the room. By then, the patient was anxious, pacing around the room, and complaining of choking. The senior resident charted in a late entry, and testified that, when he came to J’s room, he saw J and her sister there “trying to stop bleeding with applying pressure near and around the trach site and adjusting the trach”. The sister, a germaphobe, maintained that neither she, nor J ever touched the trach. She testified that throughout, there was blood oozing from the trach site, that for at least a few hours, she had been dabbing up blood from the site and complaining to the staff that this couldn’t be right, and was trying to get someone do something.

Shortly after the senior resident arrived, J suddenly became unresponsive, and a Code Blue was called. The code sheet was extremely lacking in its detail, and notably, failed to identify most of the individuals who attended the Code. In particular, there was an unidentified anesthesiologist, who had repositioned the tracheostomy tube during the Code. Somehow, neither the hospital, nor any of the doctors or nurses who were involved were able to identify this individual. Another aspect of the Code sheet and the record, for that matter, was the recording of J’s O2 saturation levels. According to the notes written in the chart, J’s saturations were never alarming. However, a lab slip recorded a very different, and alarming result during the time of the Code. When the ENT resident arrived, about 19 minutes after the Code had been called, he repositioned the trach tube, and J’s O2 saturations rose to normal levels. Unfortunately, by then, J had suffered irreversible brain damage. As a result of the damage, J suffered tremors that impacted every volitional act she attempted... Each intentional action elicited the tremors, and the harder she tried to perform the act, the more pronounced the tremors became. Cognitively, she was fairly high-functioning, although her executive functioning and behavior characteristics were impacted. As a result of the tremors, she was confined to a bed or wheelchair, and required assistance for virtually all of her activities of daily living. Her speech was almost always garbled, and others who didn’t know her often found it hard to understand her, especially over the phone. People often hung up on her because they could not understand what she was saying. She was aware of all of it, and she knew what she had lost. Still, she maintained a positive and hopeful attitude.

1. Talk to the jurors, not just the jury. When you are telling a story, make sure the people you need to listen to are. Before you begin delivering your opening or closing, pause. Make eye contact and get a cue from each juror so that you are sure that he/she is listening. Throughout your story,
make sure you return to make eye contact with each juror so that they know you’re talking to them personally.

2. Be yourself. It’s a mistake to take on the personality and persona of someone else. One of the most important factors in trial success is credibility. Your own credibility is no less important than the credibility of your clients, witnesses and evidence.

3. Develop a theme, and maintain the theme throughout your case. Your theme should be simple. Jury consultant, Joshua Karton and others have suggested that a theme should be able to be limited to a 10 word statement. In your materials, I’ve included the closing arguments in the case of Turner v. Mercy, a medical malpractice case my brother/partner, Scott Lane and I tried last December. Our theme was that “our client’s life was a book that had been written about her...some chapters having been written by her, some about her by others.” Throughout the case, we maintained the theme that the defense, and its witnesses, had written the chapter of her life involving our client’s hospitalization (the hospital record), but were now trying to re-write that chapter even though the defendant hospital’s own doctors and nurses had written it in the first place. We revisited the theme in our closing, asking the jury to write the next chapter in our client’s book.

"A point in any direction is the same as no point at all." -Harry Nilsson

“The law charges you to serve your client by discovering and delivering that client’s cast story in the proper forum to the very best of your ability, consistent with the law. It’s your professional and legal duty to do so-and failure can result in severe consequences. It’s up to you to thoroughly and clearly communicate your client’s message.” Eric Oliver

Anyone that you tell your story to comes to that story with their own individual experience and history. How many times have you been to a court, and felt that the judge had a perception of the case that was different from yours...This is just a fact based on research into and empirical observation of human decision making. People often jump the gun in presuming what any story is all about.

Your theme gives the court and jury the context within which they will interpret every fact and argument they are presented with. The court’s and jurors preconceived presumptions will always color the legal decision-making process. You can meet and defeat these presumptions in the way you choose to deliver your story. For example, in the Turner case, our client, a single working mother of 5, was being criticized by the defendants for her general failing to take care of her own health generally. During discovery, they developed evidence of what they considered her poor dental hygiene and uneven medication control...things that had occurred well before the hospitalization and care that was truly at issue in the case. The apparent thought seemed to be that our client was “damaged” by her own failures, when the defendants became involved... that they actually saved her from herself. One of her own primary care physicians even said that that our client’s failures actually led to the need for the defendant’s services.

You should think about anchors and framing for your story. Anchors are the phrases and images which conjure an image of some kind. Frames are the labels or concepts that are built or set by the anchors. One powerful anchor we used in the case was the continuous reference to “The Story”. We framed that part of the story to reflect the credibility of what had been written when
the record had been written as compared with what the defendants and their experts were saying during the trial. We’d found six notes in the chart, that had been written by five different physicians, contradicting the defendant’s position that J’s trach had been occluded because her sister had moved it out of position while trying to clean up the blood, recounting a history along the lines of J’s tracheotomy having been occluded by blood clots. I’ve never counted the number of times we said the phrase “six different notes by five different doctors”, but it was a lot!

The chapters of the book that our client had written showed her to have been an incredible, and utterly responsible, lady. In part to refute any notion that our client was even partly responsible for her injuries, we showed the extensive efforts made by our client to be a terrific mother and provider for her children, and even her children’s friends, to be an MVP-type worker in her job, to show the great effort that she’d made to take care of everyone else, and to be responsible in ALL areas of her life before she’d been injured. We used these facts to develop the psychological notion and perception that our client WAS responsible and WAS reliable, and that it would be out of character for her to not take responsibility for what she could control. This approach will allow the jury to think less about penalizing the plaintiff, and more about finding a legitimate reason to excuse any such failure. At the same time, our client’s lifetime of taking charge and taking responsibility in the different areas of her life provided a stark contrast for the defendants’ failures to acknowledge and accept responsibility for what was in their control.

4. Rules of the Road – The concept of there being rules which govern everyone’s conduct is not a new one. We are taught that we must follow rules for our behavior as young children. Those rules gave us structure, and in many circumstances, they assured us of safety. “Look both ways” is a universal guideline that applies in almost any settings, as does “Look before you leap” and “Measure twice, cut once”. These simple concepts can be applied to many contexts. Your story should incorporate “rules” by which the defendant’s standards should be measured. These rules, introduced in your story, will give the jurors a measuring stick to gauge the evidence they hear from both sides. One rule we used repeatedly throughout the Turner case was that “The one thing that a tracheostomy patient can’t have is a blocked trach tube”. Another was, “If there’s bleeding, you should call a doctor.”

5. When you tell your story, and describe what happened, tell the story in present tense, as though it is happening now. Plan your story as if you were creating a film. Many jury consultants advocate the use of story boards to map out the course of your story. Each board reflects a scene or point of the story. You should understand the importance of sequencing of your story. People tend to remember beginnings and endings. In the story of your case, you will typically want the jury to be focusing on what the defendant did wrong, rather than your client’s conduct, and so you might want to begin your story with the defendant, who he was and what his choice of conduct was that brought about the events which injured your client. Use psychodrama techniques to bring the court and jury into the scene. You are empowered to enable the court and jury to see your story any way you want them to, choosing the perspective you want them to see, the level of detail, and every fact you want them to know. Use objects in your courtroom to represent landmarks from the scene. Let the jury envision what you’re talking about by bringing the scene into the courtroom. It’s more inviting and draws them in to the story if they can experience the events themselves as you tell it. As you go through the story, pay attention to making each phrase advance the story. Your story will force the listener to envision what you’re saying.

“When it comes to which of our three primary sensory systems are used to process and "make sense" of any case story: 1) words and phrases (auditory), 2) sights and
images (visual) and 3) sensations and emotions (feeling), it is the second one, visual imagery, that is the most influential when building the embodied narratives that lead to a particular leaning or eventual judgment. Of course, this makes complete sense. You really can't appreciate a human narrative without seeing the humans involved in the events. How many times have you thought "the movie wrecked the book," or maybe the opposite, how the movie predetermines what you saw when you read the book." Eric Oliver, "Show Will Tell, Managing Mental Images with Legal Decision Makers", 2015.

6. Use of Phrasing: Use active phrasing, and think about what is envisioned by your words. In the "Show Will Tell" article, above, Eric Oliver gives examples of a variety of language choices in different case settings which can steer the listener in different directions:

Nursing Homes:

"Fall" v. "Drop." You only need to see one person, the injured plaintiff, to see a fall, but, it takes seeing two people for someone to get dropped.

"Lift" v. "Lift and Transfer." In the first, a lift is a friendly hand up; in the second, it is a serious matter of maintaining patient health and safety through the transfer.

Car Wrecks:

"Accident" v. "Wreck" or "Crash." One is like lightning striking, it's unexpected and through the fault of no one person; the other two are not.

Medical Practice:

"Care Given" v. "Actions Taken" or "Actions Withheld." The first invites imagery that overrides any claim of neglect itself; the second two reinforce imagery of neglect.

Claim Language:

"Failed to" v. "Did Not Do Properly." Which picture actually invites decision makers to envision "good intentions" on the part of the bad actors? Ironically it's, "okay, he failed, but he meant well and we should let him keep at it," instead of the more straightforward, "he did not do it right, although doing it right is his job."

Damage Attribution:

"The Plaintiff Develops/Acquires More Consequences" v. "The Plaintiff Is Forced to Go Through These Consequences." In the former version, the plaintiff is seen as the only apparent party actively affecting his or her condition; in the latter, the plaintiff's condition is actively linked to the effects
of negligent actions. This particular kind of mismanagement of mental imagery is the bane of catastrophic injury work.

Terms of Art:

"Minor Head Injury" v. "Injury to the Brain." No permanent or serious images are allowed to be seen or imagined in version one; in version two there is no doubt as to what is there to see.

7. Understand the power of visuals. Jurors are far better at looking than at listening or reading. Each important point of your case should have a visual exhibit that brings home the point. Think about what images you’d want the jury to be thinking about when they deliberate case. Use images to emphasize the truly pivotal points.

In the Turner case, our client’s tracheotomy had been occluded by blood and blood clots. The defense disputed that there was any significant bleeding from our client’s tracheostomy, while we contended there had been a great deal of bleeding, as evidenced by the testimony of a family member. The hospital charting was sketchy, and didn’t provide much description of bleeding. None of the hospital people...nurses, residents and doctors, provided much support to us beyond what had been written in the hospital record. However, the hemoglobin levels, which had been recorded every day since our client’s admission, showed a drop from 10.1 to 6.6, representing a significant loss of blood, over a short time. We demonstrated that fact by the diagram below, which showed the court and jury without a doubt, how much blood was actually lost over the relevant time period based on the hospital’s own lab values. The defense argued that the lab results were either spurious or caused entirely by hemodilution as a result of the blood products, fresh frozen plasma and packed red cells that she had received during that time. Our chart easily showed the jury what the hemoglobin levels should have been if there had been no bleeding.
You can overdo visuals, though. Less is often more effective than oversaturating with visuals. The effectiveness can be diluted if too many are used...Especially with PowerPoint. Noted jury consultants and educators, David Ball and Joshua Karton often joke, “Friends don’t let friends overuse PowerPoint”. Their reasoning is simple. When you are using PowerPoint, you necessarily are asking the jury to focus on the presentation, and away from you. Sometimes, you will have to even darken the room so that the screen is clearly seen. If you are telling a story, you want you and your surroundings to be the actors and the scene. You want the live human connection between you and the jury.

PowerPoint can be a valuable tool for the presenting lawyer, as long as it’s the lawyer who is viewing it and not the jury! Put your PowerPoint presentation on a laptop that faces you as you are talking, so that you can use it to keep your place in your story. Keep it simple...give yourself cues instead of fumbling with notes.

8. There is no “standard” man or woman who can be measured in arguing the extent of damages, and as one noted jury scholar, Harry Kalven, Jr. noted about the jury’s ability to measure the worth of human injury and suffering for each individual plaintiff: “There is in brief no standard man, no reasonable man afoot in the law of damages.... And the jury is of necessity left free to price the harm on a case by case basis.” Harry Kalven, Jr., The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 160 (1958).

In a catastrophic injury or wrongful death case, there is a story to tell about both the harms and losses that have been sustained by the plaintiff. The harms are the actual, tangible, injuries, while the losses are all of those impacts that the injuries have caused. St. Louis attorney, David Damich, couched the argument for the value of every person’s right to the life they had nicely:

“There is not a soul on this earth that lives that does not die. But there is not a soul on this earth that has the right to carelessly shorten one minute of another person’s days.

If you could be on earth for just one day - one day to watch the sun rise, one day to smell the air, the perfume, the stink, one day to look in the eyes of your children and tell them you love them, goodbye, and that it will be all right - if you had that day, what is the value to you of that? That is the first day that defense counsel says is worthless.”

We all live three “lives”...our lives at home, at work and our lives everywhere else. Each of these arenas contains witnesses to and evidence of who and what we are as individuals. Each arena should be explored before and during discovery to identify the best proof of what your client, as well as the client’s family, has had to deal with as a result of the injuries sustained. Jurors are always confronted with at least the innuendo that their verdict is something akin to a lottery award. They may feel that a plaintiff’s verdict is a win or a gain for the plaintiff.

In fact, the verdict is purely an attempt to make the plaintiff whole...to put him back in the position he would have been in if he had not been injured. It is critically important for the plaintiff’s attorney to frame the matter of compensation in a way that clearly shows was taken away from the plaintiff as a result of the defendant’s wrongful actions and choices. Economic losses are, no doubt, in many cases, important. In the world of catastrophic injury cases, though, they are often
the least significant losses that the plaintiff has suffered. The portion of the verdict that replaces economic losses is just that. From an economic standpoint, that part of a verdict simply puts the plaintiff back where he/she would have been economically if the injury had not occurred. That part of the verdict does nothing to compensate the plaintiff for their pain and suffering, loss of a normal life, disfigurement, etc. Each of those damage elements must be addressed in the verdict, and in order for that to happen, they must addressed in your evidence and in your story.

"Disability, by definition, involves the loss of some ability, some kind of normal physical functioning. It could be, and in fact has been, argued that such abilities, or capabilities, are important for welfare even if they have little or no impact on hedonics. This is the central insight of the capabilities approach to welfare proposed by Amartya Sen (1985, 1992) and elaborated on by Martha Nussbaum (2000). It was originally designed to deal with problems of social injustice, and specifically the idea that people may be content with poor social and physical conditions or injustice because they have adapted to them or have never experienced anything else. As Nussbaum (2000, p. 114) expresses it, aspirations for a better life can be squelched by habit, fear, low expectations, and unjust background conditions that deform people's choices and even their wishes for their own lives." Sen and Nussbaum delineate a series of central human capabilities, such as health, freedom from assault, political voice, property rights, equal employment, and access to education, as well as others that involve self-actualization, such as expression of emotion, affiliation with others, and recreation, that they view as universal desiderata. Some of these capabilities, such as health and recreation, are very likely to be undermined by disability and hence, it could be argued, warrant compensation even if an individual is unaffected hedonically because of adaptation or for other reasons.” Peter A. Ubel and George Lowenstein, “Pain and Suffering Awards: They Shouldn’t be (Just) about Pain and Suffering”, Journal of Legal Studies, vol. 37 (June, 2008), University of Chicago.

The Family.

It is important that family members in injury cases focus on what the injured person has lost, and not on the burden the family member has to bear because of the injury, UNLESS there is a claim by that person for lost consortium or services. As an example, a plaintiff who had been independent, and a parent, but has been disabled by their injuries, may now require the support and attendant care of their family. There is no doubt, regardless of the love and desire the family has to help, that there is a burden placed upon and felt by the family members. The loss, however, is what the plaintiff has suffered. The injured parent may very well suffer enormous embarrassment and loss of dignity if his/her child’s care to change diapers is needed. Safety and security measures may be needed for the parent, and they may feel the same loss of their own ability to protect themselves or their children. This loss is a keen one. The freedom to choose how to live each day, is supremely valuable. Liberty and independence are rights to which we are all entitled. Our criminal justice system is based upon the need to establish guilt beyond reasonable doubt in no small part because of the severity of punishment which is dealt for serious offenses. The punishment for criminal conduct is the taking away of liberty, the loss of independence. The victim of a catastrophic injury has often been confined, against their will, to a jail cell whose walls are defined by the limitations of their physical and cognitive abilities.
Use of Visuals and Anecdotes

Visuals and anecdotes give the court and jury context and real-life illustrations of what consequences occurred in the past and a basis to form some feelings about what might have been. Stories, *always told by others whenever possible*, about acts of kindness, work ethic, stories that paint a picture of the client’s nature and character tell the jury what kind of person was lost because of the injuries or death.

In the *Turner* case, our client was a single working mother of 5, and as a result of the injuries that were the subject of the case, she lost her employment, and every aspect of her life that she’d enjoyed. She’d loved people, and her job, and she loved caring for her kids and her kids’ friends. In voir dire, we used a very brief clip of our day-in-a-life video to show the jurors that a) they were there to decide a very serious and important case; and b) make sure that the jurors who heard the case would be able to tolerate the evidence we would be submitting without being upset; and c) to show the jury why we were asking if they would be able to grant a verdict in the millions of dollars if it was justified by the evidence. We had a co-worker testify to how valued and reliable an employee Jeanette had been, how she had loved to deal with people, and how hard she worked each day to get to her job and take care of her family’s needs too. Her children and others talked about how she took care of their friends, often providing them with food, clothing and housing for long stretches of time.

Day-in-a-Life videos can be extremely useful in communicating how the plaintiff’s injuries translate to their daily life. You have a real opportunity to develop the story of your client’s journey by compiling pre- and intra-case documentation of who your client was, what they’ve gone through, what they and their life has become and what it will be in the future. There is a “danger” in waiting until you’re preparing for trial to start the recording of that story. The jury might get a good idea of how the plaintiff ended up, but miss the story of what it took for them to get there. Whenever possible, start collecting photos and videos of the plaintiff as early as possible. Go to family and friends and find whatever you can recover of the plaintiff’s life before he or she had been injured, and especially if the case involves ongoing medical care or significant disability, have periodic day-in-a-life videos and photos done so that the court and jury can be taken on the plaintiff’s journey from the time of injury to trial.

During the damages portion of our closing argument, we displayed one photo of our client, as she’d been before her injuries. The jury was reminded of the woman our client had been, and how catastrophically different she had become as a result of her injuries.
9. With your visual exhibits, be frugal with the use of text. Keep it to a minimum. You want the image of the exhibit in the jurors’ minds to be the message.

10. Medical and technical drawings: Use as little labeling as possible. The drawing itself should be simple and make your point! It should be designed in a way that it can be easily seen, and quickly understood. A good rule to live by is to limit each exhibit to making one point.

11. Talk to your exhibits person about using colors for emphasis and contrasting. The eye notices the difference between just two or three colors more readily than the differences amongst four or more colors. If you know that you may be using colors that might be difficult for jurors who might be color blind, and you can’t change your color scheme, make sure you address any visual difficulties in voir dire. Better yet, though, think again about your color choices!

12. Photos should have matte/flat finishes which don’t reflect courtroom lighting or glare.

13. TEST! Your exhibits are intended to be used to make some of your most important points. Make sure they do, and test them with people, even if it’s just the people in your family or office. Show them for a few seconds and see what people think they portrayed. Ask them again the next day... What did they take away from the exhibit? How did it make them feel?

Resources:


3. Oliver, Eric, Facts Can't Speak For Themselves: Reveal The Stories That Give Facts Their Meaning, NITA, Louisville, CO, 2005


5. Peter A. Ubel and George Lowenstein, Pain and Suffering Awards: They Shouldn't be (Just) about Pain and Suffering, Journal of Legal Studies, vol. 37 (June, 2008), University of Chicago.

6. Rick Friedman and Patrick Malone, Rules of the Road, Trial Guides

7. David Ball, David Ball on Damages 3, Trial Guides

8. Mark S. Mandell, Case Framing, Trial Guides

9. Carl Bettinger, Twelve Heroes, One Voice, Trial Guides
make an independent opinion on the cause of her injury, and subsequently removed the comments because I did not form an opinion of what happened.

THE COURT: All right. Thank you, Ms. Dzik.

And now, Mr. Lane, your closing argument.

CLOSING ARGUMENT

MR. SCOTT LANE: May it please the Court, counsel, Ladies and Gentlemen of the Jury. Good morning.

You know, when I spoke to you about three weeks ago, I said that I am giving you an opening statement, and I considered that opening statement to be a promise, a promise of what the evidence was going to show in this case, and I told you during that opening statement, I said you're going to see the medical records, these medical records, and I told you, you were going to see the medical records from Mercy Hospital, and I told you that those medical records really were a chapter that was written about Jeanette's life, a very, very important chapter that was written about Jeanette's life, a chapter that was written by the hospital through its agents, doctors, nurses, those physicians and nurses that they agreed they're responsible for their conduct, and I told you, you were going to actually see the pages of the record, see the pages of that chapter that they wrote, and that you were going to really get an opportunity to understand that chapter, and I told you, I promised you that after you had an opportunity to read that chapter, you were going to come to the conclusion that the hospital was responsible for Jeanette's brain injuries, because the hospital did not do what was reasonable under the circumstances that they were presented with.

The hospital is responsible for Jeanette's brain injury. That was a promise, that was a promise, and I can say without hesitation that everything that I told you, that I told you what the evidence was going to be in this case, and I meant that as a promise, and I kept that promise.

Now, before we talk about what happened in this case, I do have to apologize. This has been bothering me for three weeks since I gave the opening statement.

I used the "R" word during opening statement to describe the way in which Jeanette felt that other people looked at her, that's the way that people looked at her, and I am sorry that Jeanette feels that way, and I'm sorry that I used that word. It wasn't a good reason, and I don't feel good about it. It was how she felt, and that is not a good excuse, and I am sorry if I offended anybody. It was offensive to me.

I also want to apologize about my habit of sometimes beating a dead horse during an examination, and I did that, because frankly, I was afraid, I was afraid that I was going to miss something or that I wasn't going to make my point perfectly clear, and I wanted to do my best for Jeanette, and if somehow, some way that bothered you, again, I apologize.

Now, the last thing I want to do is I really want to thank you on behalf of all of us for serving as a juror.

It sounds like you guys are enjoying yourselves with each other, which is nice, but we also know that it's not easy, it's not easy to spend this much time away from your family, away from work, so we all really appreciate that.

Now, your Honor mentioned that I am going to be giving -- or that we are going to give closing arguments, and counsel has an opportunity to speak, and we will also have an opportunity to speak, but Steve Lane and I are dividing up this part of the closing argument, liability and damages, meaning, I'm going to discuss why the hospital is at fault here, and Steve is going to discuss with you what injuries were caused by the hospital's negligent conduct.

There are several points frankly that we agree on, the hospital and us.

No. 1, Rule No. 1, keep the trach open.

It's the only way the patient is going to breath. You need to keep the trach open.

Coumadin, when a patient is on Coumadin, we know, everybody agrees that the patient is at an increased risk of bleeding, an
increased risk of clotting as a result of bleeding, and at an increased risk of occlusion of the trach because of the bleeding and the clots that form.

Occlusion, everybody agrees that when there's occlusion, that there is a possibility that the patient can suffer severe brain damage as a result of that occlusion, and occlusion can result in clots.

Inflated cuffs, everybody agrees that when the cuff is inflated, that prevents blood and clots from traveling down the trachea, and prevents it from having an opportunity to clog the distal, the bottom part, of the trachea and cause an occlusion, and everyone agrees that when the cuff is inflated, the patient cannot talk. So, if the patient is talking, that means the cuff is at least partially deflated, and if partially deflated, that allows blood and clots to travel down below the trachea and potentially occlude the trachea.

Vital signs. Everyone agrees that if there is a total occlusion, the vital signs are not going to be stable. They are going to be abnormal.

And everyone agrees -- and this is important -- that when there is partial occlusion of the trach, the vital signs can be normal.

One last point that everybody agrees on. Recordkeeping. Recordkeeping is important. It's important that the record be accurate, complete and timely. We all know that the physicians and nurses rely on the accuracy of records in providing appropriate treatment to patients, and also reliability of records.

When records are prepared, they are prepared close in time to the event. They are a whole lot more reliable than that person's memory ten years later, especially after a lawsuit has been filed.

You are going to be -- you are going to receive several instructions from your Honor, and one of the instructions is going to be the burden of proof instruction.

The plaintiff has the burden of proof to prove the elements in this case; meaning, that we have to prove beyond -- by a preponderance of the evidence; meaning, more probably true than not true, that the fact took place.

What does that mean? It means if you have a scale, and you have a feather on this side, and the scales are equal, and you have a feather on this side, ever so slightly, that is our burden. Just a little bit difference in weight, a little bit lower, the weight of a feather, preponderance of the evidence.

Now, we welcome that burden. We welcome that burden.

Now, Jeanette had a trach, and she was on Coumadin, and under those circumstances it's like Mercy Hospital was like a lifeguard for Jeanette. She relied on them. A lifeguard not for, let's say, a college swimming team swimming in three feet of water, but like a lifeguard for toddlers in a swimming pool, because we all know that if the lifeguard is not attentive even for a split second, that can lead to absolute tragedy.

Jeanette was helpless in the hospital relying on the doctors just like a toddler.

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<td>increased risk of clotting as a result of bleeding, and at an increased risk of occlusion of the trach because of the bleeding and the clots that form.</td>
<td>relies on the parents or the lifeguards at the pool.</td>
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<td>Occlusion, everybody agrees that when there's occlusion, that there is a possibility that the patient can suffer severe brain damage as a result of that occlusion, and occlusion can result in clots.</td>
<td>And that is what happened here, that the hospital was not attentive. The hospital did not provide the care that Jeanette needed in that situation. The hospital failed to provide the attention that she needed and that she required during that hospitalization.</td>
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<td>Inflated cuffs, everybody agrees that when the cuff is inflated, that prevents blood and clots from traveling down the trachea, and prevents it from having an opportunity to clog the distal, the bottom part, of the trachea and cause an occlusion, and everyone agrees that when the cuff is inflated, the patient cannot talk.</td>
<td>It all started February 27th, late into the evening, into the early morning, and continued on all the way through February 28th until about 12:45, and we will hear about that, but through that entire time off and on bleeding, coughing, coughing up clots, coughing up clots through the trach, you heard all about the evidence of bleeding throughout that period off and on, and now she relied -- Jeanette relied on the hospital to do what was appropriate under the circumstances to prevent occlusion of that trach, to allow for finding the bleed, to allow for treating the bleed, and most importantly, prevent occlusion of the trach, the No. 1 rule.</td>
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<td>Vital signs. Everyone agrees that if there is a total occlusion, the vital signs are not going to be stable. They are going to be abnormal.</td>
<td>So, how was the hospital negligent?</td>
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And again, negligence means that they failed to do what was reasonable under the circumstances. You heard from Dr. Cooke, and you heard from Dr. Graham.

Dr. Cooke is a nursing specialist, and you know all about her credentials, Lieutenant Colonel in the Army and all the awards and years and years of experience, and you heard from Dr. Graham, super qualified physician, and you saw his demeanor on the stand. Couldn't be a nicer, more honest, more qualified physician.

You heard what they said. First of all, Jeanette came in for an infection. We all know that. It was a life-threatening situation, but we also know unrebutted, meaning no evidence that contradicts this, we also know that she got past that. That as of February 27th and February 28th the infection was virtually gone, and they were talking about discharging her.

So, this infection, yes, it's true, it was serious, and that's why the trach was needed, but it's a non-issue, because the infection was done. She was on her way out. So, what happened on February 28th? In the morning -- well, actually late at night on the 27th and into the morning, bleeding started after six days of not having any bleeding whatsoever, but was it just bleeding? No. It was coughing up blood through the trach. Concerning? I think so. Dr. Cooke says it was very concerning. Nurse Krooswyk, hospital nurse, not so concerned.

Now, Dr. Cooke said the standard of care under those circumstances because you're worried about the bleed, you're worried about blockage of the trach, is to call a doctor to get the patient checked out. Nurse Krooswyk says no worries, you don't need to under those circumstances. Keep your fingers crossed. Hopefully there won't be any blockage.

Now, that time Jeanette was lucky, because she coughed up blood through the trach. It was a difficult situation obviously, but luckily nothing clogged the trach. So, she went on for a little while. Now, what's the next time that's important? February 28th, 5:00 o'clock. So, at that point in time he enters an order saying let's give the fresh frozen plasma that he had a plan for. That's all good. That's all good.

The problem is after he orders the fresh frozen plasma, what does he do? He leaves. He leaves.

Now, why is that a problem? Well, he can leave as long as he at some point checks in on his patient that has now had three episodes of bleeding in the last 17 hours. That's a problem.

And the standard of care required Dr. Cundiff to follow up on this patient, to give instructions to the nurses that are watching this patient, and to follow up on this patient that's been bleeding.

He didn't do that. That was a violation of the standard of care. If he had followed up, if he had made a call, if he had come see the patient, at some point in the evening he would have seen the patient, he would have found the cause of the bleeding, he would have treated the bleeding, and he would have protected the airway, but he never followed up.
So, that never happened.

Now, another thing about that episode of the bleeding after the cath lab is Nurse Chibucos.

Do you remember Nurse Chibucos? Do you remember when she was called to testify, and she was represented by the hospital at that point in time, and you remember how she talked about the fact that Jeanette was talking, and how difficult it was to admit that Jeanette was talking even though she gave a recorded statement that says she was talking, even though she gave a deposition where she said she was talking, and she finally admitted, yeah, that's what I said, and she remembered the fact that Jeanette was talking, and this is important, she said I remember that conversation, because Jeanette said can you believe this all started with a tooth problem? Very specific memory.

We know that Jeanette was talking at that point in time. Why is that important? Why is that important?

It's important because we know then the cuff is deflated. So, now you have Jeanette with a cuff deflated, because she could talk, and she is bleeding. Not a good combination for keeping the trach clear.

What else did Nurse Chibucos do? She saw the bleeding, and she gave Annette gauze so that she, herself, could dab around the trach area and help control the bleeding in that area and help keep Jeanette cleaner.

Remember she said there was blood that was trickling around on to her gown, Annette was using gauze to help control that bleeding, and that is important, as you know, later on.

Now, the reason Nurse Chibucos fought me so hard on that talking, because somehow, some way she knew the importance of the cuff being deflated.

Now, Dr. Cundiff left. We know that is below the standard of care to do that, and who did he leave Jeanette with? This patient that has bled three times in the last 17 hours, who did he leave Jeanette with? He left Jeanette with Dr. Noriega and Nurse David.

Between the two of them they had one or two trach patient's experience between the two of them. Dr. Cundiff never followed up.

Now, what happened after that? Jeanette continued to bleed. She continued to cough out blood clots. She continued to talk. The cuff remained deflated or partially inflated, however you want to look at it.

Should a doctor have been called?

Absolutely. Would a doctor have identified the bleed? Absolutely. Treated the bleed? Sure. Kept the airway open? Absolutely. That would have been the goal.

Now, at -- I'm sorry -- at 8:50 p.m. Nurse David sees Jeanette. She reinforces the padding. Now, Nurse David said, oh, I do that sometimes. What did Nurse Krooswyk say, their expert? That's because she was bleeding at that time. That's why she did it. That's reinforcement. You can't hold the blood, so you reinforce it. She's bleeding.

The standard of care according to Dr. Cooke at that point in time is again, call the doctor. Was that done? No. That was a violation of the standard of care.

This continued on, as you know, from Annette's testimony, this continued on bleeding, coughing up blood clots and then at 11:00 p.m. Nurse David enters a note finally, another note, and at 11:00 p.m. the note says that the patient stated -- meaning talking -- we all know that's what it means, it's not constantly writing, she's talking, the evidence supports that she's talking plain meaning of these records, she stated that these clots are choking me, and Nurse David noted that the patient continues to cough up blood with clots.

What does continues means? It means it was happening before, and we know that it was happening before. We know it from Annette, and we know it from the record.

So, now she's continuing to cough out blood with clots. Again, reinforces the dressing. Why? She's bleeding. This is just two hours later, she's reinforcing the dressing again. There's a lot of bleeding going on, but this time Nurse David calls Dr. Noriega.

Perfect. That's good. The only problem is Dr. Noriega did not come, and we know that because the record clearly said she didn't come in the
sense that there is absolutely nothing to
indicate that she did come, and I'm not going to
go through that. You have sat through that a
million times through every single witness, but
we all know that there is absolutely no order,
no note from either one of them that indicates
that Dr. Noriega was at the -- that Dr. Noriega
came to see this patient.

Now, this was not a hello, you know, in
other words, the doctor would be walking by the
patient's room and saying hi, how are you, this
was a page. This was a page to come see this
patient that was now continuing to cough out
blood clots and was talking about choking.

If a doctor goes to see a patient and
responds to a page like that, you would think
they enter an order, they write an order if it's
ture everything is okay. At least do something
to indicate that you were there to check on this
patient. Absolutely nothing there.

You remember Dr. Derman testifying,
well, you know, if you wrote everything down,
that you wouldn't have time to even treat the
patients, you remember Dr. Derman saying that.

Come on. How long does it take to
write this patient is doing fine? That's
insulting.

Of course, Dr. Noriega did not see --
and I'm not saying that Dr. Noriega is a liar.
I've never said that about anybody in my life,
quiet frankly, that they're a liar.

I think she's mistaken, just like Nurse
David, when she was testifying on the stand, she
said, you know what, maybe I am mistaken between
11:00 and 12:30 as to whether Dr. Noriega had
come -- whether Dr. Noriega came. I think Dr.
Noriega is confused. I think she can't
remember, and that's not so weird. You know,
it's ten years ago, but she's confused. She's
confused, because there is absolutely no
indication that she came.

And you remember Annette saying, yeah,
Dr. Noriega had come, but I remember a period of
time where she just stopped coming, and that's
period of time was between 10:30, and that's
what Annette said, and the time that Jeanette
arrested.

So, I think the evidence is very clear

that she just did not come at that time, and
everybody agrees that if Dr. Noriega did not
come in response to the page, that was below the
standard of care.

You've got to come. If you don't, for
whatever reason, that's below the standard of
care.

And also, Nurse David was also -- her
conduct was below the standard of care, too,
because she's got to make sure that a doctor
comes and sees this patient.

This is a patient who is coughing up
blood clots through the trach. There is a risk
of blockage here. You need a doctor to find out
what is going on with the bleed, treat the
bleed, identify the bleed, and most importantly,
make sure the airway is clear.

That didn't happen, and it didn't
happen at 11:15, 11:30, 11:45, 12:00, 12:15,
nothing done to get a doctor to see this
patient.

Now, at 12:30 Nurse David finally sees
the patient and says -- and she had seen the
patient and seen Jeanette during that time

period, there was a time, you know, where she's
checking vitals, her vitals are normal, but, of
course, there's partial occlusion, and we all
know, partial occlusion you can have normal
vitals, but as Nurse Krooswyk said, again the
defense expert, you can't just look at the vital
signs, you've got to look at the patient. Well,
look at the patient. She's coughing up blood
clots through the trach. She needs to see a
doctor, and no doctor is seeing her.

So, now Nurse David at 12:30, she notes
the patient is still choking, and she decides
I'm going to page Dr. Noriega again. Remember
that note, again. Doesn't say Dr. Noriega was
just there. She's paging her again, and that is
what nurses do when they're trying to cover
themselves, they put again to make sure that
everybody knows that they had tried to call this
doctor an hour and a half earlier.

So, Nurse David contacts Dr. Noriega,
and she notes in her note that Dr. Noriega came,
but it's too late. It's now 12:30, it's an hour
and a half later. She's been coughing up blood
and coughing up clots, and we know about the
fresh frozen plasma, that she's been given four
bags of fresh frozen plasma, and I know you
heard this a million times, but it's just not a coinci-
dence that the fourth bag of fresh frozen
plasma is given at 12:05, and we know that that
creates -- promotes clotting, and at 12:45, lo
and behold, she's coughing up blood clots. It's
not a coincidence, and it's silly, frankly, when
somebody says blood clots are being coughed out
under the physical examination portion of the
note, and it says that's what the sister was
telling me.

I'm sorry, I'm sorry, that just doesn't make any sense whatsoever.

Now, Dr. Noriega notes blood -- the
coughing out blood clots at 12:45, obviously the
fresh frozen plasma is working, and Dr. Noriega
notes that there's bloody gauze, a basin half
full of bloody gauze, that didn't just happen in
20 seconds or 5 minutes or an hour. The basin
is half full of bloody gauze, and she notes that
the sister has blood on her gloves.

Well, of course, she has blood on her
gloves. She's been cleaning up her sister for
hours and hours and hours and cleaning it up and
putting the bloody gauze in the basin.

At that time, 12:45, Jeanette is known
to be hysterical, running around stating I'm
choking, I can't breathe. Clearly in respiratory
distress. And most importantly -- not most
importantly -- very importantly, this is all
before Dr. Reddy gets there. All before Dr.
Reddy gets there. In fact, these problems are
the reason that Dr. Reddy was called.

So, this respiratory distress was going
on before Dr. Reddy even entered into the
picture.

So, Dr. Reddy is paged, and based on
what Dr. Reddy sees, he calls the universe; he
calls ICU, a resident, anesthesia, and the ENT
all based upon when he walks in the room what he
sees going on.

Now, Dr. Reddy, you remember what he
said during his testimony. He said I honestly
couldn't see where Annette's hands were.

Now, if you recall, I'm sure taking
notes, you recall that counsel for Mercy
Hospital at the beginning of the case said, you
know what, you're going to hear from -- you're
going to hear from Dr. Reddy, and you're going
to hear that Dr. Reddy is going to testify that
he saw her hands, Annette's hands, around the
trach, around the actual tube, itself.

That's not what he testified to during
the course of this trial.

What he said was I really couldn't see
where her hands were. They were just in the
vicinity. My view was blocked, and guess what
she was doing? Probably the same thing she was
doing for hours and hours and hours, trying to
control the bleeding.

Jeanette continued to cough up blood
and blood clots. She continued to cough out
blood and blood clots.

This was going on -- this has been
going on the whole night, and now it's at a
climax. Now its peaking.

And what happens? Lo and behold, no
mystery. She was coughing up blood clots, all
the sudden she didn't cough up the blood clots,
and we know that one or more of those clots that
she had been coughing out got lodged in her
trach, and then her vital signs became abnormal,
because there is now total occlusion, and then
she arrested, and that was at about 1:00 a.m.,
and after that point in time the sequence is
very unclear. It's unclear based upon the
records, unclear based upon the depositions.

I mean, the hospital physicians and
nurses cannot tell us exactly what happened and
what sequence.

I mean, there's just so much that we
can do to try to figure out what happened in
what sequence, but we do know that several
things occurred at that point in time.

We know that there was aggressive and
continuous suctioning. We know that there was
bagging that Dr. Reddy -- remember, Dr. Reddy
tried to bag. He wasn't able to. We don't know
exactly what he did. Then we know that there is
the anesthesiologist. The mystery man that
nobody knows. The anesthesiologist came, and he
bagged the patient, but before he bagged the
patient, what did he do? He repositioned the
trach.

So, from what we see in the notes, we
know that there is plenty of bleeding going on just from the note, itself, and we know from the deposition testimony of Annette that she observed the bleeding, but how else do we know that there was bleeding, substantial bleeding?

We know from Dr. Bitran, the defense expert, who basically agreed with everything Dr. Hirsh said, and why not? Dr. Hirsh is probably the world's top hematologist expert, again, in the world. I mean, that's not an exaggeration.

You heard his testimony. For an hour he was talking about his qualifications, because that was important for you to know who this hematologist is, and he told us about the lab work that was done at the hospital, the lab work, the hospital's lab work. Is that made up somehow, how there was pints of blood that were lost based on the lab work that came from the hospital?

And we also know that she received two pints of blood, packed red blood cells, two pints. It's not preventive, meaning, okay, if somehow she bleeds, let's give this. No. Everybody agrees that packed red blood cells are given to replace blood loss.

So, you're given two because the patient has lost two. You're giving one because the patient lost one. It's to replace blood loss.

We know from every angle Jeanette was bleeding and plenty of blood to allow for clots and clotting of a size of a 6.4 millimeter to block the distal tip of the trach.

Now, we also know that even though we don't know the exact sequence, we also know that, boy, there was plenty of opportunity for the clots -- clot or clots with her bleeding going on to get blown out through the Ambu bag, to be suctioned out through the Ambu bag, to be suctioned out by the suctioning device, and once it gets in the Ambu bag, then you remember, you can't see in the Ambu bag, you can't see through the suction. Once it's suctioned and once the Ambu bag gets it, it's gone, we don't know.

There is repositioning going on. So, you've got suctioning, repositioning and Ambu bag going on, who knows what in the world happened, but there is plenty of opportunity for a blood clot that was present to be gone by the time Dr. Cundiff gets there.

And, you know, I don't know about Dr. Cundiff. That's up to you to decide the credibility of Dr. Cundiff, but I can tell you one thing, that his note -- and he agrees with this -- that it's a hundred percent consistent with a blood clot being present.

Remember, he said partial -- the trach tube was partially occluded when he got there, and partially occluded could be occluded by some sort of dislodgement or it could be by a clot.

You can't tell by looking at that note, but regardless, it doesn't matter whether he found the clot or whether it was somehow suctioned or Ambu bagged during the 20, 30 minutes that was going on. We don't know, but we do know that a clot is what lodged in the trach.

Now, you're going to get an issue instruction it's called, and you're going to be asked to decide these issues, and I am going to run through them very quickly.

Did the nurses fail to contact the physicians and inform them of the medical condition of Jeanette Turner and request her examination? Absolutely. The nurses throughout the entire night failed to contact these physicians except for the one time that Nurse David contacted Dr. Noriega, but then didn't follow up at all.

Dr. Cundiff failed to follow up with the hospital staff to assess Jeanette Turner's condition and determine the effectiveness of this treatment. He didn't do that at all. He just left, never followed up.

Dr. Cundiff failed to identify and correct the bleeding. Dr. Cundiff absolutely did not do anything to identify and correct the bleeding, because he never followed up. So, that's why he never identified and corrected the bleeding.

Dr. Cundiff failed to prevent the occlusion. Again, same reason. He never followed up, so he didn't know anything about all this stuff that was going on, so how can he prevent the occlusion?

And then Dr. Noriega failed to assess
Jeanette, and we know she did, because she didn't show up at 11:00 o'clock, and didn't have an opportunity to assess Jeanette, and didn't to it at any time after that, and she admits that as well.

And Dr. Reddy, he failed to identify the occlusion of Jeanette Turner's airway and failed to restore Jeanette Turner's airway in a timely manner.

Now, you remember his testimony, that he tried to bag the patient right after the arrest.

Well, the problem is he wasn't able to, and he said, well, I tried, and their doctor, Dr. Derman said, well, he tried.

Well, he was the code leader. He was responsible for this patient during the code. He was with the patient when she apparently arrested.

You remember what he said, he said the anesthesiologist turned her a little bit and then was able to bag the patient.

Dr. Reddy has to be able to do that involved in a code, the code leader, and you remember Dr. Graham yesterday testified by deposition, and he said, absolutely, Dr. Reddy, the standard of care would have required him to be able to reposition the trach in a timely manner, and because he didn't, Jeanette suffered brain damage, because for those several minutes that Dr. Reddy tried to bag the patient, but couldn't, Jeanette suffered brain damage.

Again, all he had to do apparently by his own testimony was turn it just a little bit. So, we have satisfied our burden on these issues by way more than a preponderance of the evidence.

The bottom line is that it really didn't need to get to that point where everything climaxed at 12:45.

All we needed -- all Jeanette needed was for Dr. Cundiff to follow up like the standard of care required.

If he had followed up, he would have found out what was going on address, the bleeding, and again, most importantly, protect the airway.

The nurses needed to contact the doctors and follow up with the doctors, and make sure they come and assess the patient, and the doctors again needed to evaluate and identify the bleed to protect the airway.

If we prove any of these allegations;

A, B -- A through G, any of them -- it's not like we have to prove all of them -- if we prove any of them, again by a preponderance of the evidence, then the verdict should be in favor of Jeanette.

Now, as a result of the hospital's negligent conduct, a clot lodged in Jeanette's trach and resulted in brain damage.

How do we know that a clot is what lodged in her trach?

First, as opposed to dislodging, let's address dislodgement quickly.

The bottom line is there is absolutely no evidence whatsoever that there was any dislodgment or any dislodgement that caused the brain damage.

Everybody agrees that there is no note in the chart that indicates dislodgement is what caused the brain damage.

We've already talked about the only person, Dr. Reddy, the only person that saw anything that Jeanette -- or Annette was doing, and he's already told us under oath I couldn't tell -- so, that is really a non-issue, and then nobody else testified about the position of the trach until Dr. Cundiff, but again, Dr. Cundiff, what's the relevance, why is it important how Dr. Cundiff finds the trach when we know that he found it after suctioning, after bagging, and most importantly, after the anesthesiologist had repositioned the trach.

So, how Dr. Cundiff found the trach, there is no question, there is no issue. That's how the anesthesiologist put it. That's how the anesthesiologist put it.

How did -- what position did the anesthesiologist find it? I don't know. I'd love to hear from that anesthesiologist that worked at Mercy Hospital.

Now, there really is just absolutely no evidence, and I know you know that there is no evidence of dislodgement at the time of the arrest, and no evidence that says dislodgement
is what caused the arrest.

So, how do we know there's a clot, there was a clot lodged? Let's look at the testimony first.

First, there is Annette, Jeanette's sister. Annette, you saw her demeanor on the stand. She's telling the truth here, and what does she say? She said that an African-American nurse after the arrest came to her, gave her her purse and said -- because Annette wanted to know what was going on, she told her -- and remember Annette described her in detail, okay -- and the nurse said the doctor found a clot.

Okay. That's Annette, and I understand you may be saying, well, that's her sister, and, you know, maybe -- I don't know, I don't know, but the bottom line is who else said that they heard about a clot? Nurse Chibucos. Even though she hated to just say -- admit that Jeanette was talking, she had to admit that when she came back to work at Mercy Hospital, close in time after this happened. She was told that a clot is what caused the problem with Jeanette.

That's pretty darn reliable.

Now, who else? Dr. Vern, remember Dr. Vern? Dr. Vern was Jeanette's treating physician at the University of Illinois. Treating physician. It wasn't like we went to him to get expert testimony. He was already involved in her care and treatment, and he expressed an interest in Jeanette and wanted to find out what was going on.

So, he reviewed the records, and what did he find? He found it was his determination that it was clots is what caused the occlusion in Jeanette, clots, that was his opinion, and that's what resulted in her brain damage as well.

Very credible. Treater, not a retained expert. Yes, he was paid for his time after he got involved, but how did he get involved? We didn't go out and try to find him, and that's important.

Then we heard from Dr. Graham, we heard from Dr. Cooke, and then you heard from Dr. Hirsh.

And Dr. Hirsh, you heard him testify by video. Could there be a more credible person?

I have never seen a more credible witness. He was not attacked in any way, because he can't be.

He is literally the top expert in the world, and it's fine to say that, because it's true, and he is telling us about everything -- you know, a lot about blood, a lot about clotting, and what he told us, without question, that it was clotting that is what caused the occlusion in this case, in this case.

I think you need to put a lot of weight in Dr Hirsh's testimony in any event.

So, that's not where it ends. I mean, that's the testimony, but let's look elsewhere, and you've heard a lot about clots. You've heard a lot about clot notes, and I'm not going to show them all to you, because you've seen them, but you remember that there are six notes in the chart written by doctors at the hospital saying that after surgery the patient was on the floor and went into respiratory distress and arrest when a blood clot lodged in her trachea causing anoxic encephalopathy. During this event patient maintained blood pressure and
Milenkovich where Dr. Milenkovich requested a consultation by a physician, and those notes with the consultation from Dr. Milenkovich indicate that a blood clot was lodged in the trach.

Why is that important? Because Dr. Milenkovich was Jeannette's attending physician during this hospitalization. She's the gatekeeper. Remember Dr. Derman talking about that? She's the doctor that knows everything about everything that's going on during the hospitalization.

Where do you think these doctors got the information from? The attending physician, Dr. Milenkovich is requesting a consultation and telling these doctors what's going on with this patient and reviewing the records, it's a combination, but don't you think that if Dr. Milenkovich said there was a cause, anything other than a blood clot, that would be noted in those consultation notes? Absolutely.

You know, I've heard Mr. Patterson asking experts for their interpretation of why these notes don't make sense, but what I haven't heard is anybody else, any doctor from the hospital explaining these notes, explaining why they don't say -- why they don't mean exactly what they say. That's kind of interesting, I think.

You know what, it's -- you can't stop -- you can't stop at Mercy Hospital as far as clot notes, because Dr. Gittler -- do you remember Dr. Gittler? Dr. Gittler was the attending physician at Schwab University -- I mean, at Schwab Hospital, and Dr. Gittler wrote a note in her chart that said tracheostomy performed for airway protection, records report that post-op patient developed clot in tracheostomy tube, was anoxic for 20 minutes.

Now, you might be thinking, well, wait a minute, maybe she's just taking the note from the hospital and just putting that in her chart. The problem is she also spoke to Dr. Milenkovich. Who is Dr. Milenkovich? The attending physician from the hospital.

Do you think Dr. Milenkovich spoke to Dr. Gittler and told her what happened? Absolutely. Absolutely. And there she notes the anoxic event of 20 minutes.

Now, there is one other --

THE COURT: Mr. Lane, you're at 45 minutes just to let you know.

MR. SCOTT LANE: 45 minutes?

THE COURT: You have gone for 45 minutes. You have 15 minutes left.

MR. SCOTT LANE: Okay. All right. Let me wrap it up.

There is one other person, Annette Mitchell. Annette Mitchell also wrote a note in the chart -- I mean, not in the chart. Annette Mitchell was the expert life care planner, and that's what I just read a moment ago, and the importance of that is she wrote a report that on August 4th said nothing about a blood clot being lodged in Jeannette's trach, and then on August 11th, lo and behold, she writes a report after reviewing the file and says this was related to a blood clot lodged in the trach, and after that report, lo and behold, Nurse Vinett is not called to testify by the defense in this case.

MR. PATTERSON: Your Honor, objection, improper argument.

THE COURT: Overruled.

MR. SCOTT LANE: Interesting. The evidence is overwhelming that a blood clot lodged in the trach, and as a result of that, it's clear that Jeannette suffered brain damage. There is one other instruction that I want to talk to you about very briefly. It's called a 5.01 instruction. It's a missing witness instruction, and that instruction allows an adverse inference to be made if certain elements are satisfied.

No. 1, if the witness is under the control of the side -- do you have the -- there is an instruction, and here it is, and the Judge is going to read it to you, basically what it says is if a witness is under the control of another party, and the adverse party has no access to that witness -- and I'm paraphrasing -- that you can conclude, you can infer that if that witness is not called by that other party, then the testimony would have been adverse to that party.

Now, I want you to think about the fact
that the anesthesiologist was never identified.

There was a court order, and we talked about that stipulation, there was a court order entered by the Court telling them that they need to disclose everybody that was involved in managing the patient's airway, and lo and behold, 24 people were disclosed, but not the anesthesiologist. They claim that they don't know who this anesthesiologist is, and all I can say is I'm going to let you decide whether that's reasonable, whether that's a reasonable excuse for not calling the anesthesiologist. Is it believable that they don't know who this anesthesiologist is, and remember, the petition that we filed to get the name of this anesthesiologist, to get the name of anybody involved in the management of her airway, we filed that petition while she was hospitalized at the request of the family, and they still didn't disclose this anesthesiologist. Why?

And so, we're going to ask you to consider that jury instruction where you can have an adverse inference; in other words, if the anesthesiologist were called to testify, his testimony would be adverse to the hospital, otherwise, why wouldn't they identify him, and why wouldn't they call him to testify? So, I'd ask you to keep that in mind.

Thank you very much.

MR. STEPHEN LANE: Good morning.

You know, I've waited literally ten years to have this conversation with you.

I have a limited amount of time.

Chris, can you put up 428, please?

You all met Jeanette. You saw her the other day in court. You saw her at Schwab Hospital. You saw her before she went to Schwab when she was at Mercy Hospital.

I don't have to go through all of the ways that she has been disastrously injured. I don't have to tell you what you already know, but I believe your Honor will give you an instruction based on the law and based on the evidence that you've heard in this case for the past three weeks, you were selected to sit in this case, and you remember during voir dire jury selection I didn't ask you about what TV shows or what books you watched or read. I asked you a couple of things, and I asked you do you want to sit on this case, is this the right case for you, and I asked you assuming we prove our case, assuming we show you the evidence that we are entitled to a verdict in favor of Jeanette Turner, would you have any hesitancy at all, any hesitancy in awarding a verdict in favor of Jeanette for the full measure of each element of damage that she is entitled to be compensated for, and you all said yes, you would have no problem with that.

I'd like to go through the verdict form, Verdict Form A that we ask that you enter, and you enter a judgment in favor of Jeanette Turner, and I would like to help you answer the elements that are listed on the verdict form to fill out the damages that the evidence has shown.

Verdict Form A is the verdict form that is used for plaintiff's verdict, for your verdict in favor of Jeanette Turner.

The first element of damage is the reasonable expense of necessary medical care and treatment and services to date.

We agree with the defendant. We've stipulated to that amount. There is no issue about that.

The next item is the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.

Now, the past amount of necessary medical care, treatment and services received to date total $663,860.09.

And you remember Dr. Yarkony came in, and Dr. Yarkony told us about the plan of care that would be needed in order to take care of Jeanette to make sure that she's safe, to make sure that she has housing and transportation and the wheelchair that she needs, the housing that she needs, the van, transportation that she needs.

And do you remember Dr. Rushing came in, the economist, and Dr. Rushing told you the amount of money reduced to present value which if it was properly invested, would take care of Jeanette for the rest of her life, and that figure is $7,153,314.77.
Dr. Rushing also calculated the cost of the reasonable expense of necessary help received to date, and also the present cash value of the reasonable expense of necessary help reasonably certain to be required in the future, and those figures are $114,562.43 for past help, and $179,548.23 for future help.

And then Dr. Rushing also calculated for you the amount of the value of the earnings and benefits that Jeanette lost up to this time, and that figure was $399,210.30.

He also calculated the amount of the present cash value of the earnings and benefits reasonably certain to be lost in the future, and that amount was $425,102.68.

You might think that if you feel that Jeanette's injuries were negligently caused by the hospital -- and we believe they were -- that reimbursing those expenses that she's lost is full and complete compensation, but that only brings Jeanette to the point where she is restored financially for the things that she would have had up to today and into the future.

It doesn't touch the most important damage that Jeanette has had.

Jeanette was an incredible woman, an incredible woman. Raised six kids. Was a great worker. Took care of her kids, took care of other people's kids, was out, lived, loved life, and you remember when she came in and testified here, and I asked her if you could change anything, what would you change? Nothing, nothing. Only God can do that. I have to deal with the hand that I'm dealt.

So, there are economic losses that she has had, and will have, but let's talk about the things that are so important. Her life.

Pain and suffering suffered over the past ten years. Do you remember the tremor that caused her to try to drink a cup of coffee and got third degree burns on the insides of her thighs, surgery, scars.

You saw Jeanette. You heard from her daughter Jazmin. You heard from her sister.

You heard from her employer, Rosalind Jones. You heard from her doctors, Dr. Vern who's taken care of her for ten years. You've heard from Dr. Jerry Morris, the neuropsychologist.

Jeanette was an incredible woman. How she loved to dress up. The bubbly personality that she had.

You heard from work at how she would go the extra mile. She would be the first one to help out anybody else.

She used to go out with her friends, socialize, and take her kids everywhere she went. She'd take them to work, she'd take them to the Buckingham Fountain, she'd take them everywhere, and what she did with her kids, and the crafts and the clothes that she made for them, the birthday parties that she planned for them.

And do you remember in the videos, and do you remember when she was here with us, and do you remember the tremors? And do you remember what she sounds like? And do you remember that she told you she has a slight speech impediment? And she told us what it's like when she talks to people on the phone and when they hang up because they can't understand her.

And this incredible woman felt like she was nothing. And when she sees people and she goes to try to do something, and we know from the nature of this -- do you remember active myoclonic tremors -- what happens when she tries...
to do anything? It gets worse. She's punished when she tries to do anything. If she tries to talk, it becomes harder. If she tries to reach, she shakes more.

And when she sees people in public, they see this. And when she sees her grandchildren, they've been frightened.

We ask for an entry of five million dollars for the disfigurement that Jeanette has, and disfigurement is -- it's how somebody is perceived, how people look at someone, what they think when they're met with them, and that she feels that she is disfigured, this beautiful woman.

The next item is emotional distress experienced to date.

I've never met anybody quite like Jeanette. There's no doubt when people hang up on her, there's no doubt when her grandchildren are afraid, there's no doubt when she suffers the indignity of her son having to see her naked, having to bathe her, having to change her underwear, having to help her at that time of the month.

We ask that you enter on this line an amount of two million dollars for that emotional distress experienced to date.

And is there any doubt, is there any doubt that the emotions that she has gone through for the past ten years, is there any doubt that's going in the future? And we ask for the rest of her life that you enter an amount of six million dollars for the emotional distress reasonably certain to be experienced in the future.

And now I want to talk to you about what I think is the most important thing. Jeanette had a right, she had a right to live a normal life, and that normal life for Jeanette was a productive work life, was an active hands-on mom, was an active hands-on grandmother who was financially independent, who could go anywhere she wanted any time she wanted, now can go anywhere she wants as long as somebody picks her up and puts her there.

She was a mother who took care of everybody; kids from the neighborhood, people at work, and she can't take care of anybody, and she needs help with virtually every single thing she does every single day of her life.

She could make decisions. She could make decisions for her kids. She could discipline her grandchildren. She could baby-sit for them.

And do you remember Jazmin told us about the time that she came over with the kids, and Jeanette was going to watch them, but the caretaker hadn't shown up, and she couldn't answer the door, and she couldn't get there, and she couldn't watch them, and it ended up that her grandchildren had to sit for her.

Do you remember her grandchild asking her why she wears diapers? She's alone. No friends. No social life. No work.

She loved that job, and the job loved her.

You heard -- you heard from Rosalind Jones how excellent an employee she was. What a team player she was, and you heard about all the things that Jeanette did for her family, for her kids, for the neighbor's kids.

She lost virtually every part of every moment of every day of her normal life because of the injuries she suffered as a result of the hospital's negligence.

I asked if you had hesitancy, if you would have any hesitancy if we proved our case, if we gave you the evidence that establishes full and fair compensation for every element, every element, full, that means complete, that means leaving no gaps, that means as much as you can give for that, a full cup is a cup that's just short of spilling over, and we ask for past loss of normal life you enter the amount of four million dollars for the past ten years, and eight million dollars for the loss of a normal life reasonably certain to be experienced in the future.

These are just suggestions, and the prison that is Jeanette Turner's body is about the worst thing that could happen to anyone, and our laws are very clear about what it takes to put someone in jail. Imagine what it would be like to be in that jail for something you didn't do.

I know that Mr. Patterson is going to
THE COURT: Thank you.
Welcome back everyone. And now we're

go to proceed with closing arguments on

behalf of Mercy Hospital.

Mr. Patterson, good morning.

MR. PATTERSON: Thank you, your Honor.

May it please the Court, counsel,

Ladies and Gentlemen of the Jury, hello again.

I finally get to talk to you straight on, and I

hope you don't mind if I just launch right into

it, because I have a lot to talk about, and I

might talk fast, and I only have an hour, so

here we go.

In opening, which seems like it was a

long time ago, I told you that the evidence

would show that Ms. Turner received proper trach
care, that her acute brain injury was due to a

sudden trach complication, that Ms. Turner was

clinically stable right up to the moment of the

arrest, and that the nurses and doctors did not

cause this complication.

Miss Turner's respiratory arrest and

brain damage is a horrific tragedy, but Mercy

nurses and doctors are not to blame, and I

believe the evidence has supported that.

I'm going to go through everything.

February 21st, you know, it was really

uncontroverted that she had a life-threatening

condition, you heard from Dr. Cundiff how

seriously life-threatening it was. She required

an emergency trach. It was such an emergency,

it had to be done in an awake procedure.

She had to take Coumadin, so she was at

increased risk of bleeding. Some criticism of

the care for the first five, six days, and then

we get to the fact there were recognized

complications of the trach that everybody

agrees, dislodging it and negligence, blockage
can occur in the absence of negligence, that's

what happened in this case, she had a

complication, and nobody was negligent at Mercy

Hospital.

So what happened? Again, as I said in

opening, it's not the defendant's burden of

proof. It is the plaintiff's burden of proof,

but it's clear that whatever it was, it was

sudden, and it was acute, and did the trach tube

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become dislodged, was a blood clot obstructing
it, well, that's for you to decide, but I respectfully submit that the evidence supports a defense verdict regardless of what the cause was.

Again, it's the plaintiff's burden of proof, and the real question is how could the Mercy nurses and doctors have prevented this awful tragedy?

I told you during opening that the evidence will show that the patient's, Ms. Turner's vital signs were stable throughout the entire timeframe. That really hasn't been challenged.

If a trach is blocked by blood, there is not going to be normal vital signs. If it's dislodged, you will not see normal vital signs.

I'm going to put this up again. I know you're probably sick of seeing it, but it's an important graphic that I'm going to subject you to yet again.

Vital signs are, you know, it's uncontroverted that they were stable up until the very end.

What is the plaintiff's explanation?

How do they get around the stable vital signs?

Well, one theory is that this was a partial obstruction, okay?

Ladies and Gentlemen, what evidence is it? This is a court of law.

What is the evidence of a partial obstruction? When did it occur? Was it before or after the nurse is suctioning? Why wasn't the partial obstruction suctioned out? Were there any signs or symptoms of the partial obstruction? How could Mercy diagnose it if there is no signs or symptoms? And even if it was diagnosed, hypothetically, if it existed hypothetically, then what? What would an ENT doctor do to intervene?

Another explanation is that there was an intermittent blockage, and Dr. Graham actually suggested to you that, well, perhaps in between the normal vital signs there were abnormal vital signs, that's just not worth recording.

He described that as a hypothesis upon a hypothesis.

When did this intermittent blockage occur? Should Mercy have expected it, and more importantly, even if it existed, hypothetically, then what? What would an ENT doctor do about an intermittent blockage? There is no evidence of either.

I told you during opening, and as we go through this, it's designated, and this is a slide from my opening statement, and I indicate it as such. I told you that there were several issues that were undisputed.

Ms. Turner came with a life-threatening emergency, excellent care was provided during the first week, steps taken in the cardiac cath lab were reasonable. No criticisms of the plan that was formulated in the cath lab. Tracheal bleeding is a recognized complication. No criticism that the bleed occurred. No criticism of Dr. Cundiff's assessment the morning of the 28th. Appropriate to order blood products. No criticism of that. No criticism of the plan.

All of those issues have been supported by the evidence. I told you the evidence would support it, and it did.

I also told you that the evidence would show when a balloon is inflated, it prevents blood from going into the lungs, it prevents the exact same complication that the plaintiff's theory is what happened.

All vitals signs were normal. Everyone agrees with that. No evidence of acute massive bleed. Everyone agrees with that. No criticism of the code team. That one you have to put a little asterisk next to it, because coming into this trial there were no criticisms of the code, but yesterday Dr. Graham phoned in a criticism from Australia.

I told you that the evidence would say, tell you that sometimes mistakes are made in the hospital chart.

You get that at this point in time.

Clearly mistakes can be made in hospital charts. So, that's what I told you the evidence would show.

Now, I just want to go over some of the points that Mr. Lane said in his opening statement about what he believed the evidence would show.
He described it as promises during opening. Did he deliver all those promises? Well, he told you that the Mercy chart is a chapter in Ms. Turner's biography, and that Mercy was trying to rewrite the story. Clearly that's a pretty sinister suggestion that we're trying to rewrite the story.

He told you the evidence would show that it would be very concerning to have complaints of choking so many days after a trach is placed. Well, you heard Dr. Cundiff say that the balloon had not been inflated. It was when the balloon was inflated, that that's when complaints of choking would be expected, because it's uncomfortable to the patient.

He told -- there was no mention of the normal vital signs during Mr. Lane's opening. He didn't mention that. He didn't mention that the plaintiff had no criticism of the ENT plan, and he didn't tell you that that ENT plan would take about three hours to carry out which was implemented.

He told you that the evidence would show that Dr. Cundiff did not know what was going on, and that Dr. Cundiff believed the bleeding was completely stopped in the cardiac cath lab.

Well, you heard from Dr. Cundiff that there was an expectation that there would probably be continued bleeding because of her anticoagulation, because it would take the fresh frozen plasma awhile to work.

So, with all due respect to Mr. Lane, I don't believe that he delivered on those promises.

He also told you that doctors need to come when they're told. He didn't tell you that Dr. Noriega's testimony is that she did come.

He told you that there was overwhelming evidence that Ms. Turner could vocalize. He referred to Ms. Fernando's note where she said talk, talk, talk.

He didn't tell you, he knew, because Nurse Fernando has given deposition testimony, that she wasn't talking with Ms. Turner, she was communicating via writing.

He told you that the evidence would show that the sister was continually calling for help. Well, that's true. She was. What he didn't mention is that Nurse Fernando constantly came and was in the room throughout this period of time that is the subject of this lawsuit.

He told you that did any doctors come? No. Well, again, Dr. Noriega did.

And also, remember the timeline from the plaintiff's opening where it went from yellow to red, and, oh, this is danger, danger. He didn't mention that during that timeframe; 11:30, 11:45, midnight, that the vital signs were completely stable, and Ms. Turner was watching television with her sister.

He also said that Dr. Noriega didn't respond to the first page, and, boy, we spent so much time and energy on that issue about Dr. Noriega, did she come, didn't she come, and then Ms. Annette Turner took the stand and said, oh, yeah, I saw Dr. Noriega more than once. So, did he deliver on that?

Six different notes by five different doctors. We've heard that over and over again.

He did not mention it wasn't told to you during opening that those notes were written three weeks later by people who were not present at the code, and he also told you that the evidence would show that Dr. Cundiff found a clot blocking the trach. That's what he told you the evidence would show, and you heard directly from Dr. Cundiff that he did not find a clot blocking the trach.

What exactly is the plaintiff's theory of liability?

In the opening statement the only time that Mr. Lane came close to telling you what is the theory, this is a medical malpractice case, professional negligence, catastrophic injuries, what is the theory?

He told you that the Mercy doctors and nurses did not do what they were supposed to do. What's that mean? What is the specific criticism? What is the deviation from the standard of care?

He told you that the evidence would show that they needed to do whatever they need to do to prevent blockage.
What does that mean? And what exactly is the plaintiff's theory of causation? All comes down to ENT should have been called sooner. When you go through all of the issues that are in the jury instructions, it always comes down to that, should have gotten ENT there sooner.

What treatment, what intervention would have been provided to avoid this outcome? What exactly would an ENT have done? Well, you heard from Dr. Cundiff. He said if I had been called and told that there was some continued bleeding and that the vital signs were normal and that Ms. Turner was having the subjective sensation of choking, I would have said that's expected, everything is good, no need to do anything further.

The plaintiff has the burden of proof, and basically, when you get all through those instructions, there's three sort of hurdles, if you will, that the plaintiff must overcome in order to get to Verdict Form A. The first hurdle is a deviation from the standard of care. It's another way of saying negligence, professional negligence. You all are not doctors or ENT specialists. In order to get past that first hurdle, you must necessarily rely upon expert opinion testimony.

Ladies and Gentlemen, I don't think that the evidence supports even getting over that very first hurdle. And even if some of you might think, oh, well, you know, maybe they do, the next hurdle is even more insurmountable for the plaintiff, and that is causation.

In other words, they have to show that there was a deviation, a failure to getting an ENT there sooner, and that somehow that deviation was the cause of the injury. Well, Dr. Cundiff is the ENT who would have been contacted, and he told you there would have been no reason to do anything different. And then the last element is an injury, and there is no question that the plaintiff satisfies that element. We don't even dispute that.

I told you during the opening statement that there were several undisputed issues concerning the fact that Ms. Turner works, she has significant future care costs, she was a positive generous person. These are very serious injuries.

For the 35 million dollar damages request, damage awards must be fair and reasonable for both sides, and I have to -- I'm required to address it, and I'm only going to touch on it very briefly.

Damages are not supposed to punish Mercy. Sympathy is not supposed to play any role in your analysis.

Stipulations, just because we have stipulated to certain elements of damages doesn't mean that we agree we're responsible for them, and the question is what is fair and reasonable?

And I would respectfully submit that under these circumstances 35 million is not fair and reasonable. Something more around the area of 4 to 5 million would be, but if you decide for the defendants on the question of liability, you do not even need to think about -- you don't need to discuss damages. That's one of the instructions, and I respectfully believe that the plaintiff can't even satisfy that first hurdle of deviation, so there will be no occasion for you to even consider damages.

The plaintiff's case I respectfully submit is premised largely on appeals for sympathy.

Okay. This emotionally charged video footage of Ms. Turner. Ms. Turner was helpless we just heard during opening -- or at closing that she's helpless, and then we have the parade of damage experts.

Dr. Meyer to tell us that she has a brain injury. The defense doesn't dispute that. Jerry Morris to tell us about her limitations. We don't dispute that.

It was a parade of damage experts that Mercy Hospital really didn't challenge. We don't dispute that this is a very serious injury.

And then it was Ms. Turner's testimony, itself. Very sympathetic, and then she says Mercy Hospital has not beaten her like Mercy
Mccorkle Litigation Services, Inc.  
Chicago, Illinois (312) 263-0052
there's nothing shortly after the code described seeing the

Dr. Noriega also observed blood on the

She told you how she contacted ENT

Dr. Noriega took the stand and told you

Nurse Fernando David said the same

Miss Annette Turner said basically the

Why did we spend so much time on that

issue? Because, well, because they don't have

Dr. Noriega also observed blood on the

She also told you how she contacted ENT

then there's Dr. Reddy's testimony, and it's interesting how we would hear from Mr. Lane

That apparently doesn't apply to Dr.

Reddy, because Dr. Reddy's note that was written

embrace the testimony ten years later that, you

Know, I honestly can't remember exactly what I saw, but I saw something, something so unusual

Remember there was no mention in the

Security had to come. The sister left

Dr. Cundiff's testimony, again, I've
got to speed things along, but that's what I said in opening, and every single point on there

You know, counsel just said something

about how there's nothing in Dr. Cundiff's note

that supports the notion that -- there's nothing

in Dr. Cundiff's note that goes against a blood clot being there.

What about the part where it says no

airway obstruction? That's in his note. He

likes to pick the parts of Cundiff's note that

support his theory, and then ignore those

portions of the note that don't.

And then there's Ms. Annette Turner's

testimony, and this is what I told you in

opening, and it's every single one of those

points came out.

After midnight is when things got

worse, when she recalled that her sister's blood

was not clotting after the last bag of fresh

frozen plasma, and then there were some other

things that this is not in opening that I just

want to refresh all your memories about, Ms.

Annette Turner's testimony was that her sister,

Ms. Jeanette Turner, was constantly writing I

got too much Coumadin, I got too much Coumadin,

and that she recalled some doctor at some point

coming and saying, yeah, too much Coumadin,

that's not an issue in this case, and none of

the plaintiff's experts have said anything about too much Coumadin.

She told you that two doctors explained

this plan regarding fresh frozen plasma,

remember, sort of the consent, because Ms.

Annette Turner signed the form, and everything

was explained to her. She told you that she was
begging for help, and nobody was doing anything, but then subsequently on Cross she agreed, oh, yeah, Nurse Fernando was constantly in the room suctioning.

And also she testified that she was trying to keep Ms. Turner calm, and yet they were watching TV, and the other thing is that Ms. Annette Turner is very -- she's a germaphobe. I didn't call her that. She called herself that, and she doesn't like blood at all, and she was clearly very concerned about blood.

She also said that it was after the last unit of fresh frozen plasma that Ms. Turner vocalized, which is entirely consistent with a tube being dislodged right around that timeframe.

She told you that her sister, Ms. Jeanette Turner, was upset, throwing her arms around, that Annette tried to calm her down, and mentioned the unidentified doctor who said too much Coumadin, and also this unidentified nurse that said that Dr. Cundiff said that he found a blood clot lodged in the trach.

Well, you heard from Dr. Cundiff, and in order to believe that, you must necessarily include that he was giving you false testimony. There is an abundance of circumstantial evidence of what happened, right?

We don't have the burden of proof again, but there is circumstantial evidence that the sudden trach complication that occurred right around 1:00 a.m. or thereabouts was the result tragically of dislodgement of the trachea, and no one is suggesting that the sister was doing anything other than what she thought was in the best interest of her sister, but the reality is that the most likely explanation that is supported by significant circumstantial evidence is dislodgement by the sister, Nurse Fernando's observation, Dr. Reddy's note about adjusting the trach. Dr. Reddy called security. The temporal proximity between what Dr. Reddy observed and the respiratory arrest. Vital signs stable up until the very moment of arrest. The inability to Ambu bag during the code. Evidence of blood on the sister's gloves. Dr. Cundiff, trach dislodged. He did not find a blood clot, and

then there's that other note, which is a very important note, because this was one of the notes that was closest in time to the event in question contemporaneous that ICU respiratory therapy note at 3:45 a.m. the trach was dislodged.

Doctors are not journalists. That was something from opening statement.

Clearly, clearly, if you believe Dr. Cundiff, if you believe that Dr. Cundiff did not commit perjury when he came in here and looked you in the eyes and said I didn't remove a blood clot from a trach, then that necessarily means that sometimes inaccurate information is perpetuated through a medical chart, and where did that information come from? You don't just make it up, right? We've heard that from the plaintiff, right, you don't just make up stuff.

Well again, if you were a doctor trying to summarize what happened, and you look back at the notes from Nurse David and Dr. Noriega about choking on blood clots, and then you see the note by Dr. Cundiff that uses the word occluded, it would be a reasonable interpretation if you're not there and you're not conducting interviews, and you're not a journalist, a trained journalist, that, hey, it looks like it was a blood clot, plaintiff's blood clot theory. What would be the intervention? If there was a blood clot, what would the intervention be?

Well, you heard from Dr. Lavertu, and you heard from Dr. Cundiff that -- and you heard from Dr. Graham that suctioning, oh, if you think that there's blood in the trach, you think there's a clot, the standard of care of intervention is to suction the patient, which is exactly what was done. Suctioning was being performed up until shortly before the code, before Dr. Reddy arrived.

Counsel wants to say the suctioning was done after Dr. Reddy saw this incident with the sister, and we heard that over and over again, but Dr. Reddy, himself, said that, you know, on the timeline that was done before I arrived.

Just now we heard Mr. Lane say that Dr. Cundiff's note is 100 percent consistent with a blood clot blocking the trach when we just noted
that he actually wrote in his note no airway obstruction.
So, hematology issues, I just want to address them very briefly.
We heard from Dr. Hirsh about approximately three pints over five days.
Well, that might sound like a lot, but you've got to remember that there were repeated blood draws during that time.
Even Dr. Hirsh agreed that this was not an acute bleed that occurred over a very small period of time. Dr. Hirsh agreed that not all the bleeding was from the trach. There was a lot of stuff that went on. During the code she had central lines put. There was a lot of blood loss during the code.
And then also a hemoglobin of 6.1. He said, you know, that's a red herring, that's not accurate. There's no way you can go from a 10 something down to a 6.1 and then back up to a 10, that is a red herring.
And then Dr. Hirsh, the only basis for the opinion that this was a blood clot lodged in the trach is the six notes by five different doctors.

The post-code chest x-ray showed no aspirations, no evidence of blood or fluid in the lungs.
So, now we can get to the issue instruction, and, I think, Mr. Lane has it on the board, and I'm just kind of briefly summarizing it, but when you get the jury instructions, first off, you're going to have to elect a foreperson, and then the first hurdle, remember, the first element that is plaintiff must prove is a deviation from the standard of care, and that's when this issue instruction comes into play.
These are the alleged deviations from the standard of care, and the first alleged deviation is that the nurses failed to contact physicians, inform them of the medical condition of Jeanette Turner and request their examination of Jeanette Turner in a timely manner, and that refers to Nurse David, and that is entirely premised on the notion that Dr. Noriega didn't come, and she needed to call and make sure somebody did.

It also refers to Nurse Rhorwasser.
You heard a lot about her alleged deviation that occurred way over here, and with every single one of these, first, you must conclude that it was professional negligence, but then you also have to conclude that that was a cause of the injury, and with respect to Nurse Rhorwasser, I would respectfully submit that that is -- I mean, the notion that any deviation that occurred 24 hours before the code, when in between there were a multitude of doctors and nurses seeing the patient, that's not credible.
And with respect to Nurse David, well, she was in the room constantly, and whenever the sister requested, she would call the doctor.
There is some issues about Dr. Cundiff. Again, you need to go through them, and you need to decide did plaintiff meet the burden of proving that Dr. Cundiff was professionally negligent?
If the answer is no, then you move on to the next issue. If the answer is yes -- which I don't think it will be, because the evidence doesn't support it -- you then need to go the next step and conclude, well, how does that causally connect things? What would Dr. Cundiff have done, what would the standard of care have required if he had been contacted sooner? And, folks, with the stable vital signs, normal oxygen saturations, there would have been no reason to do anything.
Dr. Noriega, the issue for Dr. Noriega is that she failed to assess Jeanette Turner's condition in a timely manner. That is the contention of the plaintiff, and that again is based entirely upon the notion that she didn't come and respond to that first page.
And if you conclude that the plaintiff has not met the burden of proving that Dr. Noriega is lying to you and that she didn't come, then you go on to the next issue.
And, folks, I respectfully submit that when you do this analysis, and when you go through the issues, you will never even need to get to the question of causation or damages, because the plaintiff has not met their burden of proof.
There is a lot of non-issues that...
One page of a document with natural text: "you've been hearing a lot during this trial, and they're not in the jury instructions. Delay in giving fresh frozen plasma, that's not an issue.

Too much Coumadin, remember, that's what the sister remembered, Jeanette, oh, too much Coumadin, too much Coumadin, oh, the doctor told me we had too much Coumadin, that's not an issue in the jury instructions.

A sentinel bleed, we heard Dr. Graham describe how ominous that is, where's the bleeding, through the lungs, and you drown in your own blood. I'm not saying that happened here.

Failure to write a note. You know, Dr. Cundiff didn't write a note at 7:00 o'clock. Dr. Noriega didn't write a note around 11:00.

That's not one of the issues in the instruction. Failure to chart, failure to write a note cannot possibly cause catastrophic brain damage. So, it's not even an issue.

Missing notes, that's not an issue.

The time that it took to carry out the ENT plan is not an issue, and that's an important point because Dr. Graham and Dr. Dorothy Cooke both agree that they have no criticism of the assessment by the ENT, they have no criticism of the plan by the ENT, and they also agree that that plan would take a long time to carry out. It takes awhile to infuse four units of fresh frozen plasma, and that plan, Ladies and Gentlemen, was not done until moments before the code.

Why would Dr. Cundiff be required under the standard of care to call back at midnight or 12:30 to say, hey, how's it going? It's not until the fresh frozen plasma was infused that you have to then wait to see is the plan working, is the bleeding stopping.

So, again, what is in dispute? When we go through all of these issue instructions, and we follow them through to their logical conclusion, it all comes back to ENT should have been contacted sooner.

Plaintiff's theory is that a possible blood clot -- that was Dr. Graham's word, possible -- if it's only possible, how does that meet burden of proof, right? If your own experts on both sides, and how in the world are you supposed to work this out.

Well, folks, you again are the only judges of the credibility, and you can consider which experts for the plaintiff or the defense were more impartial, were objective, not advocates, not partisans, but view the case in a balanced manner, and I respectfully submit that although the plaintiff's experts are very well qualified, and they have very distinguished awards, and one is an English Knight in Canada and the Medical Hall of Fame and a bronze star, it doesn't change anything that you -- you are the judges of the credibility, and you decide which experts made the most sense, which ones seemed to be the most reasonable and made reasonable confessions, and I respectfully submit, I believe that that panel of experts, there is a lot of reasons to conclude that the plaintiff's experts were perhaps just a little bit too partisan in their review of this case.

Dr. Graham, I've already talked a lot about him, but it's important, he had no criticism of the plan. He acknowledges the plan..."
would take a long time to carry out.

He never clearly articulated, despite extensive testimony, four-hour Direct Examination, never clearly articulated what an ENT would have done if called, and then he offers new criticisms every time he testifies including the criticism of the code that was phoned in for the first time on the last day of evidence.

Folks, is that credible? Is that credible, that three sessions of deposition, no criticism of the code, no criticism of the code, oh, I have no criticism of anything that was done during the code, codes are hectic, codes are stressful, codes are difficult, and then on the last day of evidence he phones in, oh, no, I've got a criticism of the code.

That is not credible. That is not credible.

So, I am near the end, you'll be happy to hear that.

This is again, my -- you know, what I said from the beginning, that the evidence will establish those points, and I believe that the evidence overwhelmingly did, and that's why I believe the evidence supports Verdict Form B.

Now, folks, here in a little bit we're going to be done. Ms. Dzik and I are going to pack up our stuff and we're going to clean up the room that's a mess back there, and we're going to be done, and then you guys start work. And, folks, this is not going to be easy. It's not going to be easy.

It's not going to be easy, because Jeanette Turner was a wonderful woman who suffered a catastrophic brain injury, and all of us sympathize for her, all of us want to give her something, a new house, give her money, but this is a court of law, and your duty as jurors is to not allow sympathy to influence your verdict, and signing Verdict Form B under these circumstances is going to be difficult, but our system of justice is premised on you doing your duty.

The jury system is the most radically democratic feature of our Republic, but it only works if you do your job, and sometimes doing your job means sending someone who has catastrophic injuries out of the courtroom with no money damages, and that's what you need to do if the evidence supports it, the plaintiff did not satisfy the burden of proving the first hurdle, you don't even get to the second hurdle.

The only thing that they really proved was that Ms. Turner suffered a catastrophic brain injury.

I thank you, but before I sit down, I have one final parting comment.

Because the plaintiff has the burden of proof, okay, Mr. Lane gets to have the last word, and that's only fair. That's called Rebuttal.

So, I'm going to have to sit down, and then he's going to get the last word, and I have to sit there and be quiet, I can't really ever respond, I'm not going to be able to talk to you again during this trial, but I do have some questions that I would like to pose to Mr. Lane to address during Rebuttal.

What is the evidence? This is a courtroom. This is a court of law. What is the evidence of partial occlusion?
for your time, and I thank you for your jury service. Thank you.

THE COURT: Thank you Mr. Patterson.

Mr. Lane.

MR. SCOTT LANE: Your Honor, I thought we were taking a break.

THE COURT: No. Are you ready to go?

No. Keep going.

Thank you.

REBUTTAL

MR. SCOTT LANE: Well, for starters, I sure wish I had more time to answer all the questions that Mr. Patterson just asked for me to answer, because, you know what, there has been an answer to every single one of those questions, but thankfully, you all were paying attention during the course of this trial, and you were listening to each of the witnesses that testified during the course of this trial.

Let's start off with a couple of real quick points.

The respiratory therapist's note that states that the trach was dislodged. Of course, it was out of place. We all know it was out of place.

Dr. Cundiff came to the code, and what did he find? He found that the trach was in a different position, but the question is, how did it get there? And the answer is there was suction, there was bagging, and most importantly, there was an anesthesiologist who put the trach in that position.

That has absolutely nothing, nothing at all to do with the position of the trach at the time Jeanette arrested.

Have you heard any testimony from anybody that indicates that the trach was dislodged at the time Jeanette arrested? The answer is no.

Security? You're talking about security? How come -- you know, Mr. Lane, why was security called? You heard Annette testify. She testified that security was called because she was trying to stay with her sister after she arrested, after she collapsed, and she thought that she was dying.

What is more believable, that or that the security came because Annette was blocking the way it's configured is to actually pull it out of the trach.

Where is the testimony? Where is the evidence from anybody that the trach was actually pulled out of the trach and sticking out of the patient's throat? Is there any evidence of that whatsoever? Absolutely not.

So, as I understand it, the theory is that she was blocking the patient from Dr. Reddy, that she dislodged the trach and caused the brain damage. That's what they're trying to tell you.

A couple problems with that. No. 1, do you think that maybe somewhere in some part of the medical record, anywhere, that it would mention that the trach was dislodged, and that's what caused the brain damage? Do you think that maybe if that's what happened, that security was called to get this patient -- I mean, to get this woman away from this patient, and it's that patient that dislodged the trach and caused this brain damage, do you think that that event, even the mention of security, might be mentioned somewhere in the chart by somebody, somebody? Somebody talk about it, somebody mention it. You know what, that would be on the news.

Dr. Graham, remember what he said, that would be big news.

Because, of course, don't you think the hospital would protect themselves and put that in the record if that's what happened? Of course.

It's ridiculous, and we know that Annette had tried to get doctors all night long. You heard Nurse David say, yeah, the sister was trying to get -- trying to get me to get a doctor, and then you heard Chibucos say that, yeah, Annette told me to go get Dr. Cundiff.
Does it make any sense that she's trying desperately to get a doctor, and then when a doctor comes, she blocks them? Does it make any sense whatsoever?

You know, I wish I was as smooth as Mr. Patterson. I'm not as smooth, but you can't change the facts. You can't change the records.

I have prepared 20 different pages -- I don't have the time to go through this, but it doesn't matter, because I know you were listening, I know you were watching. You remember all the different times we were talking about the medical records.

The reason I said rewriting the medical records is because they had ridiculous interpretations of what took place in the medical records.

You know, every one of these clot found notes, go ahead, just cross out the words that the trach was -- that there was a clot lodged in the trach, and cross out those words, and now it's sister dislodged the trach, that's what caused the brain damage, that's what they want to insert in each of these records, rewrite those records, that's what they want to do.

And then you remember Nurse David? She's looking at the medical -- she's looking at her own record where it says -- you know what, I don't even want -- I don't need to show it to you, because we saw it 20 different times during the trial.

Do you remember she checked off under neurologic exam that she had clear speech, clear speech, she checked off clear speech, and one expert said, oh, no, that was -- she was writing, and I asked does that mean clear penmanship? I don't understand.

Taking very obvious -- taking various obvious -- very obvious words and just giving ridiculous interpretation. That's what I'm talking about as rewriting, and inserting things that were not events that apparently they're saying took place that aren't in the records.

You know, notes like Dr. Noreiga's talking about an event that took place at 11:00.

You think just because she testified ten years later, that she testified, oh, I remember going to see this patient at 11:00 o'clock ten years ago, and everything was normal. I remember. I remember going and doing that.

Do you remember how she talked about hundreds and thousands of patients that she has seen since then, and now ten years later she remembers that she went? Come on. Come on. Come on. It's ridiculous. Ridiculous.

She was paged to see this patient because she was choking and coughing up blood clots, and she doesn't have the time to write in the chart everything is normal. Ridiculous.

Smoke screen. Smooth, but ridiculous.

Now, the clot found notes. The clot found notes. You know what? They are super credible. They're very important.

Was there a clot lodged in this trach?

Was that -- is that what happened here? Of course, it is.

You have five different doctors, five different doctors from the hospital. They're talking about a clot being lodged, and he -- what Mr. Patterson said was, well, they looked at the records, and they interpreted the records, and then they -- all of them, every one of them misunderstood the record in exactly the same way, they all misunderstood.

Again, ridiculous. You're not going to fall for that. I know that. I know that. That is ridiculous.

Now, those five doctors, what exactly did they do?

Those five doctors looked at the medical records, and they made an interpretation of what took place.

Does that sound familiar? Like maybe the defense experts, that's what they did?

Maybe it's the plaintiff's experts, that's what they did, looked at the records? Okay. Except for one difference. These are five doctors from Mercy Hospital.

Before any litigation they conducted an unbiased evaluation of the records, but that's maybe not even true. Maybe they didn't just review the records. Maybe they were personally involved.

Of course, they were, they were involved in the treatment. Maybe they have
personal knowledge that, in fact, there was a clot that was lodged in the trach. They were there. They were involved in the treatment, and they reviewed the records.

But they're not credible? They don't believe it? On what basis? Has any of those doctors -- any doctor from Mercy Hospital come in here and said, oh, that's not right, that's not right? Do you think that that would be something --

MR. PATTERSON: Objection, improper argument.

THE COURT: Overruled.

MR. SCOTT LANE: You'd expect that, some explanation for why those records -- those entries are not correct. You didn't hear it. You didn't hear it at all.

I want to mention something else about those records.

Do you know why we know that those five clot notes are a hundred percent accurate?

The reason is that's a blowup of this note in the original chart. It's a little tiny note, a little tiny record, and what it says is

--- and you remember this, I'm sure -- 77.2 percent. I just wanted to show you the actual document, because guess what? This is the key to the entire case. Isn't that amazing, this little sheet of paper? You know why? The reason is because it says -- and here's the blowup -- it says --

MR. PATTERSON: I haven't seen this.

MR. SCOTT LANE: Same one you've seen 20 times.

MR. PATTERSON: Okay.

MR. SCOTT LANE: Yes. So, this exhibit on March 1st at 1:18. I would say that 1:18 is approximately 20 minutes after 1:00 o'clock; fair?

At 1:18 the blood gas was 77.2 percent, and I'm sure you remember Dr. Derman, how hard I had to work to get Dr. Derman to admit that 77.2 percent is a blood gas that is extremely low, extremely low.

He said it's low. She can breath. She's getting some oxygen. Doctor, is it super low? It's low. Doctor, come on, isn't it extremely low? Isn't that going to cause brain damage? Yes, yes. Finally admits it.

Why is that so important? Because there are four notes, and you've seen them. There are four of those clot found notes, I like to call them that to summarize it, four of those clot found notes talk about approximately 20 minutes of anoxia, 20 minutes of severe deprivation of oxygen.

Wow, what a coincidence. Isn't that amazing coincidence that this is at 1:18 it shows that she has deprivation of oxygen? Severe deprivation of oxygen?

So, now we've got clot, we've got this, and does it really take a rocket scientist to think that, wait a minute, she's coughing up blood clots through the trach? Fifteen minutes right before the code is called she is coughing up blood clots through the trach and stating that she's choking, and I and behold, oh, my goodness, it's crazy, I can't believe what a conclusion you can come to, one of those clots got lodged in the trach when every single expert talked about the fact that that's a major risk of a trach tube when you have blood clots and clotting and fresh frozen plasma that causes clotting, that's a major risk, and I and behold, it happened, and, wow, it's crazy, I can't believe it. You mean, during suctioning and Ambu bag and repositioning, that somehow these clots, 6.4 millimeter clot, that somehow Dr. Cundiff didn't see it during resuscitation of 20 minutes, somehow this clot disappears in an Ambu bag that pushes it out or sucks it in, and you can't ever see it again or the suctioning device somehow -- wow, that's crazy, I can't believe there's no clot there.

It's ridiculous. It is ridiculous to call five notes by six -- six notes by five different doctors as totally false with absolutely no basis to say that and no explanation as to why they're ridiculous other than, oh, they're later, they're just later.

Well, Mr. Lane says don't -- you can't make it up. That's right. These doctors do not make this stuff up. They're not going to make up that the patient had a blood clot lodged in her trach and suffered brain damage.

All of them are wrong. All of them are
wrong, and none of them knew about this blood gas. Just a super coincidence. Again,
ridiculous.
THE COURT: Mr. Lane, you're down to five minutes.
MR. SCOTT LANE: Okay. And it sure is funny how things change.
Mr. Patterson sure talked a lot about me in opening statement, but you know what I remember Mr. Patterson saying in opening statement when his theory was about the dislodged trach by Annette? I remember him saying you’re going to hear Dr. Reddy say that he had his hands around her trach and actually around the trach tube, and then, lo and behold, during the course of the trial it became abundantly clear that that's not going anywhere. Why? Because Dr. Reddy, himself, said you know what, I didn't see it, and you say I don't remember? He said I didn't see it. I didn't see that happen. Big difference between that and, oh, I don't remember, and then he gets to say, well, look at the record. No. He said, you know what, I really didn't see it. That's a

what he said.
And also, do you remember Dr. Bitran getting on the stand, their expert hematologist, and what did he say? That counsel told him when he was off the stand, that Dr. Reddy had said he didn't see it happen. Do you remember Dr. Bitran saying that?
That's important, because he realized that that can't be the theory any longer. Now its all the sudden, sudden change, sudden change of the trach, somehow, some way. It used to be all about Annette. Not anymore. Now it's a sudden change.

Last thing about causation. You remember -- you heard Dr. Graham testify. You heard Dr. Cooke testify. You heard the negligence. Causation, oh, it's really difficult causation. You get a doctor there to find out about the bleeding, to treat the bleed and protect the airway. Do you think that the doctor came -- just because Dr. Cundiff says in this trial, you know, I don't think I would have done anything different, no, the question is really what is a reasonably well qualified physician going to do under similar circumstances, and this is what's interesting.

Dr. Lavertu, their expert, what did he say when I asked if you got called, what would you have done? He said I would have gone there, I would have identified the bleed, I would have treated the bleed, and most importantly, what did he say? I would have protected the area, and I would have prevented occlusion by protecting the airway.

It's not rocket science. We're talking about clots lodging in the trach. You just protect the area, make sure you suction and make sure you monitor very carefully, and don't let it happen, because that's Rule No. 1.
Lastly, your Honor, you know, and I get emotional, and I'm sorry, but this is important. This is important to everybody in this courtroom. It's important to Jeanette Turner. It's real important, and sympathy shouldn't play a role. It shouldn't. We're not asking for sympathy, nobody is, and Jeanette Turner is the last person to ask for sympathy, but don't bend over backwards and ignore the facts.

It should be very difficult to walk out of here and not award her money, not because of sympathy, but because of the evidence that's been presented in this case over three weeks and 25 witnesses.

Don't ignore the evidence. That's all we ask you is to seriously consider the evidence and think about what's more likely; the evidence of dislodgement, which is right here, nothing, zero, or all of this evidence over here that supports the fact that there was a clot lodged in the trach?

MR. PATTERSON: Your Honor, I object to the length of this Rebuttal.
THE COURT: You're wrapping up, right?
MR. SCOTT LANE: Yes.
THE COURT: One minute.
MR. SCOTT LANE: That is an awesome responsibility that you have, and we appreciate your time and dedication, and we appreciate the fact that you've obviously taken this very seriously, and we know that you're going to take

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your job seriously when you walk back into that
room, but please think about the next chapter,
think about the next chapter for Jeanette. You
have the opportunity to write the chapter.
Don't let Mercy Hospital write the next chapter
for Jeanette Turner. You have the opportunity
to write the chapter, and make sure that her
life is as full as it can be.

And you heard Steve talk about the
elements of damages. All we ask is that you
award an amount that is fair, that is fair and
reasonable, and whatever you think is fair and
reasonable, that's fine, and we appreciate it
very much, and Jeanette, if she were here, and
she would love to be here, she would appreciate
it as well.

Thank you very much for all your time
and attention.

THE COURT: Thank you, Mr. Lane.
All right. Ladies and Gentlemen, that
concludes the closing arguments by counsel.

These are your jury instructions. This
is the law in the case. I'm going to read these
to you at this time. You will be taking all of
this back with you when you go to deliberate.

Now that the evidence is concluded, I
will instruct you as to the law and your duties.
The law regarding this case is contained in the
instructions I will give you. You must consider
the Court's instructions as a whole, not picking
out some instructions and disregarding others.

It's your duty to resolve this case by
determining the facts based on the evidence and
following the law given in the instructions.
Your verdict must not be based upon
speculation, prejudice or sympathy.

Each party, whether a corporation or
individual, should receive your same fair
consideration.

My rulings, remarks or instructions do
not indicate any opinion as to the facts. You
will decide what facts have been proven. Facts
may be proven by evidence or reasonable
inferences drawn from the evidence. Evidence
consists of the testimony of witnesses and of
exhibits admitted by the Court. You should
consider all the evidence without regard to
which party produced it.
Mercy Hospital Hemoglobin Levels

Hospital’s Reference Range = 15.5 to 12

2 Units
Packed Red Blood Cells
1:25 - 2:20
400cc PRBC
2:43 - 5:50
400cc PRBC

Expected Hemoglobin Level if No Blood Loss
Jury Selection and Deselection – Plaintiff and Defendant Perspectives

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This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.
Jury Selection and De-Selection
The Defense Perspective

Goals
- Deselect Dangerous Jurors
- Select Jurors that are Positive or Neutral
- Connect with the Jurors
- Introduce your Theme
- Highlight Favorable Information
- Acknowledge the Weaknesses of your Case
- Make the Right Impression
Developing a Profile

• Consider your theme
• Identify your strengths/weaknesses
• Create a theoretical profile
• Consider the jury questionnaire
• Research

Voir Dire Preparation

• Understand the procedure in the relevant courtroom.
• Plan your questions in advance.
• Appreciate the efficacy of open-ended questions v. yes/no questions.
• Consider the use of opinion questions.
• Beware of psychological based questions.
**Implicit Bias**

- Subconscious perception
- Based upon past experience and memory
- Affects perception, memory and inference
- Evidence of bias observable via:
  - Facial expressions
  - Reaction to others
- [https://implicit.harvard.edu/implicit/](https://implicit.harvard.edu/implicit/)

**Voir Dire Strategy**

- Address the severity of the injury and damages
- Discuss the remedy being sought
- Identify sympathetic v. empathetic
- Ask analogical questions seeking bias
- Ask if the jurors about preconceived notions
- Identify leaders/followers
Practical Tips

• Listen and watch
• Build rapport
• Be respectful
• Ask the follow up questions
• Control the rogue juror

10. Jurors don’t want to be selected.
9. Jurors are bias (and they don’t know it).
8. Jurors respect the judge.
7. You will spend 10x more time on the jury instructions than the jury.
6. Jurors will go online during the trial.
5. Jurors see everything (and it impacts their decision.)
4. Jurors get distracted.
2. Jurors won’t see the case like you do.
1. The trial begins with voir dire.
Thank You!

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Wrongful Death, Survival, and Catastrophic Injury Cases

Presented by the ISBA Tort Law Section

Friday, February 24, 2017

ISBA Regional Office

JURY SELECTION AND DESELECTION

PLAINTIFF AND DEFENDANT PERSPECTIVES

PATRICK A. SALVI
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Purpose of Voir Dire:

The purpose of voir dire is to assure the selection of an impartial jury, free from bias or prejudice. (Kingston v. Turner (1987), 115 Ill. 2d 445, 464, 505 N.E.2d 320, 328.) The trial judge has the primary responsibility for initiating and conducting voir dire, and the scope and extent of voir dire are within his sound discretion. (Kingston, 115 Ill. 2d at 464, 505 N.E.2d at 329; see also 107 Ill. 2d R. 234.) Upon review, an abuse of discretion will be found only if the trial judge's conduct prevented the selection of an impartial jury. (Kingston, 115 Ill. 2d at 465, 505 N.E.2d at 329.) A juror, however, need not be completely ignorant of the facts and issues involved in a case, and it is sufficient if the juror can put aside his opinion and return a verdict based on the evidence presented. Kingston, 115 Ill. 2d at 467, 505 N.E.2d at 330.


Bias vs. Indoctrination:

It is well established that limitation of voir dire questioning may constitute reversible error where its effect is to deny a party a fair opportunity to probe an important area of potential bias or prejudice among prospective jurors. (People v. Lobb (1959), 17 Ill. 2d 287, 161 N.E.2d 325; People v. Moore (1972), 6 Ill. App. 3d 568, 286 N.E.2d 6; Turner v. Wallace (1966), 71 Ill. App. 2d 160, 217 N.E.2d 11.) However, once such a fair opportunity is afforded, it lies within the trial court's discretion to deny further questioning on the matter. *Jines v. Greyhound Corp.* (1964), 46 Ill. App. 2d 364; *United States v. Staszcuk* (7th Cir. 1974), 502 F.2d 875.) And indeed, it may be serious error for the court to fail to cut off voir dire which becomes an attempt to indoctrinate or pre-educate jurors (Scully v. Otis Elevator Co. (1971), 2 Ill. App. 3d 185, 275 N.E.2d 905; *Osborne v. Leonard* (1968), 99 Ill. App. 2d 391, 240 N.E.2d 769; *Christian v. New York Central R.R. Co.* (1960), 28 Ill. App. 2d 57, 170 N.E.2d 183) or to obtain a pledge as to how they would decide under a given state of facts, or determine which party they would favor in the litigation. *Murphy v. Lindahl* (1960), 24 Ill. App. 2d 461, 165 N.E.2d 340.


Challenges for Cause:

Each party may challenge jurors for cause. If a prospective juror has a physical impairment, the court shall consider such prospective juror's ability to perceive and appreciate the evidence when considering a challenge for cause.

735 ILCS 5/2-1105.1
Peremptory challenges:

The right of peremptory challenge is a right to exclude jurors, not to select them. It enables a party to say who shall not try his case, but it does not enable him to select the particular jurors by whom he wishes his case tried.


Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.

735 ILCS 5/2-1106(a).

- Multiple Parties:

In *Newlin v. Foresman*, the defendant-appellant argued that the trial court disproportionately allocated the number of *voir dire* peremptory challenges on the plaintiffs’ side. 103 Ill. App. 3d 1038, 1046 (3rd Dist. 1982). There were two plaintiffs, one plaintiff/defendant, and one defendant in a counterclaim motor vehicle accident case. *Id.* at 1040. At trial, the court allotted nine challenges per side. *Id.* at 1046. The two plaintiffs got 6, the defendant got 6, and the plaintiff/defendant got 3 for each side he was on. *Id.* Holding in favor of the plaintiffs, the court stated that “[t]he trial court may, in its discretion, allow both sides up to three additional challenges for each additional party on the side having the greater number of parties. In this case, the court could have permitted six additional challenges, for a total of 11.” *Id.*
“Batson” Challenge:

The United States Supreme Court in Batson set forth a three-step process for evaluating whether the State's use of a peremptory challenge resulted in removal of venirepersons on the basis of race. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87, 88, 106 S. Ct. at 1723; People v. Williams, 209 Ill. 2d 227, 244, 807 N.E.2d 448, 282 Ill. Dec. 824 (2004). To determine at the first step whether racial bias motivated a prosecutor's decision to remove a potential juror, a court must consider "the totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike to see if they give rise to a discriminatory purpose. Batson, 476 U.S. at 93-94, 96-97, 90 L. Ed. 2d at 85-86, 88, 106 S. Ct. at 1721, 1723. In Johnson v. California, 545 U.S. 162, 170, 162 L. Ed. 2d 129, 139, 125 S. Ct. 2410, 2417 (2005), the Supreme Court noted that the threshold for making out a prima facie claim under Batson is not high: "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." See also Miller-El v. Dretke, 545 U.S. 231, 239, 162 L. Ed. 2d 196, 213, 125 S. Ct. 2317, 2324 (2005) (Miller-El II) (a defendant can "make out a prima facie case of discriminatory jury selection by 'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial").

People v. Davis, 231 Ill. 2d 349, 360 (2008).

- Three-Step Approach:

(1) the defendant must make out a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race; (2) the burden then shifts to the prosecutor to provide a race-neutral reason for excluding the juror in question; and (3) the trial court then weighs the evidence and determines if the defendant proved purposeful discrimination. People v. Easley, 192 Ill. 2d 307, 323-24, 736 N.E.2d 975, 249 Ill. Dec. 537 (2000); People v. Munson, 171 Ill. 2d 158, 174, 662 N.E.2d 1265, 215 Ill. Dec. 125 (1996).

People v. Davis, 233 Ill. 2d 244, 249, 909 N.E.2d 766, 768-69 (2009)

“This rule was extended in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), wherein the Court held: "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." Edmonson, 500 U.S. at 630. (Emphasis added).

Use Jury Questionnaire:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

THOMAS NEUHENGEN;     )
) No.: 12 L 011854
) v.
)   )
) GLOBAL EXPERIENCE SPECIALISTS, INC., a  )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
)   )
) Defendants.

MOTION IN LIMINE 
Allow Jury Questionnaire

NOW COMES the Plaintiff, by and through his attorneys, SALVI, SCHOSTOK & PRITCHARD P.C., and requests this Court to enter an Order in Limine allowing the use of a jury questionnaire. In support of its motion, Plaintiff states as follows:

Attached as Exhibit G is the proposed Jury Questionnaire, which will be answered by the members of the venire after they have been sworn and before oral questioning from the Court or the parties. According to Illinois Supreme Court 234 and its progeny, the Court has broad discretion in setting reasonable limitations for the means by which the parties examine potential jurors to determine the qualifications of individual jurors and for the parties to intelligently exercise peremptory challenges. See People v. Lanter, 230 Ill. App. 3d 72 (4th Dist. 1992). The attached questionnaire has been approved by American Board of Trial Advocates and has been used in Cook County personal injury cases. The expediency with which the questionnaire can be filled out and answers available to the parties will cut down on oral questioning and allow jurors to answer questions privately without fear of embarrassment. The questionnaire will supplement
the Court’s and parties’ oral questioning in such a fashion as to expedite *voir dire*. Plaintiff’s counsel will have two carbon sheets for each questionnaire so that distribution of the venire members’ answers is available to the Court and the parties immediately.

WHEREFORE, Plaintiff respectfully prays this Honorable Court enter an Order *in Limine* allowing the Plaintiff the use of a jury questionnaire.

___GRANTED___GRANTED OVER OBJECTION___DENIED___WITHDRAWN

Respectfully Submitted,

By: ______________________________

One of the Attorneys for Plaintiff

SALVI, SCHOSTOK & PRITCHARD P.C.
22 West Washington Street, Suite 1600
Chicago, IL  60602
(312) 372-1227
JUROR NAME: ___________________________ Age: _______ JUROR #: ___________________________

1. What is the highest grade that you completed in school? ____________________________
   If college, please list any degrees received: ______________________________________

2. Where do you work and what is your job title? ___________________________________

3. What jobs has your spouse or significant other held in the past? _____________________

4. Circle any of the following in which you have received training or education:
   Business  Law  Engineering  Health/Medicine  Psychology  Statistics  Teaching  Insurance

5. Have you ever been the plaintiff (party suing) or a defendant (party being sued) in a lawsuit? ____________
   If YES, please explain: _________________________________________________________

6. Have you ever served as a juror in a civil case? _________________________________
   If YES, what type of civil case was it? __________________________________________
   Were you the foreperson? _____________________________________________________

7. What are your favorite 3 TV shows? ____________________________________________

8. What talk radio do you listen to regularly? ______________________________________

9. What newspapers, magazines, or journals do you read regularly? __________________

10. What groups or organizations do you or your family belong to? _________________

11. List 3 people you admire the most? ____________________________________________

12. List 3 people you admire the least? ____________________________________________

13. Which of the following would you use to describe yourself? (Please circle as many as you think apply to you):
   Analytical  Careful  Compassionate  Detail-oriented  Emotional  Frugal  Generous
   Impulsive  Judgmental  Old-fashioned  Open-minded  Pro-business  Pro-consumer  Sensitive
   Skeptical  Suspicious  Visual  Worrier  Organized  Economical  Thoughtful

14. What do you enjoy doing in your spare time? _____________________________________

15. Do you consider yourself to be conservative, moderate, or liberal? (Circle One)

16. Who makes financial decisions in your home? __________________________________

17. Who writes the checks or pays the bills in your home? __________________________

18. Is there any reason why you could not serve as a juror in this case? ______________
   If YES, please explain: ________________________________________________________

I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct.

______________________________________________________________________________

Juror's Signature  Date
Specific Sum or Amount:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

THOMAS NEUHENGEN;     )
Plaintiff,    ) No.: 12 L 011854
v.       )
) GLOBAL EXPERIENCE SPECIALISTS, INC., a  )
) Nevada Corporation; and FREDERIC   )
) NEIRINCKX, Individually;    )
) Defendants.     )

MOTION IN LIMINE #
Allow Voir Dire On Verdicts Of A Specific Sum

NOW COMES the Plaintiff, THOMAS NEUHENGEN, by and through his attorneys,
SALVI, SCHOSTOK & PRITCHARD P.C., and requests this Court to enter an Order in Limine
allowing voir dire on verdicts of a specific sum. In support of its motion, Plaintiff states as follows:

Under Illinois law, the Plaintiff can ask potential jurors during voir dire whether they would
feel uncomfortable awarding a verdict for millions of dollars or a specific dollar range if the evidence
supported such a sum. DeYoung v. Alpha Constr. Co., 186 Ill. App. 3d 758 (1st Dist. 1989). It is
proper to inquire whether potential jurors have fixed ideas about awards of specific sums of money.
Id. at 765 (citing Kinsey v. Kolber, 103 Ill. App. 3d 933 (1st Dist. 1982)). Additional support can be
found in Scully v. Otis Elevator Co., 2 Ill. App. 3d 185 (1st Dist. 1971); Jines v. Greyhound Corp.,
46 Ill.App3d 364 (1st Dist. 1964); and Murphy v. Lindahl, 24 Ill. App. 2d 461 (1st Dist. 1960), all
of which were cited in Kinsey as “cases where the court held that questions concerning a specific
verdict amount tended to uncover jurors who might have bias or prejudice against large verdicts.”
Kinsey, at 946.
Further, “[t]he purpose of voir dire is to assure the selection of an impartial jury, free from bias or prejudice.” Rub v. Conrail, 331 Ill. App. 3d 692, 696 (1st Dist. 2002) (quoting Dixson v. University of Chicago Hospitals & Clinics, 190 Ill. App. 3d 369, 376 (1st Dist. 1989)). Here, it is essential to inquire about specific sums so as to intelligently exercise peremptory challenge rights pursuant to 735 ILCS 5/2-1106. Especially in light of punitive damages as an element of this case, questions involving specific sums are essential to the selection of an impartial jury free from bias or prejudice.

WHEREFORE, Plaintiff, [REDACTED], respectfully prays this Honorable Court to enter an Order in Limine allowing voir dire on verdicts of a specific sum.

Respectfully Submitted,

By: ________________________________
One of the Attorneys for Plaintiff

SALVI, SCHOSTOK & PRITCHARD P.C.
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Chicago, IL 60602
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Product Liability and Wrongful Death Cases

- **Timothy J. Cavanagh**, Cavanagh Law Group, Chicago
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This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
I. Introduction

Product liability actions present unique challenges to plaintiff attorneys. They require an in-depth understanding of the law and facts in order to develop effective themes that will persuade jurors and maximize verdicts. The following materials should serve as reference guide for the basics of product liability claims, including product liability causes of action and defenses. I have also included some quick tips for creating better themes in product liability cases and a list of additional resources that may be helpful for attorneys handling product liability cases.

II. State of the Law

Illinois recognizes three general categories of product defects: (1) defects in a product’s design; (2) defects in the way a product was manufactured; and (3) informational defects, such as inadequate warnings, directions, or instructions accompanying a product. Illinois Pattern Jury Instructions, Civil, No. 400.00 (2007) (hereinafter, IPI Civil (2007) No. 400.00).

Product liability actions arise under strict liability, negligence, and contract theories and, as a whole, are open to a number defenses not otherwise available. In Illinois, strict liability for products is codified in 735 ILCS 5/2-2101, whereas negligence and breach of warranty causes of

**Thank you to Olwen Jaffe, Law Clerk, for helping me pull together these materials.**
action are brought under their traditional doctrines. Illinois recognizes several defenses to strict
liability actions, such as assumption of the risk and unforeseeable misuse. Additionally,
contributory negligence rules may reduce or bar damages in negligence cases.

III. Causes of Action

a. Strict Liability

i. Elements

To prove a prima facie case for strict liability, the plaintiff must show that (1) the injury
or damage resulted from a condition of the product manufactured or sold by the defendant; (2)
the condition was unreasonably dangerous; and (3) the condition existed at the time the product
left the manufacturer’s control. IPI Civil (2007) No. 400.00.

ii. Additional Requirements

Depending on the type of defect, courts may read in additional requirements to the
fundamental elements of strict product liability. First, Illinois courts have emphasized a general
foreseeability requirement in strict liability product defect cases. Illinois law requires that both
the person using the product and the way in which the product is being used are “objectively
reasonable to expect.” Kirk v. Michael Reese Hosp. & Med. Ctr., 117 Ill.2d 507, 513 N.E.2d 387,

Second, Illinois caselaw has created two tests for determining whether a product is
“unreasonably dangerous” due to a defect in a product’s design. Courts will start by applying the
“consumer expectations” test. This test holds a manufacturer-defendant liable if the product’s
danger is beyond what would be contemplated by an ordinary consumer with ordinary
knowledge common to the community’s characteristics. IPI Civil (2007) No. 400.00. After
applying the consumer expectations test, courts may also apply a “risk-utility” test. The risk-utility test weighs the benefits of the product against the risk of danger inherent in the design. Under this test, a product is unreasonable dangerous is the inherent’ risk of danger outweighs the designs benefits to the individual and the public at large. IPI Civil (2007) No. 400.00.

Courts will consider number of factors in a risk-utility analysis. Those factors include, but are not limited to: (1) the availability and feasibility of alternate designs at the time of the product’s manufacture; (2) whether the design conformed to design standards in the industry, design guidelines provided by an authoritative voluntary organization, or design criteria set by legislation or governmental regulation; (3) the utility of the product to the user and the public as a whole; (4) the safety aspects of the product, including the likelihood that it will eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; and (5) any instructions accompanying the product. Jablonski v. Ford Motor Co., 2011 IL 110096, ¶85.

Finally, a product will also be unreasonably dangerous if a manufacturer failed to adequately warn of a danger or instruct on the proper use of a product. Nevertheless, manufacturers do not have a duty to warn of obvious and generally appreciated dangers or of risks that the manufacturer neither knew nor should have known about. IPI Civil (2007) No. 400.00.

b. Negligence

i. Elements

In any negligence case, the traditional elements of negligence apply. Namely, the plaintiff must establish: (1) the existence of a duty; (2) a breach of that duty; (3) an injury that was
proximately caused by that breach; and (4) damages. *Jablonski*, 2011 IL at ¶ 82. The plaintiff must establish that the manufacturer- or seller-defendant owed the plaintiff a duty of care that was violated and resulted in damages to the plaintiff from an injury that was proximately caused by the breach.

ii. Additional Requirements

In 2011, the Illinois Supreme Court applied the strict liability risk-utility test to the breach of duty analysis in negligence cases. *Jablonski*, 2011 IL 110096. The Court held that the traditional duty analysis in negligence cases required a balancing of the utility offered by the product against the risks inherent in the design of the product to determine if the manufacturer breached their duty to design a safe product. *Id.* at ¶86. Furthermore, the court noted that while conformity with industry standards was a relevant factor to be considered in the risk-utility test, failure to conform to industry standards was not dispositive of negligence. *Id.* at ¶ 92.

c. Breach of Warranty

Contract claims can also be brought for product liability actions. Both breach of implied and express warranty causes of action are available and can be viable alternatives to traditional tort approaches to product liability cases.

IV. Defenses

a. Statute of Limitation

Illinois has a two year statute of limitation for personal injury actions. 735 ILCS 5/13-202. However, an exception is made for product liability cases when a plaintiff cannot discover the injury or cause of injury until sometime after the two years has passed, as sometimes occurs in medical product or toxic substances cases. In such situations, Illinois law requires the plaintiff
to bring the action within two years of the date when the plaintiff knew, or with reasonable
diligence should have known, of the existence of the injury, but no more than eight years after
the date on which the injury occurred. 735 ILCS 5/13-213(d). Furthermore, in these cases, if the
plaintiff was under 18, or legally disabled at the time of the injury, the period of limitations does
not begin to run until the person turns 18, or the disability is removed. Id.

b. Statute of Repose

Illinois law bars strict liability actions not commenced within 12 years from the date of
the first sale, lease, or delivery of possession by a seller, or 10 years from the date of the first
sale, lease, or delivery of possession to its initial user, consumer, or non-seller, whichever period
is earlier, for any product that is claimed to have injured or damaged the plaintiff. 735 ILCS
5/13-213(b).

c. Illinois Distributor Statute

Also known as the “seller’s exception,” the Illinois Distributor Statute requires non-
manufacturing defendants in product liability actions to be dismissed from the action if the non-
manufacturing defendant certifies the correct manufacturer of the subject product. Dismissal is
mandatory unless the plaintiff can show that the defendant: (1) exercised some significant
control over the design or manufacture of the product, or provided instructions or warnings to the
manufacturer relative to the alleged defect in the product which caused the injury, death or
damage; (2) had actual knowledge of the defect in the product which caused the injury death or
damage; or (3) created the defect in the product which caused the injury, death, or damage. 735
ILCS 5/2-621.
If a non-manufacturer defendant is dismissed, a plaintiff may also move to vacate the dismissal by showing one or more of the following: (1) the applicable period of statute of limitation or statute of repose bars the assertion of a cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; (2) the identity of the manufacturer given to the plaintiff by the certifying defendant(s) was incorrect; (3) the manufacturer no longer exists, cannot be subject to the court’s jurisdiction, or, despite due diligence, is not amenable to service of process; (4) the manufacturer is unable to satisfy any judgment as determined by the court; or (5) the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff. 735 ILCS 5/2-621.

d. **Contributory Negligence**

In negligence cases, damages are barred if the plaintiff’s contributory fault is found to be more than 50% of the proximate cause of the injury. 735 ILCS 5/2-1116. Similarly, contributory fault of less than 50% may proportionately reduce a plaintiff’s damages. *Id.*

e. **Assumption of the Risk**

In strict liability actions, assumption of the risk arises when a plaintiff knows and appreciates the risk of injury and proceeds without regard for the danger. IPI Civil (2007) No. 400.00. Courts use a subjective test based on the specific plaintiff’s knowledge, understanding, and appreciation of the danger. *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 614 N.E.2d 140 (1st Dist. 1993). It is not, however, an automatic complete defense. Instead, comparative fault principles apply and recovery will barred only if the plaintiff’s fault in assuming the risk is more than 50 percent. 735 ILCS 5/2-1116.

f. **Consumer Misuse**
Caselaw defines misuse as “the use of a product for a purpose neither intended nor objectively foreseeable by a reasonably prudent manufacturer.” IPI Civil (2007) No. 400.00.

Historically, any kind of misuse is not an affirmative defense. More recently, courts have started to draw a distinction between unforeseeable and foreseeable misuse. Most appellate courts have concluded that unforeseeable misuse is not an affirmative defense, but instead constitutes comparative fault. IPI Civil (2007) No. 400.00. Other appellate courts have, however, held that unforeseeable misuse is an affirmative defense that will reduce a plaintiff’s damages. Arellano v. SGL Abrasives, 246 Ill.App.3d 1002, 617 N.E.2d 130, 186 Ill.Dec. 891 (1st Dist. 1993). The Illinois Pattern Jury Instructions do not recommend instructing on misuse, but without definitive clarification from the Illinois Supreme Court, the status of unforeseeable misuse as an affirmative defense is a gray area of law. IPI Civil (2007) No. 400.08. Foreseeable misuse, on the other hand, is still not a defense and does not affect the defendant’s responsibility. IPI Civil (2007) No. 400.00.


g. State of the Art

State of the art is not a defense to a product liability action. Bruce Schoumacher, Illinois Law Manual 5 (2012). A defendant may, however, introduce relevant evidence of compliance with established standards. Id. Similarly, a plaintiff may also introduce evidence of alternative designs to determine if a product was unreasonably dangerous. Id.

V. Themes

Developing and using themes is a crucial part of obtaining a favorable verdict in product liability cases that should not be underemphasized. Nevertheless, evidence wins cases. It is of equal importance to search for prior lawsuits and similar prior incidences that would have
provided notice to manufacturers and distributors when conducting your initial investigation of a product liability claim. Still, inexperienced attorneys may find creating a persuasive and successful theme one of the most difficult aspects of a product liability case. Therefore, the following quick tips offer ways to create a logical and straightforward narrative that will be easy for any juror to understand.

a. Simplify the Science

Jurors often complain that trial attorneys fail to explain or simplify complex issues. It is best to presume that jurors will not understand complex scientific concepts. Break the science down into easy to digest soundbites and use analogies.

b. Use Rhetorical Tools and Techniques

Rhetorical tools are your friend. Jurors are presented with an overwhelming amount of information in a short period of time. Use techniques such as repetition, metaphors, and tone of voice to help jurors comprehend and remember key information easily.

c. Anticipate Defenses and Use Themes to Rebut Them

Product liability is unique in the multiplicity of defenses available to defendants. Anticipate the defenses that will be raised. Then find ways to the incorporate your responses into your theme.

VI. Additional Resources

c. Illinois Pattern Jury Instructions, Civil, No. 400.00 (2007).
e. Illinois Institute for Continuing Legal Education *Products Liability Practice Handbook* (2014 Ed.)
Strict Product Liability

Introduction

Strict product liability is imposed without regard to traditional questions of privity, fault, or the user's ordinary negligence. It was developed in response to the inadequacy of negligence and warranty remedies. Product liability cases based on negligence, warranties, or other contractually-related theories of liability are not covered by these instructions.

The Origins of Strict Liability

The evolution of strict product liability began with the imposition of liability on sellers of food when a special implied warranty theory was developed. Race v. Krum, 222 N.Y. 410, 118 N.E. 853 (1918); Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815). Although a privity requirement persisted for a time, even in food cases, that requirement was eventually abolished and the right to recover was extended to the injured consumer. Tiffin v. Great Atl. & Pac. Tea Co., 18 Ill.2d 48, 162 N.E.2d 406 (1959); Patargias v. Coca-Cola Bottling Co., 332 Ill.App. 117, 74 N.E.2d 162 (1st Dist. 1947); Welter v. Bowman Dairy Co., 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

The special warranty in the case of food was gradually expanded to intimate items such as hair dye and soap. See e.g., Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954). In 1960, the landmark decision of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), further extended the special warranty theory to all products. The Henningsen decision, although not employing the term “strict liability in tort,” resolved the privity dilemma and articulated the rationale upon which the total transition from special warranty to strict liability in tort would ultimately be made:

The burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . . .

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity . . . .

Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial. Henningsen v. Bloomfield Motors, Inc., supra, 32 N.J. at 379-384, 161 A.2d at 81-84.
After Chief Justice Traynor of the California Supreme Court authored the decision adopting strict liability in tort in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963), the American Law Institute adopted Section 402A of the Restatement (Second) of Torts in 1964 which embraced the theory of strict liability in tort for defective products. The Illinois Supreme Court's decision in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), soon followed. The *Suvada* decision is the touchstone of strict liability in Illinois, and, although refinements have been supplied by subsequent decisions, the basic element of the theory enunciated therein remains unchanged today:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not as assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products ... made clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by [its] defective products unless those rules also serve the purposes for which such liability is imposed. *Suvada v. White Motor Co.*, 32 Ill.2d at 621, 210 N.E.2d at 187 (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701).

Strict liability in tort for defective products is not a doctrine of absolute liability which entitles a person injured while using a product to recover from any member of the chain of production or distribution; it does not make the manufacturer, distributor or retailer an insurer of the consumer's safety. *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 111, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983); *Artis v. Fibre Metal Prods.*, 115 Ill.App.3d 228, 450 N.E.2d 756, 71 Ill.Dec. 68 (1st Dist. 1983). “Fault,” in the context of strict product liability, is the act of placing an unreasonably dangerous product in the stream of commerce.

**Parties Subject to Strict Product Liability**


Legislation has modified the common law strict liability of non-manufacturers in the chain of distribution. The Distributor's Act, 735 ILCS 5/2-621, permits dismissal of strict liability claims against non-manufacturers not at the source of the chain of distribution in a product liability action. The dismissal must be based on an affidavit filed by the defendant that correctly identifies the manufacturer of the product. The court, however, cannot enter a dismissal if the plaintiff shows that the defendant filing the affidavit has exercised some significant control over
the design or manufacture of the product, or has provided instructions or warnings to the 
manufacturer relative to the alleged defect in the product, 735 ILCS 5/2-621(c) (1), or that the 
defendant had actual knowledge of the alleged defect, 735 ILCS 5/2-621(c) (2), or that the 
defendant created the alleged defect in the product, 735 ILCS 5/2-621(c) (3). Moreover, the 
plaintiff can move to vacate any order of dismissal if the statute of limitations has run against the 
manufacturer, 735 ILCS 5/2-621(b) (1), or if the manufacturer is not subject to personal 
jurisdiction in Illinois, 735 ILCS 5/2-621(b) (3).

Although strict product liability generally extends to sellers of all products, strict liability 
may not extend to sellers of used products under certain circumstances. Peterson v. Lou Bachrodt 
Chevrolet Co., 61 Ill.2d 17, 329 N.E.2d 785 (1975) (seller of used car not strictly liable); Timm v. 
Indian Springs Recreation Ass'n, supra.

ELEMENTS OF PLAINTIFF'S CASE

Plaintiff's Prima Facie Case

To recover in strict product liability, a plaintiff must plead and prove that the injury or 
damage resulted from a condition of the product manufactured or sold by the defendant, that the 
condition was an unreasonably dangerous one, and that the condition existed at the time the 
product left the manufacturer's control. (Coney, supra, 97 Ill.2d at 111; Hunt v. Blasius, 74 Ill.2d 
203, 210 (1978), Suvada, supra, 32 Ill.2d at 623; Restatement Second of Torts, Section 402A). 
The determination of whether a product is defective, and therefore unreasonably dangerous, is 
ordinarily a question of fact for the jury (see Renfro v. Allied Indus. Equip. Corp., 155 Ill.App.3d 
140, 155 (1987)), and, in making its determination, the credibility of the witnesses and the 
conflicts in the evidence are to be resolved by the jury. Korando v. Uniroyal Goodrich Tire Co., 
159 Ill.2d 335 (1994).

Although the defendant's role in commerce will seldom be an issue, the plaintiff may also 
be required to prove that the defendant was in the business of selling the product and not solely 
an installer. Restatement (Second) of Torts §402A (1965).

The plaintiff may create an inference that the product was unreasonably dangerous by 
direct or circumstantial evidence that there was no abnormal use of the product, that there was no 
reasonable secondary cause of the injury, and that the product failed to perform in the manner 
reasonably to be expected in light of its nature and intended function. Tweedy v. Wright Ford 
Sales, 64 Ill. 2d. 570 (1976); Doyle v. White Metal Rolling & Stamping Corp., 249 Ill.App.3d 
370, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993); see IPI 400.01.01 and 400.02.01.

Meaning of “Unreasonably Dangerous”

See Comment to IPI 400.06 and 400.06A for a discussion of the case law defining 
“unreasonably dangerous.”

Types of Defects

Products can be defective and unreasonably dangerous in any of three ways. First, a 
particular item may contain a manufacturing flaw. Second, the product may be defectively
designed. Third, the product may have an informational defect (inadequate warnings, directions, or instructions affixed to or accompanying the product).

**Manufacturing Defects**


**Design Defects**

A product may be defective because its design renders it unreasonably dangerous.

There are two tests that may be used to establish a design defect. The first, which goes back to the original *Restatement (Second) of Torts* §402A, is known as the “consumer expectation” test. Under this test, the danger must go beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics. *Restatement (Second) of Torts* §402A Comment (I) (1965); *Riordan v. Int'l Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985).

In addition to the consumer expectation test, the plaintiff may choose to prove a strict product liability case under the “risk-utility” test. Under this test, a product is unreasonably dangerous, subjecting a manufacturer to liability, if the design is a cause of the injuries and if the benefits of the challenged design are outweighed by the design's inherent risk of danger. *Lamkin v. Towner*, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990); *Palmer v. Avco Distrib. Corp.*, 82 Ill.2d 211, 412 N.E.2d 959, 45 Ill.Dec. 377 (1980). These principles were fully discussed by the Supreme Court in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai*, 224 Ill.2d 247 (2007); and *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 327 Ill. Dec. 1, 901 N.E.2d 329 (2008).

**Inadequate Warnings and Instructions**


A defendant has no duty to warn of dangers of which it neither knew nor should have known at the time the product was manufactured. *Byrne v. SCM Corp.*, 182 Ill.App.3d 523, 538 N.E.2d 796, 131 Ill.Dec. 421 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.*, 140 Ill.App.3d 896, 489 N.E.2d 394, 95 Ill.Dec. 173 (1st Dist. 1986) (air gun manufacturer had no duty to warn of dangers of which it neither knew nor should have known);
Elgin Airport Inn, Inc. v. Commonwealth Edison Co., 89 Ill.2d 138, 432 N.E.2d 259, 59 Ill.Dec. 675 (1982) (supplier of electricity not strictly liable for failure to warn when it neither knew nor should have known about abnormal current); Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec. 304 (1980) (pharmaceutical manufacturer can only be held liable for its failure to warn of those risks it knew or should have known at the time of manufacture).

Foreseeability

Both the person using the product and the use to which it is being put must be reasonably foreseeable. In Winnett v. Winnett, 57 Ill.2d 7, 310 N.E.2d 1 (1974), the Illinois Supreme Court emphasized the foreseeability requirement:

In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product, a position rejected by this Court in Suvada.


Damages

The plaintiff in a strict liability action may recover compensatory damages. Recovery in strict liability always has included damage to the product itself. Suvada v. White Motor Co., supra. However, under the so-called “Moorman” doctrine (based on Moorman Mfg. Co. v. Nat'l Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)), a plaintiff cannot recover in tort for solely economic losses. In Moorman, the court defined economic loss as:

 damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property *** . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. 91 Ill.2d at 82, 435 N.E.2d at 449, 61 Ill.Dec. at 752.

owners cannot recover economic losses from developer); Redarowicz v. Ohlendorf, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982).


AFFIRMATIVE DEFENSES

Plaintiff's Contributory Fault—Assumption of the Risk

One of the refinements to the Suvada decision was made in Coney v. J.L.G. Indus., Inc., 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983). Since it was “demanded by today's society” and in order to produce “a more just and socially desirable distribution of loss” in negligence actions, Illinois adopted the concept of the “pure form” of comparative negligence in Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Adopting the same reasoning which supported its decision in Alvis, and after determining that the vast majority of jurisdictions have found comparative fault theories to be applicable to strict liability cases, the Supreme Court in Coney adopted comparative fault principles in strict product liability actions. The Court specifically found that the application of comparative fault principles in a product liability action would not frustrate the Court's fundamental reasons for adopting strict product liability as set out in Suvada. Coney v. J.L.G. Indus., Inc., supra at 116.

However, plaintiff's fault is a defense only if it constitutes assumption of the risk. Plaintiff's ordinary contributory negligence is not a defense to strict product liability when that negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. Coney v. J.L.G. Indus., Inc., supra at 118-119. A consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect, as opposed to assuming a known risk, is not a defense to a strict product liability claim. Id.

The affirmative defense of assumption of the risk requires the defendant to prove that the plaintiff knew of the specific product defect, understood and appreciated the risk of injury from that defect, and nevertheless used the product in disregard of the known danger. Williams v. Brown Mfg. Co., 45 Ill.2d 418, 426-427 (1970) A user may assume a product is safe; however, if the user finds a defect and proceeds to use the product, the user assumes the risk of injury or property damage. The test of whether the plaintiff has assumed the risk is subjective; the conduct and knowledge of the plaintiff is at issue. The jury considers the plaintiff's age, experience, knowledge, understanding, and the obviousness of the defect in considering assumption of the risk. Williams v. Brown Mfg. Co., supra at 430-431; see Hanlon v. Airco Indus. Gases, 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991); Calderon v. Echo, Inc., 244 Ill.App.3d 1085, 1091,614 N.E.2d 140 (1st Dist. 1993).

Comparative fault principles apply to the plaintiff's assumption of the risk. Coney v. J.L.G. Indus., Inc., supra. If plaintiff's fault in assuming the risk is 50% or less of the total fault that proximately caused the injury or damage, plaintiff's damages are reduced by that percentage. But under legislation enacted in 1986, the plaintiff is barred from recovery if the plaintiff's assumption of the risk is “more than 50% of the proximate cause of the injury or damage for which recovery is sought.” 735 ILCS 5/2-1116; Gratzle v. Sears, Roebuck & Co., 245 Ill.App.3d
Misuse--Foreseeable and Unforeseeable


Prior to Coney, an unforeseeable misuse of the product by the plaintiff was not recognized as an affirmative defense. The issue of unforeseeable misuse usually “arise[s] in connection with [the] plaintiff's proof of an unreasonably dangerous condition or in proximate causation, or both.” Williams v. Brown Mfg. Co., 45 Ill.2d 418, 425, 261 N.E.2d 305 (1970) (“plaintiffs who ‘misuse’ a product--use it for a purpose neither intended nor ‘foreseeable’ (objectively reasonable) by the defendant--may be barred from recovery”).

In Whetstine v. Gates Rubber Co., 895 F.2d 388, 393 (7th Cir. 1990), the Seventh Circuit noted:


In Coney v. J.L.G. Indus., Inc., supra, the Supreme Court, referring to its Williams decision, said that “misuse” was a defense, and went on to hold that “misuse” would no longer bar recovery but rather would be incorporated into the concept of comparative fault. Importantly, the decision did not define “misuse,” but its reference to the Williams decision leads to the conclusion that the court was referring to unforeseeable misuse.

In contrast to unforeseeable misuse, foreseeable misuse has never been a defense to a strict product liability action at all, since such a misuse, being foreseeable, does not affect the defendant's responsibility. The manufacturer of a product has always had the duty to furnish a product which is safe for foreseeable misuses, as well as for its intended uses. Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill.1993).

Thus, the appellate court cases decided since Coney appear to conclude that the former rule--that unforeseeable misuse goes to the liability issue--has been replaced by the rule that unforeseeable misuse constitutes comparative fault, a damage-reducing factor. Several appellate court decisions have noted that misuse--defined as using the product for a purpose which is neither intended nor foreseeable--is an affirmative defense which operates to reduce the plaintiff's damages. Arellano v. SGL Abrasives, 246 Ill.App.3d 1002, 1010, 617 N.E.2d 130, 136, 186 Ill.Dec. 891, 897 (1st Dist. 1993) (finding of “misuse” vacated); Varilek v. Mitchell Eng'g

Wheeler held:


Dicta in Lamkin v. Towner, 138 Ill.2d 510, 531, 563 N.E.2d 449, 458, 150 Ill.Dec. 562, 571 (1990) commented that “neither a retailer nor a manufacturer can be held strictly liable for injuries resulting from the misuse of its product.”

Introduction revised December 2007.
400.01  **Strict Product Liability--Issues**

[1]. The plaintiff claims that he was injured [while using] [as a result of the use of] the [product name, e.g. the hammer]. Plaintiff claims that there existed in the [product name] at the time it left the control of the defendant a condition which made the [product name] unreasonably dangerous in one or more of the following respects:

*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the conditions which are claimed made the product unreasonably dangerous and which have not been withdrawn or ruled out by the court and are supported by the evidence.*

[2]. The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control];

[that any of the claimed conditions existed in the [product name] at the time it was in its control];

[that any claimed condition of the [product name] made it unreasonably dangerous];

[that any claimed condition of the [product name] was a proximate cause of plaintiff's injuries]; [and]

[that plaintiff was injured to the extent claimed.]

[4]. [The defendant also claims that the plaintiff assumed the risk of injury in one or more of the following respects: (Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of the risk on his part was a proximate cause of his injuries.]

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

This instruction must be modified to fit the allegations of the pleadings. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used as they apply to the particular case. Whenever required, variations consistent with the pleadings and proof should be used.
In a case where the product is not “in use” at the time of the occurrence, the word “by” may be substituted for the bracketed material on use in paragraph [1].

In the event there is an issue as to whether the defendant was in the business of supplying the particular product involved, the instruction must be modified by adding that particular element to the specific issues included in the instruction.

Fill in the blanks with the name of the product. In some cases, the product may be a component part.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

**Comment**

An issues instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist. 1953), that the issues made by the pleadings be concisely stated without characterization and without undue emphasis.

The elements necessary to state a cause of action in strict product liability are set forth in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The plaintiff must prove that his injury and damage proximately resulted from a condition of the product, that the condition made the product unreasonably dangerous, and that the condition existed at the time the product left the defendant's control.

The term “condition” used in *Suvada* is employed in these instructions although some of the cases use the word “defect” instead of “condition.” *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Wright v. Massey--Harris, Inc.*, 68 Ill.App.2d 70, 215 N.E.2d 465 (5th Dist. 1966); *Haley v. Merit Chevrolet*, 67 Ill.App.2d 19, 214 N.E.2d 347 (1st Dist. 1966). *Restatement (Second) of Torts* §402A (1965) speaks in terms of a “defective condition.” The phrase “unreasonably dangerous” in the *Suvada* case is used in this instruction because it is conversational and free from any connotation of traditional concepts of fault that might arise from the use of the word “defect.”

The phrase “unreasonably dangerous” has its origins in §402A of the *Restatement (Second) of Torts* (1965). Since the Illinois Supreme Court adopted the phrase in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), most Illinois reviewing courts have used that phrase. It is defined in IPI 400.06.

Dean Wade has suggested in *Strict Tort Liability of Manufacturers*, 19 S.W. L.J. 5, 15 (1965), that “the test of imposing strict liability is whether the product is unreasonably dangerous, to use the words of the Restatement. Somewhat preferable is the expression ‘not reasonably safe.’” The Illinois Supreme Court in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 343, 247 N.E.2d 401, 403 (1969), quoted from Wade's article but did not adopt his suggestion. In *Rios v. Niagara Mach. & Tool Works*, 59 Ill.2d 79, 83, 319 N.E.2d 232, 235 (1974), the Court indicated that the terms “unreasonably dangerous” and “not reasonably safe” are interchangeable. However, the *Restatement*, and *Suvada* and all its progeny, furnish persuasive authority that the jury should be instructed that it is the “unreasonably dangerous” condition of the product which leads to liability. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 250, 256, 259 (2007) again affirmed that the basis of strict product liability in Illinois is whether the product is “unreasonably dangerous.”
400.01.01    Strict Product Liability--Issues--Non-Specific Defect

[1]. [Under Count __,] the plaintiff claims that he was injured [while using] [as a result of
the use of] the [product name] and that there existed in the product at the time it left the control
of the defendant a condition which made it unreasonably dangerous because

(a) [describe the occurrence, e.g., “In running off the road] the [product name] did not
perform in the manner reasonably to be expected in light of its nature and intended
function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

[2]. The plaintiff further claims that the unreasonably dangerous condition of the
[product] was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control;]

[that the [product] was in an unreasonably dangerous condition at the time it left the
defendant's control;]

[that the [product] failed to perform in the manner reasonably to be expected in light of its
nature and intended function;]

[that the plaintiff was using the [product] in a normal manner;]

[that there was no other reasonable cause of the product's failure to perform;]

[that any unreasonably dangerous condition of the [product] was a proximate cause of the
plaintiff's injuries], and

[that the plaintiff was injured to the extent claimed.]

[4]. [The defendant claims that the plaintiff assumed the risk of injury in one or more of
the following respects:
(Set forth in simple form without undue emphasis or repetition the affirmative allegations in the
answer which have not been withdrawn or ruled out by the court and are supported by the
evidence.)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause
of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any
assumption of risk on his part was a proximate cause of his injuries.]
Notes on Use

IPI 400.01.01 (issues) and IPI 400.02.01 (burden of proof) should be given when the plaintiff does not allege a specific defect in the product but rather seeks to create the inference that the product was defective by direct or circumstantial evidence that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. Under such circumstances, plaintiff must also prove that there was no abnormal use of the product and that there was no secondary cause of the product's failure to perform properly. Tweedy v. Wright Ford Sales, 64 Ill.2d 570, 574, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976). The failure to instruct the jury about the plaintiff's burden to prove the absence of abnormal use and the absence of secondary causes has been held to be error. Doyle v. White Metal Rolling & Stamping Corp., 249 Ill.App.3d 370, 378-379, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993).

See also the Notes on Use to IPI 400.01.
400.02  Strict Product Liability--Burden of Proof

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction is designed to be used with IPI 400.01.

See Notes on Use to IPI 400.01. The bracketed material in the introductory paragraph must be used when plaintiff claims, and there is evidence tending to show, that more than one condition rendered the product unreasonably dangerous.

IPI 21.01 (Meaning of Burden of Proof) should be given with this instruction.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

Comment

See Comment to IPI 400.01.
400.02.01    Strict Product Liability--Burden of Proof--Non-Specific Defect

[Under Count __], The plaintiff has the burden of proving each of the following propositions:

First, that there existed in the [product] a condition which made the [product] unreasonably dangerous because

(a) [describe the occurrence, e.g., “In running off the road”] the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

Second, that the condition existed at the time the [product] left the control of the defendant;

Third, that the plaintiff was injured; and

Fourth, that the unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes revised December 2007.

Notes on Use

Use with IPI 400.01.01 and IPI 21.01.
B400.02.01 Strict Product Liability--Burden of Proof--Assumption of Risk

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant. But if, on the other hand, you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff assumed the risk of injury.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff had actual knowledge of the condition which the plaintiff claims made the [product] unreasonably dangerous;

B: That the plaintiff understood and appreciated the risk of injury from that condition and [proceeded] [continued] to use the [product];

C: That the condition known to plaintiff was a proximate cause of the plaintiff's claimed [injury] [damage].

[However, the plaintiff's inattentive or ignorant failure to discover or guard against the unreasonably dangerous condition of the [product] does not constitute assumption of the risk.]

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved all of the propositions required of the defendant, then your verdict should be for the plaintiff and the plaintiff's damages will not be reduced.

If you find from your consideration of all the evidence that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.
If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the [injury] [damage] for which recovery is sought, then your verdict should be for the plaintiff and the plaintiff's damages will be reduced by the percentage of the plaintiff's fault in assuming the risk.

If you find that the plaintiff's [injury] [damage] was proximately caused by an unreasonably dangerous condition of the product and if you also find that the plaintiff assumed the risk of his injury, you will determine the plaintiff's proportion or percentage of the total fault by comparing the extent to which the plaintiff's assumption of the risk and the conduct of [other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage]. If you determine the plaintiff's percentage of the total fault was 50% or less, you will write that percentage on the appropriate line on your verdict form.

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

This should be used with IPI 400.01 and IPI 21.01.

If there is no issue of assumption of risk, IPI 400.02 should be used instead of this instruction.

If the case involves an affirmative defense (other than assumption of risk), this instruction (as well as IPI 400.01) should be modified as appropriate to include that defense.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

The bracketed portion of the last paragraph should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

The bracketed paragraph following paragraph C should be used when there is evidence of the plaintiff's negligent failure to discover the defect and the court determines that the paragraph will assist the jury in its determination of this issue.

**Comment**

In *Gratzie v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability, and therefore the jury must be instructed in accordance with §2-1107.1 (735 ILCS 5/2-1107.1) that the defendant shall be found not liable if the plaintiff's contributory fault (which includes assumption of the risk) exceeds 50% of the total fault proximately causing plaintiff's injury.
B400.03. **Strict Product Liability—Assumption of Risk—Damage Reduction**

If you find that the plaintiff's injury was proximately caused by an unreasonably dangerous condition of the [product], and if you also find that the plaintiff assumed the risk of his injury, and if you further find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, you must then determine the amount of damages to be awarded by you [under Count _] as follows:

First, determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if the plaintiff had not assumed the risk;

Second, determine what portion or percentage is attributable solely to the plaintiff's fault in assuming the risk, considering the extent to which the plaintiff's assumption of risk, [the conduct of other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage];

Third, reduce the total amount of the plaintiff's damages by the proportion or percentage of plaintiff's assumption of the risk.

The resulting amount, after making such reduction, will be the amount of your verdict [under Count _].

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

This instruction together with IPI B400.02.01 should be given in all cases where assumption of the risk of the plaintiff is an issue.

The bracketed portion of paragraph “Second” should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

**Comment**

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability.
400.04 Strict Product Liability–Proximate Cause–Definition

When I use the expression “proximate cause,” I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

Instruction and Notes on Use revised September 2015.

Notes on Use

This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death. In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short version without the bracketed material may be used.

Comment

The unreasonably dangerous condition must be a proximate cause of the plaintiff's injury or damage. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); Restatement (Second) of Torts §402A (1965). On proximate cause, see Comment to IPI 15.01.
400.05  Strict Product Liability--Assumption of Risk--Factors To Be Considered

The committee recommends that no instruction be given on the evidentiary factors to be considered in determining whether the plaintiff has assumed the risk.

*Instruction and Comment revised December 2007.*

**Comment**

The test to be applied in determining the question of whether a plaintiff had the requisite knowledge of the danger is fundamentally a subjective test. It is the knowledge, understanding and appreciation of the particular plaintiff which is in issue and not that of the “reasonable man.”

In considering the propositions of whether the particular plaintiff knew of the condition, understood and appreciated the risk of injury, and proceeded to encounter the danger, the jury may consider evidence in addition to the plaintiff's own testimony as to his state of mind. The fact finder is not compelled to accept as true the statements of the plaintiff regarding his state of mind, but may consider all of the facts established by the evidence, including “the factors of the [plaintiff's] age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses.” *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d 64, 264 N.E.2d 170 (1970); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 431, 261 N.E.2d 305, 312 (1970).

However, an instruction which states that the law does not require the jury to rely upon the plaintiff's statements but may consider other factors should not be given because it unduly emphasizes certain evidence and is argumentative. Such an instruction would unnecessarily emphasize evidence relating to the user's age, experience, knowledge and understanding, as opposed to the plaintiff's testimony concerning his subjective state of mind.

While the user's age, experience, knowledge and understanding are relevant facts for the jury to consider, the subject is properly left to argument and to other instructions: IPI 3.04 (former IPI 1.04) instructs the jury as to the effect of circumstantial evidence; IPI 1.01 (former IPI 2.01) instructs the jury on the standards to be used in assessing credibility, advises the jurors that they are the triers of the facts, and advises them that they are to use common sense in evaluating what they see and hear during trial.
400.06  **Strict Product Liability—Definition Of “Unreasonably Dangerous”**

When I use the expression “unreasonably dangerous” in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product].

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

In *Lamkin v. Towner*, 138 Ill.2d 510 (1990), the Supreme Court recognized an alternative test for plaintiff to prove a strict product liability test: the “risk-utility” test. The plaintiff has the option to prove the case under either the “consumer expectation” or the “risk-utility” test. *Lamkin v. Towner, supra at 529; Hansen v. Baxter Healthcare Corp.,* 309 Ill.App.3d 869, 885, aff’d 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai Corp.,* 224 Ill.2d 247 (2007); *Mikolajczyk v. Ford Motor Co.,* 374 Ill.App.3d 646 (1st Dist. 2007), rev’d & remanded, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329, 2008 Ill. LEXIS 1424 (2008). In *Hansen, Mikolajczyk, and Carrillo v. Ford Motor Co.*, 325 Ill.App.3d 955 (1st Dist. 2001), the plaintiff opted to have the jury instructed using this instruction, what is commonly labeled the “consumer expectation” test. The instructions were approved in *Hansen, Mikolajczyk, and Carrillo*. An issue before the Supreme Court in *Mikolajczyk* was whether this instruction should be used in a strict liability design defect case.

**Comment**

The expression “unreasonably dangerous” first found acceptance in Illinois in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Court noted that its decision coincided with the views expressed in *Restatement (Second) of Torts* §402A. The phrase “unreasonably dangerous” has found common, though not universal, acceptance in subsequent decisions. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 416, 261 N.E.2d 305 (1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969); *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967). Although arguments have been advanced that the phrase “not reasonably safe” is preferable to the term “unreasonably dangerous,” the latter term has been employed in these instructions for the reasons discussed in the Comment to IPI 400.01.

The phrase “unreasonably dangerous condition” is used in these instructions instead of the words “defect” or “defective condition” because the phrase is more conversational and is less likely to suggest traditional concepts of fault to the jurors.


Although the definitions of the term ‘defect’ in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.


The correlation between “unreasonably dangerous” and “unsafe” was recognized in *Dunham v.*
Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969) when the Court approved Dean Prosser's statement that a product is defective “if it is not safe for such a use that can be expected to be made of it.” Id. at 343, 247 N.E.2d at 403. “Unsafe” has been used in this instruction to express the concepts of “dangerous” and “defective” used in the Dunham definition.

This instruction omits the word “intended” from the Dunham definition as a modifier of the product's function. It is clear that the test of the product's function is objective in nature and is not controlled by, or limited to, uses which the manufacturer intended. To use the word “intended” would invite the jury to apply a subjective standard. See Winnett v. Winnett, 57 Ill.2d 7, 11, 310 N.E.2d 1, 4 (1974).

Under this instruction a product can be “unreasonably dangerous” only when put to a use that is reasonably foreseeable. Winnett v. Winnett, supra at 11, 310 N.E.2d at 4. This instruction would bar recovery where the injury was proximately caused by the plaintiff's unforeseeable misuse of the product. “Misuse” is a use which is neither intended nor reasonably foreseeable. Williams, supra at 425, 261 N.E.2d at 309. See Comment, IPI 400.08.

An instruction defining “unreasonably dangerous” is needed because the concept is not generally understood by, nor within the common experience of, jurors. The term is comparable in complexity to “proximate cause” (IPI 15.01); “willful and wanton conduct” (IPI 14.01); “assumption of risk” (IPI 13.01, 13.02); “negligence” (IPI 10.01); and “ordinary care” (IPI 10.02). Becker v. Aquaslide 'N Dive Corp., 35 Ill.App.3d 479, 490, 341 N.E.2d 369, 377 (4th Dist. 1975). But see Pyatt v. Engel Equip., Inc., 17 Ill.App.3d 1070, 1074, 309 N.E.2d 225, 229 (3d Dist. 1974).
Strict Product Liability--Definition of “Unreasonably Dangerous”--Risk-Utility Test--Design Defects

When I use the expression “unreasonably dangerous,” I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product.

Instruction, Notes on Use and Comment created May 2009.

Notes on Use

This instruction is an alternative to IPI 400.06 for use in strict product liability trials. This instruction is new, and states the risk-utility test for proving a strict product liability design defect case.

The need for this instruction was required by the Supreme Court in Mikolajczyk v. Ford Motor Co., 231 Ill.2d 516 (2008). The court held that if there is risk-utility evidence admitted in a design defect case, even if a party presents evidence to support the consumer expectation test, a risk-utility instruction should be given instead of IPI 400.06.

Comment

Since Mikolajczyk did not expressly overrule any prior decisions, the Committee has attempted to synthesize the opinion in Mikolajczyk with Lamkin v. Towner, 138 Ill.2d 510 (1990), Hansen v. Baxter Healthcare Corporation, 198 Ill.2d 420 (2002), and Calles v. Scripto-Tokai Corp., 224 Ill.2d 247 (2007). In the latter three cases, the Supreme Court recognized that the “risk-utility” test was an alternative to the “consumer expectation” test set forth in IPI 400.06.

Lamkin, supra at 529, Hansen, supra at 433, and Calles, supra at 255-256, specifically held:

A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

The Committee considered whether to list a number of factors for the jury to use in determining whether a product is unreasonably dangerous under the risk-utility test. The Committee declined to do so for a number of reasons. Most of the risk-utility factors discussed in various decisions have their genesis in law review articles authored by Professor John Wade. See Calles v. Scripto-Tokai, 224 Ill.2d 247, 264-265 (2007). Professor Wade addressed whether those factors should be listed in a jury instruction in On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 840 (1973) and said they should not, reasoning as follows:

Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. [citation omitted]. This analysis is most helpful and can be used with profit by trial and
appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances.

See also Wade, On Product Design Defects and their Actionability, 33 Vand.L.Rev. 551, 573 (1980), “[t]he precise wording of the instruction is important and any list of abstract factors of different types is likely to confuse a jury.”

Our decision not to list factors for the risk-utility test is also supported by the Oregon Supreme Court, Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1040 n.15 (1974); the Arizona Civil Jury Instructions Committee of the State Bar of Arizona, RAII (Civil) PLJ 3 Use Note; the Colorado Supreme Court Committee on Civil Jury Instructions, Jury Instr. Civil 14:3 (4th ed.); Turner v. General Motors, 584 S.W.2d 844, 849-850 (Tex. 1979) and Florida, JI-CIV-FL-CLE PL 5 (October 2004).

When it comes to determining liability issues in tort cases, it has long been the Committee’s practice not to include a list of factors because doing so would unduly highlight certain aspects of the evidence in a case or would appear to argue for one side or the other. IPI (Civil), Foreword to the 1st Edition, XXII (2006). Good examples of the Committee’s practice in not listing factors in liability instructions that have been approved by Illinois courts are: 10.01, negligence, Schultz v. Northeast Illinois Regional Commuter R.R. Corp., 201 Ill.2d 260, 285 (2002); 11.01, contributory negligence, Blacconeri v. Aguayo, 132 Ill.App.3d 984, 990-991 (1st Dist. 1985); 14.01, willful and wanton conduct, Murray v. Chicago Youth Center, 224 Ill.2d 213, 241 (2007); 180.16, having “charge of” the work under the Structural Work Act, Larson v. Commonwealth Edison, 33 Ill.2d 316, 321, 323 (1965) and Thompson v. MCA Distributing Music Corp. of America, 257 Ill.App.3d 988, 990 (5th Dist. 1994); 100.01, highest duty of care of common carrier, Manus v. Trans States Airlines, Inc., 359 Ill.App.3d 665, 667 (5th Dist. 2005); 120.01, trespasser definition, Eshoo v. Chicago Transit Authority, 309 Ill.App.3d 831, 837 (1st Dist. 1999); and 150.15, intoxication, Navarro v. Lerman, 48 Ill.App.2d 27, 36 (1st Dist. 1964).

Evidence will determine what the risks and benefits of a design are. Counsel can argue all of the admissible risks and benefits to the jury and a list of factors would not be a helpful addition to the instruction. A list could also mislead or confuse a jury since the presence of one factor favoring one party can outweigh multiple factors that favor the other party. Calles, supra at 266-267. As the Court also noted, the lists of factors which courts may consider when assessing risk-utility are not exclusive. Calles, supra at 266.
400.07A  Strict Product Liability--Duty

The Committee recommends that no instruction concerning the duty of strict product liability of defendants be given, except in cases where IPI 400.07B, 400.07C, or 400.07D are applicable.

*Instruction and Comment revised December 2007.*

**Comment**

In strict product liability cases, the focus of the liability question is the *condition of the product*, not the conduct of the defendant. *Cf.* IPI 400.01, 400.02. Instructing a jury on a defendant's duty in this context would distract the jury from its true role: to determine whether or not the condition of the product was unreasonably dangerous. “It is preferable to avoid reference to ‘duty’ and maintain the focus on the defective character of the product . . . .” *Lundy v. Whiting Corp.*, 93 Ill.App.3d 244, 252, 48 Ill.Dec. 752, 417 N.E.2d 154 (1st Dist. 1981); accord *Wilson v. Norfolk & W. Ry. Co.*, 109 Ill.App.3d 79, 97, 64 Ill.Dec. 686, 440 N.E.2d 238 (5th Dist. 1982); *Carillo v. Ford Motor Co*, 325 Ill.App.3d 955, 259 Ill.Dec. 619, 759 N.E.2d 99 (1st Dist. 2001).
Strict Product Liability—Duty To Warn—Learned Intermediary Doctrine

The [type of product, e.g. drug] involved in this case can only be obtained with a prescription from a physician. For this reason, the [type of defendant, e.g. manufacturer] has a duty to adequately warn only [the learned intermediary involved] of the [dangers][potential adverse reactions] of which it knew, or in the exercise of ordinary care should have known, at the time the [product] left the [defendant's] control. The [defendant] has no duty to warn the [consumer][user] directly.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should be given only in cases involving prescription pharmaceuticals and other products to which the “learned intermediary” doctrine applies to limit the manufacturer's duty to warn. The manufacturer in such cases has only a duty to warn the “learned intermediary” such as a physician; it has no duty to warn the consumer directly. IPI 10.02, defining “ordinary care,” should be given with this instruction.

Comment

400.07C  **Strict Product Liability--Non-Delegable Duty**

Defendant[s] [name[s]] has [have] the duty to manufacture and sell a product that is not in an unreasonably dangerous condition. That duty cannot be delegated to another. It is not a defense for the defendant[s] [name[s]] that another person [,including plaintiff's employer,] failed to make the product free from unreasonably dangerous conditions. When I use the phrase “cannot be delegated,” I mean that the duty must be performed by defendant[s] [name[s]] and cannot be left to some other person or entity.

*Instruction, Notes and Comment revised December 2007*

*Notes on Use*

This instruction may be used in cases where the product manufacturer seeks to avoid liability with evidence that the owner of the product, such as a plaintiff's employer, selected features of the product. No court of review has approved the use of this instruction in other contexts.

*Comment*

400.07D  Strict Product Liability--Duty To Warn--General

The [manufacturer] [other] has a duty to adequately warn [and instruct] the [consumer] [user] about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the [manufacturer's] [other's] control.

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

In cases where this instruction applies, it is intended to be used with IPI 400.01 and 400.02. IPI 10.02, defining “ordinary care,” should be given with this instruction.

**Comment**

This principle of law was established in *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 35, 37 Ill.Dec. 304, 402 N.E.2d 194 (1980). The Court has not retreated from its requirements since then.
400.08   Strict Product Liability—Personal Injury—Misuse

The committee recommends that no instruction on misuse of the product be given.

*Instruction and Comment revised December 2007.*

**Comment**

The committee's recommendation that no instruction be given on the question of misuse is predicated upon the committee's assumptions stated in the introduction to this 400 Series of instructions.

If subsequent case decisions prove that these assumptions of the committee are erroneous, then, in that event, instructions to the jury on the issue of misuse may be appropriate.
400.09 STRICT PRODUCT LIABILITY--PERSONAL INJURY--LIABILITY OF NON-MANUFACTURER

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense

[1]. [that the defendant, [name of seller, distributor, assembler, etc.], did not create the condition which rendered the [product, e.g. hammer] unreasonably dangerous] [and]

[2]. [that the condition of the [product, e.g. hammer] existed before the [product, e.g. hammer] came under the control of the defendant [name of seller, distributor, bailor, etc.].

Instruction, Notes and Comment revised December 2007.

Notes on Use

Use this instruction only in a case where a non-manufacturer, such as a retailer, distributor, assembler or other party intermediary between the creator of the condition and the plaintiff, is a defendant. Select the appropriate bracketed material. For example, use of the first bracketed paragraph is indicated when an assembler or a distributor of an unpackaged product is a defendant.

Comment

Sweeney v. Matthews, 94 Ill.App.2d 6, 236 N.E.2d 439 (1st Dist. 1968), aff'd, 46 Ill.2d 64, 264 N.E.2d 170 (1970), rejects the proposition that a retailer is not subject to the same liability as a manufacturer and embraces the rationale set forth in Vandermark v. Ford Motor Co., 61 Cal.2d 256, 262, 391 P.2d 168, 171, 37 Cal.Rptr. 896, 899 (1964):

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citations omitted]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff . . . .

But see Introduction concerning statutory limitations on a retailer's liability, 735 ILCS 5/2-621.
400.10  **Strict Product Liability—Due Care Not A Defense**

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense [that the condition of the product could not have been discovered by the defendant] [or] [that care was used in the manufacture of the product].

*Instruction, Notes and Comment revised December 2007.*

**Notes on Use**

This instruction should not be given if plaintiff's claim of liability is failure to warn. *Cf.* IPI 400.07D. Use this instruction if the jury heard from suggestion, evidence, or argument that the defendant exercised care in the manufacturing process or could not discover the condition of the product.

**Comment**

400.11  Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (see Gratzle v. Sears, Roebuck & Co., 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. See IPI Chapter 45 and IPI 600.14.
Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (see Gratzle v. Sears, Roebuck & Co., 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. See IPI Chapter 45 and IPI 600.14.
**Illinois Official Reports**

**Appellate Court**

*Dunning v. Dynegy Midwest Generation, Inc., 2015 IL App (5th) 140168*

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<tr>
<td>District &amp; No.</td>
<td>Fifth District                                                                                                    Docket No. 5-14-0168</td>
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<tr>
<td>Filed</td>
<td>April 28, 2015                                                                                                   June 22, 2015</td>
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<tr>
<td>Rehearing denied</td>
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<tr>
<td>Decision Under Review</td>
<td>Appeal from the Circuit Court of St. Clair County, No. 08-L-2; the Hon. Andrew J. Gleeson, Judge, presiding.</td>
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<td>Judgment</td>
<td>Affirmed.</td>
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<tr>
<td>Counsel on Appeal</td>
<td>James L. Hodges, of Hennessy &amp; Roach, P.C., of St. Louis, Missouri, for appellant Dynegy Midwest Generation, Inc.</td>
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<td>Loretta M. Griffin and Ana Maria L. Downs, both of Law Offices of Loretta M. Griffin, of Chicago, for appellant AVI International, Inc.</td>
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<td>Thomas Q. Keefe, Jr., and Thomas Q. Keefe III, both of Keefe &amp; Keefe, P.C., of Belleville, for appellee.</td>
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Plaintiff, Gerald Dunning, was crushed between a steel I-beam support and a portion of a 28,500-pound water pump being transported on a cart pushed by a forklift. Defendant Dynegy Midwest Generation, Inc. (DMG), owned the water pump, and the cart transporting the pump was pushed by a forklift owned and operated by DMG. The cart was designed and maintained by defendant AVI International, Inc. (AVI). Plaintiff was employed as a pipefitter by third-party defendant Power Maintenance Constructors, Inc. (PMC), which was contracted to provide the labor services for the project. Plaintiff brought separate claims against defendants DMG and AVI for injuries sustained in the incident, and the trial court found in favor of plaintiff. Defendants timely appealed. We affirm.

BACKGROUND

Prior to October 8, 2007, DMG contracted with fellow defendant, AVI, and third-party defendant, PMC, to perform tasks at its Baldwin Power Plant. One of the assigned tasks involved removing a circulating water pump from its casing and out of the power plant.

DMG was in charge of the power plant at the time in question. AVI was contracted to supervise the removal, transfer, loading, and transportation of circulating water pumps from DMG’s power plant to AVI’s facility in Connecticut for repair and maintenance. AVI also provided a cart that was designed for the purpose of transporting the water pumps. AVI’s cart was designed and manufactured by AVI’s president, Clifford Burrell, and was designed so that one person could push the cart across a flat concrete floor with a load of up to 40,000 pounds. PMC was contracted to provide the labor for the project, which was performed by plumbers and pipefitters. Plaintiff was employed by PMC as a union pipefitter for the project.

The events surrounding plaintiff’s accident are as follows. On October 8, 2007, plaintiff was assisting in the removal of a 28,500-pound water pump at DMG’s Baldwin Power Plant. DMG’s water pump was lowered from its position and placed onto AVI’s cart by PMC employees. Scott Docimo, AVI’s only employee on-site at the time of the incident, watched as PMC employees rigged the pump to AVI’s cart and a forklift owned and operated by DMG. Docimo recognized that the PMC employees had improperly rigged the pump and cart to DMG’s forklift but did not say anything.

As the forklift began to slowly push the cart forward across a flat concrete floor, it began to veer off its intended path. The wheels on AVI’s cart were going in different directions, and the cart was veering from side to side. In an attempt to keep the cart moving straight, PMC employees used their hands to guide the cart. As the PMC employees were pushing on the
sides of the cart and pump to keep it moving straight, plaintiff was crushed between a portion of the pump and a steel I-beam support, sustaining serious injuries.

¶ 7 On January 4, 2008, plaintiff brought suit against DMG alleging negligence pursuant to section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 414 (1965)). Plaintiff alleged that while he was in the course of his employment as a pipefitter for PMC at DMG’s power plant, he was crushed into a steel post by a forklift owned and operated by DMG.

¶ 8 On October 1, 2008, plaintiff filed a first amended complaint adding AVI as a defendant, asserting a single count of negligence against AVI. Plaintiff alleged AVI negligently instructed rigging of the pump, failed to provide training and instruction in the safe operation of forklifts, and failed to inspect the area to ensure safe forklift operation. AVI filed an answer denying all material allegations of negligence and filed a third-party complaint against PMC alleging PMC negligently failed to maintain a lookout for dangers posed to plaintiff in the area it instructed plaintiff to work, failed to inspect plaintiff’s surroundings, failed to notify or warn plaintiff of potential dangers, failed to instruct and train plaintiff in his work, and failed to coordinate plaintiff’s work with other trades and entities present.

¶ 9 Plaintiff filed a second amended complaint on November 4, 2013, adding a strict product liability count against AVI alleging AVI’s cart was defective at the time of the accident. On November 13, 2013, AVI filed a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) contesting the legal and factual sufficiency of plaintiff’s complaint, a motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)) asserting statutes of limitation and repose defenses, and a motion to continue trial. The trial court denied all three motions, and the matter proceeded to trial on November 18, 2013.

¶ 10 Several witnesses testified for plaintiff and defendants at trial. At the close of plaintiff’s evidence, DMG moved for a directed verdict asserting plaintiff failed to show DMG owed a duty of care to plaintiff or that it was negligent. The trial court denied DMG’s motion. Also at the close of plaintiff’s evidence, the trial court directed a verdict against AVI on the counts of negligence and strict product liability. The trial court established that as a matter of law, AVI’s cart was defective and a proximate cause of plaintiff’s injuries.

¶ 11 On November 22, 2013, the jury returned a verdict finding plaintiff comparatively negligent, finding against DMG and AVI, and finding against PMC on the third-party claims. The following percentages of fault were assessed: plaintiff 6%, AVI 37%, DMG 47%, and PMC 10%. On December 18, 2013, the trial court entered judgment on the verdict rendered against DMG, AVI, and PMC. DMG and AVI timely filed posttrial motions, each moving for a judgment notwithstanding the verdict or in the alternative for a new trial, and AVI also moving to vacate the order of judgment and set aside the directed verdict entered in favor of plaintiff and against AVI. These posttrial motions were denied. Defendants DMG and AVI timely filed notices of appeal.

¶ 12 ANALYSIS

¶ 13 There are numerous issues raised by defendants on appeal. We first address the issues raised by DMG and then address the issues raised by AVI.
DMG alleges the trial court erred in denying its motion for a directed verdict, judgment notwithstanding the verdict, and motion for a new trial on the grounds that plaintiff failed to show DMG owed plaintiff a duty of care and failed to prove DMG’s alleged negligence proximately caused plaintiff’s injuries. DMG contends the evidence at the close of plaintiff’s case overwhelmingly favored DMG.

A trial court’s denial of a motion for a directed verdict or a judgment notwithstanding the verdict is reviewed de novo. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650, 924 N.E.2d 531, 542 (2010). A directed verdict or judgment notwithstanding the verdict is proper where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. The “court may only consider the evidence, and any rational inferences therefrom, in the light most favorable to the nonmoving party.” *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542.

Further, a judgment notwithstanding the verdict may not be granted merely because the court determines a verdict is against the manifest weight of the evidence. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. A trial court has no right to enter a judgment notwithstanding the verdict if there is any evidence showing a substantial factual dispute or where the assessment of the witnesses’ credibility or the determination regarding conflicting evidence is decisive to the outcome of the trial. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542-43.

Alternatively, on a motion for a new trial, the court will weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Ford*, 398 Ill. App. 3d at 651, 924 N.E.2d at 543. Hence, the standard to be used in determining whether to grant a new trial is whether the jury’s verdict was against the manifest weight of the evidence. *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 569, 851 N.E.2d 866, 875 (2006).

A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or the jury’s findings are unreasonable, arbitrary, and not based upon any of the evidence. *Kindernay*, 366 Ill. App. 3d at 569, 851 N.E.2d at 875. A trial court’s ruling on a motion for a new trial will not be reversed except in instances where it is affirmatively shown that the trial court clearly abused its discretion, as the trial judge had the benefit of observing the witnesses firsthand at trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 455-56, 603 N.E.2d 508, 513 (1992). In determining whether the trial court abused its discretion, we must consider whether the verdict was supported by the evidence and whether the losing party was denied a fair trial. *Ford*, 398 Ill. App. 3d at 651, 924 N.E.2d at 543.

At the close of plaintiff’s case, DMG moved for a directed verdict asserting it was not negligent because (1) plaintiff failed to show defendant owed plaintiff a duty and (2) plaintiff failed to establish DMG was a proximate cause of plaintiff’s injuries. After the trial court denied DMG’s motion for a directed verdict, DMG filed a posttrial motion for a judgment notwithstanding the verdict or in the alternative for a new trial, which the trial court denied. For the following reasons, we find the trial court did not err in denying DMG’s motion for a directed verdict and judgment notwithstanding the verdict or DMG’s motion for a new trial.
Before we begin our analysis, it should be noted that the existence of a duty is a question of law to be determined by the court, and questions concerning a breach of that duty and proximate cause of the injury are questions reserved for the trier of fact. *Jones v. Chicago & Northwestern Transportation Co.*, 206 Ill. App. 3d 136, 139, 563 N.E.2d 1120, 1122 (1990).

A. Duty of Care

Whether a duty exists is a question of law for the court to decide. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 227, 665 N.E.2d 1260, 1267 (1996). In resolving whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one party for the benefit of the other. *Rhodes*, 172 Ill. 2d at 227, 665 N.E.2d at 1267.

The duty inquiry involves four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226, 938 N.E.2d 440, 447 (2010).

As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the latter. *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 838, 719 N.E.2d 174, 176 (1999). However, section 414 of the Restatement (Second) of Torts provides an exception to the general rule:

“One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” Restatement (Second) of Torts § 414 (1965).


Thus, whether a duty exists under section 414 turns on whether the defendant controls the work in such a manner that he should be held liable. *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 315, 807 N.E.2d 480, 489 (2004). The comments accompanying section 414 discuss a continuum of control which our courts have used to determine the necessary degree of control a defendant must exercise to be subject to liability under this section. Comment c provides:

“In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” Restatement (Second) of Torts § 414 cmt. c (1965).

*Gregory*, 384 Ill. App. 3d at 187, 892 N.E.2d at 573.

Moreover, a possessor of land owes its invitees a common law duty of reasonable care in maintaining its premises in a reasonably safe condition. *Gregory*, 384 Ill. App. 3d at 191, 892

¶ 28  
Section 343 of the Restatement (Second) of Torts provides:

“A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.”  
Restatement (Second) of Torts § 343 (1965).

¶ 29  
In the instant case, a DMG employee was operating a forklift owned by DMG and drove the forklift into a steel beam with plaintiff in front of the forklift, thereby crushing plaintiff between the forklift and steel beam. This accident occurred on premises owned by DMG. From these facts, the jury determined DMG’s conduct was negligent and the proximate cause of plaintiff’s injuries.

¶ 30  
DMG asserts plaintiff’s injury was not reasonably foreseeable because it was the independent contractors AVI and PMC that provided the defective cart and improperly rigged the cart to DMG’s forklift, thereby creating a condition DMG could not guard against as the owner of the premises. We disagree.

¶ 31  
The accident in this case occurred at a facility owned, operated, and maintained by DMG. Plaintiff and his fellow PMC laborers worked with one of DMG’s employees in rigging DMG’s pump to a forklift owned by DMG. DMG’s operator then pushed the forklift carrying the pump down a corridor, completely controlling the load and direction of the forklift.

¶ 32  
Plaintiff’s injury was foreseeable, as DMG’s operator should have anticipated that plaintiff’s injuries would result from the operator driving the forklift into a steel beam with plaintiff in front of the forklift. DMG completely controlled the forklift, owned the pump that crushed plaintiff into the steel beam, and owned the premises on which the accident occurred. Accordingly, DMG owed plaintiff a duty of reasonable care.

¶ 33  
B. Proximate Cause

¶ 34  
DMG also alleges its operator of the forklift and the forklift itself were not the proximate cause of plaintiff’s accident. DMG argues the proximate cause of the accident was AVI’s defective cart and PMC’s failure to properly rig the pump to AVI’s cart and DMG’s forklift.

¶ 35  
Proximate cause is defined as “‘any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.’” *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 133, 679 N.E.2d 1202, 1219 (1997) (quoting Illinois Pattern Jury Instructions, Civil, No. 15.01 (1995) (hereinafter, IPI Civil (1995))).

¶ 36  
Two tests are generally applied in determining the issue of proximate cause. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. The first is the substantial-factor test, under which
the defendant’s conduct is a cause of an event if it was a material element and a substantial factor in bringing it about. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. Under the second test, commonly referred to as the “but for” rule, the defendant’s conduct is not a cause of an event if the event would have occurred without it. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. The plaintiff bears the burden of establishing proximate cause by a preponderance of the evidence. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876.

¶ 37 If a jury finds that the defendant’s negligence was a proximate cause of the plaintiff’s injury, it is no defense that something else may also have been a cause of the injury. *Holton*, 176 Ill. 2d at 133, 679 N.E.2d at 1219. The “verdict should be for defendant if the jury decides ‘that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant.’” (Emphases in original.) *Holton*, 176 Ill. 2d at 133, 679 N.E.2d at 1219 (quoting IPI Civil (1995) No. 12.05).

¶ 38 DMG indicates there can be more than one negligent act that creates the proximate cause of an injury. *Long v. Friesland*, 178 Ill. App. 3d 42, 55, 532 N.E.2d 914, 922 (1988). When an injury is caused by the concurrent negligence of two parties and the accident would not have occurred without the negligence of both, each party is a proximate cause of the injury. *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922.

¶ 39 However, as DMG points out, if the “alleged negligent act did nothing more than furnish a condition making the injury possible through the subsequent independent negligent act of a third party, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.” *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922. The test used to determine whether both acts constitute concurrent proximate cause is whether the first wrongdoer may have reasonably anticipated or foreseen the intervening cause as a natural and probable result of the first wrongdoer’s negligence. *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922.

¶ 40 Here, DMG’s operator drove a forklift owned by DMG into a steel beam, crushing plaintiff. The jury determined the operator’s negligent conduct in controlling the forklift was a proximate cause of the accident. Based on the evidence presented at trial, a reasonable jury could find that the operator’s conduct of controlling the forklift met the foreseeability, substantial-factor, and but-for tests for the proximate cause of plaintiff’s injuries. It is no defense to DMG that AVI and PMC were also a cause of plaintiff’s injuries, as the jury still found DMG’s own negligent conduct was a proximate cause of the accident. Accordingly, DMG’s assertion that its forklift and operator were not a proximate cause of plaintiff’s accident is mistaken.

¶ 41 DMG lastly alleges the trial court erred in denying its motion for a new trial, as the jury’s verdict was unreasonable, arbitrary, and not based upon any evidence. DMG asserts it should be granted a new trial because each witness provided testimony that the accident occurred because the cart was not properly rigged, and no single witness testified that DMG’s forklift malfunctioned or that the operator of the forklift drove it erratically.

¶ 42 DMG’s argument is misguided. While it may be true that the forklift did not malfunction and was not driven erratically, the record clearly indicates DMG’s employee was operating the forklift that crushed plaintiff into a steel beam. Furthermore, the 28,500-pound water pump being transported on defendant’s forklift that crushed plaintiff into the steel beam was owned by DMG, and the accident occurred on DMG’s premises.
After careful review of the evidence presented at trial, we cannot say the jury’s findings were unreasonable, arbitrary, or against the manifest weight of the evidence. The trial court did not err in denying DMG’s motion for a directed verdict or judgment notwithstanding the verdict, nor did it abuse its discretion in denying DMG’s motion for a new trial on the grounds that plaintiff failed to show DMG owed plaintiff a duty of care and failed to prove DMG’s negligence proximately caused plaintiff’s injuries.

II. AVI

A. Motion for Directed Verdict and Posttrial Relief

AVI alleges the trial court erred in granting a directed verdict in favor of plaintiff at the close of plaintiff’s evidence and erred in denying AVI’s posttrial relief. AVI contends it was error for the trial court to instruct the jury that it had directed a verdict against AVI before the defense offered any evidence, as this limited AVI’s ability to present evidence and argue its case. Further, AVI asserts the trial court never instructed the jury as to the reason it directed a verdict against AVI, and it alleges the trial court’s rulings were clearly erroneous, contrary to logic and law, and should be reversed.

In the instant case the trial court directed negligence liability and product liability against AVI based on certain statements made by AVI employees during trial. The dispositive issue in this case is whether these statements constituted judicial admissions to which the trial court directed a verdict in favor of plaintiff and against AVI.

A judicial admission is a (1) deliberate, (2) clear, (3) unequivocal, (4) statement of a party, (5) about a concrete fact, (6) within that party’s peculiar knowledge. Brummet v. Farel, 217 Ill. App. 3d 264, 266, 576 N.E.2d 1232, 1234 (1991). A judicial admission is conclusive upon the party making it and may not be controverted at trial or on appeal. Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

A judicial admission is not evidence at all but rather has the effect of withdrawing a fact from contention. Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. Judicial admissions include “admissions made in pleadings, formal admissions made in open court, stipulations, and admissions pursuant to requests to admit.” Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

The doctrine of judicial admissions requires thoughtful consideration to ensure that “justice not be done on the strength of a chance statement made by a nervous party.” Thomas v. Northington, 134 Ill. App. 3d 141, 147, 479 N.E.2d 976, 981 (1985). The general rule is qualified. Judicial admissions only apply when a party’s testimony, taken as a whole, is unequivocal. Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. The rule is inapplicable when the party’s testimony is inadvertent, uncertain, or amounts to an estimate rather than a statement of concrete fact. Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. Further, the rule is inapplicable when the facts relate to a matter about which the party could have been mistaken, such as swiftly moving events preceding a collision in which the party was injured. Brummet, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

The trial court’s ruling on an issue of judicial admission is a matter for the trial court’s sound discretion, and we are to affirm the trial court unless it abused that discretion. Smith v. Pavlovich, 394 Ill. App. 3d 458, 468, 914 N.E.2d 1258, 1268 (2009). An abuse of discretion is
found only where no reasonable person would take the view adopted by the trial court. Smith, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268.

¶ 52

A party may, by his own testimony, “conclusively bar his claim or his defense,” but whether a party’s testimony defeats his own claim depends upon an evaluation of all of his testimony, and not just a portion of it. McCormack v. Haan, 20 Ill. 2d 75, 78, 169 N.E.2d 239, 240-41 (1960). The abuse of discretion standard focuses on the context of the purported admission:

“What constitutes a judicial admission must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it was found. [Citation.] It must also be considered in relation to the other testimony and evidence presented.” Smith, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268.

¶ 53

In the instant case, several witnesses testified concerning AVI’s involvement in plaintiff’s accident. One such witness was Scott Docimo, an AVI employee who was the only AVI representative on-site at the power plant at the time of plaintiff’s accident. Docimo was at the power plant to provide technical supervision and inspection concerning the removal of equipment at the plant. During trial Docimo admitted he saw workers rigging the load onto the forklift improperly, knew it was unsafe, and said nothing despite his superior knowledge.

“Q. [Attorney for plaintiff:] You knew that they were pushing it in a way—you were the expert, and you let them push it, and you let the play develop right in front of you. And part of the reason that the cart was going squiggly, was because of how it was rigged, am I right?

A. Correct.

Q. And I want you to go to Page 133, Line 17. I said, ‘What ***’ The question was asked, ‘Would anything have prevented you from telling them that?’ Telling them that, warning them, doing your job. What did you say on Line 17? What would have prevented you? Read the answer.

A. ‘Yes. Sorry. Yes, it would because of liability. For me to tell them how to rig something, automatically puts liability onto me, which I’m not there for.’

Q. You never told anyone before this accident that they should not rig it that way, did you?

A. No.”

¶ 54

Clifford Burrell, the president of AVI, also testified during trial and admitted Docimo should have said something when he saw the men improperly rigging the load onto the forklift.

“Q. [Attorney for plaintiff:] He did not say anything. So that there’s no misunderstanding then, sir, you’re here to tell me, as the head of this company, that Mr. Docimo, who admitted that he saw something unsafe and didn’t say anything, he should have said something, am I correct?

A. Yes.

Q. Yes. And so that we can have no further disagreement between you and I, is that—there’s no misunderstanding. You would then agree that the reason—if this cart didn’t go straight, it was because it was unsafely affixed, and Docimo should have said something about it, am I right?

A. Yes.”
Burrell then admitted that AVI’s cart was intended to roll straight but failed to do so at the
time of plaintiff’s accident. Burrell indicated AVI’s cart possessed caster locks and was capable of locking its wheels for the purpose of keeping the wheels straight, but admitted he had not informed Docimo or anyone from DMG or PMC about the feature:

“Q. [Attorney for plaintiff:] Did you ever tell the guy who you sent to be your representative on this job, did you ever tell him that that cart could be locked?
A. No.
Q. You never told him. Did you tell anybody from AVI that the cart could be locked? Or strike that. From DMG, did you tell anybody from DMG that when you want to take this cart and start going north and south with it, you can lock it so the wheels won’t wobble? Did you tell anybody from [DMG] that?
A. I was not there.
Q. Did you tell them before you sent it?
A. No.
Q. Did you tell anybody from PMC that this cart that you had designed, manufactured, specified, did you tell them that the wheels could be locked?
A. No.
Q. Did anybody know?
A. No.”

Based on these admissions made by Docimo and Burrell, the trial court directed negligence and product liability against AVI. After careful review of the record before us, we cannot say the trial court abused its discretion in finding AVI’s testimony contained judicial admissions that it was negligent in supervising the transportation of the water pump from the power plant and strictly liable for the defective cart that contributed to plaintiff’s injuries. The trial court never suggested how much fault the jury should attribute to AVI, only that it could not be completely free of fault. AVI retained the right to argue for a low percentage of fault, which it in fact did. Directing a verdict against AVI for negligence and product liability was well within the trial court’s discretion.

AVI asserts that Docimo, an AVI employee not in the control group of AVI, was not a party to the proceeding and, therefore, legally could not have made a judicial admission on behalf of AVI. While AVI accurately indicates Docimo was not a party to the action, AVI fails to recognize that Burrell, as president of AVI, also testified and admitted fault concerning AVI’s negligence and product liability. As president of AVI, Burrell was certainly within the control group of AVI and had the ability to make judicial admissions on behalf of AVI, which he did.

AVI next asserts the trial court improperly directed the issue of proximate cause against AVI at the close of plaintiff’s case. AVI indicates the issue of proximate cause is ordinarily a question of fact to be determined by a jury from a consideration of all the evidence. Sabo v. T.W. Moore Feed & Grain Co., 97 Ill. App. 2d 7, 9, 239 N.E.2d 459, 463 (1968). AVI argues the trial court directed the issue of proximate cause against AVI with no legal or factual support. We disagree.

AVI ignores that where facts are undisputed and reasonable men could not differ as to the inferences to be drawn from those facts, proximate cause may be determined as a matter of law. Harrison v. Hardin County Community Unit School District No. 1, 197 Ill. 2d 466, 476,
Moreover, Scott Docimo, the AVI employee who was at the power plant to provide technical supervision and inspection for the removal of the pump, witnessed workers improperly rig the pump to AVI’s cart and DMG’s forklift and said nothing. Docimo could have prevented the accident from occurring by warning the workers that they improperly rigged the pump to the cart and forklift but did not. Further, Burrell testified he did not inform anyone of the caster-lock feature on the cart which would have positioned the wheels to move straight rather than side to side.

It is unreasonable for AVI to allege it was not in any way a proximate cause of plaintiff’s injuries. Accordingly, the trial court properly directed the issue of proximate cause against AVI.

AVI then alleges the record does not support a finding of negligence or product liability against AVI. We disagree. We find that Docimo and Burrell’s testimony supports a finding of AVI’s negligence and strict product liability.

In pleading negligence, the plaintiff must allege facts showing the defendant (1) owed him or her a duty of care and (2) breached that duty, and (3) this breach was the proximate cause of his or her injuries. Rahic v. Satellite Air-Land Motor Service, Inc., 2014 IL App (1st) 132899, ¶ 19, 24 N.E.3d 315.

Here, Docimo admitted he did not say anything to the PMC employees or DMG operator when he saw them improperly rig the pump to the cart and forklift, and Docimo’s boss and president of AVI, Burrell, condemned this silence as inexcusable. The trial court directed negligence liability on this basis. As the sole AVI employee on-site to provide supervision for the removal of the pump, Docimo owed a duty of care to plaintiff that was breached when Docimo did not inform the workers they had improperly rigged the pump to the cart and forklift, and this improper rigging was the cause of plaintiff’s accident. Thus, the elements of AVI’s negligence have been satisfied and AVI’s argument that the record does not support a finding of negligence is mistaken.

AVI also argues the record does not support a finding on the product liability claim. To prevail on a product liability claim alleging defective design, the plaintiff must establish that the allegedly defective condition of the product is a proximate cause of his injury. Barr v. Rivinius, Inc., 58 Ill. App. 3d 121, 127, 373 N.E.2d 1063, 1067 (1978). The standards for proving proximate causation are the same whether the case concerns negligence or strict liability in tort. Barr, 58 Ill. App. 3d at 127, 373 N.E.2d at 1067. “Proximate cause exists if the injury is the natural and probable result of the negligent act or omission and is of such a character that an ordinarily prudent person would have foreseen it as a result of such negligence.” Niffenegger v. Lakeland Construction Co., 95 Ill. App. 3d 420, 425, 420 N.E.2d 262, 267 (1981).

The intervention of independent, concurrent, or intervening forces will not disrupt the causal connection if such intervention was foreseeable. Niffenegger, 95 Ill. App. 3d at 426, 420 N.E.2d at 267. “[A] plaintiff may demonstrate that a product is unreasonably dangerous because of a design defect by presenting evidence of an alternative design that would have prevented the injury and was feasible in terms of cost, practicality and technological

¶ 67 In the instant case, Burrell admitted that as president of AVI, he designed the cart in question so that it moves straight when pushed. Burrell then admitted the cart did not move straight at the time of plaintiff’s accident, and Docimo also acknowledged the cart was wobbly. Burrell then admitted he did not tell anyone that the AVI cart had caster locks built into the cart before it was used at DMG’s power plant. The caster locks would have enabled the wheels to move straight, and it is reasonable to conclude plaintiff’s accident would not have occurred if the workers had known about the caster-lock feature. We find AVI’s failure to inform the workers on-site of the caster-lock feature and AVI’s acknowledgement that the cart was not moving straight as intended during the accident amounts to a defective condition that supports a finding of product liability.

¶ 68 AVI argues the trial court’s failure to define the conduct of AVI on which it directed the verdict of negligence as a matter of law was tantamount to failing to instruct the jury on an issue, which was an abuse of discretion that prejudiced AVI. However, AVI fails to indicate how it was prejudiced. AVI also indicates that for the negligent design theory, plaintiff was required to produce evidence of the standard of care in the industry at the time of design and a deviation from that standard. AVI asserts this proof required expert opinion testimony, but plaintiff disclosed no expert and offered no expert testimony concerning its cart’s design.

¶ 69 For the reasons stated above, we find that Docimo’s and Burrell’s testimony satisfied the proof necessary for the trial court to direct a verdict of negligence against AVI, and this matter need not be addressed further.

¶ 70 In its reply brief, AVI argues there is no legal precedent for entering a directed verdict against a party who has had no opportunity to present any evidence in the case unless that party was defaulted. AVI contends plaintiff’s argument that the trial court was well within its discretionary powers to order a directed verdict against AVI at the close of plaintiff’s case in chief is legally wrong. We disagree.

¶ 71 The fact that the trial court directed a verdict against AVI before AVI offered evidence contrary to the overwhelming evidence against it does not necessitate a jury determination on the question of AVI’s negligence or product liability. “As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole.” *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 504-05, 229 N.E.2d 504, 510 (1967).

¶ 72 Constitutional guarantees are not impaired by a directed verdict despite the presence of some slight evidence to the contrary, for the right to a jury trial includes the right to a jury verdict only if there are factual disputes of some substance. *Pedrick*, 37 Ill. 2d at 505, 229 N.E.2d at 510. Further, once a party makes a judicial admission adverse to his or her claim, that party cannot contradict the admission by adopting inconsistent evidence produced by other witnesses. *Tom Olesker’s Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 71 Ill. App. 3d 562, 568, 390 N.E.2d 60, 64 (1979).

¶ 73 As noted above, we find no factual dispute that AVI was at least partially responsible for plaintiff’s injuries. The fact the trial court directed a verdict against AVI before AVI presented any evidence is irrelevant, as the only matter foreclosed by the trial court’s directed verdict was that AVI was 0% at fault for plaintiff’s accident. AVI retained the right to argue a low percentage of fault to the jury, which AVI did.
AVI also requests that this court enter a judgment notwithstanding the verdict in its favor. As discussed above, a judgment notwithstanding the verdict is properly entered where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could stand. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542.

Considering all the evidence in the light most favorable to AVI, the evidence so overwhelmingly favors plaintiff in this case that no contrary verdict can stand on the issue of AVI’s negligence and product liability. Accordingly, the trial court did not abuse its discretion in directing verdicts of negligence and product liability against AVI, the trial court’s verdicts were not against the manifest weight of the evidence, and the trial court did not err in denying AVI’s motion for a judgment notwithstanding the verdict.

B. Motion for New Trial

AVI alleges it was deprived of a fair trial as a result of multiple and cumulative errors in the trial court’s rulings, and asserts it should be granted a new trial.

A court’s ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that the court clearly abused its discretion. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 548, 416 N.E.2d 268, 270 (1981). An abuse of discretion is found only where no reasonable person would take the view adopted by the trial court. *Smith*, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268. For the following reasons, we find AVI’s arguments lack merit.

AVI first alleges the trial court erred in allowing testimony from June Hight, Dr. Kirby, and Jason Reynolds. AVI indicates June Hight was not disclosed as a trial witness until two weeks before trial without reason, but she was allowed to testify over objection. AVI indicates Dr. Kirby was allowed to testify concerning opinions not in his records on permanency and prognosis, and all of AVI’s objections to Dr. Kirby’s testimony were overruled without hearing. AVI also alleges Jason Reynolds of DMG was not disclosed to give any opinion testimony, but the trial court allowed plaintiff to ask leading questions adverse only to AVI based on what Reynolds had seen and heard in the courtroom. AVI asserts the trial court’s rulings violated Illinois Supreme Court Rules 213(f) (eff. Jan. 1, 2007) and 218 (eff. Oct. 4, 2002).

AVI also alleges the trial court allowed improper impeachment of its witnesses. AVI asserts Mr. O’Leary was impeached by the absence of content in his statements and deposition rather than contrary statements. AVI also alleges plaintiff’s counsel impeached Docimo by the absence of content in his statements and deposition and not by contrary statements, and contends the law regarding impeachment was ignored. We disagree with AVI’s arguments.

AVI offers no explanation as to why these witnesses’ testimony violated Supreme Court Rules 213(f) and 218, and it cites no supporting authority in its brief based on these claims. AVI also offers no explanation for how it was prejudiced or what was improper about the impeachment. “[I]t is well settled that *** bare contentions that fail to cite any authority do not merit consideration on appeal.” (Internal quotation marks omitted.) *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 64, 14 N.E.3d 576. AVI has failed to raise these issues adequately. In light of the foregoing circumstances, we find it unnecessary to address these matters further.
AVI then alleges plaintiff’s counsel used improper lines of inquiry. AVI points to specific instances of questioning regarding Docimo and Burrell that were allegedly improper, but offers no supporting authority or explanation. For this reason, we need not address this argument.

AVI next alleges the trial court improperly tendered Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011)) against AVI for its failure to bring its cart to trial which resulted in prejudice to AVI. As a result, AVI contends it should be granted a new trial.

The decision whether to tender IPI Civil (2011) No. 5.01 to the jury is within the sound discretion of the trial court, and that decision will not be reversed absent a clear abuse of discretion. Kersey v. Rush Trucking, Inc., 344 Ill. App. 3d 690, 696, 800 N.E.2d 847, 853 (2003). IPI Civil (2011) No. 5.01, also known as the “missing-evidence instruction,” allows a jury to draw an adverse inference from a party’s failure to offer evidence. Kersey, 344 Ill. App. 3d at 696, 800 N.E.2d at 852.

IPI Civil (2011) No. 5.01 may be properly given where some foundation is presented on each of the following: (1) the evidence was under the control of the party and could have been produced through the exercise of reasonable diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence to be in his favor, and (4) no reasonable excuse for the failure has been shown. Jenkins v. Dominick’s Finer Foods, Inc., 288 Ill. App. 3d 827, 831, 681 N.E.2d 129, 132 (1997). However, IPI Civil (2011) No. 5.01 is not warranted where the missing evidence is merely cumulative of the facts already established. Jenkins, 288 Ill. App. 3d at 831, 681 N.E.2d at 132.

Here, the trial court tendered IPI Civil (2011) No. 5.01 after Burrell’s testimony concerning the caster-lock feature on the cart and Burrell’s assertion that the cart could push 52,000 pounds across a flat concrete surface. The trial court indicated that because AVI’s cart was not equally available to the parties and was under AVI’s sole control, the cart should have been produced at trial as there were still issues concerning the cart to be decided by the jury. We do not find the trial court abused its discretion in tendering IPI Civil (2011) No. 5.01. We agree that the cart was not equally available to the parties and was in the sole control of AVI and, therefore, should have been produced at trial.

AVI argues the adverse presumption of not producing the cart at trial was irrelevant because the trial court had already decided liability. We disagree. While the trial court had already directed a verdict when it tendered IPI Civil (2011) No. 5.01, each party’s degree of fault was still an issue to be decided by the jury, and production of the cart as evidence at trial would have helped the jury in that determination.

AVI also contends it was improper for the trial court to tender IPI Civil (2011) No. 5.01 immediately before releasing the jury to consider defendant’s fault. We disagree. The jury found AVI 37% at fault for plaintiff’s accident and DMG 47% at fault. After careful review of the record, we find this apportionment of fault reasonable. Reversal is not warranted if it is unlikely the error influenced the jury. People v. Hall, 194 Ill. 2d 305, 339, 743 N.E.2d 521, 541 (2000). Because AVI’s proportion of fault was reasonable, we find that even if it was error for the trial court to tender IPI Civil (2011) No. 5.01, it was not an error that influenced the jury warranting a new trial.
AVI next asserts the trial court improperly barred AVI in limine and during trial from presenting testimony regarding the specific cart in question, precluding AVI from eliciting testimony that DMG utilized the same AVI cart at its facility subsequent to the date of loss on other jobs, and that DMG designed and built its own cart using the same exact design as the AVI cart. This argument is irrelevant to the trial court’s finding of negligence and product liability against AVI.

AVI then alleges the trial court erred in allowing plaintiff’s counsel to submit a closing and rebuttal argument that was attacking and personal to opposing counsel, inflammatory, prejudicial and punitive in nature, engaging in argument with opposing counsel rather than an argument to the jury concerning the evidence, and unfounded by the evidentiary record. We disagree.

AVI indicates plaintiff’s counsel argued the credibility of defense counsel, pointed a finger at AVI’s counsel, and addressed AVI’s counsel personally during the proceedings. We find plaintiff counsel’s conduct was trial strategy that did not rise to the level of prejudice meriting reversal of the trial court’s denial of AVI’s motion for a new trial.

Finally, AVI alleges the trial court erred in numerous submissions and rejections of jury instructions. AVI asserts the trial court erred in submitting plaintiff’s instruction No. 11/IPI Civil (2011) No. 20.01 to the jury and rejecting AVI’s proposed instruction No. 1 and AVI’s instruction No. 7/IPI Civil (2011) No. B21.07. AVI asserts the trial court erred in submitting plaintiff’s instruction No. 15/IPI Civil (2011) Nos. 30.01, 30.04, 30.05, 30.06, and 30.07.

AVI also alleges the trial court erred in submitting plaintiff’s instruction No. 18/verdict form IPI Civil (2011) No. 600.14 modified and rejecting AVI’s alternative instruction No. 2/IPI Civil (2011) Nos. 600.14, 30.04, 30.05, 30.06, and 30.07 modified. Furthermore, AVI alleges the trial court erred in rejecting AVI’s instruction No. 4/IPI Civil (2011) No. 5.01 as to DMG employee William Harms, and alleges the trial court erred in rejecting AVI’s instruction No. 9/IPI Civil (2011) No. 41.05, instruction No. 11/IPI Civil (2011) No. 600.02, and instruction No. 12/IPI Civil (2011) No. 600.04.

The trial court has discretion to determine which instructions to give the jury, and that determination will not be disturbed without an abuse of that discretion. Schultz v. Northeast Illinois Regional Commuter R.R. Corp., 201 Ill. 2d 260, 273, 775 N.E.2d 964, 972 (2002). The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. Schultz, 201 Ill. 2d at 273-74, 775 N.E.2d at 972-73. Moreover, “[a] reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless [the instructions] clearly misled the jury and resulted in prejudice to the appellant.” Schultz, 201 Ill. 2d at 274, 775 N.E.2d at 973.

As discussed above, we find the jury’s apportionment of 37% fault to AVI reasonable after careful review of the record. AVI has failed to establish it was prejudiced by the abovementioned jury instructions or that the jury was misled.

C. Plaintiff’s Second Amended Complaint

AVI alleges plaintiff’s second amended complaint was factually and legally deficient on its face warranting its dismissal. AVI asserts the record on appeal indicates plaintiff’s second amended complaint was never filed and, therefore, the trial court’s corresponding entry of
directed verdict, judgment, and other rulings against AVI premised on that complaint were improper. We disagree.

¶ 98 After careful review of the record, we find the record indicates plaintiff’s second amended complaint was file-stamped by the circuit clerk on November 4, 2013. Moreover, AVI filed a motion to dismiss plaintiff’s second amended complaint on November 12, 2013, and filed its answer and affirmative defenses to plaintiff’s second amended complaint on November 18, 2013. For these reasons, AVI’s argument that plaintiff failed to file his second amended complaint lacks merit.

¶ 99 AVI next asserts that if plaintiff’s second amended complaint is deemed to have been filed, it nevertheless fails to satisfy Illinois pleading requirements.

¶ 100 A complaint only needs to contain a “plain and concise statement of plaintiff’s cause of action; it is unnecessary for the complaint to set forth evidence that plaintiff intends to introduce at trial.” Lozman v. Putnam, 328 Ill. App. 3d 761, 769, 767 N.E.2d 805, 812 (2002). Pleadings in the complaint are liberally construed “ ‘with a view to doing substantial justice between the parties.’ ” Lozman, 328 Ill. App. 3d at 769, 767 N.E.2d at 812 (quoting 735 ILCS 5/2-603(c) (West 2000)). A cause of action should not be dismissed on the pleadings unless it is apparent that no set of facts can be proved under the pleadings which would entitle plaintiff to recover. Lozman, 328 Ill. App. 3d at 769, 767 N.E.2d at 812-13.

¶ 101 AVI alleges plaintiff pled no facts giving rise to any duty owed by AVI to inspect and control the forklift, the forklift’s operation, and the premises, and alleges plaintiff’s complaint was void of factual support for plaintiff’s product liability allegations. AVI’s argument is misguided.

¶ 102 In his complaint plaintiff alleged he was crushed into a steel beam by a forklift pushing a cart owned and maintained by AVI. In his negligence count, plaintiff alleged AVI designed, manufactured, and supplied the cart giving rise to plaintiff’s injuries, and supervised the incident in which plaintiff was injured. Plaintiff also alleged AVI furnished a defective, unsafely designed, and unsafely maintained cart and failed to warn plaintiff of impending peril. In his product liability count, plaintiff alleged the cart was in a defective and unreasonably dangerous condition at the time it left the possession and control of AVI.

¶ 103 These alleged facts are enough to state a cause of action. Accepting the factual allegations in plaintiff’s complaint as true and considering them in a light most favorable to plaintiff, sufficient facts have been pled to demonstrate AVI’s negligence and product liability. Plaintiff has pled a connection between plaintiff’s injuries and AVI’s potential negligence and product liability. Accordingly, plaintiff’s second amended complaint alleges sufficient facts to satisfy the Illinois pleading standard.

¶ 104 D. Timeliness of Plaintiff’s Product Liability Claim

¶ 105 AVI alleges plaintiff’s untimely submission of the product liability claim violated the statutes of limitation and repose. AVI asserts there is no dispute that plaintiff’s product liability claim was governed by Illinois’s two-year statute of limitations period, and, therefore, plaintiff’s claim had to be filed on or before October 8, 2009, two years from the date of plaintiff’s accident. 735 ILCS 5/13-202 (West 2012). Since plaintiff’s product liability claim was filed on November 4, 2013, more than six years after plaintiff’s accident and four years
Section 2-616(b) of the Code of Civil Procedure provides that a cause of action alleged in an amended complaint, filed after the expiration of the statute of limitations period, will relate back to the filing of the original complaint if two requirements are met: (1) the original pleading was timely filed, and (2) the original and amended pleadings indicate the cause of action asserted in the amended complaint grew out of the same transaction or occurrence set forth in the original proceeding. 735 ILCS 5/2-616(b) (West 2012); Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 106, 672 N.E.2d 1207, 1222-23 (1996). This rule is “remedial in nature and should be liberally construed in favor of hearing the plaintiff’s claim.” Bryson, 174 Ill. 2d at 106, 672 N.E.2d at 1223.

In the instant case, plaintiff’s product liability count relates back to the filing of plaintiff’s negligence count against AVI. Plaintiff filed a first amended complaint on October 1, 2008, alleging a single count of negligence against AVI arising from plaintiff’s accident at the power plant. Plaintiff’s first amended complaint was timely, as it was filed within two years of his accident. Accordingly, the first requirement of the relation-back doctrine has been met. The second requirement of the relation-back doctrine is also satisfied here, as plaintiff’s product liability count arises from the same accident as the negligence count. Hence, plaintiff’s product liability count against AVI properly relates back to the timely filing of plaintiff’s negligence count against AVI, and the statute of limitations has not been violated.

AVI argues plaintiff’s product liability count asserted new causes of action premised on facts distinct in scope and time from plaintiff’s negligence count against AVI. We disagree. Plaintiff’s negligence and product liability counts both arose from the same accident at the same power plant that occurred at the same time in question. Plaintiff’s product liability count was not premised on facts distinct in scope and time from plaintiff’s negligence count.

AVI also asserts plaintiff’s untimely filing of the product liability count against AVI violated the Illinois statute of repose. No strict product liability action shall be commenced except within the applicable limitations period and within 12 years from the date of the first sale, lease, or delivery by a seller, or 10 years from the date of the first sale, lease, or delivery to its initial user, consumer, or other nonseller, whichever period expires earlier. Mitsias v. I-Flow Corp., 2011 IL App (1st) 101126, ¶ 30, 959 N.E.2d 94. AVI indicates its cart was manufactured and released in 1999, and, therefore, the 12-year repose period expired at the latest in 2011. AVI contends plaintiff’s strict product liability claim filed in 2013 was outside the 12-year repose period and violated the statute. We disagree.

The record indicates AVI was a lessor of its cart, as AVI repeatedly placed its cart in the stream of commerce for over a decade and obtained profits each time the cart was leased. “Anyone who is in the business of placing a defective product into the stream of commerce by leasing it, rather than selling it, may be strictly liable for any injuries which proximately result therefrom.” Timm v. Indian Springs Recreation Ass’n, 187 Ill. App. 3d 508, 511, 543 N.E.2d 538, 541 (1989).

The accident in the instant case occurred in 2007, and plaintiff filed a strict product liability claim against AVI in 2013. Hence, plaintiff brought his product liability claim six years after AVI leased its cart, well within the statute of repose. AVI’s argument that its cart was manufactured more than 12 years from the time plaintiff brought his product liability claim is
of no avail, as AVI fails to recognize it was a lessor of the cart rather than a seller at the time of plaintiff’s accident.

E. Eleventh-Hour Filing

In its final issue raised on appeal, AVI alleges the trial court’s consent to plaintiff’s eleventh-hour filing of new causes of action and the trial court’s denial of AVI’s motion for a trial continuance were contrary to law, prejudicial to AVI, and an abuse of discretion.

Section 2-616(c) of the Code of Civil Procedure provides:
“A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.” 735 ILCS 5/2-616(c) (West 2012).

The four relevant factors to be considered in determining whether to allow pleading amendments are:
“(1) whether the proposed amendments would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) the timeliness of the proposed amendment; and (4) whether previous opportunities to amend the pleadings could be identified.” Arroyo v. Chicago Transit Authority, 268 Ill. App. 3d 317, 322, 643 N.E.2d 1322, 1326 (1994).

Whether to allow an amendment to pleadings is within the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of an abuse of discretion. Lewandowski v. Jelenski, 401 Ill. App. 3d 893, 897, 929 N.E.2d 114, 119 (2010). A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. Lewandowski, 401 Ill. App. 3d at 897, 929 N.E.2d at 119. The trial court should exercise its discretion liberally in favor of allowing amendment if allowing it will further the ends of justice. Arroyo, 268 Ill. App. 3d at 322, 643 N.E.2d at 1326.

AVI alleges plaintiff’s amendment resulted in prejudice and hardship to AVI, as it was left with no time to disclose experts on plaintiff’s product liability claim. AVI claims the amendment changed the nature of the action it faced at trial, including the nature and quality of proof required to defend, and the trial court abused its discretion in allowing the amendment. AVI also claims it was prejudiced by the trial court’s refusal of a continuance. We disagree.

In the instant case, plaintiff’s motion to amend the pleadings came two weeks prior to trial. While AVI claims it was prejudiced by plaintiff’s eleventh-hour filing adding a product liability claim, it fails to indicate how it was prejudiced. AVI does not explain why it was prejudiced by the trial court’s refusal of a trial continuance and does not indicate what experts it wanted to testify concerning plaintiff’s product liability claim. Moreover, AVI was alerted to the issues concerning its defective cart in 2009 through its own discovery questions. AVI was already on notice of its defective cart, and to claim it was prejudicial for plaintiff to bring a product liability claim against AVI is unreasonable. We therefore conclude the trial court was within its discretion to allow plaintiff’s eleventh-hour request to amend his complaint two weeks prior to trial.

AVI indicates that amendments brought at the start of trial are inappropriate when they could have been brought earlier, as they alter the evidence required to defend and foreclose the time a party has to engage in discovery and procure requisite witnesses to defend the amended
allegations. *Arroyo*, 268 Ill. App. 3d at 322-23, 643 N.E.2d at 1326. *Arroyo* is distinguishable from the case at bar.

¶ 120 In *Arroyo*, the court denied the plaintiff’s motion to amend complaint that was brought 1 day before the scheduled trial date and 11 years and 7 months after the initial filing of the complaint. The time frame in the instant case is not comparable. Here, plaintiff’s motion to amend was filed 2 weeks prior to the scheduled trial date rather than 1 day, and was filed approximately 5 years after the original complaint was filed rather than 11-plus years. Accordingly, we find the trial court was well within its discretion to allow plaintiff to amend his complaint.

¶ 121 CONCLUSION

¶ 122 For the reasons stated herein, we affirm the judgment of the circuit court of St. Clair County.

¶ 123 Affirmed.
The duty analysis in a negligent-product-design case encompasses a risk-utility balancing test, and while compliance with industry standards is a relevant factor in that analysis, it is not dispositive.

Decision Under Review
Appeal from the Appellate Court for the Fifth District; heard in that court on appeal from the Circuit Court of Madison County, the Hon. A.A. Matoesian, Judge, presiding.

Judgment
Judgments reversed.
¶ 1 In this appeal, we are asked to clarify the duty analysis in a negligent-product-design case. Plaintiffs, Dora Mae and John L. Jablonski, Jr., as the special administrator and personal representative of the estate of John L. Jablonski, Sr., brought this action in the circuit court of Madison County against Ford Motor Company, alleging, inter alia, negligent design of the 1993 Lincoln Town Car’s fuel tank and willful and wanton conduct, seeking punitive damages. The jury returned a general verdict in the Jablonskis’ favor and awarded a total of $28 million in compensatory damages and $15 million in punitive damages. The appellate court affirmed the circuit court judgment. 398 Ill. App. 3d 222. This court allowed Ford’s petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010). For the reasons that follow, we reverse the judgments below.
On July 7, 2003, John and Dora Jablonski were traveling home in their 1993 Lincoln Town Car on I-270 in Madison County, Illinois, when they came to a complete stop in a construction zone. A Chevrolet Lumina driven by Natalie Ingram slammed into the Jablonskis’ Town Car at a high rate of speed with no evidence of braking. According to experts, the Lumina struck the Town Car at between 55 and 65 miles per hour. As a result of the crash, a large pipe wrench in the trunk of the Town Car penetrated the trunk and punctured the back of the vehicle’s fuel tank. The vehicle burst into flames, causing John’s death and Dora’s severe burns and permanent disfigurement.

Plaintiffs filed their original nine-count complaint against Ford and Ingram. After settling with Ingram, the case proceeded against Ford. Throughout the litigation, plaintiffs’ theories of recovery continually evolved. By the time of trial, in their third amended complaint, plaintiffs alleged that at the time the 1993 Lincoln Town Car was designed and manufactured and “thereafter,” Ford was under a legal duty to use ordinary care to ensure the 1993 Lincoln Town Car was not unreasonably dangerous and defective. Plaintiffs further alleged that at the time that Ford designed and manufactured the 1993 Lincoln Town Car, it was negligent and strictly liable in one or more of the following ways: (1) equipping the 1993 Lincoln Town Car with a vertical-behind-the-axle fuel tank; (2) failing to shield the vertical-behind-the-axle tank; and (3) failing to warn consumers of the risk of trunk contents puncturing the fuel tank.

Plaintiffs additionally alleged that these negligent acts constituted willful and wanton conduct. Plaintiffs specifically pleaded that at the time the 1993 Town Car was designed and manufactured Ford had knowledge of multiple deaths and/or serious injuries that were the result of its placement of its fuel tank behind the axle on certain of its vehicles, namely the Crown Victoria, the Mercury Grand Marquis and the Lincoln Town Car. Further, plaintiffs pleaded that Ford had knowledge that these particular models had an increased danger of fire-related injuries and that shielding and other devices were necessary to protect against fuel leakage and ignition.

The 11-day trial in this complex product design case included testimony from numerous lay and expert witnesses, encompassing over 3,000 pages of transcripts and hundreds of exhibits. After the close of the evidence, plaintiffs ultimately abandoned their strict liability claims, and the case was presented to the jury on several theories of negligent design and willful and wanton conduct: (1) failing to locate the fuel tank over the axle or forward of the rear axle; (2) failing to shield the fuel tank to prevent punctures by contents in the trunk; and (3) failing to warn of the risk of trunk contents puncturing the fuel tank. The jury was additionally instructed on a fourth theory never before pleaded, which was failing to inform the Jablonskis of certain remedial measures taken by Ford after the manufacture of the vehicle, but prior to the Jablonskis’ accident. The following evidence was introduced to support those four theories.

Historically, in the sixties and seventies, most fuel tanks in passenger vehicles were located behind the rear axle, or “aft of axle,” situated horizontally under the trunk of the vehicle, inches from the rear bumper. Research in 1968 indicated that this particular under
the-trunk location was susceptible to fuel-fed fires in rear-end collisions. At that time, a safer alternative location was proposed to place the fuel tank over the rear axle.

¶ 8 In 1979, Ford introduced the “Panther platform” design, which ultimately served as the basis for several large civilian and law enforcement four-door sedan models, including the Mercury Grand Marquis, the Ford Crown Victoria, the Ford Crown Victoria Police Interceptor, and the Lincoln Town Car. In these models, including the 1993 Lincoln Town Car, Ford chose a different fuel tank configuration, referred to at trial as a “vertical-behind-the-axle” tank. The tank was located aft of the axle, but between the two rear wheels, about 40 inches from the rear bumper and in front of the trunk.

¶ 9 Much of the trial centered around whether this location was a reasonably safe location for the fuel tank. By 1981, Ford began designing various new passenger car models with front-wheel drive and the fuel tank located forward of the axle. By 1991, the majority of new Ford models were being manufactured with fuel tanks forward of the axle. The Panther platform and the Mustang were the only two types of vehicles Ford still manufactured with an aft-of-axle fuel tank. Other manufacturers, including Audi, BMW, Chrysler, General Motors, and Volvo, continued to manufacture vehicles with an aft-of-axle fuel tank.

¶ 10 I. Plaintiffs’ Evidence

¶ 11 A. Negligent Fuel Tank Location

¶ 12 Plaintiffs’ expert Mark Arndt was critical of the fuel system in all aft-of-axle tanks, including both the “under the trunk” and “vertical-behind-the-axle” locations because they failed to maintain fuel system integrity during a crash. Specifically, he stated that the aft-of-axle tank was defective because it was located in the “crush zone” in rear-impact collisions and was vulnerable to being punctured by trunk contents and vulnerable to being pushed into sharp objects in front of the tank. It was his opinion that trunk contents puncturing the tank was a well-recognized problem. He testified that the safest location for the fuel tank “for a fair amount of time” was forward of the axle. Alternatively, locating the tank over the axle would significantly reduce the crush from a rear-end collision.

¶ 13 In forming his opinions, Arndt relied on several factors including basic engineering design concepts with regard to designing products generally. He testified that design safety involves considerations to design-out a problem by eliminating the hazard. If the hazard cannot be completely eliminated, then the product should be shielded to minimize the hazard, and if shielding or guarding is not effective, then warnings should be provided about the nature of the danger or potential harm that could occur. Ford taught these basic engineering principles in its own class on fuel systems engineering and these principles were outlined in its class manual beginning in 1991.

¶ 14 1. The Severy Research

¶ 15 Arndt maintained that Ford had long been aware of the dangers associated with aft-of-axle fuel tanks, including the danger of objects in the trunk puncturing the fuel tank in a rear-end collision. In support of this opinion, Arndt relied upon research done by Derwyn Severy,
a researcher at UCLA, who conducted a series of automobile crash tests, partly funded by Ford. The Severy research was published as an article in 1968 in a publication of the Society of Automotive Engineers, a peer-reviewed journal. The article was introduced into evidence at trial. With respect to fuel tank integrity and suggested design revisions, the article provided that:

“Several factors operate to determine the degree of attention given to an automobile safety oriented design problem. Prominent among these are the frequency with which the problem manifests itself, the degree of seriousness of the consequence when such problems arise, and the complexity or cost of solution of the problem.”

¶ 16 After evaluating crash tests of vehicles with fuel tanks located under the trunk inches from the rear bumper, the article provided the following conclusions:

1. *** Initial findings indicate that much progress can be made in reducing the possibility of crash fires by incorporation of relatively inexpensive design considerations relating to fuel tanks and related fuel systems.

2. Design revisions that provide for better containment of fuel *** which position the tank in locations least likely to sustain significant structural collapse, and which reduce the likelihood of fuel tank rupture, even when moderately crushed, typify improvements that would greatly curtail crash-released fuel.

3. Fuel tanks should not be located directly adjacent to the rear bumper or behind the rear wheels directly adjacent to the fender sheet-metal as this location exposes them to rupture at very low speeds of impact ***.

4. Preliminary studies suggest that the area cradled by the rear wheels, above the rear axle and below the rear window represents an improved location for the fuel tank ***.”

The article further explained as follows:

“This location is least often compromised from collisions of all types. The rear wheels, axle, and suspension provide an excellent structure to resist collapse; it is sufficiently remote from the rear end to be relatively free from rear-end collapse forces and can be protected from the passenger compartment by a fire wall, which has already been shown to be required behind the rear seat back for other reasons.”

In conclusion, the article indicated that “[c]ollision studies to date tend to support relocation of fuel tanks to the [over-the-axle] area, but further research is needed before this location can be recommended.”

¶ 17 None of the vehicles tested in the Severy research had a tank located vertical-behind-the-axle and none involved testing for trunk contents puncturing the fuel tank. With respect to the under-the-trunk tanks Severy had researched, Arndt explained that “if the tank is under the trunk, given that the force is usually moving forward, very, very unlikely that you’re going to get an object in the trunk puncturing [the tank].”

¶ 18 In 1969, Ford’s engineers investigated the proposed new over-the-axle tank location in relation to the under-the-trunk location. Roger Daniel, a Ford safety engineer, drafted a handwritten memo to his superiors at Ford regarding “Future Gas Tank Location.” In the
memo, he stated his understanding that the future direction with respect to fuel tank location was to “hang the tank under the trunk.”

¶ 19 Although he indicated that there were advantages and disadvantages to this location, he stated that the under-the-trunk location was vulnerable to rear-end impacts. He recommended that “for all vehicles except wagons and convertibles, the best tank location by far appears to be [over] the axle.” The advantage of this design, according to Daniel, was that it would be “[a]lmost impossible to crush the tank from the rear.”

¶ 20 Thereafter, in 1970, the engineering staff at Ford prepared a typewritten memo which provided the following analysis:

“We have examined possible fuel tank locations and determined that the safest place for a fuel tank is [over] the rear axle and below the package tray. In rear[-]end accidents, the tank is above and forward of vehicle components likely to crush during the collision or deform it, while in lateral accidents, the tires, axle, and wheel-house structure provide extensive protection against rupture or even excessive deformation.”

The memo indicated that in the proposed over-the-axle tank location, the tank would be “high enough in the trunk to essentially preclude rupture from in-trunk articles during an accident. However, should such an unlikely rupture occur, the gasoline would be confined to the trunk.”

¶ 21 The concern about rupture from in-trunk articles did not refer to the vertical-behind-the-axle tank location later chosen by Ford.

¶ 22 Thereafter, in a “Cost Engineering Report” to determine the potential cost of moving the fuel tank to the over-the-axle location, Ford’s engineers concluded that the cost of that design change would have been $9.95 per vehicle. Ford chose not to incorporate that design change into the 1979 Panther platform vehicle.

2. Other Accidents

¶ 23 As additional support for its theory that the location of the tank was dangerous and that Ford knew of the risk of danger, plaintiffs introduced a list of 44 rear-end collisions between 1981 and 2003 (exhibit 1). The list revealed seven accidents that occurred prior to the sale of the 1993 Lincoln Town Car involving Panther platform vehicles with vertical-behind-the-axle tanks where there was a fuel-fed fire due to tank rupture. None of those accidents involved trunk contents puncturing the tank.

¶ 24 In conjunction with that list, plaintiffs additionally introduced, and Arndt relied upon, over objection, a list of 50 accidents involving fuel-fed fires in Panther platform vehicles, which specifically described the cause of each fire (exhibit 96). Exhibit 96 has no dates listed on it. However, when cross-referenced with exhibit 1, it reveals that after the sale of the 1993 Town Car, between 1997 and 2003, there were 11 incidents prior to the Jablonski accident where Crown Victoria Police Interceptors had trunk contents puncture the tank in high-speed rear-end collisions involving police officers.

¶ 25 Arndt additionally prepared and relied upon, over objection, a separate list of 416
incidents involving a very diverse set of Ford model vehicles manufactured over a wide range of years, from the mid-sixties to the early nineties, prior to the manufacture of the 1993 Lincoln Town Car. The list was compiled by Arndt from a larger list of incidents Ford had disclosed in answers to an interrogatory in another case from 1992 which also included some forward-of-the-axle tanks.

All of the 416 vehicles on the edited list had aft-of-axle tanks. A few were vehicles with a vertical-behind-the-axle tank, but none were Lincoln Town Cars or other Panther platform models and most were vehicles with tanks located under the trunk inches from the bumper. All of the 416 incidents involved either a puncture, split, or tear of the fuel tank, resulting in 364 burn injuries and 378 deaths. However, there was no evidence that any of these accidents were caused by trunk contents puncturing the tank.

On cross-examination, Arndt acknowledged that he did not know the speed of any of the 416 incidents and could not say how a 1993 Lincoln Town Car would have reacted under the same conditions of those incidents. He also agreed that the vast majority of the cars on the list were designed in the sixties and seventies and were not tested under the 1993 federal government standards for fuel system integrity. He acknowledged that some of the vehicles he removed from the accident list had forward-of-the-axle fuel tanks, but he could not say how many.

Arndt also agreed that as of 1991, most cars on the road had an aft-of-axle fuel tank. Therefore, it would be reasonable to believe that if asked about fires involving products on the road as of that date, most manufacturers would identify vehicles with aft-of-axle fuel tank fires because that is how most vehicles were designed. Arndt also acknowledged that he could not tell how the 416 incidents compared to any other manufacturer during the same time period. He also could not tell how the 416 compared to the total number of accidents actually reported and collected during that time period.

Plaintiffs also introduced an exhibit entitled “Fire Risk in Fatal Rear Collision Accidents.” This list was compiled by Ford in 2002. The statistics indicate that between 1985 and 1997, the Lincoln Town Car had a fatal collision with fire rate per 100,000 registered vehicle years of 0.107, which Arndt agreed meant that there was one fatal collision with fire for every one million registered vehicle years of driving. Between 1985 and 1990 the Ford Escort, a small front-wheel-drive car with a forward-of-the-axle tank had a fatal collision with fire rate of 0.030 which meant that there was only a 0.3 fatal collision with fire for every one million registered vehicle years of driving. There was no evidence of the cause of any of these fires or evidence of what the rate would have been in 1993 at the time the Lincoln Town Car was manufactured.

3. Alternative Feasible Design

Arndt testified that at the time Ford manufactured the Lincoln Town Car, a safer, more practical location for the fuel tank would have been forward of the axle. As evidence of an alternative feasible location for the fuel tank, Arndt performed two different crash tests in 2004 on a 1992 Ford Thunderbird with a forward-of-the-axle tank at 54 and 75 miles per hour. The trunk was packed with various items to simulate those items located in the
Jablonski trunk at the time of the accident. The crash tests revealed no punctures to the fuel tank and no indication that any components punctured the tank.

¶ 33 On cross-examination, Arndt acknowledged that an automobile designer cannot merely design for rear impacts, but must also consider impacts from other angles. Arndt did not crash test the Thunderbird in a side-impact scenario and did not compare how the Lincoln Town Car would do in a side-impact or front-impact crash. He agreed that a Town Car has advantages in a side-impact collision because the tank is protected between the two rear wheels and the rear frame. Arndt also acknowledged that the Thunderbird and the Town Car are distinct vehicles. The Thunderbird is a two-door coupe and the Town Car is a four-door sedan. The Town Car is also considerably larger and weighs more. Arndt acknowledged that locating the tank forward of the axle would require Ford to completely redesign the vehicle and that cost would be a consideration in evaluating that decision.

¶ 34 As additional evidence of an alternative feasible design, Arndt explained that in the 1957 Skyliner, a rear-wheel drive, large vehicle, Ford placed the fuel tank in an over-the-axle location to accommodate space for a hard-top convertible.

¶ 35 4. Other Evidence Regarding Industry Standards

¶ 36 Arndt also testified that by 1991 all manufacturers were designing their new model vehicles with fuel tanks located forward of the axle and Ford’s global architectural plan as of 1989 indicated that all new models would have fuel tanks located forward of the axle. In 1981, Ford began moving the fuel tank in various models to a forward-of-the-axle location. By 1991, the only vehicles still designed by Ford with a fuel tank located aft-of-axle were the Mustang and the Panther platform vehicles.

¶ 37 Arndt agreed that a manufacturer cannot prevent every postcollision fire from occurring in a vehicle and that a fuel tank cannot be designed to be completely fireproof. Rather, the manufacturer is responsible for a design that “holds the fuel integrity of the vehicle.” He acknowledged that the 1993 Lincoln Town Car satisfied the federal motor vehicle safety standards for fuel integrity applicable to 1993 model vehicles and that Ford exceeded that standard with its own heightened 50-miles-per-hour crash testing.

¶ 38 B. Failure to Shield to Prevent Punctures by Trunk Contents

¶ 39 It was Arndt’s further opinion that if Ford chose not to relocate the tank, it should have provided shielding either inside the trunk or between the trunk and the tank that would have protected the trunk from contents puncturing the back of the fuel tank. Additionally, Ford should have provided a device in the trunk that would force trunk contents to be aligned laterally in the trunk. Plaintiffs introduced testimony that Ford had used shielding on its fuel tanks in some vehicles since the 1970s and that shielding generally was technically and economically feasible to use. However, when asked about shielding that would have specifically protected the tank from puncture from trunk contents, Arndt stated that he did not have a design that was “proven out by crash testing or some sort of design process.”
¶ 40 C. Failure to Warn of the Risk of Trunk Contents
Puncturing the Tank

¶ 41 With respect to the failure to warn, Arndt testified that at the time of manufacture, Ford
should have provided the consumer with a warning of the risk that objects in the trunk could
puncture the fuel tank, along with directions on how to align trunk contents laterally to avoid
puncture to the tank because the danger was “clearly known.” Arndt acknowledged that
between 1979 and 1993 there were millions of Panther platform vehicles sold and, as of
1993, there were zero incidents of trunk contents puncturing the tank. As of 1993, he was not
aware of any incident with other Ford model vehicles or any other manufacturer’s vehicles
where trunk contents had punctured the tank. Additionally, Arndt conceded that as of 1993,
there were no other manufacturers warning customers on how to pack their trunks.

¶ 42 D. Failure to Inform About Postsale Remedial Measures

¶ 43 Plaintiffs also introduced evidence at trial, over Ford’s repeated objection, regarding
Ford’s failure to inform the Jablonskis of certain postsale remedial measures taken in 2002.
Plaintiffs’ theory was that because Ford became aware of certain problems and voluntarily
undertook certain measures with respect to the Crown Victoria Police Interceptor, it should
have also informed its civilian customers about those measures. Subsequent to the sale of the
Town Car, but prior to the Jablonski accident, law enforcement agencies became aware of
high-speed rear-end collisions in which police officers were injured or killed in postcrash
fires in Crown Victoria Police Interceptors. As a result of these incidents, police agencies
complained to Ford and the National Highway Transportation Safety Administration
(NHTSA).

¶ 44 In October 2001, the NHTSA opened an investigation into postcrash fires in Ford’s
Panther platform vehicles. After completing its investigation in 2002, the NHTSA found that
Crown Victoria Police Interceptors, compared to civilian Panther platform vehicles, “have
a much greater exposure to high-energy rear impacts due to the nature of their use as blocker
vehicles at crash scenes or during routine traffic stops along high-speed public roads.” The
NHTSA required no action by Ford nor did it prohibit the “aft-of-axle” fuel tank design.

¶ 45 When asked to comment on the NHTSA’s findings, Arndt agreed that “it would not be
a good idea to dictate a fuel tank location because you can *** make a bad fuel tank in a
good location *** and I suppose *** you could probably make a good fuel tank in any
location.” The NHTSA additionally found that “the structural and component design is a
more critical factor than fuel tank location in maintaining fuel system integrity.” Arndt
agreed with this statement in part, but continued to identify fuel tank location as an important
consideration.

¶ 46 During 2002, government officials in various jurisdictions had opened investigations as
a result of police officer deaths. In June of 2002, Ford announced the formation of a “Crown
Victoria Police Interceptor Blue Ribbon Panel.” This panel consisted of Ford and law
enforcement representatives committing to a 90-day program to evaluate fuel system
upgrades and police procedures as a part of a “Police Officer Safety Action Plan.” In
September of 2002, the Blue Ribbon Panel announced certain remedial measures, including
the creation of an “Upgrade Kit,” which consisted of shields designed to protect the fuel tank from puncture by component parts in high-speed rear-end collisions. All experts agreed that the Upgrade Kit would not have prevented the Jablonski accident.

¶ 47 The panel also announced the creation of a “Trunk Pack,” for the Police Interceptor consisting of a drop-in trunk liner made of high-density polyethylene, which ensures the user places objects in the trunk laterally rather than longitudinally. Arndt acknowledged that the “Trunk Pack” was designed for the Police Interceptor and he was not recommending that particular design for civilian use or in the Lincoln Town Car. A sticker located on the “Trunk Pack” instructed the user to “align hard or sharp police equipment laterally.”

¶ 48 The panel also announced recommendations for police safety procedures, including “Trunk Packing Considerations for Police Vehicles.” These Trunk Packing Considerations advised officers on items not to carry in the trunk and advised them regarding the placement of other items in the trunk to reduce the potential for fuel tank rupture by trunk contents. Finally, Ford announced the development of a website where the law enforcement community and the general public could find information about the upgrades to the Police Interceptor.

¶ 49 In October of 2002, Ford informed by mail all the registered owners of Police Interceptors and all the Ford, Lincoln, and Mercury dealers in the United States about the availability of the upgrade kit. In March of 2003, Ford also notified its 32,000 governmental fleet customers regarding the upgrade kit. In May 2003, the police and Police Interceptor customers were notified by mail that the Trunk Pack could be ordered through a Ford dealer. According to the website, a direct mailing to fleet customers informing them of the availability of the Trunk Pack was to take place in June 2003, and shipments of the product to dealers were to begin on June 16, 2003, about three weeks before the Jablonski accident. The Trunk Packing Considerations were available only through the website and with the purchase of the Interceptor Trunk Pack. Civilian owners of Panther platform vehicles, including the Jablonskis, received no notice of the availability of the Trunk Pack or the Trunk Packing Considerations.

¶ 50 Sue Cischke, a vice president of Ford and the highest ranking Ford employee responsible for vehicle safety, made the decision not to notify civilian users of these measures because it was Ford’s opinion that the risk of fuel-fed, postcrash fires in high-speed rear-impact collisions is unique to police users because police officers have significantly greater exposure in severe highway collisions. However, with respect to the Trunk Packing Considerations, she admitted at trial that of the articles Ford warned police that carrying in the trunk was not recommended, some could potentially be present in civilian cars.

¶ 51 II. Ford’s Evidence

¶ 52 After the circuit court denied its motion for a directed verdict on all grounds of negligence, strict liability, and punitive damages, Ford presented countering documentary evidence and testimony. Ford’s primary theory was that its conduct in locating the fuel tank vertically behind the axle was not unreasonable, as it was in the best location for that vehicle considering the overall design of the vehicle and that changing the location would reduce the
effectiveness of other desirable attributes of the vehicle.

¶ 53 In support of its theory, Ford introduced evidence that it met all relevant safety standards with regard to fuel integrity, that it did not violate the standard of care in the industry, and that the fuel tank puncture by the pipe wrench was such a rare, unique, and unforeseeable occurrence that no manufacturer could anticipate or design against such an occurrence. Ford presented evidence that prior to the time of sale, no Panther platform vehicle was ever subject to punctures from trunk contents. Further, prior to the Jablonski accident, no civilian vehicle was ever subject to a fuel tank puncture. Millions of Ford Panther platform vehicles had been driven for years with a small incidence of postcrash fires.

¶ 54 Ford’s experts opined that there is no optimum fuel tank location for all vehicles. Rather, the design of a fuel system depends upon the design of the overall car structure and considerations regarding impacts from various directions. It was their opinion that it is important to consider that the body-on-frame design of the Panther platform has different package space and different strengths that interact with the location of the fuel tank. These qualities make the location of the tank for that car different from what might be the best location for a front-wheel drive, unit body, or smaller car. If the fuel tank were moved in the Panther platform vehicles to the forward-of-the-axle location, the body-on-frame construction and rear-wheel drive would have to be eliminated, making it a totally different car. In the defense experts’ opinion, the vertical behind-the-axle tank was the best and safest design for the 1993 Lincoln Town Car and provided the most protection from all types of crashes.

¶ 55 Ford introduced statistical data including data indicating that 99.9993% of all Town Cars made from 1992 to 2001 had never been involved in a fatal rear-end collision with fire. Similarly, considering all Panther platform vehicles made in that same 10-year period, 99.9993% had never been involved in a fatal rear collision with fire. By 2003, there were about 15 million vehicles still on the road that were manufactured in 1993 with aft-of-axle tanks. With respect to the other 416 accidents introduced by plaintiffs, Ford’s experts indicated that none were relevant to consider because they were cars of a different era, built to different safety standards and performed differently in a crash.

¶ 56 A. Compliance With Federal Motor Vehicle Safety Standards

¶ 57 The NHTSA is the federal agency responsible for implementing federal highway safety laws. The NHTSA specifically promulgates the Federal Motor Vehicle Safety Standards required for fuel system integrity. Ford presented evidence that at the time of manufacture, the 1993 Lincoln Town Car satisfied the applicable version of Safety Standard 301, which required 1993 model-year vehicles to withstand, with minimal fuel leakage, a rear impact at 30 miles per hour from a nondeformable, 4,000-pound barrier. Ford also introduced evidence of its own internal higher fuel integrity standards which involved car-to-car crash testing at 50 miles per hour from three different angles.

¶ 58 According to Ford’s experts, these standards were more stringent than Safety Standard 301, and more rigorous than most standards used by any other vehicle manufacturers at the time. In 2000, the NHTSA rejected a proposal from some advocacy groups that the NHTSA
regulate the location of fuel tanks, requiring them to be forward of the axle. The NHTSA explained that “such a requirement is unnecessary and would be design restrictive,” noting that “the structural and component design is a more critical factor than fuel tank location in maintaining fuel system integrity.”

¶ 59 Ford additionally sought to introduce evidence that in 2004, the NHTSA adopted a more stringent version of Safety Standard 301, requiring it to withstand a 50-mile-per-hour crash test, and that the 1993 Lincoln Town Car satisfied the new standard promulgated more than a decade after the car was manufactured. The circuit court excluded this evidence.

¶ 60

B. Over-the-Axle Design Not Workable

¶ 61 With respect to the design of the 1993 Lincoln Town Car, Ford introduced evidence from its employee Jack Ridenour, a mechanical engineer and fuel system designer who joined the fuel system design group at Ford in 1971. He testified that the over-the-axle location advocated by Severy did not show that the vertical-behind-the-axle tank location was an unsafe dangerous location. Ridenour stated that the research done by Severy in the late sixties advocated the over-the-axle design as superior to the under-the-trunk location. He testified that the over-the-axle tank location addressed by Severy and Daniels ultimately proved unworkable.

¶ 62 Based on Severy’s research it was thought at the time that the over-the-axle tank location was superior to the under-the-trunk location. Ford’s European designed Caprice was held up as an example of how to implement that design effectively and was manufactured until 1972. The advantages of that design were that it was farther away from the rear bumper and provided more crush space behind the fuel tank. Also, the tank would not be exposed to the under-vehicle environment and road hazards.

¶ 63 Ridenour testified that the cost estimate for the over-the-axle tank and placement of a metal barrier to protect the passenger compartment had nothing to do with the 1993 Lincoln Town Car fuel system, fuel tank location, or the way it was executed. Rather, he stated that the 1971 cost estimate showed the increased costs associated with the metal barrier for the over-the-axle tank.

¶ 64 He was not aware of any manufacturer who was ever able to accomplish the design concepts of Severy and Daniels in a workable design. Ford crash test results for this design revealed that the impact forces on the passenger compartment and the occupants were unsatisfactory. Therefore, the Caprice was discontinued in 1972 and Ford discontinued the use of the over-the-axle tank location. Ford’s expert testified that the 1957 Skyliner had a different frame structure and was not a crashworthy design that would have passed fuel safety standards in 1993. The disadvantages of the over-the-axle design included a susceptibility to damage in override collisions, the risk that gasoline vapors could collect in the passenger area of the vehicle presenting a combustion hazard, the inability to separate the tank from the passenger compartment with a metal barrier, and a risk that trunk contents could puncture the fuel tank.

¶ 65

C. Vertical Behind the Axle Best Location for Town Car
¶ 66 Ridenour testified that the Panther vehicle is executed with a steel floor pan that totally isolates the tank from the interior of the vehicle, the passenger compartment and the trunk and that forms a barrier between any trunk contents and the tank. He testified that the vertical-behind-the-axle design also incorporates the positive attributes of the over-the-axle location. The vertical design of the Town Car tank is about the same distance away from the rear bumper as the over-the-axle tank. Also, similar to the over-the-axle location, the vertical-behind-the-axle location is also between the area cradled by the rear wheels. It is well protected in side crashes by the heavy axle structure and suspension of a rear-wheel-drive vehicle. Severy indicated that this location was least often compromised from collisions of all types.

¶ 67 Ford also introduced evidence that there are advantages and disadvantages to the forward-of-the-axle location. Specifically, Ford’s experts addressed the advantages to that tank location in a front-wheel-drive vehicle with a smaller “unit body” car where there are more options with respect to the placement of the fuel tank. Body-on-frame cars have a different package space and are rear-wheel drive, which has certain benefits. A disadvantage of the forward-of-the-axle location is the fill pipe because the longer the pipe, the more vulnerable it is in a crash. Also, the forward-of-the-axle tank is more susceptible to damage in side-impact crashes.

¶ 68 Ford’s experts believed that the tank design in the 1993 Town Car was the best location for that particular car because the tank is well forward of the bumper, providing a lot of crush space in the back of the car. It is below the vehicle floor and separated from the inside of the vehicle and allows for a short fill pipe. The tank is inside the frame rails, which are very strong, and the axle is able to move forward, creating space for the fuel tank to move forward which is an advantage in certain types of crashes.

¶ 69 D. Accident Was Unforeseeable

¶ 70 With respect to the cause of the accident and whether it was foreseeable, Ford presented expert testimony that the cause resulted from a combination of necessary and sufficient conditions that had to occur for this accident to have happened. Those factors included the speed of the vehicle that struck the Town Car, the configuration of that vehicle, the exact alignment of those vehicles at the time of impact, the exact location and longitudinal alignment of the pipe wrench in the trunk on impact, the type of trailer hitch on the Town Car, and other factors that caused the pipe wrench to penetrate the fuel tank. Out of millions of Town Cars on the road, it was the only known accident in which the fuel tank had been penetrated by trunk contents and the only known non-police-vehicle incident considering all Panther platform vehicles. Ford’s experts believed that the incident was so rare that the risk of trunk contents puncturing the fuel tank should be given little consideration in fuel system design.

¶ 71 E. Proposed Shielding Was Unworkable

¶ 72 With respect to the proposed shielding of the trunk wall advocated by Arndt, the Interceptor Trunk Pack was tested in the Crown Victoria Police Interceptor and proved
effective in preventing trunk contents from puncturing the trunk. Ford’s expert testified that based on his testing, a Kevlar backing in the trunk might have added strength, but would not have prevented the pipe wrench from puncturing the tank in this particular accident. Additionally, he testified that there was no feasible guarding system for the rear of the tank that would have prevented the pipe wrench from penetrating the tank. A metal barrier could be designed in between the trunk wall and the tank, but would likely puncture the tank in a side-impact collision. Therefore, the design would make the overall safety worse compared to this remote event. He testified that there was no alternative feasible shield design that would have prevented this particular accident.

¶ 73 III. Procedural History at the Close of the Evidence

¶ 74 At the close of the evidence, Ford renewed its motion for a directed verdict on all theories and grounds of recovery. Plaintiffs then voluntarily dismissed their strict liability count with prejudice and Ford moved for a mistrial claiming that “substantial evidence was presented in this case under the guise that it was relevant in a strict liability claim.” Ford particularly argued it was prejudiced by the postsale conduct introduced into evidence. The circuit court denied the motion for a mistrial and for a directed verdict.

¶ 75 Thereafter, during the instructions conference, the circuit court accepted plaintiffs’ issues instruction, which provided for the fourth, yet unpleaded theory that Ford was negligent in “failing to inform of the existence of the Trunk Pack and/or Trunk Pack Recommendations.” With regard to the fourth theory, Ford again objected to any postsale duty to warn and argued that plaintiffs never pleaded a postsale duty to warn. Plaintiffs then sought leave to amend their pleadings to conform them to the proof adduced at trial, which the circuit court granted over Ford’s objection. No pleading was tendered to the court until after judgment.

¶ 76 The circuit court gave a non-Illinois Pattern Jury Instruction (IPI) relying on the Restatement (Third) of Torts: Products Liability § 10 (1998), regarding a postsale duty to warn and another non-IPI instruction directing the jury that Ford “could be liable for voluntarily undertaking to provide a post-sale warning to some customers but not to others.” The circuit court additionally rejected Ford’s proposed special interrogatories, all of which plaintiffs objected to on the basis of improper form.

¶ 77 After closing arguments, the jury returned a general verdict awarding Dora Mae Jablonski compensatory damages totaling $23.1 million and awarding punitive damages in the sum of $15 million. The jury also awarded compensatory damages to the estate in excess of $5 million.

¶ 78 Thereafter, over Ford’s objections, between May and November 2005, plaintiffs were granted three opportunities to amend the pleadings to conform them to the proof at trial. The sixth amended complaint alleged that Ford was negligent for the additional reason that it failed “to inform the plaintiffs of the existence of the Trunk Pack and/or trunk pack recommendations even though Ford had voluntarily undertaken to inform police consumers of the existence of the trunk pack and/or trunk pack recommendations.” The trial court subsequently denied Ford’s motion for a judgment notwithstanding the verdict or alternatively for a new trial.
On appeal, the appellate court affirmed the judgment. This court granted Ford’s petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010). In addition, pursuant to Supreme Court Rule 345 (Ill. S. Ct. R. 345 (eff. Sept. 20, 2010)), we allowed the Illinois Trial Lawyers Association (ITLA) to file a brief as amicus curiae on behalf of plaintiffs. We also permitted Caterpillar, Inc., and the Alliance of Automobile Manufacturers to file briefs as amici curiae on behalf of Ford.

ANALYSIS

Although Ford raises numerous issues for our review, as an initial matter, to answer these questions, we must first clarify the duty analysis in a negligent-product-design case, and specifically address the application of the risk-utility test in determining the duty of care.

We begin our discussion by setting forth the general principles applicable to a negligent-product-design case. A product liability action asserting a claim based on negligence, such as negligent design, is based upon fundamental concepts of common law negligence. Calles v. Scripto-Tokai Corp., 224 Ill. 2d 247, 270 (2007). As in any negligence action, a plaintiff must establish the existence of a duty, a breach of that duty, an injury that was proximately caused by that breach, and damages. Heastie v. Roberts, 226 Ill. 2d 515, 556 (2007).

The determination of whether a defendant owes a duty to a plaintiff is a question of law, reviewed de novo. Thompson v. Gordon, 241 Ill. 2d 428, 438-39 (2011). A manufacturer has a nondelegable duty to design a reasonably safe product. Calles, 224 Ill. 2d at 270. Thus, the key question in a negligent-design case is whether the manufacturer exercised reasonable care in designing the product. Id. “In determining whether the manufacturer’s conduct was reasonable, the question is ‘whether in the exercise of ordinary care the manufacturer should have foreseen that the design would be hazardous to someone.’ ” Id. at 271 (quoting American Law of Products Liability 3d § 28:48, at 28-66 (1997)). To show that the harm was foreseeable, the plaintiff must show that “the manufacturer knew or should have known of the risk posed by the product design at the time of manufacture” of the product. Id.; Sobczak v. General Motors Corp., 373 Ill. App. 3d 910, 923 (2007).

It has long been held that whether the manufacturer exercised reasonable care in designing its product also encompasses a balancing of the risks inherent in the product design with the utility or benefit derived from the product. Restatement (Second) of Torts § 291, at 54 (1965) (“[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”). When the risk of harm outweighs the utility of a particular design, there is a determination that the manufacturer exposed the consumer to a greater risk of danger than is acceptable to society. Sheila L. Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 610 (1980) (“[c]onceptually and analytically, this approach bespeaks negligence”).

In the context of a strict liability design-defect case, we have previously set forth a nonexhaustive list of factors derived from various authorities that may be relevant to the risk-utility analysis. These factors include evidence of (1) the availability and feasibility of alternate designs at the time of the product’s manufacture; or (2) that the design used did not
conform to the design standards in the industry, design guidelines provided by an 
authoritative voluntary organization, or design criteria set by legislation or governmental 
regulation. Calles, 224 Ill. 2d at 263-64 (quoting Anderson v. Hyster Co., 74 Ill. 2d 364, 368 
(1979)). Other factors that may be relevant include the utility of the product to the user and 
to the public as a whole, the safety aspects of the product including the likelihood that it will 
cause injury and the probable seriousness of the injury, and the manufacturer’s ability to 
eliminate the unsafe character of the product without impairing its usefulness or making it 
too expensive to maintain its utility. Id.; see also Mikolajczyk v. Ford Motor Co., 231 Ill. 2d 
516, 555 (2008) (finding the risk-utility formulation in the Restatement (Third) of Torts: 
Products Liability § 2, cmt. f, at 23 (1998), to be instructive in a design defect case).

¶ 86 In Calles, we concluded that risk-utility balancing remains operative in determining 
whether a defendant’s conduct is reasonable in a negligent-design case. Calles, 224 Ill. 2d 
at 269 (“the conclusion that the risk-utility test is not applicable in negligent-product-design 
cases is not binding precedent”). Numerous commentators have concurred that the balancing 
test developed for strict liability claims, which examines whether a product is unreasonably 
dangerous, is essentially identical to the test applied in determining whether a defendant’s 
conduct in designing a product is unreasonable and that any distinction is mere semantics. 
See Aaron D. Twerski, Chasing the Illusory Pot of Gold at the End of the Rainbow: 
(“There simply is no difference between reviewing the conduct of the manufacturer and the 
product design. Ultimately, products are neither reasonable nor unreasonable; they are 
deemed so only because a human fact-finder utilizing risk-utility tradeoffs decides one way 
or another on the issue.”); William Powers, Jr., A Modest Proposal to Abandon Strict 
Products Liability, 1991 U. Ill. L. Rev. 639, 654 (“[C]ourts have had to expend considerable 
energy trying to explain how defectiveness under the risk-utility test differs from negligence. 
The effort has been far from successful.”); see also Blue v. Environmental Engineering, Inc., 
215 Ill. 2d 78, 118 (2005) (Fitzgerald, J., specially concurring, joined by McMorrow, C.J.) 
(noting that the risk-utility test in strict liability and the approach used in administering 
traditional reasonableness standard of negligence appear to be coextensive).

¶ 87 There are a myriad of factors that may be relevant to the balance, and they may vary 
depending upon the unique facts and circumstances of each case. In applying the balancing 
test, the court must initially balance factors it finds relevant to determine if the case is a 
proper one to submit to the jury. Calles, 224 Ill. 2d at 266 (citing Restatement (Third) of 
Torts: Products Liability § 2, Reporters’ Note, cmt. f, at 94 (1998)). Once this threshold 
determination has been met, the issue is then for the fact finder to determine the weight to 
be given any particular factor, and its “ ‘relevance, and the relevance of other factors, will 
vary from case to case.’ ” Calles, 224 Ill. 2d at 266 (quoting Restatement (Third) of Torts: 
Products Liability § 2, cmt. f, at 23 (1998)). With these principles in mind, we now consider 
Ford’s specific contentions.

¶ 88 Ford contends that it is entitled to a judgment notwithstanding the verdict on plaintiffs’ 
first three theories of negligence because plaintiffs failed to present sufficient evidence that 
it breached any recognized standard of care and, therefore, insufficient evidence to justify 
submitting any of their negligence claims to the jury. “[V]erdicts ought to be directed and
judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.” Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510 (1967). In other words, a motion for judgment n.o.v. presents “a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff’s] case.” York v. Rush-Presbyterian-St. Luke’s Medical Center, 222 Ill. 2d 147, 178 (2006) (quoting Merlo v. Public Service Co. of Northern Illinois, 381 Ill. 300, 311 (1942)). We review de novo the trial court’s decision denying Ford’s motion for judgment notwithstanding the verdict. Lazenby v. Mark’s Construction, Inc., 236 Ill. 2d 83, 100 (2010).

¶ 89 I. Compliance With Industry Standards

¶ 90 Ford initially argues that its compliance with industry standards alone is dispositive of its duty in a negligent-design claim. Ford relies on the proposition of law in Blue, that a claim for negligent design requires proof that the “defendant deviated from the standard of care that other manufacturers in the industry followed.” Blue, 215 Ill. 2d at 96 (plurality op.). As we explained, this view does not represent the appropriate duty analysis in a negligent-design claim.

¶ 91 Although the plurality opinion in Blue suggests that conformance to an industry standard is dispositive on the issue of negligence (see Blue, 215 Ill. 2d at 100), as we explained in Calles, that language is not binding authority (Calles, 224 Ill. 2d at 269) and is contrary to well-settled law in Illinois and throughout the country. Rather, we have previously held that evidence of industry standards is a factor to be considered in the balance and has always been relevant to determining whether a defendant has exercised reasonable care in designing a product. See Ruffiner v. Material Service Corp., 116 Ill. 2d 53, 58 (1987); Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 286, 294 (1965); see also Cornstubble v. Ford Motor Co., 178 Ill. App. 3d 20, 39 (1988) (Calvo, J., dissenting); Nave v. Rainbow Tire Service, Inc., 123 Ill. App. 3d 358, 360 (1984); Denniston v. Skelly Oil Co., 47 Ill. App. 3d 1054, 1068 (1977); McNealy v. Illinois Central R.R. Co., 43 Ill. App. 2d 40, 469-70 (1963).

¶ 92 However, the mere fact that a manufacturer adhered to all relevant industry standards does not require judgment as a matter of law. It is well settled that conformance to industry standards is relevant, but not dispositive on the issue of negligence. Restatement (Second) of Torts § 295A (1965); 1 Dan B. Dobbs, The Law of Torts § 164, at 397 (2001); Prosser and Keeton on Torts § 33, at 195 (W. Page Keeton et al. eds., 5th ed. 1984). See also Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470 (1903) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”). Similarly, evidence of a violation of industry standards is considered probative of, but not conclusive on, the question of negligent design. The standard remains whether the conduct was reasonable under the circumstances. Calles, 224 Ill. 2d at 270; Modelski v. Navistar International Transportation
Moreover, we note that Ford understood this to be the standard. During the motions in limine conference, plaintiffs sought to limit Ford from introducing evidence regarding governmental safety standards. In arguing the motion, Ford stated:

“We do not intend to say [to] the jury that because [we] complied with Federal Motor Vehicle Safety Standards, therefore we win the case, okay. It is, we are entitled to show the standard, what it is, that we complied with it. And it is *** evidence of due care. And it is evidence, but it is not dispositive and we are not going to argue it is dispositive.”

Additionally, in opening statements Ford acknowledged that compliance with industry standards was not conclusive evidence of reasonableness but, rather, that it “used the federal standards as one of their criteria.” Ford stated that “this doesn’t dispose of the issue, but it is an indication.” Accordingly, Ford’s contention that compliance with industry standards is dispositive of a negligent-product-design claim lacks merit.

II. Application of the Risk-Utility Balancing Test

We next consider Ford’s contention that it was erroneously held to a higher duty of care than reasonable care, requiring it to design out, guard against, and warn of every conceivable risk. A manufacturer is not required to guard against every conceivable risk, regardless of the degree of harm. Cunis v. Brennan, 56 Ill. 3d 372, 376 (1974). Rather, as we explained, plaintiff was required to produce evidence that Ford’s conduct in designing the fuel system was unreasonable by presenting evidence that the risk was foreseeable and that the risks inherent in the product design outweighed the benefits. Calles, 224 Ill. 2d at 270-71.

It was uncontradicted that the 1993 Lincoln Town Car satisfied the specific federal fuel system integrity standards promulgated by the NHTSA for rear-end collisions and exceeded that standard with Ford’s own internal 50-miles-per-hour crash testing. It was Arndt’s opinion that the ability to maintain fuel system integrity was the standard by which to measure the reasonable design of the fuel system. It was also uncontradicted that it was an accepted industry practice in 1993 to locate the fuel tank aft of axle, as other manufacturers in the industry, including Audi, BMW, Chrysler, General Motors, and Volvo, continued to manufacture vehicles with aft-of-axle fuel tanks at that time. After investigating the 1993 Lincoln Town Car, the NHTSA chose not to mandate a different location for the tank, concluding that “the structural and component design is a more critical factor than fuel tank location in maintaining fuel system integrity.”

Given that Ford complied with, and even exceeded, the industry standard set for fuel system integrity, plaintiffs were required to come forward with evidence that despite Ford’s compliance, its conduct was otherwise unreasonable because the foreseeable risk posed by the vertical-behind-the-axle design of the fuel tank at the time of manufacture outweighed its utility.

Plaintiffs sought to establish that Ford’s conduct in designing the fuel tank was unreasonable because at the time of manufacture, there was a safer alternative feasible tank design either over the axle or forward of the axle. Arndt believed that forward of the axle was...
the safest tank location “a fair amount of the time” and presented evidence of a successful crash test with a 1992 Thunderbird with a forward-of-the-axle tank.

¶ 100 Nevertheless, Arndt acknowledged that other variables must also be considered in evaluating the design of a fuel system. Arndt agreed the structure and component design of the particular vehicle are important considerations in maintaining fuel system integrity. The Lincoln Town Car was a heavy-duty six-passenger vehicle, with a deep-well trunk, a body-on-frame construction, which aided in the absorption of energy in a collision, and a solid rear axle, which was less susceptible to damage and less expensive to repair than an independent rear suspension. Arndt additionally acknowledged that an automobile designer must consider collision impacts from all angles. The uncontradicted evidence presented was that the design of the Lincoln Town Car had advantages over the Thunderbird in side-impact collisions.

¶ 101 It was also uncontradicted that moving the tank would have required Ford to completely redesign the vehicle, and would have introduced other risks of equal or greater magnitude, including fuel-fed fires from the filler pipe and tank rupture from other parts of the vehicle.

¶ 102 The over-the-axle tank had its own safety risks. That location was discontinued by Ford in 1972, and by 1994, no other manufacturer in the industry was manufacturing vehicles with an over-the-axle tank. “It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also introduce into the product other dangers of equal or greater magnitude.” Restatement (Third) of Torts: Products Liability § 2, cmt. f, at 23 (1998).

¶ 103 Ultimately, Arndt agreed with the NHTSA’s conclusion that it was appropriate not to dictate fuel tank location because, as he stated, “you could probably make a good fuel tank in any location.” Accordingly, the evidence presented regarding an alternative feasible design did not support the conclusions that Ford’s conduct in locating the fuel tank in the vertical-behind-the-axle location in the 1993 Lincoln Town Car was unreasonable. Plaintiffs must show more than the technical possibility of an alternative design.

¶ 104 Plaintiffs also introduced the Severy research, Ford’s internal engineering recommendations from the late 1960s and early 1970s advocating an over-the-axle tank location, and the costs associated with moving the tank to that location. However, these recommendations were made a decade before the Panther platform was introduced. The reasonableness of the vertical-behind-the-axle design for a fuel tank was not considered at that time. Rather, Severy found that the under-the-trunk tank location, inches from the rear bumper, was unsafe because it exposed the tank to rupture at low speeds. Instead, the alternative over-the-axle location was thought by Severy to be “an improved location.” Thus, this evidence was relevant to the risks associated with the under-the-trunk location and the need to move the tank from that location. It was not evidence from which the jury could conclude that Ford’s conduct was unreasonable with respect to an entirely different fuel tank location ultimately chosen for this particular vehicle a decade later which was never tested in Severy’s research.

¶ 105 Plaintiffs also introduced evidence that Ford was aware of the potential for trunk contents to puncture the fuel tanks in other designs that Ford ultimately chose not to adopt. However, the risk was so remote that it had never manifested itself with respect to this design in the 15
years that millions of Panther platform vehicles were on the road prior to 1993. Nor was Arndt aware of any accident prior to 1993 involving any vehicle made by any manufacturer where any object in a trunk had ever punctured a fuel tank. Plaintiffs also introduced 416 purportedly substantially similar accidents in support of its contentions. However, there was no evidence that in any of these incidents trunk contents ever punctured the tank in a Panther platform vehicle or in any other vehicle manufactured by Ford or any other manufacturer as of 1993.

Additionally, with respect to shielding, although not required to develop a specific prototype, it was incumbent upon plaintiffs to present evidence that there was a shield that was feasible to prevent trunk contents from puncturing the tank in the 1993 Lincoln Town Car. Regarding the possibility of a shield that would be fitted over the fuel tank, Arndt “mocked up” a shield that would conceivably fit on the tank, but stated that it was not “proven out by crash testing or some sort of design process.” With respect to the existence of the optional Kevlar Trunk Pack designed for the Crown Victoria Police Interceptor in 2002, Arndt conceded that the Trunk Pack designed for that vehicle was not appropriate for the 1993 Lincoln Town Car. Although Ford’s crash testing at 75 miles per hour revealed that the Upgrade Kit shielding developed to prevent punctures from the component parts surrounding the tank was effective, the experts all agreed that the Upgrade Kit would not have prevented the ruptures that occurred in the Jablonski accident. Accordingly, there was insufficient evidence of a shield that would have been feasible to prevent this accident from occurring.

In sum, after balancing the foreseeable risks and utility factors, plaintiffs failed to present sufficient evidence from which a jury could conclude that at the time of manufacture, Ford’s conduct was unreasonable or that it had acted unreasonably in failing to warn about the risk of trunk contents puncturing the tank. It complied with the industry standard for fuel system integrity, it exceeded that standard by its own heightened crash-testing standards, other manufacturers in the industry continued to produce vehicles with aft-of-axle fuel tanks, and despite the clear gravity of the injury, the risk was extremely remote. Additionally, there was no evidence of a feasible shield that would have prevented the injury in this case. Accordingly, there was insufficient evidence to justify the submission of plaintiffs’ first three claims of negligence to the jury.

III. Postsale Duty to Warn

We next consider Ford’s various contentions regarding plaintiffs’ fourth theory of negligence. Specifically, Ford maintains that plaintiffs’ fourth theory of negligence, which was never pleaded before trial, is premised upon a postsale duty to warn which is contrary to Illinois law. Under plaintiffs’ fourth theory, the jury was instructed that it could find Ford negligent for its failure to “inform of the existence of the Trunk Pack and/or Trunk Pack recommendations.” Ford developed these measures a decade after the sale of the 1993 Lincoln Town Car.

We initially reject plaintiffs’ argument that Ford has forfeited any claim of error on the postsale duty to warn issue. The pretrial and trial record is replete with instances where Ford
raised the lack of a postsale duty and challenged the relevance of the postsale testimony in relation to its duty to the consumer at the time of manufacture.

¶ 111 With respect to the merits, under established Illinois precedent, when a design defect is present at the time of sale, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk as soon as the manufacturer learns or should have learned of the risk created by its fault. Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 33-36 (1980) (duty to warn if manufacturer knew or should have known of the danger at the time of sale); Carrizales v. Rheem Manufacturing Co., 226 Ill. App. 3d 20, 34 (1991) (“Illinois law has been reluctant to impose a duty to warn beyond the time when the product leaves the manufacturer’s control unless the manufacturer knew or should have known at that time that the product was defective.”); Kempes v. Dunlop Tire & Rubber Corp., 192 Ill. App. 3d 209, 218 (1989).

¶ 112 Nevertheless, “a manufacturer is under no duty to issue postsale warnings or to retrofit its products to remedy defects first discovered after a product has left its control.” Modelski v. Navistar International Transportation Corp., 302 Ill. App. 3d 879, 890 (1999); Carrizales, 226 Ill. App. 3d at 34; Collins v. Hyster Co., 174 Ill. App. 3d 972, 977 (1988) (“[T]he law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control.”).

¶ 113 Plaintiffs argue that their fourth theory has always been premised upon a continuing duty to warn at the time the car was manufactured, and thereafter. Specifically, they argue that if a manufacturer knew or should have known of the hazard at the time of manufacture, establishing a duty to warn when the product left its control, that duty to warn is then a continuous one.

¶ 114 The appellate court agreed and found that plaintiffs’ theory was based upon a continuous duty to warn. We do not quarrel with the statement of the law recognizing a continuing duty to warn. We reiterate, as the appellate court noted in Modelski, a continuing duty may be imposed if at the time of manufacture of the product the manufacturer knew or should have known of the hazard.

¶ 115 Nevertheless, that theory was not presented to the jury at trial. During the hearing on Ford’s motion for a directed verdict, plaintiffs specifically noted that the evidence pertaining to subsequent remedial measures was admissible to support “a post-sale duty to warn.”

1A duty may be imposed upon a manufacturer by a statute or administrative regulation which mandates the recall of the product, under circumstances where the dangerous characteristic of the product is not discovered until after the product has left the manufacturer’s control. Modelski, 302 Ill. App. 3d at 889; see also Restatement (Third) of Torts: Products Liability § 11 (1998) (addressing the duty in the context of a recall). However, in the absence of such an obligation, or a voluntary undertaking, Illinois has not imposed such a duty on a manufacturer in the context of product design or specifically failure to warn. But see, e.g., Proctor v. Davis, 291 Ill. App. 3d 265, 278 (1997) (in the context of pharmaceutical products duty to notify the medical profession of additional side effects discovered from product’s use).
Moreover, the jury instruction proffered by plaintiffs does not comport with a continuing duty to warn theory. Rather, over Ford’s objections, the trial court submitted the following non-IPI instruction to the jury:

“One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonably careful person in the seller’s position would provide such a warning under the circumstances.

A reasonably careful person in the seller’s position would provide a warning after the time of sale if:

The seller knows or reasonably should know that the product poses a substantial risk of harm to persons; and

Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

A warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

The risk of harm is sufficiently great to justify the burden of providing a warning.

Whether or not Ford Motor Company acted as a reasonably careful person under the circumstances of this case is for you to decide.”

¶ 116 This instruction is virtually a verbatim recitation of section 10 of the Restatement (Third) of Torts: Products Liability (1998), which has not been previously adopted in Illinois. As explained under comment a, section 10 specifically recognizes a “duty to warn of a product-related risk after the time of sale, whether or not the product is defective at the time of original sale,” if a reasonable person in the seller’s position would provide a warning under the enumerated circumstances. (Emphasis added.) Restatement (Third) of Torts: Products Liability § 10, cmt. a, at 192 (1998). The reporters’ note to comment a specifically highlights

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2The Restatement (Third) of Torts: Products Liability § 10 (1998) provides:

“(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.

(b) A reasonable person in the seller’s position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.”

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that Illinois has “reject[ed] the imposition of any post-sale duty to warn if the product was not defective at the time of sale.” Restatement (Third) of Torts: Products Liability § 10, Reporters’ Note, cmt. a, at 198 (1998).

¶ 117 Accordingly, the jury instruction as proffered allowed the jury to find Ford negligent even if Ford had not breached a duty of care existing at the time the car was manufactured. The instruction allowed the jury to recognize a duty that could arise based upon knowledge of risks discovered after the sale of the car even if it found Ford had not acted unreasonably at the time the car was manufactured. Indeed, there was evidence admitted that Ford subsequently learned of tank punctures from trunk contents causing fuel-fed fires in Panther platform Crown Victoria Police Interceptor vehicles involved in high-speed rear-end collisions. Based upon this subsequently acquired knowledge alone, the jury could have found a post-sale duty to inform of the safety improvements made nearly a decade later without ever concluding that Ford knew or should have known the product was unreasonably dangerous at the time of sale. Consequently, where plaintiffs’ theory, as presented to the jury, was premised upon a duty not recognized in Illinois at the time of trial, it was legally defective and improperly submitted to the jury for its consideration. See Lazenby v. Mark’s Construction, Inc., 236 Ill. 2d 83, 98 (2010).

¶ 118 Alternatively, plaintiffs and amicus ITLA ask this court to adopt section 10 and to recognize the post-sale duty to warn theory articulated by the American Law Institute. Although we do not foreclose the possibility that a post-sale duty to warn could be recognized in the future in Illinois, we decline the invitation to expand the duty in this case under the particular facts and circumstances presented here.

¶ 119 Even if we were to adopt the formulation as reflected in the Restatement (Third) of Torts, there was insufficient evidence presented to the jury with regard to the enumerated circumstances under which a reasonable person would provide a warning under section 10. As stated previously, the theory was never pleaded by plaintiffs prior to trial. Furthermore, required elements of such a claim included whether “[t]hose to whom a warning might be provided can be identified,” and whether a warning could effectively be communicated to those persons and acted on by the consumer. ITLA suggests that Ford could have easily identified the customers and effectively communicated the warning. ITLA notes that vehicle identification numbers (VIN) are used to register vehicles and would allow for the location of the current owner. ITLA indicates that Ford could feasibly identify the VINs of vehicles for which a post-sale warning should be given and that Ford could have publicized to consumers through the general media. Nevertheless, none of this evidence was specifically presented to the jury at trial on this theory, nor was Ford provided with an opportunity to dispute these circumstances as articulated under this new theory. With respect to the failure to inform of the Trunk Pack, Arndt acknowledged that it was not even suitable for the 1993 Lincoln Town Car. Accordingly, we decline to consider in this case whether Illinois should adopt a post-sale duty to warn.

¶ 120 IV. Voluntary Undertaking

¶ 121 To the extent that the appellate court alternatively found plaintiffs’ fourth theory of
recovery cognizable under the voluntary undertaking doctrine, we find the court erred in invoking this doctrine under these circumstances. The non-IPI instruction that plaintiffs proffered and that was submitted to the jury stated as follows:

“A manufacturer who voluntarily undertakes to provide an after[-]the[-]sale warning to some of its customers may be subject to liability if it does not warn other customers.

Whether the manufacturer’s conduct in warning some of its customers and not others was reasonable under the circumstances is for you to decide.”

¶ 122 The instruction was purportedly premised upon the Restatement (Second) of Torts § 323 (1965) and this court’s rulings in Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69 (1964), and Wakulich v. Mraz, 203 Ill. 2d 223 (2003). However, the instruction as submitted to the jury is not an accurate statement of the law. The voluntary undertaking theory as expressed in section 323 of the Restatement (Second) of Torts provides as follows:

“§ 323. Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other’s reliance upon the undertaking.”

Restatement (Second) of Torts § 323 (1965).

¶ 123 As we recently reiterated, “[u]nder a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking.” Bell v. Hutsell, 2011 IL 110724, ¶ 12 (quoting Frye v. Medicare-Glaser Corp., 153 Ill. 2d 26, 32 (1992)). “The theory is narrowly construed.” Id. (citing Frye, 153 Ill. 2d at 33).

¶ 124 In this case, Ford’s impetus for developing the optional “Trunk Pack” and the “Trunk Packing Considerations” was the result of its Crown Victoria Police Interceptor Blue Ribbon Panel under which Ford and law enforcement representatives agreed to evaluate fuel system upgrades and police procedures as part of a “Police Officer Safety Action Plan.” The evidence revealed that between 1993 and 2003, law enforcement agencies had become increasingly aware of high-speed rear-end collisions in which police officers were injured or killed due to postcrash fires in Crown Victoria Police Interceptors while performing police duties.

¶ 125 As a result of the panel’s findings, Ford developed recommendations for improved police safety procedures, including the “Trunk Packing Considerations for Police Vehicles,” which advised officers how to place items in the trunk to reduce the potential for trunk contents puncturing the fuel tank, and developed the optional “Interceptor Trunk Pack,” consisting of a drop-in trunk liner, requiring the police to place objects in the trunk laterally rather than longitudinally. The sticker on the Trunk Pack indicated “align hard or sharp police equipment laterally.” Ford also developed a website containing information regarding the upgrades to the Police Interceptor and notified fleet customers of the Trunk Pack. However, civilian
owners of Panther platform vehicles, including the Jablonskis, never received notice of the availability of these upgrades.

¶ 126 Based upon the evidence at trial, the extent of Ford’s undertaking in developing the Trunk Pack and Trunk Packing Considerations was directed specifically at improved police safety related to use of the Police Interceptor. The Trunk Pack was developed for the Police Interceptor by Ford with input from law enforcement to address specific police concerns and that was the impetus for its development, along with the packing considerations for police vehicles. That undertaking did not create a duty owed toward other individual civilian customers. Furthermore, at no time in any of plaintiffs’ six iterations of its complaint did they ever contend that Ford undertook a voluntary duty with respect to any nonpolice customers. Consequently, contrary to the appellate court’s finding, the trial court erred in instructing the jury on a postsale duty to warn theory based on a voluntary undertaking.

¶ 127 V. Other Contentions Raised by Ford

¶ 128 In light of our holding, we need not address Ford’s multiple remaining contentions regarding whether there was sufficient evidence of misconduct to warrant submission of plaintiffs’ claim for punitive damages to the jury, and its contentions regarding various evidentiary rulings, including whether the trial court erred in admitting evidence related to postsale remedial measures, whether the 416 other accidents were substantially similar, and whether the court erred in rejecting Ford’s special interrogatories.

¶ 129 CONCLUSION

¶ 130 In sum, we hold that the duty analysis in a negligent-product-design case encompasses a risk-utility balancing test, and compliance with industry standards is a relevant factor in that analysis, but is not dispositive. Furthermore, in this case, plaintiffs presented insufficient evidence from which a jury could conclude that Ford breached its duty of reasonable care on the first three negligent-design theories. Plaintiffs’ fourth theory, premised on a postsale duty to warn, was not cognizable under Illinois law and its voluntary undertaking did not create a duty to civilian customers. For the foregoing reasons, we reverse the judgments below.

¶ 131 Judgments reversed.
DEFENDING A WRONGFUL DEATH/CATASTROPHIC INJURY CASE

IN THE CONTEXT OF PRODUCT LIABILITY

I. Defending Against a Sympathetic Plaintiff
   a. Strike the perfect balance between not blaming the plaintiff for his/her injury, while also arguing that the defendant is not at fault.
   b. Present with respect and dignity for the plaintiff.
   c. Be genuinely sympathetic.
   d. Demonstrate that while the injury is unfortunate, it is not the defendant’s fault.
   e. Science vs. sympathy.
      i. Overwhelm with evidence of lack of fault or causation, but be simple and straight forward.
   f. Assume the burden is on you to prove that your client is not liable.
   g. Assume that assumption of the risk is not an available defense.

II. Desensitizing the Jury
   a. Confront the injury early in the case.
   b. Allow the jury to get their sympathy and emotions out early, if possible.

III. Battle of the Experts
   a. Keep the language simple – use experts who can explain complex concepts in simple terms that a layman can understand.
   b. Do not allow an expert to speak down to anyone, especially opposing attorney or jury. No haughtiness or airs.
   c. Expert should present well and be down to earth.
   d. Keep the science simple – do not overburden the jury with detailed scientific explanations that will only serve to confuse them.
   e. Do not overreach.
   f. Pay close attention to plaintiff’s experts and catch them when they overreach.
   g. If plaintiff’s expert says anything that is scientifically incorrect, call them out on it. Out-expert them.

IV. Types of Defects (See Illinois Pattern Jury Instructions – Civil § 400.00)
   a. Design defect: manufacturer should have chosen a better design.
   b. Manufacturing defect: something went wrong in the manufacturing process.
   c. Failure to warn: the consumer did not know the product was dangerous and, had there been a warning, she would have complied with it and not become injured.
   d. Failure to instruct: manufacturer did not properly instruct the consumer on how to use the product and, therefore, the consumer became injured.

V. Defenses
a. **Statute of Limitations** – 2 years for personal injury; 4 years for breach of warranty.

b. **Causation** – plaintiff must show that the defect caused the injury. If a defect existed but it did not cause the injury, no liability.
   
i. Product vs. unforeseeable use vs. cause vs. origin of defect is a third or non-party.

c. **Awareness** – the product’s danger was:
   
i. Open and obvious;
   
   ii. A matter of common knowledge; or
   
   iii. Known to and appreciated by the plaintiff.

d. **Plaintiff misused product** – no liability where a plaintiff misuses a product in an unforeseeable manner.

e. **Product alteration** – if the product is substantially altered after it leaves the hands of the manufacturer, the manufacturer will not be held liable for any injuries the altered product may cause.

f. **State of the art** – not a defense but can be used as relevant evidence. *Connelly v. Gen. Motors Corp.*, 184 Ill. App. 3d 378 (1st Dist. 1989).

g. **Assumption of the risk** – plaintiff assumes the risk if she is subjectively aware of the unreasonably dangerous condition but proceeds despite it. *Betts v. Manville Pers. Injury Settlement Trust*, 225 Ill. App. 3d 882 (4th Dist. 1993).

VI. **Possible Defendants and Third Party Defendants**

a. Supplier

b. Seller

c. Assembler

d. Manufacturer (2-621)
   
i. Component part manufacturer

e. Upstream liability

f. If circumstances allow, launch aggressive third party attack.

VII. **Third Party Defendants**

VIII. **Market Share/Enterprise Liability**

a. While a valid theory in other states, Illinois does not recognize market share or enterprise liability. The Illinois Supreme Court has stated that market share liability is “flawed in that it cannot equate liability to actual harm caused.” *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222.

IX. **Select Jury Instructions**

a. **Definition of “Unreasonably Dangerous”**: When I use the expression “unreasonably dangerous” in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product]. IPJI – Civil § 400.06.
b. **Alternative Definition of “Unreasonably Dangerous”:** When I use the expression “unreasonably dangerous,” I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product. IPJ – Civil § 400.06A.

c. **Learned Intermediary Doctrine:** The [type of product, e.g. drug] involved in this case can only be obtained with a prescription from a physician. For this reason, the [type of defendant, e.g. manufacturer] has a duty to adequately warn only [the learned intermediary involved] of the [dangers][potential adverse reactions] of which it knew, or in the exercise of ordinary care should have known, at the time the [product] left the [defendant’s] control. The [defendant] has no duty to warn the [consumer][user] directly. IPJ – Civil § 400.07B.

d. **Duty to Warn:** The [manufacturer] [other] has a duty to adequately warn [and instruct] the [consumer] [user] about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the [manufacturer’s] [other’s] control. IPI – Civil § 400.07D.

X. **Illustrations**

a. A woman’s sleeve catches fire while cooking breakfast and she sustains third degree burns over 40% of her body. She sues the foreign manufacturer and domestic seller of the garment claiming that it suffered from a design defect in that it was unreasonably dangerous, and that the garment should have come equipped with a warning label.

b. A jockey falls off his horse on a synthetic racing surface and becomes paralyzed from the waist down. He sues the manufacturer of the synthetic racing surface claiming that the product enhanced his injuries. If he had fallen on dirt, he claims, he might have been injured – but he would not have been paralyzed.

c. A barge passes through a canal in the dead of winter, carrying slurry oil. The barge owner asks his employee to warm a container of oil with a torch. The employee complies, and the container of oil bursts into flames, killing the employee and sending him into the canal. The barge owner sues the manufacturer of the oil claiming that the oil was unreasonably dangerous due to a manufacturing defect.

d. More than two hundred people across America become sick or die from inhaling toxic grout sealer after manufacturer secretly changes formula without notifying the distributor, retailer or public. Plaintiffs sue manufacturer, retailer and distributor under various state's product liability laws.
“Day in the Life” and Other Convincing and Helpful Videos

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ILLINOIS STATE BAR ASSOCIATION

Wrongful Death, Survival & Catastrophic Injuries Cases

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Introduction

Illinois trial lawyers have increasingly discovered the value of utilizing video as demonstrative evidence. In our society, video images are an integral part of our daily routine. The power of video is evidenced every time we view a news story regarding an accident, a terrorist attack or natural disaster at home or in a distant country, or refreshingly, a heartwarming story. Video instantly demonstrates in a few frames what otherwise would take several paragraphs or written text or minutes of spoken language to describe. We more readily identify with the people in the video, although in most instances they are complete strangers. Furthermore, we are persuaded by what we see, more readily than by what we read or hear. Studies have shown that most human learning is based on sight and that people who have simultaneously seen and heard evidence have far greater memory retention of that information. The increase in retention is based in part on the great amount of information that can be accurately communicated by video. If a picture is worth a thousand words, a video is worth a million words. Seeing is believing.

Recognizing the high premium that our society places on visual images and the ability of video to bring an argument “to life”, it is not surprising that attorneys have discovered the value of utilizing video at trial before a jury and for out of court settlement purposes before an insurer or mediator. To maintain a competitive advantage, attorneys must understand and master the effects of visual tools on the viewer’s perceptions, thoughts, beliefs and emotions.

I. Purposes of a Professionally Produced Video

Both from a plaintiff and defense perspective, there are many purposes for utilizing a professionally produced video:

A. Use of professionally produced video depositions;
B. To desensitize the viewer to the subject or content of the video;
C. To bring in evidence that otherwise could not be explained or admitted;
D. To prove damages:

1. When used to support damages, a video will capture pain, physical and psychological disability and rehabilitation over an extended period of time;
2. Formats include still photographs, Progressive Video and Day in the Life Video and Settlement Brochures;
3. Video length is determined by the interest level of the viewer;
4. Video is supportive of future medical and life care expenses. By using video, the plaintiff is able to bring subjects, equipment and devices into the courtroom.

E. To disprove damages, a Defense Day in the Life or Surveillance Video;
F. Use of a videotaped Independent Medical Examination;
G. To prove liability or to substantiate a defense to liability.

II. Description and Uses of the Various Video Formats

The application of certain types and formats of video is determined by the audience. When the audience is a jury and the videotape is to be used in the courtroom, such as with a Progressive Video or Day in the Life Video, certain evidentiary restrictions are applicable. Courts allow more latitude where the video is used as demonstrative evidence, such as a visual aid or context to an expert’s testimony. While no legal restrictions inhibit a video presentation which is to be used as a settlement tool, certain common sense restrictions are applicable.

A. Progressive Video is a series of Day in the Life films taken over an extended period of time. It is well suited to demonstrate pain and suffering over the course of treatment and the stages of recovery which may be lengthy. Videotaping should commence as soon after the injury as feasible and continue at intervals until trial to capture each stage of the plaintiff’s recovery such as hospitalization in the acute care setting, therapy, and other rehabilitative and in-home care. Since it may be several years before the case reaches trial and the plaintiff may have adapted to (amputee with a prosthesis) or recovered from the injury after extensive therapy, the Progressive Video is very effective at conveying the plaintiff’s potential in reaching his maximum potential. Video is also a way to show the viewer the need for equipment such as a hospital bed, ventilator, various monitors, and adaptations made to the home or vehicle.

B. Day in the Life Video features the plaintiff in a variety of everyday situations that the non-injured person takes for granted: bathing, eating, dressing, ambulating, interacting with family members and other activities of daily living. If appropriate, video may be taken of the plaintiff undergoing dressing changes, physical and occupational therapy or other treatments. If a child is involved, videotaping the school day is essential. Video helps the plaintiff convey to the judge and jury the struggles of his post-injury life. It demonstrates the plaintiff’s courage and determination as he confronts everyday challenges and obstacles. Sometimes it is advisable to have a short lead-in, depicting the plaintiff in a healthy, pre-injured, active state. It is highly unlikely that a person with the same or similar injury/disability as the plaintiff will be chosen to be a juror. Jurors have a natural inclination to take health and mobility for granted. Additionally,
the plaintiff often has a tendency to be stoic and avoid the appearance of self-pity. By visually and simultaneously contrasting the plaintiff’s prior active state to the current condition, a major psychological impact is made on the viewer. This has a dramatic effect when the viewer compares the plaintiff’s former life to the daily struggles, which he now endures.

**C. Living Plaintiff Documentary/Wrongful Death Documentary (Settlement Brochure) for Mediation or Settlement Conferences**

This is a narrated presentation of chronological factual information to build the plaintiff/decedent’s life story. The Living Plaintiff Documentary must compare and contrast the plaintiff’s level of functioning pre and post injury and the finished product must show the current condition and level of function. It is a highly effective method to promote settlement with an insurer because of the visual impact and also because it personalizes the plaintiff/decedent.

A Living Plaintiff/Wrongful Death Documentary allows the attorney to present the liability and damages aspects of the case to the insurer or mediator in the most favorable light, thereby giving the insurer an incentive to justify a large settlement. Interviews with family, friends, co-workers and home video and photographs that depict the plaintiff/decedent prior to injury or death will be incorporated. The Documentary can also include expert witness testimony, as well as surveillance video, the Medical Examiner’s Report, and any graphic photographs. It will force the insurer to consider the strengths of the plaintiff’s claim and the viability of any defenses. The insurer will evaluate the track record of the attorney in similar cases and recognize that the attorney has the ability, knowledge, competence and financial ability to present the case to the jury.

The Settlement Brochure has practical advantages in that the information can be presented in one package that can be reproduced or edited and the adjuster can view the material at his own pace, concentrating on those areas in which he is most interested. Due to the inherent cost of producing a Settlement Brochure, this format tends to be used in high policy cases such as medical malpractice, aviation and trucking. If the available insurance or attorney’s budget is limited, video may not be an appropriate option.

**Illinois Caselaw**

This section will review the relevant Illinois caselaw regarding the use of video at trial. The first Illinois case to examine the use of video was *Barenbrugge v. Rich*, 141 Ill. App. 3d 1046, 490 N.E. 1368 (1st Dist. 1986). Barenbrugge holds that a videotape of a Day in the Life of a plaintiff in a medical malpractice action, which was an accurate portrayal of plaintiff’s condition and circumstances and whose probative value was not questioned was properly admitted. Videotapes and photographs are admissible if their probative value is not outweighed by their inflammatory effect.
In Georgacopolous v. University of Chicago Hospitals and Clinics, 152 Ill. App. 3d 596, 504 N. E. 2d 830 (1st Dist. 1987), the court upheld the admissibility of a Day in the Life video which demonstrated a medical malpractice plaintiff undergoing painful physical therapy sessions. The defendants’ objections that the videotape was both prejudicial and cumulative were unavailing. The court reasoned that no objection had been made that the videotape was not an accurate portrayal of the plaintiff’s condition and circumstances. Furthermore, the judge described the tape as “tasteful” and the objectionable therapy session amounted to only a few minutes out of a nineteen minute tape.

A 1991 Illinois Supreme Court case, Cisarik v. Palos Community Hospital, 144 Ill 2d 339, 579 N.E. 2d 873 (1991,) established a two prong admissibility test for videos:

i. A proper foundation must be laid by the person having personal knowledge of the filmed object, who can attest that the videotape accurately depicts what it purports to show; and

ii. The probative value of the videotape must outweigh the danger of unfair prejudice in order to be admissible.

Additionally Cisarik set parameters regarding discovery rules:

a. Materials generated during the preparation of a video, such as schedules or storyboards are not discoverable because such material is attorney work product;

b. Outtakes or unused videotape, that is scenes which were taped but not included in the final edited version, are privileged as attorney work product; and

c. Opposing counsel has no right to be present at the time of videotaping.

A videotape depicting decedent responding to a reporter’s question about a job program in which she was involved was admissible in a Wrongful Death Action to show the decedent’s state of well being prior to her death. Videotape and photographs are properly admitted into evidence if their probative value is not outweighed by their inflammatory effect. Exchange National Bank v. Air Illinois, 167 Ill. App. 3d 1081, 522 N. E. 2d 146 (1st Dist. 1988).

In Roberts v. Sisters of Saint Francis Health Services, 198 Ill. App. 3d 891, 556 N.E. 2d 662 (1st Dist. 1990), the defense attorney used a Day in the Life film prior to voir dire to expose the veniremen to a potential source of bias in the case. Whether a party
may use such a film as an aid to assist in the jury selection process is a case of first impression. The court held that since litigants have a right to examine prospective jurors to enable them to select a jury that is qualified and competent to determine the facts in issue without bias, prejudice or partiality, it seems only fair that defendants should be allowed to make prospective jurors aware of the condition or injury, which would be graphically exposed to them during trial.

The trial judge’s refusal to admit a videotape of plaintiff’s surgery was not an abuse of discretion as the videotape was cumulative and it would have added nothing to plaintiff’s case where the surgeon could not and did not testify. Palumbo v. Kuiken, 201 Ill. App 3d 785, 559 N.E. 2d 206 (1st Dist. 1990).

In Drews v. Global Freight Lines, 144 Ill 2d 84, 578 N.E. 2d 970 (1991), the court properly admitted videotapes depicting the decedent teaching his son to swim and play golf as they conveyed the uncontested truth concerning the decedent’s state of health, his relationship with his family, and the services and instruction that he provided to them. Since there was no serious question about the probative value of the exhibits, the defendant’s only argument is that they are inflammatory and prejudicial in their cumulative effect. As in Barenbrugge, this argument is not persuasive and the videotape and photographic exhibits of the decedent and his family were properly admitted.

In a case involving an amputation, the appellate court could not review arguments that damages awarded for pain and suffering, disability and disfigurement were excessive because the railroad failed to identify where the videotaped materials and photographic material used in determining damages appeared in the record on appeal. Barton v. Chicago & Northwestern Transportation Co., 325 Ill. App. 3d 1005, 757 N.E. 2d 533 (1st Dist. 2001).

A video animation depicting a bacterial infection in the heart that spread to the brain was admissible in a medical malpractice action arising from the physician’s alleged negligence in failing to completely remove the catheter from the plaintiff’s brain resulting in its migration to the heart. Expert witnesses testified that video animation would be helpful in explaining to the jury the development of endocarditis, a condition for which plaintiff was at increased future risk. Dillon v. Evanston Hospital, 199 Ill. 2d 483, 771 N. E. 2d 357 (2002).

Where filming of a Day in the Life video depicting the driver of a car involved in an accident with a train began three weeks before trial and the existence of the video was not disclosed to the defense until the day the trial was expected to begin, it was not
disclosed and tendered too late to make it inadmissible. The trial court had modified the
discovery deadline, depositions were being taken by both sides until a week before trial
and the purpose of the video was to illustrate the driver’s life at the time of trial. It would
therefore make little sense to record her activities months in advance. The probative value
of a Day in the Life film was not outweighed by the danger of prejudice where the video
showed the driver engaging in commonplace activities in a manner that conformed to the
trial testimony about her injury and disability and the video was narrated by a trial
witness whose testimony was subject to objection and cross-examination. Velarde v.
affirmed Cisarik holding that opposing counsel has no right to intrude into the production
of a Day in the Life film, and further that outtakes are protected from discovery.

However, in Spyrka v. County of Cook, 366 Ill. App. 3d 156, 851 N.E. 2d 800 (1st
Dist. 2006) the court held that video animation was not timely disclosed for purposes of
trial where plaintiff counsel failed to disclose his intent to use the video animation until
the day of opening statements and was unable to show the video animation to defense
counsel or the trial judge until three days later. There was no order extending discovery
deadlines, plaintiff admitted at oral argument that plaintiff’s physicians’ depositions
which discussed animation were taken months prior to trial and the animation purported
to show what happened to the plaintiff years prior to trial.

The animation purported to show in a step-by-step fashion how the blood clot
traveled from the lower part of decedent’s body to the upper part of the body, resulting in
her death. While the trial court called the animation a demonstrative aid, the appellate
court found the animation to be substantive evidence. Cross-examination of the plaintiff’s
expert showed that the expert had nothing to do with the creation of the animation. The
appeellate court held that the animation could not be used since the expert could not state
that the animation was an accurate portrayal of what it purports to show.

In a personal injury action resulting from a motor vehicle accident, testimony
from the plaintiff’s wife provided the proper foundation for the admission of the Day in
the Life film. She testified that she had personal knowledge of the contents of the film
and that she had attended two physical therapy sessions and the film accurately depicted
how the plaintiff ambulated and how his therapy was administered. The film did not
focus on plaintiff’s pain and discomfort to the exclusion of anything else. While he did
wince and grimace in various parts of the film, the plaintiff also smiled and talked with
the therapist. The film focused on the therapy sessions that would be required for the rest
3d 1040, 891 N.E. 2d (1st Dist. 2008).
**Tips for Hiring a Videographer**

Use a well-credentialed and experienced videographer who only does work for attorneys. Refrain from using a videographer who films weddings and parties, as her credibility will come into play.

Engage the videographer as soon as possible to capture valuable footage of the plaintiff in the immediate post-injury period.

Be certain that the videographer can respond on short notice when time is of the essence.

Determine how many videos of the videographer has done and speak with references to determine whether the videos were an effective settlement tool or useful at trial.

Determine whether any of the videos were excluded at trial as this may reflect inexperience or staging.

View actual footage to ensure that she effectively captured the necessary material and that the lighting was appropriate and that the video was not staged.

Consider using video in cases with lesser damages in addition to those cases with catastrophic injuries.

Even if your clients do not appear will on camera, use video to capture therapy sessions, doctor visits and educational sessions.

**VI. Conclusion**

This paper discussed the importance of using a qualified videographer to document the nature and extent of the plaintiff’s injuries, efforts during rehabilitation, need for assistive devices and the effect of the injury on the family. The format will depend on the audience and type of injury. The applicable Illinois cases should be reviewed for admissibility requirements. It is imperative that the attorney retain a qualified videographer whose integrity will not be questioned at trial.
The Use Of Professionally Produced Video As Demonstrative Evidence

EVIDENCE VIDEO

VIDEOGRAPHY FOR THE LEGAL PROFESSION

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DETERMINE THE NATURE OF THE AUDIENCE

Illinois trial attorneys have increasingly discovered the value of videos as a medium for demonstrative evidence. The use of Day-in-the-life videos helps attorneys to educate the jury about the impact of an injury or malpractice and how it has affected their client’s quality of life.

Day-in-the-life videos, depicting the daily activities or the physical condition of the plaintiff after an injury, accident or malpractice, have become a commonly used form of video evidence. Case law also characterized Day-in-the-life as demonstrative evidence similar to a photograph or chart. Courts have recognized that, while portions of the video may contain unfair prejudice, the video may be probative on the whole.

The application of certain types and formats of video is determined by the audience. For example, certain evidentiary restrictions are applicable where the audience is the jury and the videotape is to be used in the courtroom, such as with a Day-in-the-life presentation. Similarly, where the video is an accident reconstruction for purposes of presentation to a jury, the legal rules of evidence are strictly enforced. However, more latitude is available where the videotape is to be used merely as demonstrative evidence, such as a visual aid or context to an expert’s testimony. No legal restrictions inhibit a videotape presentation which is to be used as a settlement tool, although certain common sense restrictions are applicable.

In personal injury cases or malpractice, Day-in-the-life videotapes are routinely held to be admissible.

Cisarik v. Palos Community Hospital, 144 Ill. 2d 339, 579 N. E. 2d 873 (1991);

Cisarik, an Illinois Supreme Court case established a two-prong admissibility test for videos and holds that outtakes or unused videotape, are privileged as attorney work product.

Cisarik sets down two major rules of discovery:

a. A proper foundation must be laid by the person having personal knowledge of the filmed object, who can attest that the videotape accurately depicts what it purports to show; and

b. The probative value of the videotape must outweigh the danger of unfair prejudice in order to be admissible.
Cisarik also set the parameters regarding discovery rules:

a. Materials generated during the preparation of a video, such as schedules or storyboards are not discoverable because such material are attorney work product;

b. Outtakes or unused videotape, that is scenes which were tape recorded but not used in the final edited version, are privileged as attorney work product;

c. Opposing counsel has no right to be present at the time of videotaping.

Donnellan v. First Student, Inc.
383 Ill. App. 3d 1040, 891 N. E. 2d (2008)

In a personal injury action resulting from an automobile accident, testimony from the plaintiff's wife provided the proper foundation for the admission of the Day-in-the-life film. She testified that she had personal knowledge of the contents of the film and that she had attended two physical therapy sessions and the film accurately depicted how the plaintiff ambulated and how his therapy was administered.

The film did not focus on plaintiff's pain and discomfort to the exclusion of anything else. While he did wince and grimace in different spots on the film, the plaintiff also smiled and talked with the therapist. The film focused on the therapy sessions that would be required for the rest of the plaintiff's life rather than on his pain.

Generally no special effects, filter modifications of natural light or sound are allowed to ensure an accurate portrayal. Where the video is perceived as confusing to the jury or legal issues involved, it will be excluded.

When it involves presenting evidence to the trier of fact, the adage that a picture is worth a thousand words holds true. Research shows that we retain more information when it is presented both orally and visually. The attorney must develop a visual strategy to communicate with the trier of fact to increase their level of understanding and retention of the issues.
The first Illinois decision to examine the nature of videos was:

Barrenbrugge v. Rich, 141
Ill. App. 3d 1046, 490 N. E. 1368 (1st
Dist. 1986)

Barrenbrugge holds that a videotape pf a Day-in-the-life of plaintiff in a medical malpractice action, which was an accurate portrayal of plaintiff's condition and circumstances and whose probative value was not questioned was properly admitted. Videotapes and photos are admissible if their probative value is not outweighed by their inflammatory effect.

The Day-in-the-life video focuses on a daily routine, that can run from five to eight hours. This type of video is accomplished through a series of steps. Pre-production tasks include:

- Identifying daily activities, possible mapping out the daily routine with a storyboard or chart of daily activities;
- Arranging for taping at all appropriate locales and considering background shots;
- Considering technical requirements to reduce the need for extra taping, and;
- Accommodating the production for natural sound, to fully and accurately depict how the injuries affect daily life.

The Day-in-the-life video demonstrates the necessity of contemporaneous special care and special equipment. The Day-in-the-life video also demonstrates the impact that the jury has on the plaintiff's family members, including the hardship of additional caretaking needs, and can assist in establishing the loss of society claims.

A Day-in-the-life video can be used to reinforce the physical therapist's testimony regarding the patient's goals and future needs, thereby establishing Life Plan arguments for future care. To show the future need for therapy and how the person has improved with therapy, a series of Day-in-the-life videos can be prepared over a two-year period, which are then edited into a 20-minute final tape.
A Day-in-the-life video has sometimes included a 30-second lead-in, depicting the plaintiff in a healthy, pre-injured, active state. This has a dramatic effect on the viewer, when he compares the plaintiff in a pre-injury state with the daily struggle he endures after suffering a traumatic injury.

The use of the lead-in technique is significant, because viewers often erroneously conclude that the video subject has always been limited in the manner depicted. By visually and simultaneously contrasting the plaintiff's prior active state to the current condition, a major psychological impact is made on the viewer.

Videotape is more powerful than any verbal description of psychological injury and is uniquely well-adapted to demonstrate Noneconomic Damages, such as Pain and Suffering, Mental Anguish, and Future Damages. Admissibility requirements are considered on a case-by-case basis due to the danger that such visual testimony will be considered inflammatory.


In Georgacopolous, The First District upheld the admissibility of a Day-in-the-life video which demonstrated painful physical therapy sessions. The defendants' objections that the videotape was both prejudicial and cumulative were unavailing. The court reasoned that no objection had been made that the videotape was not an accurate portrayal of the patient's condition and circumstances. Furthermore, the judge described the tape as "tasteful" and the objectionable therapy session amounted to only a few minutes out of a nineteen minute tape.

Video is the most effective method of demonstrating pain and suffering, in part because the plaintiff is the witness with the most direct knowledge, particularly in the situation where the pain is subjective and not obviously related to an identifiable injury. Pain may be presumed where it is a natural consequence of an injury and may be inferred from the circumstances of an injury, such as where it is inflicted violently.
Emotional states are most effectively documented by video whether used as a videotaped deposition for impeachment purposes or used for demonstrating further intangible injury suffered by plaintiff.

Definition of “Emotional States:” complex reactions evoked by environmental stimulations or the memory of those stimulations, consisting of:

(i) a subjective part consisting of acute awareness of various bodily sensations and diffuse feelings not easily referable to any specific organ, the aroused awareness itself being an important part of the picture:

(ii) with an objective aspect, consisting of what is seen when a person suffering emotional stress is observed, involving muscular tension, motor restlessness, tremor, expressive vocal intonations, dilated pupils, perspiration, pallor, chill of the extremities, and various automatic reactions.

Stein, Damages and Recovery: 
Personal Injury and Death Actions, 
The Lawyers Co-operative 

b. Videotape may be the only vehicle for capturing the plaintiff’s emotional state e.g., Videotaped Documentaries:

(i) A documentary of a living plaintiff is an effective method to promote settlement with an insurer because of the visual impact and because it demonstrates plaintiff’s financial commitment to the lawsuit; these videos are sometimes termed “settlement brochures.”
(ii) **Wrongful death documentary** is a narrated presentation of chronological, factual information to build the decedent's life story.

(iii) Wrongful death documentaries are not admissible, but portions can be used in courts as a chronology in Illinois:

**Drews v. Goebel Freight Lines.**  
144 Ill. 2d 84, 578 N.E.2d 970 (1991)

In Drews, videotapes depicting the decedent teaching his son to swim and play golf were properly admitted as they conveyed the uncontested truth concerning the decedent's state of health, his relationship with his wife and children, and the services and instruction he provided his family.

**Exchange National Bank v. Air Illinois.**  
167 Ill. App. 3d 1081, 522 N.E.2d 146 (1st Dist. 1988)

In Exchange National Bank, the court properly admitted a videotape into evidence which depicted decedent responding to a reporter's question about a job program in which she was involved. In a Wrongful Death Action, such evidence is admissible to show the decedent's state of well-being prior to her death.

c. Emotional states can be evoked by:

(i) Background shots of conventional cultural icons or symbols, such as the American flag or a church steeple, because setting provides context.

(ii) Still photographs, home movies or videotapes of personal relics, incorporated into the documentary, such as wedding photos, graduation pictures, honorary or sports awards, yearbooks, report cards, children's drawings or homemade greeting cards, records of religious affiliation, participation in social clubs, and work records, other family mementos that are charged objects.
(iii) Such visual paraphernalia cause the viewer to “read into” the videotape and to personally identify with the subject — spaces in the visual vocabulary are filled by the viewer with their own preconceived perceptions. For example the use of bathroom facilities can be implied through skillful editing or scene planning without actually recording the plaintiff using the bathroom. The visual images are capable of creating complex perceptual experiences virtually instantaneously.

(iv) Use of narration or music to set a tone. Television news anchors and reporters may be used as narrators and to assist in producing the script; a female narrator is matched with a female plaintiff, or an elderly male narrator is paired with an elderly male plaintiff. For use of narration generally,

_Ciuzio v. United States_, 465 U. S. 1034 (1984); _United States v. McKneely_, 69 F. 3d 1067, 1074 (10th Cir. 1995.)

_Note:_ Where the plaintiff’s voice strength was in issue, court refused to admit videotape because sound volume was subject to manipulation by operator, and interview by plaintiff’s grandson was considered overly sympathetic.


(v) Pre-production interviews and final on-camera interviews of significant or influential people in the decedent’s life to present aspects of the life story. Loss of society claims can be effectively established in this way.

(vi) Skillful and tasteful use of lighting, focus shadow; camera filters may be used.
(vii) Pre-production planning of shots of scene with the use of a storyboard, to minimize re-taping and maximize impact. Scene planning includes consideration of camera angles, lens use, cutaway shots, slow pulling awe, from a close-up panning, fades, zoom, extreme slow motion, contrasts in scale, shifts in focus, mirrored reflections, end dissolves, etc.; consideration of whether to use a single or multiple cameras, or a stationary or mobile camera.

(viii) Skillful editing, e.g. telling the story in short clips or “staccato” editing (attention spans are usually only 3 to 4 seconds in duration;) inserting a shot of the plaintiff while others are testifying about the decedent.

**Mental Anguish:** courts have distinguished different kinds of suffering to constitute “mental anguish.”

*Stein, Damages & Recovery (1973)* Objective of

The circumstances under which the injury was suffered is frequently relied upon in the determination of admissibility. The categories which have received special considerations are:

(a) Fright and shock;

(b) Anxiety about future injury,
   either physical or economic;

(c) Mental illness caused or precipitated by the injury;

(d) Humiliation, sense of insult or indignity,
   mortification or wounded pride;
(e) Loss of peace of mind and happiness;

(f) Loss of enjoyment of life;

(g) In Illinois, a plaintiff was compensate for "slight but permanent" brain damage suffered in an industrial accident, but was also entitled to recover for anxiety and depression, which was an independent condition that arose from and was traceable to brain injury.

\textit{Wood v. Mobil Chemical Co.,}

\textit{50 Ill. App. 3d 465, 365 N. E. 2d 1087 (1977.)}

The format of the \textbf{Progressive Video} is well suited to demonstrate pain and suffering over the course of treatment and stages of recovery.

(i) A progressive video traces the plaintiff and the injuries over an extended period of time. Videotaping should begin as close to the time of injury as possible and continue at various intervals until trial.

(ii) Progressive videos chronicle each stage of plaintiff's recovery, e.g. hospitalization, rehabilitation, homecare. The dates of each major segment or recovery phase can be inserted into the video.

(iii) Progressive videos are most effective at settlement conferences and negotiation.

(iv) Progressive video are excellent vehicles for presenting the inference of future suffering.
Other Videotape Themes

(a) Use of a Day-in-the-life video during voir dire to determine prejudice.

Roberts v. Sisters of
St. Francis Health Services, 198 Ill. App 3d
891, 556 N. E. 2d 662 (1st Dist. 1990)

(b) To videotape necessary surgery.

Barry v. Owens-Corning Fiberglas Corp., 282
Ill. App. 3d 199, 668 N. E. 2d 8 (1st Dist. 1996)

Dillon v. Evanston Hospital
771 N.E.2d, 357

© To Videotape deposition testimony.

(d) Accident reconstruction – accuracy is paramount:

Amstar Corp. v. Aurora Fast
Freight, 141 Ill. App. 3d 705 (3d Dist
1986.)

(e) Surveillance.

CONCLUSION

This article presents a variety of existing uses for videotape, and hopefully suggests numerous, as yet untested, uses for videotape in the course of settlement or litigation. Videotape records, investigates, demonstrates, documents, impeaches, and preserves evident. Different video formats, such as the progressive video, chronology, documentary, and the Day-in-the-life video, each have a specialized function and their own individualized, visual vocabulary. This article explores some of the basic tools of this visual vocabulary to demonstrate to the practitioner what he or she needs to know in order to use video to advantage. In a contemporary society which is so intrinsically involved with the visual, seeing truly is believing, and litigators can no longer avoid learning this basic vocabulary. While the Day-in-the-life videos provides the Illinois Bar with a unique, comprehensive means of introducing evidence in a timely manner.
Judicial Perspective: What’s Effective in the Courtroom

- **Hon. Clare Elizabeth McWilliams**, Cook County Circuit Court, Chicago
  cmcwil8282@aol.com

This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
Probate Pitfalls and Requirements

- **Hon. Karen L. O’Malley**, Circuit Court of Cook County, Chicago
  
karen.omalley@cookcountyil.gov

This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
Damages: Effective Presentations
Portraying Loss and Effective Ways to Refute

- **Shawn S. Kasserman**, Tomasik, Kotin & Kasserman, LLC, Chicago
  shawn@tkklawfirm.com

- **Donna Kaner Socol**, Hughes, Socol, Piers, Resnick & Dym, Ltd., Chicago
  dsocol@hsplegal.com

This segment includes all materials received by the course book publication deadline. Please contact the speaker for any other materials used at the program.
ISBA
WRONGFUL DEATH, SURVIVAL, AND CATASTROPHIC INJURY CASES

Friday,
February, 24, 2017

Shawn S. Kasserman
Tomasik Kotin Kasserman, LLC
Wrongful Death Damages

The Illinois Wrongful Death Act was enacted in 1853 to ameliorate the harsh results of common law, wherein a person’s claims abated with death. The right to bring an action for wrongful death has been held to be given, regulated, and limited by this statute. See Vitro v. Mihelic, 209 Ill.2d 76 (2004) (“Wrongful Death Act affords the sole remedy for the surviving family members”); Hale v. Morgan Packing Co., 91 F.Supp. 11 (E.D.Ill. 1950) (Wrongful Death Act is unknown to and in derogation of common law and is purely statutory).

The Illinois Wrongful Death Act creates a cause of action in the name of the personal representative for the benefit of the surviving spouse and next-of-kin for their “pecuniary injuries” sustained due to the decedent’s death. 740 ILCS 180/1. It is intended to provide the surviving spouse and next of kin with the benefits that they would have received from the continued life of the decedent. The term “pecuniary injuries” has been interpreted to include benefits of a pecuniary value, which includes money, goods, and services received by the next of kin of the deceased. IPI Civil 31.00. When there are surviving children, it also includes the instruction, moral training, and superintendence of education that the children would have received from the deceased parent. Id. “Pecuniary injuries” has also been held to include:

- Loss of consortium by the surviving spouse, Elliott v. Willis, 92 Ill.2d 530, (1982);
- Loss of a minor child's society by the parents, Bullard v. Barnes, 102 Ill.2d 505 (1984);
- Loss of an unmarried adult child's society by the parents, Prendergast v. Cox, 128 Ill.App.3d 84 (1st Dist. 1984);
- Loss of a parent's society by an adult child, In re Estate of Keeling, 133 Ill.App.3d 226 (3d Dist. 1985); and

Where the decedent leaves direct lineal kin, or a widow or widower, there is a presumption that they have suffered some substantial pecuniary loss by reason of the death. Ferraro v. Augustine, 45 Ill.App.2d 295 (1st Dist. 1964); Hall v. Gillins, 13 Ill.2d 26 (1958); Dukeman v. Cleveland, C., C. & St. L. Ry., 237 Ill. 104 (1908); Dodson v. Richter, 34 Ill.App.2d 22, 180 N.E.2d 505 (3d Dist. 1962). This presumption applies even where the decedent was an adult and the next
of kin are also adults. *Ferraro, supra; Dukeman, supra*. The presumption of some substantial pecuniary loss will be an element which the jury must consider with other evidence.

*Bullard, supra*, held there is no longer a presumption of loss of earnings upon the death of a minor child, but there is a presumption of pecuniary injury to the parents in the loss of a minor child's society. *Ballweg v. City of Springfield*, 114 Ill.2d 107 (1986), and *Prendergast v. Cox, supra*, extended this presumption to include the loss of an adult child's society by the parents. No such presumption attaches in the case of siblings. *In re Estate of Finley, supra*.

It is now also possible to recover for the wrongful death of an unborn child if the fetus was viable at the time of the tortious act. *Green v. Smith*, 71 Ill.2d 501 (1978). The presumption of the parents' loss of society injury extends to a stillborn child. *See v. Sutkus*, 145 Ill.2d 336 (1991).

**Survival Act Damages**

Most any discussion of the Illinois Wrongful Death Act will naturally include a Illinois Survival Act component, yet each cause of action is fundamentally different and distinct. The Illinois Survival Act, 755 ILCS 5/27-6, creates a separate cause of action from the Wrongful Death Act. The Survival Statute permits representatives of the deceased to maintain an action that had accrued during the deceased’s lifetime.

While a Wrongful Death action is brought by a decedent’s personal representative (i.e., executor or administrator) to recover for the injuries sustained by the decedent’s spouse and next of kin from the death of the decedent that was wrongfully caused, a survival action is brought on behalf of the decedent’s estate to recover for personal injuries sustained by the decedent that occurred during the decedent’s life. See IICLE Wrongful Death and Survival Actions in Illinois Practice Handbook 2011 (ed. Scott M. Seaman). As the Supreme Court noted:

> The statutes were conceptually separable and different. The one related to an action arising upon wrongful death; the other related to a right of action for personal injury arising during the life of the injured person. *Murphy v. Martin Oil Co.*, 56 Ill.2d 423 (1974).

The executor of an estate, as appointed by the probate court, has the authority to bring a survival action to recover for the injury. *Kasongo v. United States*, 523 F. Supp. 2d 759 (N.D. Ill. 2007); see also “Understanding Wrongful Death and Survival Actions,” Ill. B.J., October 2015, Frank Andreano.
In a survival action, a jury would be instructed:

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the estate for any of the following elements of damages proved by the evidence to have resulted from the [negligence] [wrongful conduct] of the defendant during the period between the time of the decedent's injuries and the time of his death, taking into consideration the nature, extent, and duration of the injury:

[Use 30.00 Series]

Whether any of these elements of damages has been proved by the evidence is for you to determine. IPI Civil 31.10.

Pain and suffering is an element of damages recoverable under the Survival Act. To recover, there must be evidence that the plaintiff was conscious of his or her pain and suffering. *Carter v. Azaran*, 332 Ill.App.3d 948 (1st Dist. 2002). However, this does not mean a plaintiff must present medical testimony establishing consciousness. *Hall v. National Freight, Inc.*, 264 Ill.App.3d 412 (1st Dist. 1994) (medical testimony not required for jury to evaluate conscious pain and suffering where lay witnesses testified to decedent’s talking and nodding prior to death). Although medical testimony is not required, evidence from a health care professional that a particular injury is likely to cause pain is relevant when determining whether a plaintiff actually experienced pain. *Carter v. Azaran*, 332 Ill.App.3d 948 (1st Dist. 2002).

**Personal Injury Damages**

When considering the appropriate elements of damages in a personal injury case, look to 30.01 – 30.23 of the Illinois Pattern Jury Instructions.

In a personal injury action, a jury is instructed:

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the [negligence] [wrongful conduct] [of the defendant], [taking into consideration (the nature, extent and duration of the injury) (and) (the aggravation of any pre-existing ailment or condition)].

(insert the elements of damages which have a basis in the evidence)

Whether any of these elements of damages has been proved by the evidence is for you to determine. IPI 30.01.
The first paragraph, specifically informs the jurors that they may compensate the plaintiff only for “any” of the elements of damages proved, and the concluding paragraph of this instruction specifically tells the triers of fact that whether “any” of the elements of damages has been proved is for the jury to decide. The elements of damages in a personal injury lawsuit includes non-economic damages, such as past and future pain and suffering; past and future disability or past and future loss of normal life; shortened life expectancy; disfigurement; and past and future emotional distress. Damages also include economic damages, such as past and future wage loss, and past and future medical expenses.

Past and future pain and suffering are compensable elements of damages in a personal injury lawsuit. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 241 (1907); Krichbaum v. Chicago City Ry. Co., 207 Ill.App. 44 (1st Dist.1917); McDaniels v. Terminal R.R. Ass'n, 302 Ill.App. 332, 350 (4th Dist.1939). To recover for future pain and suffering, there must be evidence that such pain and suffering is reasonably certain to occur in the future.

Past and future disability or loss of normal life is a separate element of damages. Holston v. Sisters of the Third Order of St. Francis, 165 Ill.2d 150, 175 (1995), Smith v. City of Evanston, 260 Ill.App.3d 925 (1st Dist.1994). Loss of a normal life or disability means the temporary or permanent diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life. Smith v. City of Evanston, 260 Ill.App.3d 925 (1st Dist.1994). Whether to use “disability” or “loss of a normal life” is up to the trial judge. The Smith court disapproved of the term “disability,” holding that the phrase “loss of a normal life” more accurately described this element of damages and would be less confusing to the jury. In Torres v. Irving Press, Inc., 303 Ill.App.3d 151 (1st Dist.1999), the court disapproved of the term “loss of a normal life,” holding that “disability” was the appropriate element of damages on which the jury should be instructed.

Shortened life expectancy damages are appropriate if there is evidence that plaintiff's life expectancy has been shortened by the tort. Bauer ex rel. Bauer v. Memorial Hosp., 377 Ill.App.3d 895, 920-921 (5th Dist. 2007). This element can arise when the tort causes a plaintiff to be likely to die prematurely. Dillon v. Evanston Hosp., 199 Ill.2d 483, 500 (2002).

Disfigurement is recognized as a separate element of compensable damages in Illinois. Holston v. Sisters of the Third Order of St. Francis, 165 Ill.2d 150, 175 (1995); Simon v. Kaplan,
321 Ill.App. 203 (1st Dist.1944). An individual may recover for any disfigurement caused by the tort.

Past and future emotional distress is another element of compensable damages. Where the plaintiff has sustained personal injuries due to the defendant’s negligence or other personal tort, the plaintiff is entitled to recover all damages which are the natural and proximate result of the tort. *City of Chicago v. McLean*, 133 Ill. 148, 153 (1890). Where the defendant’s negligence inflicts an immediate physical injury, Illinois courts allow recovery for the mental disturbance accompanying the injury. In *Babikian v. Mruz*, 2011 IL App (1st) 102579, the jury returned a verdict for the plaintiff in a medical malpractice action with separate line items for pain and suffering for permanent abdominal pain and emotional distress for a decline in her mental health. The appellate court rejected the defendant’s claim that the award of emotional distress damages were duplicative of the plaintiff’s recovery for pain and suffering. The court also rejected defendant’s contention that emotional distress damages are allowed only in causes of action for intentional or negligent infliction of emotional distress. The court held that the rule in Illinois is just the opposite, that damages for emotional distress are available to prevailing plaintiffs in cases involving personal torts such as medical negligence, citing *Clark v. Children’s Memorial Hospital*, 2011 IL 108656.

As to economic damages, a plaintiff may recover the reasonable expense of past and future medical care. *Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, 241 (1907). In actions for damages arising out of an injury to an unemancipated minor, the items of damage listed in this element are recoverable by the parents. *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840 (1st Dist.1986). However, the usual practice in Illinois is to sue for those damages in the minor’s action.

With reference to past wage loss, an injured party may recover for the time lost even though he was paid his regular wage during incapacitation. *Cooney v. Hughes*, 310 Ill.App. 371 (1st Dist.1941). A plaintiff may also recover for the diminution of the plaintiff’s capacity to earn. It may be based upon inability to earn in occupations or fields of endeavor like or unlike his past earning experience, so long as his lost capacity to earn is established by the evidence. Consequently, damages incurred as a result of impaired earning capacity are not necessarily measured by proof of past lost wages. *Buckler v. Sinclair Ref. Co.*, 68 Ill.App.2d 283 (5th Dist.1966). Further, the element of damages for future lost earnings does not depend on whether
the injured party was employed on the date of the occurrence. *Casey v. Baseden*, 131 Ill.App.3d 716 (5th Dist.1985).

**Conclusion**

The key to properly presenting damages at trial is to know what elements are available and how to best present the client’s damages. The former should become second nature to us, but the latter needs proper investigation in each and every case. This investigation into your client’s damages needs to begin when you are first retained and continue on through the end of the trial. Understanding the true nature of your client’s injury and planning the best method of demonstrating that loss to a jury is one of the great honors any lawyer could undertake.
CATASTROPHIC DAMAGES:
The Defense Perspective

From Sympathy to the Reptile

Presentation by Donna Kaner Socol

HUGHES SOCOL
PIERS RESNICK DYM, LTD.
I. BACKGROUND: THEORY

A. The Reptile Theory

The Reptile Theory first applied to litigation is the brain-child of Ball and Keenan, who went public with their concept nearly five years ago. They borrowed the concept of the reptile brain from neuropsychologist Paul MacLean who first espoused the theory in the 60s. MacLean theorized that three parts of the human brain reflect stages of human evolution:

1. Reptilian (primitive survival based);
2. Paleomammalian (emotion, reproduction, parenting); and
3. Neomammalian (language, logic, planning)

Ironically, the Reptile Theory Maclean advanced has long since been revised and critiqued in neuropsychology scholarship, but this did not prevent Ball and Keenan from adopting it for their purposes. Where MacLean suggests that the reptilian portion of the brain is responsible for species-typical instinctual behavior, such as aggression, dominance, or territoriality, Ball and Keenan interpret this to mean that reptilian subcortical region of the brain maximizes "survival advantages" and minimizes "survival dangers." According to Ball and Keenan, "when the Reptile sees a survival danger, even a small one, she protects her genes," which, to the authors, can be correspondingly applied to jurors who may see danger and must "protect [her]self and the community," by awarding damages that punish or deter defendants.

What Ball and Keenan espouse is encouraging plaintiff attorneys to convey "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community." In order to generate this sense of immediate danger...
within jurors they "urge plaintiff's lawyers to frame a case so it appears that every defendant \textit{chose} to violate a safety rule." For Ball and Keenan, "every wrongful defendant act derives from a choice to violate a safety rule," and thus the courtroom becomes a safety arena wherein damage awards enhance safety and decrease the danger posed by the defendant. According to Ball and Keenan, jurors serve as the guardians of community safety and the author's formula "Safety Rule + Danger = Reptile" theorizes that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by the defendant, resulting in jurors awarding damages to the plaintiff to protect themselves and society (survival instinct).

\textbf{B. Novel Tactics}

Ball and Keenan's Reptile methodology can indeed influence juror decision-making, but not because of its ability to tap into jurors' survival instincts. Instead, the authors' formulac approach applies successful techniques long used by great plaintiff's attorneys: reduce a case to its essence and rhetorically focus a case on a critical issue for jurors (e.g. safety). The case reduction and rhetorical tactics simplify decision-making for jurors and persuade them of the plaintiff's case. Large damage awards tend to come from juries who believe a defendant knowingly broke a rule, but is unwilling to admit it or tries to back out of a prior admission.

Establishing the case's "rule" or principle early in the case is Ball and Keenan's specialty and lays the foundation for the reptile plaintiff's attorney.

The novelty and effectiveness of Ball and Keenan's approach is two-fold: (1) a long distance perspective to litigation - instead of focusing on framing jury issues as trial approaches, Ball and Keenan are teaching attorneys to focus on jury issues at depositions or as early as possible in a case, so that (v2) defendants naively agree to a seemingly innocuous rule, law, code, or principle that they broke or deviated from and thus must now live with the violation of their own rule or law. The defendant has now been framed in light of knowingly violating a rule or principle or forced to backslide out of it at trial, a tactic which erodes a witness' credibility with jurors. Either instance is a nightmare-come true for defendants, because a low dollar case has exponentially increased and the plaintiff has begun to see real opportunities to exploit at trial. Preventing Reptile plaintiff attorneys from gaining leverage by increasing a defendant's exposure is the critical first step in combatting reptile tactics. Other vulnerabilities clearly exist, but witness testimony at deposition and at trial are by far the most important strategic elements where Reptile plaintiff attorneys lay the foundation for their cases.
II. DEFENSE TACTICS

A. Defendant’s Deposition Testimony

Plaintiff attorneys have learned the quickest path to profits involves settling a case in excess of its actual value by forcing a defendant to pay. They accomplish high value settlements by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high.

B. Defendant’s Trial Testimony:

When the defendant agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the primary mistake is insufficient witness preparation that focuses on the science/medicine more than the manipulative Reptile techniques. The "gotcha moment," when the defendant gets boxed in by plaintiff’s counsel and begins to respond emotionally (i.e., argumentativeness, defensiveness, or anxiety), typically results in a serious mess that is difficult to clean up during defense counsel’s rehabilitation efforts. The irony here is that it is the defendant that goes into survival mode cognitively, not the jury. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers of the defendant. In reality, jurors award damages to punish the defendant who breaks safety rules, not to protect themselves or the community.

The Reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainer" in nature. These questions focus on the following big picture principles:

1. Safety is always top priority
2. Danger is never appropriate
3. Protection is always top priority
4. Reducing risk is always top priority
5. Sooner is always better
6. More is always better
Hypothetical safety questions are more specific and often take the form of an if-then statement, like "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?"

These deceptive questions are effective because they provide just enough information (compared to the big picture safety questions) to lure defendant witnesses into providing an inflexible, absolute answer. By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow for a specific answer.

Bottom line: training a witness to withstand these reptilian attacks goes far beyond traditional "witness preparation." Instead, more sophisticated witness training is needed, as the witness must undergo cognitive and communicative restructuring. Witnesses must literally develop a new process of thinking and communicating through intense operant conditioning methods to ensure cognitive and communicative changes take place.

Sample Examination

Attorney: "Doctor, patient safety is your top priority, isn't it?"

Doctor: "Yes, of course."

Attorney: "And the emergency procedure you chose to perform during Mr. Smith's surgery wasn't very safe because it resulted in his death, correct?"

Doctor: "That's true, but you have to understand that I — "

Attorney: (with emphasis) "Doctor you didn't make Mr. Smith's safety your top priority, and because you are ignoring your own rule, you put Mr. Smith and perhaps all of your patients in danger, didn't you?"

It is at this point the Reptile Plaintiff attorney has his or her claws into the witness. Jurors simplify the case to be one in which the doctor knowingly put his patient at risk and violated his own safety rule. While the Reptile theory offers a more aggressive plaintiff strategy erroneously packaged in neuro-psych wrapping, Ball and Keenan's guidance can certainly
be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. This article dealt with witness training because it is the first and most potent attack technique employed by the Reptile plaintiff attorney, and we urge you to develop new advanced techniques for witness training prior to deposition and trial. Thwarting reptilian attacks by reinforcing a solid defense foundation ensures protection for your client, minimizes your exposure, and offers you greater leverage in settlement discussions or in preparation for trial.

III. MOTIONS IN LIMINE

A. Closing Arguments Can Be Problematic

While attorneys are generally permitted wide latitude in closing argument, this latitude is not without qualifications. *Copeland v. Stebco Products Corp.*, 316 Ill.App.3d 932, 947, 738 N.E.2d 199, 212 (1st Dist. 2000). A judgment will only be reversed when the challenged remarks prevent a party from receiving a full trial. *Id.* The reviewing court will give “considerable deference” to the trial court’s decision as to whether to permit the remarks “as it is in a superior position to assess the accuracy and effect of the counsel’s statements.” *Id.* Generally, it is improper to ask the jury to put itself in the Plaintiff’s position. *Legget v. Kumar*, 212 Ill. App. 3d 255, 280, 570 N.E.2d 1249, 1264. Further, it is highly improper for an attorney to do or say anything in argument the only effect of which will be to inflame the passions or arouse the prejudices of the jury against one of the parties without throwing any light upon the question for decision. *Petraski v. Thedos*, 2011 IL App (1st) 103218, ¶ 106, 963 N.E.2d 303, 320 (1st Dist. 2011) citing *Svoboda v. Blevins*, 76 Ill.App.2d 277, 281, 222 963 N.E.2d 219 (1966).

B. Cases to Know and Understand

*Vanderhoof v. Berk*, 2015 IL App (1st) 132927, 47 N.E.2d 1080 (1st Dist. 2015). (A medical case) The Appellate Court held that the Defendant forfeited most of its arguments about Plaintiff’s counsel making improper arguments at the closings because it had not objected to them. Moreover, Plaintiff’s counsel’s statements were “aimed at making the jurors appreciate the importance of their role and civic duty, but [did] not specifically call upon them to ‘send a message’ or to base their verdict on anything other than facts of the case.” Finally, the one statement that was objected to, namely, “We need to embrace the sense of community that we live in, care about each other, protect each other” was deemed to be “relatively vague” and did “not specifically call upon the jury to use its verdict to send a message.” Further, any prejudice was cured when the judge sustained defense counsel’s objection and said “Move along. Improper argument. To send a message is not a proper argument. Move along counsel.”
**Pleasance v. City of Chicago**, 396 Ill.App.3d 821, 920 N.E.2d 572 (1st Dist. 2009). (Not a med-mal case). Plaintiff’s decedent had been shot and killed by a Chicago Police Officer. The trial was on damages only, and not the conduct of the officer. At the closing, Plaintiff’s counsel made the following argument: “These [juror] chairs protect all of us. They protect all us against injustice, and against abuse. And it is through this system that we are allowed to defend ourselves against abuse and against injustice. So it is an awesome responsibility, indeed. . . . Your verdict is going to tell your entire community whether you’re willing to accept a police officer’s willful and wanton killing of a member of our society.” Appellate Court held that this, and several similar statements, were improper and denied the defendant a fair trial. This was especially true here where the narrow question at issue was how much was the plaintiff due the loss of society for her decedent. Be aware, the Court also concluded that an improper jury instruction also was prejudicial and that also contributed to its decision to grant Defendant a new trial.

**Spyka v. County of Cook**, 366 Ill.App.3d 156, 851 N.E.2d 800 (1st Dist. 2006) (A med-mal case) Plaintiff’s counsel’s opening statement to the effect that “The most disturbing part of this case? Nothing’s changed at Cook County Hospital” was prejudicial. Plaintiff’s counsel’s closing statement to the effect that “you will decide whether or not medical care was acceptable. Same type we either receive or may receive in the future. Any or all of us. . . It is your voice today that will enable you to cherish, to protect that medical system” was deemed prejudicial because it was an emotional argument. Neither remark was deemed a reason to reverse the decision for Plaintiff, however, because the verdict had been overturned on other grounds. The parties, however, were admonished not to repeat the arguments at the next trial.

**Velarde v. Illinois Central R.R.Co.**, 354 Ill.App.3d 523, 820 N.E.2d 37 (1st Dist. 2004). (A Tim Cavanaugh case.) The case involved a train hitting a car. Plaintiffs had argued that if the train had hit a truck carrying a Monet painting destroying it, and the painting was worth $50 million, a decision by the jury to award the painting’s owner $25 million because the jury did not like Impressionist paintings would not “be full justice. It wouldn’t be fair justice. It would be half justice.” The Court on review indicated that it “failed to comprehend” Defendant’s argument that the Plaintiffs’ counsel “guilted” the jury into returning a higher verdict. Dismissing this argument out of hand, the Court construed the Defense argument as a complaint that the Plaintiffs had made an emotional argument, a point the Court also rejected. The Court concluded that the argument was an appeal to award Plaintiffs what they deserved irrespective of what the jury personally felt about the Plaintiffs. Plaintiffs’ counsel also had argued that the jury should not confuse the hypothetical painting case with this case, “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.” The Court considered this a “vague, passing remark which was not clarified or emphasized by subsequent argument.” Defense counsel further failed to object to these and other potentially objectionable statements.
Copeland v. Stebco Products Corp., 316 Ill.App.3d 932, 738 N.E.2d 199 (1st Dist. 2000). (Not a med-mal case.) Upon review, the Appellate Court concluded that Plaintiff’s comments on the closing about the Rachel Barton case were improper. These included that “the community spoke about what a violinist. . . [stopped by objection].” “The musician who plays the violin at least can get up every morning and still play the violin. . . . An elementary reading teacher who teaches small children every day. . . cannot continue her beloved profession any more than the flutist could if she lost her arm or her hand or her fingers.” Such remarks were improper because they were not based on either evidence or the reasonable inferences from the evidence. “It is error for counsel to appeal to the passions of the jury.” Because the jury verdict had been overturned on another basis, the Court just stated “Such comment should not be repeated on retrial.”

Zoerner v. Iwan, 250 Ill.App.3d 576, 619 N.E.2d 892 (1st Dist. 1993). (Not a med-mal case.) This was a personal injury case arising out of a car accident where both drivers were drunk. Plaintiff asserted that he had been denied a fair trial by defense counsel’s argument that “Drinking and driving is not right. . . The difference is [plaintiff] is here asking you for hundreds of thousands of dollars because of it. That’s wrong, and we should send a message that it’s wrong, and I hope you’ll do that with your verdict.” While the plaintiff did not object at trial, the Appellate Court considered the issue anyway. The Court concluded that the statements were sufficiently prejudicial that they warranted review even though the plaintiff did not object to them. The Court concluded that the statements deprived Plaintiff of a fair trial because counsel “clearly appealed to the jurors’ sense of moral outrage with an argument that had no bearing on the case – a tactic hardly directed at helping the jury impartially to resolve the fact questions presented to it.” Besides damages, the jury in this case was charged only with determining the proximate cause of the accident. “Suggestions of being regarded for driving drunk or sending messages that drunk driving is wrong had no place in the jury’s deliberations about a factual issue, and counsel was ill advised to insinuate that they did.” Please note though, while these arguments were deemed by the Court to have denied plaintiff a fair trial, the Court concluded that exclusion of a statement by a witness also was a factor in granting Plaintiff a new trial.

Special Thanks to Bill Kanasky Jr., Ph.D. for His Contributions

Bill Kanasky Jr., Ph.D. is the Vice President of Litigation Psychology at Courtroom Sciences, Inc., a full-service, national litigation consulting firm. He is recognized as a national expert, author and speaker in the areas of witness preparation and jury psychology. Dr. Kanasky specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post trial interviewing. Dr. Kanasky’s success with training witnesses for deposition and trial testimony is remarkable. His systematic witness training methodology is efficient and effective, as it is designed to meet each witness’s unique needs, while concurrently teaching core principles of persuasive communication. He can be reached at 312.415.0600 or bkanasky@courtroomsciences.com.
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Mr. Cavanagh has been selected for inclusion in *The Best Lawyers in America*© in the field of personal injury litigation from 2015-2017. Cavanagh Law Group has been listed in “Best Law Firms” by U.S. News & World Report in the years 2016 and 2017. Mr. Cavanagh was named one of the top 500 plaintiffs’ lawyers in the United States by *Lawdragon* magazine. Leading Lawyers Network, a division of Law Bulletin Publishing Company, has named Cavanagh a "Leading Lawyer" every year since its inception in 2003—an honor that is limited to the top 5 percent of lawyers in Illinois. Leading Lawyers has consistently named him one of the top 100 consumer lawyers in Illinois. For the last seven years he has been named to the prestigious "Irish Legal 100" by The Irish Voice Newspaper, which recognized him as one of the top 100 Irish attorneys in America. Cavanagh was selected to Super Lawyers by Thompson-Reuters from 2005-2017. He is a member of the Board of Managers of the Illinois Trial Lawyers Association, where he serves on the Executive Committee. In 2001, he was selected by the Law Bulletin Publishing Company as one of the "40 Illinois Attorneys Under the Age of 40 to Watch".

He has obtained over 50 verdicts and settlements in excess of $1 million including the following:

- $55 million railroad crossing verdict (recognized by the National Law Journal as one of the top 100 verdicts in the country in 2002);
- $14 million medical malpractice settlement;
- $13.7 million wrongful death verdict;
- $10 million trucking settlement;
- $9.75 million settlement involving a collision between a vehicle and a bicyclist;
- $9.1 million railroad crossing settlement;
- $7.5 million medical malpractice settlement;
- $6.65 million wrongful death verdict;
- $5.7 million uninsured motorist arbitration award for an injured police officer; and
- $5.55 million wrongful death settlement against the Chicago Transit Authority.

Tim graduated from John Carroll University in 1984 and from IIT Chicago-Kent College of Law in 1987.
Catherine L. Garvey is Associate General Counsel and Executive Director of the Professional Liability Program at The University of Chicago Medicine. She received a BSN from the University of Illinois College of Nursing, and worked as a staff nurse at the University of Chicago Children’s Hospital while attending law school at DePaul University. She has 26 years of experience in private practice, most recently as one of the founding partners at Brennan Garvey, LLC (Now Brennan Burtker, LLC). While there, she served as a member of the firm’s Executive Committee and focused her practice on the defense of professional and general negligence litigation for hospitals, dialysis companies, physicians, and other health care professionals. She has successfully tried several cases to verdict, and defended health care professionals at licensure hearings before the Illinois Department of Professional Regulation.
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Martin L. Glink earned his undergraduate degree in Sociology at the University of Illinois in 1974 and his Juris Doctor at IIT Chicago Kent College of Law (*cum laude*) in 1977 where he received the American Jurisprudence Award in Constitutional Law. He is the Principal of the Law Office of Martin L. Glink in Arlington Heights, Illinois. Mr. Glink handles significant personal injury, and municipal tort liability cases. Clients include those seriously injured by medical, hospital, and nursing home negligence. He has recovered many millions of dollars in settlements and verdicts for the firm’s clients. Mr. Glink has argued cases before the Illinois Supreme Court and Appellate Court. He has litigated in many counties throughout Illinois.

Mr. Glink is the co-founder and co-organizer of the Suburban Bar Coalition for Judicial Evaluation Committee and has served as its Director since 1988. He is a member of the Illinois State Bar Association, Decalogue Society of Lawyers, Illinois Trial Lawyers Association, Chicago Bar Association, and American Association for Justice. He is a past president of the Northwest Suburban Bar Association. He is a “Leading Lawyer” and a “Super Lawyer.”
Gera-Lind Kolarik is the founder and owner of Evidence Video, Inc. Since the company's inception in 1988, she has produced over 30,000 videos and has helped attorneys win 2 billion dollars in settlements and verdicts. Ms. Kolarik specializes in brain injury, paralysis, birth injury, amputee, and death cases. She graduated from Dominican University and worked at CBS and WBBM as an Assignment Editor and Producer. She then worked in the same capacities at Channel 7 in Chicago where she received an Emmy Award for spot news coverage. Ms. Kolarik was nominated for two more Emmy Awards and an Oscar for an ABC news special. She has also written three successful true crime books with her first book selling over 500,000 copies. She has spoken at many legal seminars on the use of video at trial and mediation and how to maximize damages.
Stephen I. Lane is the managing partner of Lane & Lane, LLC. Since 1978, his practice has involved the handling of catastrophic injury and wrongful death cases arising from medical malpractice, automobile and other vehicular accidents, defective products and premises and sexual abuse.

Over the course of his professional career, Steve and his firm have obtained numerous multi-million dollar awards and settlements for his clients, including a verdict last year of $22.18 million in a no-offer medical malpractice case. He has been recognized by numerous organizations for his legal ability and integrity, and has served on a number of Illinois Bar Association and other law societies and associations, committees and boards, including multiple terms as a member of the ISBA Board of Governors, the Decalogue Society, ITLA, the Board of Directors of the Center for Elder and Disability Law and the International Society of Primerus Law Firms, an organization made up of more than 3,000 attorneys from nearly 50 countries around the world. Lane & Lane, LLC is the only Plaintiffs’ personal injury law firm in Illinois to be included in membership in this prestigious organization.

He has also had the privilege of authoring state legislation, and of teaching other lawyers over the years, instructing them in areas of medical matters and litigation, including trial and strategy. His hope is that more people are being helped every day because he has been able to help other lawyers become better advocates for their clients.

Steve earned his B.A. in Political Science at the University of Illinois in 1975 and his J.D. at the Illinois Institute of Technology Chicago-Kent College of Law in 1978. He is admitted to practice in Illinois an before the U.S. District Court Northern District of Illinois and the U.S. Supreme Court.
Hon. Clare McWilliams was elected to the Circuit Court of Cook County in November, 2004, and has since has presided over a variety of different courtrooms throughout Cook County. Judge McWilliams was initially assigned to Municipal District One, Richard J. Daley Center, Chicago, Illinois. From August, 2006 to August, 2007 Judge McWilliams was assigned to Municipal District Two, Skokie, Illinois and presided over the majority of calls including both civil and criminal matters. In August, 2007 Judge McWilliams was assigned to the Law Division, Jury Section where she currently presides over tort, complex litigation and personal injury jury trials and since August 2013 has been supervising judge of the Cook County Asbestos Docket.
Nicole D. Milos focuses her practice on protecting the interests of business owners. She is often retained in retail, restaurant and hospitality matters, and litigates construction litigation, product liability, professional liability, commercial matters, fraud claims and coverage disputes. Nicole has extensive experience utilizing alternative dispute resolution tactics, including mediations. Nicole provides her clients with services to avoid liability, minimize exposure and transfer risk. Nicole specializes on finding creative opportunities to resolve cases and avoid costly and lengthy litigation.

Nicole is a graduate of John Marshall Law School (J.D., 2001), and Saint Mary’s College, Notre Dame (B.S., 1998). She is a member of the Illinois bar, and is admitted to practice before the U.S. District Courts for the Northern District of Illinois; U.S. District Courts for the Southern District of Illinois; U.S. District Courts for the Northern District of Indiana; District Court for the District of Kansas; Northern District of Ohio; 6th Circuit Court of Appeals; and 10th Circuit Court of Appeals. Nicole has also been admitted to practice on a pro hac vice basis in many states throughout the United States.

Nicole is an active member of the Illinois Association of Defense Trial Counsel, the Defense Research Institute, Claims and Litigation Management Alliance and The Executives’ Club of Chicago. Nicole has published and presented extensively on concealed carry laws and defense strategies for cases alleging the criminal acts of third parties. She has also offered presentations regarding risk transfer strategies, best litigation practices and claim evaluation techniques.

Nicole was awarded the 2016 International Women’s Leadership Association, Woman of Outstanding Leadership, and was recognized as a 2016 Top Female Executive. She was named the IDC Volunteer of the Year in recognition for her many outstanding contributions including serving on the Board of Directors, serving on the CSI, as chair of the Tort Law Committee, and for her work as the Managing Editor of the IDC’s Survey of Law. Nicole received the IDC Rising Star Award. The award is presented annually to a young attorney who has exhibited exemplary performance in the practice of law, demonstrated commitment to the defense bar and the association, and has been involved in significant projects that had a positive result on the practice of law.
Brian Murphy graduated from Loyola University of Chicago School of Law in 1989 and has been in practice for 27 years. He began his legal career with Williams and Montgomery in Chicago, Illinois. Two years later, in 1991, Mr. Murphy joined Hofeld & Schaffner where he has concentrated his practice in all matters of plaintiff’s catastrophic personal injury and wrongful death litigation. Mr. Murphy has a special concentration in medical negligence litigation. He is a current member of the Assembly of the Illinois State Bar Association and is a member of the Illinois Bar Association’s Tort Section Council. Mr. Murphy is a member of the Board of Managers of the Illinois Trial Lawyers Association, where he has been co-chair of the Medical Negligence Committee for the past eleven years. He has argued before the Illinois Supreme Court and the Illinois Appellate Court; He has tried cases in Cook County and the collar counties and he has recovered in excess of $100,000,000.00 on behalf of his clients. Mr. Murphy is AV rated by Martindale-Hubble; has been named a SuperLawyer every year since 2008; he has an AVVO 10.0 rating, and he has been included in Marquis Who’s Who in American Law since 2015. Mr. Murphy has lectured frequently on topics of trial practice, pre-trial practice and ethics.
Hon. Karen L. O’Malley was elected to the Circuit Court of Cook County in 2012 and assigned to the Probate Division in December 2013 where she presides over Decedent’s Estates. Judge O’Malley serves on the Illinois Supreme Court Judicial Conference and the Alternative Dispute Resolution Coordinating Committee.

Prior to joining the bench Judge O’Malley served as an assistant state’s attorney in Cook County for more than 16 years then practiced in the field of plaintiff’s personal injury. Teaching since 1995, Judge O’Malley has taught evidence, trial advocacy, and criminal justice courses at Northwestern University School of Law, DePaul University College of Law and University of Illinois Chicago. Judge O’Malley is a 1985 graduate of the University of Illinois and earned her J.D at IIT Chicago-Kent College of Law.
Edward B. Ruff, III is an equity partner and a shareholder with Pretzel & Stouffer, Chartered. He is a member of the firm’s executive committee, which he has chaired on several occasions. He has tried over seventy cases to verdict, in the areas of product liability, mass tort, commercial litigation, fire loss, bad faith, intellectual property and professional negligence. He has served as lead counsel in a number of multi-district litigation matters, including Stand ’n Seal “Spray-On” Grout Sealer, Menu Foods and Pedicle Screws, developing a reputation for handling matters on a national basis. He successfully defended the former president of the New York Stock Exchange in a $300 million commercial fraud claim.

Ed’s experience and reputation have earned him a preeminent rating from Martindale-Hubbell, as well as selection as an Illinois Super Lawyer by his peers, since its inception. He has written numerous publications and has lectured for the Illinois State Bar Association, DRI, the FDCC and the Illinois Association of Defense Counsel. Ed speaks on a variety of topics related to product liability safety, fire and casualty, multidistrict litigation and jury trials, and has been an instructor for the FDCC Litigation Management College numerous times.

Ed is also a mechanical engineer with a background in heat transfer engineering. He enjoys fishing, hunting and bike riding with his wife.
Patrick A. Salvi concentrates his legal practice in several limited areas primarily involving a trial practice in cases concerning serious personal injury, medical malpractice and wrongful death. Mr. Salvi achieved record breaking jury verdicts and settlements on behalf of his clients including a record high $33 million jury verdict.

In 1982, Mr. Salvi founded the law firm of Salvi, Schostok & Pritchard P.C. (originally the law offices of Patrick A. Salvi) in Waukegan, Illinois. He is the sole owner and Managing Equity Partner of Salvi, Schostok & Pritchard. The firm has 16 lawyers and is supported by more than 30 staff members including paralegals, nurse paralegals, and administrative assistants.

Mr. Salvi is routinely recognized as one of the most prominent attorneys in the country. In 2017, he was named to Illinois Super Lawyers Top 10 list for the fourth year in a row. His peers selected him as one of the top 10 lawyers out of all categories of law and out of 96,000 Illinois lawyers. He was also named one of the “Best lawyers in America” by Woodward/White, Inc. In 2013, Mr. Salvi was appointed to the Illinois Supreme Court Committee on jury instructions in civil cases. Additionally, he was the recipient of a 2011 and 2012 Award for trial lawyer excellence by the jury Verdict reporter and law Bulletin Publishing Company. Other accolades include: “highest rating for legal Ability and general recommendation” and “Bar register of Preeminent lawyers” from Martindale Hubbell American law directory; member of the AAJ leaders forum; “the leading American Attorneys of Illinois” from the consumer law guidebook; “one of the top ten Personal injury lawyers in Illinois” and “top 5% of all lawyers in Illinois” from a survey of legal peers conducted by the law Bulletin Publishing company’s leading lawyers. In 2015, Mr. Salvi was also selected to the leading lawyers Advisory Board. In 2001, he was invited to become a fellow in the prestigious international Academy of trial lawyers. He is also a former President of the Illinois trial lawyers Association and served a three-year term (2010-2012) as chairman on the Character and fitness, 2nd district committee of the Illinois Board of Admissions to the Bar. Additionally, Mr. Salvi is chairman of the law School Advisory council and is an Adjunct law Professor at the University of Notre Dame Law School.

Mr. Salvi earned his B.A. (cum laude) at St. Mary’s University of Minnesota in 1975, his J.D. at the University of Notre Dame Law School in 1978, and his Doctor of Laws (honoris causa) at St. Mary’s University of Minnesota in 1999.
**Donna Kaner Socol** is a founding member and shareholder of Hughes Socol Piers Resnick & Dym, Ltd. She concentrates on representation of the health care industry, including tort, medical malpractice, medical device, pharmaceutical and commercial litigation defense. She has defended numerous multi-million dollar lawsuits involving brain damaged and impaired infants, as well as serious injuries and deaths involving adults and children. She has defended almost every medical specialty in malpractice matters. She has also arbitrated matters before the Illinois Department of Professional Regulation on behalf of physicians.

Ms. Socol earned her B.A. (*cum laude*) at Northwestern University in 1973 and her J.D. (*cum laude*) at DePaul University College of Law in 1976 where she was a member of the *DePaul Law Review*. She is admitted to practice in Illinois and before the U.S. District Court for the Northern District of Illinois – General and Trial Bar.

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Underwritten by The United States Life Insurance Company in the City of New York.

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Underwritten by AEGON Companies (depending on state of residence) Transamerica Life Insurance Company, Cedar Rapids, IA; and Transamerica Financial Life Insurance Company, Harrison, NY (for NY residents only), 21297556.

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To start shopping, log-in to: https://smartsavings.motivano.com

Once logged in, you will need to use the one-time username “ISBAmax1” and password “Marketplace1.” On the next screen, you’ll be prompted to create your own personal login and account information to use for all your future shopping trips.

Plans may vary and may not be available in all states.

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