Closing argument: Some topics to consider ©

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Substantive evidence

Substantive evidence is evidence that is offered for the purpose of proving a fact in issue, as opposed to evidence offered for the purpose of either discrediting a witness or corroborating the testimony of that witness.[1] In *Rios v. City of Chicago*,[2] the defendant's meteorology expert relied, in part, upon the deposition of an eye-witness who died prior to the trial of the case. In closing argument, defense counsel argued substantively the facts stated in the deposition upon which the expert relied as a basis for that expert's opinion. The Illinois Appellate Court held that it was reversible error for the defense counsel to have argued as substantive that evidence which was merely the basis for the expert's opinion.

Similarly, in *Piano v. Davison*,[3] the Illinois Appellate Court upheld the trial court for properly restricting the plaintiff's closing argument. Plaintiff's counsel had attempted to argue substantively medical literature that was used to impeach the defense expert witness.

Finally, in *McDonnell v. City of Chicago*,[4] one of the defendants argued that it was error for the plaintiff's counsel to read during closing argument parts of a co-defendant's prior statement that was used during the trial for impeachment of that co-defedant. In rejecting the defendant's argument, the Illinois Appellate Court acknowledged that impeachment evidence must not be argued substantively, but that what the plaintiff's counsel said during his closing argument did not represent that the impeaching evidence was substantive.[5]

Judicial admission

A judicial admission is a statement made by a party about a concrete fact within that party's particular knowledge that is deliberate, clear and unequivocal.[6] An attorney in either a civil[7] or a criminal case[8] is capable in court of making an admission that may be binding upon his or her client. An admission of a party may concern fault.[9] A judicial admission is binding upon the party who makes it, thereby prohibiting that party from either controverting or explaining the judicial admission.[10]

In *Lowe v. Kang*,[11] a pedestrian, who was hit by an automobile, brought suit against the driver of the automobile. During closing argument, the defendant driver's attorney made repeated statements that both parties were at fault. After defense counsel's closing argument, the plaintiff moved for a directed verdict as to the defendant's liability. The trial court granted the plaintiff's Motion for a Directed Verdict and instructed the jury that the issue of the defendant's liability was no longer before them for their consideration. The plaintiff's counsel then presented his rebuttal argument regarding the issues of comparative negligence and damages. On appeal, the Illinois Appellate Court upheld the trial court's granting of the direct verdict of liability against the defendant on the basis of the repeated judicial admissions of fault that the counsel for the defendant made during closing argument.[12]

The appellate court in *Lowe* examined the circumstance of the case and the context in which the defendant's counsel's statements were made. With respect to the circumstances of the case, the appellate court noted that that testimony of the witnesses, as well as the physical evidence presented at trial, indicated that neither party saw the other until an instant before the accident.

With respect to the context in which the defense counsel's statements were made, the appellate court reasoned that it was fatal for the defense counsel not to argue in the alternative. Rather than admitting fault, in the appellate court's opinion, the defense counsel should have argued that the defendant was not negligent, but if the jury found otherwise, then the plaintiff's negligence must be offset against the defendant's negligence so as to reduce the plaintiff's damages. Consequently, the appellate court held that the trial court properly found that the defense counsel's statements made during closing argument were judicial admissions that allowed the trial court to grant the plaintiff a directed verdict.[13]

Conversely, in *Stamp v. Sylvan*,[14] the plaintiff's attorney during closing argument in an automobile accident case asked the jury to award the plaintiff $2.3 million based, in part, upon the non-economic damages of pain and suffering and loss of a normal life. Counsel for the defendants suggested to the jury that the present action was a "whiplash case" that was worth about $10,000. On appeal, the Illinois Appellate Court held that defense counsel's statements regarding the plaintiff's damages during closing argument did not constitute judicial admissions because those statements were not clear, unequivocal statements about concrete facts within the defense counsel's particular knowledge. Instead, the defense counsel's statements, in the opinion of the appellate court, were merely opinions or suggestions that the jury was free to either accept or reject.[15]

Likewise, in *Dobyns v. Chung*,[16] a medical negligence case, the defendant's attorney made the statement in closing argument that if the jury found liability against his clients, "then a fair verdict on damages would be a million dollars." The jury returned a verdict against the physician and hospital in the amount of $100,000, which was reduced by 50% because the jury found that patient was contributorily negligent. On appeal, the plaintiff argued that the defense counsel's statement that a "fair verdict on damages would be a million dollars" was a judicial admission that bound the defendants. The Illinois Appellate Court rejected the plaintiff's argument. The appellate court reasoned that defense counsel's statement regarding the amount of damages was an opinion and, therefore, was not a binding judicial admission.[17]

Hired gun

In the case of *Regan v. Vizza*,[18] the defense counsel compared the plaintiff's treating physician to Paladin, a television character who was a hired gun in the Old West. The treating physician was on staff at the hospital where plaintiff sought medical attention because of the motor vehicle accident from which the case arose. The treating physician was an orthopedic surgeon who had been recommended to treat the plaintiff by the hospital's emergency care physician. On appeal, the Illinois Appellate Court found that defense counsel's remarks were sufficiently prejudicial and inflammatory so as to constitute reversible error.[19]

However, if a closing argument made by counsel is supported by the evidence in the case, counsel is allowed to use the "hired gun" argument. In *Moore v. Centerville Township Hospital*,[20] plaintiff's counsel during

closing argument referred to the defendant's two medical experts as "high-priced experts" and "hired gun doctors." The verdict was for the plaintiff, and the defendant appealed. The Illinois Appellate Court noted that earlier Illinois Appellate decisions held that comments during closing argument such as a "hired gun" to be improper.[21] Nevertheless, the appellate court in *Moore* held that the "hired gun" type argument was permissible so long as the evidence in the case justified the argument. In *Moore*, the evidence showed that both experts for the defense charged significant rates for their time and that both experts testified predominantly for defendants in other cases.[22]

Missing witness

Generally, a party's failure to call a witness who is within its control is a proper argument during closing.[23] I.P.I. Civil No. Section 5.01 states as follows:

5.01 Failure To Produce Evidence or A Witness

> If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:
>
> 1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.
> 2. The [evidence] [witness] was not equally available to an adverse party.
> 3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him.
> 4. No reasonable excuse for the failure has been shown.[24]

The decision to instruct the jury as to the adverse inference of a missing witness is within the sound discretion of the trial court.[25]

In *Wetherell v. Matson*,[26] a five-year-old boy was awarded $9,000 by a jury for injuries to his foot that were caused when a 13-year-old boy riding a lawn mower ran over the five-year-old's foot. At trial, an orthopedic surgeon, who saw the injured boy two months before trial was not called by the plaintiff to testify about the boy's foot injuries. During closing argument, the defense attorney commented about the plaintiff's failure to call the orthopedic surgeon as a witness. During the plaintiff's attorney's rebuttal argument, the plaintiff's attorney attempted to explain the reason for not calling the orthopedic surgeon as a witness. The defense attorney objected and a colloquy then ensued among the trial court and the attorneys for both the plaintiff and defendant. Although the I.P.I. Section 5.01 missing witness instruction was discussed, the trial court did not give the instruction and allowed the plaintiff to resume explaining why the orthopedic surgeon was not called.

On appeal, the defendant argued that the failure to call a witness is always a proper comment because the requirements for giving I.P.I. Section 5.01 are greater than the permissible scope of closing argument regarding a missing witness. The Illinois Appellate Court disagreed, reasoning that the crucial element was the party's control over the missing witness. Otherwise, without the element of control, as in *Wetherell*, the plaintiff would have had to produce every physician who treated him or be faced with the argument of the defendant that those physicians were not produced because they would have testified adversely. Consequently, the appellate court held that the orthopedic surgeon was not under the control of the plaintiff, and it was error for the defendant's attorney to insinuate that the orthopedic surgeon would have testified adversely toward the plaintiff. As a result, the appellate court ordered a new trial on damages.[27]

Similarly, in *O'Connell v. City of Chicago*,[28] the plaintiff's attorney made no request for the I.P.I. Section 5.01 missing witness instruction. In rebuttal argument, the attorney for the plaintiff, over four sustained objections by the defense attorney, talked about the city's failure to produce a police officer in its effort to prove that the plaintiff was intoxicated. The Illinois Appellate Court held that the plaintiff's attorney's argument was improper because no evidence existed that the missing police officer was still on the police force or had anything relevant to say. The appellate court further expounded that even if the absent witness were an officer at the time of trial, he or she would have been considered to have been a public employee and, therefore, equally available to both parties.[29]

Conversely, in *Simmons v. University of Chicago Hospital*,[30] a medical negligence action, after a lengthy debate, the trial court gave the missing witness instruction because the defendant failed to produce a physician who was instrumental in treating the plaintiff. Both the Illinois Appellate Court and the Illinois Supreme Court held that giving the missing witness instruction was proper because the physician in question was an employee of the defendant hospital who was potentially liable to the plaintiff and, therefore, was not equally available to the plaintiff.

A distinction can be made, however, between commenting about a party's failure to call a witness and commenting upon the disparities and gaps in the testimony presented. In *Gilman v. Kessler*,[31] the allegedly intoxicated person in a Dram Shop action was a party to the case, but did not appear at trial. The Illinois Appellate Court held that the defense counsel's closing argument was proper because the defense counsel was careful not to comment upon the plaintiff's failure to call the allegedly intoxicated person because that person was not under the plaintiff's control and was equally available to the defendant. Rather, the defense counsel artfully argued about the lack of testimony of the allegedly intoxicated person causing disparities and gaps in the testimony presented.[32]

A retained expert who is hired by a party to support that party's position at trial is under that party's control and, therefore, unavailable to the opposing party.[33] However, if the proffered testimony of a retained expert is cumulative of other expert testimony of the party controlling that expert, that cumulative expert may be withdrawn without the trial court giving the missing witness instruction.[34]

For example, the Illinois Appellate Court in *Montgomery v. Blas*[35] held that the trial court properly used its discretion by allowing defendant to withdraw one of the three experts whom he had retained. At issue was whether epidural steroidal injections given by the defendant were the cause of the plaintiff's avascular necrosis. The appellate court found that the withdrawn expert was not contradictory to the other two experts and if that withdrawn expert were called to testify, the trial would have been unnecessarily prolonged. Therefore, the appellate court held that the trial court properly used its discretion in allowing the defendant to withdraw the cumulative expert without having to suffer a missing witness instruction.[36]

However, if the testimony of the with-

drawn expert is not entirely cumulative, it is reversible error not to give the missing witness instruction.[37] In *Kersey v. Rush Trucking, Inc.*,[38] the defendant withdrew its accident reconstruction expert on the premise that the expert's testimony would be cumulative to information that defense counsel obtained during the cross-examination of the plaintiff's accident reconstruction expert. One of the key issues at trial was whether the defendant's truck was speeding at the time of the accident. The Illinois Appellate Court found that the withdrawn expert's testimony regarding the speed of the truck was most likely favorable to the plaintiff's position, and, therefore, it was reversible error by the trial court not to have given the missing witness instruction against the defendant.[39]

Finally, a party may avoid the missing witness instruction if that party gives reasonable notice to the opposing party before trial of the abandonment of an expert witness.[40] In *Taylor v. Kohli*,[41] the trial court gave the missing witness instruction because the plaintiff failed to call an expert witness. The Illinois Appellate Court remanded the case for a new trial on the issue of whether reasonable notice of abandonment was given.[42] The Illinois Supreme Court upheld the ruling of the appellate court.[43]

Rebuttal

In closing argument, the plaintiff, in rebuttal, must reply to the argument of the defense and must not introduce any new line of argument.[44] In *Clarke v. Medly Moving and Storage, Inc.*,[45] the plaintiff's decedent was an 83-year-old man who was struck and killed by one of the defendant's trucks while crossing the street. At trial, the defense counsel argued that the man's survivors somehow pieced together photographs and testimony to falsely portray a close relationship with the decedent. In rebuttal, the plaintiff's counsel argued that the defense was "kicking the decedent in the grave."

The Illinois Appellate Court held that the plaintiff's counsel did not engage in improper argument because the plaintiff's counsel properly responded to the defense counsel's argument that plaintiff was exaggerating his damages and disingenuously fabricating his claim.

Likewise, in *Caponi v. Larry's 66*,[46] the Illinois Appellate court held that the plaintiff's rebuttal argument that the value of the pain and suffering of older persons such as the plaintiff was no less than that of younger persons was a proper response to the defense counsel's argument. The plaintiff was properly responding to the argument of defense counsel that the plaintiff was not a wage earner in the flush of his career.

Conversely, in *Malanowski v. Jabamoni, M.D.*,[47] the Illinois Appellate Court held that the trial court properly barred the plaintiff's counsel from discussing damages in rebuttal. Because the plaintiff's counsel did not discuss damages in closing argument, defense counsel did not discuss damages in closing argument. Consequently, in discussing damages for the first time in rebuttal, the plaintiff's counsel was not replying to the argument of the defense, but was introducing a new line of argument.

Similarly, in *Prendergast v. Cox*,[48] the counsel for the plaintiff urged the jury to take inflation into account in measuring damages. The defense counsel objected on the basis that no evidence was presented by anyone as to inflation. The trial court sustained the objection, and the Illinois Appellate Court held that the trial court's ruling was correct.[49]

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1. *People v. Suastegui*, 374 Ill. App. 3d 635, 871 N. E. 2d 145 (1st Dist. 2007).
2. 331 Ill.App.3d 763, 771 N. E. 2d 1030 (1st Dist. 2002).
3. 157 Ill.App.3d 649, 510 N. E. 2d 1066 (1st Dist. 1987).
4. 102 Ill.App.3d 578, 430 N. E. 2d 169 (1st Dist. 1981).
5. It is difficult to comprehend why the Illinois Appellate Court did not rule in this case that when the witness whose credibility is under attached is also a party to the action then the prior inconsistent statement of that party witness constitutes an admission and is, therefore, independently and substantively admissible. See, *e.g.*, *Security Savings and Loan Association v. Commissioner of Savings and Loan Associations*, 77 Ill.App,3d 606, 396 N.E. 2d 320 (3rd Dist. 1979).
6. *In re Estate of Rennick*, 181 Ill.2d 395, 692 N. E. 2d 1150 (1998).
7. *Standard Management Realty Company v. Johnson*, 157 Ill.App.3d 919, 510 N.E.2d 986 (1st Dist. 1987).
8. *People v. Howery*, 178 Ill.2d 1, 687 N.E.2d 836 (1997).
9. *Wright v. Stokes*, 167 Ill.App.3d 887, 522 N.E.2d 308 (5th Dist. 1988).
10. *Keeven v. City of Highland*, 294 Ill. App. 345, 689 N.E.2d 658 (5th Dist. 1998); *Williams Nationalease, Ltd. v. Motter*, 271 Ill.App.3d 594, 648 N.E.2d 614 (4th Dist. 1995); *Pandya v. Hoerchler*, 256 Ill. App. 3d 669, 628 N.E.2d 1040 (1st Dist. 1993).
11. 167 Ill.App.3d 772, 521 N. E. 2d 1245 (2nd Dist. 1988).
12. *Id.*, 521 N. E. 2d 1247 - 1250.
13. *Id.*
14. 391 Ill.App.3d 117, 906 N.E.2d 1222 (1st Dist. 2009).
15. *Id.*, 906 N.E.2d 1230.
16. 399 Ill.App.3d 272, 926 N.E.2d 847 (5th Dist. 2010).
17. *Id.*, 926 N. E. 2d at 860.
18. 65 Ill.App.3d 50, 382 N.E.2d 409 (1st Dist. 1978).
19. *Id.*, 382 N.E.2d 412.
20. 246 Ill.App.3d 579, 616 N.E.2d 1321 (5th Dist. 1993).
21. *Id.*, 616 N.E.2d 1330 - 1331.
22. *Id.* at 1332. See also, *Klingelhoets v. Stacia Charlton-Perrin*, 2013 IL App. (1st) 112412, 983 N. E. 2d 1095 (1st Dist. 2013); *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill.App.3d 1034, 787 N.E.2d 247 (1st Dist. 2003).
23. *Hunter v. Chicago and Northwestern Transportation Company*, 200 Ill.App.3d 458, 558 N.E.2d 216 (1st Dist. 1990).
24. Please note that I.P.I. Civil No. §5.01 also applies to missing evidence. *Roeseke v. Pryor*, 152 Ill. App.3d 771, 504 N. E. 2d 927 (1st Dist. 1987) (defendant hotel failed to produce night manager's report summarizing events in question).
25. *Schaffner v. Chicago and Northwestern Transportation Company*, 129 Ill.2d 1, 541 N.E.2d 643 (1989).
26. 52 Ill.App.3d 314, 367 N.E.2d 472 (4th Dist. 1977).
27. *Id.*, 367 N.E.2d 475 - 476.
28. 285 Ill.App.3d 459, 674 N.E.2d 105 (1st Dist. 1996).
29. *Id.*, 674 N.E.2d 112.
30. 162 Ill.2d 1, 642 N.E.2d 107 (1994).
31. 192 Ill.App.3d 630, 548 N.E.2d 1371 (2nd Dist. 1989).
32. *Id.*, 548 N. E. 2d at 1381-1382. See also, *Lewis v. Cottonbelt Route – St. Louis Southwestern Railway Company*, 217 Ill.App.3d 94, 576 N.E.2d 918 (5th Dist. 1991).
33. *Montgomery v. Blas*, 359 Ill.App.3d 83, 833 N.E.2d 931 (1st Dist. 2005).
34. Id.
35. Id.
36. *Id.*, 833 N.E.2d 935. See also, *Adami v. Belmonte*, 302 Ill.App.3d 17, 704 N.E.2d (1st Dist. 1998); *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730, 631 N. E. 2d 1186 (1st Dist. 1994).
37. *Kersey v. Rush Trucking, Inc.*, 344 Ill.App.3d 690, 800 N.E.2d 847 (2nd Dist. 2003).
38. *Id.*
39. *Id.*, 800 at 856-857. See also, *Natalino v. JMB Realty Corp.*, 277 Ill.App.3d 270, 660 N.E.2d 138 (1st Dist. 1995).
40. *Taylor v. Kohli*, 162 Ill.App.2d 91, 642 N.E.2d 467 (1994).
41. *Id.*
42. 252 Ill.App.3d 852, 625 N.E.2d 64 (1st Dist. 1993).
43. 642 N. E. 2d 469-470.
44. *People v. Bundy*, 295 Ill. 322, 129 N.E. 189 (1920).
45. 381 Ill.App.3d 82, 885 N.E.2d 396 (1st Dist. 2008).
46. 236 Ill.App.3d 660, 601 N.E.2d 1347 (2nd Dist. 1992).
47. 332 Ill.App.3d 8, 772 N.E.2d 967(1st Dist. 2002).
48. 128 Ill.App,3d 84, 470 N.E.2d 34 (1st Dist. 1984).
49. *Id.*, 470 N.E.2d 39.