

Supplement to
Civil Trial Practice

**Winning Techniques of
Successful Trial Attorneys**

Compiled and Edited by

M.P. Papadakis, Esq.

Appendices to Chapter 23

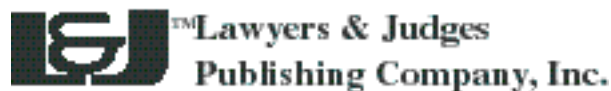
Philip H. Corboy

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

**—From a Declaration of Principles jointly adopted by
a Committee of the American Bar Association
and a Committee of Publishers and Associations.**

The publisher, editors and authors must disclaim any liability, in whole or in part, arising from the information in this volume. The reader is urged to verify the reference material prior to any detrimental reliance thereupon. Since this material deals with legal, medical and engineering information, the reader is urged to consult with an appropriate licensed professional prior to taking any action that might involve any interpretation or application of information within the realm of a licensed professional practice.

Copyright © 2000 by Lawyers & Judges Publishing Co. All rights reserved. All chapters are the product of the Authors and do not reflect the opinions of the Publisher, or of any other person, entity, or company. No part of this book may be reproduced in any form or by any means, including photocopying, without permission from the Publisher.



P.O. Box 30040 • Tucson, AZ 85751-0040

(800) 209-7109 • FAX (800) 330-8795

Website: www.lawyersandjudges.com

E-mail: sales@lawyersandjudges.com

Library of Congress Cataloguing-in-Publication Information

Civil trial practice : winning techniques of successful trial attorneys / edited and compiled by M.P. Papadakis

p. cm.

Includes index.

ISBN 1-930056-15-X

1. Trial practice--United States I. Papadakis, M.P.

KF8915 .C566 2000

347.73'75--dc21

Supplement

00-038469

ISBN 1-930056-15-X

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

Appendix A

Motion in Limine

Philip H. Corboy

**IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS**

EDWARD A. KARSTEN, Guardian of the)
Estate and Person of JOAN E. KARSTEN,)
a Disabled Person, and EDWARD A. KARSTEN,)
)
Plaintiffs,)
)
v.) No. 80 L 1089)
)
ROBERT McCRAY, GLEN H. ASSELMEIER,)
and GLEN ELLYN CLINIC, S.C., a)
corporation,)
)
Defendants.)

MOTION IN LIMINE

Plaintiffs respectfully move this court *in limine* for entry of an Order to prohibit counsel for all defendants from introducing in any way and in any form at any time during the court of this trial, any evidence, remark, statement, request, suggestion, inference, innuendo, question, answer, testimony, or reference of any nature which might inform, infer, or suggest to the jury the fact that Joan Karsten suffered from a condition of left side weakness, weakness in her arms, weakness in her legs, neuropathy, myopathy, central nervous system disorder, or multiple sclerosis and that Joan Karsten received treatment or underwent treatment for left sided weakness, weakness in her arms, weakness in her legs, neuropathy, central nervous system or multiple sclerosis which may or may not have been a neuropathy, myopathy, central nervous system disorder or multiple sclerosis in 1972 or at any time prior to this occurrence.

Plaintiffs further request this court to instruct counsel for defendants to instruct defendants, Robert McCray, Glen H. Asselmeier, and any agent of defendant Central DuPage

Hospital or Glen Ellyn Clinic, S.C., a corporation, and each and every witness not to mention, refer to, interrogate concerning, voluntarily answer or attempt to convey to the jury at any time during these proceedings any information as to the aforementioned conditions. Plaintiffs further request that counsel for each defendant instruct each witness not to make any reference to or inference to the fact that this motion has been filed, argued or ruled upon by the court and that counsel for each defendant be instructed to warn each and every witness appearing for the defense in this litigation to strictly comply with the ruling of this court. In support of this motion, plaintiffs attach hereto a Memorandum of Law and state:

1. That the existence of this condition of left sided weakness, weakness of the arms, weakness of the legs, neuropathy, myopathy, central nervous system disorder, or multiple sclerosis in 1972 or at any time prior to this occurrence is not probative of any issue before this court.

2. That there has been no testimony by any expert or medical professional called by plaintiffs or defendants which in any way based upon a reasonable degree of medical certainty relates this alleged condition or these alleged conditions suffered by Joan Karsten in 1972 to any injury sustained by Joan Karsten as a result of the occurrence complained.

3. That under these circumstances, if this condition or conditions were made known to the jury, it would be highly improper and prejudicial to plaintiffs, and even if the court were to sustain an objection and strike such testimony or instruct the jury not to give consideration to the same, it would be highly prejudicial to plaintiffs.

Respectfully submitted,
CORBOY & DEMETRIO, P.C.

Appendix B

Plaintiffs' Memorandum in Support of Motion in Limine

Philip H. Corboy

**IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS**

EDWARD A. KARSTEN, Guardian of the)
Estate and Person of JOAN E. KARSTEN,)
a Disabled Person, and EDWARD A. KARSTEN,)
)
Plaintiffs,)
)
v.) No. 80 L 1089)
)
ROBERT McCRAY, GLEN H. ASSELMEIER,)
and GLEN ELLYN CLINIC, S.C., a)
corporation,)
)
Defendants.)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE TO PROHIBIT INTRODUC-
TION OF TESTIMONY REGARDING A POSSIBLE
NEUROPATHY OR MYOPATHY SUSTAINED BY
JOAN KARSTEN IN 1972**

Plaintiffs fear one or more defendants may seek to introduce testimony at trial that Joan Karsten suffered from a condition of left arm weakness, left leg weakness, left sided weakness, neuropathy or myopathy during 1972. This condition has also been referred to as a possible demyelinating disease such as multiple sclerosis. Joan Karsten received a work-up for this condition at Central DuPage Hospital in 1972. A definitive diagnosis of the exact nature of this condition was never obtained, although the final impression was a possible myopathy.

There has been no competent testimony based upon a reasonable degree of medical certainty which in any way relates this condition to left arm weakness, left leg weakness, left sided weakness, neuropathy or myopathy suffered by Joan Karsten in 1972 to the injury sustained by Joan Karsten as a result of her treatment received at Central DuPage Hos-

pital on and subsequent to April 29, 1979.

When evidence of a prior injury or illness is sought to be introduced at trial, that prior injury or illness must be connected by competent medical testimony to the injury sustained by plaintiff. *Marut v. Costello*, 53 Ill.App.3d 340 (1964). In *Marut*, plaintiff maintained that counsel for defendant improperly questioned plaintiff and plaintiff's physician concerning a possible connection between a prior injury to the cervical spine and injury to the lumbar spine which was the basis of the plaintiff's litigation.

The appellate court held that evidence of the prior injury should have been barred as there was no testimony tending to connect the two injuries. Plaintiff's prior injury was irrelevant on the issue of proximate cause of plaintiff's current injury to the lumbar spine. Defendant never connected the injury by calling a medical expert, rather defendant sought to connect the injuries through the cross-examination of plaintiff's physician. However, the physician repeatedly stated that the two injuries were not connected.

Unless some competent witness is willing to testify that the two injuries are connected or reasonably might be connected, we do not see how the question of whether the injuries were connected could be before the jury. There was no evidence from which the jury could come to that conclusion. 53 Ill.App.2d at 357-358.

The absence of testimony which connects a prior injury or illness to a current injury renders the prior injury or illness irrelevant and prejudicial because of the innuendo to which such evidence is susceptible. *Simpson v. Johnson*, 45 Ill.App.3d 789, 795 (1977). Certainly, in the absence of competent medical testimony in this case, any mention of a prior neurological injury would be prejudicial to plaintiff because of the innuendo to which a jury may attach to evidence of this type.

In *Rehak v. City of Joliet*, 53 Ill.App.3d 724 (1977), defendants sought to introduce evidence that plaintiff was a diabetic to show that plaintiff's injury was proximately caused by her diabetes, not a hole in the street. In affirming the trial court's exclusion of testimony regarding plaintiff's

diabetic condition, the appellate court stated that although the testimony would have established that diabetes could or might have caused the plaintiff to fall, “it was clear the doctor was talking only in terms of possibilities without any medical reason suggesting a direct relationship between the disease and the fall.” *Rehak*, at page 727. As the medical testimony was insufficient to establish a causal connection between the diabetes and the later incident, it was properly excluded.

Other cases which have addressed the issue of the admissibility of testimony regarding prior injury to the same part of the body have required that defendant establish a connection between the prior injury and the injury complained of. In *Greim v. Sharpe Motor Lines*, 101 Ill.App.2d 142 (1968), the court held that evidence of plaintiff’s neck injuries incurred in a prior accident would have no relevance until defendants produced competent medical proof that a reasonable connection existed between the prior neck injury and the neck injury complained of in the case at bar. The court stated that as defendant failed to produce any connecting proof, the trial court properly refused to allow evidence of the prior accident and injury. *Greim* at page 142.

The only testimony which has been elicited during discovery concerning the relationship between this alleged condition in 1972 and the injuries claimed to have been sustained by plaintiff as a result of the negligence of the defendant healthcare providers in the case at bar was obtained from two expert physicians who have been identified by defendants, Robert McCray and the Glen Ellyn Clinic, S.C.

The following testimony was provided by Dr. Stuart Levin during his deposition:

Q Is there any indication that her neurological disease, if that’s what it was, in 1972, is related at all to her disease today?

A Well, you know, I went through the chart with that in mind. That doesn’t change my opinion. I don’t even think it changes anybody’s involvement one way or the other. So I think I could be very objective about it, in case I was not being objective otherwise against my wishes.

And there’s such a mediocre workup, I really can’t, that it is or isn’t.

Something bizarre happened to the patient, and I know from one of our grand rounds that there has been a case where there has been like 15 years or something like that between episodes. So I would

say if this was more like that and they had a little bit more information, then I’d say it’s a possibility.

If, on the other hand, this is really what I was assuming initially, a Landrey Guillain-Barre syndrome, then my guess would be that they are independent, because I don’t know of any association at all.

Q Isn’t it just as likely that this has absolutely nothing to do, her disease in 1972, with her disease today?

A Oh, honestly, you know, if we were sitting here talking about a case and we weren’t in an adversary role, I’d say, “I don’t know, you know. It’s a mediocre thinking. It could be related.”

If I was more sure of what the patient had and if what that patient had in ’72 could not be explained so I am very specific, on the basis of CNS thrombotic episodes, particularly occurring in the cortex, maybe in the spinal cord, but mainly in the cortex, then I would say that it couldn’t have anything to do with it, as far as my knowledge is concerned.

And if those findings were more like CNS rather than peripheral neuropathy, I’d say, “Well, honestly, they could be related.”

My reading of their EMG, et cetera, makes me feel, though I have trouble reading it, that is is more peripheral. Therefore, my feeling is it is probably not related. That’s as far as I can go.

Q Well, wouldn’t it be fair to say that it is more likely than not that it’s not related?

A Well, I am willing to talk the same way in one direction as the other. Yes, it’s more likely than no. Just assuming this was peripheral disease.

Q No, I mean looking at what you have got there.

A I have trouble reading it. So assuming that what I read is what it says, that’s my own improvise. It’s much more likely than not that it’s not related. (Pages 196 to 199 of Dr. Stuart Levin’s Deposition.)

Clearly, Dr. Levin does not provide competent medical testimony on which to base a causal relationship or any

relationship between Mrs. Karsten's condition in 1972 and the injury sustained by her as a result of this occurrence.

Testimony was also provided by Dr. John Shaw during the course of his deposition.

Q Now, when did Mrs. Karsten first manifest symptoms of TTP?

Mr. O'Reilly: You mean during the year 1979?

Mr. Horan: I mean at any time.

The Witness: Well, it may have been as early as 1972.

Q What do you base that statement on?

A Well, I base that on the fact that in 1972 she had an undiagnosed neurological symptom complex and a low platelet count.

Q Was there any diagnosis made of her condition in 1972?

A There was, as I believe the final diagnosis was that of an orthopedic problem in her left arm, an epicondylitis, I believe.

I'm not sure I recall what the final sign-out diagnosis from the hospital is. I can look for you.

Final impression, weakness left upper extremity rule out neuropathy or myopathy.

Q Do you believe she had TTP in 1972?

A She may have.

Q Based on a reasonable degree of medical and surgical certainty, did Mrs. Karsten suffer from TTP in 1972?

A In answer to your question now, based on the evidence that I have, the medical investigation that is available to me in 1972, I feel that it is possible that this was an early program; but no, I cannot make the statement with a reasonable degree of medical certainty that she had TPP in 1972.

The Witness: I think she had a symptom complex which could well have been suggestive of TTP, but the

medical information available is indeed inadequate to say it with certainty.

Q So is it your testimony that based on a reasonable degree of medical and surgical certainty that you are unable to say that the 1972 admission of Joan Karsten in any way relates to your diagnosis of TTP from 5/14/79?

A Because I think that there is evidence in that chart, specifically thrombocytopenia and vague neurological syndrome that may well relate, as you said, did it in any way relate, that may well in some specific way relate to her 1979 admission.

Q Can you tell me based upon a reasonable degree of medical and surgical certainty how that 1972 admission relates to our condition on 5/14/79?

A In that TTP, thrombotic thrombocytopenic purpura is a disease complex with commonly has antecedent events which sometimes may precede the full-blown complex by years of many vague syndromes. Specifically vague neurological syndromes which are often undiagnosed.

In addition, thrombocytopenia, which is part of the TTP, is clearly present 1972. We have not other explanations for that thrombocytopenia. When you have a patient who during a hospitalization has a disease complex in which this associated at points in the disease, I think it's reasonable to say that they could well be related.

Q Do you have any information as to whether Joan Karsten suffered any other neurological problems at all from 1972 through 1979?

A I have no information.

Q What I'm asking is this. Based on a reasonable degree of medical and surgical certainty, can you say that the 1972 event was a predetermined of the TTP that you are diagnosing in 1979?

A I think you are asking me to state in legal terminology somehow a medical situation which may be associated with the disease, and given subsequent events is likely to be. But in an isolated situation, is situation A related to situation B, where my answer

is “It may well be”, you are asking me, is “It may well be,” defined as a reasonable degree of medical certainty. And I don’t have the legal training to answer that.

(Pages 9-17 of the Deposition of Dr. John Shaw.)

The testimony of a medical expert as to the proximate cause of injury must be based upon a reasonable degree of medical and scientific certainty. Mere surmise or conjecture cannot be regarded as proof of an existing fact.

In *Lyons v. Chicago City of Railway Co.*, 258 Ill. 75 (1913), the Supreme Court held that it was reversible error to allow the admission of opinion testimony by plaintiff’s treating physician who stated, “I formed the opinion that he might have a fracture of the anterior fossa which is above the eye for the reason that the injury to the eye, the bloodshot eye appearance appeared later. I could not have an absolute opinion on that without an x-ray plate showing that fracture of the orbital plate.” The court found this evidence to be clearly speculative and therefore not competent. Mere surmise or conjecture is never regarded as proof of fact and the jury will not be allowed to base a verdict thereon. The physician therein stated he was not telling the court or the jury that the man did have a fracture. The court distinguished this from an instance wherein the witness testifies that from this experience in such matters his judgment was that there was a fracture.

Clearly, the testimony provided by Dr. Levin and Dr. Shaw does not amount to an opinion that there was indeed a causal relationship between the condition suffered by Mrs. Karsten in 1972 and the injury sustained by her as a result of this occurrence. A safeguard upon the reliability of expert testimony is that the expert no matter how skilled or experienced will not be permitted to guess or state a judgment based on mere conjecture. In *Schwartz v. Peoples Light and Coke Company*, 35 Ill.App.2d 25 (1962), an expert testified on cross-examination that there might be a causal connection between the condition of the stove and the fire if one were to assume an essential fact which he characterize as only a possibility and which was not supported by any other evidence. In ruling that the testimony of this expert should have been excluded, the appellate court found that the opinion of the experts had not probative value on the issue of proximate cause.

The ultimate test for the admissibility of any evidence at trial is question of relevancy. A classic examination of the relevancy issue was undertaken by the appellate court in *Caley v. Manicke*, 29 Ill.App.3d 323 (1961). In that case, during the cross-examination of plaintiff, defendant elicited admissions that plaintiff had been involved in an automo-

bile accident before and after the occurrence complained of. Defendant never offered any evidence to connect these accidents with plaintiff’s current injury but argued that when viewed with plaintiff’s own medical testimony there was a sufficient relationship demonstrated.

The defendant argued where there could be more than one cause of injury, it was plaintiff’s burden to prove which one was the proximate cause. Defendant maintained that he should be allowed to elicit all possible causes and upon eliciting those possible causes, should have had the right to have all evidence as to these causes submitted to the jury.

Although testimony was elicited as to a possible cause, the evidence did not establish even remotely that these prior and subsequent injuries were a possible cause of plaintiff’s injuries. As a result, no jury could reasonably infer from these incidents that one or both of them were related to the injuries plaintiff sued on. In short, there was no nexus between the prior and subsequent injuries and the injury complained of.

The court excluded the testimony of possible causation on grounds of relevancy stating:

That intervening and contributory causes are material to the issues of proximate cause is implicit in the very nature of things, and taken as a matter of course in actions of this kind. They are material propositions that may be proved. The question here is whether the evidentiary facts offered by defendant did prove either on or both of them. Relevancy has been defined as a tendency to establish a fact in controversy, or to render a proposition in issue more or less probable. To be probable, evidence must be viewed in the light of logic, experience and accepted assumptions concerning human behavior. We think on all these counts, viewing the evidence as a whole, reading text in context, that the cross-examination failed to produce evidence that had a tendency to establish any fact which would render plaintiff’s proof of proximate cause less probable. *Id* at 330.

Plaintiffs respectfully suggest that the evidence elicited herein as to the cause and effect relationship of the alleged conditions suffered by Joan Karsten in 1972 and her injuries which form the basis of her complaint are so speculative and nebulous that no nexus between them can be established.

WHEREFORE, plaintiffs respectfully request entry of an Order in limine to prohibit the introduction of such evidence as plaintiffs fear its admission would prejudice plaintiffs by the speculation and innuendo that the jury could attach to such evidence.

Respectfully submitted,
CORBOY & DEMETRIO, P.C.

Appendix C

Plaintiffs' Motion to Strike Certain Testimony

Philip H. Corboy

**IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT
IN THE NAME OF THE PEOPLE OF THE STATE
OF ILLINOIS**

EDWARD A. KARSTEN, Guardian of the)
Estate and Person of JOAN E. KARSTEN,)
a Disabled Person, and EDWARD A. KARSTEN,)
)
Plaintiffs,)
)
v.) No. 80 L 1089)
)
ROBERT McCRAY, GLEN H. ASSELMEIER,)
and GLEN ELLYN CLINIC, S.C., a)
corporation,)
)
Defendants.)

**PLAINTIFFS' MOTION TO STRIKE CERTAIN
TESTIMONY**

Plaintiffs respectfully move this honorable court for entry of an order to strike any and all testimony which informs, infers or suggests to the jury the fact that Joan Karsten suffered from a neurological condition or disorder, including a possible demyelinating disease such as multiple sclerosis, in 1972 or at any time prior to this occurrence. Plaintiffs further request this court to strike any and all testimony which infers or suggests to the jury that Joan Karsten has or had thrombotic thrombocytopenia purpura, otherwise known as T.T.P. In support of said motion, plaintiffs state that there has been no testimony of any kind by any witness that any of these conditions is a proximate cause of the current mental and physical condition of Joan Karsten.

As this court is aware, prior to opening statements, plaintiffs moved this court *in limine* to prohibit defendants from introducing at trial any testimony that Joan Karsten suffered from a condition of left arm weakness, left sided weakness, neuropathy, myopathy, or possible demyelinating dis-

ease, such as multiple sclerosis. In support of their motion, plaintiffs stated that there had been no competent testimony based upon a reasonable degree of medical certainty which in any way related these conditions to the injuries sustained by Joan Karsten as a result of her treatment received at Central DuPage Hospital on and subsequent to April 29, 1979.

In response to plaintiffs' motion *in limine*, counsel for defendant, Robert McCray, stated that this evidence was highly probative of the proximate cause of Joan Karsten's current neurological condition. Defendant assured this court that Dr. John Shaw, an expert witness, would testify that the left sided weakness and medical and neurological condition exhibited by Joan Karsten in 1972 was a manifestation of T.T.P., the condition which Dr. Shaw would opine to be the cause of Joan Karsten's current physical and mental handicaps. (See Defendants' Response to Plaintiffs' Motion to Exclude Evidence that Joan Karsten Suffered from a Certain Medical Condition in 1972 at page 4.)

Plaintiffs inform this court that they have now been told by counsel for defendant, Robert McCray, that Dr. John Shaw will not be providing testimony at trial. As a result, there has been no competent medical testimony, based upon a reasonable degree of medical and surgical certainty, which relates any of these prior neurological conditions to any of the injuries sustained by Joan Karsten as a result of the negligence of these defendant physicians.

The case of *Caley v. Manicke*, 29 Ill.App.2d 323 (1961), is analogous to the case at bar. In *Caley*, defendant questioned plaintiff as to injuries sustained in an automobile accident subsequent to the occurrence complained of, after representing to the court that he would connect it to the plaintiff's current injury. When defendant failed to connect the subsequent accident to the injury, the trial court struck the testimony of the plaintiff regarding the subsequent accident. In affirming the trial court, the appellate court stated:

Defendant argues that these before and after occurrences should have been left in for consideration by the jury; that where there could be more than one cause of the damage it is the plaintiff's burden to prove which

one caused it; that defendant has the right to elicit upon cross-examination, other possible causes, and upon eliciting such evidence to have all the evidence as to such causes submitted to the jury. These would be correct statements of law, were it not for the fact that the evidence elicited on this cross examination does not even remotely establish a possible cause or causes of plaintiff's injury. . . . We think on all these counts, viewing the evidence as a whole, reading test in context, that the cross-examination failed to produce evidence that has a tendency to establish any fact which would render plaintiff's proof of proximate cause less probable. *Caley v. Manicke*, 29 Ill.App.2d 323, 330.

In accord with the *Caley* decision, and for all of the reasons enunciated in plaintiffs' previously filed motion *in limine*, plaintiffs respectfully request entry of an order to strike any and all testimony which refers to or informs the jury of any prior neurological condition suffered by Joan Karsten, including left arm weakness, left side weakness, neuropathy, myopathy, central nervous system disorder, or possible demyelinating disease, including multiple sclerosis. Plaintiffs further request that any and all testimony inferring or referring to the fact that Joan Karsten had T.T.P. should be stricken. Plaintiffs request further that the jury be instructed to disregard all of the aforementioned testimony.

Respectfully submitted,
CORBOY & DEMETRIO, P.C.

Appendix D

Plaintiffs' Reply to Defendants' Response

Philip H. Corboy

**IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS**

EDWARD A. KARSTEN, Guardian of the)
Estate and Person of JOAN E. KARSTEN,)
a Disabled Person, and EDWARD A. KARSTEN,)
)
Plaintiffs,)
)
v.) No. 80 L 1089)
)
ROBERT McCRAY, GLEN H. ASSELMEIER,)
and GLEN ELLYN CLINIC, S.C., a)
corporation,)
)
Defendants.)

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE
TO PLAINTIFFS' MOTION TO STRIKE CERTAIN
TESTIMONY**

The core of Defendants' response to Plaintiffs' Motion to Strike Certain Testimony is that Defendants, specifically counsel for Defendants, assert that the neurologic condition of Joan Karsten exhibited during her May 14, 1979 admission to Central DuPage Hospital is consistent with a pre-existing demyelinating condition, multiple sclerosis. (See Defendants' Response to Plaintiffs' Motion, page 1.) While counsel for Defendants makes this assumption, Defendants have failed to produce one scintilla of evidence to support this assertion. Not one witness has been supplied during the course of this trial who has stated that Joan Karsten had multiple sclerosis or a demyelinating disease at any time prior to this occurrence, in 1972 or in May of 1979. Not one physician has been provided to state that the current physical and mental condition of Joan Karsten is a proximate result of prior neurological symptoms, let alone multiple sclerosis or a demyelinating disease. Yet, despite this total lack of evidence, counsel for Defendants would like the opportunity to

argue to the jury that the vague neurological symptoms experienced by Joan Karsten in 1972 are the proximate cause of her current condition.

At the onset, Plaintiffs wish to emphasize that they object to and vigorously opposed the introduction of any anticipated testimony that would in any way and in any form inform, infer or suggest to the jury the fact that Joan Karsten suffered from a condition of left sided weakness, weakness in her arms, weakness in her legs, neuropathy, myopathy, central nervous system disorder or multiple sclerosis, and the fact that Joan Karsten received treatment or underwent testing for left sided weakness, weakness in her arms, weakness in her legs, neuropathy, central nervous system disorder or multiple sclerosis, which may or may not have been a neuropathy, myopathy, central nervous system disorder or multiple sclerosis in 1972 or at any time prior to this occurrence. This court, after listening to extensive arguments on Plaintiffs' motion *in limine* and considering written memorandum, allowed testimony on this subject matter because these Defendants assured this court that they would connect this evidence to the issues before the court.

The primary assertion made by Defendants in response to Plaintiffs' motion *in limine* to bar this evidence was that the evidence sought to be excluded was relevant to the issues in this trial, specifically, it was "highly probative of a central issue in this case, namely the proximate cause of Joan Karsten's current neurologic condition" and "that Joan Karsten's current condition related to a pre-existing condition." (See Defendants' Response to Plaintiffs' motion *in limine* at pages 1 and 2.) Defendants boldly claim that they were "prepared to submit evidence to the effect that Joan Karsten suffered from left sided weakness in 1972" and "that Dr. John Shaw, Defendant's expert witness, will testify that the left sided weakness and medical and neurological condition exhibited by Joan Karsten in 1972 was a manifestation of TTP, the condition which he opines to be the cause of Joan Karsten's current physical and mental handicaps." (See Defendants' Response to Plaintiffs' Motion *in Limine* at pages 3 and 4.)

Defendants' plan, now foiled, was clearly delineated in Mr. O'Reilly's opening statement, wherein he stated:

Throughout the course of that hospital stay, the doctors who cared for her never determined what the cause, the real cause, of the neurological symptomology was.

Sure, they had a lot of thoughts and a lot of impressions but nothing where they ever said, "Hey, we can point to this and that's obviously what's causing this. This is what happened.

. . . there will be different opinions as to what the possible cause of Mrs. Karsten's problems were in this particular case.

Doctors even today who care for her at the hospital still have no clear answer to explanation as to what did occur, but really it's only in hindsight, looking back, examining the records, the entire medical chart, by experts, hematologist—hematologist is a doctor who specializes in blood—in looking at her entire medical picture, and I am not talking about only the hospitalizations in April, May, June and July of 1979 but also the hospitalization back in August of 1972 do we get some insight as to the most likely or the most probable cause of what occurred to Mrs. Karsten at this time in 1979.

The evidence in this case will show that back in 1972 Mrs. Karsten was examined by a neurologist, a specialist in abnormalities of the nerves and nervous system, as well as an orthopedic surgeon.

During the examination in August of 1972 by the orthopedic surgeon, a Dr. Richard Domingus of Wheaton, Illinois, it was related to him by Mrs. Karsten that she had been having problems, left-sided weakness problems, particularly involving the left arm and left leg for a period of about a year prior to the time of that visit and that she was having difficulty holding on to kitchen utensils, actually dropping them to the point where she had something with her left hand and she would have to move it into her right hand to hold it.

Dr. Richard Domingus was so concerned about the history and the symptomology that was related to him by Mrs. Karsten at that time that he had her hospitalized at Central DuPage Hospital.

He was concerned about some usual muscle or nerve-type disease. He was concerned even to the fact that she

might have MS, Multiple Sclerosis, and entertained that as a possible diagnosis.

During that hospitalization, some testing was done of the nerves and muscles where he performed some testing.

She did have abnormalities on that testing, but remember, this is back in 1972 and they did not rule in or rule out any specific muscular or neurological disease.

They couldn't confirm it, but they couldn't rule it out either.

Taking that into consideration, the expert witnesses in this case and based upon particularly the blood laboratory work that was done on Mrs. Karsten during the second hospitalization—and believe me, during the course of the examination of these records by various experts, many possible suggestions were made as to what really caused her problem, whether it was truly a drug reaction of a bizarre nature or unusual nature with the Keflex, whether it was an exacerbation of this underlying muscular nerve problem that she had back in 1972 or whether the fact that the appendix ruptured for such a period of time prior to her admission to Central DuPage Hospital which can affect the surrounding tissues of that infection might come in contact with.

The most likely, and the opinion of the hematologists who will testify in this case the cause of all these unusual things and the unfortunate things and tragic things that Mrs. Karsten suffered was a rather rare—and a little known about blood disease at that time.

As a matter of fact, in 1972, I don't know whether or not there were many physicians in this country who knew about it. In 1979 they knew a little bit more but certainly not as much as they do today.

It's a blood condition called Thrombotic Thrombocytopenic Purpura. Fortunately, even the doctors refer to it as TTP.

Without me even attempting to give you a detailed description of what TTP is, the expert witnesses will give that explanation for you, hopefully, with some type of graphs or illustrations to show you how this condition affects the human anatomy and can form little micro-clots, tiny little clots, in the blood system and go up

to where the capillaries are. They are the small little portions of the blood system that go up to the brain and everywhere else and clog those areas and deprive it of the oxygen that is necessary to keep those tissues and cells alive.

Actually, it was this condition, looking back in the '72 admission to Central DuPage Hospital, that was most probably the cause of the symptomology.

It has this tendency, this particular disease, to strike, recede, stay in a recession for a number of years and then anything can turn it on again, trigger it, an operation, a stress of an operation, whatever.

Back in 1979, they thought most patients who had this particular condition always died of it, but they have learned since that they don't. They can survive.

Some people have rather—well, not certainly as severe a neurological result with Mrs. Karsten, but you can have episodes like she had in '72 or it can have the affect that unfortunately it did have on her in 1979.

You don't know all the answers in medicine. I think these physicians will do the best they can to describe to you why they believe that this is the most likely cause and how it works and how it operates.

Opening Statement of Roger K. O'Reilly
pages 132-137

As this court is keenly aware, Defendants have rested and Dr. John Shaw never testified. As a result, there is no evidence in the record that Joan Karsten has or had TTP, let alone that it was triggered by her 1972 symptoms. Mr. O'Reilly's eloquent promise was clearly broken.

Furthermore, although counsel for Defendant pledged that the doctors who care for her in 1979 never determined the real cause of her neurological symptomology, he must have overlooked the admission in his clients, Defendant, Roger McCray, as to the cause of Joan Karsten's current condition. Specifically, Plaintiffs refer to the admission of Dr. McCray at his deposition, which is now Plaintiffs' exhibit number 89 in evidence:

Q Were you able to make a diagnosis at any time?

A I guess a one word answer—again, I feel I should have a constant apology for quibbling with words.

If by "make a diagnosis" you mean to make a flat-footed, sure diagnosis that we can find and feel at the end and say that this is what the lady had like you could if she broke her hip where you could say that she broke her hip, period, if that's what you mean by the word diagnosis, I have to say no, we never made a diagnosis.

Q What was your best opinion of a diagnosis?

A All right. Our best theory when we put in all together after—do you want me to go back from Florida on and make one diagnosis?

Q No. The diagnosis during her second hospital stay, the one that began on May 14.

A All right. I can say that if I signed her out today, I would say sepsis secondary to a previous ruptured appendix. And the sepsis caused a rare condition called DIC, disseminated intravascular coagulation, very poorly understood, which in my view, had secondary effects in the brain—because of those multiple, little capillary-sized clots; it would be like a lot of flea bites all over the brain—had secondary effects on the blood itself causing the hemoglobin to drop and secondary effects to the kidney. And all this was from the sepsis.

But since that's an extremely rare condition, nobody, to my knowledge, has been able to come out flatfootedly and say that she had that condition. We all say that we think she had it. Even if we all agreed that she did have it, then there is the question of how often do you see that following appendicitis? Medicine is like that. Sometimes you get rare things.

Q Could we safely say that it is more probably true than not true that she had that?

A I can't think of a better explanation than that, DIC.

Q It is also fair to say that it is more probably true than not true that that came as a result of the ruptured appendix.

A Yes.

The events which have transpired here are a perfect ex-

ample of why Plaintiffs' motion *in limine* to preclude testimony on this subject matter *in toto* was pursued with vigor. If Defendants failed to connect this evidence of a very vague, undefined neurological condition to the issue of proximate cause or the injuries sustained by Joan Karsten, this testimony by its mere admission, would leave the jury with the inference that this neurological condition must somehow be relevant to the issues in this case. The consequences of the misleading nature of this type of testimony is that Defendants never did connect it up, placing Plaintiffs in a most untenable position.

It should be apparent that the real reason Defendants were anxious for this court to allow this testimony was so that the jury would infer that since Joan Karsten had a prior neurological problem, her current neurological condition must be a result of that condition, not the negligence of these Defendants, even though Defendants knew they would never be able to present one witness to prove by competent testimony the cause and effect relationship between the symptoms experienced by Joan Karsten in 1972 and her current injuries. To permit these Defendants to benefit from evidence which they introduced as probative evidence supporting Defendants' theory of proximate cause, which then failed to materialize, is simply ludicrous. To allow counsel for Defendants to now argue that this evidence is relevant to the issues in this case would invite the jury to speculate.

Having failed to produce Dr. Shaw, who was to have relied on these 1972 neurologic symptoms via *Wilson v. Clark*, 82 Ill.2d 186 (1981), it is curious that Defendants then rely on the *Wilson* decision to somehow bootstrap the theory that these 1972 symptoms are substantively relevant. *Wilson* held that an expert witness, including a treating physician, may rely on information not in evidence in reaching his opinion, if the information upon which the expert bases his opinion is of a type that is relied on by other experts in the field. The key, however, is that the treating physician must state an opinion. In the case before this court, there is no opinion by any witness, including treating physicians, which states that this prior neurological condition has any relevance at all to the issues before this court, let alone that these symptoms are the basis of an opinion.

The cornerstone of the *Wilson* decision is the reliability of the "hearsay records or opinions" upon which the testifying expert bases his opinions. The records themselves are not independently admissible as substantive evidence. The expert may rely on facts contained in those records if they are reliable and are a bases of the opinion. It is axiomatic that there must be some opinions given. If there is no opinion based upon the facts or notations in the records, the records in and of themselves do not become substantive evidence. To

hold otherwise would be errant nonsense.

In *Bailey v. City of Chicago*, 116 Ill.App.3d 862 (1983), the reviewing court held that the medical records in question were sufficiently reliable to permit a medical expert to offer his opinion based upon those records. The court emphatically refused however to allow the *Wilson* decision to be utilized as a method to introduce these records as substantive evidence of the facts stated therein. Although Defendants offer no expert to pine on any subject wherein they rely on these 1972 medical records, Defendants attempt to utilize a convoluted analysis of the *Wilson* decision regarding the alleged reliability of a hospital record to introduce in evidence that which they otherwise could not.

The cases cited by Defendants do not support their contention in this regard. In *People v. Ward*, 61 Ill.2d 559 (1975), a psychiatrist relied on medical records to state an opinion that a defendant in a murder prosecution was sane. The clear difference between *Ward* and the case before this court is that the physician gave an opinion to which the records were relevant as a basis for the opinion.

Similarly, in *Guerrero v. City of Chicago*, 117 Ill.App.3d 348 (1983), the court held that it was error to consider a referenced in a medical record as substantive evidence that the event occurred absent testimony that the reference was relied on by the expert in reaching his opinion and that the reference was the type of information reasonably relied upon by experts in the field.

Plaintiffs do not deny that a medical record can be a type of information reasonably relied on by a physician in reaching an opinion. Defendants state that the physician witnesses proffered by Defendants have testified that they relied on Mrs. Karsten's 1972 medical records in rendering their diagnosis, care, treatment and/or prognosis of Joan Karsten in 1979. It is curious, however, that Defendants have not provided one instance where a physician witness proffered by Defendants relied on the 1972 records to state an opinion. Dr. McCray, as was previously mentioned, considers sepsis, not the 1972 neurology, to be the cause of Joan Karsten's current condition.

Dr. Richard H. Dominguez, an orthopedic surgeon, who treated Mrs. Karsten in 1972, clearly stated at trial that no conclusive diagnosis of her 1972 symptoms was ever reached:

Q What was your impression at that time, doctor?

A Well, we were unable to come up with a conclusive diagnosis at that point in time. There was no question that she had objective evidence of a neurological condition, a—some type of neurological

process.

Dr. Neballa and I were both concerned at the possibility that she had Multiple Sclerosis, based on our examination and the history, but we were unwilling to put that diagnosis on her because we were unable to establish that diagnosis.

All the tests we were able to come up with, with the exception in one abnormality—subtle abnormality in the muscle enzyme, all other tests in the examination were normal. And so our conclusion was that she had a neurological condition. We did not know what that neurological condition was with certainty, and that from our perspective, there was no other treatment to be rendered at that point in time. (Testimony of Dr. Richard H. Dominguez, pages 3426-3427).

A I discussed with her the results of the tests, I told her quite frankly that we had evidence that she had a neurological condition. We did not know with certainty what that neurological condition was . . .

Furthermore, I told her that the condition that she had was probably going to be one of three things. It was either going to get better on its own, and there was a likelihood it would do that. It would either deteriorate, and then it would be obvious to everyone what her condition was. Or she might go along period of time with no symptoms and might have another flare-up, and there was no way I would predict which one of these things was going to happen. (Testimony of Dr. Richard H. Dominguez, pages 3428- 3429)

Dr. Dominguez specifically stated that a diagnosis of multiple sclerosis was never made:

A Well, certainly, in the early 70s, the diagnosis of Multiple Sclerosis is impossible. Once it's applied to a patient, it is impossible to remove from that patient. Because they can be virtually normal, you can put the diagnosis on them, and they can be normal for years and years or be normal for the rest of their lives, and not have another flare-up. And it was our opinion at that point in time that that was an unnecessary and unfair load to put on anyone at that point in time, especially, without being certain of the diagnosis, and that required more than one

episode as I understood M.S. at that point in time. (Testimony of Dr. Richard H. Dominguez, pages 3429-3430.)

Furthermore, Dr. Dominguez state that the 1972 condition was idiopathic, and he would not be surprised if Joan Karsten never had a recurrence of these symptoms:

Q And at that time when you examined her, you found—forgive me if I'm flipping this the wrong way, some vague symptoms which you just couldn't put your finger on?

A That's correct.

Q Would that be a pretty safe way to put it?

A That's a fair statement.

Q In medicine, do you fellows use a term called idiopathic?

A Yes.

Q Idiopathic, I think, means you don't know that the cause of it is?

A It's a fancy word for unknown.

Q Would it be fair to say that this was an idiopathic condition?

A That's correct.

Q That you just didn't know what it was?

A That's correct.

Q Now, as far as this condition was concerned, you never saw her again, did you?

A After August of '72, I never saw her again.

Q Now, you would not be surprised, would you, as a doctor sitting there today, if this one episode that she had she described to you came and went and never came back?

A That's correct.

Q And you would not be surprised if she went on to

live a very normal life, and went on to play tennis, and live a social life, and did all the things that a normal, healthy person would do, and never be bothered by this again?

A That's correct.

Q Would it also be fair to say that the condition or whatever you want to call it that you saw her for could very easily have just disappeared and never interfered with her life again?

A That's correct.

Q As far as you know, today, she does not have M.S.?

A I don't know what she has today. That's correct.

Q And when you examined her for this neurological condition, you could very well expect it to disappear and never bother her again?

A Yes.

(Testimony of Dr. Richard H. Dominguez, pages 3433-3437.)

Following their convoluted analysis of the *Wilson* decision, Defendants attempt to demonstrate that Dr. Steven Menet, another treating physician, somehow "relied on" the 1972 episode. Nevertheless, when specifically questioned about his "toxic encephalopathy diagnosis," he stated:

Q So when you are talking about Mrs. Karsten's neurologic problems, would this be the category that would be in you—under your impression, describe those particular problems in your diagnosis there?

A I think it would kind of consolidate all the different things, in that, say, that these things would have caused confusion.

But since we—since I really had no clear understanding of why the neurologic problem started and why they developed, that's the best I could do.

(Testimony of Dr. Steven Menet at page 3286.)

Q What did that mean to you, doctor, in connection with what you were trying to do for this patient?

A It points would that we were treating many differ-

ent problems. We were treating the obvious one, the infection. That we believed were going on, but there were other problems. The neurological problem was something along side and separate from it, and Dr. Balter sums it up beautifully by saying what he had. The lady has a severe impression encephalopathy that we could not nail down the cause of.

(Testimony of Dr. Steven Menet at pages 3404-3405.)

Q Go to the third line down, over the past several weeks, she had developed an increasingly severe encephalopathy, no cause of which has been found?

A Absolutely.

Q Well, I don't know about absolutely, but what did that mean to you as the treating physician, an encephalopathy, no cause of which has been found?

A That exactly in one sentence explained her neurological problem.

Q What is encephalopathy?

A It means something effecting the brain. It's totally a generic term, but it's accurate here.

(Testimony of Dr. Steven Menet at page 3413.)

Q Did you ever as the treating physician determine the cause of the encephalopathy?

A Never.

Q Did the encephalopathy account for the neurological problems Mrs. Karsten had?

A Encephalopathy accounts—it's another way of saying it. Encephalopathy means she had neurological problems. But, you know, we could not account for that.

Q Is it a diagnosis?

A It's a description, not a diagnosis.

Q Do you know that it was that was causing the encephalopathy?

A We had suspicions, but not proof.

(Testimony of Dr. Steven Menet at pages 3405-3406.)

Clearly, once again, nowhere in this descriptive, non-diagnostic explanation of Mrs. Karsten's current condition does Dr. Menet rely on, yet alone refer to, the 1972 symptomology as a proximate cause or a basis of his opinion.

Although Dr. Stone unequivocally stated that Joan Karsten's injuries are a direct result of sequelae from her ruptured appendix, testimony of which the court is most aware and will not be repeated here, Defendants try to state that Dr. Stone attached significance to Mrs. Karsten's 1972 neurological condition. Scrutiny of his testimony in context clearly reveals that he did not attach any significance to this condition whatsoever and that the contents of the 1972 medical records did not change his opinions as to the deviations from the standard of care by these Defendants and their causal relationship to the injuries sustained by Joan Karsten.

Plaintiffs do not deny that Joan Karsten was hospitalized in 1972 for a left arm weakness to rule out a possible neuropathy or myopathy. Plaintiffs aggressively deny, however, that there is any competent showing that this admission or the alleged neurologic symptoms exhibited therein have any relevance to any issue before this court.

Dr. Robert N. Pesch and Dr. Noel Rao, Joan Karsten's treating psychiatrists, have testified that in addition to central nervous system disorders, Joan Karsten suffers from severe diffuse brain injury, including injury to the brain stem, the cerebellum and the cortex. These insults to the brain have resulted in permanent ataxia, permanent dysarthria, permanent quadraparesis and permanent cognitive deficits, including short and long-term memory loss. Not one iota of evidence has linked any of these deficits to the undiagnosed condition of left arm weakness in 1972. To allow counsel for Defendants to argue to the jury that this vague, undiagnosed prior neurological condition is responsible for the condition of Mrs. Karsten today would invite the jury to speculate on a premise for which there is absolutely no support within the record.

When evidence of a prior injury or illness is sought to be introduced at trial, that prior injury or illness must be connected by competent medical testimony to the injury sustained by plaintiff. *Marut v. Constello*, 53 Ill.App.2d 340 (1964). In *Marut*, plaintiff maintained that counsel for defendant improperly questioned plaintiff and plaintiff's physician concerning a possible connection between a prior injury to the cervical spine and injury to the lumbar spine which was the basis of the plaintiff's litigation.

The appellate court held that evidence of the prior injury should have been barred as there was no testimony tending to connect the two injuries. Plaintiff's prior injury was irrele-

vant on the issue of the proximate cause of plaintiff's current injury to the lumbar spine. Defendant never connected the injuries by calling a medical expert, but sought to connect them through the cross-examination of the plaintiff's physician. That physician repeatedly stated, however, that the two injuries were not connected. In finding reversible error, the appellate court stated:

Unless some competent witness is willing to testify that the two injuries are connected or reasonably might be connected, we do not see how the question of whether the injuries were connected could be before the jury. There was no evidence from which the jury could come to that conclusion. 53 Ill.App.3d at 357-358.

In *Rehak v. City of Joliet*, 53 Ill.App.3d 724 (1977), defendants sought to introduce evidence that plaintiff was a diabetic to show that plaintiff's injury was proximately caused by her diabetes, not a hole in the street. In affirming the trial court's exclusion of testimony regarding plaintiff's diabetic condition, the appellate court stated that although the testimony would have established that diabetes could or might have caused the plaintiff to fall, "it was clear the doctor was talking only in terms of possibilities without any medical reason suggesting a direct relationship between the disease and the fall." *Rehak*, at page 727. As the medical testimony was insufficient to establish a causal connection between the diabetes and the later incident, it was properly excluded.

Other cases which have addressed the issue of the admissibility of testimony regarding prior injury to the same part of the body have required that defendant establish a connection between the prior injury and the injury complained of. In *Greim v. Sharpe Motor Lines*, 101 Ill.App.2d 142 (1968), the court held that evidence of plaintiff's neck injuries incurred in a prior accident would have relevance until defendants produced competent medical proof that a reasonable connection existed between the prior neck injury and the neck injury complained of in the case at bar. The court stated that as defendant failed to produce any connecting proof, the trial court properly refused to allow evidence of the prior accident and injury. *Greim* at page 142.

The ultimate test for the admissibility of any evidence at trial is a question of relevancy. A classic examination of the relevancy issue was undertaken by the appellate court in *Caley v. Manicke*, 29 Ill.App.2d 323 (1961). In that case, during the cross-examination of plaintiff, defendant elicited admissions that plaintiff had been involved in an automobile accident before and after the occurrence complained of. Defendant never offered any evidence to connect these accidents with plaintiff's current injury, but argued that when

viewed with plaintiff's own medical testimony, there was a sufficient relationship demonstrated.

The defendant argued where there could be more than one cause of injury, it was plaintiff's burden to prove which one was the proximate cause. Defendant maintained that he should be allowed to elicit all possible causes and upon eliciting those possible causes, should have had the right to have all evidence as to these causes submitted to the jury.

Although testimony was elicited as to a possible cause, the evidence did not establish even remotely that these prior and subsequent injuries were a possible cause of plaintiff's injuries. As a result, no jury could reasonably infer from these incidents that one or both of them were related to the injuries plaintiff sued on. In short, there was no nexus between the prior and subsequent injuries and the injury complained of.

The court excluded the testimony of possible causation on grounds of relevancy stating:

The intervening and contributory causes are material to the issue of proximate cause is implicit in the very nature of things, and taken as a matter of course in actions of this kind. They are material propositions that may be proved. The question here is whether the evidentiary facts offered by defendant did prove either one or both of them. Relevancy has been defined as a tendency to establish a fact in controversy, or to render a proposition in issue more or less probable. To be probable, evidence must be viewed in the light of logic, experience and accepted assumptions concerning human behavior. We think on all these counts, viewing the evidence as a whole, reading text in context, that the cross-examination failed to prove evidence that had a tendency to establish any fact which would render plaintiff's proof of proximate cause less probable. *Caley v. Manicke*, 29 Ill.App.3d 323, 330.

The reasoning of the *Caley* and *Marut* decision was explicitly embraced in a medical professional negligence action, *Simpson v. Johnson*, 45 Ill.App. 3d 789 (1977), wherein the appellate court reaffirmed that a jury should not be invited to speculate on innuendo with no foundation in the record.

The cases cited by Defendant to support their proposition that "Plaintiff's physical infirmities of a demyelinating condition, multiple sclerosis, exhibited in 1972 and thereafter are relevant to demonstrate that this condition pre-existed the treatment rendered by Defendants, and therefore Defendants' treatment could not be the proximate cause of Plaintiff's damage" (Defendant's Response at page 7) could not be more inapplicable. Plaintiffs iterate that no diagnosis of multiple sclerosis has ever been made other than by counsel for Defendant who wishes it were so. Furthermore,

in 1972, Joan Karsten, "in passing" complained of weakness in her left arm. She never complained in 1972 or at any time prior to May, 1970, of dysarthria, ataxia, quadriparesis, brain damage including injury to the brain stem, cerebellum and cortex, and cognitive deficits including short and long-term memory loss. In fact, as testified to by her husband, Edward Karsten, Joan Karsten never complained after August, 1972 of any neurologic symptoms until after her appendectomy. From August, 1972 until April 29, 1979, Joan Karsten was a very active, very able and very fit woman who functioned as a wife and mother. She was employed outside the home as a volunteer for numerous charities and as a paid employee at Kelly Services and Women's, Inc. She continued to play tennis socially and competitively. Clearly, prior to April 29, 1979, Joan Karsten was not wheelchair dependent, dependent in all daily living activities and unable to be left alone without supervision.

As proclaimed by Defendants, *Vandermyde v. Chicago Transit Authority*, 73 Ill.App.3d 984 (1979) is indeed instructive. As stated by the court:

When a prior injury is sought to be connected with a present injury, it must be connected by competent testimony . . . No case has held that the competent testimony may only be medical testimony, and the instances requiring additional evidence have involved an injury to another part of the body . . . or plaintiff's denial of questions which have involved an injury to another part of the body. 73 Ill.App.3d at 992.

Vandermyde involved a back injury and a pre-existing back condition. Plaintiffs do not deny Joan Karsten had left arm weakness in 1972. They deny she had multiple sclerosis and Defendants know they cannot prove she did. Furthermore, even if they could, the jury, as lay persons, would have no basis to connect multiple sclerosis with Joan Karsten's brain damage. Certainly, Defendants do not contend that these lay jurors, without competent medical testimony, can relate left arm weakness, cause undetermined, to Joan Karsten's brain injury and its sequelae.

Similarly, other cases cited by Defendants, *Elberts v. Nussbaum Trucking, Inc.*, 97 Ill.App.3d 381 (1981), *Palsie v. McCorkle*, 79 Ill.App.3d 425 (1966) and *Kaptain v. Overgaard*, 19 Ill.App.2d 483 (1958), are distinguishable as these cases discuss an injury to the same part of the body. Left arm weakness is not synonymous with brain damage, including injury to the brain stem, cerebellum and cortex. *Parham v. Carl N. Linden Co.*, 36 Ill.App.2d 224 (1962) allowed plaintiff to introduce evidence of a prior condition, a less than perfect right eye, as the condition was relevant to the issue of damages sustained by Plaintiff as a result of the injury to his

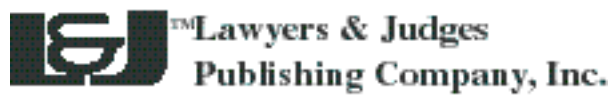
“good” left eye. Perhaps Defendants would accept that any left side weakness now experienced by Joan Karsten serves only to augment her injuries.

In conclusion, Plaintiffs respectfully suggest that the only person at trial to utter one word at trial regarding the 1972 neurologic condition of Joan Karsten as a cause of her current condition is Roger K. O'Reilly, counsel for Defendants. His bald assertion is merely the conclusion which counsel for Defendants would like to have proved but could not. This stark fact is amply supported by the record. Defendants have failed to produce a single witness to state the simple self-proclaimed evident truths they so readily embrace, that Joan Karsten's current condition is consistent with, let alone caused by, multiple sclerosis. Plaintiffs allege that if Defendants could have found one statement in the record to support their contention, they would have supplied it to this court. Plaintiffs state without reservation that there is no such evidence within this record.

Plaintiffs can only assume that Defendants did not present Dr. John Shaw as a witness because his position that Joan Karsten had TTP in 1972 was untenable. Defendants did not present a witness who could state that Joan Karsten had multiple sclerosis and that it proximately caused her injuries because they could not find one.

In spite of their explicit promise to this court that Defendants would hook up the 1972 symptoms to the issues before this court, Defendants have consummately failed to do so. Their failure comes at the expense of Plaintiffs, who are now prejudiced by a record replete with unsubstantiated references to multiple sclerosis, TTP and demyelinating disease. The only remedy now available to Plaintiffs, following denial of their request for a mistrial, is to strike this evidence and to instruct the jury to disregard it.

Respectfully submitted,
CORBOY & DEMETRIO, P.C.



P.O. Box 30040 • Tucson, AZ 85751-0040
(800) 209-7109 • FAX (800) 330-8795

Website: www.lawyersandjudges.com
E-mail: sales@lawyersandjudges.com