2016 IL App (2d) 150002-U
No. 2-15-0002
Order filed June 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ZOEY STAVROU, a minor, by her parents and next friends, HRISTOS STAVROU and NIKOLETTA STAVROU, HRISTOS STAVROU, individually, and NIKOLETTA STAVROU, individually,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 10-L-782
EDWARD HEALTH SERVICES CORPORATION d/b/a EDWARD HOSPITAL and HEALTH SERVICES, EDWARD HOSPITAL, TERRACE OBSTETRICIANS and GYNECOLOGISTS, S.C., THOMAS CHEN, M.D., DAWN J. OSWALT, R.N., and LAURA L. CALLAHAN, R.N.,	)	Honorable Kenneth L. Popejoy,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The trial court did not err in allowing defendants to use computer animations as demonstrative evidence, where they were timely disclosed and illustrated the medical issues involved in the case. The video depicting the formation of the umbilical cord hematoma in 11 seconds was not prejudicial, because the video

> portrayed how a hematoma forms; further, the court required defense counsel to give the jury repeated admonitions that the video did not depict the time it took the hematoma to develop, nor did it depict exactly what happened to the minor plaintiff; also, the video was not relevant to the issue of defendants' violation of the standard of care.

¶ 2 On May 14, 2006, the minor plaintiff, Zoey Stavrou, was born with cerebral palsy as a result of an umbilical cord hematoma that deprived her of oxygen *in utero*. Zoey's parents, plaintiffs Nikoletta Stavrou and Hristous Stavrou, sued defendants, Edward Health Services Corporation d/b/a Edward Hospital & Health Services, Edward Hospital (the hospital), Terrace Obstetricians & Gynecologists, S.C., Thomas Chen, M.D., Dawn J. Oswalt, R.N., and Laura L. Callahan, R.N., for negligence. On May 16, 2014, the circuit court of Du Page County entered judgment against plaintiffs and in favor of defendants after a jury trial. Plaintiffs appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Because plaintiffs argue that defendants' use of certain demonstrative evidence was error, we recite only those facts necessary for an understanding of that issue.

¶ 5 A. Zoey's Birth

¶ 6 On the evening of May 13, 2006, Nikoletta was admitted to a labor room at the hospital. She was Nurse Oswalt's only patient. Nurse Callahan was the charge nurse, meaning that she had some managerial responsibilities. Dr. Chen was Nikoletta's obstetrician. He was at the hospital that evening to deliver Nikoletta's baby, although he was not continuously present at Nikoletta's bedside during labor.

¶ 7 At approximately 7 p.m., Nurse Oswalt attached an electronic fetal monitor to Nikoletta's abdomen to monitor the fetus's heartbeats. The data relayed the state of the fetus's well-being.

Nurse Oswalt continuously read and interpreted the data until the monitor was removed at a little past midnight.

¶ 8 Shortly after 8 p.m., an anesthesiologist administered an epidural to Nikoletta. Throughout the evening, Nurse Oswalt adjusted Nikoletta's position and, at one point, administered oxygen to her. At 11:54 p.m., Nurse Oswalt called Dr. Chen because she saw a concerning change in the fetal monitor strip pattern.

¶ 9 Dr. Chen noted a lack of progress in Nikoletta's labor. At midnight, he called for a non-emergency C-section. Zoey was born at 12:25 a.m. on May 14, 2006. The umbilical cord was around her neck. Zoey had no heartbeat, and her Apgar scores were zero. Due to vigorous resuscitation efforts, Zoey began breathing after 12 minutes, but she had suffered catastrophic brain damage due to a 9 centimeter hematoma occluding the umbilical cord that deprived her of oxygen for approximately 30 minutes.

¶ 10 B. The Lawsuit and Trial

¶ 11 On September 3, 2008, plaintiffs filed a complaint alleging that defendants were negligent in failing to appreciate sooner that Zoey was in trouble during labor. Specifically, plaintiffs alleged in their second amended complaint that Dr. Chen failed to recognize a non-reassuring fetal heart rate pattern on the fetal monitor strips and failed to order a C-section at approximately 9:05 p.m. Plaintiffs alleged that Nurses Oswalt and Callahan failed to formulate a plan to proceed to a C-section when the fetal monitor strips showed "recurrent severe prolonged" fetal heart rate decelerations and failed to initiate a "chain of command" to facilitate a C-section.[1]

[1] Trial testimony established that Nurse Callahan had the responsibility to go up the hospital chain of command to advocate for a C-section if there were a disagreement between the nurses and Dr. Chen over whether a C-section was necessary. Testimony also established that

¶ 12 Trial commenced on April 28, 2014. Plaintiffs presented expert testimony that at approximately 8 p.m. the fetal monitor strips indicated that Zoey's oxygen was compromised such that a C-section should have been called no later than 9 p.m. Defendants' experts testified that the fetal monitor strips were reassuring until almost midnight and that Dr. Chen acted within the standard of care in calling a non-emergency C-section at midnight.

¶ 13 At trial, the parties agreed that Zoey's injury was caused by the umbilical cord hematoma. They also agreed that the hematoma was caused by blood leaking through a hole in the umbilical cord vein. The parties further agreed that the occluded cord caused terminal bradycardia (near-total asphyxia) beginning at 12:08 a.m. The parties disagreed as to whether defendants were negligent in interpreting the fetal monitor strips throughout the evening.

¶ 14 1. Defendants' Video Animations

¶ 15 On May 5, 2014, plaintiffs filed a motion in *limine* to bar defendants from presenting video animations to the jury. Defendants maintained that the animations illustrated the medical issues. Simplified, those issues involved episodic compressions of the umbilical cord that affected the amount of oxygen Zoey received *in utero* and her ability to recover from those episodes. The episodes were reflected as decelerations, or dips below the midline, on the fetal monitor strips.

¶ 16 Plaintiffs' theory was that Zoey was in trouble at 8 p.m. and should have been delivered by C-section at 9 p.m. Plaintiffs presented evidence that Dr. Chen's failure to call the C-section caused Zoey's oxygen reserves to become depleted so that she could not withstand the terminal bradycardia that began at 12:08 a.m. Contrariwise, defendants' theory was that the fetal monitor strips were "reassuring" until almost midnight, when Nurse Oswalt alerted Dr. Chen. According

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there was no disagreement between the nurses and Dr. Chen.

to defendants' theory, the umbilical cord hematoma could not have been predicted or prevented. Defendants' expert testified to the rarity of such an occurrence.

¶ 17 The motion in *limine* alleged that defendants disclosed the animations, marked Exhibit 41 A1, A2a, A2b, A3, and A4, after jury selection on April 28, 2014. Plaintiffs did not object to A1. Their objections to the others were threefold: (1) lack of foundation; (2) untimely disclosure; and (3) they purported to show a step-by-step reenactment of defendants' theory of what happened to Zoey *in utero*. Plaintiffs objected to A3 on the further basis that it depicted defendants' theory of causation regarding the timing and development of the umbilical cord hematoma. The hematoma developed in 11 seconds in the animation.

¶ 18 The court ruled that the disclosure was timely. Before trial, the parties had agreed to disclose demonstrative exhibits on the evening before such exhibits were to be used. Further, at plaintiffs' request, defendants were not allowed to use the animations during plaintiffs' case.

¶ 19 As to A2a and A2b, defendants had already removed certain text that plaintiffs found objectionable. The court ordered defendants to remove depictions of moving fetal monitor strips, but allowed the depiction of static fetal monitor strips. The court also noted that one animation depicted the umbilical cord being momentarily compressed between the baby's head and shoulder, when there was no evidence that had occurred. However, the court ruled that plaintiffs could address the discrepancy on cross-examination.

¶ 20 The court stated that A3 depicted a "lightning strike" hematoma. The court remarked: "There is no evidence that it was 11 seconds. There's no evidence that it was anything. That's one of the big issues *** in this case."[2] The court ruled that the depiction was not prejudicial,

[2] Dr. Cirilo Sotelo-Avila, a board certified pediatric pathologist, would later testify for plaintiffs that the hematoma could have started minutes before Zoey's delivery or as far back as

because it accurately represented what happens generally with a hematoma. The court ordered defendants' counsel to inform the jury that the animation was not a representation of the time it took the hematoma to develop "to full exposure."

¶ 21 The court allowed A4, a depiction of a moving fetus at the time of an administration of an epidural to the mother, but ordered defendants to remove the depiction of a fetal monitor strip.

¶ 22 2. Defendants' Use of A3

¶ 23 Dr. Anthony Sciscione testified as one of defendants' experts. During direct examination, defense counsel prefaced his use of A3 by saying: "And again, I want to make it clear. *** We're not trying to say this exactly represents what happened with Zoey *** and how many seconds or minutes it took for the hematoma to actually fill to its maximal size of 9 centimeters. We're trying to just give a visual conceptual what [*sic*] a rupture in the cord would look like and how a hematoma can accumulate." Counsel later referenced A3 again with Dr. Sciscione and reiterated: "We're not trying to say it all happened in just two or three seconds. That's not our point."

¶ 24 Dr. Sciscione testified that the terminal bradycardia began at 12:08 a.m. and was "definitely" due to the umbilical cord hematoma. According to Dr. Sciscione, Zoey was neurologically normal prior to 12:08 a.m. He called the hematoma an "unfortunate gestational accident," likening it to a "blown tire on the highway." He testified to its rarity in the medical literature.

¶ 25 Dr. Sciscione deflected a question from defense counsel about what was depicted on A3 and instead described the substance known as Wharton's jelly that surrounds the umbilical cord

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approximately 10:25 p.m. In any event, according to Dr. Sotelo-Avila, it was not instantaneous. Defendants' experts testified that it took minutes for the hematoma to develop.

vein as being like Jell-O. He testified that the hematoma was like water from a garden hose pushing the Jell-O-like substance out of the way. He testified: "And that's my—that's what I believe happened in this particular case."

¶ 26 During plaintiffs' cross-examination, Dr. Sciscione testified that he was not able to see how long it took the hematoma to develop on A3 because of technical problems when the exhibit was played during his direct examination. Plaintiffs' counsel stated: "Well, that's a good point." Nevertheless, Dr. Sciscione testified, A3 was accurate in the way it portrayed the rupture. He testified that the hematoma would have happened in minutes, not seconds.

¶ 27 Defendants' expert pathologist, Dr. Janice Lage, testified that A3 fairly and accurately demonstrated the effect that the umbilical cord hematoma would have on the delivery of oxygen to a fetus. Defense counsel again informed the jury that the exhibit did not show the timing of Zoey's hematoma but was being used to show how the hematoma can generally affect the delivery of oxygen and nutrients. Dr. Lage testified that A3 was a "nice depiction" of the relative size of the vein. She also testified that A3 accurately depicted how a hematoma would swell the umbilical cord.

¶ 28 Another defense expert, Dr. Julie Levitt, testified that, although A3 showed the hematoma developing in 11 seconds, in her opinion, it took minutes. Defense counsel again advised the jury that A3 was a demonstrative exhibit that was used to show how the hematoma prevented the flow of oxygen and nutrients.

¶ 29 C. The Posttrial Motion

¶ 30 The jury returned a verdict in favor of defendants, and on July 16, 2014, plaintiffs filed a posttrial motion assigning, *inter alia*, the use of the animations as error. At the hearing on the posttrial motion on December 4, 2014, the court rejected the timeliness objection. The court also

ruled that the animations were neither dramatic nor emotional in content, but were factual representations. The court then denied the posttrial motion, and this timely appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Plaintiffs contend that the trial court abused its discretion in allowing the animations to be used as demonstrative evidence, because they were not timely disclosed and were adversarial, rather than instructive. Plaintiffs maintain that the use of the animations deprived them of a fair trial, because they were inaccurate and preconditioned the jurors' minds to accept defendants' theories. Plaintiffs assert that the evidence was so closely balanced that the jury might have decided in their favor, rendering any "substantial" error prejudicial. However, because we determine that the court did not err in allowing the animations to be used as demonstrative evidence, we need not assess whether the case was close or opine on whether the closeness of the evidence even would be a factor in the analysis.

¶ 33 It is within the trial court's discretion whether to allow a party to present demonstrative evidence to clarify an expert's testimony, and a reviewing court will not disturb that determination absent a clear abuse of discretion. *Preston ex rel. Preston v. Simmons*, 321 Ill. App. 3d 789, 801 (2001). The use of demonstrative evidence with a jury is favored because it aids in comprehension. *Hernandez v. Schittek*, 305 Ill. App. 3d 925, 931 (1999). The primary considerations in whether to allow demonstrative evidence are relevancy and fairness. *Hernandez*, 305 Ill. App. 3d at 931. Demonstrative evidence is distinguished from real evidence in that demonstrative evidence has no probative value in itself. *Smith v. Ohio Oil Co.*, 10 Ill. App. 2d 67, 75 (1956). Demonstrative evidence must be explanatory of some relevant issue in the case. *Smith*, 10 Ill. App. 2d at 76. Only where demonstrative evidence is inaccurate or misleading will its admission constitute an abuse of discretion. *Preston*, 321 Ill. App. 3d at 801.

An abuse of discretion occurs only where no reasonable person could agree with the trial court. *Timothy Whalen Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 366 (2011).

¶ 34 Here, the animations are in color and of short duration. They depict a fetus with a visible beating heart, an umbilical cord, and the flow of oxygenated blood to and from the mother. Occasionally, the fetus moves. A2a and A2b also depict a static fetal monitor strip bearing Zoey's name, the date, and the time span covered by the strip. A3 depicts the rupture of the vein and the formation of the hematoma, as well as a cross section of the cord detailing the vein and arteries. With the formation of the hematoma, the cord fills with blood and becomes distended and the arteries narrow. At the end of A3, a portion of the actual pathology report appears on the screen. Also, photographs of the hematoma appear and then dissolve into the animation.

¶ 35 We agree with the trial court that the animations are factual, non-dramatic, and without emotional appeal. Certainly, the photographs of the real hematoma are more disturbing than what is depicted in the animated drawings. Each animation is titled according to its content. A2a is titled "Normal Neuro-Cardiac Axis and Physiologic Control." A2b is titled "Variable Decelerations." A3 is titled "Umbilical Vein Rupture and Hematoma," and A4 is titled "Epidural with Movement." The videos are explanatory of the medical concepts in the case.

¶ 36 We first address defendants' contention that plaintiffs have forfeited any issue with respect to A2a, A2b, and A4 by failing to make an argument. Failure to argue a point and to cite relevant authority result in forfeiture of the issue. *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19. Plaintiffs center their arguments on A3, but they also argue generally that A2a, A2b, and A4 were improper attempts to depict exactly what happened to Zoey. Consequently, the issue is not forfeited.

¶ 37 We turn now to plaintiffs' argument that the disclosure was untimely. Plaintiffs acknowledge that they agreed that demonstrative exhibits could be disclosed the evening before they were to be used. However, they now claim that their agreement resulted in unfairness because of the nature of the animations, which they describe as "vivid," "compelling," and "high tech."

¶ 38 Specifically, plaintiffs first make a one-sentence, conclusory statement that the "non-disclosure" was a violation of Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) (governing expert opinions) and Illinois Supreme Court Rule 214 (eff. July 1, 2014) (governing document production). Plaintiffs do not develop a cogent argument as to why the disclosure violated these Rules, so the argument is forfeited. *Franciscan Communities*, 2012 IL App (2d) 110431, ¶ 19.

¶ 39 Plaintiffs next assert that the disclosure of the animations after jury selection was fundamentally unfair, because plaintiffs had no time to respond to the exhibits. Plaintiffs assert that this case is "on all fours" with *Spyrka v. County of Cook*, 366 Ill. App. 3d 156 (2006), where the court held that a video animation was not timely disclosed.

¶ 40 In *Spyrka*, on the day of opening statements, the plaintiff disclosed his intention to use a video that would not be completed for another three days. *Spyrka*, 366 Ill. App. 3d at 162. After the video was prepared, the plaintiff refused to tender a copy to the defense, because only the $20,000 original existed. *Spyrka*, 366 Ill. App. 3d at 162. The trial court barred the video's use but then reversed its ruling on the day that the plaintiff's expert used the video during his testimony. *Spyrka*, 366 Ill. App. 3d at 165-66.

¶ 41 *Spyrka* is distinguishable, because the defense in that case literally was given no time to prepare a response to the video. The plaintiff refused to tender a copy to the defense. *Spyrka*, 366 Ill. App. 3d at 162. Then, the defense was caught short when the court reversed its prior

ruling and allowed the video to be used that very day. Further, the disclosure violated the discovery rules. *Spyrka*, 366 Ill. App. 3d at 166.

¶ 42 Here, plaintiffs and defendants agreed that demonstrative exhibits could be disclosed on the evening before they were to be used. Defendants disclosed the animations on April 28, 2014, after jury selection. Plaintiffs successfully barred their use during plaintiffs' case, so the animations were not used at trial until May 8, 2014. Unlike in *Spyrka*, plaintiffs had 10 days to prepare to address the exhibits.

¶ 43 Nevertheless, plaintiffs complain that their agreement regarding the disclosure of demonstrative evidence was procured by sleight of hand. Plaintiffs argue that their lead counsel participated in the conference at which the agreement was reached by telephone from Australia, where it was early in the morning and the connection was bad. We cannot conclude that plaintiffs were duped into the agreement, or that they misunderstood it, because co-counsel was present in person. Consequently, we reject plaintiffs' argument that the disclosure was untimely.

¶ 44 Next, plaintiffs argue that the animations were not merely visual aids but were depictions of what defendants claimed actually happened to Zoey *in utero*. Plaintiffs rely on *Spyrka*, *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, and *French v. City of Springfield*, 65 Ill. 2d 74 (1976).

¶ 45 In *Spyrka*, the court held that the animation was not a "general demonstrative exhibit intended to help the jury understand" the mechanism of the plaintiff's injury, because it purported to show, "in a step-by-step fashion," what happened to the plaintiff. *Spyrka*, 366 Ill. App. 3d at 168.

¶ 46 In *Sharbono*, the court held that a PowerPoint presentation used by the defense purportedly to explain the four characteristics that radiologists used for evaluation of breast

lesions was not properly classified as demonstrative evidence, because it was used to show the basis of the defendant's own medical opinion and to support his diagnosis that the plaintiff's lesion was benign. *Sharbono*, 2014 IL App (3d) 120597, ¶ 33.

¶ 47 In *French*, the plaintiff, a passenger who was injured when the decedent driver's automobile struck a utility pole, introduced a video that tended to support her theory of the case, rather than present a general depiction of the area where the accident occurred. *French*, 65 Ill. 2d at 81-82. The movie was taken from the driver's seat, and the camera was fixed at the driver's eye level, positioning the viewer in the driver's seat. *French*, 65 Ill. 2d at 82. The automobile in the film traveled in the far left lane, similar to the path the plaintiff alleged that the deceased driver took just before the collision. *French*, 65 Ill. 2d at 82. Our supreme court held that the video improperly "preconditioned the minds of the jurors to accept the plaintiff's theory[,] because the film depicted what she claims occurred the night of the accident." *French*, 65 Ill. 2d at 82. The trial court's extensive instructions to the jury as to the limited purpose of the movie did not remove the prejudice, because the trial court made statements that were inconsistent with its instructions, such as telling the jury that the film gave a " 'sense of the driving of the car and the visibility as it relates to the street.' " *French*, 65 Ill. 2d at 82.

¶ 48 Those cases are inapposite. As we explained above, the animations in the present case were explanatory of the general medical issues involved in the case. The trial court removed features that it determined were too specific to Zoey. Nevertheless, the dissent comments that the videos were "riddled" with substantive evidence. While some specific features remained, like the static fetal monitor strips, portions of the pathology report, and photographs of the hematoma, those were not argumentative or controversial and were in front of the jury in other exhibits. The noncontroversial evidentiary items depicted in the videos facilitated their

explanatory purpose by providing context. For instance, the developing hematoma in A3 is shown as a spreading red splotch. Without the portions of the pathology report and the photograph of the actual hematoma, the viewer would have no clue what the red splotch represents. Without context, it looks like ink spilling from a leaky fountain pen. Similarly, the static fetal monitor strips correlate the concepts of decelerations and variables with the visuals of what could have caused them. Further, the court required unequivocal admonitions to the jury that the animations were not of Zoey. In our view, the animations that were shown to the jury were more like the animation showing the general development of endocarditis that was approved in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493 (2002), than those in *French*, *Spyrka*, or *Sharbono*.

¶ 49 In their reply brief, plaintiffs rely on *Clark v. Cantrell*, 529 S.E. 2d 528, 538 (S.C. 2000), in which the South Carolina supreme court held that the trial court properly excluded a computer animation of an automobile accident that did not accurately reflect the testimony of the proponent and her expert witness. *Clark* is notable for South Carolinians, because the South Carolina supreme court decided under what circumstances the then new technology would be admissible under South Carolina's Rules of Evidence. *Clark*, 529 S.E. 2d 528, 535-38. In our view, *Clark* is inapplicable to our case, both because it relies on South Carolina law and is factually distinguishable. In *Clark*, the video did not accurately portray either the initial position of the car in which the plaintiff was riding or its movement before the accident. *Clark*, 529 S.E. 2d at 535. Before oral argument, defendants requested leave to cite *Webb v. CSX Transportation, Inc.*, 615 S.E. 2d 440 (S.C. 2005), also from the South Carolina supreme court, as additional authority, "if South Carolina law is to be considered at all." In *Webb*, the South Carolina supreme court found no abuse of discretion under its rules in allowing a computer video

that misrepresented the time a car was stopped by about six seconds. *Webb*, 615 S.E. 2d at 448-49. At oral argument, we granted defendants leave to cite *Webb*, over plaintiffs' objection. Despite plaintiffs' claim that *Clark*'s rationale is "compelling," we find the citation of South Carolina cases unhelpful, where there is no dearth of Illinois cases on the subject. "When there is Illinois case law directly on point, [Illinois courts] need not look to case law from other states for guidance." *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381, 395 (2005).

¶ 50 Plaintiffs argue that A3 was used to portray defendants' theory that the hematoma developed rapidly rather than over a period of hours. However, the parties agreed that the hematoma did not develop in 11 seconds, as portrayed in the video, and that was made clear to the jury numerous times. In Dr. Sciscione's direct examination, defense counsel stated to the jury that "[w]e're not trying to say this exactly represents what happened with Zoey *** [but] give a visual conceptual what [*sic*] a rupture in the cord would look like and how a hematoma can accumulate." Later in his direct examination, counsel again stated that the hematoma did not happen in seconds. He stressed: "That's not our point."

¶ 51 Plaintiffs contend that the near-instantaneous hematoma depicted in A3 was shown to the jury repeatedly during Dr. Sciscione's direct examination under the guise of an equipment malfunction. It appears from the transcript that defense counsel had trouble working the equipment. When plaintiffs' counsel alluded to the video during his cross-examination, Dr. Sciscione replied: "[T]he animation kept sort of failing so I really couldn't count the time [that it took for the hematoma to form]." Plaintiffs' counsel responded: "That's a good point." Thus, the record is not clear how many times the jury saw the video or parts of it. Even if the jury

viewed the animation more than once, we believe that the court's and counsels' admonitions were sufficient to prevent the jury from being misled.

¶ 52 Next, plaintiffs assert that Dr. Sciscione testified that A3 portrayed what happened to Zoey. The record belies this assertion. Instead of answering defense counsel's question on direct examination about what the video depicted, the doctor launched into a lengthy dissertation on Wharton's jelly, which he compared to Jell-O. Dr. Sciscione then verbally imagined the water from a garden hose pushing the Jell-O away. He testified: "And that's my—that's what I believe happened in this particular case." "*That*" refers to the story the doctor told, not to the video. Plaintiffs' contention that the doctor exclaimed "that's what I believe happened in this particular case," meaning what was shown on A3 was what happened to Zoey, is a misstatement of the record.

¶ 53 The overriding disagreement between the parties is whether A3's "lightning-strike" portrayal of the hematoma's development affected the jury's verdict. Defendants argue that the video was relevant only on the issue of causation and had no impact on the standard of care. This is so, defendants argue, because the timing of the hematoma has nothing to do with whether defendants misinterpreted the fetal monitor strips throughout the evening.

¶ 54 We agree that the timing of the hematoma is irrelevant to the standard of care. If the decelerations seen on the fetal monitor strips at approximately 8 p.m. dictated that Dr. Chen perform a C-section by 9 p.m., whether those decelerations were caused by a forming hematoma or something else would not matter. What matters are the decelerations. Conversely, if the decelerations did not dictate a C-section at 9 p.m., then defendants would not have breached the standard of care. How to interpret the decelerations was the battle of the experts at trial. Thus,

the jury could have found that defendants were not negligent without regard to when the hematoma formed.

¶ 55 This is known as the "two-issue rule." When there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and no special interrogatory was requested. *Witherall v. Weimer*, 118 Ill. 2d 321, 329 (1987). As an example, where the trial evidence was conflicting on the issue of negligence, and the jury's verdict in the defendants' favor could be explained by a finding of no negligence, an error in submitting a sole proximate cause instruction did not make any difference. *Tabe v. Ausman*, 388 Ill. App. 3d 398, 404-05 (2009). To further illustrate, plaintiffs in our case contend that defense counsels' repeated admonitions to the jury that A3 did not depict the timing of the hematoma were ineffective. However, even if they were ineffective, it did not make any difference to the verdict, because the verdict can be explained by the jury's belief that defendants were not negligent.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 58 Affirmed.

¶ 59 JUSTICE HUTCHINSON, dissenting:

¶ 60 I would not be the first author to, in a judicial opinion or otherwise, lament the inscrutable vastness of the word "demonstrative" in the term "demonstrative evidence." Seemingly, evidence of all types can be "demonstrative" as long as it is not "substantive," which is to say that it was not "admitted as substantive evidence." See, *e.g.*, *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 341 (1991); *Lorenz v. Pledge*, 2014 IL App (3d) 130137,

¶ 17; *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 706 (7th Cir. 2013); K. Broun, 2 MCCORMICK ON EVIDENCE § 212 (7th ed. 2013); M. Graham, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 401.8 (10th ed. 2010). Nor would I be the first author to point out what is likely the most famous use of a demonstrative exhibit in Western literature: Marc Antony's "use of Caesar's blood-stained toga and slashed body to arouse the Roman mob" in Shakespeare's *Julius Caesar*. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir. 1996) (Posner, J.). My concerns in this case though are much less esoteric. Unlike Antony, the demonstrative evidence—here, videos of a "simulated" child interposed with substantive evidence—was used not to stir an audience to action but to desensitize it to the point of indifference. The effectiveness of that strategy is not my concern; the inaccuracy and the unfairness of the exhibits however is.

¶ 61 In the appendix to this dissent, I have included several screenshots from the videos. They are brief snapshots, but they give a general idea of how sharp and striking these videos are. Video A1 depicts general maternal physiology. It is 1 minute, 45 seconds in length (1:45). Video A2a, is entitled "*Normal* Neuro-Cardiac Axis and Physiologic Control." I emphasize the word "Normal" because A2a first depicts an ideal transfer of blood and oxygen to a fetus *in utero*; but then it depicts "generic" distress to that process and shows the child's heartbeat slowing to a crawl. At the end, Zoey's EKG strips are overlaid with the simulation. The total time in A2a is 2:08. Video A2b is largely similar to A2a, but blandly titled "Variable Decelerations." The total length of A2b is 3:09.

¶ 62 A3 depicts what the defense again calls "a scenario" entitled "Umbilical Vein Rupture and Hematoma." Its total length is 3:11, of which 11 seconds depict the formation of a hematoma and then the complete occlusion of the umbilical cord. Afterwards, as the majority

notes, the hospital's report on Zoey's pathology is superimposed over the animation. *Supra* ¶ 35.

¶ 63 A4 depicts an "Epidural *with Movement*." The "with movement" part is more than an understatement. A4 is only 1:09 in length, but between seconds 22 and 23 of the video, the umbilical cord tightens around the fetus' neck with the ferocity of a python and the child's neck jerks along with cord, helplessly. Then, as quickly as it began, the tension is released, and neck and child return to normal.

¶ 64 These 12 minutes of video were not mere explanatory aids, like a drawing, or a plat, or even a simple video used to clarify testimony. See, *e.g.*, *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493 (2002); *Hernandez v. Schittek*, 305 Ill. App. 3d 925, 930 (1999). No, these videos were high-tech commercials. They are vivid and they are visceral. *And* their supposedly simulated tableau is riddled with *substantive* evidence from *this* case, such as the pathologist's report and Zoey's EKG strips. How can anyone say then that they merely demonstrate *a* hematoma "in general" when they are littered with evidence referring to Nikoletta and Zoey *specifically*? All evidence is prejudicial in a sense, but this evidence crossed the line; it was *unfairly* prejudicial. *Cf.* Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 65 A3 in particular though was highly misleading. Plaintiffs pointed this out in their motion *in limine* to exclude the videos. They noted that defendants were expected to present evidence at trial concerning the timing of the hematoma that was inconsistent with A3's depiction of <u>*a*</u> hematoma occurring from start to finish in 11 seconds. Attached to plaintiffs' motion were exhibits including the depositions of pathologists Dr. Janice Lage (the defense's pathologist who testified at trial) and Dr. Dwight Morrow (the hospital's pathologist). Both pathologists examined the physical evidence and looked for blood clotting to determine when

the hematoma began to form. In her deposition, Dr. Lage, estimated that between 2% and 10% of the blood found in the hematoma was from between 30 minutes and two hours *before* Zoey's delivery. In his deposition, Dr. Morrow indicated that some of the blood was from two to three hours *before* Zoey's delivery. I say "some of the blood" because plaintiffs did not include enough of Morrow's deposition to give the full context and amount. Nevertheless, plaintiffs clearly were disputing the accuracy and relevance of the depiction in A3.

¶ 66 In response to the plaintiffs' motion *in limine*, all of the defendants asserted that A3 was "demonstrative"; none specifically responded to plaintiffs' contention concerning A3's inaccuracy. The trial court stated that A3 was admissible however because it depicted "merely what happens with a hematoma" (again, in general) and that it was not inaccurate because there was "no evidence" concerning the timing of the formation in Zoey's umbilical cord. To whatever extent the trial court's first statement is true, the second statement certainly was not.

¶ 67 The trial court's failure to see the relevance of A3 as a contested issue—contested with supporting evidence, in fact—may have frustrated the court's exercise of discretion, and might support *de novo* review. See generally *Porter v. City of Chicago*, 393 Ill. App. 3d 855, 857 (2009). However, even under the deferential abuse-of-discretion standard, my vote is the same.

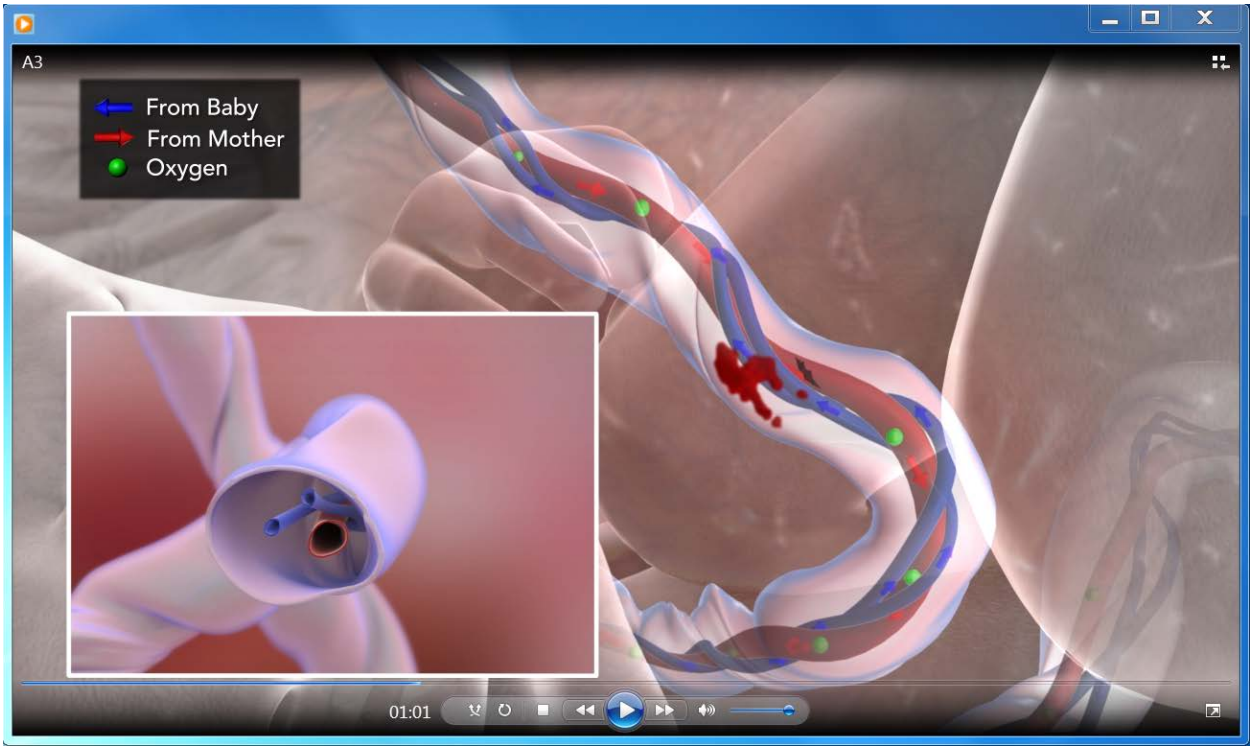
¶ 68 What was the relevance of a video in this case depicting the formation of an umbilical cord hematoma, *ex nihilo* through the cord's complete occlusion, in 11 seconds? Defendants conceded that the hematoma did not occur in such a short time; that was the reason the jury had to be admonished each time A3 was shown. In that sense, A3 was no less unfairly prejudicial than admitting a drawing that was not drawn to scale (*Slavin v. Saltzman*, 268 Ill. App. 3d 392 (1994)), or a video shot from a misleading vantage point (*Amstar Corp. v. Aurora Fast Freight*, 141 Ill. App. 3d 705 (1986)). In fact, A3 was uniquely worse. Its inaccuracy—depicting a

complete occlusion in 11 seconds—obfuscated the questions of when the hematoma began to form and when and how medical personnel should have responded. The two-issue rule does not help then, because the inaccuracy was so prejudicial as to taint the jury's verdict on both causation and the standard of care.

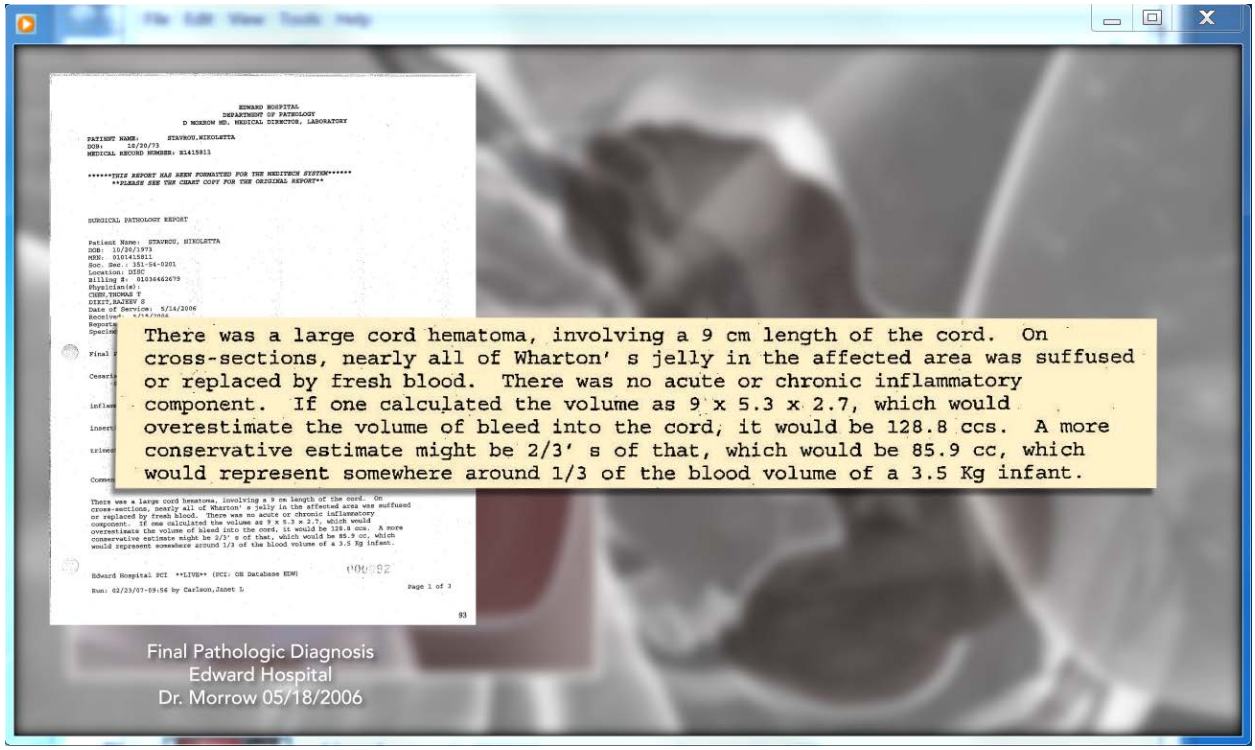
¶ 69 The suddenness of the occlusion in A3, the split-second tightening of the cord in A4, and the use of Zoey's EKG strips and pathology report all repeatedly told the jurors that Zoey's medical personnel did everything they could; that everything was alright until it wasn't. And by then it was too late. Things happen. This evidence was used to *corroborate* the defense's case, not to explain it. It was used to desensitize the jurors, rendering them indifferent to the issues of negligence and standard of care. And, to me, the question is not whether plaintiffs had an opportunity to offer a countervailing simulation, but rather whether the exhibits defendants used were so unfair in and of themselves as to deny plaintiffs a fair trial. These exhibits were. No reasonable person could have seen these exhibits as merely demonstrative when substantive evidence was interspersed throughout. No reasonable person would have thought that fleeting references to the video's inaccuracy, and reminders that a given video was admitted "as relevant only to causation" would contain the damage. I take no issue with the conclusion that the defendants timely disclosed the videos. However, because the videos, taken together, were so unfairly prejudicial; because they were both "inaccurate" and "misleading" (*supra* ¶ 33 (citing *Preston ex rel. Preston v. Simmons*, 321 Ill. App. 3d 789, 801 (2001)), they should not have been admitted in the first place.

¶ 70 Therefore, I dissent.

-APPENDIX-


A3
From Baby
From Mother
Oxygen
01:01


A3
02:44


There was a large cord hematoma, involving a 9 cm length of the cord. On cross-sections, nearly all of Wharton' s jelly in the affected area was suffused or replaced by fresh blood. There was no acute or chronic inflammatory component. If one calculated the volume as 9 x 5.3 x 2.7, which would overestimate the volume of bleed into the cord, it would be 128.8 ccs. A more conservative estimate might be 2/3' s of that, which would be 85.9 cc, which would represent somewhere around 1/3 of the blood volume of a 3.5 Kg infant.
Final Pathologic Diagnosis
Edward Hospital
Dr. Morrow 05/18/2006