
 IN THE APPELLATE COURT OF ILLINOIS
 FIRST JUDICIAL DISTRICT

FNCB BANK & TRUST, as Independent Administrator of	)	
the Estate of Charles A. Schauer, Deceased,	)	
	)	
Plaintiff-Appellee,	)	Appeal from
	)	the Circuit Court
	)	of Cook County
v.	)	
	)	20L8609
MK DELIVERIES, INC.; FELIX OCAMPO JR.; AND ERIN	)	
ZILKA,	)	Honorable
	)	Brendan A. O'Brien,
Defendants	)	Judge Presiding
	)	
(MK Deliveries, Inc. and Felix Ocampo, Jr., Defendants-	)	
Appellants; Erin Zilka, Defendant-Appellee).	)	

JUSTICE McBRIDE delivered the judgment of the court, with opinion.
 Presiding Justice Van Tine and Justice Ellis concurred in the judgment and opinion.

OPINION

¶ 1 Suburban delivery service MK Deliveries, Inc.; its employee-driver, Felix Ocampo Jr.; and another motorist, Erin L. Zilka, were sued by Charles A. Schauer's estate for his survival and wrongful death in a traffic accident near Plainfield, Illinois. A series of collisions occurred in the dark around 6 a.m. on January 19, 2020, on an unlit section of southbound Interstate 55. MK Deliveries' 2008 Hino box truck was first struck by a 2006 Nissan Titan pickup truck. The collision disabled both trucks, and they abruptly stopped in the outermost travel lane, with the box truck resting about 100 feet behind the pickup truck. The box truck's battery was disconnected by the

impact of the collision, and the vehicle's hazard lights could not be activated. Schauer's estate alleged that Ocampo negligently failed to set out reflective triangles or use flares to warn others that his unilluminated box truck was sitting in an active lane of the highway. Zilka was alleged to be driving without due care, not keeping an adequate lookout, and driving too fast for conditions. The right side of her 2019 Dodge Durango SUV collided with the left rear of the box truck. Schauer was Zilka's front passenger and died at the scene. Schauer, an officer with the Berwyn Police Department, was almost 34 years old at the time of his fatal injuries. A jury awarded \$13.8 million to Schauer's estate (his then 12-year-old son and 9-year-old daughter) for his wrongful death and attributed 99% of the fault to MK Deliveries and Ocampo and 1% of the fault to Zilka. MK Deliveries and Ocampo appeal. We will be referring to them to as a singular appellant or as MK Deliveries. MK Deliveries contends that numerous errors warrant the entry of a judgment notwithstanding the verdict (JNOV) or a new trial.

¶ 2 The estate proceeded to trial on its fourth amended complaint. In earlier versions of the pleading, the estate also sued Rodrigo Marin, Maria Kadushkina, and Topsy's Tap. Rodrigo Marin drove the pickup truck that first struck and disabled the box truck. Marin pled guilty to driving under the influence and tendered the limits of his \$25,000 coverage. Maria Kadushkina was the president and owner of MK Deliveries and settled for \$100,000. The other settling defendant, Topsy's Tap, was the Berwyn bar where Zilka had been drinking with Schauer and was allegedly overserved. She was arrested for driving under the influence. It is unclear from the record how much Topsy's Tap tendered to the estate. After Zilka was found not guilty of drunk driving, Schauer's estate amended its complaint to remove the allegation that Zilka drove under the influence.

¶ 3 The central theory of the fourth amended complaint was that Ocampo was required by federal law to place three warning devices behind his stopped vehicle within 10 minutes because of the hazard it created. When the accident occurred, parts 392.22(a) and (b) of the Code of Federal Regulations provided the following:

“(a) Hazard warning signal flashers. Whenever a commercial motor vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than necessary traffic stops, the driver of the stopped commercial motor vehicle shall immediately activate the vehicular hazard warning signal flashers and continue the flashing until the driver places the warning devices required by paragraph (b) of this section. ***

(b) Placement of warning devices—(1) General rule. Except as provided in paragraph (b)(2) of this section, whenever a commercial motor vehicle is stopped upon the traveled portion or the shoulder of a highway for any cause other than necessary traffic stops, the driver shall, as soon as possible, but in any event within 10 minutes, place the warning devices required by § 393.95 of this subchapter, in the following manner:

(i) One on the traffic side of and 4 paces (approximately 3 meters or 10 feet) from the stopped commercial motor vehicle in the direction of approaching traffic;

(ii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial motor vehicle in the center of the traffic lane or shoulder occupied by the commercial motor vehicle and in the direction of approaching traffic; and

(iii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial motor vehicle in the center of the traffic lane or shoulder occupied by the commercial motor vehicle and in the direction away from approaching traffic.

(2) Special rules—***

* * *

(v) Divided or one-way roads. If a commercial motor vehicle is stopped upon the traveled portion or the shoulder of a divided or one-way highway, the driver shall place the warning devices required by paragraph (b)(1) of this section, one warning device at a distance of 200 feet and one warning device at a distance of 100 feet in a direction toward approaching traffic in the center of the lane or shoulder occupied by the commercial motor vehicle. He/she shall place one warning device at the traffic side of the commercial motor vehicle within 10 feet of the rear of the commercial motor vehicle.” 49 C.F.R. § 392.22 (2020).¹

¶ 4 In the following trial summary, we have omitted witnesses and evidence that have no bearing on the issues raised on appeal.

¶ 5 Ocampo testified that he had a commercial driver’s license, although he did not need one to drive a vehicle as small as the Hino box truck. MK Deliveries had about a dozen trucks and delivered pallets for Amazon. He arrived at the truck yard in Plainfield around 2 a.m., made his usual deliveries to Glenwood and Woodridge, and then got on Interstate 55 to return the truck. It was cold and very dark at about 6 a.m., with favorable, dry weather conditions on the highway. There were three southbound lanes, and then a fourth lane would appear and become the exit lane that he would take toward Route 30. The highway curved slightly to the right and had a paved shoulder. In the last half-mile, however, another vehicle collided with the left side of the Hino.

¹The opening brief did not include special rule (2)(v), which is the portion of the regulation applicable to the divided highway where Ocampo’s vehicle stopped and was struck by Zilka’s vehicle. See 49 C.F.R. § 392.22(2)(v) (2020).

The box truck stopped almost immediately in a “really bad spot,” and it no longer had working lights.

¶ 6 About 95% of the Hino blocked the outer travel lane, and the remainder was on the highway’s shoulder. Ocampo recognized that the situation was “dangerous” for himself and others because oncoming drivers would be unable to see the box truck in the dark until “com[ing] right up on top of it.” He wanted to get out of harm’s way. He climbed out on the passenger’s side with a flashlight and his mobile phone and brought along his reflective jacket because it was a cold night. He left behind the reflective triangles that were stored under the passenger’s seat. He called his manager, Xavier Patino, thinking that Patino was close enough to quickly assist with some operable lights. It turned out that Patino was not at the yard. Ocampo’s phone records showed that their first conversation was at 5:57 a.m. Ocampo’s next call was to 911. Then Ocampo walked behind the truck and began waving the flashlight and his phone’s flashlight in order to warn others about the danger.

¶ 7 Ocampo stood only a couple feet away from the box truck and positioned himself close enough to the guardrail to give himself a 50% chance of hopping over if a driver did not see him. He knew that a federal regulation required him to utilize safety devices, but he did not believe that he was supposed to put his own life in jeopardy. Cars were coming at Ocampo at 65 or more miles per hour, and he “didn’t want to play chicken” with them by setting out the triangles. There was nothing, however, that prevented him from walking along the guardrail to put the warnings into position. Only the curve in the road impaired his ability to see the oncoming headlights.

¶ 8 According to Ocampo, no more than four minutes passed before Zilka’s SUV collided with the mid-sized box truck in lane four in the “pitch black.” During those minutes, multiple cars in

lanes one, two, and three had safely driven by. Perhaps 20 cars made it through, and 5 of those 20 had “near misses.” Zilka, however, was transitioning from lane three to lane four. Zilka had already crashed when Ocampo stopped waving the phone in order to answer a call from Patino at 6:12 a.m. The police arrived 10 to 12 minutes later and shut down the roadway.

¶ 9 MK Deliveries’ business manager, Xavier Patino, testified that he had been friends with Ocampo for about 20 years before hiring him in 2020. During their first phone call, at 5:57 a.m., Ocampo said that his disabled truck was sitting in a travel lane. All of the company’s trucks carried the reflective triangles that were supposed to be deployed as soon as possible or within 10 minutes of a disabling event. Their second phone call, 15 minutes later, was before Zilka’s collision.

¶ 10 Erin Zilka was a 35-year-old Joliet police officer. Zilka testified that she was generally an attentive driver and was alert that morning. She was not in a rush or distracted by anything such as her cell phone. Her car was in good working order, and she was traveling at 1 or 2 miles above the posted speed limit of 65 miles per hour. There were no visibility issues other than the darkness and the fact that the only illumination came from vehicle headlights in the light traffic. Zilka was familiar with the roadway because she had driven it hundreds of times. She was driving in the fourth lane in order to take the Plainfield exit. The road curved as she approached the point where the box truck had stopped. She was surprised and had only a few seconds to react. Although she could not identify the object in the road, she immediately applied her brakes and swerved to the left. There were no reflective triangles, no illuminated warnings, no one trying to get her attention, and no other notice that there was an object obstructing the roadway. If she had seen reflective triangles in the fourth lane on Interstate 55, then she would have slowed and tried to move over.

¶ 11 Curtis Bennett testified that he drove past the crash scene. It was pitch black, and just by

chance, Bennett was in the only lane that was not entirely obstructed by a disabled vehicle. He had to weave through debris. As he looked to his right, he saw someone waving a very dull light. The person was not wearing a reflective jacket and was on the other side of the guardrail. It was so dark that Bennett could not identify the SUV's color. He pulled over to the shoulder and called 911. While he was on the call, there was another collision, and the operator said that emergency services were already on their way.

¶ 12 Joseph E. Stidham, the estate's accident reconstruction expert, was a former Kentucky State Police trooper and had been reconstructing traffic accidents since 1996. Stidham and his employees spent over 200 hours studying this accident, including driving through that section of the highway multiple times and inspecting the box truck at the police tow yard. Stidham held a commercial driver's license, and he was the owner and driver of two commercial motor vehicles, one of which was a Ford F-450 that was similar to Ocampo's box truck. Stidham was familiar with the federal regulations and had personally used reflective triangles on four occasions.

¶ 13 Zilka's SUV was equipped with modern, high-intensity headlights. When she came around the curve, her headlights would not have reached the box truck itself, but they would have reached and reflected the warning triangles if Ocampo had placed them 10, 110, and 210 feet behind the box truck. This placement would have given Zilka 800 feet to perceive and react. According to Stidham, Zilka would have struck the first reflective device placed at 210 feet behind the box truck, but she would not have struck the box truck.

¶ 14 The computer-aided dispatch (CAD) report from the police and the cellular phone records showed a call between Ocampo and Patino at 5:57 a.m., Ocampo's call to 911 at 6:01 a.m., a motorist reporting a truck with no working lights at 6:06 a.m., another motorist reporting debris

across all of the lanes at 6:09 a.m., and that Ocampo and Patino had a five-minute call that began at 6:12 a.m. In other words, 12 minutes elapsed between Ocampo's first call to Patino and the crash that had strewn debris all over the highway, and 15 minutes elapsed between Ocampo and Patino's two conversations. Patino testified at his deposition that the second call originated before the crash, but the CAD data refuted that testimony because then the two men would have been on the phone during the crash.

¶ 15 In Stidham's opinion, any vehicle that is stopped on the highway creates a "hazard" and a "very dangerous situation." Ocampo was "[a]bsolutely" negligent for failing to use the three reflectors. Ocampo would not have put himself in harm's way by placing the reflectors, because he could have walked up the shoulder and waited for gaps in the "fairly light" traffic. "Every time these things are deployed by every truck driver in the country, they have the same situation [of traffic coming at them]." While it was reasonable for Ocampo to be concerned for his own safety, it was not reasonable for him to be unconcerned about the safety of oncoming drivers. Even if Ocampo had worn a reflective jacket, stood inside the guardrail (rather than outside it as reported by one witness), and waved a flashlight and mobile phone, Ocampo's actions were insufficient under the federal regulations. He was required to know those regulations. He did not even take the triangles out of his truck. His deposition testimony was that he had to search for his phone and jacket. At his height, when he exited from the passenger's door, the triangles "would have been right in his face," and he "could have grabbed them." Furthermore, there was a heightened need for the triangles when he was unable to turn on the truck's flashing lights as required by the same regulations.

¶ 16 In Stidham's opinion, Ocampo could have placed the three triangles within one minute.

However, 15 minutes passed between his two phone calls with Patino. He could have walked along the shoulder and then stepped or reached over to put each triangle in place. He was supposed to position the three devices on the driver's side of the lane, the midline of the lane, and then at the edge or "fog line" of the travel lanes, so that traffic would be directed toward the left. If he had placed them like this, then Ocampo would have been in harm's way only when he was actually in the roadway setting out the first triangle, instead of on the shoulder, and for a total of less than one minute. Stidham created an exhibit for the jury's benefit in order to "demonstrate the reflectivity of [reflective triangles]." For the staged photo, he had positioned triangles on the shoulder of an unlit section of a curved Kentucky roadway.

¶ 17 Stidham acknowledged that accidents still occur when warning devices are used. However, in Stidham's opinion, Ocampo violated the federal regulations, and if Ocampo had done what he was supposed to do, then this crash would not have occurred.

¶ 18 Illinois State Police Trooper Jonathan R. Kueker, a traffic crash reconstruction officer, testified by way of an evidence deposition. There were a total of three collisions, and the series was set into motion when Marin's pickup truck struck Ocampo's vehicle. (We will discuss the third collision below.) The state police investigation confirmed that the box truck lost engine power, power steering, and all interior and exterior lights after the impact destroyed the battery housing that was suspended below Ocampo's door. The investigation also confirmed that Ocampo's retro-reflective triangles were still under his passenger's seat. Retro-reflective triangles do not illuminate and instead bounce back light directly to its source.

¶ 19 Ocampo told Trooper Kueker that only two to four minutes elapsed before the second collision occurred. Trooper Kueker did not think that the curve in the road, elevation change, or

lack of lighting along Interstate 55 were factors in Zilka's collision.

¶ 20 Zilka's airbag control module showed that, at five seconds before impact, she was traveling at 68 miles per hour and her foot pressure on the accelerator was 27%. A vehicle traveling 65 miles per hour covers 95.3 feet per second. At three seconds before, she was 278 to 301 feet away and beginning her attempts to avoid the object in her lane. At 1.5 seconds before impact and 137 to 148 feet away, she was removing her foot from the accelerator. At 1.4 seconds before, her accelerator pressure had reduced to 5%. At 0.5 seconds before, she was beginning to apply the brake. At 0.4 seconds before, she was beginning to steer toward the left/counterclockwise and turned 10 degrees. At 0.3, 0.2, and 0.1 seconds before impact, she steered 52, 105, and 134 degrees to her left. Trooper Kueker characterized 134 degrees as "a lot of input into a *** steering wheel." Because the airbag data and physical evidence at the scene correlated, he considered the airbag data to be accurate.

¶ 21 The second collision pushed the box truck almost entirely onto the shoulder and rotated Zilka's SUV to the left/clockwise until it came to rest mostly across lane three, with only about one foot of it occupying lane four. Ocampo said that another one to three minutes passed before the third collision occurred. The third collision was when Vincent Costanzo drove his Nissan Altima sedan through the debris field between the SUV and the box truck and struck Marin's pickup truck in lane four, where it had stopped ahead of the box truck. Costanzo said that he saw someone on the shoulder with a flashlight. Another eyewitness, Curtis Bennett, said that a person on the other side of the guardrail was waving a flashlight.

¶ 22 Illinois State Police accident investigator Michael Trainor testified that the first call about Marin and Ocampo's collision came in just two minutes after his 6 a.m. shift started. Another

trooper arrived on the scene first and was speaking with Zilka when Trooper Trainor arrived at approximately 6:15 a.m. Schauer appeared to be deceased, and Trooper Trainor was unable to detect a pulse. Ocampo told Trooper Trainor that the box truck had been disabled for about four minutes before Zilka collided with it. Ocampo also said that he was waving a flashlight while standing behind the passenger's side and that he was waving or wearing a reflective vest. This made it seem that less than 10 minutes transpired between the first and second crashes. Trooper Trainor believed that Zilka's crash occurred because she had very minimal time to react to the presence of the box truck. Ocampo was required to deploy three warning devices as soon as possible, but he had not placed any warning devices after the first collision or even after the second collision, and then the third collision occurred. In Trooper Trainor's opinion, Ocampo's failure to place orange warning triangles behind his box truck caused Zilka's collision. Regardless of whether the box truck had any power, Ocampo could have put the triangles behind his vehicle in lane four. The road's slight upward rise also contributed to the accident. The curve in the road was another factor because it gave drivers less time to react than they would have had on a straightaway. It was possible, however, that this accident would have occurred even if reflective triangles had been positioned, because oncoming drivers needed to be alert and respond appropriately. Zilka responded to an emergency situation that she had no hand in creating.

¶ 23 MK Deliveries' accident reconstruction expert, Michael E. O'Hern, formed his own accident reconstruction firm in 1995, 10 years before leaving the Tinley Park police force. In contrast to Stidham (the estate's expert) and Illinois State Police Troopers Kueker and Trainor, O'Hern did not have experience as a highway crash investigator for a state police force. In O'Hern's opinion, Ocampo's conduct was reasonable, and it did not cause or contribute to

Schauer's death. Reflective triangles do not guarantee that an accident will not occur. They are passive devices, and a light beam must "hit[] them right" in order for the light to bounce back. It was also O'Hern's opinion that triple reflectors do not make an accident scene safe. However, O'Hern's testimony was contrary to his statement in a 2018 case that the plaintiff created a hazard by failing to utilize flares or reflective triangles.

¶ 24 According to O'Hern, Ocampo's ANSI² class 3 (reflective) vest "actively warn[ed] approaching drivers"; his movement in the vest would be more visible and attention-grabbing than a passive triangle and was reasonable. Lancelot Ebot, Vincent Costanzo, and Curtis Bennett were eyewitnesses who drove through the Marin-Ocampo accident scene and reported seeing someone waving a flashlight. Costanzo, however, had been unable to avoid colliding with Marin's pickup truck.

¶ 25 The Illinois State Police CAD phone records were not a reliable indicator of when Zilka crashed, because the 911 calls were routed to three different dispatch centers and then a dispatcher would have determined that the calls needed to be transferred to Illinois State Police. Furthermore, Ocampo said he made three calls to 911, but the CAD data showed only one of those calls, and there was no record of the call that Zilka said she made.

¶ 26 O'Hern disagreed with Stidham's opinion that the shoulder was a safe place to be. It was safer than being in the roadway, but it would not have been reasonable for Ocampo to put himself in danger by placing triangles on the roadway. Doing so would require Ocampo to gauge the speed of vehicles that were traveling at 65 to 90 miles per hour.

² "ANSI" is an acronym for the American National Standards Institute. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 39 n.2 (2004).

¶ 27 MK Deliveries first argues that it was entitled to JNOV or a new trial given that the estate did not prove that Ocampo's purported negligence proximately caused the fatal collision.

¶ 28 We review the circuit court's denial of a motion for JNOV *de novo*. *Inman v. Howe Freightways, Inc.*, 2019 IL App (1st) 172459, ¶ 61. In this survival and wrongful death action based on negligence, the estate needed to prove that (1) the defendants owed a duty of care, (2) the defendants breached that duty of care, and (3) the breach was the proximate cause of Schauer's injuries and death. *Id.* ¶ 62. The third element, proximate cause, is "defined as a cause that, in the ordinary course of events produced the plaintiff's injury." (Internal quotation marks omitted.) *Id.* In a negligence suit, proximate cause is generally an issue of material fact to be determined by the trier of fact. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). However, when the facts proven at trial do not legally entitle the plaintiff to a recovery, the court may rule on proximate cause as a matter of law. See *Inman*, 2019 IL App (1st) 172459, ¶ 60 (addressing JNOV motion); *Ramirez v. Carobene*, 2025 IL App (1st) 240203, ¶ 31 (same).

¶ 29 Proximate cause consists of cause in fact and legal cause. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446 (2004) (citing *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992)). The first component, cause in fact, examines the reasonable certainty that a defendant's conduct caused the injury. *Id.* In other words, the question is "whether the injury would have occurred absent the defendant's conduct." *Id.* (citing *Lee*, 152 Ill. 2d at 455).

¶ 30 "The second requirement, legal cause, is established only if the defendant's conduct is 'so closely tied to the plaintiff's injury that he should be held legally responsible for it.'" ' ' *Id.* (quoting *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002), quoting *McCraw v. Cegielski*, 287 Ill. App. 3d 871, 873 (1996)). "The proper inquiry regarding legal cause involves an assessment of

foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct.” *Id.* at 446-47 (citing *Lee*, 152 Ill. 2d at 456). Therefore, if it is “ ‘highly extraordinary’ ” that breach of a duty should have caused the particular injury, then imposing liability is not justified. *Lee*, 152 Ill. 2d at 456 (quoting Restatement (Second) of Torts § 435(2) (1965)).

¶ 31 The trial evidence and reasonable inferences to be drawn from it substantiate the estate’s claim that Ocampo’s negligent failure to place warning devices behind the disabled box truck was a proximate cause of Schauer’s death. As to the question of cause in fact, the estate’s expert (Stidham) and the investigating trooper (Trainor) both testified that Ocampo’s failure to utilize warning triangles was a cause of the collision. Even the defense expert, O’Hern, admitted that “[t]he purpose of reflective triangles is to put out and let road users—attempt to let road users know of a possible or potential roadway hazard that they may be approaching.” Thus, there was some evidence that the injury would not have occurred absent Ocampo’s conduct. As to legal cause, Ocampo testified that “pretty much like 95[%]” or “almost the entirety of [the disabled box] truck” occupied the fourth lane of southbound Interstate 55, and it is undisputed that he did not place any reflective triangles behind it. Legal cause is established if a reasonable person would foresee that Zilka’s collision with the box truck would be a likely result of that conduct. It was entirely foreseeable that a collision would occur as a result of Ocampo’s failure to warn oncoming highway traffic that a disabled vehicle was obstructing most of an active travel lane.

¶ 32 However, MK Deliveries argues that the estate did not meet its burden of showing that Zilka was keeping a proper lookout and concentrating on the roadway where she would have seen any warning devices behind the disabled box truck. It argues that the evidence showed that Zilka

had only a scant few seconds at her rate of speed to perceive and react to warnings. It points out that she testified to her general alertness “that morning” and that “generally” she is an attentive driver but that she did not specify she was keeping a lookout, particularly on the stretch of highway where the estate’s expert said that warning triangles would have been visible. This was a detail that the defense could have addressed, but did not, through its cross-examination of Zilka and the various experts. The jury heard the witnesses’ testimony and viewed the evidence. “It [was] the jury’s function to weigh contradictory evidence, judge the credibility of the witnesses and draw the ultimate conclusion from the facts.” *Lee v. Grand Trunk Western R.R. Co.*, 143 Ill. App. 3d 500, 512 (1986). “If reasonable minds may differ as to the inferences and conclusions to be drawn from the facts, then [a JNOV] should not be entered.” *Id.* at 510. MK Deliveries’ criticism of this “deficiency” in the evidence does not meet the *Pedrick* standard for a JNOV, which requires that the opponent’s evidence “loses its significance when viewed in the context of all of the evidence.” *Williams v. Chicago Osteopathic Health Systems*, 274 Ill. App. 3d 1039, 1047 n.3 (1995) (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 504 (1967)). “The court has no right to enter a [JNOV] if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.” *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992); see *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1087 (1990) (citing *Lee*, 143 Ill. App. 3d at 509). The standard for granting a JNOV is a high standard, and a JNOV is not appropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. As long as there is some evidence that supports the jury’s verdict, a JNOV

is improper. *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 62. Entering a JNOV would be improper here because Zilka testified to her attentiveness while driving and the black box data (which recorded when she took her foot off the accelerator, applied the brakes, and turned the steering wheel) indicated that she was paying attention and reacting to what she could see. The jury's role was to resolve witness credibility and questions of fact. *Villa*, 202 Ill. App. 3d at 1087. The evidence presented does not point so overwhelmingly in favor of a verdict for MK Deliveries that no reasonable jury would have reached the conclusions that this jury reached. The JNOV motion was properly denied.

¶ 33 Alternatively, MK Deliveries argues that “this deficiency” in the evidence renders the verdict against the manifest weight of the evidence, which warrants a new trial. A verdict is against the manifest weight of the evidence when “the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.” *Id.* at 1089. The denial of a motion for a new trial is reviewed for a clear abuse of discretion. *Id.* An abuse of discretion occurs when no reasonable person would take the view that the court adopted. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). Our review of the extensive evidence presented on proximate cause confirms that the jury's findings were reasonable, were not arbitrary, and were based on the evidence that was seen and heard at trial. MK Deliveries was not entitled to a new trial.

¶ 34 MK Deliveries next contends that a new trial is warranted because certain evidence supporting two of its defense theories was barred. It first contends there were certain facts about Marin and Ocampo that showed that Marin was the sole proximate cause of Zilka's collision.

¶ 35 We note that there was ample testimony about the “first impact between the Nissan Truck

and the Hino truck,” the fact that “the first accident disabled the battery within the Hino” and “caused the power loss,” and that “this series of crashes was set in motion by Mr. Marin’s Nissan Titan striking Mr. Ocampo’s truck.” MK Deliveries also told the jury that “Ocampo found himself in a sudden, chaotic, unexpected situation where he was completing his delivery run and the next second there’s a crash and he loses all power. That causes the truck to come to a stop.”

¶ 36 On appeal, however, MK Deliveries contends that the jury should have heard the additional “shocking” facts that (1) Trooper Trainor opined that Marin’s pickup truck struck the median before it struck and disabled the box truck in the outermost lane, (2) Ocampo’s head hit his side window, and (3) Ocampo saw Marin take off running down the exit ramp. MK Deliveries contends that these additional facts were crucial for the jury to fairly analyze whether Ocampo was acting reasonably under all the circumstances that he was facing when he did not use warning devices. It cites *Peach v. McGovern*, 2019 IL 123156, ¶ 26, for the proposition that relevant evidence is admissible and *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549-50 (2008), which does not seem to be on point because it indicates that a jury instruction may be given if it is supported by the evidence. In any event, the circuit court acknowledged that a defendant “can bring in another accident if it may be the sole proximate cause” and that the evidence need only be slight. See *Ghostanyans v. Goodwin*, 2021 IL App (1st) 192125, ¶ 74 (defendant may try to establish by competent evidence that conduct of a third person was sole proximate cause of plaintiff’s injuries).

¶ 37 MK Deliveries relies on only general legal principles and cites no illustrative cases that indicate that the circuit court abused its discretion by excluding the facts about Marin’s intoxicated conduct before and after his pickup truck collided with the MK Deliveries box truck. We find no relevance to any of these facts. Marin was not a defendant, and the focus of the fourth amended

complaint was what Ocampo failed to do after his box truck stopped and blocked almost an entire travel lane. There were no allegations nor any criticism of Ocampo's conduct prior to that moment. "Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable." *Wimberley v. Material Service Corp.*, 12 Ill. App. 3d 1051, 1056 (1973) (excluding evidence of an injury suffered by plaintiff after the occurrence in question). The trajectory of Marin's vehicle and his flight on foot down the exit ramp were not relevant to the estate's fourth amended complaint or to MK Deliveries' defense to those allegations. Those facts did not cause Ocampo's subsequent negligent decision to forego placing warning devices behind the box truck. In other words, Marin's conduct could not have been considered a proximate cause of the fatal collision. Ocampo's purported head strike is also irrelevant, given that there was no defense or medical evidence that he acted the way that he did because he was injured. Thus, it was not an abuse of discretion to exclude any of these "shocking" facts about the first collision, and their exclusion does not warrant a new trial.

¶ 38 We also point out that, even if Ocampo had been permitted to testify that his head struck the side window, it does not seem that the testimony would have helped the defense. Ocampo testified about actions that indicate he was actually quite capable and resourceful rather than diminished by an injury. He quickly exited the box truck because he assessed that it was sitting in harm's way, took his reflective jacket because it was cold outside, called his employer first because he thought that his manager was in close proximity and could bring assistance before first responders could, called 911 to summon emergency assistance, and used a flashlight and his mobile phone's flashlight feature to signal approaching drivers. These actions do not suggest that Ocampo had difficulty evaluating the situation and making reasonable choices.

¶ 39 The second defense theory that MK Deliveries wanted to more thoroughly develop was through evidence of Zilka's conduct in the 48 hours leading up to the crash. Zilka was driving at or near the time of day when she usually went to bed and she had been out drinking with Schauer from about midnight to 5:40 a.m. A defense theory was that Zilka's diminished concentration, alertness, and reaction time reduced her ability to respond to any warning devices. MK Deliveries contends that the excluded evidence might have convinced the jury that reflective triangles would not have prevented the collision.

¶ 40 Zilka responds, and MK Deliveries does not disagree, that her level of fatigue was not one of the estate's core allegations. The estate claimed that Zilka failed to exercise reasonable care and caution, failed to keep an adequate lookout, and drove too fast for the traffic and highway conditions. “ ‘ “Relevant evidence” means evidence having any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence.’ ” (Emphasis added.) *Wheeler Financial, Inc. v. Law Bulletin Publishing Co.*, 2018 IL App (1st) 171495, ¶ 105 (quoting Ill. R. Evid. 401 (eff. Jan. 1, 2011)). Furthermore, defense counsel made an offer of proof but only elicited Zilka's testimony that she was not fatigued. Zilka testified *in camera* that she was on her usual sleep/awake schedule because she worked overnight shifts and would keep the same schedule on her days off. There was no expert testimony that Zilka was tired or that her lack of sleep may have been a contributing cause to the accident. As there was no evidence that Zilka was fatigued, it was not an abuse of discretion to bar this topic from the trial. See *id.* ¶ 104.

¶ 41 MK Deliveries also argues that it was error to exclude evidence of Zilka's alcohol consumption in those 48 hours, including that she drank at Topsy's Tap, took an open beverage

from the bar to her vehicle, and subsequently had a blood alcohol concentration (BAC) of 0.077. Illinois law prohibits driving with an alcohol concentration of 0.08 or more. 625 ILCS 5/11-501(a)(1) (West 2020); *People v. Olvera*, 2023 IL App (1st) 210875, ¶ 21.

¶ 42 Evidence of drinking is considered so prejudicial that more than mere drinking must be shown—there must be evidence of actual intoxication with impairment of physical or mental capabilities. *Wagner v. Zboncak*, 111 Ill. App. 3d 268, 270 (1982); see *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 803 (1999) (“The general rule governing the admissibility of evidence pertaining to the mere consumption of alcohol is that such evidence may not be introduced unless actual intoxication can be proved.”); *Benuska v. Dahl*, 87 Ill. App. 3d 911, 914 (1980) (“It is well established that the subject of drinking may not be raised or examined by a party unless that party can prove actual intoxication.”). MK Deliveries cites what appears to be a contrary opinion. In *Reuter v. Korb*, 248 Ill. App. 3d 142, 155 (1993), the court states:

“Although an alcohol concentration in excess of .05 but less than .10 does not give rise to any presumption that a person was or was not under the influence of alcohol (Ill. Rev. Stat. 1989, ch. 95½, par. 11-501.2(b)(2)), it may be considered with other competent evidence in determining whether a person was under the influence of alcohol.”

¶ 43 However, as the paragraph continues, the court adheres to the established requirement that there be evidence of intoxication, not just evidence of alcohol consumption. The court states, “Here, there was no other evidence of intoxication,” and then it discusses the deposition testimony of three police officers, a passenger, and an expert witness, none of whom would testify in court that the defendant was intoxicated. *Id.* Furthermore, the statute cited in *Reuter* would allow for certain presumptions when there are allegations of alcohol use, but there were no such allegations

in the estate's fourth amended complaint. The statute provides:

“(b) Upon the trial of any civil or criminal action or proceeding *arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol*, the concentration of alcohol in the person's blood or breath at the time alleged as shown by analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

2. If there was at that time an alcohol concentration in excess of 0.05 but less than 0.08, such facts shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol.”

(Emphases added.) 625 ILCS 5/11-501.2(b) (West 2020).

See Ill. Rev. Stat. 1989, ch. 95½, par. 11-501.2(b)(2) (identical except for a threshold of 0.05 to 0.10 BAC).

¶ 44 The estate initially alleged that Zilka drove with a BAC in excess of 0.08% in violation of 625 ILCS 11-501(a)(1) (West 2020), but it removed those allegations before trial. Furthermore, there was no competent evidence, such as an expert's testimony, that Zilka was intoxicated. Accordingly, the statute and *Reuter*, 248 Ill. App. 3d 142, have no apparent relevance in this appeal. MK Deliveries would have been inviting the jury to speculate that Zilka was intoxicated when there was no evidence to that effect. MK Deliveries has not shown that it was an abuse of discretion to exclude evidence that Zilka had been merely drinking.

¶ 45 MK Deliveries has not met its burden of showing that certain evidence supporting its two

defense theories was improperly barred and would warrant a new trial on liability and damages.

¶ 46 We next consider whether it was error to refuse to allow defense expert O'Hern to testify that his opinions were based on a statement made by the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) and whether the court further erred by denying a mistrial on this basis. The regulatory agency stated in a letter to MK Deliveries that it deemed the collision between the Titan pickup truck and the Hino box truck and the subsequent collision between the Hino box truck and the Dodge SUV to be "non preventable" crashes. The circuit court initially denied the plaintiff estate's motion *in limine* to keep out the agency's conclusion, stating that it will "come[] in on the basis of opinion." During opening statements, defense counsel referred to the document, which elicited an objection from the estate. The next day, the estate sought reconsideration of its motion *in limine*, because the estate's expert had advised the estate's lawyer that the regulatory agency considered it inappropriate to use its reports in civil litigation. According to the agency, its preventability findings were "not appropriate for use by private parties in civil litigation," and the agency's determination "does not establish legal liability, fault or negligence by any party and was made by persons with no personal knowledge of the crash." On reconsideration, the circuit court said that the court would follow the federal government's "strong suggestion," and the court barred use of the FMCSA findings.

¶ 47 MK Deliveries argues this decision was an abuse of discretion. When granting reconsideration, however, the circuit court relied on *Van Steenburg v. General Aviation, Inc.*, 243 Ill. App. 3d 299, 316 (1993). In that case, the circuit court granted the plaintiff's motion *in limine* to preclude the use of opinions from the National Transportation Safety Board (NTSB). *Id.* at 314. The defendants, nevertheless, used the NTSB reports in cross-examination of the plaintiff's expert.

Id. at 316. The appellate court held that this was impermissible, stating: “[w]hile there is no dispute here that an expert’s reliance on *factual observations* noted in the NTSB report is reasonable, defendants have failed to show that an expert’s reliance on the *opinions* of the NTSB investigator is likewise reasonable.” (Emphases added.) *Id.*

¶ 48 The similarity between *Van Steenburg* and this case is that the defendants sought to introduce the “opinions” of an outside agency through their expert’s testimony. *Id.* MK Deliveries did not seek to introduce factual findings from the FMCSA report but sought to introduce the agency’s ultimate conclusion on the “preventability” of the crash. The trial judge initially held that these findings could come in through O’Hern. However, when presented with evidence that the underlying report was unreliable and should not be used in civil litigation, according to the FMCSA itself, the trial judge barred the conclusion entirely. MK Deliveries cannot plausibly argue that O’Hern’s reliance on the unreliable opinion was reasonable. *Van Steenburg* is directly on point and precludes use of the federal agency’s conclusion. See *id.*; see also *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 668 (2003) (“The majority of courts allow the admission of factual reports as long as they do not contain agency conclusions on the probable cause of accidents.”); *In re Air Crash at Charlotte, North Carolina on July 2, 1994*, 982 F. Supp. 1071, 1077 (D.S.C. 1996) (same); *In re Complaint of Armatur, S.A.*, 710 F. Supp. 390, 402 (D.P.R. 1988) (“The general rule is that the factual findings of *** NTSB reports are admissible if based on trustworthy sources, while evaluative conclusions are not admissible.”). The trial court made the correct ruling when it did not allow MK Deliveries to rely on the FMCSA’s correspondence.

¶ 49 MK Deliveries attempts to distinguish *Van Steenburg*, arguing that the FMCSA document was trustworthy. However, the trustworthiness of the document, and thus its value in this case,

was not a question for the circuit court to decide. The FMCSA prescribed the value of the document to this case when it declared that it should not be used in a civil case to establish liability, fault, or negligence. The circuit court ruled consistently with that declaration, which was well within its discretion.

¶ 50 MK Deliveries argues that *Van Steenburg* is inconsistent with *Wilson v. Clark*, 84 Ill. 2d 186, 194 (1981). *Van Steenburg* and the other cases we cited above are not inconsistent with that supreme court authority. In *Wilson*, a medical malpractice plaintiff argued that the circuit court had improperly allowed hospital records into evidence and had improperly allowed an expert to answer questions assuming facts stated in those records. See *id.* at 191-92. After noting that the hospital records were not admissible as business records, the supreme court adopted Rule 703 of the Federal Rules of Evidence, which provides, “ ‘If [facts or data are] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.’ ” *Id.* at 193 (quoting Fed. R. Evid. 703). Thus, Illinois courts may allow even a nontreating expert to testify based on facts not in evidence, so long as the information underlying the expert’s opinion “is of a type that is reliable.” *Id.* This rule dispenses with the substantial time needed to produce and examine every authenticating witness involved in creating a medical record and instead allows one physician’s validation to suffice. See *id.* at 194. Importantly, *Wilson* does not suggest that an expert can rely on *opinions* contained in the medical records but instead explicitly states an expert can rely on *facts or data* contained in those records. As MK Deliveries wanted to use the FMCSA’s opinions about crash preventability, rather than facts from the report, it is clear that the trial judge properly excluded this basis for expert O’Hern’s opinion.

¶ 51 A trial judge is given great discretion in determining motions *in limine* and other evidentiary motions, and such decisions will not be disturbed on review, absent an abuse of that discretion. *Leona W.*, 228 Ill. 2d at 460. Again, an abuse of discretion occurs when no reasonable person would take the view that the court adopted. *Id.* Even if an abuse of discretion has occurred, reversal is not warranted unless the record establishes that the ruling created “substantial prejudice affecting the outcome of the trial.” *Id.*; see *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 558-59 (1976) (recognizing that a party is not entitled to an error-free trial and that minor improprieties during a lengthy, complex, and difficult jury trial do not warrant reversal where the trial as a whole was fair). Rulings on motions *in limine* are interlocutory and remain subject to reconsideration throughout the trial. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 40 (2010).

¶ 52 The judge’s initial decision to allow the FMCSA opinion was erroneous and was corrected on reconsideration. See *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 23 (circuit court is permitted to grant a motion to reconsider based on its determination that it erred in its previous application of existing law). Furthermore, the estate objected when MK Deliveries referred to the report during opening statements, and the circuit court gave an opening statement limiting instruction: “Again, what counsel is telling you is what he expects the evidence will be. If the evidence is not borne out by what he is telling you, please disregard what he’s saying.” For these reasons, we find no error in the judge’s ultimate resolution about O’Hern and the FMCSA.

¶ 53 MK Deliveries next asks us to conclude that this case was sufficiently close on the question of liability that a verdict could have been returned for either side and that the jury was improperly influenced by four additional errors. Three of the four concern the plaintiff estate: its closing argument was improper, it misused Stidham’s demonstrative exhibit of reflective triangles at night,

and it should not have been allowed to show the jury a “gory” photo of Schauer’s lifeless body.

¶ 54 Generally, it is error to ask a jury to put itself in the position of a party. *Koonce v. Pacilio*, 307 Ill. App. 3d 449, 457 (1999). MK Deliveries contends that, during closing arguments, the estate’s attorney said “We do not take this case lightly nor this request. The bond that we have with our dad, with our mom, with our children—.” The attorney did not conclude his sentence, because MK Deliveries objected and then the trial judge said, “Sustained. Sustained. Sustained. Disregard counsel’s last statement.”

¶ 55 A trial judge’s ruling on a motion for a new trial will not be disturbed unless the moving party can demonstrate that the circuit court clearly abused its discretion. *Anderson v. Zamir*, 402 Ill. App. 3d 362, 364 (2010) (citing *Maple*, 151 Ill. 2d at 455). We do not find that the circuit court clearly abused its discretion by denying a mistrial on this basis. The purpose of closing argument “is to draw reasonable inferences from the evidence and assist the jury in fairly arriving at a verdict based on the law and the evidence.” *Copeland v. Stebco Products Corp.*, 316 Ill. App. 3d 932, 948 (2000). Generally, counsel is afforded wide latitude during closing argument; they may “comment and argue on the evidence and any inference that may be fairly drawn from that evidence.” *Clarke v. Medley Moving & Storage, Inc.*, 381 Ill. App. 3d 82, 95 (2008). “The scope of closing argument is within the sound discretion of the trial court and the reviewing court will reverse only if the argument is prejudicial.” (Internal quotation marks omitted.) *O’Neil v. Continental Bank, N.A.*, 278 Ill. App. 3d 327, 340 (1996). Similarly, whether comments made during closing argument had a prejudicial effect is within the circuit court’s discretion and will not be reversed absent a clear abuse of discretion. *Clarke*, 381 Ill. App. 3d at 95. MK Deliveries’ argument is not persuasive because the estate’s attorney did not ask the jurors to put themselves in the position of the Schauer

children. The attorney acknowledged the existence of a family bond that some people hold, MK Deliveries timely objected, and the judge sustained the objection and immediately issued a curative instruction.

¶ 56 We also reject MK Deliveries’ contention that it was improper for the estate to use its expert Stidham’s photo of reflective triangles at night as a demonstrative exhibit.

¶ 57 Demonstrative exhibits are favored because they help the jury better understand the issues. *Burke v. Toledo, Peoria & Western R.R. Co.*, 148 Ill. App. 3d 208, 213 (1986).

“Photographs are admissible if they have a reasonable tendency to prove or disprove a fact at issue but may be excluded when irrelevant or immaterial or if their prejudicial nature outweighs their probative value. [Citation.] As demonstrative evidence, photographs should not be admitted if they are inaccurate or would mislead or confuse the jury.”

Johnson v. Bailey, 2012 IL App (3d) 110016, ¶ 13.

A proper foundation must be laid first establishing that the photo is a true and accurate representation of what it purports to portray. *Id.*; see *Reid v. Sledge*, 224 Ill. App. 3d 817, 821 (1992). The admission of a photo is reviewed under the abuse of discretion standard. *Johnson*, 2012 IL App (3d) 110016, ¶ 13.

¶ 58 During opening statements, the estate’s attorney specified that the photo was a demonstrative exhibit that had been staged and taken by its retained expert. Counsel said, for instance, “there is no photograph of the triangles on January 19th of 2020 because it never happened” and “Mr. Stidham set this scene up.” Counsel also told the jury that the photo showed triangles on a section of Kentucky highway where there was a bend in the road “similar” to the section of Interstate 55 where the collision occurred. Counsel said that the triangles were on the

shoulder. When Stidham testified, he specified that his photo was staged on “Kentucky 118, the Hyden Spur. It’s where I live.” He further testified that there was no overhead lighting and that the reflectors were placed on the shoulder. In addition, “This is just simply to demonstrate the reflectivity of these. I was in a 2014 F-250, my truck. Headlights were on dim. That photograph was taken 500 feet from the closest reflector.” During cross-examination, Stidham confirmed that he had taken the photo on a rural road in Kentucky and that he placed the reflectors on the shoulder rather than a lane of travel. Stidham explained that he put the triangles on the shoulder instead of a travel lane because did not want to create a traffic hazard. He had previously testified that Zilka could not have avoided striking “the first reflective device 210 feet before the collision.” In other words, Stidham anticipated that Kentucky motorists would be unable to avoid all of the triangles if he had placed them on the actual roadway.

¶ 59 The specific statement that MK Deliveries takes issue with is counsel’s statement that, “if Mr. Ocampo had used those triangles that night, it would have looked like this.” MK Deliveries contends there was no competent testimony that the photo approximated similar conditions to what Zilka would have encountered. We disagree with MK Deliveries because the jury was clearly and repeatedly told that the photo depicted a similar scene instead of the same scene that Zilka would have come upon. The jury was told multiple times that the exhibit was “demonstrative” or staged for the trial. The jury was also told that the exhibit did not portray Interstate 55 as it appeared on January 19, 2020, that it depicted a different but “similar” bend in a rural spur of Kentucky highway that lacked overhead lighting, and that it had been taken from a pickup truck with dimmed headlamps when 500 feet from the first triangle that oncoming traffic would see. Furthermore, a key dissimilarity was pointed out, more than once. Counsel and Stidham both told the jury that the

triangles were set up on the highway's shoulder instead of its outer lane. Stidham also specified that the purpose of the exhibit was "just simply to demonstrate the reflectivity of [the triangles]." This record shows that the photo was a true and accurate representation of what it purported to show and that the photo was not inaccurate, misleading, or confusing. Accordingly, it was not unfair or prejudicial for the estate to use the demonstrative exhibit.

¶ 60 Another photo that MK Deliveries disapproves of is a photo of Schauer's "gory" body showing his bloodied face, "lifeless open eyes," and what appears to be urine on his blue jeans. MK Deliveries contends that any probative value of this inflammatory photo was substantially outweighed by the unfair prejudice that it caused. It cites Rules of Evidence 401, 402, and 403 (eff. Jan. 1, 2011) and *Hulsebus v. Russian*, 118 Ill. App. 2d 174, 181 (1969), for the proposition that the photo should not have been admitted because it had no independent relevance given that the estate's medical expert had already testified to Schauer's lack of injuries. In *Hulsebus*, a surgeon gave detailed medical testimony describing injuries that a passenger received in a three car collision. *Id.* A color photo of him in the operating room was not admitted, but subsequent photos of his scarred face were shown. *Id.* at 180. According to the appellate court, "By anyone's description, the [excluded] photograph [of the operation] discloses a gory and hideous sight." *Id.* The court found that the trial judge had properly exercised discretion by excluding an exhibit that was likely to inflame and prejudice the jury. *Id.* at 180-81.

¶ 61 We would not describe Schauer's photo as gory, as his facial features and clothing appear normal at first sight. In any event, *Hulsebus* does not indicate that gory or inflammatory photos should always be excluded. See *id.* The admission of photos, even ones that are inflammatory or gruesome, are at the trial judge's discretion. See *Drews v. Gobel Freight Lines, Inc.*, 144 Ill. 2d

84, 100-01 (1991). Schauer's estate used the autopsy photo to support its survival damages claim. In *Drews*, the supreme court did not disturb the admission of "gruesome" morgue photos in support of a claim for pain and suffering experienced during the 30 minutes that the decedent remained conscious after a car accident. *Id.* at 89, 100-01. One photograph showed multiple lacerations to the decedent's face and throat, and the other photograph showed a gaping wound and burns to his right knee. *Id.* at 99. Determining whether a photo is too gruesome to be admitted is a very subjective decision, and the trial judge is best able to determine the possible prejudice of publishing inflammatory or gruesome photos. *Id.* at 101. The trial judge decided that the probative value of the *Drews* photos outweighed their inflammatory and prejudicial effect on the jury. *Id.* The photos were relevant to the decedent's pain and suffering, even though the pathologist testified about the decedent's injuries. *Id.* There was also a photo that showed the defendant's tractor-trailer surrounding and partially inside the decedent's crushed van. *Id.* The *Drews* accident scene photo was admitted for the purpose of showing the extent of pain and suffering that the decedent had experienced during the 30 minutes he was pinned inside the wreckage, and not to show any element of causation. *Id.* The trial judge here also determined that the probative value of Schauer's autopsy photo exceeded its inflammatory and prejudicial effect. The trial judge was in the best position to determine the possible prejudice that the photo would have. Like the *Drews* plaintiff, Schauer's estate used the photo to support its claim of pain and suffering, rather than to show causation. Accordingly, we do not find that the decision was an abuse of discretion. Furthermore, the photo does not seem to have inflamed or prejudiced the jury because the panel declined to award any damages ("\$0") for Schauer's pain and suffering. The entire \$13.8 million award was attributed to his two children's "Loss of money, benefits, goods and services"; "Grief, sorrow and mental

suffering”; and “Loss of Society.”

¶ 62 The fourth claimed trial error that tipped this “close” case was when Zilka was allowed to “opine” about an ultimate issue—whether she would have been able to avoid the box truck if the triangles were utilized. MK Deliveries contends that Zilka was speculating and opining as a lay witness about an issue that the jury was capable of determining for itself.

¶ 63 Zilka, however, did not give this testimony because MK Deliveries objected to the questioning and the objection was sustained. Zilka testified only generally about seeing triangles deployed many times as a police officer and that if she had seen such triangles it would have had an effect on her driving. More specifically, the following exchange transpired:

“Q. Ms. Zilka, you testified, of course, that you did not see these reflective triangles placed anywhere on the roadway, shoulder, the lane or anything of that sort as you are approaching this object that you struck?

A. Right, I did not.

Q. Had you seen those reflective triangles placed, as we see in a similar manner to this photograph, would you have been able to take extra steps to avoid striking that box truck?

[DEFENSE COUNSEL]: Objection, motion *in limine*, also calls for speculation.

THE COURT: Lay some foundation. I’ll sustain the objection. Lay some foundation.

Q. Ms. Zilka, again, just to get your understanding better of what those reflective triangles are, tell us how many times in your life you’ve driven by at night to the reflective triangles placed in a roadway in a manner similar to what we see in this photograph?

A. Having been a police officer for many years and working at nights the entire time, hundreds, if not more.

Q. Okay. And in those hundreds of times you have driven by or observed those reflective triangles, is the purpose of those triangles to give motor vehicles in the roadway notice to slow or stop or move or otherwise?

A. Yes.

Q. If you had seen these triangles on Interstate 55 in your fourth lane of traffic as you were attempting to exit [to] Route 30, would those triangles have had an effect on what you would have done as a driver?

[DEFENSE COUNSEL]: Objection, calls for speculation.

THE COURT: Well, I'm going to allow a little bit on this. But if you get the kicker question, I'll sustain the objection.

Go ahead. You can answer that.

* * *

A. Well, yeah, I would believe so. I would slow down and try to get out of the way or get in the next lane.

Q. And do you believe that if those had been out there illuminated, that you could have avoided colliding with that object?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained. That will be sustained. Disregard the question.

[PLAINTIFF'S COUNSEL]: Thank you, Ms. Zilka. I have nothing further."

¶ 64 MK Deliveries cites *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 103, for the proposition that Zilka was improperly allowed to speculate based on guess, surmise, or conjecture and *Freeding-Skokie Roll-Off Service, Inc. v. Hamilton*, 108 Ill. 2d 217, 221 (1985), for

the proposition that lay testimony on an ultimate issue is improper. However, in *Racky*, an expert stated an opinion that was based on his review of photos, documents, and testimony, rather than engaging in unsupported guesswork. *Racky*, 2017 IL App (1st) 153446, ¶¶ 46, 103. Furthermore, the expert did not identify the defendants’ conduct as the cause of the subject dangerous condition and testified more generally about the condition itself. *Id.* ¶ 103. Both the trial and appellate courts rejected the defendants’ exaggeration of the testimony. *Id.* ¶¶ 102-03. MK Deliveries has similarly misstated the record. Zilka was not permitted to opine about an ultimate issue, did not engage in speculation, and based her statement on her familiarity with the reflective warning devices she had encountered many times as a police officer on the overnight shift. In *Freeing-Skokie*, 108 Ill. 2d at 219-21, lay witnesses were erroneously permitted to testify about an ultimate issue of fact—whether they thought that the accident could have been avoided. In contrast, MK Deliveries objected to that question, the circuit court sustained the objection, and Zilka was not permitted to testify on the ultimate issue of whether this collision could have been avoided.

¶ 65 MK Deliveries also argues that, in this “close” case, a new trial is warranted because of the combined effect of the four purported trial errors that we discussed immediately above—what the estate’s attorney started to say during closing arguments before MK Deliveries objected, the use of Stidham’s staged photo, the publication of Schauer’s autopsy photo, and Zilka’s statement that the sight of warning triangles would have affected her driving. MK Deliveries cites, for instance, *Shehy v. Bober*, 78 Ill. App. 3d 1061, 1071 (1979), for the proposition that a court will grant a new trial when the question of liability is “sufficiently close” and a reviewing court cannot determine whether the combined effect of misconduct and evidentiary errors misled the jury and affected its verdict. In our opinion, the question of liability was never close in this case, and even in

combination, the four alleged errors did not affect the verdict or justify ordering a new trial. See *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 87 (“ ‘where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed’ ” (quoting *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964))).

¶ 66 Finally, MK Deliveries argues that it was error to exclude evidence that Schauer and his wife were contemplating a divorce. It contends that excluding a draft marital settlement agreement warrants a new trial on damages, given that the Schauers’ “impending divorce” and his likely obligation for child maintenance and health insurance lessened his children’s economic losses. The figures that Schauer and his wife were discussing were less than the figures that were calculated by the estate’s economic expert witness, Kristin Kucsma. MK Deliveries also contends that split custody would have reduced the “chores” that Schauer “performed for the kids.”

¶ 67 There was an offer of proof, during which Schauer’s wife testified that she and Schauer were discussing terms but had not finalized them, had not signed a marital settlement agreement, and had never filed an action for dissolution of their marriage. Schauer’s wife was not a claimant in this negligence action and did not have a claim for loss of society or loss of services.

¶ 68 In our opinion, the draft contract was properly excluded from the trial because (1) it was merely a draft and, therefore, not relevant and (2) even if it was relevant, its probative value was substantially outweighed by the danger of causing unfair prejudice or confusing the issues. The agreement was under negotiation, the financial figures and custody arrangement that MK Deliveries was keen to present to the jury were subject to revision, and neither of the Schauers had gone as far as actually filing an action for dissolution. They were working with attorneys and a mediator. The Schauers could have changed their minds about any and all of the settlement terms

and whether they would actually end their marriage. Furthermore, Schauer's estate did not seek damages for his wife and limited its compensation claim to his two children. Thus, the draft had no relevance in these proceedings. In addition, the probative value of the status of the Schauers' marriage was incredibly low. By agreement, the wife's testimony did not encompass her relationship with her husband and was limited to his relationship with their children. The estate made this a case about two young children losing their father, and it did not concern his relationship with his wife. Given the low evidentiary value of the status of the couples' relationship and the absence of a claim on the wife's behalf, all evidence of potential divorce was correctly barred as unduly prejudicial. See *Petraski v. Thedos*, 382 Ill. App. 3d 22, 32 (2008) (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

¶ 69 Furthermore, MK Deliveries was able to cross-examine the estate's economic expert about her calculations for the financial contributions (*e.g.*, income, financial support, financial assistance, and other financial benefits) and services (*e.g.*, household services, companionship, advice, and counsel) that Schauer could have continued to make to his children if he had not died. MK Deliveries astutely emphasized that the expert was telling the jury what Schauer *could* have contributed to his children, not necessarily what Schauer *would* have contributed, and that it was up to the jury to determine the economic damages. Through cross-examination and closing arguments, MK Deliveries contended that the jury's award should be much lower than the expert had calculated. This record does not suggest that MK Deliveries was prejudiced on the issue of economic damages due to the exclusion of the draft marital settlement agreement.

¶ 70 For all these reasons, we affirm the judgment on appeal.

¶ 71 Affirmed.

1-24-2281

FNCB Bank & Trust v. MK Deliveries, Inc., 2026 IL App (1st) 242281

Decision Under Review: Appeal from the Circuit Court of Cook County, No. 20-L-8609; the Hon. Brendan A. O'Brien, Judge, presiding.

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