This chapter was first published by IICLE®.

10 Motions at the Close of the Evidence

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The authors wish to thank Alexander L. Berg for his invaluable assistance in updating this chapter for 2012.

I. [10.1] INTRODUCTION

This chapter addresses the motions that an attorney may wish to make at the close of the evidence at trial. Such motions include, among others, motions for a postponement of the trial; motions to dismiss certain parties or claims; and motions to strike certain evidence, parts of pleadings, or affirmative defenses. Being prepared to make such motions is imperative as counsel often will have only a few moments to bring them before closing arguments commence and the opportunity is lost.

II. MOTION FOR A CONTINUANCE

A. [10.2] Grounds for a Continuance at the Close of Evidence

Section 2-1007 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, governs motions for a continuance. It provides:

> **On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment.**
>
> **The circumstances, terms and conditions under which continuances may be granted, the time and manner in which application therefor shall be made, and the effect thereof, shall be according to rules.** 735 ILCS 5/2-1007.

Obtaining a continuance at the close of evidence is difficult, and a request for a continuance is likely to be viewed with skepticism by the court and one's opponent. Indeed, once a trial has begun, courts generally will grant a continuance only for particularly grave reasons. *See In re Marriage of Ward*, 282 Ill.App.3d 423, 668 N.E.2d 149, 154, 217 Ill.Dec. 964 (1st Dist. 1996); *Montgomery v. Terminal Railroad Association of St. Louis*, 73 Ill.App.3d 650, 392 N.E.2d 77, 81, 29 Ill.Dec. 520 (5th Dist. 1979). Nevertheless, a continuance may be critical if, for example, an important witness is unavailable during the trial or additional time is needed to prepare important rebuttal evidence.

Illinois Supreme Court Rule 231 explicitly governs motions for a continuance made at the time of trial. Rule 231 recognizes four grounds for a continuance: (1) material evidence is absent; (2) a party whose presence is necessary for full and fair prosecution or defense of the action is in the military service of the United States or Illinois in time of war or insurrection; (3) the party applying for the continuance or his or her attorney is a member of the Illinois legislature and is in attendance there; and (4) a pleading is amended and because of the amendment, the opposing party is unprepared to proceed to or with the trial. S.Ct. Rules 231(a), 231(c), 231(d).

S.Ct. Rule 231(f) places a heavy burden on a party who asks for postponement during trial: *"No motion* for the continuance of a cause made after the cause has been reached for trial *shall be heard, unless a sufficient excuse is shown for the delay."* [Emphasis added.] *See Ward*, *supra*, 668 N.E.2d at 154. Thus, a party seeking a continuance must show "sufficient excuse" why the

motion was not made earlier to avoid potential inconvenience to the parties or witnesses and/or the costs associated with postponing the matter in the middle of the trial. *Id.; Martinez v. Scandroli,* 130 Ill.App.3d 712, 474 N.E.2d 456, 457, 85 Ill.Dec. 728 (2d Dist. 1985).

The decisive factor in ruling on a motion for a continuance is whether the moving party has demonstrated due diligence in proceeding with the case. *See In re Marriage of Chesrow,* 255 Ill.App.3d 613, 627 N.E.2d 416, 420, 194 Ill.Dec. 300 (2d Dist. 1994); *McMillen v. Carlinville Area Hospital,* 114 Ill.App.3d 732, 450 N.E.2d 5, 11, 70 Ill.Dec. 792 (4th Dist. 1983). *See generally Mohawk Medical Center, Inc. v. Quern,* 84 Ill.App.3d 1026, 406 N.E.2d 839, 40 Ill.Dec. 636 (1st Dist. 1980).

In determining whether denial of a continuance was appropriate, reviewing courts also will consider whether the trial court has granted previous continuances, whether both parties have declared themselves ready for trial, and whether the movant's opponent has concluded the presentation of his or her evidence. *See Schneider v. Seibutis,* 3 Ill.App.3d 323, 279 N.E.2d 37, 39 (1st Dist. 1972).

An appeal from the denial of a motion for a continuance based on a witness' failure to appear is unlikely to succeed unless counsel can show that he or she has done his or her best to secure the attendance of the witness. *See, e.g., People v. Ford,* 368 Ill.App.3d 562, 857 N.E.2d 900, 905, 306 Ill.Dec. 501 (1st Dist. 2006) ("To show that the trial court erred in denying [defendant's] request for a continuance to secure additional witnesses, defendant would have to show he was diligent in seeking the witnesses, that the testimony was material and might have affected the jury's verdict and that he was prejudiced."). See also S.Ct. Rule 231(a). If the witness cannot be found, counsel should be prepared to demonstrate that the witness' absence was a surprise. Counsel must have subpoenaed the witness or at least made a diligent effort to do so. *People v. Tillman,* 82 Ill.App.3d 430, 402 N.E.2d 825, 828 – 829, 37 Ill.Dec. 823 (1st Dist. 1980). If the subpoena was served, counsel must have tendered the appropriate witness fee.

An appellate court will not disturb the grant of a continuance unless there was an abuse of discretion or a palpable injustice at the trial level. *Chesrow, supra,* 627 N.E.2d at 420; *Sinram v. Nolan,* 227 Ill.App.3d 241, 591 N.E.2d 128, 129, 169 Ill.Dec. 248 (4th Dist. 1992). The denial or refusal of a continuance is not a ground for reversal if the party complaining was not prejudiced by the denial. *Chicago Motor Club v. Robinson,* 316 Ill.App.3d 1163, 739 N.E.2d 889, 893, 250 Ill.Dec. 892 (1st Dist. 2000).

B. [10.3] Procedure for Obtaining a Continuance

The moving party "shall" support a motion for continuance with one or more affidavits. S.Ct. Rule 231(a); *Mikarovski v. Wesson,* 142 Ill.App.3d 193, 491 N.E.2d 864, 865 – 866, 96 Ill.Dec. 585 (2d Dist. 1986); *Bullistron v. Augustana Hospital,* 52 Ill.App.3d 66, 367 N.E.2d 88, 92, 9 Ill.Dec. 654 (1st Dist. 1977). *But see generally Jack v. Pugeda,* 184 Ill.App.3d 66, 539 N.E.2d 1328, 1331 – 1334, 132 Ill.Dec. 522 (5th Dist. 1989) (trial court abused its discretion in refusing to grant plaintiff's motion for continuance even though no affidavit was filed). Failure to comply with the affidavit requirements is, in itself, grounds for denying the motion. *See Bullistron, supra,* 367 N.E.2d at 92.

When a motion for a continuance is based on the absence of material evidence, S.Ct. Rule 231(a) requires that the affidavit show (1) due diligence to obtain the evidence; (2) the content of the evidence; (3) the location of the witness' residence (if testimony is involved); and (4) that additional time will enable the moving party to procure the evidence. Furthermore, the affidavit must show that the facts to be presented are material to the litigation. *Almodovar v. Lent*, 238 Ill.App.3d 279, 606 N.E.2d 275, 277 – 278, 179 Ill.Dec. 443 (1st Dist. 1992).

If an amendment to a pleading is the basis for the motion for continuance, the affidavit must state that, as a consequence of the amendment, the moving party is unprepared to proceed with the trial. If the moving party is unable to proceed following an amendment because it lacks material evidence to address the matters alleged in the amendment, then the affidavit also must satisfy the requirements of S.Ct. Rule 231(a) described above.

III. [10.4] PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS

If you are the plaintiff and your motion for a continuance at the close of evidence is denied, you may want to consider moving to voluntarily dismiss the case without prejudice. Such a motion is allowed under §2-1009(c) of the Code of Civil Procedure, 735 ILCS 5/2-1009(c). Section 2-1009 provides:

> **(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.**
>
> **(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.**
>
> **(c) After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.**
>
> **(d) A dismissal under subsection (a) of this Section does not dismiss a pending counterclaim or third party complaint.**
>
> **(e) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.**

Subsection (a) gives a plaintiff a nearly absolute right to dismiss all or any part of the action without prejudice upon notice and the payment of costs. Importantly, such a request must be made "before trial or hearing begins." 735 ILCS 5/2-1009(a). The term "hearing" found in this rule refers to the equitable equivalent of a trial, *i.e.*, when the parties begin to present arguments and evidence to achieve an ultimate determination of their rights. *Bailey v. State Farm Fire &*

Casualty Co., 137 Ill.App.3d 155, 484 N.E.2d 522, 92 Ill.Dec. 7 (5th Dist. 1985). Moreover, in addition to costs, S.Ct. Rule 219(e) provides that when a party voluntarily dismisses a case

> **to avoid compliance with discovery deadlines, orders or applicable rules[,] . . . [t]he court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.**

See Valdovinos v. Luna-Manalac Medical Center, Ltd., 328 Ill.App.3d 255, 764 N.E.2d 1264, 1275 – 1276, 262 Ill.Dec. 147 (1st Dist. 2002).

This section "is designed to address 'the use of voluntary dismissals to avoid compliance with discovery rules or deadlines, or to avoid the consequences of discovery failures, or orders barring witnesses or evidence.' " *Id.*, quoting Committee Comment, Rule 219(e) (rev. June 1, 1995).

Subsection (b) makes clear that the court has discretion to hear and decide a dispositive motion that has been filed prior to a motion for a voluntary dismissal. *See Mizell v. Passo,* 147 Ill.2d 420, 590 N.E.2d 449, 451, 168 Ill.Dec. 812 (1992).

Subsection (c) provides that once trial or hearing begins, the plaintiff may dismiss only on terms fixed by the court. This is the section under which a plaintiff may technically voluntarily dismiss at the close of evidence. In practice, however, it is unlikely that a court would allow a plaintiff to voluntarily dismiss at the close of evidence without a compelling reason. In *Gibrick v. Skolnik,* 254 Ill.App.3d 970, 627 N.E.2d 76, 77 – 78, 193 Ill.Dec. 917 (1st Dist. 1993), for example, the defendant objected to the qualification of the plaintiff's expert. Subsequently, the plaintiff asked for a continuance to obtain another expert. The trial court denied the continuance, but granted the plaintiff's motion for voluntary dismissal without prejudice. 627 N.E.2d at 78. The appellate court reversed, finding that the trial court abused its discretion in granting the motion for voluntary dismissal. 627 N.E.2d at 81. *See also McWilliams v. Dettore,* 387 Ill.App.3d 833, 901 N.E.2d 1023, 1038, 327 Ill.Dec. 290 (1st Dist. 2009) (plaintiff not entitled to voluntarily dismiss her medical malpractice case after determination that her expert witness was unqualified to offer testimony when trial had already started). But at least one court has upheld the granting of a voluntary dismissal without prejudice in the later stages of a case. In *Voegele v. Kidd,* 18 Ill.App.2d 400, 152 N.E.2d 887, 888 (4th Dist. 1958), at the close of the defendant's case but prior to the introduction of any rebuttal evidence, the plaintiff moved the court for leave to dismiss without prejudice. The reason proffered for the dismissal was that one of the plaintiff's essential witnesses in the case, the physician who was going to testify about the injuries sustained by the plaintiff, was unavailable to testify although he was available the previous afternoon when the court recessed to attend a funeral. *Id.* The trial court granted the voluntary dismissal, and the appellate court found that this was not an abuse of discretion. 152 N.E.2d at 889.

Subsection (d) provides that a plaintiff's voluntary dismissal of the case does not dismiss a pending counterclaim or third-party complaint. Finally, subsection (e) further clarifies that the right to voluntarily dismiss one's claims applies equally to all plaintiffs, including counterclaimants and third-party plaintiffs.

Although §2-1009 gives a plaintiff flexibility to dismiss and refile the claims, courts have sought to limit misuse of the section by holding that a plaintiff may not use a motion to dismiss as a way to forum-shop. *Ott v. Little Company of Mary Hospital*, 273 Ill.App.3d 563, 652 N.E.2d 1051, 1061, 210 Ill.Dec. 75 (1st Dist. 1995).

IV. [10.5] MOTIONS TO STRIKE EVIDENCE

At the conclusion of the presentation of evidence, it is the responsibility of the trial attorney to ensure that there is no evidence before the jury that opposing counsel has either failed to "connect up" or on which the court has reserved a ruling. Counsel should move to strike any such evidence that is harmful to his or her case. A motion to strike evidence is timely as soon as the nature of the objection becomes apparent. *Levin v. Welsh Brothers Motor Service, Inc.*, 164 Ill.App.3d 640, 518 N.E.2d 205, 217, 115 Ill.Dec. 680 (1st Dist. 1987); *Central Illinois Public Service Co. v. Gibbel*, 65 Ill.App.3d 890, 382 N.E.2d 846, 848, 22 Ill.Dec. 456 (4th Dist. 1978).

A. [10.6] Striking Testimony

Witnesses often testify out of order. As a result, an attorney may fail to fulfill a representation that he or she will establish a proper basis for the admission of otherwise objectionable testimony at a later time. Counsel should consider a motion to strike such testimony at the close of the evidence. If counsel does not make such a motion, any objection to the evidence likely is to be deemed waived. *See Gillespie v. Chrysler Motors Corp.*, 135 Ill.2d 363, 553 N.E.2d 291, 296, 142 Ill.Dec. 777 (1990).

B. [10.7] Striking Exhibits

Counsel should maintain an exhibit list as the trial proceeds. The list should show (1) the number of each exhibit, (2) its description, (3) whether it was identified (and, if so, by whom), (4) when it was offered, and (5) if it was admitted into evidence. Counsel may find it helpful to prepare, in advance of trial, a chart such as the one shown below, listing each document he or she expects to introduce into evidence.

Exhibit Number	Brief Description	Date Offered	Exhibit Identified? By Whom?	Admitted or Excluded	Date Admitted or Excluded
1					
2					
3					

Maintaining such a list offers numerous benefits. It will assist in preventing an opponent from examining a witness with, or arguing before the jury based on, an exhibit not in evidence. It will also ensure an exhibit that was not admitted into evidence is not taken into the jury room during deliberations. And regardless of which party the attorney is representing, the list will help ensure that all of the exhibits are offered into evidence before counsel rests his or her case. Of course, the failure to properly admit an exhibit into evidence ordinarily prohibits the use of that exhibit during closing arguments or on appeal.

V. [10.8] MOTION TO AMEND PLEADINGS

Section 2-616(c) of the Code of Civil Procedure governs motions to amend pleadings. It provides:

> **A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.** 735 ILCS 5/2-616(c).

A motion to amend the pleadings to conform to the proof is one of the most common motions at the close of the evidence. The plaintiff may want to amend the complaint, for example, to include charges of negligence that were not included in the complaint but were proven at trial. Or the defendant may wish to amend the pleadings to allege a new affirmative defense that arose during the trial. When making such a motion, the proposed amended pleading *must* be submitted in writing. *Volvo of America Corp. v. Gibson,* 83 Ill.App.3d 487, 404 N.E.2d 406, 410 – 411, 39 Ill.Dec. 22 (1st Dist. 1980) (it was not abuse of discretion for court to deny leave to amend when no proposed amended pleading was tendered to court for ruling). Consideration of a motion to amend is left to the court's sound discretion. *Golembiewski v. Hallberg Insurance Agency, Inc.,* 262 Ill.App.3d 1082, 635 N.E.2d 452, 461, 200 Ill.Dec. 113 (1st Dist. 1994). In exercising that discretion, the court considers four factors: "(1) whether the proposed amendments would cure the defective pleadings, (2) whether they would cause prejudice or surprise to the defendants, (3) the timeliness of the proposed amendments, and (4) whether previous opportunities to amend the pleadings could be identified." *Id.*

The ability to amend is a significant right that the court should not easily abridge. *See Cretton v. Protestant Memorial Medical Center, Inc.,* 371 Ill.App.3d 841, 864 N.E.2d 288, 309 – 310, 309 Ill.Dec. 422 (5th Dist. 2007). However, the need for an amendment must be apparent in light of the evidence that has been introduced during the trial, and the amendment will not be allowed unless the evidence already produced supports the amendment. *See id. See also Bailey v. City of Decatur,* 49 Ill.App.3d 751, 364 N.E.2d 613, 616, 7 Ill.Dec. 452 (4th Dist. 1977).

What is more, some authority suggests that a motion to amend made after trial has begun should not be granted if the amendment involves matters of which the moving party had full knowledge at the time that the original pleadings were filed and there is no excuse for failing to raise those matters in the original pleading. *In re Liquidation of Inter-American Insurance Company of Illinois,* 329 Ill.App.3d 606, 768 N.E.2d 182, 193, 263 Ill.Dec. 422 (1st Dist. 2002).

VI. [10.9] MOTION FOR JUDGMENT IN NONJURY CASES

Section 2-1110 of the Code of Civil Procedure governs motions for judgment in nonjury cases. It provides:

> **In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a**

> **judgment dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived.** 735 ILCS 5/2-1110.

In a nonjury case, a motion for judgment may be made by a defendant at the close of the plaintiff's evidence. The standard for granting such a motion is more relaxed than the standard that applies to a motion for a directed verdict in a jury case because the court need not defer to a jury as the finder of fact.

Pursuant to this section, in a nonjury case, the court effectively may decide the case, and if it concludes that the plaintiff has not carried his or her burden of proof, it may terminate the case and grant judgment in the defendant's favor. In a nonjury case, the judge is the trier of fact and has the duty to pass on the credibility of the witnesses and to consider the weight and quality of the evidence. *See City of Evanston v. Ridgeview House, Inc.*, 64 Ill.2d 40, 349 N.E.2d 399, 408 (1976); *Vitacco v. Eckberg*, 271 Ill.App.3d 408, 648 N.E.2d 1010, 1012, 208 Ill.Dec. 88 (1st Dist. 1995). In deciding the motion, the judge has the responsibility to consider all the evidence, including any evidence that is favorable to the moving party. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill.App.3d 163, 773 N.E.2d 1155, 1158 – 1159, 266 Ill.Dec. 85 (1st Dist. 2002).

If the court denies the defendant's motion for judgment and the defendant then proceeds with his or her case-in-chief, the defendant waives any objection to the trial court's ruling and cannot challenge it on appeal. *Pancoe v. Singh*, 376 Ill.App.3d 900, 876 N.E.2d 288, 296, 315 Ill.Dec. 288 (1st Dist. 2007); *Evans & Associates, Inc. v. Dyer*, 246 Ill.App.3d 231, 615 N.E.2d 770, 775, 185 Ill.Dec. 900 (2d Dist. 1993).

When an appeal is taken from an order granting judgment for the defendant at the close of the plaintiff's case, the reviewing court will not reverse the trial court's decision unless it is contrary to the manifest weight of the evidence. *City of Evanston*, *supra*, 349 N.E.2d at 408; *Development Management Group, Inc. v. Interstate Realty, Inc.*, 61 Ill.App.3d 155, 377 N.E.2d 1107, 1111, 18 Ill.Dec. 471 (1st Dist. 1978).

VII. [10.10] MOTION FOR DIRECTED VERDICT IN JURY CASES

Section 2-1202 of the Code of Civil Procedure governs motions for directed verdict in jury cases. It provides:

> **If at the close of the evidence, and before the case is submitted to the jury, any party moves for a directed verdict the court may (1) grant the motion or (2) deny the motion or reserve its ruling thereon and submit the case to the jury. If the court denies the motion or reserves its ruling thereon, the motion is waived unless the request is renewed in the post-trial motion.** 735 ILCS 5/2-1202(a).

By its terms, the section allows motions for a directed verdict by any party. It recognizes, therefore, that motions for a directed verdict may be made by the defendant at the close of the

plaintiff's case and by both the plaintiff and the defendant at the close of all the evidence. Because the court defers to the jury as the finder of fact, the standards that apply to a motion for a directed verdict are more stringent than those that apply in nonjury cases.

A. [10.11] Directed Verdict Motions Generally

Section 2-1202 of the Code of Civil Procedure effectively encourages judges to deny motions for a directed verdict in jury cases by empowering the judge to conditionally deny the motion and reserve ruling on it until after the jury returns a verdict. The benefit of this approach is twofold. On the one hand, if the jury finds in favor of the moving party, the issues presented by the motion for a directed verdict become moot. On the other hand, if the jury finds for the nonmoving party, the moving party can renew the arguments in a posttrial motion for judgment notwithstanding the verdict. *See Compass Sales Corp. v. National Mineral Co.*, 321 Ill.App. 522, 53 N.E.2d 319, 321 – 322 (1st Dist. 1944).

In this regard, Illinois procedure is similar to the procedure under Federal Rule of Civil Procedure 50(b). *See Johnson v. New York, N.H. & H. R.*, 344 U.S. 48, 97 L.Ed. 77, 73 S.Ct. 125, 128 (1952). Unlike Fed.R.Civ.P. 50(b), however, §2-1202 does not require a defendant to move for judgment at the close of the plaintiff's case as a condition precedent to later moving for judgment notwithstanding the verdict. To the contrary, §2-1202(b) expressly authorizes the entry of judgment notwithstanding the verdict "even though no motion for directed verdict was made." 735 ILCS 5/2-1202(b).

B. [10.12] The Law on Directed Verdicts

In jury cases, a motion for a directed verdict is governed by the same legal standard that applies to a motion for judgment notwithstanding the verdict. In *Pedrick v. Peoria & Eastern R.R.*, 37 Ill.2d 494, 229 N.E.2d 504, 513 – 514 (1967), the Illinois Supreme Court established a uniform test that applies to such motions. It stated that a directed verdict should be

> **entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.** *Id.*

See also Sullivan v. Edward Hospital, 335 Ill.App.3d 265, 781 N.E.2d 649, 655, 269 Ill.Dec. 852 (2d Dist. 2002); *Hendrix v. Stepanek*, 331 Ill.App.3d 206, 771 N.E.2d 559, 568 – 569, 264 Ill.Dec. 855 (5th Dist. 2002); *Cherny v. Fuentes*, 271 Ill.App.3d 1071, 649 N.E.2d 519, 522, 208 Ill.Dec. 463 (1st Dist. 1995).

Even though the court is not supposed to "weigh" the evidence when ruling on a motion for a directed verdict, it nevertheless should conduct a "disciplined evaluation" of the relative strength of the evidence. *Williams v. Chicago Osteopathic Health Systems*, 274 Ill.App.3d 1039, 654 N.E.2d 613, 618, 211 Ill.Dec. 151 (1st Dist. 1995). Thus, as courts have recognized, the " 'presence of *some* evidence of a fact which when viewed alone may seem *substantial*, does not always, when viewed in the context of all of the evidence retain such *significance*,' thereby allowing the direction of a verdict." [Emphasis in original.] *Id.*, quoting *Pedrick, supra*, 229

N.E.2d at 510. Indeed, *Pedrick* "fully contemplates that trial courts are to decide when weak evidence has so faded in the strong light of all of the proof that only one verdict is possible of rendition." *Williams, supra,* 654 N.E.2d at 618, quoting *People v. Rosochacki,* 41 Ill.2d 483, 244 N.E.2d 136, 140 (1969). This comparative approach prevents the nonmovant from simply submitting a miniscule amount of evidence, supplemented by inferences and implications, to defeat the motion. Instead, the nonmoving party must provide enough proof so that the evidence does not overwhelmingly favor the moving party.

Courts are not uniform in their description of what constitutes an overwhelmingly favorable situation for the moving party. Some courts have held that the *Pedrick* test is met and a motion for a directed verdict should be granted if the plaintiff has introduced no evidence tending to prove the allegations of the complaint or has introduced only a "bare scintilla of evidence." *See In re Estate of Milligan,* 4 Ill.App.3d 38, 280 N.E.2d 244, 249 (5th Dist. 1972). Other courts, however, have said that "[a] directed verdict is appropriate where the plaintiff has not established a *prima facie* case." *Schiff v. Friberg,* 331 Ill.App.3d 643, 771 N.E.2d 517, 529, 264 Ill.Dec. 813 (1st Dist. 2002).

The *Pedrick* test gives the trial court considerable flexibility to decide issues on a motion for directed verdict. If the evidence meets the *Pedrick* standard, the court, for example, can determine the question of willful and wanton misconduct on a motion for directed verdict, which is normally a question of fact for determination by the jury. *Breck v. Cortez,* 141 Ill.App.3d 351, 490 N.E.2d 88, 93 – 94, 95 Ill.Dec. 615 (2d Dist. 1986).

If there is any substantial factual dispute that requires an assessment of the credibility of witnesses, however, the *Pedrick* test instructs that the trial court should not substitute its own judgment for that of the jury. *Pedrick, supra,* 229 N.E.2d at 513 – 514; *Connelly v. General Motors Corp.,* 184 Ill.App.3d 378, 540 N.E.2d 370, 375, 132 Ill.Dec. 630 (1st Dist. 1989). In such cases, the court should carefully preserve the constitutional right of the parties to a jury determination. *Pedrick, supra,* 229 N.E.2d at 510; *City of Mattoon, Illinois v. Mentzer,* 282 Ill.App.3d 628, 668 N.E.2d 601, 605, 218 Ill.Dec. 117 (4th Dist. 1996); *Chladek v. Albon,* 161 Ill.App.3d 884, 515 N.E.2d 191, 193, 113 Ill.Dec. 382 (1st Dist. 1987).

C. [10.13] Procedure for Motion for Directed Verdict

Under §2-1202 of the Code of Civil Procedure, either party may make a motion for a directed verdict at the close of the evidence, but only the defendant may make a motion at the close of the plaintiff's evidence. 735 ILCS 5/2-1202. Plaintiffs should be particularly aware of this possibility — especially if a defense witness is expected to provide important testimony for the plaintiff's case — because the plaintiff can rely only on evidence presented in his or her case-in-chief to defend against a motion for a directed verdict at the close of his or her evidence. *Friedman v. Safe Security Services, Inc.,* 328 Ill.App.3d 37, 765 N.E.2d 104, 116, 262 Ill.Dec. 278 (1st Dist. 2002). *See also Century-National Insurance Co. v. Tracy,* 316 Ill.App.3d 639, 737 N.E.2d 353, 358 – 359, 249 Ill.Dec. 963 (2d Dist. 2000).

In such a case, if the evidence necessary to defeat the motion was not actually introduced in the plaintiff's case-in-chief, a defendant's motion for a directed verdict can be granted even if the plaintiff obtained sufficient evidence to thwart the motion from a defense witness taken out of

order. *See Friedman, supra,* 765 N.E.2d at 116. If a party makes a motion for a directed verdict at the close of trial, however, the court must consider all of the evidence introduced by both sides in determining whether the evidence is sufficient to withstand the motion. *Anderson v. General Grinding Wheel Corp.*, 74 Ill.App.3d 270, 393 N.E.2d 9, 15 – 16, 30 Ill.Dec. 354 (1st Dist. 1979).

Although courts generally prefer that a motion for directed verdict be in writing, there is no such requirement. *Trillet v. Bachman,* 96 Ill.App.3d 477, 421 N.E.2d 580, 583, 51 Ill.Dec. 945 (3d Dist. 1981).

Consistent with S.Ct. Rule 240, when the court directs a verdict, it need not order the jury to return a particular verdict and submit a written and signed form. ("The order of the court granting a motion for a directed verdict is effective without any assent of the jury." *Id*.) Instead, the court may enter its own order and, if the ruling is in favor of the plaintiff on the issue of liability, give the jury only that form of the verdict that allows it to return a monetary award for the plaintiff.

D. [10.14] Waiver and Preservation for Purposes of Appellate Review

If a party fails to move for a directed verdict at the proper time, it waives the right to have the case taken from the jury. *See First National Bank of LaGrange v. Lowrey,* 375 Ill.App.3d 181, 872 N.E.2d 447, 468, 313 Ill.Dec. 464 (1st Dist. 2007). Failure to move for a directed verdict also waives the right to argue on appeal that the trial court erred by not entering a directed verdict on its own accord. *Gonzalez v. Prestress Engineering Corp.,* 194 Ill.App.3d 819, 551 N.E.2d 793, 798, 141 Ill.Dec. 606 (4th Dist. 1990). Moreover, a party must renew its objections in its posttrial motion to preserve them for appeal. *See Cohan v. Garretson,* 282 Ill.App.3d 248, 667 N.E.2d 1325, 1331, 217 Ill.Dec. 749 (1st Dist. 1996).

If the court grants a motion for a directed verdict, it preserves for review the question of whether the jury might reasonably have found for the party against whom the verdict was directed. *Mohn v. Posegate,* 184 Ill.2d 540, 705 N.E.2d 78, 80, 235 Ill.Dec. 465 (1998). A party against whom a verdict was directed does not need to file a posttrial motion. *Keen v. Davis,* 38 Ill.2d 280, 230 N.E.2d 859, 860 – 861 (1967); *Doe v. Dilling,* 371 Ill.App.3d 151, 861 N.E.2d 1052, 1063 – 1064, 308 Ill.Dec. 487 (1st Dist. 2006).

E. [10.15] Plaintiff's Strategy for Damages

If the plaintiff wants only the issue of damages to be submitted to the jury, he or she should consider moving for a directed verdict on the issue of liability. Of course, if the plaintiff neglects to make the motion and the jury finds no liability, the plaintiff cannot claim that the trial court erred in submitting the issue of liability to the jury. Nevertheless, the plaintiff in these circumstances may still challenge the adequacy of the damage award and seek a new trial on that issue alone. Such a motion is within the trial court's discretion to grant. *See Iacovelli v. First Security Trust & Savings Bank,* 202 Ill.App.3d 982, 560 N.E.2d 904, 905, 148 Ill.Dec. 307 (1st Dist. 1990); *Costa v. Keystone Steel & Wire Co.,* 267 Ill.App.3d 683, 642 N.E.2d 908, 913, 205 Ill.Dec. 43 (3d Dist. 1994).

VIII. [10.16] CONCLUSION

A case can be won or lost at both the trial and appellate levels by the decisions counsel makes with respect to motions at the close of the evidence. Indeed, a party can obtain significant tactical advantages by making the appropriate motion. Accordingly, counsel is well-advised to devote the necessary time and thought to the motions that can be brought by all parties once the presentation of evidence is complete.

IX. [10.17] APPENDIX — FORMS

The templates in §§10.18 – 10.24 below are intended to provide only basic guidance on the format that a motion at the close of evidence should take. Some courts may require additional detail beyond that contained in the templates before they accept and/or grant the motion. Further investigation into these requirements is strongly recommended before any motion is filed.

A. [10.18] Motion for a Continuance

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

B. [10.19] Motion for a Directed Verdict by Plaintiff

The motion for directed verdict for the plaintiff can be simpler than for the defendant. The following form may be appropriate for an ordinary negligence case.

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

C. [10.20] Order for Plaintiff's Directed Verdict

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

D. [10.21] Verdict in Case in Which Plaintiff Has Received a Directed Verdict

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

E. [10.22] Motion for Directed Verdict by Defendant (Long Form)

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

F. [10.23] Motion for Directed Verdict by Defendant (Short Form)

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G. [10.24] Order for Defendant's Directed Verdict

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