

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**NANCY B. BISSELL AND** )  
**ROBERT G. BISSELL, M.D.,** )  
 )  
                  **PLAINTIFFS** )  
 )  
**v.** )  
 )  
**THE BREAKERS BY-THE-SEA,** )  
**R & E ASSOCIATES, INC. AND** )  
**PAUL PROVENCHER,** )  
 )  
                  **DEFENDANTS** )

**CIVIL No. 96-191-P-H**

**ORDER ON PLAINTIFFS’ MOTION FOR NEW TRIAL**

In this slip and fall case, where the plaintiff Nancy Bissell was injured allegedly by slipping on the stray end of a cardboard box from a condominium renovation project, the jury rendered a verdict in favor of the defendants (the property owner/manager and the contractor), finding no liability. The plaintiffs have now moved for a new trial, claiming prejudice from the opening and closing statements of one defendant’s lawyer, my denial of a requested jury instruction and the exclusion of a particular item of evidence. The defendants resist the motion, claiming that there was no error and that if there was error, it was harmless or was waived. One defendant also argues that it should not be prejudiced by any alleged misstatements by the other defendants’ lawyer, so that if any new trial is granted, it should be only as to the defendants whose lawyer caused the error. I find no error in the

opening statement and no error in the denied jury instruction. The closing argument was improper, objection was properly made, but was ultimately waived. No error occurred in the exclusion of evidence. The motion for new trial is, therefore, **DENIED**.

### A. OPENING STATEMENTS

In her opening statement, the lawyer for the defendants The Breakers By-the-Sea and R & E Associates, Inc. (property owner and manager) stated:

Folks, no one saw the accident. No one heard the accident. No one came on the accident scene while Mrs. Bissell was still there. Mrs. Bissell was the only person around, and she does not know what happened. Mrs. Bissell never saw the box top that you've heard a lot about today. Mrs. Bissell does not know why she fell.

Now that box top theory makes for an interesting story, but that story shouldn't be confused with evidence. Let me tell you what I mean by that. There is evidence that Mrs. Bissell had on tie shoes that morning. Maybe she tripped over her shoe laces, but that's not evidence.

There is evidence that she was not feeling well that day, hadn't gone to go get lunch, that's evidence that maybe she was lightheaded and just lost her footing. Maybe that's what happened, but that's not evidence.<sup>1</sup> There is evidence in some of the photographs that you're going to see that there was an oak leaf on top of this infamous box top. That's the evidence.

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<sup>1</sup> I believe the transcript probably should read: "There is evidence that she was not feeling well that day, hadn't gone to go get lunch, that's evidence. Maybe she was lightheaded and just lost her footing, maybe that's what happened, but that's not evidence." In other words, the defendant's lawyer was distinguishing direct evidence from inference in this series of parallels. Her suggestion that inference does not qualify as "evidence" may be debatable, but that was not the challenge and the point she was making was clear enough.

Maybe she slipped on the oak leaf. That's not evidence, but maybe that's what happened.

Following opening arguments, the lawyer for the plaintiffs Nancy and Robert Bissell objected. At sidebar he argued that the defendants' lawyer was improperly inviting the jury to speculate about defense theories for which there would be no evidence, and could not escape her professional obligation (to direct her remarks to items for which she had a good faith belief that evidence did exist) by merely calling those possibilities "not evidence." The defendants' lawyer represented that there would be appropriate evidence.

A trial judge is obviously at a disadvantage in ruling on objections to openings where the objections are based on lack of evidence, because he has not yet heard the evidence and he must therefore rely on the lawyers' professional representations as to what evidence they expect to produce. What I did with the objection, since I could not yet rule that there was no evidence, was to remind the jury that lawyers' opening statements are not evidence and that they should listen to the evidence itself as it came in.

THE COURT: . . . . What you've heard so far, ladies and gentlemen, are the lawyers' opening statements. Lawyers have told you things about what they think the evidence will be, what it will not be. Basically, I want you to ignore that now and listen to what the evidence is in terms of what you hear from the witness stand and in terms of what you see on the screen in front of you. That's what matters as opposed to what the predictions are as to what the evidence will be or will not be.

In this case, as the defendants' lawyer represented, there ultimately was evidence in the medical records of possible syncope (temporary unconsciousness) and Mrs. Bissell testified

that she wore shoes with shoelaces the day of the accident. Although there was no affirmative evidence that either of these items actually caused the fall, the defendants do not bear the burden of proof on causation. It was the plaintiffs' burden to prove by a preponderance of the evidence that the box top caused Mrs. Bissell's fall. For that they had to have competent evidence, direct or circumstantial. The defendants, in contrast, had no burden to prove what caused the fall (this was not a *res ipsa loquitur* case). They did have the right, however, to cast aspersions on the plaintiffs' explanation. The suggestion that other factors were possible would not be sufficient to meet a burden of proof, but was appropriate in trying to shake the jury's confidence in the explanation of the plaintiffs (the party with the burden of proof). There is no basis for a new trial here.

#### **B. JURY INSTRUCTIONS**

There was no error in my ruling denying the plaintiffs' jury instruction concerning the role of construction materials other than the box top. The plaintiffs litigated the case throughout summary judgment and trial on the premise that the box top caused the accident. It was too late to raise a new theory of what caused the accident at the charge conference.

### C. CLOSING ARGUMENTS

In her closing argument, the lawyer for the property owner and the manager urged the jury to conclude that the Bissells had manufactured evidence. She started by stating that was not her purpose (“Did the plaintiffs plant the box top, or manufacture some of those photographs? We aren’t saying that.”), but then proceeded to urge just such a conclusion (“[I]t could have happened. That might explain . . . . That might explain . . . . [M]anufacturing the evidence might explain . . . .”). This was a dangerous strategy that easily could have backfired if it offended the jury, but it was not improper. Although caselaw generally prohibits a lawyer from saying that a witness lied—a testimonial and inflammatory statement by the lawyer, see United States v. Rodriguez-Estrada, 877 F.2d 153, 158-59 (1st Cir. 1989); United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987)—it does not prevent a lawyer from urging the jury to reach such a conclusion based upon the evidence. See United States v. Grabiec, 96 F.3d 549, 550 (1st Cir. 1996) (stating that counsel may not express personal beliefs, but may argue for certain inferences from the evidence); Polansky v. CNA Ins. Co., 852 F.2d 626, 627-28 (1st Cir. 1988) (same); United States v. Cresta, 825 F.2d 538, 555 (1st Cir. 1987) (same), cert. denied, 486 U.S. 1042 (1988). Urging the jury to conclude that a party or witnesses (not their lawyer)<sup>2</sup> manufactured evidence is no different. The circumstances surrounding the taking of the photographs and the conflicting

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<sup>2</sup> The photographs were taken within a few days after the accident, and there was no suggestion that a lawyer had been engaged at that time.

testimony from other parties as to the actual circumstances at the site of the accident here provided an adequate basis for urging the jury to reach such a conclusion from the direct evidence.<sup>3</sup>

At one point, however, the defendants' lawyer turned her attention to the plaintiffs' lawyer. She read from a transcript the following excerpt from his opening statement:

Now on Tortola where the Bissells live, it's really not a thriving medical community. I think you could say Dr. Bissell did not intend to be a doctor any more. It's not what he had in mind when he married Nancy. But he hunkered down when this [accident] happened, he took his [medical] boards again at his age, passed them and works part-time on St. Thomas taking a lengthy commute each day.<sup>4</sup>

She then referred to Dr. Bissell's cross-examination where he admitted that he had actually taken his medical boards six months *before* the accident and had obtained his medical license two months *before* the accident. Perhaps mistakenly hearing what I expected to hear, I interpreted this part of her argument as permissible comment on the failure of the plaintiffs' case to live up to the glowing picture painted in their lawyer's opening statement.<sup>5</sup> After all,

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<sup>3</sup> I am not agreeing that evidence was manufactured, but only that there was an adequate evidentiary basis upon which to urge the jury that such was a reasonable inference.

<sup>4</sup> I have added the bracketed insertions. Contrary to the plaintiffs' argument, the defendants' lawyer did not mischaracterize the opening statement. The plaintiffs' argument that Dr. Bissell's timing had been established in discovery is not relevant here; what matters is what was said at trial.

<sup>5</sup> I had sustained the plaintiffs' objection to cross-examining Dr. Bissell on the contents of his lawyer's opening. That was improper cross-examination, but it does not follow from that ruling that it is improper closing argument to draw the jury's attention to the failures of a plaintiff's case to live up to its promise as outlined by a lawyer in opening.

the tactic of trying to discredit a case because the opening statement promised too much is one of the most frequently used devices judges see. It usually is not particularly effective, but it is not improper. When the plaintiffs' lawyer stood to object ("Excuse me, Your Honor, I hate to object, but my—if I made a mistake—"), I first stopped him from making a speaking objection in front of the jury during his opponent's closing argument ("Counsel"). He then requested to be seen at sidebar and I responded "At the end of the closing." In my mind, caught in an embarrassing overstatement, he was trying to dilute the strength of the defendants' closing by interrupting it. At the end of the defendants' closing, he went immediately to the podium to rebut. I reminded him that I was willing to hear him at sidebar then, but he explicitly declined. I concluded that either he had realized that the argument was not improper, or he had decided it might backfire on the defendants and tactically that he could deal with it better on rebuttal than through a judicial curative instruction. Now, however, in his motion for new trial, he argues that this part of the closing was so outrageous that it required an immediate curative instruction by the judge *sua sponte* and that failure to immediately instruct the jury, coupled with permitting the argument about manufacturing evidence, created incurable error that demands a new trial.

Curiously, none of the lawyers ordered a transcript of this closing argument to support their respective arguments about its propriety or impropriety, but argued this new trial motion apparently from memory. Distrustful of my own memory and confronted with passionately opposing viewpoints, I directed the court reporter to provide a certified transcript of the

portion in question. I have italicized language that apparently escaped me at the time, but which I now find troubling:

Let's talk about credibility for a minute. It was pretty obvious that Bob and Estelle Wellman [representatives of the corporate defendants property owner/manager] were upset about some of the questions they'd been asked. Bob and Estelle Wellman have worked hard all their lives. They're good people, they're careful people, they take pride in what they do. There is no credible evidence that they did anything wrong. You know, the plaintiffs may have technically sued R & E Associates and Breakers By-the-Sea condominium, but they're pointing the finger at Bob and Estelle Wellman and Bob and Estelle don't like that one bit.

That brings me to another question of credibility. Did the plaintiffs plant the box top, or manufacture some of those photographs? We aren't saying that. But it could have happened. That might explain why there is a photo of debris only in front of the second floor door when it is undisputed that Mr. Provencher was working on the third floor. That might explain why Heather Bissell was so confused about which photographs she took and which ones she didn't take. I think she said she took four to 17. And then she didn't, then she did, then she didn't. Now I think the status of the record is that she's not sure who took 0 through 3, but it wasn't her.

You know, manufacturing the evidence might explain this bionic box top and how it magically appeared just moments before the accident when Heather saw it but decided not to pick it up. And then this bionic box top vanishes and Paul Provencher doesn't see it Monday or Tuesday, Bob Wellman doesn't see it on Wednesday. And Heather Bissell doesn't see it on Wednesday night. But then, the magical box top reappears on Thursday, just in time for there to be—for it to be there when the plaintiffs came back from Massachusetts. So they get a great picture of it, and finally pick it up.

*One more thought on credibility. In his opening statement, Attorney Garmey stated the following, “Now on Tortola where the Bissells live, it’s really not a thriving medical community. I think you could say Dr. Bissell did not intend to be a doctor any more. It’s not what he had in mind when he married Nancy. But he hunkered down when this happened, he took his boards again at his age, passed them and works part-time on St. Thomas taking a lengthy commute each day.”*

Folks, we know now that Dr. Bissell took his boards six months before the accident. We know now that Dr. Bissell was licensed to practice medicine two months before the accident. Not after.

*Now everybody makes mistakes. And if you find that Mr. Garmey made a mistake, don’t hold it against him. But he made an observation in those remarks that you should consider in evaluating the credibility of the witnesses in this case. Dr. Bissell told you under oath in response to Mr. O’Neil’s questions that he did not plan on going to Tortola to be a doctor.*

MR. GARMEY: Excuse me, Your Honor, I hate to object, but my—if I made a mistake—

THE COURT: Counsel.

MR. GARMEY: May we be seen at sidebar then?

THE COURT: At the end of the closing.

MS. GAYTHWAITE: *Are you really supposed to believe that this man in his mid 50s would have quote, hunkered down<sup>6</sup> and taken those boards if he did not intend to practice down there? Are you really supposed to believe that he claimed all those thousands of dollars in relocation expenses on his income tax returns if he didn’t plan to relocate his practice down to the Virgin Islands? If Dr. Bissell was not truthful and*

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<sup>6</sup> The quotation is from the plaintiffs’ lawyer’s opening statement.

forthcoming when he testified under oath that he was not intending to be a doctor in Tortola, if he was not truthful about that part of his testimony, what other parts of his testimony was he not truthful and forthcoming about?

Whatever the defendants' lawyer actually meant in the comments I have highlighted (she states that she intended no attack on the plaintiffs' lawyer himself), they are reasonably subject to the following interpretation:

The plaintiffs' lawyer's opening statement—that Dr. Bissell before the accident did not intend to be a doctor any more—has been proven wrong. If he just made an innocent mistake in recounting the sequence of the medical boards and the accident, don't hold that against the plaintiffs' case. But if it wasn't an innocent mistake, you the jury should consider what this lawyer said in his opening statement in evaluating the credibility of the witnesses he called and should question the claims of this lawyer, as well as the testimony he presented.

If the jury gave it that interpretation, then it was undoubtedly improper argument. What a lawyer says in openings and closings, as judges instruct juries *ad nauseam*, is not evidence. It therefore cannot bear upon the credibility of witnesses, which can be determined only from the evidence.<sup>7</sup>

It is obvious on reading the transcript that this was the gist of the plaintiffs' contemporaneous objection; the problem was that I had missed the import of what the defendants' lawyer had just said. As a result, error occurred when I refused to recognize the contemporaneous objection and correct the defendants' lawyer's improper argument. Two

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<sup>7</sup> Another possible interpretation—that the opening statement showed that Dr. Bissell had lied to his own lawyer—is also unacceptable. There was no evidence at trial as to what Dr. Bissell told his lawyer.

issues remain. Was the error harmless? See Fed. R. Civ. P. 61. If not, did the plaintiffs waive the error by rejecting the offered sidebar at the end of the defendants' closing?

So far as harmless error is concerned, credibility was the crux of the case. The defendants' testimony and arguments portrayed conditions on the construction renovation site that differed dramatically from what the plaintiffs recounted. The plaintiffs' evidence presented a negligently created mess (of which the box top was part) whereas all the defendants testified to inspections and cleanliness and no wayward box top. Therefore, to implicate, even unintentionally, the plaintiffs' lawyer on the overall issue of credibility—particularly in a context where fabrication of evidence had just been argued—could have been a telling blow, urging the jury to conclude that the plaintiffs' case was flawed by distortion and half-truth from the outset. I cannot say that this was harmless. See Ahern v. Scholz, 85 F.3d 774, 786 (1st Cir. 1996) (if judgment is in equipoise, error is not harmless).<sup>8</sup>

The plaintiffs' motion for new trial does not address the issue of waiver, except perhaps implicitly in the argument that the reference to fabrication of evidence “was so outrageous as to constitute plain error incapable of remediation.” Mem. at 9.<sup>9</sup> Certainly the

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<sup>8</sup> Indeed, during deliberations the jury asked to see a blow-up of two photographs of the box top, further indication that the charge of manufactured evidence was not taken lightly.

<sup>9</sup> The plaintiffs seem to have the sequence of the defendants' closing argument reversed. Their legal memorandum states:

Plaintiffs' counsel can only hope that the Court was as shocked as the Plaintiffs and their counsel when the suggestion was *later* made that crucial evidence had been “manufactured.” The Court during the course of these proceedings had on a few occasions

plaintiffs did not initially waive their objection. Instead, their lawyer stood to object, but I interrupted him and prevented him from approaching sidebar to be heard. What is the consequence of his subsequent decision not to follow up when the defendants' lawyer finished her closing? (THE COURT: "Do you still wish to approach, counsel? Excuse me, do you wish to approach?" MR. GARMEY: "Yes, I do. No, I don't.") To perform the waiver analysis, I assume that, had he approached, the plaintiffs' lawyer might have persuaded me that the defendants' closing had indeed been improper and thereby obtained from me a curative instruction at the end of the defendants' closing. Such a curative instruction presumably would have said something to the effect that the lawyer's opening statement was to have no role in the jury's evaluation of a witness's credibility and to remember that openings are not evidence but only good faith predictions. That is what the

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sua sponte and quite properly ordered Plaintiffs' counsel not to lead his own witnesses. Having only moments *before* overruled counsel's objection to the suggestion he had lied in his opening, the Court should have spared counsel *further* humiliation in front of this jury. The fact is, however, that this portion of counsel's argument was so outrageous as to constitute plain error incapable of remediation. As the trial judge said in O'Rear, "you can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good." 554 F.2d [1304, 1309 (5th Cir. 1977)]. . . . As in O'Rear, the misleading and false suggestion of fabrication of evidence, which was greatly enhanced, if not made possible, by the exclusion of Heather Bissell's testimony concerning her slip on cardboard moments before Plaintiff's injury, produced a "warped version of the issues as received by the jury . . . and a judgment based on that kind of a twisted trial must be set aside. . ." O'Rear at 1309 [sic].

Mem. at 9 (emphasis added). In fact, the reference to manufactured evidence came first, was not directed at the plaintiffs' lawyer, was not improper, and provoked no objection. The references to the plaintiffs' lawyer came second.

plaintiffs waived. I must decide, therefore, whether an instruction at the end of the closings could have cured what had been said earlier.

I conclude that an instruction could have been devised to cure the error. The objectionable part of the argument was involving the plaintiffs' lawyer on the issue of witness credibility. A proper curative instruction would have been simple for the jury to follow: forget about the opening statements in evaluating witness credibility, and focus solely on the evidence as it actually came in. Indeed, Dr. Bissell himself testified about the correct sequence of boards and accident when asked on cross-examination, so his credibility on that subject was not even involved. The real issue was whether he intended, before the accident, to practice medicine on Tortola. On that, there was direct testimony by Dr. Bissell (that he did not intend to be a doctor) to which the defendants' lawyer had turned in her closing argument just before the plaintiffs' lawyer objected, and to which she returned in her second and third sentences after the objection.

In sum, I offered the plaintiffs' lawyer an opportunity to argue his objection at sidebar at the end of the defendants' closing. He made a tactical decision to reject that opportunity, relying instead on a passionate argument to the jury inviting them essentially to make the case rise or fall on this issue. The judgment that rebuttal was a better device than any instruction from a judge may well have been correct (and the defendants' verdict does not undercut that judgment, for the verdict may well have been rendered on different grounds). In any event, it removes the basis for a new trial.

#### **D. HEATHER BISSELL'S PRIOR SLIP**

In a motion *in limine*, the defendants R& E Associates and The Breakers By-the-Sea moved to exclude the box top itself (which the plaintiffs had preserved) together with any evidence that Heather Bissell, the Bissells' daughter, had allegedly slipped on it (without falling) earlier the morning of her mother's accident. I denied the motion so far as admissibility of the box top was concerned (*i.e.*, the box top came in), but stated that I would probably exclude evidence of Heather's slip on Rule 403 grounds. See Endorsement of Jan. 31, 1997. I ultimately did so at sidebar when the plaintiffs proffered it again at the end of Heather's (the first witness's) testimony. As a result, the jury heard Heather testify that she saw the box top in the relevant location earlier the morning of her mother's accident and that she saw it again (though slightly moved) after her mother's accident. In addition, the jury had the box top itself to examine as well as a number of photographs of its location taken the day of the accident and a few days later. The jury did not, however, hear testimony that Heather had slipped earlier on the same box top. I excluded that part of the evidence under Rule 403 on the conventional reasoning that the jury might too easily infer that because Heather had slipped on the box top, her mother must have as well, and thereby fail to examine the actual evidence (or lack thereof) concerning the circumstances of Mrs. Bissell's fall. See Cameron v. Otto Bock Orthopedic Industry, Inc., 43 F.3d 14, 16-17 (1st Cir. 1994); McKinnon v. Skil Corp., 638 F.2d 270, 277 (1st Cir. 1981).

The plaintiffs argue that Heather Bissell's prior slip was relevant and admissible on four grounds: (1) to show (and rebut defense arguments about) the cause of Mrs. Bissell's fall; (2) to show that the box top was difficult to see; (3) to show the jury why Heather Bissell had noticed the box top's location and its move and took pictures of it; and (4) to rebut the assertion of manufactured evidence by demonstrating the reason for her ability to identify the box top.

First, I summarily reject argument (2). Nothing prevented Heather from testifying about the difficulty of seeing the box top without referring to her own slip.

Heather's slip is not particularly probative on arguments (3) and (4). The issue was whether the box top was there at all, and the defendants made no issue of why Heather might or might have not noticed it as she left the premises with her father earlier the morning of her mother's accident and had been able to identify it.

In retrospect, argument (1) may have more merit than I initially accorded it at the end of Heather's testimony before I had seen the exhibits and heard the witnesses other than Heather and the closing arguments. Heather's slip, if believed, could have demonstrated that the cardboard was a slippery substance that could have caused Mrs. Bissell's feet to seem simply to go out from under her, as she later testified. Although the jury had the box top in the jury room, jury experiments to test the coefficient of friction cannot be presumed (indeed, juries are cautioned not to do research on their own and the jury room is carpeted). Causation was an important issue, with the defendants suggesting, for example, that Mrs. Bissell might

have had a brief fainting spell or tripped over her own feet. Heather's slip, therefore, could be probative of the reasonableness of the plaintiffs' theory of how the accident occurred, since it occurred in the same place very close in time to Mrs. Bissell's slip. See McCormick on Evidence § 200 (4th ed. 1992). The risks of admitting evidence about Heather's slip, in retrospect, were not severe. At trial, it was undisputed that Mrs. Bissell did not know what caused her to fall and that there were no observers. The defendants, therefore, were able to focus the jury's attention on that absence of proof and, if testimony about Heather's slip had been admitted, could have urged the dangers of ungrounded speculation by highlighting the fact that Heather's slip, if it occurred, did not prove that her mother actually suffered the same fate.

By the same token, my ruling excluding evidence of Heather's slip during her testimony is also supportable under Fed. R. Evid. 403. I did allow evidence about the box top's dangerous location and the defendants did not argue that this small piece of smooth cardboard would *not* slip on the pavement. Thus, the fact of Heather's slip was not essential to the plaintiffs' circumstantial evidence case. Instead, the focus seemed to be on whether the box top really existed. There was some risk, moreover, that circumstances of Heather's slip might automatically be attributed to Mrs. Bissell's fall—where, without an independent memory by Mrs. Bissell, those circumstances would be difficult to subject to cross-examination.<sup>10</sup>

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<sup>10</sup> There is no complete transcript and I therefore do not rely on my recollection that the plaintiffs did not re-proffer testimony about Heather's slip at a later point in the trial when the nature

I conclude that, in fact, both admission and exclusion of Heather's slip were supportable conclusions under the balancing analysis of Fed. R. Evid. 403—neither ruling would be an abuse of discretion. Without error, there is no ground for a new trial.

**E. CONCLUSION**

The motion for a new trial is accordingly **DENIED**.

**SO ORDERED.**

**DATED THIS 10<sup>TH</sup> DAY OF JUNE, 1997.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**

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of the controversy over Mrs. Bissell's slip was manifest on the record (essentially after Mrs. Bissell's testimony).