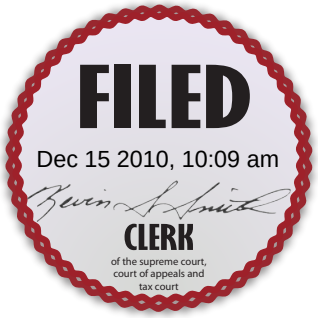

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IN THE
COURT OF APPEALS OF INDIANA

HUMMER TRANSPORTATION, INC. and 1039012 ONTARIO, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 64A04-1002-CT-72
KIMBERLY SPOA-HARTY and JESSE HARTY,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0606-CT-4748

December 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Hummer Transportation, Inc. (Hummer) and 1039012 Ontario, Inc. (Ontario) appeal from a jury verdict and judgment on the issue of damages in favor of Kimberly Spoa-Harty (Kim) and Jesse Harty (collectively, the Plaintiffs) in a personal injury action initiated against Hummer, Ontario, and others. Hummer and Ontario raise the following restated issues for our review:

1. Did the trial court abuse its discretion by entering a default judgment on the issue of liability against Hummer and Ontario as a discovery sanction?

2. Did the trial court abuse its discretion by disallowing the admission of medical records at the trial on damages?

3. Did the trial court abuse its discretion by the manner in which it ruled on various statements of Plaintiffs' counsel made during closing argument?

We affirm.

On February 17, 2006, Inderjeet Sekhon (Sekhon) was operating a tractor-trailer westbound on I-94 in Portage, Indiana, when his truck collided with Kim's Chrysler Sebring, in which she was also travelling westbound. The Plaintiffs filed a complaint against Hummer, Ontario, and others for the personal injuries Kim sustained as a result of the collision. The Plaintiffs alleged that Sekhon was operating the tractor-trailer on behalf of Hummer and Ontario at the time of the collision and that they were vicariously liable for Sekhon's negligence. The Plaintiffs also alleged that Hummer and Ontario were negligent in failing to exercise reasonable care in the inspection, maintenance, and repair of the tractor-trailer and in the hiring, training, retention, and supervision of Sekhon, their driver. Hummer

and Ontario denied negligence in their answer to the complaint and asserted numerous affirmative defenses.

On November 5, 2007, the Plaintiffs filed a motion to default Hummer and Ontario on the issue of liability as a sanction for alleged non-compliance with discovery. Hummer and Ontario responded to the motion thirty days after the date the response was due. Nonetheless, a hearing was held, the trial court took the matter under advisement, and ultimately granted the motion to default Hummer and Ontario on the issue of liability as a sanction for their non-compliance with discovery. Hummer and Ontario moved to have the default judgments set aside. After a hearing on the matter, the trial court denied the motion.

A jury trial was scheduled on the issue of damages only and all other defendants were voluntarily dismissed. Ultimately, the jury entered a verdict in favor of Kim in the amount of $4,270,000 and for her husband in the amount of $950,000, and the trial court entered judgment on the verdicts. Hummer and Ontario filed a motion to correct error, which was deemed denied by operation of Ind. Trial Rule 53.3. Hummer and Ontario now appeal. Additional facts will be supplied.

1.

Hummer and Ontario claim that the trial court abused its discretion by granting the Plaintiffs' request for a default judgment on the issue of liability against Hummer and Ontario as a discovery sanction.

On November 22, 2006, the Plaintiffs had given Hummer notice of an Ind. Trial Rule 30(B)(6)[1] deposition of Hummer scheduled for January 18, 2007, and served interrogatories and a request for production on Hummer. Hummer did not respond to the discovery requests and continued its deposition. The Plaintiffs gave Hummer a second notice of deposition on November 7, 2007, and Hummer again continued the deposition. The Plaintiffs then requested dates for Hummer's deposition, but Hummer failed to provide the information. The Plaintiffs sent correspondence to Hummer's counsel asking for responses to their discovery requests, noting Hummer's refusal to appear for deposition, and advising Hummer that the Plaintiffs would seek court intervention if Hummer again failed to cooperate.

Hummer failed to answer the outstanding discovery requests and did not appear for deposition. Instead, Hummer's counsel claimed that Hummer[2] was no longer in business and that it had no involvement with the cargo being carried at the time of the accident.

The Plaintiffs scheduled Ontario's T.R. 30(B)(6) deposition for August 23, 2007 in Canada and identified 36 areas of inquiry. Prior to the deposition, the Plaintiffs asked who would be produced as Ontario's T.R. 30(B)(6) corporate representatives. They were advised that Ontario would be appearing by Amrik Bal, Rajneesh Walia, and Sartaj Johel. The

[1] Ind. Trial Rule 30(B)(6) provides in relevant part as follows:

> A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf.

[2] Ontario was the legal name of the corporation, which did business as Hummer Transportation, and was located in Canada. Ontario had interstate motor carrier authority in both Canada and the United States and was in the business of transporting freight. Ontario leased its tractor trailers from GE Canada Equipment

depositions began as planned, but only Bal appeared. Throughout his testimony Bal denied having knowledge of various matters previously identified in the deposition notice and claimed that Walia and Johel were the individuals who knew the answers to the questions.[3] In particular, Bal testified that Walia had knowledge of whether Ontario's operating authority had been revoked, Walia and Johel were knowledgeable about safety matters, and that Walia hired and fired drivers such as Sekhon. Bal further testified that Walia handled Ontario's accident register and safety training. Walia or Johel were identified as having information about maintenance records for the tractor-trailer involved in the crash. Neither Walia or Johel were produced for deposition. The safety manual that the Plaintiffs had requested prior to the deposition was produced later on September 17, 2007.

At the hearing on the Plaintiffs' motion for default judgment, counsel for Hummer argued that default was inappropriate as a sanction because Hummer was no longer in existence. Records from the California Secretary of State reflected that Hummer was in fact in existence, and an active corporation operated by Anil Kumar, the individual with whom Bal entered into a lease agreement for the use of Ontario's tractor-trailers. The Federal Motor Carrier Safety Administration had revoked the motor carrier registration and authority of Hummer involuntarily on October 2, 2006. Thus, counsel for Hummer argued that the

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Finance. Hummer is a California corporation in the business of transporting freight and leased tractor trailers from Ontario. Hummer and Ontario shared the profits on the loads being transported.

[3] Johel, who was the chief financial officer and corporate secretary for Hummer and was the safety director for Ontario, terminated his employment with Ontario days before the deposition was to take place. Ontario indicated in its response to the motion for default judgment that Ontario out-sourced its safety and driver training to a business organization known as Trux Solutions. Although designated by Ontario as one of their T.R. 30(B)(6) corporate representatives, Ontario later argued that Walia was an employee of Trux Solutions, and thus was beyond Ontario's control for purposes of producing him for deposition.

revocation of the motor carrier registration and authority in effect rendered Hummer non-existent.

Ontario argued that default was inappropriate because it had supplied a corporate representative for deposition and the other designated representatives were no longer under its authority or control for purposes of producing them for deposition.

After taking the matter under advisement, the trial court granted the Plaintiffs' motion for default judgment on the issue of liability as to Hummer and Ontario. This ruling was unsuccessfully challenged in a motion to set aside the default judgments and is challenged now on appeal.

"[A] trial court enjoys broad discretion in determining the appropriate sanctions for a party's failure to comply with discovery orders." *Smith v. Smith*, 854 N.E.2d 1, 4 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is against the logic and natural inferences to be drawn from the facts of the case. *Smith v. Smith*, 854 N.E.2d 1. Because of the fact-sensitive nature of discovery issues, a trial court's ruling is given a strong presumption of correctness. *Id*. "Absent clear error and resulting prejudice, the trial court's determinations with respect to violations and sanctions should not be overturned." *Id*. at 4-5.

A trial court may impose various sanctions for discovery violations, including an award of costs and attorney fees, exclusion of evidence, dismissing the action, or rendering a judgment by default. *Nwannunu v. Weichman & Associates, P.C.*, 770 N.E.2d 871 (Ind. Ct. App. 2002) (citing Ind. Trial Rule 37(B)(2)). A trial court is not required to impose lesser sanctions before applying the ultimate sanction of dismissal or default judgment. *Id*.

The rules of discovery are designed to "allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement." *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 399 (Ind. Ct. App. 1997). Although discovery is intended to require "little, if any, supervision or assistance by the trial court," when the goals of this system break down, Ind. Trial Rule 37 provides the trial court with tools to enforce compliance. *Id.* T. R. 37(B)(2) permits a trial court to sanction litigants for their failure to comply with discovery orders. The rule provides, in pertinent part, as follows:

> If a party or an officer, director, or managing agent of a party or an organization ... fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * * * *
>
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Here, Hummer and Ontario argued that they should not be sanctioned for non-compliance with discovery because they had done all they could under the circumstances. Neither entity requested additional time in which to comply with the discovery requests in lieu of default on the issue of liability. Faced with the history of the discovery process in this situation and Hummer and Ontario's insistence that they had complied to the best of their ability, the trial court was left with little choice but to find that the sanction of default was necessary. Hummer and Ontario had answered the complaint and asserted affirmative

defenses, but had not provided the Plaintiffs with information essential to litigation of the issues.

While we have acknowledged that the opportunity to be heard in court is a litigant's most precious right, one that should be only sparingly denied, we also have acknowledged that we will not condone a disregard for a trial court's orders. *Prime Mort. USA, Inc. v. Nichols*, 885 N.E.2d 628 (Ind. Ct. App. 2008). The only limitation on the trial court's use of discretion in discovery sanction determinations is that the sanction must be just. *Id*. Hummer and Ontario note that when this court is called upon to consider whether the sanction is just, we routinely consider whether a party has received a prior warning that lack of compliance could result in a dismissal.

It is undisputed that Hummer did not provide a T.R. 30(B)(6) corporate representative for deposition. Ontario provided a T.R. 30(B)(6) corporate representative for deposition, but that representative was unprepared to answer questions in many of the designated areas of inquiry. The Plaintiffs repeatedly sought discovery from Hummer and Ontario before notifying their counsel that the Plaintiffs would seek the intervention of the trial court. Under these circumstances we find that the entry of default judgments against Hummer and Ontario on the issue of liability was just, and that the trial court did not abuse its discretion.

2.

Hummer and Ontario argue that the trial court erred by disallowing the admission of medical records pertaining to Kim's injuries during the jury trial on the issue of damages. Hummer and Ontario argue that a proper foundation was laid for the records and that a foundation was laid for the experts who would have used the records during their testimony.

In addition, they contend that the medical records should have been admitted as a sanction for the Plaintiffs' counsel's conduct for allegedly informing the record custodians of the healthcare providers subpoenaed by Hummer and Ontario that Hummer and Ontario were withdrawing their subpoenas and there was no need for those witnesses to appear for trial.

In particular, and after the close of cross-examination in each instance, Hummer and Ontario sought to admit the medical records generated by Plaintiffs' witnesses, Dr. Mary Zemansky, a clinical psychologist, Dr. Rupesh Shah, an internal medicine physician, and Dr. Gene Fedor, an orthopaedic surgeon, all of whom treated Kim. Additionally, Hummer and Ontario sought to introduce as an exhibit two binders containing Kim's medical records, and affidavits from the custodians of those records verifying their authenticity. There was no witness present to lay the foundation for the admission of the two binders.

The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58 (Ind. Ct. App. 2002). We will reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of that discretion. *Id*. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id*. In the present case, the trial court denied the admission of the evidence.

In *Schloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1277 (Ind. Ct. App. 1998), a panel of this court made the following observation:

> Evid. R. 803(6) provides that a memorandum, report, record or data compilation of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity (unless a lack of

> trustworthiness is indicated) are not excluded by the hearsay rule. That is quite different from saying that such records are per se admissible.
>
> The difference arises from the fact that such records must also be otherwise admissible. In other words, hospital records may not be excluded as hearsay simply because they include opinions or diagnoses. But, and it is a substantial but, for medical opinions and diagnoses to be admitted into evidence, they must meet the requirements for expert opinions set forth in Evid. R. 702. Furthermore, as the court explained in *Fendley v. Ford*, 458 N.E.2d 1167, 1171 n. 3 (Ind. Ct. App. 1984) expressions of opinion within medical or hospital records historically have not been admissible under the business records exception because their accuracy cannot be evaluated without the safeguard of cross-examination of the person offering the opinion. While *Fendley* was decided before the adoption of our Rules of Evidence, we find that its reasoning remains sound and that it continues to apply under the Rules.

Evidence Rule 702(a) provides in relevant part that

> [if] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.

Here, the trial court determined that the exhibits would be confusing to the jurors.

In regard to the medical records generated by Drs. Zemansky and Shah, we note that they were asked to identify the records, but were not questioned by Hummer and Ontario about the observations, opinions, and diagnoses, contained therein. Afterwards, counsel moved to admit the records. We believe the trial court correctly observed that the doctors were identified as experts by counsel for the Plaintiffs. The problem, correctly identified by the trial court, was that the records were mostly handwritten and contained abbreviations, diagrams, and notations that were difficult to read or interpret without a witness to explain them.

Dr. Fedor was asked to identify a document described as a health history form purportedly pertaining to Kim. He was able to identify the form as one used by his office, but could not say for certain that Kim was the person who completed the form, as it was done outside his presence. The document was excluded because of foundational deficiencies and Dr. Fedor's lack of personal knowledge.

Assuming for the sake of argument that the trial court erred, a conclusion we do not reach, any error in the exclusion of the form was nonetheless harmless. Hummer and Ontario were able to question Kim thoroughly about the form during her testimony at trial. Where wrongfully excluded evidence is merely cumulative of other evidence presented, its exclusion is harmless error. *Allen v. State*, 787 N.E.2d 473 (Ind. Ct. App. 2003). The trial court did not abuse its discretion by disallowing the evidence.

Hummer and Ontario also argue that the trial court erred by excluding the medical records contained in the two binders offered at trial. The trial court found that there was an insufficient foundation laid for their admission and that the exhibit would be confusing to the jury. There was no witness present to lay the foundation for the admission of the two binders. Hummer and Ontario simply moved to admit the evidence at trial. As previously mentioned, any number of witnesses could have been called to testify about and lay the foundation for the two-binder exhibit, but such was not the case here. We do not find an abuse of the trial court's discretion.

This does not end our discussion about the admissibility of the binders, though. Hummer and Ontario had issued subpoenas to the custodians of the medical records of the

health care providers utilized by Kim. Those witnesses could have laid a foundation for the documents contained in the binders.

Prior to the trial, counsel for the Plaintiffs sent letters to those witnesses advising them that a stipulation had been reached between the parties regarding the admissibility of Kim's medical bills and insurance payments, thus obviating the need for their testimony at trial. The subpoenas sent by Hummer and Ontario also referenced testimony about Kim's medical records, however, which were not the subject of the stipulation. Only one of the subpoenaed witnesses appeared at trial after receiving the Plaintiffs' letter.

Counsel for the Plaintiffs argued that there was no prejudice to Hummer and Ontario as no witness fee had been submitted for any of the witnesses at issue, thus service of process on the witnesses was defective. *See* Ind. Trial Rule 45(G).[4] Hummer and Ontario argued that although the parties had reached an agreement regarding the admissibility of medical bills and payments made, there apparently was no stipulation regarding the admissibility of the medical records themselves. When Hummer and Ontario discovered that their witnesses had been called off, they asked the trial court to admit the two-binder exhibit as a sanction against the Plaintiffs for their actions.

The trial court found that there was gamesmanship on the part of both sides, and declined to admit the evidence as a sanction. In fact, the trial court stated

[4] T. R. 45(G) provides in relevant part as follows:

> Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person who shall be required to attend outside his county of residence as provided in section (C), and by so tendering to him the fees for one [1] day's attendance and the mileage allowed by law.

> When we left yesterday, we had a couple of things to decide. One of which was the defendants' trial binder, Exhibit I, which consisted of two volumes and it had to do with the medical records of the plaintiff. If this were a football game, I could be off-setting penalties, I suppose, but that's not the way we operate here.
>
> [Counsel for Plaintiffs], I think your letters to the defendants' witnesses were not appropriate. I also think the defendants' tender of subpoenas without the fee was not appropriate as well. The trial binders, Defendants' Exhibit I will not be admitted.

Appellant's Appendix at 122.

We conclude that the trial court did not abuse its discretion by disallowing the evidence because of the lack of foundation and potential confusion of the jury. Likewise, we conclude that the trial court's decision to decline to admit the challenged evidence as a sanction was appropriate as it did not condone the gamesmanship that apparently was being employed by counsel for both sides.

3.

Hummer and Ontario argue that the trial court abused its discretion by failing to remedy several alleged errors that occurred during the Plaintiffs' closing argument. Hummer and Ontario contend that these errors amount to reversible error.

As an initial matter, the Plaintiffs note that Hummer and Ontario have developed an argument here, but have failed to cite to any authority for their position that reversible error occurred. Ind. Appellate Rule 46(A)(8)(a) requires as follows:

> The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.

In their reply brief, Hummer and Ontario argue against waiver contending that previous decisions of this court allow appellants "to either develop a cogent argument or cite to relevant authority," and cite this court's opinion in *Kentucky Nat. Ins. Co. v. Empire Fire and Marine Ins. Co.*, 919 N.E.2d 565 (Ind. Ct. App. 2010) in support of that statement. We disagree with Hummer and Ontario's interpretation.

In *Kentucky National*, where we found an issue waived, we observed that the appellant did "not develop a cogent argument or cite to any authority in support of its argument." 919 N.E.2d at 586. We cited *Loomis v. Ameritech Corp*., 764 N.E.2d 658 (Ind. Ct. App. 2002), a case in which one of the requirements, cogent argument, was not met and resulted in waiver of the issue. Thus, where an appellant waives an argument by failing to satisfy one requirement on appeal, i.e., presenting a cogent argument, as in *Loomis*, then where an appellant does not satisfy either requirement on appeal, i.e., cogent reasoning and citation to authority, as in *Kentucky National*, the issue surely is waived. The *Kentucky National* court did not intend to amend the appellate rules to allow an appellant to choose the method by which to present the argument on appeal. Instead, we noted that the appellant in *Kentucky National* had failed in both regards.

That said, we agree that Hummer and Ontario have waived this argument for purposes of appeal. Nonetheless, we prefer to decide issues on their merits when possible, and do so here. *See Kelly v. Levandoski*, 825 N.E.2d 850 (Ind. Ct. App. 2005) (appellate review of merits when possible is preferable).

Hummer and Ontario argue that the Plaintiffs violated their own motion in limine which was granted by the trial court during closing argument. Prior to trial, the trial court

granted the Plaintiffs' motion in limine seeking to prevent Hummer and Ontario from discussing the fact that the Plaintiffs could invest their verdict after trial. During closing argument, counsel for the Plaintiffs discussed the effects of inflation on the jury verdict, but did not mention investment of a jury verdict. Hummer and Ontario did not object to the Plaintiffs' argument.

During Hummer and Ontario's closing argument, a direct reference was made about the Plaintiffs' ability to invest the verdict. Counsel for the Plaintiffs objected to the argument and the trial court admonished the jury to disregard that aspect of the closing argument when arriving at a damages award.

An order in limine is not a final ruling on the admissibility of evidence, but is designed to prevent mention of prejudicial material to the jury. *Allied Property and Cas. Ins. Co. v. Good*, 919 N.E.2d 144 (Ind. Ct. App. 2009). To assert error in the admission of evidence that is the subject of an order in limine, however, requires a proper contemporaneous objection whether or not the court granted an order in limine. *Brown v. Terre Haute Reg. Hosp.*, 537 N.E.2d 54 (Ind. Ct. App. 1989).

Here, there was no objection made during the Plaintiffs' closing argument about the effects of inflation when the jury considered the award of damages. Further, when reference was made by Hummer and Ontario about the subject of the order in limine, a contemporaneous objection was made, and the trial court instructed the jury to disregard that aspect of the argument. The trial court did not abuse its discretion in this regard.

Hummer and Ontario also argue that reversible error occurred when Plaintiffs' counsel made a reference to "coked up drivers in crummy equipment" when speaking of truck drivers

and the trucking industry. *Appellants' Appendix.* at 126. Hummer and Ontario objected to the reference, but the trial court did not take any curative measures suggested by Hummer and Ontario.

A review of the record reveals that the following statements were made by counsel for the Plaintiffs prior to and immediately after the objection:

> Well, remember when we first started you said that you were going to follow the law that Judge Alexa is going to give you and you were going to base your decision on the evidence. That's what you've said. Now, what does that mean? I'm going to give you a concrete example. If one of your members were to go back there during deliberations and say, you know what, I hate these trucking companies. They send these coked up drivers in crummy equipment flying back and forth to Chicago on 94. I don't care who their case . . . . If one of your fellow jurors were to say that, that would be wrong. That's what I was saying. You need to gently remind them to follow the evidence, follow the law. . . .

Id. at 125-26. Placed in context, we agree with the trial court that curative measures were not necessary. There was no abuse of discretion here.

Also during closing argument, counsel for the Plaintiffs stated the following:

> You know, when we first started seemed like a long time ago. I wondered – I tried to figure out, you know, where are these people going? They had been proven –they've been convicted of negligence. All of her doctors agree – all of her doctors agree that she has brain damage. All of her doctors agree with all of her problems. What are they going to do? What are they going to say when they come in here? And then when that man came from –the corporate representative came the first few days, I thought, okay, they're going to put him on and they're going to apologize and they're going to take responsibility and they're going to be right and try to come to some reasonable number – make a reasonable suggestion, a reasonable resolution.
>
> * * *
>
> I mean, what are they talking about? Stipulated $123,800 and they want to come in here and say pay her, what, $19,000 or something. That's crazy. Shame on them. And shame on them for not coming in here and apologizing.

> You know that's what they should have done. I thought that's what they were going to do. When they brought that man in here from Toronto, I said he's going to stand up here and say, you know what, we were wrong. We're going to be right next time. We are responsible We accept responsibility. We're sorry. How do we make this right?

Id. at 131-33.

Counsel for Hummer and Ontario requested a bench conference where they claim that they objected to the reference to an apology. Prior to trial the Plaintiffs had requested an order in limine precluding Hummer and Ontario from making any reference to a "communication of sympathy, apology or attempted benevolence unless accompanied by an admission by defendants of their negligence." *Id.* at 1591.

We first acknowledge that the argument of counsel is not evidence. *El v. Beard*, 795 N.E.2d 462 (Ind. Ct. App. 2003). Yet, assuming for the sake of argument, that the trial court erred by failing to strike the argument, or by failing to admonish the jury, the error was harmless. The issue of liability had been decided because of Hummer and Ontario's discovery violations. The only issue before the jury was the issue of damages. Hummer and Ontario have failed to demonstrate how this portion of the argument of counsel improperly influenced the jury's determination of that issue. The trial court did not abuse its discretion.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.