No. 1-09-3617

FIFTH DIVISION
March 25, 2011

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DONALD HOWELL, a minor by his mother and next friend, LATANYA TURKS, Plaintiff-Appellee, v. CHICAGO HOUSING AUTHORITY, a municipal corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 03 L 1919 Honorable Richard J. Elrod, Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Judgment in favor of plaintiff affirmed where (1) Defendant did not satisfy its burden for entry of a judgment notwithstanding the verdict; (2) Defendant was not entitled to a new trial where verdict was not against manifest weight of the evidence; and (3) Defendant failed to show that trial errors justified a new trial.

Defendant Chicago Housing Authority (CHA), in this personal injury action appeals from a jury verdict in the amount of $16,500,000 in favor of plaintiff Donald Howell, a minor by his mother and next friend, Latanya Turks. On appeal, defendant contends the circuit court improperly denied its motions for judgment *n.o.v.* and a new trial. We affirm.

BACKGROUND

From November 15, 1991 to May 2, 1996, plaintiff, Donald Howell (Donald) resided with his mother, Latanya Turks (Ms. Turks), in an apartment owned by CHA. It is undisputed that, unbeknownst to Ms. Turks, the apartment contained lead-based paint during that time.

In July of 1994, when he was two years and eight months old, Donald was tested for lead as part of a routine office visit. A finger stick blood test showed an elevated lead level of 25 micrograms/deciliter (mcg/dl). Donald was then seen by Dr. Meenaxi Sanghani, a board certified pediatrician, who ordered a second blood test that was performed through a venous draw. The result was an elevated blood level of 19 mcg/dl. Dr. Sanghani ordered an X-ray of Donald's knee to determine if he had chronic lead poisoning. The radiology report indicated that there were no lead lines in the bones of the knee. Dr. Sanghani also ordered an X-ray of Donald's abdomen to rule out any acute ingestion of lead. The X-ray results were normal and showed no signs of acute lead ingestion. Dr. Sanghani started Donald on a course of oral chelation therapy, which is a treatment for elevated blood lead levels using medication that causes the patient to discharge the lead through urination. Dr. Sanghani ordered a follow-up blood test in September 1994, the results of which were 10 mcg/dl.

Ms. Turks filed suit against CHA alleging negligence. She further alleged that during the

time period from November 15, 1991 to May 2, 1996, Donald ingested lead-bearing substances from the interior of the apartment and suffered lead poisoning. She contended that, as a direct and proximate result of one or more of CHA's negligent acts, Donald suffered serious and permanent physical and mental injuries, he will remain disabled, and he will suffer great future pain and suffering.

The case proceeded to a jury trial, but prior to jury selection, CHA admitted its negligence. Therefore, the only issues during trial were proximate cause and damages.

Also prior to trial, plaintiff presented eleven motions *in limine* and CHA presented eight motions *in limine*, two of which are at issue in this appeal. The first of these is the trial court's denial of CHA's motion *in limine* No. 8 which sought to exclude "[a]ny and all references to either Donald Howell or Ms. LaTanya Turks being lead poisoned during the course of their residence at ***[the CHA owned apartment] prior to July 11, 1994." The second issue raised is whether trial testimony violated the trial court's order granting CHA's motion *in limine* No. 6 prohibiting "any and all references to any negligent acts or omissions on the part of the CHA[.]" These issues will be discussed in further detail in our analysis below.

At the beginning of the trial, the judge informed the jury of CHA's admission of negligence, summarized as follows:

> (1) CHA knew that the apartment Ms. Turks and her son lived in contained lead paint from 1990 through July 1994, which included the time Ms. Turks was pregnant with Donald and the time Donald lived in the apartment after his birth, up to the time he was diagnosed with an elevated blood lead level;

(2) during that same period, the lead paint in the CHA apartment was peeling and flaking;

(3) during 1990, CHA knew or should have known, and from 1991 through 1994, CHA knew that the apartment contained peeling and flaking paint;

(4) CHA was negligent in failing to properly maintain and correct the peeling and flaking lead paint in violation of applicable laws;

(5) the repair of the flaking and peeling paint was not the responsibility of LaTanya Turks.

The jury trial then proceeded over the course of several days in August 2009. The relevant testimony at trial follows.

Ms. Latanya Turks

Ms. Turks was the first witness in the plaintiff's case. She testified that she lived in the apartment during her pregnancy with Donald. While she was pregnant, she received regular prenatal care on a weekly or bi–weekly basis. Ms. Turks was not tested for lead during the pregnancy, nor at any time. With the exception of morning sickness, she had no complications.

Ms. Turks testified regarding the flaking lead paint falling onto the floor of the apartment from the ceiling and the walls of the bathroom, the kitchen, and the bedroom. She stated there were "flakes everywhere." When plaintiff's counsel asked Ms. Turks if the condition continued throughout her entire pregnancy, CHA objected based on "relevancy in light of the admission, prejudice, and [violation of] motion *in limine* No.6 [which prohibited "any and all references to any negligent acts or omissions on the part of the CHA"]. The court called a sidebar and CHA's

objection was overruled.

After the sidebar, Ms. Turks was asked by plaintiff's counsel if this condition of the flaking paint in the apartment had remained constant during her entire pregnancy. She stated, "It remained constantly" at which point the trial court interrupted and requested that the court reporter read back the question. The trial court then addressed the jury as follows:

> "THE COURT: I just want to point out to the ladies and gentlemen of the jury that what I read to you as far as the admissions, it says during the time of LaTanya Turks' pregnancy in 1991 and the time Donald lived in the apartment and the time he was diagnosed with an elevated blood level in the summer of 1994, the lead paint in their Chicago Housing Authority apartment was peeling and flaking. That is the admission.
>
> PLAINTIFF'S COUNSEL: Yes.
>
> THE COURT: And I will let this witness testify to that. It may be duplicative, it may be redundant, and that was one of the bases of [CHA counsel's] objection. But to show that this witness had knowledge, that she was there, I'll let her testify even though it would be duplicative of the admission made by the defendant, Chicago Housing Authority.
>
> You may answer.
>
> MS. TURKS: "Yes, it was."

Ms. Turks then testified that, as a result of the condition of the paint that was peeling and flaking, she had to clean the apartment. Plaintiff's counsel next asked her to "[t]ell the jury what

[she] did in terms of cleaning the apartment during this pregnancy of yours when this paint was peeling and flaking." Before she answered, the trial court interjected as follows:

> "THE COURT: Again, I want to point out that the Chicago Housing Authority has admitted that the repair of the flaking and peeling paint was not the responsibility of LaTanya Turks. So this, again, could be duplicative, but I will let her answer. She is the defendant – the plaintiff in this case."

Ms. Turks then proceeded to testify that she kept trying to sweep up the peeling and flaking paint and that she did so "[m]aybe once or three – every other day." She also testified that she continued to live in the apartment with Donald up until the time he was two years and eight months old, when the routine lead testing was first performed on him and he was diagnosed with lead poisoning.

Plaintiff's Causation Expert – Dr. Ronald Gabriel

Plaintiff's next witness was Dr. Ronald Gabriel, a physician whose specialty is pediatric neurology, and whose testimony was presented by way of his videotaped evidence deposition. Dr Gabriel testified that it was his opinion that Donald suffered from lead poisoning that began while he was still in his mother's womb. The lead poisoning continued both during and after the pregnancy. He further opined that this lead poisoning led to Donald's "current condition which is characterized by significant language and intellectual and social retardation to a point where he is never going to be employable and will require long-term 24-hour custodial care."

In addition to the fact that Donald was actually diagnosed with lead poisoning, Dr. Gabriel based his opinion that the lead poisoning caused Donald's retardation on a number of

other facts. While pregnant with Donald, Ms. Turks was in a lead-exposed environment in which there was peeling and flaking of lead-based paint. Dr. Gabriel stated that "[u]ndoubtably, mother was exposed certainly by inhalation, which is a very efficient way of becoming lead poisoned." He further testified that during the time that Donald was in the womb, "that lead easily transfers from mother's blood across the placenta into Donald's blood while he was a fetus."

The "second salient fact," according to Dr. Gabriel, was that "when Donald was born he had a head circumference in the microcephalic range, which is an abnormally small head size, of 30.5 centimeters." Dr. Gabriel also testified that based on research studies, a baby's head size will be reduced in growth by about half a centimeter per 10 micrograms percent of lead. He testified that, based upon Donald's head size, his lead level was between 30 and 50 micrograms percent. Dr. Gabriel explained that skull size depends on the growth of the brain and where the brain growth is retarded, the skull size will be retarded. He further stated that it was "well-recognized that lead poisoning in the growing brain can retard brain growth because it kills off cells and it kills off the mechanism by which cells of the brain communicate with each other."

In addition, as a basis for his opinion that lead poisoning caused Donald's retardation, Dr. Gabriel relied on (1) a chest X-ray performed when Donald was three months old that showed "splaying or clubbing of the margins of the ribs" which he described as a classical finding of lead poisoning involving bone; (2) pale optic disks before he was one year of age suggesting optic atrophy which is compatible with lead poisoning; and (3) Donald's episodes of constipation, irritability, anemia, nausea, and vomiting during his first year of life.

Dr. Gabriel relied upon some additional factors, however, which included the following:

(1) Donald was premature and had a low birth weight, although Dr. Gabriel acknowledged that the physician who delivered Donald had determined that he was a "term" baby; (2) a blood test result for Mrs. Turks showing findings compatible with lead toxicity, even though the blood test report contained the name of another woman and Dr. Gabriel was later told it did not pertain to Ms. Turks; and (3) his assumption that one of Donald's blood tests contained abnormal cells containing certain "blue spots" that are characteristic of lead poisoning, although the hospital's laboratory finding was actually that of a different type of cell, target cells, which are instead indicative of sickle cell anemia. Dr. Gabriel acknowledged that there are children born severely retarded, or with microcephaly, who do not have lead poisoning and also acknowledged that these conditions may be a result of genetic and chromosomal disorders.

Plaintiff's Causation Expert – Dr. Gilbert Given

Dr. Gilbert Given, a pediatrician, also testified that Donald suffers from mental retardation caused by lead poisoning that occurred while his brain was developing in his mother's womb. He based his opinion on the fact that the apartment that Ms. Turks was living in during her pregnancy contained lead paint that was peeling and flaking off the walls which created lead dust. Dr. Given testified that when a pregnant woman is inhaling lead dust, there is no dispute in the world literature that the lead is transmitted to the baby *in utero* via the placenta. Dr. Given testified that lead passes through the placental barrier and then travels to the developing brain of the baby. Dr Given also testified, however, that Donald had additional exposure to the lead in the apartment after he was born.

Dr. Given stated that lead is neurotoxic meaning it destroys brain cells. He further

testified that there is no literature in any major publication to the contrary. Dr. Given also testified that *in utero* lead exposure destroys brain cells and, if there is significant lead it causes a reduction in the size of the head.

Based on the medical literature and charts issued on head size, Dr. Given opined that Donald's head was very small at the time of his birth. Donald's head size at birth was 30.5 cm which was below the third percentile which, by definition, is microcephalic. Donald's head size at birth was entered in the microcephalic range on the hospital chart.

Dr. Given acknowledged that a blood level of 25 mcg/dl would not be high enough to account for Donald's level of retardation, but testified that there is a difference between lead exposure after birth and lead exposure *in utero*, because the developing brain is more sensitive to lead toxicity than a fully formed brain. He stated that a blood lead level of 25 mcg/dl *in utero* would result in a reduction in head size of approximately 2.5 cm or one inch.

Regarding CHA's contention that Donald's retardation was due to a genetic cause, Dr. Given testified that something happened *in utero* since Donald's head grew at an accelerated rate once he got out of the womb. Donald's rapid weight gain once he was delivered offered additional support for his *in utero* lead exposure, because he was removed from the environment where his mother had been passing her inhaled lead to Donald's body via the placenta.

In addition to the condition of the apartment and Donald's blood lead test results of 1994, Dr. Given also based his opinion on Donald's condition at birth, specifically the fact that Donald was microcephalic and small in height and weight. Dr. Given did acknowledge that the medical records stated that Donald was "full term" and that his birth weight was within the normal range,

albeit at the "bottom end of normal." He also acknowledged that Donald's head circumference had grown to within the normal range within three to six weeks, which was during the time that Dr. Given had concluded that Donald was still being exposed to lead in the apartment.

Defendant's Causation Expert – Dr. Pasquale Accardo

Dr. Pasquale Accardo, a pediatrician sub-specializing in neurodevelopmental disabilities in pediatrics and developmental and behavioral pediatrics, testified as CHA's first causation expert witness. Dr. Accardo stated that Donald has severe retardation, as well as atypical autistic behaviors that he believes are due to autistic spectrum disorder. Dr. Accardo agreed that lead is neurotoxic and a "brain poison," that Donald had elevated blood lead levels, and that lead can cause severe mental retardation. He further agreed that when there is an identifiable cause of mental retardation, there is no reason to look for a genetic cause. Nonetheless, Dr. Accardo opined that lead exposure did not cause Donald's conditions. Dr. Accardo's opinion was that the cause of Donald's retardation was genetic, *i.e.*, caused by one gene or polygenetic, *i.e.* caused by many genes.

Dr. Accardo estimated the probability of Donald's condition being genetic in origin at 90 percent. He testified that there were five bases for his opinion that Donald's condition was genetic in origin: (1) the severity of his problem with no other cause; (2) the difference in the size of his kidneys with no other cause; (3) scoliosis despite no identifying risk factors or family history; (4) "all sorts of scattered hints" in the medical records, which were never carefully evaluated "about some kind of skin lesions *** certain of which can occur in genetic disorders"; and (5) the "unevenness" of Donald's profile at age 17.

With regard to this last basis for his opinion, the "unevenness" of Donald's profile at age 17, Dr. Accardo explained that it referred to the scores Donald got on two "Vineland" tests. Dr. Accardo testified that a "Vineland" test measures how one functions day to day. Dr. Accardo opined that a comparison of the test Donald had at age five years and five months with the test he had at age 17, showed a decrease in function that was caused by a genetic disorder or a rare genetic syndrome.

Regarding the severity of Donald's retardation, Dr. Accardo opined that mild retardation is rarely genetic and more likely to be environmentally caused, whereas severe retardation signifies a greater likelihood of a genetic origin. Dr. Accardo noted that a radiologic report showed that one of Donald's kidneys was significantly larger than the other. Dr. Accardo testified that as the level of mental delay increases in severity, the incidence of associated problems such as that with the kidneys, as well as scoliosis, tends to lean one "much more towards a genetic etiology." According to Dr. Accardo, it is the cumulative grouping of these conditions that supports a genetic etiology.

Dr. Accardo testified that he could not absolutely rule out the possibility that Donald's lead levels of 19 to 25 mcg/dl at the age of two and two-thirds years old had some effect on his brain function, but stated that the effect would be a loss of three to six IQ points which would be impossible to identify in a single child. Dr. Accardo agreed that a blood lead level over 40 mcg/dl could account for Donald's level of retardation.

Dr. Accardo admitted that he entered into his computer all of Donald's abnormalities which had formed the basis for his opinion that Donald's condition had a genetic basis, but there

had been no computer match to any known genetic syndrome.

Over CHA's objection, the trial court ruled that Dr. Accardo could not testify regarding whether Donald was microcephalic at birth. The basis of the ruling was that Dr. Accardo had not disclosed that opinion as required under Supreme Court Rule 213.

Defendant's Causation Expert – Dr. Thomas Blondis (*Treating Physician*)

Dr. Blondis, a pediatrician specializing in neuro-developmental disabilities, examined Donald twice when he was 12 years old. Dr. Blondis testified by way of videotape. He stated that Donald had profound mental retardation and autistic behaviors. Dr. Blondis opined that Donald was most likely born with those conditions and also opined that Donald's lead levels did not cause either of those conditions.

Dr. Blondis stated that with respect to Donald's first measured blood lead level of 25 mcg/dl by finger stick when he was age 2 years and 8 months, such a lead level cannot be the cause of profound mental retardation. He stated that treatment to get lead out of the system might begin at a blood lead level of 25 mcg/dl but that the general rule for starting treatment would be a level of 40 mcg/dl. He would be very concerned by a level of 80mcg/dl.

Dr. Blondis agreed that some lead crosses the placental barrier but testified that, in the studies he reviewed, the level of lead in the fetus was significantly less than it was in the parent. Dr. Blondis agreed that peeling and flaking paint creates lead dust. He further agreed that it was not desirable for a pregnant woman to be in an apartment that had peeling and flaking paint creating lead dust.

Dr. Blondis testified that because Donald's blood lead level dropped from 19 mc/dl to 10

mcg/dl after treatment and did not rebound, his blood level before he was tested was not that significant. He stated that the drop in Donald's blood lead level indicated that he had some ingestion of lead but that it was not significant. He did not think the level would have dropped if Donald was still being exposed, or if Donald had lead in his bones. With regard to the absence of lead lines in bones on Donald's X-rays, Dr. Blondis testified that if there was lead exposure *in utero* and then for a period of over two years and eight months, he doubted that lead would deposit in the bones because a fetus or a newborn contains "primarily cartilage" and not bone.

Dr. Blondis did not know whether Donald was microcephalic at birth, but he was not microcephalic at the time of Dr. Blondis's examination.

Defendant's Causation Expert – Dr. Gail Wasserman

Dr. Gail Wasserman is a research scientist who holds a Ph.D. in developmental psychology. Since 1985, she has spent her career investigating the effects of lead exposure on child development. Dr. Wasserman testified that in a longitudinal study on children in Kosovo, who were studied prenatally and over time, children were found to have blood lead levels as high as 70 or 80 mcg/dl and were not symptomatic. She testified that with an increase in the blood lead level from 10 mcg/dl to 20 mcg/dl, IQ scores would drop three to five points. She disagreed with the other defense expert, Dr Accardo, that a blood lead level of 40 mcg/dl could cause Donald's level of retardation.

Dr. Wasserman testified that the uptake of lead, which refers to the amount of lead that stays in the blood after ingestion, as opposed to that which immediately leaves the body, is far less in adults, even if pregnant, than it is in children. She opined that exposure to lead at the

level experienced by Donald cannot cause severe to profound retardation, nor does it cause autism or autistic-like behavior.

Dr. Wasserman testified that when one is sweeping lead dust, some of it becomes airborne, and that one of the ways people take in lead is by breathing it. Dr. Wasserman concluded that, based on the description of Ms. Turks sweeping up the falling lead paint in the apartment, it was "overwhelmingly likely" that she was taking in lead while pregnant. Dr. Wasserman agreed with plaintiff's experts that when lead from a pregnant woman crosses the placental barrier and gets into the baby, the lead circulates through the baby, and it enters the baby's brain as it is forming in the womb.

Dr. Wasserman agreed that lead is neurotoxic, a brain poison. She acknowledged that, within a certain range of exposure, there is literature that correlates lead levels with a child's head size. She also testified that, within that range, as blood lead levels increase by 10 mcg/dl, head size decreases by approximately a half centimeter. Dr. Wasserman agreed that Donald was born with a small brain. She further agreed that he was microcephalic at birth and his head size was 30.5 centimeters. She testified that if Donald's head size had been 32 centimeters, which is one-and-a-half centimeters larger than it was, it would then have fallen into the normal range for head size. Dr. Wasserman also agreed that lead is known to cause microcephaly.

Defendant's Causation Expert – Dr. Meenaxi Sanghani (*Treating Physician*)

As noted earlier, Dr. Meenaxi Sanghani was the pediatrician who treated Donald after his elevated blood lead level was discovered. Dr. Sanghani testified that she ordered the X-ray of Donald's knee to determine if he had chronic lead poisoning, which was negative as there were

no lead lines in the bones of the knee. Dr. Sanghani also testified that Donald was suffering from lead poisoning. Dr. Sanghani stated that a child may be exposed to lead *in utero*, and because the fetus is primarily cartilage and not bone, there will be no bone for the lead to enter. Dr. Sanghani admitted that it is possible for a child to be exposed to lead over a period of a year without lead lines in his bone.

The jury returned a verdict in favor of plaintiff and the court entered its judgment in the amount of $16,500,000 which was comprised of $8,000,000 for past and future disability, $6,500.000 for future caretaking expenses, and $2,000,000 for loss of future earnings. On December 2, 2009, the trial court denied CHA's post-trial motion requesting judgment notwithstanding the verdict or, in the alternative, a new trial. On December 22, 2009, CHA filed this timely appeal.

ANALYSIS

A judgment notwithstanding the verdict (judgment *n.o.v.*) 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." *Pedrick v. Peoria & E. R. Co.*, 37 Ill. 2d 494, 510 (1967); accord *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). A trial court should not "enter a judgment *n.o.v*. if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple v. Gustafson*, 151 Ill. 2d at 454. "[T]he standard for obtaining a judgment notwithstanding the verdict is a

'very difficult standard to meet' and limited to 'extreme situations only.' " [Citation.] *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005). As the Illinois Supreme Court has explained:

> "A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. [Citations.] Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple v. Gustafson*, 151 Ill.2d at 452-53.

Thus, where a jury is presented with the testimony of experts with conflicting opinions, "our task is not to reweigh the evidence and make our own determinations." *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 550 (2005). A judgment *n.o.v* presents a question of law that we review *de novo*. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 547 (2005).

CHA contends that this case meets the *Pedrick* standard for the entry of a judgment *n.o.v.* because "plaintiff failed to present evidence demonstrating a substantial factual dispute as to causation." CHA notes that plaintiff acknowledged at trial that she had to meet her burden of proving causation with circumstantial evidence. CHA cites *Salinas v. Werton*, 161 Ill App. 3d 510, 514 (1987) and *Friedman v. Safe Security Services, Inc.*, for the general proposition that a plaintiff who relies on circumstantial evidence for the factual basis of her claim. may not rely on "possibilities" as a basis for the inference of causation but must instead present evidence establishing a "reasonable certainty" that a defendant's acts caused the injury. CHA contends

that the "possibility" that Donald had a higher blood level, either *in utero* or shortly after birth, compared with the actual test results of his blood level at age 32 months, could not support an inference of causation. In response, plaintiff contends that the cases cited by CHA are inapplicable and, as an example, distinguishes *Salinas v. Werton*, a case that did not contain any proximate cause testimony. Plaintiff argues that in the instant case, by contrast, the evidence of *in utero* damage to Donald from elevated lead levels was established through expert testimony offered to a reasonable degree of medical certainty and was supported by CHA's own experts who agreed with the medical principles on which plaintiff's case was based.

In support of its argument that it is entitled to judgment *n.o.v.,* CHA first notes that plaintiff's causation theory was based on Donald having *in utero* lead poisoning as a result of Ms. Turks inhalation of lead dust from the lead-exposed environment of the apartment in which there was peeling and flaking lead-based paint. CHA further notes that plaintiff's expert, Dr. Given testified to Donald's *in utero* lead exposure as a result of the condition of the apartment, not only during the pregnancy, but also cited the "additional lead exposure" that resulted after Donald was born. Dr. Given testified that this additional lead exposure occurred after Donald was born, when "he was living in the same environment where he was exposed to the lead in that apartment." CHA notes that Dr. Given testified that the damage from lead poisoning occurs early, "*in utero* and in the first one or two years of life."

CHA contends that although the very condition of the apartment was the foundation for plaintiff's experts' opinions that Ms. Turks and Donald had ingested sufficiently high amounts of lead to cause his mental retardation, plaintiff then repudiated this foundation to justify its

experts' opinions of a microcephaly diagnosis. CHA notes that plaintiff's expert claimed that being "out of that lead environment," meaning the uterus, explained Donald's rapid head size increase in the weeks after he was born. But, as the CHA notes, "Donald was then living in the *very* environment where Ms. Turks allegedly ingested, merely by breathing the air, a sufficient amount of lead to generate a blood lead level that was transferred to Donald *in utero*. CHA argues that the claim that Donald's head size grew when he was out of the environment of the uterus, but was in the same apartment, demonstrates the impermissibly speculative nature of plaintiff's entire causation theory. CHA asserts that "[a]n amount of lead dust sufficient to increase Ms. Turks' blood lead level would have the same, if not a greater, effect on a newborn."

Plaintiff asserts that CHA chooses not to focus on the evidence which the jury heard and contends this argument is merely an example of CHA's selective citation of the evidence.

While it is not disputed that Donald's head size increased to normal while he lived in the apartment, this fact alone does not "repudiate" the basis of plaintiff's expert, Dr. Given's opinion that Donald's injuries were caused by *in utero* lead exposure. Dr. Given testified that there is a difference between lead exposure after birth and lead exposure *in utero*, because the developing brain is more sensitive to lead toxicity than a fully formed brain. He also stated that a blood lead level of 25 mcg/dl *in utero* would result in a reduction in head size of approximately 2.5 cm or one inch. This vulnerability of the fetal brain to *in utero* lead exposure was supported by CHA's expert witness, Dr. Wasserman, who agreed that, within a certain range of *in utero* lead exposure, head size decreases by approximately a half centimeter for each increase of 10 mcg/dls of blood lead level.

CHA asserts that plaintiff presented no testimony that a blood lead level of 25 mcg/dl, which was the level of Donald's first blood test (at age 32 months), can produce the severe mental retardation which is seen in Donald. CHA argues that without actual test results, plaintiff's expert testimony is speculative.

CHA argues that the absence of blood lead level test results for Ms. Turks before or after her pregnancy and of any blood level test results for Donald from conception until 32 months renders plaintiff's proof of causation insufficient, as a matter of law. We disagree.

As the basis for their opinions, plaintiffs' experts relied upon the following facts, all of which were heard by the jury:

- Ms. Turks lived in the apartment during her pregnancy with Donald; the apartment contained peeling and flaking lead paint;
- the paint chips constantly fell to the floor and Ms. Turks swept them approximately every other day during her pregnancy;
- the act of sweeping the lead paint caused Ms. Turks to ingest lead by breathing in the lead dust that was created;
- lead crosses the placental barrier in pregnant women and enters the developing fetal brain;
- lead is neurotoxic, *i.e.* a brain poison;
- when this brain poison enters the developing fetal brain it causes the death of brain cells which in turn causes a reduction in the size of the baby's head of approximately one-half a centimeter per 10 mcg/dl lead in the blood;

- if the brain is so small it falls outside the range of normal, it is referred to as microcephalic;
- lead is a recognized cause of microcephaly;
- Donald's head size at birth was outside the normal range and he was microcephalic;
- Donald's head size was approximately 1.5 cm below the normal range which correlated with an *in utero* blood lead level of 25-30 mcg/dl;
- Donald exhibited additional symptoms indicative of lead poisoning which included a blood tests containing abnormal cells containing certain "blue spots" characteristic of lead poisoning;
- a chest X-ray performed when Donald was three months old that showed "splaying or clubbing of the margins of the ribs" which he described as a classical finding of lead poisoning involving bone;
- Donald had pale optic disks before he was one year of age suggesting optic atrophy which is compatible with lead poisoning;
- Donald had episodes of constipation, irritability, anemia, nausea, and vomiting which are symptoms seen in lead poisoning; and
- normal CT scans performed when Donald was 3 months and 12 years old and which ruled out a significant genetic disease that involves the brain.

The lengthy trial record in the instant case shows that plaintiff and CHA offered conflicting expert testimony. As plaintiff notes, much of its proximate cause evidence was supported by the testimony of CHA's own experts. The jury, based on all of the evidence, found

that plaintiff had established that CHA's negligence was the proximate cause of Donald's injuries. CHA has not satisfied its legal burden of showing that all of the evidence, when viewed in its aspect most favorable to the plaintiff, so overwhelmingly favors CHA that no contrary verdict based on that evidence could ever stand. *Pedrick*, 37 Ill. 2d at 510.

As noted earlier, a judgment *n.o.v.* should not be entered "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple v. Gustafson*, 151 Ill. 2d at 454. Here, there was a substantial factual dispute. CHA's theory was that Donald's retardation was caused by genetics, which the jury rejected after hearing all of the conflicting evidence from experts on both sides. Thus, we decline to enter a judgment *n.o.v.*

CHA raises an additional argument, again challenging plaintiff's proximate cause evidence and the absence of earlier blood level tests from plaintiff. This time, however, CHA contends that plaintiff's expert testimony regarding lead poisoning should not have been admitted because, without the results of actual blood tests, plaintiff's experts' opinions lacked a sufficient factual basis and were merely speculative. CHA asserts that "the trial court should have granted CHA's motion *in limine* No. 8 or granted CHA's post-trial motion, based on the inadequacy of the factual basis for plaintiff's experts' opinions." CHA's motion *in limine* No. 8., sought to exclude "[a]ny and all references to either Donald Howell or Ms. LaTanya Turks being lead poisoned during the course of their residence at ***[the CHA owned apartment] prior to July 11, 1994."

In support of its motion, CHA argued that the lack of blood test results from Ms. Turks or Donald, apart from Donald's test results at the age of 32 months, rendered speculative plaintiff's experts testimony, which was based on backward extrapolation, and no evidence, to find a basis for the cause of Donald's retardation. CHA contended that the cause of mental retardation is unknown in 40-50% of the cases, and plaintiff's experts had admitted that most cases are genetic in origin.

Citing *Simers v. Bickers*, 260 Ill. App. 3d 406, 413 (1994), CHA argues that "[a]n expert witness cannot fabricate the factual basis for his opinions through his own testimony." In *Simers*, the defendant had fitted plaintiff with a pair of soft contact lenses. *Simers*, 260 Ill App. 3d at 408. Plaintiff thereafter complained of dry, itchy eyes which the defendant treated with eye drops and stressed the importance of disinfecting the contact lenses. *Id.* The eye problems worsened and eventually led to her hospitalization with symptoms of near blindness. *Simers*, 260 Ill App. 3d at 408-09. Plaintiff sued the defendant contending that defendant's negligent fitting of the contact lenses caused her eye problems. *Simers*, 260 Ill App. 3d at 410-11. The defendant's expert testified that the cause of plaintiff's eye problems was an infection due to bacteria that entered the eye as a result of plaintiff failing to clean her lenses. *Simers*, 260 Ill App. 3d at 411. The defendant's expert stated that he had to "surmise" the cause of the infection because a culture of the solutions used was never taken. *Simers*, 260 Ill App. 3d at 412. The court concluded "there exists no factual, scientific or expert evidence to support [the contention that bacteria entered plaintiff's eyes from lack of cleaning the lenses]. *Simers*, 260 Ill App. 3d at 413. The court held that the expert's testimony was mere conjecture and should have been stricken *Id.*

Simers is readily distinguishable. In the instant case, there was not such a total lack of evidence. Although there were no blood test results for Ms. Turks, or for Donald before he was 32 months, there was sufficient evidence to support plaintiff's expert's opinions as detailed earlier in this opinion. We reject CHA's claim that the opinions were fabricated or based on speculation. Thus, the trial court properly denied CHA's motion *in limine* No. 8 which sought to exclude the testimony. Plaintiff's proof of proximate causation was sufficient as a matter of law and CHA is not entitled to a judgment *n.o.v.*

We next address CHA's alternative argument that it should be granted a new trial. In support of its contention, CHA presents two separate bases: (1) the verdict was contrary to the manifest weight of the evidence, and (2) the verdict "was the product of trial errors that prevented the jury from focusing on the causation gap."

With respect to CHA's first basis, we disagree that the verdict was contrary to the manifest weight of the evidence. The standard used to determine whether to grant a new trial differs from that used in determining whether a judgment notwithstanding the verdict (judgment *n.o.v.*) should be granted. *Lazenby v. Mark's Construction., Inc.*, 236 Ill. 2d 83, 100 (2010); *Ortiz v. Jesus People, U.S.A.*, 939 N.E.2d 555, 559 (Ill. App. 2010), citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 131-32 (1999) and *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). We acknowledge that the standard for a judgment *n.o.v.* is the higher of the two. *Id.* With regard to a motion for a new trial, a court "will weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Id.* Nonetheless, "a reviewing court may not simply reweigh the evidence and substitute its judgment

for that of the jury." *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). A verdict is against the manifest weight of the evidence only "where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). Neither situation is present here. The jury rejected the defense theory that the cause of Donald's retardation was genetic or indeterminate and found that the proximate cause of his condition was the negligence of the CHA. Based upon the evidence presented, it cannot be said that the opposite conclusion was clearly evident. The jury's findings were not unreasonable or arbitrary and were based on the evidence outlined earlier. The determination of whether a new trial should be granted rests within the sound discretion of the trial court, and its ruling will not be reversed absent an abuse of that discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003). The trial court here did not abuse its discretion in denying a new trial based on its conclusion that the verdict was not against the manifest weight of the evidence.

CHA has additionally argued, however, that the trial court abused its discretion in failing to grant a new trial because "the verdict was the product of trial errors." CHA raises a number of alleged errors and argues that these errors, either individually or cumulatively, prevented the jury from focusing on what CHA again contends was a "causation gap." These alleged errors can be summarized as follows: (1) jury instructions unduly emphasized CHA's negligence and diverted the jury's attention from the issue to be decided – causation; (2) trial testimony concerning CHA's negligence violated an order *in limine*; (3) plaintiff's closing argument improperly focused on CHA's negligence; (4) the trial court should not have barred cross-examination of plaintiff's experts regarding Donald's continued residence in the CHA apartment; (5) the

trial court should not have barred Dr. Accardo from testifying that Donald was not microcephalic at birth; (6) the trial court should not have instructed or allowed the jury to consider Donald's loss of future earnings in the absence of any evidence sufficient to enable the jury to rationally formulate an award. We shall address these issues in the order in which they are presented.

Whether the Jury Instructions Unduly Emphasized CHA's Negligence and Diverted the Jury's Attention from the Issue to Be Decided – Causation

As plaintiff correctly notes, CHA did not object to the jury instructions of which it now complains and has forfeited the issue. Nonetheless, we choose to address the merits.

Before Ms. Turks testified, the trial court provided the jury with definitions of "negligence," "ordinary care," and "duty." In addition, the court read the CHA's admission of negligence, as outlined earlier. The trial court also provided the jury with instructions on the issues of negligence, ordinary care, and duty after closing arguments.

We conclude there was no error. As the trial court noted during the discussion regarding the jury instructions to be given at the close of evidence, although CHA admitted negligence, the instructions were necessary so that the jury would understand what that admission meant and would understand that CHA had a duty to be free from negligence. The trial court further explained that the jury was also being told that plaintiff had the burden of proving that the negligence was a proximate cause of the injuries, and the instruction would assist the jury in narrowing the issues and in putting the admission of negligence in its proper perspective.

Whether Trial Testimony Concerning CHA's Negligence Violated an Order in Limine

CHA notes that, over its objection, Ms. Turks was allowed to testify to flaking lead paint

falling from the ceilings and walls of her apartment. CHA contends this violated the order *in limine* that barred evidence of CHA's negligence in failing to repair or maintain the apartment. CHA further argues that after the trial court erroneously allowed this testimony, it further emphasized CHA's negligence when it then addressed the jury as follows:

> "THE COURT: I just want to point out to the ladies and gentlemen of the jury that what I read to you as far as the admissions, it says during the time of LaTanya Turks' pregnancy in 1991 and the time Donald lived in the apartment and the time he was diagnosed with an elevated blood level in the summer of 1994, the lead paint in their Chicago Housing Authority apartment was peeling and flaking. That is the admission.
>
> PLAINTIFF'S COUNSEL: Yes.
>
> THE COURT: And I will let this witness testify to that. It may be duplicative, it may be redundant, and that was one of the bases of [CHA counsel's] objection. But to show that this witness had knowledge, that she was there, I'll let her testify even though it would be duplicative of the admission made by the defendant, Chicago Housing Authority."

CHA argues that the trial court made yet another error that overly emphasized the CHA's negligence when it made an additional statement to the jury, as follows:

> "THE COURT: Again, I want to point out that the Chicago Housing Authority has admitted that the repair of the flaking and peeling paint was not the responsibility of Latanya Turks. So this, again, could be duplicative, but I will let

her answer."

As plaintiff notes, the purpose of Ms. Turks testimony was to establish proximate cause. Where, as here, a defendant admits negligence but denies liability, a plaintiff is allowed to introduce evidence of negligence when it is relevant to establishing proximate cause. See. *e.g.*, *Rath v. Carbondale Nursing and Rehabilitation Center, Inc.*, 374 Ill. App. 3d 536, 540-41 (2007).

Simply being in an apartment containing lead paint does not establish that there is an intake of lead. Plaintiff submitted evidence of the falling lead paint and evidence that Ms. Turks was required to sweep it up continually, in order to establish Ms. Turk's intake of lead during her pregnancy. As plaintiff notes, CHA's expert witness, Dr. Wasserman, agreed that the sweeping made the intake of lead through inhalation "overwhelmingly likely."

The condition of the apartment and Ms. Turks sweeping was relevant to proximate cause. Thus, it was not error to allow Ms. Turks testimony with respect to her presence in the apartment with flaking lead paint falling from the ceilings and walls of her apartment, that she then swept. For the same reason, the trial court did not commit error in allowing Dr. Blondis's testimony regarding the condition of the apartment as it related to the issue of proximate cause. The order *in limine* barred evidence of CHA's negligence, including its failure to repair or maintain the apartment, but the order *in limine* did not specifically prohibit plaintiff from discussing the apartment's condition during the time Ms. Turks resided there throughout her pregnancy. We conclude that the trial court did not abuse its discretion in allowing the testimony regarding the condition of the apartment.

Whether Plaintiff's Closing Argument Improperly Focused on CHA's Negligence

The next alleged error raised by CHA concerns plaintiff's closing argument. At the outset, we note that no objections were made during this closing argument. Plaintiff's counsel argued as follows:

> "The plaintiff has to do certain things during the course of a trial. Some of those things that the plaintiff has to do – one of those things is to prove that the defendant was negligent. It all starts with negligence. If you don't do anything wrong, then it doesn't matter what else happens. You don't owe money.
>
> In this case, there is absolutely positively no dispute that this defendant was negligent and not just a little. In this case, there is absolutely no dispute that with knowledge, actual knowledge that there was lead paint in that apartment, actual knowledge, that that lead paint was flaking and peeling and falling, actual knowledge that that condition created a danger to Ms. Turks and to her unborn child, with all of that knowledge, they didn't do anything, not a thing."

CHA also argues that plaintiff's counsel "mocked the CHA's defense" by arguing:

> " 'It's not us. We're the ones who gave him brain poison. That's our fault. We're the ones responsible for him being lead poisoned. That's our fault. But blame his genes.' That's the defense."

CHA asserts that plaintiff "flagrantly violated" the court order granted CHA's motion *in limine* No. 6 hat prohibited "any and all references to any negligent acts or omissions on the part of the CHA[.]" CHA also argues that plaintiff's counsel "vilified the CHA and inflamed the sympathy and compassion of the jury" and that these "overt appeals to emotion and prejudice constituted

plain error that requires correction and a new trial."

As CHA notes, plaintiff's counsel advised the jury that there was no dispute that CHA was negligent and merely recited the stipulation between the parties. As plaintiff correctly notes, CHA has omitted from its brief the statement which followed. Plaintiff further advised the jury that it had the burden of proof and that plaintiff could only recover if she proved that it was more probably true than not that lead was the cause of Donald's injury. Taken in context, we agree with plaintiff that there was no error.

CHA also complains that plaintiff's counsel inappropriately and repeatedly emphasized CHA's conduct including CHA's knowledge of and failure to rectify the dangerous condition in Ms. Turks apartment and that plaintiff inappropriately argued that CHA was taking "advantage of [its] own negligence."

As plaintiff argues however, in the instant case, "plaintiff was accused of avoiding genetic testing" and "refusing to have X-rays done." Thus, it was proper for plaintiff to explain why CHA's so-called "gap in causation" specifically the absence of earlier lead testing, existed and why the tests had not been done. It was appropriate to allow the jury to understand that the lack of such testing was not plaintiff's fault. In further argument, plaintiff told the jury not to guess or speculate what those test results would have been and that instead, the jury should find that the lead was the proximate cause of Donald's damage only if that was a logical conclusion to be drawn from the evidence. Again, we believe that taken in its proper context, there was no error in these statements made during plaintiff's closing argument.

Whether the Trial Court Incorrectly Barred Cross-examination of Plaintiff's Experts Regarding

Donald's Continued Residence in the CHA Apartment

The next argument raised by CHA is that the trial court abused its discretion in sustaining plaintiff's objection to CHA's cross-examination of plaintiff's expert Dr. Gabriel regarding Donald's blood lead levels lowering even though he continued to be exposed for another two years after chelation in the same apartment. CHA argued that this tended to disprove plaintiff's theory that his mere presence in that apartment caused the elevated blood lead levels in the first instance.

CHA sets forth the unedited copy of Dr. Gabriel's evidence deposition, noting that CHA's counsel would have cross-examined him as follows:

> "Q: So by September of 1994, mid September, two months after the first test, it was down to the range of 10, right?
>
> A: Yes. It's in a range now – 10 or below is considered a non-risk range.
>
> Q: *And during the 11/2 year time period from September of 1994 until Donald moved out of the CHA apartment in May of 1996* (CHA's emphasis)
>
> MR. SCHAFFNER [plaintiff's counsel]: Objection...
>
> BY MR. MOORE [defendant's counsel]:
>
> Q: *– his blood lead level never went up again did it?*(CHA's emphasis)
>
> MR. SCHAFFNER [plaintiff's counsel]: Objection; fact

not in evidence. There's no foundation in this case for when Donald himself stopped living in that apartment.

BY MR. MOORE [defendant's counsel]:

Q: You can answer the question, sir.

A: *That's correct.*(CHA's emphasis)

Q: So for whatever period of time– strike that. So after Donald was chelated – after September of 94, his blood lead level never went up again, it never rebounded forward; it went down, right?

A: That's correct.

Q: *And it went down while he was living in this CHA apartment that you called a highly exposed environment, correct?* (CHA's emphasis)

MR. SCHAFFNER [plaintiff's counsel]: Objection; no foundation.

THE WITNESS [Dr. Gabriel]: *There's no question that the apartment was highly exposed during pregnancy. I cannot give you the exact characteristics of the apartment when Donald was older, when he was less vulnerable to the toxic effects on the brain.* (CHA's emphasis).

CHA contends that the trial court unfairly limited CHA's ability to contest proximate causation

with its ruling.

The trial court explicitly stated that it would let in the evidence of the continued residence if it was a basis for any expert's opinion. The court also stated "I think we're opening up a side issue, a collateral issue of why she stayed there or how she stayed there, [and] did she stay there."

"The admission of evidence and the scope of cross-examination are issues within the sound discretion of a trial court, and a reviewing court will not reverse rulings on those issues absent an abuse of discretion." *Wisniewski v. Diocese of Belleville* 2011 WL 193425 (Ill.App. 5 Dist. 2011), citing *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003) and *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 102 (1995). When there is an error in an evidentiary ruling in a civil trial, a reviewing court will not reverse the trial court's decision unless that error was substantially prejudicial and affected the outcome of the trial. *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 780 (2006). Applying this standard to the instant case, even were we to conclude that the trial judge committed error in excluding the testimony of Dr. Gabriel's cross-examination, we would not find reversible error. As plaintiff notes, the relevancy of the issue was belied by the fact that even CHA's own experts did not comment or rely on it. We cannot say that any error in excluding the evidence was substantially prejudicial and affected the outcome of the trial.

Whether the Trial Court Incorrectly Barred Dr. Accardo from Testifying That Donald Was Not Microcephalic at Birth

CHA next argues that the trial court abused its discretion in barring under Supreme Court Rule 213 Dr. Accardo's testimony that Donald was not microcephalic at birth. Our review of the

record clearly shows that Dr. Accardo never denied that Donald Howell was microcephalic at birth. When asked during his deposition if Donald was microcephalic, Dr. Accardo responded, "I don't recall that he was." We decline CHA's request to interpret Dr. Accardo's testimony as stating an opinion that Donald was not microcephalic.

Dr. Accardo's written Rule 213 disclosure did not state that he held an opinion that Donald was not microcephalic. When CHA sought to have Dr. Accardo opine at trial that Donald was not microcephalic, plaintiff raised an objection based on a Rule 213 violation. CHA contended that his deposition answer was adequate disclosure of his opinion. While the trial court disagreed, it offered to allow CHA to introduce Dr. Accardo's deposition testimony when he was called to the witness stand. CHA declined and elected instead not to ask Dr. Accardo any questions on microcephaly. As plaintiff notes, that may be because according to Dr. Accardo's microcephaly definition, the head size chart he credited, and Donald's uncontested head size, Dr. Accardo would be forced to agree with CHA's other expert, Dr. Wasserman, that, in fact, Donald was microcephalic.

Whether the Trial Court Incorrectly Instructed and Allowed the Jury to Consider Donald's Loss of Future Earnings in the Absence of Any Evidence Sufficient to Enable the Jury to Rationally Formulate an Award

CHA next challenges the award for Donald's loss of future earnings. During closing argument, plaintiff's counsel stated that some people earn minimum wage, that if Donald earned minimum wage he would have earned $650,000 over the course of his lifetime, but also argued that if he earned more than that, his income would be higher. Plaintiff's counsel left it to the jury

to decide the amount of future earnings without suggesting a specific amount. CHA now contends that the jury had no basis for calculating a lifetime earnings figure of $2,000,000 where no testimony was offered on the issue. CHA argues that the jury should not have been permitted to consider lost future earnings.

In order to be entitled to a jury instruction on a claim of lost future earnings, a plaintiff need only furnish "some evidence" probative of his claim. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 407 (1998); accord *Preston v. Simmons*, 321 Ill. App. 3d 789, 804 (2001) (for a plaintiff to be entitled to an instruction on future damages, "a plaintiff need only cite to some evidence in the record to justify the theory of the instruction").

As plaintiff notes, the evidence established that Donald has an IQ of 16, and that at the age of 17, he could not dress himself, he could not toilet without assistance, he could not brush his teeth without assistance, he could not count over five, and he could only make a few letters of the alphabet. He cannot be left alone for even one minute. It was uncontradicted that Donald will never be gainfully employed.

As CHA acknowledges, where a minor with no employment history is injured, the general rule is relaxed. *Preston v. Simmons*, 321 Ill. App. 3d at 804. As the *Preston* court explained: "[W]here evidence is adduced of some permanent injury to a minor child, the trier of fact may infer a future loss of earnings from the nature of an injury, and an instruction to that effect may be issued." *Id*, citing *Alvis v. Henderson Obstetrics, S.C.*, 227 Ill. App. 3d 1012, 1021(1992), in turn citing *Hartseil v. Calligan*, 40 Ill. App. 3d 1067, 1069 (1976). Accordingly, we conclude that the giving of an instruction on the loss of future earnings was not error.

CHA has additionally argued, however, that plaintiff's counsel's argument exceeded the allowed latitude given during closing arguments when plaintiff's counsel stated as follows:

> "All of you have different things in your lives that you can look back on and think 'That made me happy, that made life worthy.' No matter what it is that you think back to that made you happy, no matter what it is, it is absolutely for sure that that will never happen in Donald Howell's life, absolutely for sure."

Citing *Brant v. Wabash R.R. Co.*, 31 Ill. App. 2d 337 (1961), CHA argues that the plaintiff's counsel improperly suggested that the jury put itself in plaintiff's position. CHA also argues that the verdict was the result of "undue sympathy for the plaintiff and her son, compounded by unfair passion and prejudice against the CHA.

In *Brant*, counsel stated to the jury as follows:

> "[The record shows that counsel stated, 'you recall anyone who takes the life of another is subject to giving his own life.' And, 'how much is it worth? How much is it worth from 11 years of age? How much is it worth? I don't know if any of you have had a child without a parent, if you have then you will be able to * * * One who has been in that situation can appreciate it.' And again the statement, 'Can any one of you think of any greater physical evil than pain and suffering? You have heard people pray to die. Has any one of you ever heard anyone pray for pain and suffering?' And again the statement, 'I suppose if you went into the poorer places of this community or over to St. Louis or East St. Louis, and you met someone who needed money, someone who needed money more than he needed

> anything else in the world, and you said to him, 'I will pay you $100.00 an hour if you will accept this pain and suffering'" * * * 'that is an element of damages, and don't take my word, take the Court's word.' * * * 'And as I say, if you found someone who needed money more than anything else in the whole wide world, and you said, 'I will pay you $100.00 an hour-I will pay you $200.00 an hour, if you will take the suffering of George Brant.'" Defendant objected in all instances and requested a mistrial both during the course of the argument and at the conclusion thereof, but the objections were overruled and the motion for mistrial was denied." *Brant*, 31 Ill. App. 2d at 339-40.

The *Brant* court determined that considered as a whole, the argument exceeded the latitude which should normally be given to counsel. *Id.* The court noted that the statement by plaintiff's counsel that "you will recall anyone who takes the life of another is subject to giving his own life," the reference to a "child without a parent," and the reference to the hypothetical person in the community who "accepts $100.00 or $200.00 to endure the pain"' potentially improperly influenced the jury in the assessment of damages. *Id*. The court decided that "[t]he cumulative effect of these remarks in the light of a verdict of $88,500 for the death of the 59 year-old-man who was earning $519 to $572 per month, raises the basic question of whether the appeal to the jury's sympathy." *Id.*

Although it is not proper to have the jury put itself in the position of the plaintiff, we believe that the comments made in the instant case, as well as their impact on the jury, falls well short of those made in *Brant*.

During closing argument, plaintiff's counsel stated to the jury that, if Donald did work for minimum wage, over the course of his lifetime, he would have earned approximately $650,000. The jury's award was $2,000,000. Plaintiff's counsel states, and CHA does not dispute, that the jury award for lost earning capacity, after being reduced to present cash value, was $50,000 per year. We cannot say that the award for lost future earnings, although higher than an award based on minimum wage might have been, was a result of an improper appeal to the jury's sympathy.

CONCLUSION

In view of the foregoing, we conclude that (1) the trial court correctly denied CHA's motion for judgment *n.o.v.* where CHA did not meet its legal burden for a judgment *n.o.v.*, and (2) the trial court correctly denied CHA's motion for a new trial where the verdict was not against the manifest weight of the evidence, and there were no trial errors justifying a new trial. We affirm the judgment of the circuit court of Cook County.

Affirmed.