

TRIAL - July 2005

Winning Trial Techniques

Pick Your Battles:

Picking your Battles AND you Battleground

by Douglas K. W. Landau  
ABRAMS LANDAU, Ltd.  
www.LandauLawShop.com  
797 Center Street at the corner of Station Street  
Herndon, Virginia 20170  
(703-796-9555; fax: 703-796-9210)  
[doug@LandauLawShop.com](mailto:doug@LandauLawShop.com)

## **I. Introduction**

No defendant likes to revisit the “scene of the crime,” the scene of the accident or the scene of bloodshed. It is simple human nature; people do not like to be confronted by their failures or reminded of calamities. With these thoughts in mind, we decided to do something different in a case against the major national convenience store chain. We also knew we had to “think outside the box” and take the defendant and defense counsel outside of their “comfort zone,” since they defended premises liability trip and fall and slip and fall claims every day, and our state is one of the last of the archaic jurisdictions that has contributory negligence and assumption of the risk as complete bars to any recovery by the injured plaintiff.

Even in such onerous jurisdictions, the plaintiff has one sure advantage. The plaintiff gets to start the case and “fire the first salvo.” It is best to front load your work and make that first shot a “knockout blow.”

Too many lawyers simply file their personal injury lawsuits in order to stop the statute of limitations from running, without also serving discovery (Interrogatories, Requests for Production, Subpoenas, Requests for Admission), Notices for Deposition and all of their exhibits (which the defense will request and get anyway). By getting the exhibits out before they are requested, we are able to set the tenor of the case and force defense counsel to play “catch up.” As a corollary to my late father’s advice “never take a case that you were not willing to try to a jury’s verdict,” the mandate that a case should not be filed unless it is filed completely, taking every advantage with an all encompassing start to the litigation can give to the individual personal injury plaintiff.

In this case, we represented a woman who tripped and fell going hurrying on a rainy morning into the convenience store to get her morning coffee. We knew: what

discovery the defense attorney would send; that he would want the depositions at his firm's impressive office building; and, that he would want to show off in front of the carrier and corporate representatives. Our client was a very nervous woman, and she would feel the heat and the pressure on the other side's "home turf," as they had a notoriously bad thermostat in their conference room. We also wanted to take the defendant's witnesses videotape depositions *prior to* our client's examination before trial.

## **II. Strategy (Think about What, When, Where, Why, How ?)**

We wanted to get our notices out first. We wanted to achieve this first "blow" so that the defendant's witnesses would be locked in, on tape, before our client was deposed. What we also wanted was a quick method of preserving the scene, without a lengthy fight over the necessity for a Motion for Inspection. Deposition notices only needed a week's notice; Motions for Inspection required several weeks to accomplish, and not without a big fight. We also wanted the jury, at trial, to be able to feel as though they had visited "the scene of the crime." In this new post 9/11 era, I knew of no trial judge who would allow me to take a jury out of the courthouse in order to visit an accident scene. So, I had to bring the scene to the courthouse. We therefore noticed scene depositions of the store manager AT the store where my client fell. We also noticed the videographer and that this EBT could be used at trial (and in our jurisdiction, favorable portions could even be played during our case in chief !). We conceded on the point of doing the plaintiff's deposition at a later date at defense counsel's office, because the scene deposition was to take place in February, outdoors, and the cold would have affected our client severely.

We had done scene depositions in car and bicycle accident cases, with state troopers walking the roadway and pointing out landmarks for the jury's later viewing. We had also deposed defendants by the side of the road, and taken measurements of their cars (that they had used to get there !) in their presence and on videotape, in order to rebut their allegations as to safe passing clearance distance, physical damage to the vehicle, etc. As with the other scene depositions, we knew (and our court reporter and videographer knew) to dress comfortably, be ready for wind, and have our examination tightly scripted in order to hold the jury's interest like a good television show later in court. Defense counsel, ever mindful of looking the part (even though counsel is off camera) usually is inappropriately dressed for the side of the road, the sweltering Virginia heat or, as here, a frigid winter's day! I call this "environmental lawyering."

Utilizing a quality hand held camera, tripod on wheels, and a warmly dressed videographer, we began the deposition of the store manager. We had the manager introduce herself, show the eye-catching advertisements and signage on the front windows and then point out the missing chunk of cement from the curb that caught my client's foot and threw her down. I was the "narrator" and we were getting useful tape. But defense counsel and the witness were turning blue. They asked if we could continue in the store, which was open and heated at that hour. I responded that they had previously indicated that we could not go inside the store because we would disrupt business, there were "trade secrets," there was insufficient space, and because all of the events relevant to our case occurred outside.

### **III. Compromise and Conclusion**

We compromised, and continued in the manager's office, a place my client, investigator and I had never been before. Inside the cramped room, we could see stacked behind the witness's head all of the risk management books and procedure manuals issued by the company. We could also see the incentive charts and signage that reminded those that worked there to "keep them revvin'..." Because the store could not now hide the fact that they: kept records of accidents, had risk management protocols and had requested that the missing cement be repaired instead of painted over, (and in effect, hidden from customers encouraged to: hurry in and out; look at the large, brightly colored window signage; and unaware of this latent defect on the walking surface of the sidewalk) we knew that by agreeing to come inside instead of torturing defense counsel and causing frostbite, we had stumbled on helpful evidence that would negate the otherwise potentially lethal affirmative defenses in our jurisdiction.

Had we chosen not to move inside, we would have never gotten access to this additional documentary information, gleaned the second theme of our case ("they keep you revvin' - in a hurry, in and out, looking at the signage for the specials, so that they do not want you looking at your feet and the wedge they painted over..."). By reconvening in the manager's office, she could not claim that she did not have records, or could not remember key facts or locate co-worker identification information (because the payroll logs were on her desk). While defense counsel and witness were able to regain feeling in their fingers, by agreeing to their request to change the deposition venue, we were able to take the case out of their hands. The case settled favorably for this client in a jurisdiction notoriously harsh on trip and fall claimants (with juries that are famously tolerant of other people's pain and suffering) without having to go to trial.