FOURTH DIVISION
March 22, 2018

No. 1-16-3341

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SARAH ALBERT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 14 L 10602
	)	
IDETTE GUERERRO,	)	Honorable
	)	Ronald F. Bartkowicz
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Reversed and remanded for new trial. Giving of unmodified version of I.P.I. 70.02 regarding right-of-way, coupled with defense counsel's incorrect argument as to meaning of that instruction, was sufficiently prejudicial to warrant new trial.

¶ 2 Plaintiff, Sarah Albert, appeals from a jury verdict in her action against defendant, Idette Guererro, arising from an automobile accident. Plaintiff argues that the trial court erred in allowing defendant to use Illinois Pattern Jury Instruction Civil 2d 70.02 (IPI 70.02), the instruction on the right-of-way at an intersection. She also challenges the court's decision to admit evidence of plaintiff's prior injuries and a pre-existing condition, when there was no expert testimony establishing a causal connection to her current injury. Plaintiff seeks a judgment notwithstanding the verdict or a new trial.

¶ 3 We conclude that the submission to the jury of the unmodified version of IPI 70.02, in combination with defense counsel's improper legal argument concerning that instruction's meaning, was sufficiently prejudicial to warrant a new trial. We reverse the judgment of the circuit court and remand this matter for a new trial.

¶ 4 I. BACKGROUND

¶ 5 On October 27, 2012, plaintiff and defendant were involved in an automobile collision at the intersection of Hiawatha Drive and Teakwood Drive in Homer Glen, Illinois. Plaintiff was travelling in an easterly direction on Hiawatha Drive. Defendant was heading south on Teakwood Drive.

¶ 6 It is undisputed that the intersection of Hiawatha Drive and Teakwood Drive was an uncontrolled, open intersection—there were no traffic signs or lights. It is also undisputed that, as the two vehicles approached the intersection, plaintiff's vehicle was on the right.

¶ 7 Plaintiff was a resident of the subdivision where the accident occurred. Defendant was unfamiliar with the town of Homer Glenn and was there attending a baby shower.

¶ 8 Plaintiff testified that Hiawatha Drive was a "main road" and a "preferential road," and it was common knowledge among the residents of the subdivision that Hiawatha Drive was a major thoroughfare. Plaintiff also testified that Hiawatha Drive was one of the two main thoroughfares through the subdivision. She defined a thoroughfare as a "[s]treet that takes you from one end of the subdivision to the opposite end of the subdivision" and that Hiawatha Drive "goes from one end of the subdivision all the way through and all these other streets connect into it." Plaintiff said Teakwood Drive did not go all the way through the subdivision and was a side street because it "only goes from Creekside to Pin Oak in one straight line." She testified that one could leave the subdivision via Hiawatha Drive, but could not leave it by Teakwood Drive.

¶ 9 Plaintiff testified that, as she approached the intersection, she saw defendant's car coming down the road and assumed it would yield, because plaintiff had the right of way. Plaintiff's vehicle entered the intersection first, and defendant's car was approximately two or three car-lengths from the intersection at that moment. As plaintiff was going through the intersection, she saw defendant's car speed up, and plaintiff tried to stop, but the cars collided in the middle of the intersection.

¶ 10 Defendant testified she did not see plaintiff's vehicle until the collision occurred, or shortly before. When she first saw plaintiff's vehicle, it was one or two feet away from her and had already entered the intersection. Defendant testified that she did not see plaintiff's car enter the intersection.

¶ 11 As to her injuries, plaintiff testified that she felt severe pain in her neck immediately. She was taken to the hospital by ambulance; x-rays showed no obvious fractures. She sought medical treatment three days after the accident from orthopedic surgeon, Dr. Vijay Thangamani.

¶ 12 Dr. Thangamani testified by way of an evidence deposition. The record includes a transcript of the trial court's rulings on the admissibility of Dr. Thangamani's testimony during his evidence deposition. The record also includes a copy of the transcript of the evidence deposition, showing those portions that were stricken by the trial court. Because the instant case did not involve any claim of injury to plaintiff's right shoulder, the trial court *sua sponte* struck certain portions of Dr. Thangamani's testimony referencing his treatment of plaintiff's prior right shoulder injury, including testimony elicited by plaintiff's counsel during direct examination. Dr. Thangamani's testimony will be discussed in further detail as part of our analysis of plaintiff's argument regarding the admissibility of the evidence regarding her prior injuries and pre-existing conditions.

¶ 13 As one of her instructions, defendant tendered IPI 70.02 on the right-of-way, which the trial court gave over plaintiff's objections.

¶ 14 The jury found in favor of defendant. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Plaintiff challenges the trial court's decision to allow defendant to use IPI 70.02, the instruction on the right-of-way at an intersection, and the court's decision to admit evidence of plaintiff's pre-existing condition. In her posttrial motion, plaintiff requested both a new trial and a judgment notwithstanding the verdict (JNOV). We first address the jury instruction issue because, on appeal, plaintiff has raised this issue in support of both requests.

¶ 17 A. Jury Instructions

¶ 18 A litigant has the right to have the jury clearly and fairly instructed on each of the litigant's theories that are supported by the evidence. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995). "All that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction." *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). The evidence may be insubstantial or slight. *Id.*; *Leonardi*, 168 Ill. 2d at 100. But it is error to give an instruction not based on the evidence. *Leonardi*, 168 Ill. 2d at 100; accord *Brady v. McNamara*, 311 Ill. App. 3d 542, 546 (2000) (reversible error occurs when court gives jury instruction that is not supported by evidence). A trial court's decision on whether an instruction should be given to the jury is reviewed for an abuse of discretion. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13.

¶ 19 During the instruction conference, defendant tendered to the court I.P.I. 70.02 in its entirety, which the trial court gave, over plaintiff's objections.

¶ 20 I.P.I. 70.02 states:

"Right of Way—Intersection

At the time of the occurrence in question, there was in force in the State of Illinois a statute governing the operation of motor vehicles approaching intersections.

If two vehicles are approaching an intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the right will enter the intersection first or both vehicles will enter the intersection at about the same time, then this statute requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

On the other hand, if two vehicles are approaching the intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the left will enter the intersection and pass beyond the line of travel of the vehicle on the right before the vehicle on the right enters the intersection, then this statute requires the driver of the vehicle on the right to yield the right of way to the vehicle on the left.

The fact that a vehicle has the right of way does not relieve its driver from the duty to exercise ordinary care in approaching, entering and driving through the intersection.

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, that party was negligent before and at the time of the occurrence."

¶ 21 Plaintiff's objection to the instruction is two-fold. The first is that the instruction did not apply at all, because plaintiff's vehicle was on a "preferential highway," and she thus had the

right of way as a matter of law. Second, plaintiff argues that, even if the instruction was applicable, the third paragraph of that instruction should have been stricken as unsupported by the evidence.

¶ 22 1. Designation of "Preferential" Right of Way

¶ 23 We first address plaintiff's argument that the instruction did not apply in the first instance, because her vehicle was on a "preferential highway." In support of her contention that Hiawatha Drive was the preferential road, plaintiff relies on her own testimony. In rejecting plaintiff's argument that her vehicle was on a preferential highway, the trial court decided that plaintiff's personal opinion that Hiawatha Drive was a preferential highway was not controlling and noted that she failed to present any evidence that a governmental unit put a sign up to indicate that it was a preferential road. The trial court was correct.

¶ 24 The Notes on Use section of this instruction, citing *Voyles v. Sanford*, 183 Ill. App. 3d 833, 837 (1989), states: "This instruction applies only when the occurrence involved an open, unmarked intersection, with neither vehicle on a preferential highway; if one of the vehicles was on a preferential highway, this instruction should not be used."

¶ 25 *Voyles*, 183 Ill. App. 3d at 834, involved a collision at the intersection of Route 1 and Corning Road near Beecher, Illinois. But that intersection, unlike the one in the instant case, was not an open, unmarked intersection. Instead, it involved an intersection where one of the roads had a stop sign (Corning Road) and the other did not (Route 1). Defendant's vehicle was on Route 1. *Id*. This was, according to the court, the "preferential highway." *Id*. at 837. On the night of the accident, the stop sign on Corning Road was missing. *Id*. But the driver on Corning Road "was well acquainted with the road" and knew she had to stop at the intersection. *Id*.

Nonetheless, she failed to slow down as she approached the intersection and crashed into the defendant's vehicle. *Id*.

¶ 26 This court concluded that the trial court properly refused plaintiff's tendered I.P.I. 70.02, for open, unmarked intersections. *Id*. We decided that it would have confused the jury, in part, because defendant's vehicle was on a preferential highway. *Id*. at 803-04. Thus, *Voyles* stands for the proposition that a downed or missing stop sign does not convert an intersection into an open, unmarked intersection; if Road A has no traffic-control device regulating it, and it intersects with Road B that does have a traffic-control device such as a stop sign, Road A is the preferential highway at that intersection.

¶ 27 The term "preferential highway" was not defined in *Voyles*. But the intersection there was controlled by a stop sign. And where this court has used the term "preferential highway," we typically refer to an intersection where the preferential highway is a through highway with no stop signs and the other "non-preferential" highway or secondary road is controlled by a stop sign. See, *e.g.*, *Griffin v. Cohen*, 2015 IL App (5th) 140408, ¶ 5 ("There is no stop sign on Route 3. Water Street has a stop sign posted on either side of the road at the intersection. Therefore, Route 3 is the preferential highway and Water Street is the secondary road."); *Asplund v. Silica Sand Transportation, Inc.*, 254 Ill. App. 3d 593, 597-98 (1993) (driver on preferential highway generally has right of way over motorists on non-preferential, secondary roadway controlled by stop sign); *Moore v. Swoboda*, 213 Ill. App. 3d 217, 231 (1991) ("courts have held that the driver on the preferential highway has no duty to expect that a driver on a nonpreferential highway will disobey a stop sign and collide with his vehicle); see also 625 ILCS 5/11-904 (West 2012) ("Preferential right-of-way at an intersection may be indicated by stop or yield signs as authorized in Section 11-302 of this Chapter."); *Kofahl v. Delgado*, 63 Ill. App. 3d 622, 625

(1978) ("The duty of a driver at a stop sign where his road intersects with a preferential highway has been codified in section 11-904(b) of the Illinois Vehicle Code.").

¶ 28 In fact, "[m]uch has been said about the relative duties of drivers upon preferential highways and those upon *non-preferential highways controlled by stop signs*." (Emphasis added.) *Kofahl*, 63 Ill. App. 3d at 625. But plaintiff has failed to cite any Illinois case, and our independent research has not found one, involving an open, unmarked intersection containing no stop signs, yield signs, or other traffic-control devices, where this court concluded that one of the roads was the "preferential highway."

¶ 29 The Illinois Vehicle Code does not contain the term "preferential highway," but it does contain the term "preferential right of way." Article IX of Chapter 11 of the Illinois Vehicle Code is currently comprised of ten sections, all dealing with who has the right of way under various circumstances and who must yield. 625 ILCS 5/ch. 11 (West 2012); see also *People v. Isaacson*, 288 Ill. App. 3d 560, 564 (1997). Section 11-901 deals with vehicles approaching or entering intersections, and reads as follows:

> "(a) When 2 vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right.
>
> (b) The right-of-way rule declared in paragraph (a) of this Section is modified at through highways and otherwise as stated in this Chapter." 625 ILCS 5/11-901(West 2010).

¶ 30 The "preferential highway" referenced in *Voyles* was a "through highway," which the Illinois Vehicle Code defines as "[e]very highway or portion thereof on which vehicular traffic is given preferential right of way, and at the entrances to which vehicular traffic from intersecting

highways is required by law to yield right of way to vehicles on such through highway in obedience to either a stop sign or a yield sign, when such signs are erected as provided in this Act." 625 ILCS 5/1-205 (West 2012).

¶ 31 The Illinois Vehicle Code is "a comprehensive legislative enactment whose primary purpose is to regulate the flow of vehicular traffic on the public roads of this state." *Kelsey-Hayes Co. v. Howlett*, 64 Ill. App. 3d 14, 16 (1978). With respect to highways under their jurisdiction, governmental bodies, including the Department of Transportation (the Department) and local authorities, have the authority and discretion to give a preferential right of way by: designating a highway as a "through highway" by erecting stop signs or yield signs at specified entrances to the highway; designating an intersection as a stop intersection or a yield intersection by erecting signs at one or more entrances to the intersection; or erecting appropriate traffic control devices. See 625 ILCS 5/11-302; 5/11-304; 5/11-904; 5/11-1204 (West 2012). Plaintiff has pointed to no provision in the Illinois Vehicle Code to support her argument that Hiawatha Drive had a preferential right of way.

¶ 32 Although plaintiff criticizes defendant's reference to the Illinois Vehicle Code, she has also failed to provide any case law supporting her theory that she was travelling on the preferential road based on the "common knowledge" among the residents of the subdivision that Hiawatha Drive was a "major thoroughfare." We found no Illinois case supporting such a claim.[1]

[1] We have, however, found case law from other jurisdictions, rejecting the notion that one's personal experience and opinions on the "preferential" status of a road can supplant a state statute. See, *e.g.*, *Ellis v. Sketers*, 1 Kan. App. 2d 323, 326-27 (1977) (in absence of stop or yield signs at intersection, fact that one of roads may have been designated an arterial street by city and considered through street by others, could not defeat application of state right-of-way statute); *Carney v. State Farm Mutual Automobile Insurance Company*, 335 So. 2d 759, 763

¶ 33 Here, the collision took place at an open and uncontrolled intersection. The intersection had no stop signs, yield signs, or any type of official traffic control signal. There was no evidence that the Department or any local authority exercised its authority or discretion to designate the intersection as a yield intersection or stop intersection, or to designate Hiawatha Drive as a through highway. Hiawatha Drive is not a preferential highway. Thus, plaintiff's argument that IPI 70.02 should not have been used, because her vehicle was on a preferential highway, fails.

¶ 34 2. *Whether Evidence Supported Giving of Entire Instruction*

¶ 35 Plaintiff's second argument regarding the use of I.P.I 70.02 is that the evidence in the case did not support the giving of the instruction in its entirety. Specifically, plaintiff takes issue with the language in paragraph three, which addresses when the vehicle on the right must yield the right of way. Plaintiff argues that defendant did not overcome the right-of-way burden, because there was no evidence adduced that defendant's vehicle "enter[ed] the intersection and pass[ed] beyond the line of travel of" plaintiff's vehicle before plaintiff's vehicle entered the intersection. Plaintiff argues that, because there was no evidence that defendant saw plaintiff's vehicle before it was actually in the intersection, defendant could not possibly show that she

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(1976) (local custom by residents of area could not be used to change statutory definition of through highway); *Lemke v. Mueller*, 166 N.W. 2d 860, 864 1969 (same); *Wood v. Melton*, 179. Kan. 128, 132-33 (1956) (alleged custom, practice and usage that cars travelling a particular north-south road would stop and yield to any traffic on east-west road, which was contrary to right-of-way statute, could not be used to establish or defeat action and such evidence could not be received at trial); *Stephens v. Cutsforth*, 256 Wis. 256, 261 (1949) (new trial granted where jury was improperly instructed that custom or agreement, if properly established, would supplant statutes governing travel on a public highway).

observed it and was "able to clear the intersection." Plaintiff relies on this court's opinion in *Seaman v. Wallace*, 204 Ill. App. 3d 619 (1990).

¶ 36 *Seaman*, a wrongful death action, involved a collision at an unmarked intersection involving a "tractor-trailer-tanker" (tractor) driven by the defendant and a pickup truck driven by the plaintiff's decent, Wilbur Seaman (Wilbur). *Id*. at 622-23. The defendant's tractor was 53 feet long, with five axles—three on the cab and two on rear of the trailer. *Id*. at 623. It was travelling southbound toward the intersection, while Wilbur's pickup was travelling eastbound toward the same intersection—meaning the defendant's tractor was on the left, and Wilbur's pickup was on the right. *Id*.

¶ 37 When the front of the defendant's tractor crossed the south line of the intersection, but while the trailer of the vehicle was still in the intersection, Wilbur's pickup truck collided with the trailer on the defendant's tractor, resulting in Wilbur's death. *Id*. In closing argument at trial, the defendant argued that, under the law, if a vehicle on the left (the defendant's tractor) reached the intersection before the vehicle on the right (Wilbur's pickup), the law provided that the vehicle on the left had the right of way. *Id*. at 627. Thus, counsel argued, because the defendant's tractor reached the intersection first, the tractor had the right of way. *Id*.

¶ 38 The plaintiff argued in rebuttal that, under IPI 70.02, the defendant's tractor had the right of way only if its vehicle completely cleared the pickup's line of travel before the pickup reached the intersection. Because the evidence showed that this did not occur, Wilbur's pickup truck had the right of way. *Id*. at 627-28.

¶ 39 On appeal, after a careful review of the law, this court held that the plaintiff's interpretation of the right-of-way was the accurate proposition of law. It did not matter whether the vehicle on the left reached the intersection first; the vehicle on the left had the right of way

only if, while traveling at a reasonable speed, it could *clear* the intersection before the vehicle on the right *entered* the intersection. *Id*. at 632. The defendant's contrary interpretation, we noted, "would create a race to the intersection," whereby the first vehicle to enter the intersection would automatically gain the right of way. *Id*. at 633. This court concluded that, under IPI 70.02:

> "The jury must decide, after taking into account the relative speed and distances of the cars, whether the driver of the vehicle on the left was justified in believing he could pass through the intersection, that is, clear the intersection, before the vehicle on the right entered the intersection. If so, the vehicle on the left may be deemed to have had the right-of-way." *Id*. at 634.

¶ 40 The Comments to I.P.I. 70.02 likewise note that *Seaman* "emphasiz[ed] that the vehicle on the left has the right-of-way only if the driver of that vehicle justifiably believes that he will be able to 'pass through the intersection, that is, clear the intersection, before the vehicle on the right enter[s] the intersection.' "

¶ 41 Plaintiff does not dispute that the third paragraph of IPI 70.02 accurately reflects Illinois law, but she argues that it was error to include that third paragraph, because the evidence at trial did not support it. As we quoted the entirety of the instruction above (see *supra*, ¶ 20), we print only the relevant second and third paragraphs of IPI 70.02 again:

> "If two vehicles are approaching an intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the right will enter the intersection first or both vehicles will enter the intersection at about the same time, then this statute requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

> On the other hand, if two vehicles are approaching the intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the left will enter the intersection and pass beyond the line of travel of the vehicle on the right before the vehicle on the right enters the intersection, then this statute requires the driver of the vehicle on the right to yield the right of way to the vehicle on the left."

¶ 42 Plaintiff argues that including the third paragraph of IPI 70.02 was improper, because there was no evidence that the "vehicle on the left"—defendant's vehicle—had "enter[ed] the intersection and pass[ed] beyond the line of travel of the vehicle on the right [plaintiff's vehicle] before the vehicle on the right enter[ed] the intersection." *Id*. Nor, for that matter, was there any evidence that defendant "was justified in believing he could pass through the intersection, that is, clear the intersection, before the vehicle on the right entered the intersection." IPI 70.02, Comments (quoting *Seaman*, 204 Ill. App. 3d at 634).

¶ 43 We agree with plaintiff that the record discloses no evidence that defendant's vehicle had cleared the intersection before plaintiff's vehicle entered that intersection, or that defendant justifiably believed that she could clear the intersection before plaintiff's vehicle entered it. First, there is no dispute that the collision occurred within the intersection. Second, defendant testified that she did not see plaintiff's vehicle until the moment of impact or perhaps immediately preceding impact, when the vehicles were one or two feet away from colliding. And while the photographs are not in the record, the trial court found that "[p]hotos and trial testimony placed damages to the vehicles to be located at the corner of each vehicle."

¶ 44 So there is no evidence that defendant's vehicle had cleared the intersection before plaintiff's vehicle entered it; all of the evidence suggests otherwise. It is far from clear, in fact,

that defendant's vehicle even reached the intersection first; defendant never directly testified on this subject, as she admitted she never saw plaintiff's car enter the intersection, though her testimony implied that defendant's vehicle reached it first. For her part, plaintiff testified that she saw defendant's vehicle in advance, expecting it to yield, and that her car entered the intersection first by two or three car-lengths. In any event, there is certainly no evidence that defendant had calculated in advance, justifiably or otherwise, that her vehicle was capable of clearing the intersection before plaintiff's vehicle would reach that intersection.

¶ 45 On appeal, defendant does not attempt to argue that she had cleared the intersection or that she reasonably believed she could do so. Defendant hardly even mentions her own trial testimony in her brief. Before the jury in closing argument, defendant's counsel took the same position defendant takes on appeal—that the only thing that matters is that defendant reached the intersection first. In explaining the meaning of the third paragraph of IPI 70.02—that is, what it meant for the vehicle on the left to "enter the intersection and pass beyond the line of travel of the vehicle on the right"—she told the jury that "[t]he law says, if the vehicle on the left is already in the intersection, has passed that line, no, you don't have the right-of-way anymore." Counsel argued that defendant "was in control" of the intersection because she reached it first.

¶ 46 For the record, as plaintiff correctly notes, defendant never testified that she reached the intersection first; again, she testified that she did not even see plaintiff's vehicle until the moment of impact in the middle of the intersection, or immediately before impact. But the bigger point is what we have explained above—that the law does not permit the vehicle on the left the right of way simply because it reached the intersection first. See *Seaman*, 204 Ill. App. 3d at 634. The law does not countenance a "race to the intersection." *Id*. at 633. The third paragraph of IPI 70.02's reference to "passing the line of travel of the vehicle on the right" does not mean merely

passing into the *intersection,* as defendant argued to the jury, but rather just what it says: passing beyond the line of travel that the car on the right would travel as it entered the intersection—"*clearing*" the intersection, in other words, before the car on the right even reached that intersection. (Emphasis added.) *Id*. at 634.

¶ 47 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence. *People v. Parker,* 223 Ill.2d 494, 501 (2006). Jury instructions should "fairly, fully, and comprehensively apprise the jury of the relevant legal principles." *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273–74 (2002). The trial court has the discretion to determine if a particular jury instruction is applicable and supported by the evidence. *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1137 (2010); *Matarese v. Buka,* 386 Ill. App. 3d 176, 178 (2008); see also *Panepinto v. Morrison Hotel, Inc*., 71 Ill. App. 2d 319, 338 (1966) ("the appropriateness of any I.P.I instruction must be determined by its proper relationship to the evidence in the case on trial.").

¶ 48 Supreme Court Rule 239(a) (eff. Apr. 8, 2013) requires the use of an IPI in a civil case whenever, "giving due consideration to the facts and the prevailing law," the court determines that it accurately states the law. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 14. If the IPI does not accurately state the law in all respects, the pattern instruction may be modified. Ill. S. Ct R. 239(b) (eff. Apr. 8, 2013); *Studt*, 2011 IL 108182, ¶ 14; see also *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 79; *People v. Clarke*, 391 Ill. App. 3d 596, 626 (2009). A circuit court is deemed to have abused its discretion if the pattern instruction misleads the jury and results in prejudice to the litigant. *Schultz,* 201 Ill. 2d at 274; *Taylor*, 2011 IL App (1st) 093085, ¶ 79.

¶ 49 We agree with plaintiff that the third paragraph of IPI 70.02, though an accurate statement of the law in the abstract, was not applicable or supported by the evidence in this case. The paragraph immediately preceding the third paragraph stated the accurate and applicable legal standard regarding right-of-way in this case: if two vehicles approach an unmarked intersection such that, driving at reasonable speeds, the vehicle on the right enters first, or both vehicles "enter the intersection at about the same time," the vehicle on the right has the right of way.

¶ 50 The challenged third paragraph, which begins with the phrase "On the other hand," clearly posits an alternative factual scenario, where the driver on the left not only reaches the intersection first but is able to clear the intersection before the driver on the right has reached the intersection. There was not the slightest bit of evidence that this alternative factual scenario was present here; defendant does not even try to claim so.

¶ 51 In many instances, the inclusion of a jury instruction that accurately states the law, but is not applicable to the evidence at trial, would be an insufficient basis, by itself, for a new trial. The problem here is that defense counsel then used that third paragraph to argue an entirely incorrect version of the law to the jury. Indeed, defendant's case centered on this incorrect notion that the right of way belonged to the first vehicle to reach the intersection—which defendant claimed was her vehicle—and counsel used this third paragraph (erroneously) to claim to the jury that the law supported her position. Before the jury in closing argument, in explaining the meaning of the third paragraph of IPI 70.02—that is, what it means for the vehicle on the left to "enter the intersection and *pass beyond the line of travel* of the vehicle on the right" (emphasis added), defense counsel argued:

"The law says, if the vehicle on the left is already in the intersection, has passed that line, no, you don't have the right of way anymore. Right? [Defendant] has the right-of-way if she's in control of the intersection.

So now you have to ask yourself *** who had—who was in the intersection? Who was in control of this intersection?

***

[Defendant] was in control of the intersection. She was already there. *** You know what that means? If she's in control of the intersection, it doesn't matter if you think you have the right of way; you didn't. You had to stop. You had to yield and you didn't. That's what the law says and that's what the evidence is going to show you."

¶ 52 As we previously explained, counsel's argument was not a correct statement of the law. It is not simply a matter of which vehicle reaches the intersection first; the vehicle on the left has the right of way only if it can *clear* the intersection before the vehicle on the right *enters* it. A vehicle on the left does not "control" the intersection merely by reaching it first. Defense counsel's argument thus significantly aggravated the inclusion of this third paragraph of IPI 70.02 by arguing that it meant something it did not.

¶ 53 Moreover, the evidence did not so strongly favor defendant that we could find this error harmless. As noted in more detail above, plaintiff testified that the vehicles approached the intersection at roughly the same time; plaintiff's vehicle was going the speed limit; she saw defendant's vehicle approaching but assumed that defendant would yield because plaintiff had the right of way; plaintiff's vehicle reached the intersection first, while defendant's vehicle was still two or three car-lengths away from the intersection; as plaintiff's car entered into the intersection, defendant's vehicle sped up and raced through the intersection, at which time

plaintiff applied her brakes to no avail; and defendant's vehicle collided with her vehicle on the front driver's side, from the back of the front wheel well to the front of the car.

¶ 54 Defendant, on the other hand, said she never saw plaintiff's vehicle until they were about to collide in the intersection. She slammed on the brakes just before the collision. She described the damage to her car as if it were hit closer to the side of her vehicle, describing the collision as her vehicle being "T-boned."

¶ 55 The combination of this inclusion of the third paragraph of IPI 70.02, along with defense counsel's incorrect argument as to its meaning, was sufficiently prejudicial to warrant a new trial. See *Studt*, 2011 IL 108182 (reversal for new trial is warranted if jury instruction misleads jury and results in serious prejudice to opposing party); *Schultz*, 201 Ill. 2d at 274 (same); *Bielicke v. Terminal R.R. Ass'n of St. Louis*, 291 Ill. App. 3d 690, 693-94 (1997) (reversing and remanding for new trial where trial court gave instruction not supported by evidence that caused prejudice).

¶ 56 We do not agree with plaintiff, however, that she was entitled to a JNOV. A JNOV should be granted only when all of the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could ever stand. *Lawlor v. North American Corporation of Illinois*, 2012 IL 112530, ¶ 37. The standard for entry of a JNOV is a high one, and it is inappropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *Id.*

¶ 57 We cannot say that this standard was met. The right-of-way question is critical in a case like this one, but it is not dispositive. As IPI 70.02 itself provides, correctly so, having the right of way does not relieve a driver from exercising ordinary care. Section 11-901 of the Illinois Vehicle Code does not confer an absolute right of way nor afford the driver on the right a

conclusive presumption that the other must yield. The right-of-way statute must be considered with regard to both the distance and speed of vehicles approaching the intersection. *Duffek v. Vanderhei*, 81 Ill. App. 3d 1078, 1085 (1980); *Relli v. Leverenz*, 23 Ill. App. 3d 718, 719-20 (1974).

¶ 58 Whether a plaintiff was exercising ordinary care before a collision depends on the circumstances of the impact. *Relli*, 23 Ill. App. 3d at 720; *cf. Griffin v. Cohen*, 2015 IL App (5th) 140408, ¶ 21 ("Although the driver on a preferential road has the right-of-way and therefore has the right to expect that the driver from the secondary roadway with a stop sign will obey that stop sign, the right to proceed into the intersection is not absolute."); *Guy v. Steurer*, 239 Ill. App. 3d 304, 308 (1992) (driver on preferential road does not have absolute right-of-way to proceed into obvious danger and has duty to keep proper lookout, observe due care in approaching and crossing intersections, and drive as prudent person would to avoid collision when danger is discovered, or should have been discovered by exercise of reasonable care). Thus, regardless of who has the right of way, all drivers have a duty to maintain a proper lookout and to use every precaution to avoid a collision. *Duffek*, 81 Ill. App. 3d at 1085.

¶ 59 While we agree that the error in the jury instruction was sufficient to warrant a new trial, we cannot say that no verdict in favor of defendant could ever stand based on the evidence presented at trial. It is conceivable that the jury properly understood the right-of-way law but simply believed that plaintiff failed to exercise ordinary care to avoid a collision, regardless of the fact that she had the right of way. The entry of a JNOV would be inappropriate.

¶ 60 We thus reverse the judgment and remand for a new trial.

¶ 61 B. Admissibility of Evidence of Plaintiff's Prior Injuries and Pre-existing Condition

¶ 62 Plaintiff also claims that she should have been granted a new trial based on the trial court's erroneous rulings related to the admissibility of certain testimony from Dr. Thangamani's evidence deposition. Although we have already determined that plaintiff is entitled to a new trial based on the erroneous instruction, we will address plaintiff's argument, as this issue is likely to recur on retrial. Specifically, plaintiff claims that the trial court abused its discretion in allowing defense counsel to cross-examine Dr. Thangamani, "over plaintiff's objection, about pre-existing conditions to the same part of the body, without introducing competent medical testimony as to the relevance."

¶ 63 The so-called "same-part-of-the-body" rule was a doctrine developed in the appellate court that allowed a defendant to introduce evidence that the plaintiff had previously suffered injuries similar to those at issue. *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 53 (2000). Under this doctrine, "evidence of a prior injury is admissible without any showing that it is causally related to the present injury as long as both the past and present injuries affected the same part of the body." *Id*. This is no longer the rule in Illinois.

¶ 64 In *Voykin*, our supreme court considered whether a defendant must present medical or other competent evidence of a causal or relevance connection between a plaintiff's prior injury, prior accident, or preexisting condition and the injury at issue. *Id*. at 51. There, the plaintiff sued for injuries he sustained in a car accident. *Id*. at 51-52. Plaintiff had sought treatment for neck and back pain. *Id*. at 52. The trial court, applying the same-part-of-the-body rule, allowed the defendant to question the plaintiff and his doctor about plaintiff's prior injury to his lower back, which had occurred five years before the accident. *Id*. The court also allowed the defendant to introduce evidence of plaintiff's prior carpal tunnel syndrome and prior "neck problems" that were "secondary" to the plaintiff's playing hockey since he was six years old. *Id*. at 52, 60.

¶ 65 After the jury returned a verdict in defendant's favor, plaintiff argued on appeal that defendant should not have been allowed to introduce evidence of the plaintiff's prior injuries without providing expert testimony to demonstrate a causal connection between the past and present injuries. *Id*. at 52. The appellate court agreed, reversing and remanding for a new trial. *Id*. at 52-53. The Illinois Supreme Court affirmed the appellate court's judgment. *Id*. at 61.

¶ 66 The court's decision in *Voykin* provided a comprehensive analysis of the same-part-of-the-body rule, which it rejected, and enunciated a new standard. The court described the same-part-of-the-body rule as "nothing more than a bright-line relevancy standard" and rejected the automatic relevance found in the rule. *Id*. at 57.

¶ 67 Instead, as the court explained, for evidence of a prior injury to be relevant, it "must make the existence of a fact that is of consequence either more or less probable." *Id.* As the court noted, a defendant generally seeks to introduce evidence of a plaintiff's prior injury "for one of three purposes: (1) to negate causation; (2) to negate or reduce damages; or (3) as impeachment." *Id*. "With respect to causation, evidence of a previous injury is relevant only if it tends to negate causation or injuries." *Id.* As to damages, the court noted that "the prior injury may be relevant to establish that the plaintiff had a preexisting condition for which the defendant is not liable and that the defendant is liable only for the portion of the damages that aggravated or increased the plaintiff's injury." *Id*. at 58.

¶ 68 The court in *Voykin* next considered whether expert testimony was necessary to determine whether a prior injury was relevant to the current injury. The court concluded as follows:

> "Without question, the human body is complex. A prior foot injury could be causally related to a current back injury, yet a prior injury to the same part of the back may not

> affect a current back injury. In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, *if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the "same part of the body" or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence*. This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." (Emphasis added.) *Id*. at 59.

¶ 69 Applying these principles, the supreme court affirmed the appellate court's judgment based on the trial court's erroneous admission of the plaintiff's "neck problems." *Id*. at 61. But the court did not address the admissibility of the evidence of the plaintiff's prior back injury or his treatment for carpal tunnel syndrome, instead deciding that the trial court on remand was in the best position to address the admissibility of that evidence under the new standard. *Id* at 60-61.

¶ 70 Although, under *Voykin*, there may be three separate bases for the admissibility of the evidence of a prior injury—causation, damages, or impeachment—our review of the record here indicates that the trial court, as well as the parties, have focused solely on the "causation" basis.

¶ 71 In her posttrial motion before the trial court, plaintiff cited only *Cancio v. White*, 297 Ill. App. 3d 422 (1998), contending that "the defense attorney questioned Dr. Thangamani at length

about [plaintiff's] prior injuries, despite objection and knowledge that there was no causal connection between the prior conditions and those which he related to the collision." In its order denying plaintiff's posttrial motion, the trial court likewise relied on *Cancio* but found the testimony admissible because: (1) "it is the treating doctor's own notes of Plaintiff's medical history that precipitated the line of questioning;" and (2) plaintiff told Dr. Thangamani that she had been in physical therapy for neck pain ten days before the accident.

¶ 72 The trial court further noted that, even if the admission of the testimony were error, it was harmless, because Dr. Thangamani corrected any error on redirect, testifying "that he did not believe there was a causal relationship between plaintiff's prior injuries and the later injuries from the motor vehicle collision," and that the symptoms for which he was treating plaintiff before this collision were "distinctly different" from her post-collision injuries.

¶ 73 On appeal, the parties continue to focus on causation. Defendant argues that she "provided an alternate theory as to what was *causing* the alleged pain to Plaintiff based on her own treating orthopedic surgeon's medical notes of Plaintiff." (Emphasis added.) Defendant does not argue that it sought admission of plaintiff's prior injury or pre-existing condition for the purpose of impeachment or for the purpose of negating or reducing damages. Instead, the evidence was sought to negate causation.

¶ 74 The fact that the treatment for the prior injury was in "the treating doctor's own notes" does not make the evidence automatically admissible. As plaintiff notes, a plaintiff's prior physical condition, including prior injuries, are usually found in the doctor's notes. Defendant seems to take the position that she could question Dr. Thangamani about any pre-existing conditions or symptoms related to prior injuries, simply because they were contained in the notes

he made on the days where he also saw plaintiff for her current injuries from the car accident. But *Voykin* requires more than a mere mention of previous injuries within a doctor's notes.

¶ 75 A defendant is required to demonstrate a causal relationship between a prior and present injury. *Voykin*, 192 Ill. 2d at 56. "[A]bsent competent and relevant evidence of a causal connection between the preexisting condition and the injury complained of, evidence of the preexisting condition is inadmissible." *Cancio v. White*, 297 Ill. App. 3d 422, 430 (1998). In sum, a defendant must demonstrate that the evidence he wishes to present is relevant to the question at issue—namely, whether the defendant's negligence caused the plaintiff's injury. *Voykin*, 192 Ill. 2d at 56.

¶ 76 Defendant here did not introduce any expert testimony that plaintiff's prior neck pain meant she had a herniated disc at C5-C6 before the collision, but defense counsel elicited testimony from Dr. Thangamani on this issue. Nor did defendant present any expert testimony that plaintiff's prior neck pain meant that this collision did not cause any injury. This testimony should have been stricken.

¶ 77 Defendant's other arguments regarding the admissibility of this testimony is that plaintiff opened the door to the testimony, and that any error was harmless (as the trial court held). Harmless error does not concern us, as we are already remanding for a new trial. Nor need we delve into whether plaintiff opened the door, as we recognize that the parties will retry the case. We do recognize, of course, that a party can waive an objection to witness testimony by inviting the error, or "opening the door," by first eliciting testimony on the subject in the first instance. See *People v. Tolbert*, 323 Ill. App. 3d 793, 805 (2001).

¶ 78 On remand, consistent with this order, the trial court should reassess the admissibility of the testimony elicited during Dr. Thangamani's cross-examination, striking whatever testimony it deems irrelevant.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand the matter for a new trial consistent with this order.

¶ 81 Reversed and remanded.