

NEWS & DEVELOPMENTS

The Missing-Witness Charge and Cumulative Evidence

In the context of a civil trial, the New York Court of Appeals has addressed the interplay between a missing-witness charge and cumulative evidence. *DeVito v. Feliciano*, 978 N.Y.S.2d 717 (N.Y. 2013). It held that the trial court committed reversible error when it denied a missing-witness charge as to the defendants' uncalled medical specialists on the ground that their testimony would have been cumulative of the trial testimony of the plaintiff's medical specialists. When a missing-witness charge is requested in a civil case, the uncalled witness's testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the witness. Testimony of an uncalled witness may not be considered cumulative simply because it would repeat or be consistent with an opposing party's evidence.

In *DeVito*, the elderly plaintiff was a passenger in a car driven by her daughter and alleged she suffered serious injuries when that car was "rear-ended" by a van operated and owned by the defendants. The plaintiff's evidence at trial included the testimony of the plaintiff, her daughter, and specialists who had either treated plaintiff or examined her medical records. The specialists' testimony went to the extent and seriousness of plaintiff's injuries and the probability that those injuries were the result of the accident. Cross-examination of the plaintiff's witnesses revealed, among other things, that plaintiff had not earlier disclosed that she was seriously injured in a fall four months before the accident, that the plaintiff's physical condition when she left the hospital after the accident was inconsistent with her now-claimed physical condition, and that the hospital records did not reflect some of the injuries the plaintiff asserted resulted from the accident.

Prior to trial, the defendants had four specialists examine the plaintiff on their behalf but declined to call any of them as a trial witness. (While not discussed in the court of appeals' opinion, it appears that the defendants declined to call their specialists at trial because they, at least in part, reached conclusions similar to those of the plaintiff's specialists as to the seriousness of the plaintiff's injuries.) The trial court denied the plaintiff's subsequent request for a missing-witness charge as to the defendants' specialists, finding that their testimony would have been cumulative of the testimony of the plaintiff's specialists. The plaintiff, however, was permitted to argue during summation that the jury should draw an adverse inference against defendants from their failure to call their specialists to the stand.

The jury ultimately decided for the defendants, finding that the accident was not a factor in bringing about the plaintiff's injuries. That verdict and the ruling denying a missing-witness charge was later affirmed by the Appellate Division, after which the plaintiff was granted leave

to appeal to the court of appeals. The court of appeals found that the trial court's denial of the plaintiff's request for a missing-witness charge to constitute reversible error, and a new trial was ordered.

The court of appeals described the “uncalled-” or “missing-” witness charge as permitting (but not requiring) a jury to draw an adverse inference based upon a party's failure, without reasonable explanation, “to call a witness who would normally be expected to support that party's version of events.” It found that in the case before it three of the four “preconditions” to a missing-witness charge were not in dispute. The defendants' uncalled specialists (1) had knowledge that was “material” to the trial; (2) were under the defendants' control and would be expected to testify at trial in their favor; and (3) were available to defendants. Turning to the disputed fourth precondition—that the uncalled-witness's testimony be expected to give noncumulative testimony—the court rejected as a matter of law the defendants' position (and that of the courts below) that a missing-witness charge was properly denied because the testimony of the defendants' specialists would have been cumulative of that given at trial by plaintiff's specialists.

Rather, the court concluded that an absent witness's testimony may not be ruled cumulative simply on the ground that it would be cumulative of the testimony of witnesses called by an opposing party. It would be “anomalous” to hold otherwise, the court found, and observed that “if the testimony of a defense physician who had examined a plaintiff and confirmed the plaintiff's assertion of a serious injury was deemed to be cumulative to the evidence offered by the plaintiff, thereby precluding the missing-witness charge, there would never be an occasion to invoke such charge.” *Id.* at 722 (quoting *Leahy v. Allen*, 644 N.Y.S.2d 388 (N.Y. App. Div. 1996)).

In reversing the jury verdict and ordering a new trial, the court explained that the trial court's refusal to provide the jury with the requested missing-witness charge could not be deemed a “harmless error.” While the trial court did permit plaintiff to argue to the jury in summation that it should draw an adverse inference against the defendants from its failure to call its specialists, a party's summation “is not ordinarily a substitute for the appropriate jury charge by the court; the error here was not cured by the summation.” *Id.* at 722.

In light of its facts and the breadth of the holding in *DeVito*, attorneys in New York may seek a missing-witness charge with greater frequency in cases where an adversary declines at trial to produce a potential fact witness or designated expert. Courts in New York may then have the opportunity to decide what, if any, limits or exceptions there are to *DeVito*.

Keywords: litigation, commercial, business, missing witness, uncalled witness, missing-witness charge, uncalled-witness charge, adverse inference, cumulative evidence, *DeVito*

— [*John P. McCahey*](#) is a litigation partner at *Hahn & Hessen LLP* in New York, New York