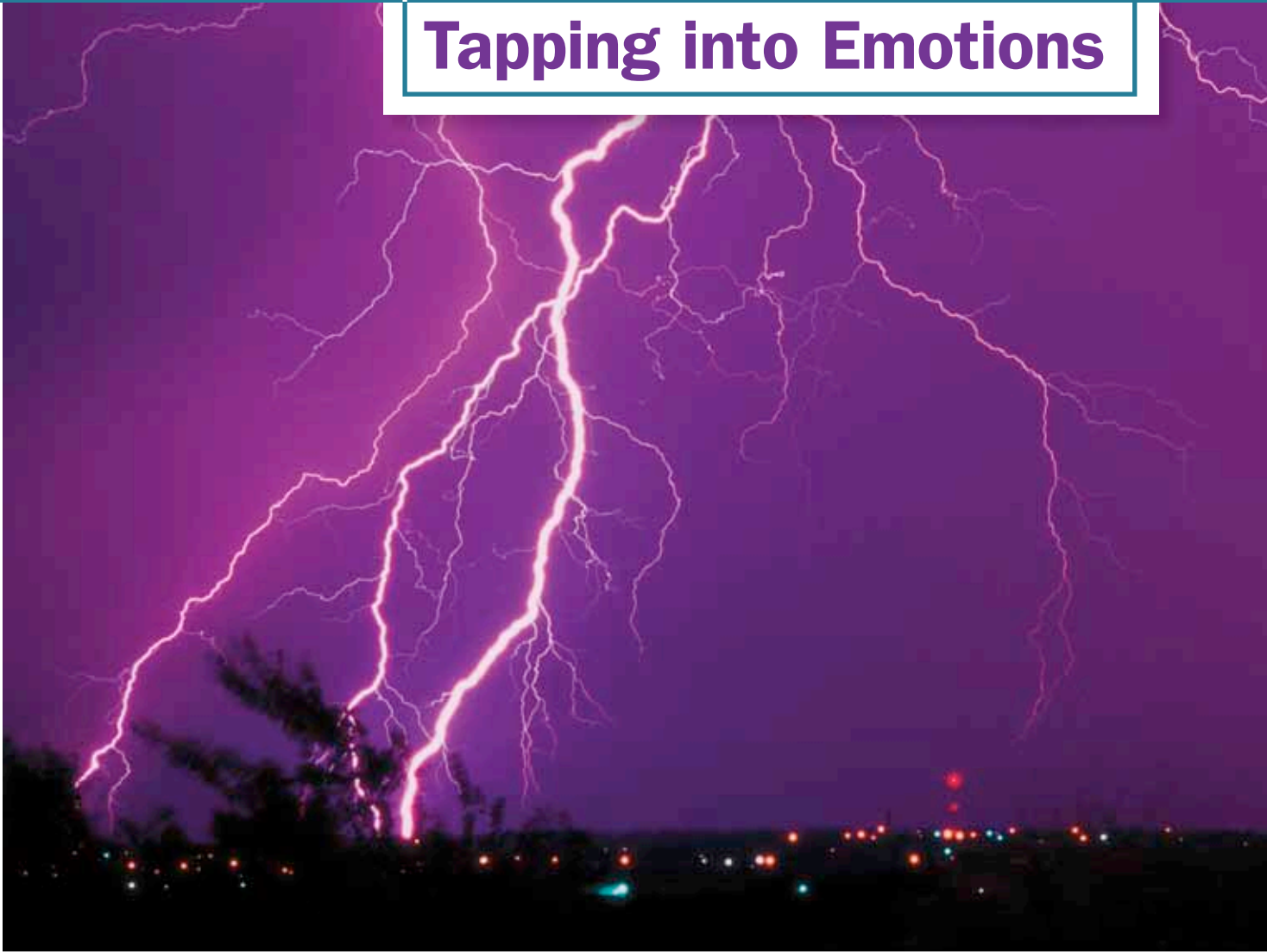


Tapping into Emotions



The Weight of Morals, Mores, and Beliefs in the Courtroom

Jurors are often ruled more by emotion than by law.

By || **GREGORY S. CUSIMANO**

Western philosophers, from Socrates and Plato on, have promoted pure reason as the gold standard of decision-making. Yet we know that the ideal of the law as “reason, free from passion” is rarely achieved in a courtroom setting. Instead, jurors’ morals, mores, values, and beliefs often receive the greatest weight.

This is the result of an automatic decision-making process that we have developed to promote what we think and believe and to justify our actions and decisions. We make these decisions every day, often without realizing it.

Such automatic thinking is a lot like riding a bicycle. As a result of trial and error, all of a sudden we are upright. We don’t know exactly how—we just are—and unconsciously we continue making the same adjustments to stay upright. If we had to rely on reasoning to decide to turn the handlebars left and right, it would be too late, and we would crash.

This kind of automatic decision-making is also happening in the jury room. I’ll illustrate with a real example. Jane Doe, 29 years old and seven months pregnant with her first child, visits a retail chain store. Jane asks Steve, the manager, where she can find a how-to book on maintaining an aquarium; her husband is a new enthusiast. Steve asks the assistant manager, Linda,



to show Jane the location. Linda leads Jane halfway down an aisle and then says she will find the book at the end on the left. As Jane follows Linda's directions, she slips and falls hard on a clear puddle of water.

Steve knew that an aquarium had been leaking that morning. An hour earlier, store employees discovered water in an adjacent aisle. Steve had asked an employee to mop it up and put warning cones around it, yet the water had run under the product display and into the aisle where Jane slipped. There were no cones or warning signs in the area where Jane had been directed. The employees say they hadn't discovered the water in this aisle, but there is no evidence they checked. After falling, Jane had immediate pain and was taken to the hospital in an ambulance. Doctors heard no fetal heart tones, and her baby was delivered stillborn. Several experts blamed the fall for the placental abruption and death of the child.

For the retail store to be held liable, most states require evidence that shows

- the premises were not in a

reasonably safe condition, or a dangerous condition or defect existed

- the defendant knew or should have known about the condition or was at fault in not discovering the condition
- the plaintiff was harmed
- the defendant's conduct or lack of conduct caused the plaintiff's harm.

The store had notice of the water. There was no sign or warning where Jane fell. Linda led Jane to where the problem existed. The water was not visible on the floor, even in Linda's opinion. Jane fell because of the water, and the experts say the fall ultimately caused the child's death. Without going through each element in detail, the legal elements appear to be satisfied. In other words, the plaintiff would win this case if it were presented on a law school examination.

But in focus groups, the participants generally blamed Jane and not the retail store. "Aquariums were in the area, and she knew it," some said. "She knew she was pregnant and should have been extra careful; she wasn't, or she wouldn't

have fallen." "Something else had to be present medically. She probably didn't follow her doctor's prenatal instructions." Although there was legal proof, the participants were unconvinced.

After further inquiry, we learned that Jane had asked the manager if she could use the store phone to call her doctor because the battery in her cellphone died. Steve told Jane it was against store policy to allow a customer to use the store phone. After a while, another customer let Jane use her cellphone, at which point Jane's doctor told her to call an ambulance. Jane was in pain and asked the manager if she could sit in a front office where she could see the ambulance arrive. Steve instead directed her to a room in the back of the store where dogs were being groomed.

When new focus group participants were told these additional facts, they were outraged. They universally agreed that the defendant was liable, and many raised punitive damages on their own. This new information stained the defendant's character and disgusted the participants. Thus, they gave it disproportionate weight in their decision-making process, based on their basic moral value system.

Search for facts that take the plaintiff out of the stereotype of someone trying to get something for nothing. Understand the emotional response tied to facts that make a difference to the jury. Stress the facts that make jurors empathize with your client and make the defendant look uncaring—and the jury will respond. ▣



Gregory S. Cusimano is a partner with Cusimano, Roberts & Mills in Gadsden, Ala. He can be reached at greg@alalawyers.net.