FOURTH DIVISION
November 9, 2017

No. 1-16-0932

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAROLYN HOWARD, as Daughter and Special Administrator of the Estate of Alice Bowen, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 16-0932
NORTHWESTERN MEMORIAL HOSPITAL, HEATHER HEIMAN, M.D., SUSAN LOEHMER, R.N., ROSELAND COMMUNITY HOSPITAL, CARRIE WILSON, M.D., and AYOOLA AWOFADEJU, M.D.,	)	Honorable Thomas E. Flanagan, Judge Presiding.
Defendants,	)	
(Northwestern Medical Faculty Foundation, Defendant-Appellant.)	)	

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

Held: We reverse the circuit court's decision to grant a new trial. The circuit court abused its discretion in overturning the jury's verdict as a discovery violation sanction.

¶ 1 In this medical negligence case, defendant Northwestern Medical Faculty Foundation (NMFF) takes an interlocutory appeal from the trial court's order granting plaintiff Carolyn

Howard's motion for a new trial. Following a jury trial resulting in a verdict in favor of NMFF, plaintiff asserted in her posttrial motion that NMFF had concealed a discovery document. After posttrial discovery and briefing, the trial court granted Howard's motion. For the following reasons, we reverse.

¶ 2 I. BACKGROUND

¶ 3 Howard filed this wrongful death case on June 18, 2007, on behalf of her 80-year-old mother and the decedent, Alice Bowen. The complaint named several defendants besides NMFF, including Dr. Heather Heiman, Nurse Susan Loehmer Brankle, Northwestern Memorial Hospital, Roseland Community Hospital, Dr. Carrie Wilson, and Dr. Ayoola Awofadeju. The complaint alleged that defendants mismanaged Alice Bowen's anti-coagulation medication Coumadin in January 2005, leading to her death on June 17, 2005. Specifically, plaintiff alleged that Dr. Heiman reduced Bowen's Coumadin dosage on January 21, 2005, but Dr. Heiman and nurse Brankle failed to properly communicate the dosage decrease and Dr. Heiman improperly monitored her Coumadin levels. Plaintiff alleged that Alice Bowen ingested too much Coumadin, which caused a spinal cord hematoma and paralysis of the lower extremities, ultimately leading to her death. Following dismissal of several defendants, plaintiff filed a first amended complaint on November 24, 2014, against only NMFF under a theory of vicarious liability for the actions of Dr. Heiman and nurse BRankle.

¶ 4 A. Trial Evidence

¶ 5 Dr. Heiman, a board-certified internist with NMFF, testified that she has treated hundreds of patients on Coumadin. Alice Bowen began taking Coumdin in January 2002 and Dr. Heiman took over her care in August 2004; she had been a patient since 1989. Dr. Heiman testified that Alice Bowen suffered from several medical conditions, including chronic pulmonary emboli, for

which she had been taking Coumadin. Alice Bowen also suffered from hypertension, coronary artery disease, congestive heart failure, chronic restrictive lung disease, hyper-coagulable state, chronic kidney disease, and severe osteoarthritis in her right hip.

¶ 6 Dr. Heiman managed her Coumadin medication in order to ensure the level stayed within the therapeutic range by monitoring her "INR" (internal normalized ratio) level, which is a measurement of the blood's ability to clot. Dr. Heiman discussed Coumadin with Alice Bowen and informed her that her optimal INR range was 2.0 to 3.0 and she would reduce or increase her dose as necessary. Her Coumadin prescription was modified numerous times over the years by prior treating physicians. Dr. Heiman changed her dosage five times between when she assumed her care and January 21, 2005. Dr. Heiman testified that Alice Bowen's INR levels would go up or down appropriately when her prescription was increased or decreased, respectively, indicating that she was able to correctly follow the modified dosage instructions, even when Alice Bowen had to cut pills in half in order to obtain the correct dosage.

¶ 7 At her first appointment with Dr. Heiman on August 11, 2004, Alice Bowen did not have difficulty relating her medical problems, did not seem confused, and she was able to understand. She was able to accurately state all the medications she was on. Dr. Heiman ordered an INR and discovered that her level was low at 1.5. A nurse called Alice Bowen and instructed her to increase her Coumadin dose per Dr. Heiman's instructions.

¶ 8 From January 7, 2005, to January 13, 2005, Alice Bowen was hospitalized at Northwestern Memorial Hospital. As she was experiencing low INR levels, she was taking 2.5 milligrams of Coumadin daily during her hospitalization and receiving a "bridge" medication of Lovenox injections to help increase her INR levels faster. At the time of discharge on January 13, Alice Bowen's dosage was increased to 5 milligrams of Coumadin daily at bedtime. Her INR

level was tested on January 14 and found to be within the therapeutic range at 2.25, and Lovenox was discontinued.

¶ 9 Dr. Heiman testified that she saw Alice Bowen in her office on the evening of January 20, 2005. Dr. Heiman ordered a blood test that evening to check her INR level. Dr. Heiman testified that Alice Bowen brought all of her medications, including the Coumadin, to her appointment and asked questions about them. Alice Bowen also would have received a current medication list when she left the appointment containing written instructions to take 5 milligrams or one 5-milligram tablet of Coumadin a day at bedtime. They scheduled a follow-up appointment for February 3, 2005.

¶ 10 Alice Bowen's INR test subsequently showed a level of 3.7. Dr. Heiman has long used a widely accepted algorithm from the University of Michigan to determine dosage changes. Dr. Heiman testified that the relationship between Coumadin dosage and INR level is not linear and can vary based on diet, illness, other medications, and other factors. Dr. Heiman ordered Alice Bowen's dosage to be decreased from 5 milligrams daily to instead take a 5-milligram tablet on Tuesday, Thursday, Saturday, and Sunday, and to take 4 milligrams on Monday, Wednesday, and Friday. She reduced the dose by about 8% because the algorithm recommended a 5 to 10% reduction. The algorithm also indicated that, for an INR of 3.7, it was appropriate to repeat the INR within 7 to 14 days; the follow-up appointment and INR test on February 3 was appropriate based on these guidelines. Dr. Heiman testified that when a Coumadin dose change is small, it can take days to show a corresponding change in the INR. Dr. Heiman testified that "in particular you want to make sure they don't go too low. This is a patient who had just been in the hospital with a low INR, and there was a concern that this could have been a recurrent blood clot in her lung causing her shortness of breath."

¶ 11 Dr. Heiman sent an email note at 10:30 p.m. on January 20, 2005, regarding Alice Bowen's dosage change to her assisting nurse, Brankle, who was filling in for Dr. Heiman's usual nurse. Dr. Heiman's email instructed nurse Brankle to contact Alice Bowen and instruct her to decrease her Coumadin dosage as set forth above. The electronic record system showed that nurse Brankle opened the email around 3:46 p.m. on January 21, which was a Friday. Dr. Heiman testified that Bowen's current 5-milligram dose was documented in her note from the patient visit on January 20. Dr. Heiman also instructed Brankle in her email to let her know if she thought Bowen did not understand the instructions. Dr. Heiman testified she did not need to personally speak with Alice Bowen regarding the change in dosage because an INR of 3.7 "was a very modest elevation," she had an INR in the range of 3.7 multiple times before, and she "had successfully been able to make changes. And nurses generally manage this."

¶ 12 Dr. Heiman also instructed Brankle in her email note to call in the new prescription to the pharmacy for 1-milligram tablets. She wanted 1-milligram tablets in case further adjustments in dose needed to be made. Alice Bowen had been on 1- and 5-milligram tablets in the past. Coumadin tablets are color-coded different colors corresponding to different milligram doses and the specific dosage is imprinted on each tablet. Dr. Heiman testified that she knew Brankle called in a prescription of 4-milligram tablets because Dr. Heiman later approved the prescription. She testified that her instruction regarding the number of milligrams for the dosage was an order, but the instruction "for the exact way to dispense the pill is a suggestion."

¶ 13 Regarding when Bowen was supposed to start the modified dosage, Dr. Heiman testified that "[i]t depended on when she could get it from the pharmacy. So I was looking to change her total weekly dose. If she had been able to get it Friday, great. If she could get it by Monday, that was okay, as well, because we didn't have a critical level that we were dealing with."

¶ 14 After Brankle spoke with Alice Bowen on Friday, January 21, 2005, Brankle prepared a note, which was sent electronically to Dr. Heiman. Based on what Brankle wrote, Dr. Heiman testified that "it was clear" that Brankle gave Alice Bowen the proper instructions regarding the dosage change and Alice Bowen understood. Dr. Heiman testified that if a nurse communicates a prescription change to a patient and the patient is able to repeat it back, this is acceptable to ensure it is understood.

¶ 15 Alice Bowen did not fill the prescription until Monday, January 24, 2005. The new prescription bottle for the 4-milligram tablets would have instructed in writing to take one tablet on Monday, Wednesday and Friday. Her 5-milligram bottle instructed to take one tablet daily. Dr. Heiman agreed that if Alice Bowen followed the directions on both pill bottles for the 5-milligram tablets and the 4-milligram tablets, she could have taken 9 milligrams on Monday, January 24. Dr. Heiman indicated that if Bowen took 9 milligrams on Monday, her weekly total dosage would have been 39 milligrams instead of 35 milligrams. Dr. Heiman testified that, at one point in the past, Bowen had taken as much as 49 milligrams per week, but she never registered an INR above 4.2.

¶ 16 Alice Bowen was admitted to Roseland Community Hospital on Wednesday, January 26, 2005. She experienced extremity weakness, shoulder pain, and could not feel or move her legs and had limited arm motion. At that time, she had an INR of 5.36. Her INR level continued increasing over the ensuing hours. As a result of becoming over-anticoagulated, she developed a spontaneous bleed on her spinal cord which caused paralysis of her lower extremities. Dr. Heiman agreed that paralysis was a risk factor for the subsequent development of decubitus ulcers on Alice Bowen's lower extremities and these could be a contributing cause of a reduced

life expectancy. Dr. Heiman testified that chronic renal failure and congestive heart failure can also cause death and Alice Bowen had both conditions.

¶ 17 Dr. Heiman testified that Alice Bowen was 80 years old, lived at home with one or two family members, and she had always followed instructions regarding Coumadin and other medications very well in the past. Dr. Heiman previously sent Alice Bowen to the Coumadin Clinic in her office, where she was taught about taking Coumadin. Dr. Heiman testified that Alice Bowen never provided her any document indicating that a family member had the legal right to make decisions regarding her medical care or that Dr. Heiman had permission to provide her family with information regarding her medical care.

¶ 18 Dr. Heiman acknowledged that there were home healthcare nurses involved in Alice Bowen's care, but she testified that these nurses had a "limited scope of what they can do." They were not with Alice Bowen every day, they were there for an hour or less, and they were not present at bedtime when Coumadin is taken. The visiting nurse would take Alice Bowen's blood pressure and respiratory rate, which she had a hard time controlling. The nurse would organize physical therapy and perform blood draws when appropriate. Dr. Heiman testified that Alice Bowen did not ask her to inform a visiting nurse or her family of any changes in medication at the January 20 appointment. She testified that there was nothing in NMFF's records which indicated that visiting home healthcare nurses were managing Alice Bowen's medications.

¶ 19 Brankle testified that she did not specifically remember Alice Bowen and she thus testified based on her custom and practice as a nurse and her notes. Brankle has worked as a registered nurse for over 24 years and has instructed patients on medications thousands of times, often over the telephone. She has given patients instructions regarding Coumadin thousands of

times and has provided instructions for Coumadin dose modifications over the telephone hundreds of times.

¶ 20 Based upon her customary practice, Brankle reviewed Alice Bowen's chart before she called her on Friday, January 21, 2005. Brankle testified that there was nothing about Dr. Heiman's email that was unclear to her. Brankle testified that her own note regarding her telephone call to Alice Bowen showed that she relayed Dr. Heiman's instructions to Alice Bowen to lower her Coumadin dose to 4 milligrams on Monday, Wednesday, and Friday, and 5 milligrams the other days, and also that she called in the new dose prescription to the pharmacy. She acknowledged that she cut and pasted some content of Dr. Heiman's email into her own note. Brankle then added "R.N. notified patient as above per Dr. Heiman. Called in Coumadin to Walgreens." Brankle agreed that her note did not indicate when Alice Bowen was to start the new prescription, but she called it in on Friday and she could have started that day. She testified that Dr. Heiman asked her to order 1-milligram tablets, but this was just a suggestion.

¶ 21 Brankle testified that it was her custom and practice to verbally relay to patients the doctor's instructions, ask them if they understand, have them repeat it back to her, and encourage them to write it down. Brankle would have specifically documented it and notified Dr. Heiman had Alice Bowen not understood. The fact that it was not documented in her note indicated that Alice Bowen understood. Brankle did not know how much time she spent on the telephone; the electronic records system automatically input the date and times she opened and closed the note, *i.e.*, 3:46 p.m. to 3:49 p.m.

¶ 22 Brankle testified that she did not communicate with any home healthcare nurses because Alice Bowen understood the instructions and Dr. Heiman did not order Brankle to contact a home healthcare nurse. She would only communicate with visiting nurses if the doctor instructed

her to. She agreed that with Coumadin, visiting nurses were often advised of the prescriptions and can perform INR blood draws. Brankle did not know how often a visiting nurse was with Alice Bowen, but they are generally not present at bedtime, when Coumadin is taken. Dr. Heiman's email also did not request or order Brankle to contact any family members. No family member was designated as a contact person for Alice Bowen's changes in medication.

¶ 23 Brankle agreed that Alice Bowen had one prescription bottle for the 5-milligram tablets of Coumadin which instructed to take one tablet by mouth at bedtime. The new prescription bottle of 4-milligram tablets instructed to take "one tablet by mouth Monday, Wednesday, and Friday as directed." Brankle agreed that these dosages taken together were not the dose Dr. Heiman wanted Alice Bowen to take on Monday, January 24.

¶ 24 Plaintiff's expert witness nurse, Barbara Levin, opined that the standard of care requires a nurse to ensure that a patient understands a modification in medication. She opined that Brankle did not comply with the standard of care because Brankle failed to advise Alice Bowen that she was not going to take 5-milligrams tablets seven days a week, failed to ask Alice Bowen to write down the new dose schedule and read it back to her, failed to explain why her dosage was being modified, and failed to indicate when to start the dosage change. Levin opined that Brankle should have become familiar with Bowen's plan of care and she should have known or determined when her next INR would be and communicated with Dr. Heiman and Alice Bowen, but Brankle did not follow up on this and her note did not address it.

¶ 25 Levin further opined that the standard of care required Brankle to communicate in writing to Dr. Heiman the nature and extent of her communication with Alice Bowen, but she failed to meet that standard because she cut and pasted the email that Dr. Heiman sent to her and only added that she talked to the patient. Brankle did not add any specifics about what pills she

ordered, what education she provided, or whether Alice Bowen understood. Levin also opined that the 4-milligram tablets should have been 1-milligram tablets and that the modification as to the 5-milligram prescription bottle should have been addressed.

¶ 26 Levin also opined that under the standard of care, Brankle should have communicated with Bowen's home healthcare visiting nurse regarding the dosage change because a home healthcare agency was documented in the medical records as being involved with her care. Levin testified that the January 12, 2005, hospital discharge record indicated that Dr. Heiman arranged home care services through Compassionate Home Care and a visiting nurse came every day following her hospital discharge on January 13, 2005, to administer a Lovenox injection, although the last injection was on January 15. Levin conceded that no notes from visiting nurses existed and she did not know how often or for how long the nurses were with Alice Bowen, and there was no indication they were present at bedtime. Levin agreed that Dr. Heiman's note did not instruct Brankle to contact the visiting nurse or a family member.

¶ 27 On cross-examination, Levin conceded that her own patients take anticoagulation medications only for a temporary period of time and the majority of time she gives instructions in person. She agreed that the depositions of Alice Bowen's family members indicated that Alice Bowen managed her own medications and doctor communications. Levin agreed that there had been multiple changes in Alice Bowen's Coumadin prescriptions over the years, requiring her to take extra pills, cut a pill, or lower her dose, and her INR levels responded accordingly.

¶ 28 Milton Bowen, Alice Bowen's son, testified that following the January 26, 2005, hospitalization, Alice Bowen was not independent anymore and needed assistance to drink water. He testified that before the hospitalization, Alice had a wheelchair but rarely used it because she could walk.

¶ 29 Howard testified that another daughter, Mary Ann DeBerry, lived with Alice Bowen. Howard testified that no one helped Alice Bowen take her medications, her mother was able to take the medications by herself, and she was good about taking them as prescribed. Howard testified that visiting home healthcare nurses would lay out pills for her to take and do INR testing. Before her hospitalization on January 26, 2005, her mother was strong willed, independent, and able to walk, but would use a wheelchair when tired.

¶ 30 Plaintiff's expert Dr. Morris Papernik, M.D., opined that Dr. Heiman correctly responded to the elevated INR level of 3.7 on January 20, 2005, by reducing Alice Bowen's dosage by the appropriate amount. However, Dr. Papernik opined that Dr. Heiman's management of her INR levels fell below the standard of care. He explained that because Alice Bowen had not had several consecutive normal INRs and her level was trending upwards, her INR should have been rechecked in two or three days after the January 21 dose modification, instead of on February 3. He opined that Dr. Heiman's failure to schedule a repeat INR sooner contributed to Alice Bowen having too much Coumadin in her bloodstream and led to the ensuring complications, *i.e.*, the spinal cord hematoma, paralysis, and bedsore ulcers, which contributed to her death. Further, Dr. Papernik testified that Dr. Heiman's note to Brankle failed to meet the standard of care because it did not contain a start date for the medication change or a quantity of pills for the new prescription.

¶ 31 He also opined that the failure to communicate the modification to home healthcare providers or family members contributed to Alice Bowen's injuries. Dr. Papernik opined that Alice Bowen ended up with two prescription bottles; one instructing her to take 5 milligrams every day, and a second bottle directing her to take 4 milligrams on Monday, Wednesday, and Friday; thus, she must have taken a 5-milligram and a 4-milligram tablet on Monday, January 24,

2005. Dr. Papernik testified that when Alice Bowen was admitted to Roseland Community Hospital on January 26, her INR levels were 5.3, 6.2, and 7.1, and these elevations were consistent with her taking 9 milligrams of Coumadin on January 24.

¶ 32 On cross-examination, Dr. Papernik conceded that he has never practiced in the area of hematology or published articles on Coumadin. Dr. Papernik conceded that Alice Bowen's medical records from August 2004 to January 2005 showed that her INR levels fluctuated above and below the therapeutic range, which was not unusual, and Alice Bowen had INRs as high as 3.6 and 4.2, but had not developed a bleed. Dr. Papernik conceded that there was no evidence that Alice Bowen was mentally incompetent. He conceded that Bowen had several severe medical conditions including hypertension, chronic restrictive lung disease, pulmonary embolism, congestive heart failure, chronic renal failure, morbid obesity, and severe right hip arthritis, which kept her bed-bound. He agreed that she had end-stage renal disease, which could cause death. He did not see any evidence that she died of infection.

¶ 33 Plaintiff's also presented the expert testimony of Adrian Upton, M.D., a neurologist and neurophysiologist. Dr. Upton opined that given Alice Bowen's INR of 3.7 on January 20, 2005, taking 9 milligrams of Coumadin on January 24 would explain the INR levels she registered at Roseland Community Hospital on January 26 and 27. He opined that the most probable cause of her spinal hematoma was increased Coumadin; this resulted in lower extremity paralysis and pressure sores, and the injuries she suffered contributed to her death. Assuming that the communications by Dr. Heiman and Brankle deviated from the standard of care, he opined that these contributed to Alice Bowen having too much Coumadin in her system and her subsequent injuries and death. He opined that after a modification of dosage, the INR should be rechecked

two or three days later, and Dr. Heiman's failure to conduct a follow-up INR after the 3.7 on January 20 deviated from the standard of care.

¶ 34 On cross-examination, Dr. Upton conceded that he is not licensed to practice in the United States and has never published articles on Coumadin. If his own patient needs long-term anticoagulation, he refers the patient to a hematologist. He agreed that Alice Bowen's cause of death was renal failure, as was listed on her death certificate. Reviewing Alice Bowen's medical records from before Dr. Heiman assumed her care, he conceded that when her prior INR levels rose above 3, the INR tests were not repeated until several days later, ranging from 7 to 32 days later.

¶ 35 The defense presented the expert testimony of registered nurse Julia Busta. She has communicated with patients over the telephone to explain medication instructions hundreds of times, including for Coumadin dosing. Busta opined that Brankle complied with the standard of nursing care as she carried out Dr. Heiman's order to contact the patient regarding lowering the dose, called the prescription into the pharmacy, and properly documented her call. Busta testified that Brankle's notation that "RN notified the patient as above per Dr. Heiman," meant Brankle contacted Alice Bowen and carried out Dr. Heiman's orders. Busta testified that the fact that Brankle did not note any problems in relaying the instructions indicated that Alice Bowen understood. Busta opined that Brankle complied with the standard of care in her telephone call to Alice Bowen because she explained the lower dosage instructions, asked her to repeat it back so that she understood, gave her the opportunity to write it down, and then documented it. Busta opined that Brankle's note complied with the standard of care as it stated exactly what she was directed to do. Busta testified that having the patient repeat the instructions and asking if she understood was sufficient to satisfy the standard of care.

¶ 36 Busta testified that the standard of care did not require Brankle to call in a prescription for 1-milligram tablets as this was only a suggestion. Busta testified that in her experience pharmacies do not always have every dosage of Coumadin tablets available. Busta testified that Brankle was not required to retrieve from Alice Bowen the 5-milligram prescription bottle as this would have been "very inappropriate" because Alice Bowen was still supposed to take the 5-milligram tablets on four days of the week. Busta testified that the nursing standard of care did not require Brankle to schedule a repeat INR because there was a plan in place created by Dr. Heiman and it was not the role of a nurse to schedule a blood test or change a plan of care established by a physician.

¶ 37 Busta opined that the standard of care did not require Brankle to contact a family member or a home healthcare nurse as Alice Bowen managed her own medications and there was no indication that Alice Bowen was confused. Busta testified that Alice Bowen's records showed that she underwent about 11 changes in her Coumadin dose over the years, some of which were done over the telephone, and only Alice Bowen managed her Coumadin. A visiting nurse was present occasionally and inconsistently, but Alice Bowen was responsible for her night medicine, including Coumadin. Busta testified that Brankle would need permission to contact a visiting nurse or family member as Alice Bowen was mentally competent, but there was no documentation giving such permission.

¶ 38 Defense expert Dr. Thomas Gallagher, M.D., a board certified internal medicine physician, testified that he has treated hundreds of patients on Coumadin and communicated instructions to nurses concerning dosage changes for Coumadin thousands of times. He opined that the dosage change ordered by Dr. Heiman on January 20, 2005, complied with the standard of care because Alice Bowen's INR level was "slightly outside the normal range, and based on

the algorithm that was used by Dr. Heiman which I think is appropriate and reasonable, the change in dose of approximately 5 to 10 percent is appropriate." The algorithm recommended a decrease of 5 to 10% for an INR between 3.1 and 3.9. Dr. Heiman ordered an 8% decrease.

¶ 39 Dr. Gallagher opined that the standard of care did not require Dr. Heiman to order a repeat INR within two or three days of the dosage change as Coumadin takes "at least seven days, six to seven days before it may reach a steady state" and retesting too soon could be misleading. Dr. Gallagher testified that the algorithm also indicated a follow-up INR for 7 to 14 days later, and Dr. Heiman ordered one 13 days later. He testified that an INR of 3.7 was not an alarmingly high level; she had INRs above 3.0 at least seven or eight times and ranged from 3.6 to 4.2 and she had not experienced bleeding complications.

¶ 40 Dr. Gallagher testified that he frequently uses email to communicate instructions to nurses because his office has an electronic medical record system. He opined that it was "very appropriate" for Dr. Heiman to communicate the dosage change to Brankle by email because there was less chance of errors; "it's written on the screen. It can be double checked by the nurse and clarified with the patient when she calls her." He opined that Dr. Heiman's email instructions were appropriate, reasonable, and within the standard of care because the dosage change was clear and there was no ambiguity. He opined that Dr. Heiman complied with the standard of care in ordering Brankle to contact Alice Bowen with the instructions because "that's how it usually works, that the doctor doesn't always have time to call each patient individually; that the nurse will convey the instructions to the patient and arrange for follow up."

¶ 41 Additionally, Dr. Gallagher opined that it was appropriate for Alice Bowen to be contacted because "[m]ost of the time the patient is the one who is contacted, almost always unless there's some other extenuating circumstances," and she successfully handled multiple

dosage changes over the years. She had seen Dr. Heiman recently and she was clear, competent, lucid, and did not have any mental issues or difficulty managing her medications; nothing in the depositions of the family members suggested that she was incapable of taking her medication.

¶ 42 Dr. Gallagher opined that the standard of care did not require Dr. Heiman to instruct Brankle to tell Alice Bowen to throw away her bottle of 5-milligram tablets. He explained that "Coumadin is a medication where the dose will change frequently so that the dose on—that's printed on the bottle is not always what they're taking," and Alice Bowen had "done this before and was well aware of that issue, so she knew to make an adjustment *** she had done this multiple times in the past and it was fairly clear to her that she wouldn't follow the instructions on the bottle verbatim."

¶ 43 According to Dr. Gallagher, Alice Bowen's chronic medical conditions indicated she had a "far reduced life expectancy *** [l]ess than a year, on the order of months probably." She had coronary artery disease, diastolic dysfunction, severe arthritis, kidney disease and end stage renal failure, refractive hypertension, and a hyper-coagulable state.

¶ 44 On cross-examination, Dr. Gallagher testified that he had not reviewed any records from the home healthcare agency Compassionate Home Care consisting of a home health certification and plan-of-care documents.[1] He indicated that the plan of care dated November 5, 2004, to January 4, 2005, indicated that Alice Bowen's mental status was "[f]orgetful." On redirect, he noted it also stated that Alice Bowen was "oriented." He testified that the plans were not treatment notes by a nurse, they did not list the correct prescriptions for Coumadin, and they did not indicate that a visiting nurse was managing her medications.

[1] The documents produced by Compassionate Home Care consist of two forms entitled "home health certification and plan of treatment." One is dated November 5, 2004, to January 3, 2005, and the other is dated January 4, 2005, to March 4, 2005. The forms list Alice Bowen's medications and dosage (including Coumadin), her diagnoses, nutritional requirements, functional limitations, mental status, prognosis, orders for treatment, goals, and the visiting nurse and physician's name (Dr. Heiman).

¶ 45 Dr. Gallagher testified on cross-examination that Alice Bowen's NMFF patient notes showed that prior dosing modifications were either explained in writing, in person, or communicated with a visiting home nurse. Dr. Gallagher testified that it did not matter whether the nurse or the physician contacted the patient, "as long as the directions are clear and the patient is able to understand." On redirect, he clarified that one note showed that a nurse called on behalf of the doctor; in another note, it was unclear whether the doctor spoke with a visiting nurse or Alice Bowen, but the doctor did not provide the visiting home nurse with any medication instructions.

¶ 46 The defense's hematology expert, Dr. Gary Kay, testified that he has managed patients on Coumadin long-term hundreds of times and treated patients like Alice Bowen who take Coumadin due to chronic pulmonary embolus. He observed that Alice Bowen had been on doses significantly higher than 35 milligrams in the past; she was on a 49-milligram per week dose in 2002 for three and a half months and the highest INR she achieved was 3.6. She was on a 42 milligram dose for four months in 2002 and 2003 and her highest INR was 3.6. The highest INR ever reported for her was 4.2 in September 16, 2004, when she was on 37 milligrams per week.

¶ 47 Dr. Kay opined that, considering her past history, if she had taken 9 milligrams of Coumadin on Monday, January 24, 2005, this was not a sufficiently increased dose to cause the magnitude of rise seen in her INR levels at Roseland Community Hospital (5.36, 6.34, and 7.1 between January 26 and January 27, 2005). A dose of 9 milligrams of Coumadin on Monday, January 24 would result in a weekly dose total of 39 milligrams, and she had previously been on much weekly higher doses and never achieved an INR close to the levels measured at Roseland Community Hospital. He opined that the likely cause for the dramatic rise in her INRs at Roseland Community Hospital was that she "ingested more Coumadin than just one additional 4

milligram tablet. It would have had to be substantially more to raise the INR by that level. *** [P]robably on the order of 20, 25 milligrams, something along those lines." He opined that this occurred sometime after January 21, 2005.

¶ 48 During the course of trial, the parties discussed several times outside the presence of the jury the Compassionate Home Care plans of care documents. Plaintiff made a motion for a mistrial, arguing that NMFF failed to produce these documents, which the trial court denied.

¶ 49 Following presentation of the evidence and closing arguments, the jury found for NMFF and against plaintiff.

¶ 50 B. Motion for a New Trial

¶ 51 Howard filed a posttrial motion for judgment notwithstanding the verdict or a new trial, based on the failure to produce the Compassionate Home Care records. She asserted that the defense, without leave of court, issued a subpoena for the records on November 18, 2011, seeking production by December 2, 2011, and NMFF received them on April 3, 2012, but never provided copies to Howard. Howard argued NMFF was required to disclose them pursuant to a September 8, 2011, case management order and the discovery rules.[2] She asserted that the records were significant and she was prejudiced by their nondisclosure.

¶ 52 The record reflects that NMFF engaged U.S. Legal Support (U.S. Legal), a third party legal services vendor, to issue the subpoena to Compassionate Home Care. The subpoena requested the following records: "any and all notes, phone logs, charts, or correspondence from December 2004 and January through June of 2005 regarding Alice Bowen."

¶ 53 The parties conducted discovery regarding Howard's motion, including taking the deposition of Pamela Johnson, the director of operations for U.S. Legal. Johnson testified that

[2] On September 8, 2011, the court entered a focused case management order which stated that the "parties shall produce any home health care records in their possession by 9-11-11" and that "Northwestern's counsel represents to the court that it has no home health records."

NMFF issued the subpoena to Compassionate Home Care and U.S. Legal sent Compassionate Care a subpoena packet on November 17, 2011, with a due date of December 2, 2011. Johnson explained that the subpoena packet contains a copy of the subpoena, any necessary authorizations or other documents from the requesting party, and a cover sheet. U.S. Legal also sent notice packets to all parties to the case. The November 18, 2011, notice packet included (1) a copy of the subpoena sent to Compassionate Home Care, (2) an order form plaintiff could fill out and return to U.S. Legal to order copies of any Compassionate Home Care records produced; (2) a notice form from defendant's law firm apprising Howard's law firm of the subpoena; and (3) a service list listing counsel for defendant, plaintiff, and other parties; and (4) an affidavit of satisfactory assurance from NMFF's counsel regarding request of medical records. The notice form was directed to Howard's counsel and counsels of other parties and indicated that a subpoena for Compassionate Home Care was issued and the records were due by December 2, 2011. Johnson created the notice packet procedure; U.S. Legal has followed it for eight years and processes 250 to 350 orders per day. U.S. Legal also provides proof of service of the subpoenas. Compassionate Home Care produced the records via eFax to U.S. Legal on April 3, 2012.[3] Once records are produced, U.S. Legal sends the records automatically to the party who issued the subpoena request; in this case, NMFF. It also calls the other counsel on the service list to notify them that records have been produced and to determine if they want copies if they have not sent in the order form included in the notice packet. It typically does not inform the requesting party

[3]Johnson explained the delay between the due date on the subpoena and the date Compassionate Home Care finally produced records. Johnson testified that U.S. Legal's notes log showed that U.S. Legal contacted Compassionate Home Care on January 26, 2012, by telephone, and was informed that the subpoena was forwarded to Compassionate Home Care's attorney. All follow-up calls were made to him until April 3, 2012, when U.S. Legal called Compassionate Home Care directly again because it had not heard from the attorney. Compassionate Home Care indicated that the attorney was supposed to send a "no records statement" because it had a retention period of six years and therefore no longer had any records. Compassionate Home Care apologized and indicated it would fax a statement that day. Compassionate Home Care then called U.S. Legal back that same date and informed them there was some information in the computer that it would print off and fax over, but there was no actual file because it had been destroyed.

whether other parties ordered copies. Johnson testified that U.S. Legal's written logs documented that U.S. Legal contacted plaintiff's law firm via telephone on April 5, 2012, regarding the fact that Compassionate Home Care had produced records. U.S. Legal also contacted other parties' counsel and one party ordered records. On April 11, 2012, U.S. Legal noted in its log that it had not received a response from plaintiff's counsel. Johnson testified that the log also indicated that plaintiff's law firm was contacted on October 13, 2012, regarding a different part of the subpoena related to records from Walgreens, and plaintiff's firm indicated that it wanted copies of those records.

¶ 54 In response to the motion, NMFF argued that it did not "secret" the documents, it had no special access to or ability to conceal documents created by and in possession of a third party and plaintiff knew that Compassionate Home Care had provided care to Alice Bowen. NMFF argued that it used an open and transparent discovery process through U.S. Legal to subpoena the records and notify the other parties and it had no knowledge whether plaintiff's counsel ordered copies. Plaintiff's counsel was notified both of the subpoena and that records had been produced, but never responded. NMFF asserted that even if there were a defect in producing the documents, they were irrelevant.

¶ 55 The trial court granted Howard's motion for a new trial on March 8, 2016. NMFF filed a timely petition for leave to appeal pursuant to Supreme Court Rule 306(a)(1), which this court granted.

¶ 56 II. ANALYSIS

¶ 57 A. Standard of Review

¶ 58 On review, this court "may not set aside a trial court's ruling on a motion for a new trial unless the trial court abused its discretion." *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 102.

"Likewise, the imposition of sanctions for failure to comply with discovery rules and orders, and decisions regarding what type of sanction to impose, are matters within the broad discretion of the trial court." *Kubicheck v. Traina*, 2013 IL App (3d) 110157, ¶ 29. "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Cimino*, 2015 IL App (1st) 133373, ¶ 102.

¶ 59 B. Discovery Violation Sanctions

¶ 60 NMFF argues that the trial court abused its discretion in granting a new trial as its order contains several inaccuracies concerning the facts and issues presented. NMFF contends there was no basis for granting a new trial as NMFF did not conceal any documents and they were made available to plaintiff, who chose not to order them.

¶ 61 Howard argues that granting a new trial was an appropriate sanction because, regardless of whether NMFF intentionally concealed documents, it violated discovery and had a duty to supplement.

¶ 62 The Illinois Supreme Court rules concerning discovery "authorize a trial court to enter any order that is 'just' to remedy a party's unreasonable failure to comply with the supreme court's discovery rules or with an order issued under those rules." *Kubicheck*, 2013 IL App (3d) 110157, ¶ 28 (citing Ill.S.Ct.R. 219(c) (eff. July 1, 2002)). "A 'just' order of sanctions under Rule 219(c) is one which, 'to the degree possible, insures both discovery and a trial on the merits.' " *Id.* (quoting *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998)). The purpose of sanctions is to coerce compliance, and not to punish the non-compliant party. *Id.* Discovery is not meant to be used tactically to obstruct the opposing party, and the rules require full, complete disclosure. *Id.* ¶ 29.

¶ 63 "Under the appropriate circumstances, a trial court may order a new trial as a result of a discovery violation committed by the party who prevailed in the initial trial." *Kubicheck*, 2013 IL App (3d) 110157, ¶ 29. In reviewing whether a trial court abused its discretion in imposing a sanction under Rule 219(c), this court examines the following factors:

> "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence.' [Citations.]. 'Of these factors, no single factor is determinative.' " *Kubicheck*, 2013 IL App (3d) 110157, ¶ 31 (quoting *Shimanovsky*, 181 Ill. 2d at 124).

¶ 64 C. Trial Court's Factual Findings

¶ 65 After careful review of the trial court's order granting a new trial, in addition to the record from the trial and posttrial proceedings, we conclude that the order contains several inaccuracies concerning what the record and evidence showed.[4] For example, in its order, the trial court held that "[m]edicine dosage was requested because it was a critical issue. Also, how Home Healthcare was important to the case." While we agree that Compassionate Home Care is relevant to the case, the meaning of the latter sentence fragment is unclear. The subpoena did not request "how Compassionate Home Care was important to the case," nor did it request "medicine dosage." Rather, the subpoena specified that Compassionate Home Care produce "[a]ny and all notes, phone logs, charts or correspondence from December 2004 & January through June of 2005 regarding: Alice Bowen." Moreover, the actual prescribed dosage of

[4] The order also contains other statements which have no relevance to the issues involved. For example, the trial court's order identified U.S. Legal's counsel by name and noted that she was present at Johnson's deposition, and also noted that NMFF's response brief appended a copy of the deposition.

Coumadin was not, in fact, a contested issue at trial and Compassionate Home Care's records were not requested in order to determine medicine dosage. This was established by other evidence. The parties did not dispute that Alice Bowen had been prescribed 5 milligrams of Coumadin per day, and Dr. Heiman properly lowered her dose to 4 milligrams of Coumadin on Monday, Wednesday, and Friday, and 5 milligrams the remaining days.

¶ 66 The trial court also stated, "[t]he knowledge of what, if any, subpoena was served on Home Health Care for records." Assuming this fragmented sentence implies that a subpoena was possibly never served on Compassionate Home Care, we disagree. The evidence showed that a subpoena was served and, in fact, documents were produced in response. There was no contrary evidence presented and Howard has not contended otherwise. Additionally, as noted, the contents of the subpoena were clear—it specified the records sought.

¶ 67 We are also concerned by the trial court's finding that "[d]efendant left a message with the law firm of attorney Rogers. What the clarity of content was remains unknown." This statement is not supported by the evidence. The posttrial proceedings demonstrated that a representative from U.S. Legal, and not NMFF or NMFF's counsel, called Howard's attorney. And, the content of the message left by U.S. Legal for plaintiff's counsel was not unknown. U.S. Legal's written logs and Johnson's testimony established what information was communicated to Howard's counsel. The written logs indicated that the U.S. Legal representative called and left a message indicating that Compassionate Home Care had produced records pursuant to the subpoena which were available to order. Again, there was nothing presented to contradict this.

¶ 68 The trial court also held that the documents produced by Compassionate Home Care showed "undertakings" with respect to "medication regiment; effective anticoagulant therapy, appears [*sic*] tissue perfusion attention to possible slow bleeding ***, attention to Vitamin K

foods ***, Coumadin to 3/4/05 on Tuesdays and Saturdays." The two documents themselves are entitled "Home Health Certification and Plan of Treatment" and span a several-month time period. In that sense, they do not show the "undertakings" of Compassionate Home Care's staff; they merely outline a general plan or summary. It is undisputed that the documents are not actual notes written by Compassionate Home Care staff recording the staff's activities after specific care was provided on a specific date.

¶ 69 We next examine the trial court's conclusion that there was a discovery order in effect and NMFF's compliance was "lacking *** in rule 219 diligence," although not intentionally. Howard contends that NMFF violated the case management court's September 8, 2011, order to produce home healthcare records by September 22, 2011.

¶ 70 The trial court held that the "case management court admitted an order regarding disclosure by the Defendant." This holding is not wholly accurate. The September 8, 2011, case management order provided that "the *parties* shall produce any home health care records in their possession by 9-22-11" and it further stated that NMFF's counsel represented that "it has no home health records." (Emphasis added). Thus, the case management court did not order only NMFF to disclose home health care records in its possession. Rather, it applied equally to any party. It is undisputed that at the time the order was entered and at the time of the due date on September 22, 2011, NMFF did not have any home health records in its possession. NMFF did not violate the discovery order, as it applied only to what the parties had in their possession at the time and it is undisputed that it did not have any records in its possession at that time or at the end date of the order, September 22, 2011.

¶ 71 D. Discovery Rules

¶ 72 We now turn to Howard's contention that NMFF violated the supreme court discovery rules when it failed to provide supplemental disclosure pursuant to her Rule 237 request for Alice Bowen's medical records. This contention is more problematic for NMFF. The record reflects that on April 29, 2013, Howard filed a request to produce pursuant to Supreme Court Rules 213(e) and 237, which requested, in part:

> "[t]he complete medical records pertaining to ALICE BOWEN including office records, telephone logs, correspondence, medical reports, hospital records, laboratory reports, bills, insurance forms, etcetera; *** "[a]ny and all medical reports, medical records, hospital records or any other documents relating in any way to the injuries allegedly sustained by ALICE BOWEN, as a result of the occurrence alleged in the pleadings; *** [a]any and all medical reports, medical records, hospital records or any other documents relating to any injury or illness sustained by the Plaintiff pre-occurrence or post-occurrence; *** [a]ny and all records, contracts, memoranda, medical records, hospital records, business records, *** relating in any way to the matters alleged in the pleadings or relating to the issues at trial[.]"

¶ 73 Rule 213(e) governs the production of documents in answer to interrogatories and provides that when a party answers an interrogatory by producing documents, "that production shall comply with the requirements of Rule 214." Ill. S. Ct. R. 213(e) (eff. Jan. 1, 2007). Additionally, Rule 213(i) imposes a duty to "seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." Ill. S. Ct. R. 213(e) (eff. Jan. 1, 2007). In turn, Rule 214 governs the discovery and production of documents; it similarly imposes upon a party "a duty to seasonably supplement any prior

response to the extent of documents, objects or tangible things which subsequently come into that party's possession or control or become known to that party." Ill. S. Ct. R. 214(d) (eff. Jul. 1, 2014). Rule 237(b) governs compelling the appearances of witnesses at trial or an evidentiary hearing, including requiring production at the trial of documents previously produced during discovery. Ill. S. Ct. R. 237(b) (eff. Jul. 1, 2005).

¶ 74 NMFF does not dispute that it was under a continuing obligation under the supreme court rules to tender discovery documents. NMFF maintains that it discharged this duty by engaging the services of third party vendor U.S. Legal to issue and handle the subpoena process.

¶ 75 We disagree. Under the Illinois Supreme Court Rules, NMFF was obligated to "seasonably supplement" or amend its prior answers to interrogatories and discovery requests for production. Based on the broad language of Howard's request, this encompassed the records ultimately produced by Compassionate Home Care, even if they did not constitute medical treatment records. The Illinois Supreme Court's discovery rules always apply, regardless of custom and practice. This is particularly significant given the timing of events here. The subpoena to Compassionate Home Care came out of sequence as it was issued after discovery was completed. There was also a specific order (*i.e.*, the September 8, 2011, case management order) entered on this exact issue. Thus, the due date in the protective order had passed, written discovery was completed, and, according to Howard, deposition of her experts was already completed when the documents were received by U.S. Legal.

¶ 76 E. Cases Cited by the Parties

¶ 77 On appeal, Howard relies primarily on three cases to support her argument. First, in *Buehler v. Whalen,* 70 Ill. 2d 51, 65-66 (1977), the defendant automobile manufacturer was ordered to disclose all crash test reports, but only provided some reports involving low-speed

crashes and falsely stated in an interrogatory that no other employees or subsidiaries had submitted a report or opinion on the design defect at issue, when in fact a report by an employee of one of its subsidiaries found the design was hazardous. *Id.* The supreme court found the defendant withheld critical records and gave false answers to interrogatories, and thus the trial court properly instructed the jury that unfavorable inferences could be drawn from failure to produce the evidence, prohibited the defendant from arguing that the secreted evidence would not have supported the plaintiff's claims, and denied the defense's motion for a new trial. *Id.* at 67.

¶ 78 In *Boettcher v. Fournie Farms, Inc.*, 243 Ill. App. 3d 940, 946-49 (1993), the appellate court vacated the jury's verdict against the defendants and granted a new trial due to the plaintiff's discovery violation in falsely answering an interrogatory that he had not made any claims against any insurance company for the loss at issue, when he had in fact made two prior claims, and this information was probative of a central issue of the case.

¶ 79 In *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 278-79 (1982), the plaintiff filed an untimely petition to vacate the jury-verdict judgment obtained in favor of the defendant, and the trial court granted the defendant's motion to dismiss. The plaintiff argued that the defendant gave false answers to interrogatories and withheld its prior tests and reports during discovery which would have showed a design defect. *Id.* at 279. The plaintiff discovered in separate litigation a report by defendant's research engineers indicating a safety hazard in the design. *Id.* at 281. As the procedural posture involved a motion to dismiss, the supreme court viewed the petitioner's allegations as true and assumed that the defendant had knowledge of the evidence and failed to produce it, and it thus reversed the trial court's decision to grant the motion to dismiss. *Id.* at 282.

¶ 80 On the other hand, NMFF relies primarily on *County Board of School Trustees of DuPage County v. Ass'n of Franciscan Fathers*, 49 Ill. App. 3d 686, 695-97 (1977). There, the defendant sought to vacate a judgment of condemnation in an eminent domain suit, but failed to file its petition within the two-year limitations period. The defendant asserted an exemption based on fraudulent concealment alleging that the plaintiff school board hid a report in which the superintendent allegedly expressed an opinion on the necessity of the taking, which would have defeated the condemnation action had it been disclosed. *Id.* The court rejected this argument because the report was publicly available (as it was a public document presented at a public meeting) and known to the defendant during the condemnation proceeding. *Id.* The evidence showed that the defendant knew of the report during the original condemnation proceedings and with "the exercise of ordinary diligence" could have discovered the report contained information relevant to the taking of the property. *Id.* at 696-97. The defendant could have obtained a copy of the report from the school board or other sources. *Id.* at 697. Although the plaintiffs' answer to interrogatories was not forthright in regards to whether the superintendent had ever expressed an opinion as to the necessity of the taking, "once the [defendant] knew of the existence of the *** report, they were on notice that there existed a difference of opinion concerning whether the report constituted or contained" an opinion regarding the taking and the defendant "could no longer rely on" the answer to the interrogatories. *Id.* Although the plaintiffs did not provide the defendant with the report, the plaintiffs had not done anything to conceal the existence of the report. *Id.* The court noted that the interrogatories did not prevent the defendant from raising its defense and the report did not contradict the superintendent's deposition. *Id.* at 698.

¶ 81 Like the defendant in *Franciscan Fathers*, Howard could have obtained copies of the records with minimal diligence. Compassionate Home Care was not an undisclosed or unknown

entity. Indeed, Alice Bowen received care from Compassionate Home Care and therefore the existence or possibility of the existence of such records was not unknown to plaintiff. Plaintiff's counsel received notice of the subpoena, notice that documents were produced, and an opportunity to order copies of the records. Additionally, the evidence supported that NMFF did not make false representations or intentionally conceal documents. See, also, *Ostendorf*, 89 Ill. 2d at 285 (observing that fraudulent concealment does not occur where the evidence in question is a "public document which the petitioner could have obtained at any time");

¶ 82 In contrast, we find the cases cited by Howard are distinguishable from the present circumstances. Those cases involved evidence which was in the exclusive possession or within the exclusive knowledge of the non-disclosing party, who provided no or fractional disclosure and misleadingly represented that it did not have the material sought or that such material did not exist. Here, in contrast, NMFF did not create the records and they were not records of a subsidiary or employee or researcher connected to NMFF. Compassionate Home Care was a separate, unrelated entity. The creation, existence, content, or destruction of the records was not within NMFF's control, unlike in the cases discussed above. In further distinction, NMFF invoked an open and transparent discovery process to subpoena records from Compassionate Home Care, of which all parties, including plaintiff, received notice. There was no indication that NMFF knew whether plaintiff ordered copies of the records. Plaintiff had successfully ordered copies of documents produced by Walgreens under the same subpoena procedures employed by U.S. Legal and NMFF. The evidence does not support that NMFF purposefully or intentionally withheld or concealed the documents. The evidence established that plaintiff's law firm received a notice packet regarding the subpoena with ordering information. According to U.S. Legal's written telephone logs, U.S. Legal called plaintiff's counsel on April 5, 2012, to advise him that

Compassionate Home Care had produced records. This evidence stands unrebutted as Howard presented no contrary evidence.

¶ 83 Howard had the negligible burden to return U.S. Legal's order form or call to request the records. Instead, Howard took no action to obtain the records. See *Shimanovsky* 181 Ill. 2d at 124 (considering "the diligence of the adverse party in seeking discovery" in reviewing whether discovery sanctions were appropriate); *Cohn*, 250 Ill. App. 3d at 228 ("Among the factors to be considered in determining whether a sanction is appropriate" where a Rule 237 notice violation has occurred "is the diligence of the party claiming the violation in attempting to secure the document prior to trial.").

¶ 84 As stated, we hold the trial court's factual findings were unreasonable and not supported by the record, and we find that the trial court abused its discretion in that regard. *Cimino*, 2015 IL App (1st) 133373, ¶ 102. On the other hand, we also conclude that NMFF was under a continuing obligation to disclose the documents at issue pursuant to our discovery rules. Its engagement of a third party vendor did not discharge or abrogate this duty under the court rules. In that regard, the trial court was correct in holding that NMFF committed a discovery error. [5]

[5] We also briefly address Howard's contention that Northwestern failed to follow regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d *et seq*. (2012)) in issuing the subpoena as it "surreptitiously" filed a sworn "Affidavit of Assurances" with it. Howard contends that defense counsel therein averred that she "intended and expected" notice to be given to plaintiff's counsel, but this failed to satisfy federal regulations that an entity may disclose protected health information if it receives satisfactory assurances and that the requestor has already made reasonable efforts to ensure the subject of the information was given sufficient notice of the request. 42 C.F.R. § 164.512(e) (West 2012). We note that the affidavit of assurance was dated November 14, 2011, and the due date of the records from Compassionate Home Care was December 2, 2011, which would allow sufficient time for plaintiff to raise any objection after notification of the request for medical records. As stated, there was nothing surreptitious about NMFF's subpoena request for the medical records, of which all parties were notified. And any suggestion that Howard would have raised an objection is belied by the record, as the trial court had previously ordered production of any such records in the parties' possession, Howard herself wanted such home healthcare records, and the basis of her appeal is that she was entitled to such records and they would have changed the result at trial.

¶ 85 F. Prejudice

¶ 86 Given NMFF's discovery rules violation, we must next examine whether the trial court's chosen sanction, *i.e.*, granting a new trial, amounted to an abuse of discretion under the circumstances of this case.

¶ 87 NMFF argues that even if it could be faulted for a lack of diligence in providing the records, they were irrelevant, and the trial court failed to identify any discernible impact or prejudice to Howard's case.

¶ 88 Howard argues that she was prejudiced by their nondisclosure because she was unable to examine her own experts and defense experts about the documents during discovery depositions. She asserts that the documents were significant as they showed Alice Bowen was forgetful and that Dr. Heiman and nurse Brankle deviated from the standard of care in not communicating the Coumadin prescription modification to a home healthcare nurse.

¶ 89 The trial court held that Howard's case was weakened because she did not have these records for depositions and at trial. In support, the trial court stated, "See attachments to plaintiff's supplement brief ***. See also the attachments to defense response ***." It cited the parties' exhibits to their briefs without further explanation of its reasoning.

¶ 90 It is difficult for this court to review the trial court's exercise of discretion when exercised in such a conclusory fashion. Based on our review of the record, however, we conclude the trial court's chosen discovery sanction is not supported by the trial and posttrial evidence. The trial court failed to explain or support its conclusion that NMFF's "less than diligent" actions amounted to a discovery violation so severe as to justify vacating the jury's verdict and ordering a new trial. *Kubicheck*, 2013 IL App (3d) 110157, ¶ 28 (a trial court may enter any

order that is "just" to remedy unreasonable noncompliance with discovery rules); *Shimanovsky*, 181 Ill. 2d at 123 (a sanction aims to achieve compliance, not to punish).

¶ 91 As stated, the evidence does not support that NMFF purposefully or intentionally withheld the subpoena or the documents or concealed their existence. Additionally, it was undisputed that plaintiff's counsel was notified of the subpoena and that documents were produced, but counsel took no action to obtain copies of the documents. See *Ogg v. City of Springfield*, 121 Ill. App. 3d 25, 41 (1984) (finding no abuse of discretion in refusing to grant the plaintiff a new trial where the plaintiff alleged the defendants purposely withheld documents showing willful and wanton misconduct but it was "not apparent from the record that the documents in question were purposefully withheld in violation of discovery rules.").

¶ 92 Ultimately, regardless of any discovery violations, we find no discernible prejudice to Howard. *Shimanovsky* 181 Ill. 2d at 124. Considering the content of the documents, the trial evidence, and the fact that Howard was able to make use of the documents at trial, we find that trial court overestimated the prejudicial effect of the documents and, consequently, the necessity of ordering a new trial as a sanction. See *Ogg*, 121 Ill. App. 3d at 41 ("[i]n order for newly discovered evidence to warrant the granting of a new trial, it must be of such a conclusive character that it will likely change the result if a new trial is granted").

¶ 93 The Compassionate Home Care documents were not complex or voluminous records. They consisted of two plans of care, a total of four pages, one pertaining to November 2005 to January 2005, and the other pertaining to January 2005 to March 2005. There was no indication that they revealed any evidence which could have been further investigated by plaintiff. The record reflects that NMFF experts never reviewed or used any Compassionate Home Care

documents in reviewing the case or preparing for depositions or trial, and therefore NMFF did not try to gain any advantage through use of any undisclosed evidence.

¶ 94 Howard, and not the defense, first introduced the Compassionate Home Care documents at trial when she questioned defense expert Dr. Gallagher.[6] Howard could have recalled her expert witnesses and examined them regarding the plans of care. The primary information of interest to Howard in the plans of care was the checkmark next to the box indicating that Alice Bowen was "forgetful," and counsel was able to present this information to the jury in her cross-examination of Dr. Gallagher. She also admitted the plans of care into evidence for the jury's consideration. Howard referred to the Compassionate Home Care documents in her closing arguments, asserting that they showed that home healthcare services were involved in Alice Bowen's care and treatment, that Dr. Heiman implemented a home healthcare nursing plan, that Dr. Heiman failed to notify a home healthcare nurse of the January 21, 2005, dosage change, and that nurse Brankle failed to contact a home healthcare nurse.

¶ 95 As such, regardless of the availability of these documents before trial, Howard was able to incorporate the plans of care documents into her trial strategy and she utilized them to advance her case and attack NMFF's case. She established her contention that the standard of care applicable to Dr. Heiman and nurse Brankle required them to inform the home healthcare workers of the Coumadin dosage change.

¶ 96 We note that in arguing that she was prejudiced, Howard contends that the January 21, 2005, dosage modification was the only modification that was not made in person or in writing or made by the doctor with the involvement of a home healthcare nurse. This argument is not supported by the trial evidence. Plaintiff questioned Dr. Gallagher whether a visiting nurse was

[6] Although Howard maintains that the defense first introduced the documents, the record reflects that the defense only questioned Levin if she had seen any visiting nurse notes or knew how often visiting nurses attended to Alice Bowen, and Levin responded that visiting nurse notes did not exist.

involved with or informed of Alice Bowen's prior dosage changes, but Dr. Gallagher testified that it was irrelevant whether there was a visiting nurse involved. The defense largely rebutted any importance of the plans of care during its redirect examination of Dr. Gallagher, when he testified that the box for "oriented" in the mental status section was also checked, which meant Alice Bowen could understand verbal instructions. He testified that nothing in the depositions of Alice Bowen's family members indicated that Alice Bowen had difficulty understanding or following medical instructions. He explained that the plans of care were not actually medical notes by a visiting nurse, they did not indicate that the home healthcare nurses were managing medications, and they contained inaccurate Coumadin dose information. Reviewing NMFF medical notes regarding Alice Bowen's prior Coumadin modifications, Dr. Gallagher clarified that they were either communicated by a nurse over the telephone or the notes were unclear as to whether her doctors gave modification instructions to Alice Bowen or a visiting nurse. Thus, the Compassionate Home Care documents did little to advance plaintiff's argument regarding the January 21, 2005, dosage modification.

¶ 97 We recognize that the abuse of discretion standard applies to our review of the trial court's decision to grant a new trial as a sanction. *Kubicheck*, 2013 IL App (3d) 110157, ¶ 29. However, such a decision must nevertheless be supported by the record. Here, we find the trial court's decision was unreasonable under the circumstances. *Cimino*, 2015 IL App (1st) 133373, ¶ 102. The trial court overstated the relevance and prejudicial impact of the documents. Ultimately, plaintiff's counsel was able to utilize the documents to cross-examine the defense expert, admit them into evidence, and otherwise make effective use of them at trial. Even despite NMFF's discovery violation, granting a new trial was disproportionate under the circumstances and less severe sanctions were available to the trial court. See *Buehler*, 70 Ill. 2d at 68 (giving as a

sanction the instruction that jury could infer secreted evidence was unfavorable to the defendant and barring the defendant from attempting to prove to jury that the evidence would not have supported the plaintiff's claims).

¶ 98 III. CONCLUSION

¶ 99 For the reasons discussed, we reverse the circuit court's order granting Howard a new trial. We reinstate the jury's verdict in favor of NMFF.

¶ 100 Reversed.