2018 IL App (4th) 170672-U

NO. 4-17-0672

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 3, 2018
Carla Bender
4th District Appellate
Court, IL

MICHAEL HASSEBROCK and ANDREA HASSEBROCK, Individually and as Special Co-Administrators of the Estate of KIYA HASSEBROCK, Deceased,	)	Appeal from the Circuit Court of Sangamon County No. 07L102
Plaintiffs-Appellants,	)	
v.	)	
MARGARET MacGREGOR, M.D., SPRINGFIELD CLINIC LLP, et. al.	)	Honorable
Defendants-Appellees.	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiffs' motion for a new trial, as plaintiffs failed to show they were prejudiced by the defendants' alleged failure to comply with Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007).

¶ 2 In May 2007, plaintiffs, Michael Hassebrock and Andrea Hassebrock, filed a medical malpractice suit against defendants Margaret MacGregor, M.D., Springfield Clinic LLP, and Brian Russell, M.D. Plaintiffs alleged the actions of Dr. MacGregor and Dr. Russell resulted in the death of their daughter, Kiya Hassebrock. In February 2017, a jury ruled in defendants' favor.

¶ 3 Plaintiffs appeal, arguing they were denied a fair trial when defendants violated Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) by introducing previously undisclosed

opinion testimony at trial and when the trial court refused to adequately sanction the defendants for their violation. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Kiya's Hospitalization and Death

¶ 6 Kiya was born prematurely, in the 26th week of pregnancy, on September 22, 2000. Shortly after birth, Kiya suffered a ventricular hemorrhage, also known as a brain bleed. Intracranial bleeding, like that experienced by Kiya, may cause an inflammatory response that may scar the brain. Normally, spinal fluid travels into ventricles along the brain's surface where the fluid is absorbed. Scarring, however, can block the pathways that allow reabsorption to occur. When blockage occurs, cerebrospinal fluid accumulates. This accumulation of fluid is referred to as hydrocephalus, a condition caused by Kiya's brain bleed. Kiya suffered a number of other health problems as a result of her premature birth, including cerebral palsy, bronchopulmonary dysplasia, seizure disorder, and asthma.

¶ 7 To treat Kiya's hydrocephalus, several treatments were implemented. Initially, a reservoir was implanted. When Kiya was a few months old and weighed enough to tolerate general anesthesia, Dr. Russell placed a ventriculoperitoneal shunt within the right ventricle of Kiya's heart to drain excess spinal fluid into Kiya's peritoneum where it would be reabsorbed into the body.

¶ 8 On January 3, 2006, Kiya underwent a tonsillectomy and adenoidectomy. One day after the surgery, Kiya was admitted to St. John's Hospital in Springfield, Illinois, with complications. Kiya was prescribed antibiotics and sent home. On January 6, 2006, Kiya was readmitted with additional symptoms, including a fever of 103.6 degrees and a cough. An initial

laboratory result revealed signs of infection. Kiya also experienced abdominal distention and significant pain. Tests revealed a significant amount of venous gas and pneumatosis intestinalis (the presence of gas in the small or large intestine) leading doctors to fear Kiya had necrotic bowel.

¶ 9 On January 8, 2006, Kiya underwent major abdominal surgery to determine whether her bowel was necrotic. Before the abdominal surgery, a neurosurgeon, Terrence Pencek, M.D., externalized Kiya's shunt by removing the drain that was inserted into Kiya's peritoneum to allow the shunt to drain outside Kiya's body. The externalization was done to prevent the necrotic bowel from infecting Kiya's brain. After the surgery, which revealed no indication of a necrotic bowel, physicians left Kiya's shunt open to allow it to drain externally as if it were still in Kiya's body.

¶ 10 After the externalization, Dr. Russell initially managed the shunt. Dr. Russell was responsible for managing the shunt from January 12, 2006, until January 18, 2006, when he left for vacation. As of that date, Dr. MacGregor managed Kiya's shunt until Dr. Russell's return on January 22. Dr. Russell continued to manage the shunt until Kiya was transferred to St. Louis Children's Hospital on January 26. On January 12, 2006, Dr. Russell ordered to clamp the drain on Kiya's shunt during certain intervals. Staff was to clamp the shunt after 50 cubic centimeters of fluid drained in an eight-hour nursing shift.

¶ 11 During her hospitalization, Kiya experienced fevers, intermittent irritability, and some seizure-like episodes. Kiya's fevers would spike on occasion. On January 14, Dr. MacGregor found no evidence of shunt malfunction. On January 16, 2006, a physician questioned whether the shunt, which was clamped at that point, was the source of Kiya's

irritability. A computed tomography (CT) scan of Kiya's head, performed on January 18, 2006, revealed increased dilatation of the ventricles consistent with malfunction of the shunt tube. On January 21, 2006, Kiya's pupils were dilated and her left eye deviated inward. Kiya's father reported Kiya was interacting "normally." Kiya was "tolerating her feeds," and her labs were stable. On the morning of January 25, 2006, Kiya began suffering generalized tonic-clonic seizures. She was not improving. The physicians agreed to increase the amount of fluid drained from Kiya's head.

¶ 12 On the night of January 26, 2006, Kiya was transferred to St. Louis Children's Hospital. The following morning, a brain CT scan indicated Kiya suffered subacute infarcts of both cerebral hemispheres. The doctors concluded Kiya suffered a significant brain injury and had no chance for a meaningful recovery. Kiya died at 9:01 a.m. on January 28, 2006. Kiya's death certificate indicates she died of "bilateral brain infarcts" as a consequence of "Intracranial Hypertension" existing one week.

¶ 13 In May 2007, plaintiffs filed their complaint. Attached to the complaint was a report by retained expert Dr. John Waldman who opined the physicians who were responsible for managing Kiya's shunt from January 12, 2006, until January 25, 2006, were negligent for failing to properly manage the externalized shunt to prevent the intracranial hypertension leading to Kiya's seizure activities.

¶ 14 B. Pretrial Disclosure Regarding Dr. Herbert Engelhard's Opinion

¶ 15 In January 2015, a Rule 213(f)(3) disclosure was made regarding Dr. Engelhard's opinion as a controlled expert witness. Among the opinions to be offered was that Kiya's seizures during her hospitalizations were "more likely than not the result of the patient's

persistent fevers." Dr. Engelhard would opine "[t]here was a return to [Kiya's] neurological baseline after a possible seizure event," which typically would not occur "if elevated intracranial pressure were causing the seizures." Dr. Engelhard would testify Kiya was transferred to St. Louis Children's Hospital not because of the management of her shunt but for further gastrointestinal workup, increased support, and acute care. Defendants disclosed "Dr. Engelhard may discuss [Kiya's] medical problems and conditions in detail in his deposition as they relate to seizures, the management of the drain, and the prognosis for this patient."

¶ 16 According to the disclosure, Dr. Engelhard would further testify the patient was "at her neurological baseline upon transfer to St. Louis Children's Hospital" and the external drain was managed in the same way at St. Louis Children's Hospital as it had been managed at St. John's Hospital. The morning after Kiya's arrival at St. Louis Children's Hospital, she was found to have a global cerebral infarct. The disclosure also states: "The drain pressure was measured in St. Louis. Dr. Engelhard will testify about this measurement and the significance of this measurement."

¶ 17 C. Dr. Engelhard's Deposition

¶ 18 During his discovery deposition, Dr. Engelhard was asked by plaintiffs regarding whether he had any opinions not previously discussed. Dr. Engelhard testified to the following:

> "That's a big question but fair enough that you ask it. It's a complicated case. I think you certainly have the gist of my opinions as far as neurosurgical management being appropriate, the neurosurgical management complied with the standard of care. She was a very sick child who certainly was unfortunate. That

> there was no evidence of increased intracranial pressure that I saw based on my review of the chart until she got to St. Louis.
>
> It's my opinion that we haven't gotten out is I don't think any change in the management at St. John's would have altered the outcome at St. Louis over having the global infarct. There could be other minor or corollary things if we get into different questions or subjects, but I think you know where I'm coming from."

Plaintiffs' counsel asked, "You think we've covered them?" Dr. Engelhard replied, "Yeah."

¶ 19 D. Trial

¶ 20 The trial was lengthy, beginning February 14, 2017, and ending February 23, 2017. Because the sole issue on appeal is whether a new trial is warranted given defendants' failure to disclose their expert's opinion the "management" of the shunt in St. Louis was a cause of Kiya's intracranial pressure and death, we need not summarize the testimony and evidence in its entirety.

¶ 21 1. *Dr. Russell's Testimony*

¶ 22 According to Dr. Russell, draining spinal fluid is "a fine tightrope that we have to walk." Dr. Russell "didn't want to not drain fluid, but again, *** did not want to over-drain her." Dr. Russell agreed an externalized shunt "clamped for days and days" could increase intracranial pressure. In his years of experience, Dr. Russell concluded patients can usually tolerate intermittent clamping for a period of hours. For Kiya, balancing the risks of over-drainage and under-drainage, Dr. Russell ordered the drain unclamped every eight hours to allow the release of up to 50 cubic centimeters of cerebrospinal fluid. According to the order, the nurses opened

the clamp at the beginning of each shift and left it open until they drained 50 cubic centimeters of fluid or until the end of their shifts. Kiya's intracranial pressure varied daily. On some days, the device drained 50 cubic centimeters in one hour. On other days, the drain remained unclamped for an entire eight-hour shift.

¶ 23 *2. Dr. John Waldman's Testimony*

¶ 24 Dr. John Waldman, board-certified in neurological surgery, testified on behalf of the plaintiffs. Dr. Waldman explained a person's head is full of brain matter, cerebrospinal fluid, and blood. Dr. Waldman testified when cerebrospinal fluid accumulates, something has to be displaced or the pressure will rise. As pressure rises, the brain is injured. Because Kiya had hydrocephalus, it was necessary to have a shunt placed to drain excess fluid into a body part that can reabsorb it into the blood stream so the fluid is not lost. The peritoneum is the ideal spot to divert excess fluid.

¶ 25 Dr. Waldman testified clamping a shunt in a patient has the potential for damage, creating major potential for under-drainage. If the patient cannot absorb cerebrospinal fluid, excess fluid would accumulate, eventually leading to death. Before causing death, clamping will cause neurological symptoms. Dr. Russell and Dr. MacGregor were negligent in that they ignored Kiya's neurological symptoms. Dr. Waldman testified Kiya's inward eye deviation and unequal pupils suggested she experienced increased intracranial pressure when those conditions were observed. Dr. MacGregor was negligent by failing to identify Kiya's problem, not following Kiya closely enough, and failing to take steps to alleviate her under-drainage problem given the clear manifestation on the CT scan that Kiya was being under-drained. Dr. Waldman opined Dr. MacGregor's failures contributed to an increase in Kiya's intracranial pressure, which

caused her death.

¶ 26 Dr. Waldman opined Dr. Russell breached the standard of care by ignoring CT scans showing progressive enlargement of her ventricles and other neurological signs and failing to act to relieve her pressure. The intermittent clamping ordered by Dr. Russell caused increased intracranial pressure. Kiya's eye deviation was a symptom suggestive of increased pressure ignored by Dr. MacGregor and Dr. Russell.

¶ 27 Dr. Waldman concluded the mismanagement of the shunt by defendants caused a net increase in Kiya's intracranial pressure that contributed to her death. Dr. Waldman further opined the brain injury that caused Kiya's death occurred while she was under Dr. Russell's "and/or" Dr. MacGregor's care in Springfield. Dr. Waldman opined he would not have ordered the shunt clamped.

¶ 28 On cross examination, Dr. Waldman admitted he did not review the hospital CT scans or any of Kiya's preadmission CT scans, as he never received them.

¶ 29 3. *Dr. Engelhard's Testimony*

¶ 30 Dr. Engelhard, defendants' retained expert, opined defendants met the standard of care. Dr. Engelhard testified both doctors "did everything right." The doctors "drained it all appropriate[ly] and they managed the neurological care of Kiya in an appropriate way when she was at St. John's." Dr. Engelhard, when asked if he had an opinion as to the cause of Kiya's death, testified: "Generally, she was in, I'd say, fairly stable condition when she went to St. Louis. It's clear that at St. Louis Children's something dramatically changed in the morning of January 27th. It was an event that had not happened before. Her pulse dropped. Her pupils dilated. She never came back. She became unresponsive. She had to be intubated, and really the

event clearly happened at St. Louis Children's." Dr. Engelhard testified he reviewed every page of the records and never examined Kiya. While at St. John's Hospital, Kiya "had increased intracranial pressure in a bad way." At St. John's Hospital, unlike in St. Louis Children's Hospital, Kiya "always would come back."

¶ 31 Dr. Engelhard testified the medical records from St. Louis Children's Hospital indicated Kiya's condition was improved as of 4 a.m. on January 27. Her condition was "back to baselining." Kiya's pulse was "okay." Kiya's pupils were equal in size and reactive to light. At this point, Kiya had been at St. Louis Children's Hospital for approximate five or six hours. Dr. Engelhard opined if Kiya was badly injured at St. John's Hospital, she could not have improved to that point.

¶ 32 According to Dr. Engelhard, a neurosurgery resident did not see Kiya at St. Louis until 8 a.m. on January 27. At that time, Kiya's pulse was 88 beats per minute, lower than any time it was taken at St. John's Hospital. Dr. Engelhard opined the January 27 CT scan showed new findings establishing Kiya's brain injuries occurred while Kiya was at St. Louis Children's Hospital.

¶ 33 Dr. Engelhard was asked about a radiology report that indicated the injury in the January 27 CT scan occurred days earlier given the blurring between the gray and white matter. Dr. Engelhard agreed Kiya suffered a global infarct, which meant the whole brain lost blood flow, but he disagreed with the conclusion that the blurring established the date of injury. Dr. Engelhard based this conclusion on the fact that earlier scans taken "when she was doing okay" also showed blurring.

¶ 34 On cross examination, in a line of questioning regarding Kiya's experience with

seizures from fevers, the following questions and answers occurred:

"Q. You think the fevers caused the seizures that led to the death, right?

A. That's part of it.

Q. What else is part of it?

A. The management of the shunt at Children's Hospital in St. Louis."

¶ 35 Plaintiffs' counsel promptly moved to strike the statement under Rule 213. A sidebar conference immediately followed. The trial court heard plaintiffs' objection. The court questioned whether a violation occurred but stated, "I'm going to strike the answer and move on." Plaintiffs' counsel responded, "That's fine." The court stated the following to the jury: "Okay. With regard to the witness's response to the last question, with regard to attributing one of the causes of Kiya's demise, it's stricken. You're not to consider it, the last response from the question that was just asked. You can't consider it, and you'll receive instructions about that later."

¶ 36 Dr. Engelhard had no quarrel with the cause of death listed on Kiya's death certificate: "bilateral brain infarct as a result of intracranial hypertension." He did not agree the intracranial hypertension went back one week as reported on her death certificate. Plaintiffs asked Dr. Engelhard if it was his opinion a seizure occurred in St. Louis that caused the infarct. Dr. Engelhard replied it was not. The following then occurred:

"Q. What's your opinion?

A. It's as to the issue that has been stricken.

Q. Is it your - -

A. Judge, you can tell me to answer or not.

THE COURT: Just a moment. It's [plaintiffs' counsel's] question. Mr. Kelly?

[PLAINTIFFS' COUNSEL]: Your opinion in St. Louis was that she was at her baseline, correct?

A. When she initially was there, fair enough."

¶ 37 After Dr. Engelhard's testimony, plaintiffs moved for additional relief. Plaintiffs argued at no point in the disclosure regarding Dr. Engelhard's testimony did defendants disclose he blamed anyone. Dr. Engelhard twice raised the issue of the "new opinion." At this point, the trial court stated: "He didn't mention the opinion. He mentioned that it had been stricken, and he was looking for instructions from the Court." Plaintiffs argued Dr. Engelhard's disclosure violated a motion *in limine*. Plaintiffs asked Dr. Engelhard's testimony be stricken as a sanction for the violation, the jury be informed of the reason the testimony was stricken, and a subsequent hearing to determine the extent defendants knew about the new opinion and defendant's reasons for not disclosing it.

¶ 38 Defendants countered there was no ruling on and thus no violation of plaintiffs' motion *in limine* on the matter, noting the docket showed the trial court reserved ruling on that motion. Defendants further emphasized Dr. Engelhard did not say anyone at St. Louis Children's Hospital deviated from the standard of care. Defendants highlighted their position the event happened in St. Louis, which was Dr. Engelhard's opinion.

¶ 39 The trial court agreed "to that extent that the witness had not disclosed those type

of opinions" but refused the relief requested, finding no "error to the extent that a mistrial is warranted."

¶ 40 4. *Closing Argument*

¶ 41 In closing, plaintiffs explained to the jury, regardless of the existence of multiple causes, plaintiffs need only establish defendants' conduct was among the causes that led to the brain infarct. Plaintiffs pointed to the jury instruction on proximate cause: "If you decide that a Defendant was negligent and that negligence was a proximate cause of injury to the plaintiff, it's not a defense that something else may also have been a cause."

¶ 42 Defense counsel emphasized on three occasions defendants were not blaming anyone in St. Louis. Dr. Russell's counsel stated: "I told you from the very beginning, St. Louis, it's an odd situation. We are not blaming it on anybody in St. Louis, making that perfectly clear. What happened in St. Louis happened in St. Louis. It is what it is ***." Dr. MacGregor's counsel stated the following: "Unfortunately, it did happen in St. Louis, at St. Louis Children's, but not at St. John's, and I'm not suggesting they did something wrong there, I'm not. It's just it didn't happen." Later in his closing argument, Dr. MacGregor's counsel repeated that position: "The records are silent, but we do know she didn't have that condition when she went there, and I'm not suggesting they did anything wrong. Again, she was a very sick girl with significant problems that made her ability to fight the illness not good."

¶ 43 The jury returned a verdict for defendants.

¶ 44 E. Plaintiffs' Motion for a New Trial

¶ 45 Plaintiffs filed a motion for a new trial. The only issue in that motion that is pursued on appeal is plaintiffs are entitled to a new trial due to defendants' failure to disclose Dr.

Engelhard's opinion the management of Kiya's shunt at St. Louis Children's Hospital was a cause of increased intracranial pressure.

¶ 46 The trial court held a hearing on plaintiffs' motion. At the close of the hearing, the trial court ruled as follows, denying plaintiffs' motion:

> "***I think it's relevant that *** the defendants didn't ask the questions that initiated this whole issue. So, that's just one point I think for the record. The other was, I'm a little intrigued by this idea of a hearing, hearing from a doctor, potentially counsel, but even to consider that, I believe there's a threshold of finding some type of concern or potential error of misconduct, but as an officer of the Court, the Court has no reason to believe that any error took place.
>
> They limited their direct. They accepted the Court's ruling when striking the testimony. No evidence anyone had any knowledge of any change – alleged changed position of opinion. In issuing my ruling on this motion, I'll just state again for the record that I have reviewed all the relevant pleadings, transcripts provided to the Court and carefully considered the arguments of the Court presented today. I don't find there's prejudice justifying a new trial in this matter.
>
> I also find that the facts from the case decided by our appellate court in the Fourth District are distinguishable from the

facts and circumstances here.

I find it interesting, and I've reviewed this before, but in hearing Mr. Biswell read it back to the Court at this time, the deposition of the expert in question, and he reads back the answer prior to this sort of catch-all question by Plaintiffs' counsel, and I hear an explanation by an expert doctor talking about the potential of other things that would, in my view, invite a litany of follow-up questions to lock in the deponent. It was not a scenario where, in this Court's view, of trying to lock in somebody who testified at trial you could have a catch-all question sort of stating any other opinions, question mark. The statement prior to that invited again, a litany of questions in that there were clearly other factors and that the doctor had summed up the gist of what his testimony would be. So, you know, I feel there was a real opportunity at that point and that it wasn't taken advantage of. Mr. Kelly is a fantastic attorney, but, again, the way it played out in trial, I'm satisfied that defense counsel didn't create any error. ***

The last thing is the jury. The jury was very attentive. They worked very hard. It was a long trial. The courts, we get a sense, when I ask them to disregard testimony and strike testimony, if I look over at that jury, and I look at them all, we really get a sense whether or not they are with us, because sometimes things are

> struck that I think would be interesting to the jury, and you can see their faces, and they indicate, in my view, that they really would have liked to have heard that testimony. I didn't get any of those signs from this jury. This was an excellent jury, and they came back with a verdict, and I just don't find the prejudice."

¶ 47 This appeal followed.

¶ 48 II. ANALYSIS

¶ 49 On appeal, plaintiffs argue the trial court erroneously denied their motion for a new trial, as, they contend, defendants' overt violations of Rule 213 resulted in an unfair trial. Plaintiffs contend the court should have stricken Dr. Engelhard's testimony in its entirety, informed the jury of the reason for doing so, and ordered a hearing to ascertain defendants' knowledge of Dr. Engelhard's "new" opinion.

¶ 50 A. The Standard of Review

¶ 51 Illinois Supreme Court Rule 341(h)(3) (eff. Jan. 1, 2016) mandates an appellant "include a concise statement of the applicable standard of review for each issue." Plaintiffs failed to comply with this rule.

¶ 52 In their "Standard of Review" section, plaintiffs make a broad statement regarding standards of review, asserting the "admissibility of evidence is typically within the sound discretion of the trial court" and except when the admissibility decision relies on a determination of law, the trial court's decision is subject to *de novo* review. See *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 891, 647 N.E.2d 618, 623 (1995) (cited by plaintiffs). This statement is not applicable to the matter on appeal.

¶ 53 This appeal does not involve a question of admissibility of evidence. When plaintiffs objected to Dr. Engelhard's statement on grounds it violated Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007), the trial court questioned whether a violation occurred, but ruled in plaintiffs' favor, disallowing further testimony consistent with that opinion, striking the statement, and instructing the jury to disregard it. The evidence plaintiffs alleged to be improper was not admitted. Plaintiffs do not argue it should have been admitted. A standard of review regarding admissibility of evidence does not apply.

¶ 54 Instead, this case is before us on the denial of a motion for a new trial on the allegation plaintiffs were denied a fair trial when defendants' expert witness allegedly violated Illinois Supreme Court Rule 213 by testifying to a conclusion undisclosed in discovery. In *White v. Garlock Sealing Technologies, LLC*, 373 Ill. App. 3d 309, 323, 869 N.E.2d 244, 255 (2007), this court held the abuse-of-discretion standard applies on review of a trial court's decision to *grant* a new trial based upon a Rule 213 violation. We find the same standard is appropriate when reviewing a decision denying a new trial on the same allegation.

¶ 55 Moreover, a new trial for a violation of Rule 213 is not warranted absent a showing of prejudice. See *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 75, 8 N.E.3d 93 (finding a new trial "is warranted when the Rule 213 violation is of such character and magnitude as to deprive a party of a fair trial and the party seeking the mistrial demonstrates actual prejudice as a result" (internal quotation marks omitted)); see also *White*, 373 Ill. App. 3d at 327-28 (considering whether the plaintiff suffered sufficient prejudice to support the grant of a new trial).

¶ 56 B. Illinois Supreme Court Rule 213

¶ 57 Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) governs the disclosure of the identity of witnesses who will testify at trial. *White*, 373 Ill. App. 3d at 323. Under Rule 213(f)(3), a party must identify for each retained expert: "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefore; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007). "The importance of a party's compliance with the mandates contained in Rule 213(f) cannot be overstated," as Rule 213(g) restricts the testimony a witness can give on *direct examination* at trial to the information disclosed in answer to Rule 213(f) interrogatory. *Fakes*, 2014 IL App (4th) 121100, ¶ 64. Under subsection (i), a party has a duty to supplement or amend an answer or response when "new or additional information subsequently becomes known to that party." Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007).

¶ 58 The disclosure requirements are mandatory and subject to strict compliance. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110, 806 N.E.2d 645, 651 (2004). Allowing a party to ignore Rule 213's disclosure requirements defeats the purpose of the rule and encourages tactical gamesmanship. *Id.* at 109-10.

¶ 59 There are three options for sanctions for a party's failure to comply with Rule 213. An aggrieved party may move to (1) strike the portion of the testimony that violates the rule, (2) strike the witness's testimony in its entirety and bar further testimony from that witness, or (3) have a mistrial declared. *Eloy*, 2014 IL App (4th) 121100, ¶ 74. A trial court should not hesitate to sanction a party for nondisclosure. *Sullivan*, 209 Ill. 2d at 110. The trial court has discretion to determine the appropriate remedy and must insure the sanction imposed allows for a fair trial rather than punish the party who committed the violation. *Fakes*, 2014 IL App (4th)

121100, ¶ 75 (citing *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 378, 805 N.E.2d 222, 233 (2003)).

¶ 60 1. *White v. Garlock*

¶ 61 In support of its argument a new trial is warranted, plaintiffs rely heavily on our decision in *White*.

¶ 62 In *White*, the decedent worked for 40 years in a power plant at which asbestos-containing packing and gaskets manufactured by defendant Garlock Sealing Technologies, LLC, (Garlock), were used. *White*, 373 Ill. App. 3d at 311-12. Decedent's physician testified decedent developed asbestosis, the cause of his death, as a result of inhaling asbestos. *Id.* at 312. Before trial, Garlock disclosed Steven R. Smith, M.D., as an expert witness. Garlock provided plaintiff with a report in which Dr. Smith questioned whether the medical evidence showed decedent suffered from asbestosis and noted the presence of clinical findings of pulmonary aspergillosis, a fungal infection in the lungs. *Id.* Among the opinions offered by Dr. White was that "[i]t is not possible for me to state, to a reasonable degree of medical certainty, that [decedent] either did have or did not have bona fide asbestosis." (Internal quotation marks omitted.) *Id.* at 313. At trial, however, after a suggestion by plaintiff Dr. Smith was "like the Monday morning quarterback" pointing out errors made by other doctors, Dr. Smith volunteered, "I'm not casting stones at any physicians. I'm just saying that [decedent] did not have asbestosis ***." (Internal quotation marks omitted.) *Id.*

¶ 63 The trial court in *White* noted the change in Dr. Smith's opinion was on a "major issue in this case." (Internal quotation marks omitted.) *Id.* at 314. In determining the remedy during trial, the court explained because the disclosures contained "many signs" asbestosis was

not likely, it believed it sufficient to strike Dr. Smith's opinion testimony decedent did not have asbestosis. (Internal quotation marks omitted.) *Id.* at 315.

¶ 64 The jury found in Garlock's favor. Plaintiff filed a post-trial motion seeking a new trial, asserting Garlock's failure to disclose the new opinion denied her a fair trial. After the hearing on the motion for a new trial, the trial court asked to hear further evidence and directed defendant to produce Dr. Smith to testify. *Id.* at 316. After considering Dr. Smith's testimony, the court granted plaintiff's motion for a new trial. *Id.* at 318. The court found an egregious Rule 213 violation. *Id.* The court ruled Dr. Smith did not finalize his opinion until right before he was to testify. At that point, Garlock was obligated to update its Rule 213 disclosure indicating the opinion differed from the opinion in his disclosure. *Id.* at 319.

¶ 65 On appeal, this court affirmed the order for a new trial. *Id.* at 311. We rejected the argument Rule 213(i) did not require defendant to amend or supplement the response by Dr. Smith, because defendant did not elicit the testimony on direct examination. *Id.* at 325. We agreed with the trial court's conclusion plaintiff's counsel had the right to expect on cross examination to not hear an answer different from that in the disclosure. *Id.* at 325-26. We further rejected defendant's claim plaintiff could not object to testimony she elicited. *Id.* at 327. We reasoned plaintiff did not "elicit" the testimony, as Dr. Smith volunteered the information in a manner that was not responsive to a question posed. In addition, we found plaintiff had the right to conduct her cross-examination of Dr. Smith in confidence she knew his pertinent opinions. *Id.*

¶ 66 We find *White* distinguishable. It is questionable *White* dictates a finding defendants violated Rule 213 as there are significant differences between the facts of each case. Here, unlike Dr. Smith in *White*, Dr. Engelhard did not volunteer his opinion in a nonresponsive

manner to a question by plaintiffs. Dr. Engelhard's response was to a direct, open-ended question by plaintiffs. In addition, unlike Dr. Smith's opinion in *White*, Dr. Engelhard's opinion regarding the "management of the shunt in St. Louis" was not inconsistent or contrary to his opinions in his disclosures or during his deposition testimony. While he was not permitted to testify to such an opinion on direct examination (see Ill. S. Ct. R. 213(g) (eff. Jan 1, 2007) ("The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on *direct* examination at trial." (emphasis added))), he was arguably not limited by Rule 213 to answer to a direct question on cross-examination in a manner not inconsistent with his disclosure. See *Fakes*, 2014 IL App (4th) 121100, ¶ 70 (distinguishing *Skubak v. Lutheran General Health Care Systems*, 339 Ill. App. 3d 30, 790 N.E.2d 67 (2003), on the ground "the disputed trial testimony was consistent with the controlled expert's Rule 231 disclosure ***."). Dr. Engelhard's disclosed opinions related to the care of Kiya at St. John's and the opinion the intracranial pressure that caused her death occurred at St. Louis Children's Hospital. In contrast, in *White*, Dr. Smith's testimony directly contradicted the opinions in his disclosure, triggering the duty to amend in Rule 213(i). See *White*, 327 Ill. App. 3d at 325.

¶ 67 Further distinguishing the two cases is the magnitude of the issues to which the opinions applied. In *White*, the question of whether the decedent could recover from exposure to asbestos turned on whether the decedent suffered an asbestos-related disease. See *id.* at 314 (noting the trial court called the issue of whether the decedent had asbestosis "something of a major issue in this case" (internal quotation marks omitted)). A finding the decedent did not have asbestosis would have precluded a finding for plaintiff. Here, however, a conclusion the

"management of the shunt" at St. Louis Children's Hospital contributed to Kiya's seizures and death did not foreclose a finding for plaintiffs. The jury was well-aware it need only find defendants were negligent and that negligence was a proximate cause of Kiya's death: "It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury."

¶ 68 2. *Prejudice*

¶ 69 We, however, need not decide whether defendants violated Rule 231's disclosure requirements because we find no abuse of discretion in the trial court's decision plaintiffs suffered no prejudice as a result of Dr. Engelhard's statement. This was an eight-day trial. The short statement made by Dr. Engelhard was promptly objected to and stricken. The trial court noted the jury was attentive and gave no indication it would not heed the court's admonition. Dr. Engelhard did not testify physicians in St. Louis acted negligently or that they failed to meet a standard of care. The jury knew throughout the entire case defendants denied causing the injury and defendants argued the evidence showed the event that triggered the intracranial pressure and Kiya's resulting death occurred in St. Louis. In addition, the opinion, if accepted, would not have foreclosed a finding of negligence, as the jury was well aware "it's not a defense that something else may also have been a cause."

¶ 70 Furthermore, defendants, on three occasions during closing argument, told the jury they were not arguing St. Louis Children's Hospital did anything wrong. While plaintiffs cite these same statements in closing as indicative of a plan for a trial by ambush, we disagree. The statements are consistent with defendants' theory of the case throughout. We further note plaintiffs did not object to these statements when they were made.

¶ 71 The trial court sat in the "best position to determine to what extent the improper evidence may have affected the decisions of the jury." *Id.* at 329. The court's conclusion plaintiffs suffered no prejudice is not an abuse of discretion.

¶ 72 III. CONCLUSION

¶ 73 We affirm the trial court's judgment.

¶ 74 Affirmed.