2019 IL App (5th) 170399-U

NO. 5-17-0399

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RANDY A. GRATER and VICKI GRATER, as Administrators of the Estate of Randallynn Grater; and RANDY GRATER JR.,	)	Appeal from the Circuit Court of Madison County.
Petitioners,	)	
v.	)	No. 14-MR-127
THE COURT OF CLAIMS,	)	
Respondent-Appellee	)	
(Randy A. Grater and Vicki Grater, as Administrators of the Estate of Randallynn Grater, Petitioners-Appellants).	)	Honorable David W. Dugan, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justice Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Although the Illinois Department of Transportation violated Supreme Court Rule 213 (eff. July 1, 2002) which resulted in the inappropriate allowance of two experts' testimony at the hearing in the Court of Claims, this court is without jurisdiction to review the ruling of the lesser tribunal even though it may have erred or misconstrued the law where the aggrieved petitioners were given adequate notice and the opportunity to be heard. Where there is no genuine issue of material fact, we affirm the summary judgment and also affirm the trial court's denial of the petitioners' writ of *certiorari*.

¶ 2 Randy A. Grater and Vicki Grater, as administrators of the estate of their deceased daughter, Randallynn Grater, appeal from the trial court's summary judgment in favor of the Court of Claims. Randallyn Grater tragically died as a result of injuries sustained in a motor vehicle accident at an intersection on Illinois Route 40 near St. Jacob in Madison County. The Graters filed a wrongful death claim against the Illinois Department of Transportation (IDOT) in the Court of Claims. Two IDOT employees testified at the hearing held on the claim, giving their expert opinions. IDOT had not complied with discovery requests and Court of Claims-set deadlines for disclosure of expert witnesses. However, despite motions seeking to bar their testimony, the commissioner for the Court of Claims allowed the testimony of both witnesses. At the conclusion of the hearing, the commissioner made his recommendation to the Court of Claims judges and the Court of Claims ruled in IDOT's favor. After the Court of Claims denied the Graters' posttrial motion, the Graters appealed by filing the underlying case in the Madison County circuit court. The Court of Claims filed a motion for summary judgment alleging that the Graters were not denied due process by the Court of Claims' actions in allowing the expert witnesses to testify. The trial court granted summary judgment in favor of the Court of Claims and denied the Graters' writ of *certiorari*.

¶ 3 BACKGROUND

¶ 4 On December 7, 2000, Randallyn Grater was involved in a motor vehicle accident that ended her life. Randallynn was a passenger. The accident took place at the intersection of St. Jacob-Marine Road and U.S. Route 40. At the time of the accident, the intersection was governed by two stop signs—one on St. Jacob Road and the other on Marine Road. The intersection also had a caution light on Route 40 in both directions. The driver of the vehicle

that Randallynn was in attempted to enter the intersection on Route 40 from one of the side roads but did not see the approach of a vehicle on Route 40. The two vehicles collided, and Randallynn sustained fatal injuries. At least four fatal accidents at this intersection preceded the Grater accident. Eventually, the State of Illinois committed to the construction of a four-way traffic control device with a scheduled completion date of July 2000. The deadline passed without the completion of the project.

¶ 5 Initially, the Graters filed suit against CSX, which owned the rail line that crosses the intersection on the St. Jacob side of Route 40. The trial court entered summary judgment in favor of CSX concluding that CSX was not responsible for the intersection at issue. Thereafter, the Graters filed this case in the Court of Claims.

¶ 6 On October 15, 2009, the Graters filed interrogatories seeking information from IDOT in the Court of Claims. One of the interrogatories asked IDOT to disclose witnesses pursuant to Illinois Supreme Court Rule 213(f) (eff. July 1, 2002). The Court of Claims commissioner set a discovery cutoff of February 1, 2010. That discovery deadline expired without IDOT filing responses to the Graters' interrogatories. The Graters did not make a Rule 201(k) attempt to resolve this discovery issue by questioning IDOT's intent. Ill. S. Ct. R. 201(k) (eff. Jan. 1, 1996). On May 21, 2010, the Graters objected to the lack of IDOT's disclosure of witnesses in its response to IDOT's motion for summary judgment to which IDOT attached affidavits of proposed witnesses. After the commissioner denied IDOT's motion for summary judgment, on June 10, 2010, IDOT filed answers to the Graters' interrogatories. In its Rule 213 disclosure, IDOT listed three witnesses that it intended to call at trial to testify about IDOT's opinions and actions regarding the St. Jacob intersection:

Michael Pritchett, project engineer, previously a design and planning engineer; James Wessel, design and planning engineer, previously an access permits engineer; and RuAnna Stumpf, permits unit employee. Attached to the answers, IDOT attached a copy of Wessel's deposition taken in June 2002 in the earlier case the Graters filed against CSX. No other information about the nature, content, or foundation of the witnesses' expected testimony was included in the disclosure.

¶ 7 On November 9, 2011, the Graters filed a motion *in limine* seeking to bar IDOT's three witnesses from testifying at trial as a sanction for failing to comply with the discovery deadline. In response, IDOT argued that because the Graters were informed of these witnesses on June 10, 2010, and opted not to object to and/or depose them in the intervening 17 months, it should not be sanctioned. In addition, IDOT argued that the attorneys representing the Graters had access to IDOT's documents and employees from the earlier case against CSX. IDOT made multiple arguments in opposition to the request for sanctions, including the lack of surprise to the Graters; that the proffered testimony would not be prejudicial because the Graters already had the information; that the testimony was vital to IDOT's defense; that the Graters failed to show any diligence by attempting to obtain the information from IDOT; that the objection was untimely; and that IDOT acted in good faith in making the June 2010 disclosure, albeit at a date months after the discovery deadline. The Graters argued that prejudice would occur because of the potential that the three witnesses would provide opinion-based testimony. The commissioner denied the motion *in limine*, finding that the Graters had 17 months between disclosure and the hearing to rectify the discovery issue. The Court of Claims commissioner offered to pause the hearing for 24

hours to give the Graters the opportunity to depose the witnesses. The Graters declined the opportunity.

¶ 8 Numerous people testified at the November 2011 evidentiary hearing. We will briefly summarize the testimony of each.

¶ 9 Anthony Miller testified that Randallyn Grater was his passenger on December 7, 2000, and they were involved in a motor vehicle accident that resulted in Randallyn's death. He does not remember the accident. He does not know if he stopped at the stop sign at the intersection of Marine-St. Jacob Road and Route 40.

¶ 10 Randy Adam Grater Jr. testified that he was the older brother of Randallyn. He testified to numerous positive attributes of Randallyn and detailed his relationship with her. He testified that he used to work at a bar that was alongside the railroad tracks on the St. Jacob side of the intersection and that he was aware of weekly accidents at the intersection before the traffic signal was installed.

¶ 11 Randy A. Grater Sr. testified that he was Randallyn's father. He testified that the dangers of the intersection had been a common topic in the St. Jacob community since the early seventies. He testified that there had been more than one petition circulated to obtain a traffic control device at the intersection. Randy testified that although he had not been an eyewitness to collisions at the intersection, he had heard the collisions from his vantage point inside a bar near the intersection.

¶ 12 Vicki Lyn Grater testified that she was Randallyn's mother. She had researched accidents at this intersection after the one involving her daughter and had discovered six fatal accidents. She testified that in the fall of 2000 she spoke with Jim Easterly, an IDOT

employee, about this intersection. Easterly informed her that there had not been enough fatalities at the intersection to warrant installation of a traffic control device. Vicki also testified about numerous nonfatal accidents at the same intersection. She signed three different petitions circulated by concerned area citizens who wanted a traffic control device installed at the intersection.

¶ 13 Raymond Muniz testified that he was the current mayor of St. Jacob and had been involved with the zoning board and as a trustee for the village since 1995. He testified about petitions from the citizens, as well as a letter to and from a state representative, requesting installation of a traffic control device. In his experience, Mayor Muniz testified that traffic at the intersection was heaviest in early morning and evening rush hour. He testified that he knew of at least two previous fatal accidents, as well as hundreds of nonfatal accidents at the intersection. Although he testified that the intersection was dangerous, St. Jacob had never conducted its own traffic counts at the intersection due to a lack of funding and a lack of governmental authority to do so because the intersection was under the state's control. At another intersection within St. Jacob, Mayor Muniz testified that IDOT had placed traffic counters at his request. However, he questioned the legitimacy of the resulting traffic counts because of the timing of both the placement and the removal of the counters. In his opinion, this practice of avoiding the peak travel times, by placing the counters after the morning rush and collecting the counters before the evening rush, could never reflect an accurate traffic count.

¶ 14 James Lockebie testified that he had resided in St. Jacob since 1965 and was familiar with numerous accidents at the intersection, including two fatalities. He testified that he

himself had been involved in an accident at the intersection. He knew of at least three petitions circulated by concerned area citizens that were forwarded to IDOT. As a former village board member, Lockebie testified that he had been present for meetings with IDOT representatives during which IDOT stated that it was its duty to keep the intersection safe. He stated that St. Jacob began asking IDOT to install a traffic control device at the intersection in 1975. Lockebie testified that St. Jacob was informed that it could not unilaterally install a traffic control device to control that intersection because the state owned the intersection.

¶ 15 At the evidentiary hearing, IDOT called two witnesses—James Wessel and RuAnna Stumpf, both IDOT employees. Counsel for the Graters objected to any testimony by either witness on the basis of inadequate and improper disclosure under Rule 213. Before James Wessel testified, the commissioner noted the objection, stating: "If the judges decide my decision is wrong, they can exclude it and just exclude it from consideration." During the testimony of both witnesses, the commissioner confirmed that the Graters had an ongoing objection to their testimony.

¶ 16 James Wessel testified that he is employed by IDOT and has held several different positions during the 28 years of his employment. Since 1999, he has worked as a design and planning engineer—in charge of traffic control devices, highway lighting, access permits, oversize move permits, billboard permits, and IDOT's safety program.

¶ 17 Wessel testified that prior to installing a traffic control device, IDOT investigates the traffic volumes at the desired location, the accident data at that location, and the geometrics. He defined geometrics as the way in which an intersection is laid out. Wessel testified that

IDOT used the Uniform Traffic Control Devices manual for compiling data for the justification of installing a traffic control device. The manual is issued by the Federal Highway Administration and provides a uniform set of rules for installation of pavement marking, traffic control devices, and traffic signage throughout the nation. If an entity asked IDOT to install a traffic control device, IDOT would first determine the traffic volume, then review crash data for the applicable intersection. "If warrants are close, we would investigate more, go into more detail." Wessel explained that "the warrants" were guidelines contained within the Uniform Traffic Control Devices manual that can justify the installation of the traffic control device.

¶ 18 Counsel for the Graters objected to the continuation of Wessel's testimony as his testimony appeared to be headed into opinion-based testimony about whether or not the individual facts regarding the St. Jacob intersection warranted a traffic control device. The Graters argued that the manuals had not been disclosed. IDOT argued that Wessel testified about the warrants and the specific manual in his nine-year-old deposition from the Graters' civil case against CSX, and therefore his current testimony could not have prejudiced the Graters. IDOT's counsel conceded that she had never disclosed the manuals in this Court of Claims case. The commissioner stated:

> "I am going to allow him to testify at this point, but this is with—this is a close call that the judges—I have to make the record for the judges, but the judges are going to certainly look at this, and may find that this isn't something that is proper that can be testified to for a Rule 213 violation. ***
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> ***
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> You have a continuing objection, blanket objection, for him to be offering any expert testimony *** even if he goes to the ultimate conclusion."

¶ 19 Wessel continued his testimony by explaining that IDOT requires two warrant standards to be met in order to approve installation of a traffic control device. IDOT mandates review of 4 of the 12 warrants listed in the federal manual. The four warrants used by IDOT are: (1) minimum vehicular volume at the intersection, (2) interruption of continuous traffic (when there is a high volume on the main road and a lower volume on the side road that would prevent that traffic from entering out onto the main road), (3) accident experience, and (4) a vehicular volume coupled with difficulty entering the higher volume main road from the lower volume side road.

¶ 20 Wessel's testimony then turned to the St. Jacob intersection at issue. He investigated the intersection many times beginning in 2000 but was not part of the investigation when it was determined that a traffic control device should be installed. Wessel identified many documents in the file dated 1989, 1990, 1994, and 1998 that detailed IDOT investigations of the intersection pursuant to requests by St. Jacob that failed to meet the warrants standard.

¶ 21 Wessel generally explained that IDOT would not install a traffic control device at an intersection that did not meet two of the warrant standards because of potential IDOT liability for noncompliance with the manual if there was a subsequent accident at the intersection. He also gave his opinion, based upon his 20-plus years of IDOT engineer experience, that a traffic control device does not always make an intersection safer.

¶ 22 On cross-examination, Wessel testified that IDOT frequently gets multiple requests about the same intersection, as IDOT did with this St. Jacob intersection. He testified that he was taught that a correct way to conduct traffic volume studies with a traffic counter is to leave the counter in place 24 hours per day for several days. However, he clarified that he

has never conducted traffic volume studies for IDOT. At the hearing, when asked if the intersection was safer now because of the traffic control device, he denied that it was safer, but acknowledged that nine years prior when he was deposed, he had answered that same question affirmatively.

¶ 23 Wessel testified that at the 2000 date of Randallynn's fatal accident, IDOT did not consider fatalities in determining if an intersection warranted a traffic control device. In 2005 or 2006, IDOT began considering the number of accidents as opposed to the severity of the accidents as the appropriate factor.

¶ 24 RuAnna Stumpf testified that she is employed by IDOT and has held several different positions during the 30.5 years of her employment. Since January 2000, she has worked as the permits unit chief in the Bureau of Operations. Before that position, Stumpf was the traffic studies chief in the Bureau of Programming. As the chief of traffic studies, Stumpf obtained traffic counts, analyzed the numbers obtained in the counts, reviewed annual traffic count maps to review studies that were sent in by consultants, and forecast traffic for state program projects. Stumpf explained that the counts contained on the traffic count maps are completed in different years depending upon if the map involves state-marked routes or county roads. Traffic counts on state-marked routes are conducted every other year on odd-numbered years and an updated traffic count map is created. Traffic counts on county roads are conducted on a five-year cycle, and so every fifth year, an updated traffic count map is created.

¶ 25 In discussing technology used to conduct traffic counts, Stumpf detailed changes in traffic count technology. Initially the hose counters strung across the roadway could take a

24-hour or 48-hour traffic count. Later in the 1990s, the traffic counters would provide hourly counts. In 1999, IDOT began using a new piece of equipment that obtained traffic counts on a magnetic field.

¶ 26 The state-marked route system traffic counts are completed by obtaining an average daily count. She explained that to get an average daily count, IDOT attempts to get 24-hour traffic counts on a Tuesday, Wednesday, or Thursday. Stumpf disputed earlier testimony from witnesses for the Graters that IDOT did traffic counts from 9 a.m. to 3 p.m.

¶ 27 Special traffic counts are conducted on an as-requested basis. Stumpf testified that in the early 1990s, the only way that a special count could be conducted was by a manual count—where the IDOT employee "had to physically sit in an intersection and count the turning movements and tabulate them every 15 minutes or half hour or hour, depending on how big the intersection was." Each IDOT employee performing the manual count used a clicker board for each of the four directions. Once the magnetic traffic counts became available, IDOT did not have to manually conduct requested traffic counts.

¶ 28 On cross-examination, Stumpf stated that oftentimes she was the IDOT employee placing the traffic count hoses across the roadways. She could not recall whether or not she had completed a traffic count at the St. Jacob intersection at issue. She acknowledged that in order for the state to obtain a good sense of the traffic flow at an intersection, a 24-hour count would be beneficial. She testified that it was not necessary, however, to be present for 24 hours for all types of counts. She stated that if IDOT just needed to check peak periods, the newer equipment could collect the needed data in just a couple of hours during a peak period. "[T]he need of the study will dictate the type of count [IDOT completes]." Stumpf

testified that she knows of no reason to set traffic counters from 9 a.m. to 3 p.m., but admitted that she had no way to know for certain if this was done in St. Jacob. The 24-hour counts are not used to determine if an intersection requires a traffic control device; instead, IDOT typically utilizes counts of peak hour turning movements.

¶ 29 IDOT did not call the third identified Rule 213 witness to testify at the hearing.

¶ 30 At the conclusion of the hearing, the commissioner prepared his confidential recommendation to the Court of Claims.

¶ 31 On January 10, 2013, the Court of Claims entered its order denying the claims of the Graters against IDOT and dismissing the matter with prejudice.

¶ 32 The Court of Claims' order recounted the Graters' motion *in limine* requesting that three IDOT witnesses be barred from testifying as a sanction for failure to properly disclose them in discovery. The order then outlines the arguments made before the commissioner by both the Graters and IDOT. The Court of Claims reviewed the applicable law as follows:

> "The law provides that a trial court has broad discretion in determining whether to bar testimony for a discovery violation. The factors used in determining what sanction, if any, to apply are: ['](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.' See *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123-24, 692 N.E.2d 286, 291 (1998). In the case at hand, the commissioner determined that Claimants failed to meet their burden of establishing surprise or prejudice. The commissioner further found that Claimants failed to provide good reason as to why they did not pursue their discovery objection in relation to the June 4, 2010[,] disclosure for over a year and a half. For those reasons, Claimants' first motion *in limine* was denied."

¶ 33 The Court of Claims did not state whether or not the commissioner's evidentiary rulings were correct and did not assess whether the denial of the motion *in limine* was proper in light of Rule 213(f).

¶ 34 The opinion contained a summary of the applicable law and elements that the Graters had to establish in their negligence-based wrongful death case against IDOT: duty, breach of that duty, and damages proximately caused by that breach. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 340, 798 N.E.2d 724, 729 (2003). The Court of Claims concluded that the Graters failed to meet their burden of proof to establish that IDOT breached its duty of ordinary care to maintain its roadways in a reasonably safe condition. *Reidy v. State*, 31 Ill. Ct. Cl. 16 (1975).

¶ 35 The Court of Claims explained that in order to establish that IDOT deviated from its duty of care, the Graters had to show that IDOT failed to investigate the complaints at all, failed to apply its proper procedures in assessing the St. Jacob intersection, or failed to follow IDOT's own policy on the installation of traffic control devices. Based upon the Court of Claims' review of the evidence and testimony introduced at the hearing, the Court of Claims concluded that the Graters had not established any of these potential breaches of duty. IDOT never acknowledged or made any determination that the St. Jacob intersection required a traffic control device in its earlier investigations. IDOT did not ignore the requests of the Village of St. Jacob and conducted four investigations—June 7, 1989; August 23, 1990; July 1, 1994; and April 29, 1998. IDOT's required warrants, in keeping with the applicable federal uniform manual, were not met in these four investigations. The Court of Claims stated: "If IDOT had failed to respond and monitor the intersection, had failed to

comply with the Manual on Uniform Traffic Control Devices, or improperly conducted its analysis[,] then a case for liability may have been sustained." The Court of Claims discounted statements by witnesses who testified for the Graters that the traffic counts were improperly conducted. The Court of Claims held that there was no report or evidence that IDOT ever conducted an improper traffic count, and thus testimony to the contrary by witnesses for the Graters was merely speculative.

¶ 36 The Graters filed a petition in the Court of Claims seeking a new trial that was denied on November 7, 2013.

¶ 37 On May 6, 2014, the Graters filed their petition for a writ of *certiorari* to the Madison County circuit court seeking review of the January 10, 2013, decision of the Court of Claims. The Graters alleged that their due process rights were violated because IDOT violated Illinois Supreme Court Rule 213(f)(3), but was not barred from introducing the testimony of witnesses, James Wessel and RuAnna Stumpf.

¶ 38 The Court of Claims initially filed a motion to transfer venue, and then a motion to dismiss, both of which were denied.

¶ 39 On February 21, 2017, the Court of Claims filed its motion for summary judgment. The Court of Claims argued that there was no genuine issue of material fact because the Court of Claims' refusal to bar the testimony of the two IDOT witnesses did not violate the due process rights of the Graters. The Court of Claims argued that the Graters had notice of the two witnesses and had the opportunity to have explored additional discovery. In response, the Graters countered that they were denied a fair trial because IDOT did not timely respond to its discovery requests and ultimately provided incomplete responses.

These late responses did not comply with Rule 213(f)(3) because IDOT did not list each witness's conclusions and opinions with foundational bases, did not list each witness's qualifications, and did not attach copies of relevant reports prepared by the witnesses.

¶ 40 On September 22, 2017, the trial court entered its order granting summary judgment in favor of the Court of Claims. The trial court noted that the Court of Claims found that at the time IDOT had disclosed the three witnesses, it thought they were Rule 213(f)(1) lay witnesses. The trial court found that they were clearly not lay witnesses, but nevertheless found that there was "nothing to suggest that the Claimants were deprived of their right to present evidence or argue their positions relative to the action that they filed." In so holding, the court stated: "the purpose of disclosure of witness testimony is to 'avoid unfair surprise at trial', but this court finds that the surprise that might naturally attend an untimely disclosure does not necessarily rise to the level of a deprivation of a meaningful hearing for the purposes of due process analysis."

¶ 41 On appeal, the Graters contend that they were deprived of due process. They also argue that the Court of Claims Act is unconstitutional. At oral argument, counsel for the Graters conceded that the Court of Claims Act is constitutional and withdrew the second argument.

¶ 42 ANALYSIS

¶ 43 Because the Graters' underlying claim against IDOT originated in the Court of Claims, we briefly review the applicable procedure for relief from a Court of Claims decision. Section 15 of the Court of Claims Act authorizes the Court of Claims to provide a procedure for review of its decisions. 705 ILCS 505/15 (West 2012). The Court of Claims

may grant a new trial before the Court of Claims. *Id.*; 74 Ill. Adm. Code 790.220 (2012). The Court of Claims Act provides no method for judicial review of its decisions. See *Reichert v. Court of Claims*, 203 Ill. 2d 257, 261, 786 N.E.2d 174, 177 (2003). "Decisions of the Court of Claims are generally not subject to judicial review." *Reyes v. Court of Claims*, 299 Ill. App. 3d 1097, 1106, 702 N.E.2d 224, 231 (1998) (citing *Klopfer v. Court of Claims*, 286 Ill. App. 3d 499, 502, 676 N.E.2d 679, 682 (1997)). However, "*certiorari* is available to address alleged deprivations of due process by the Court of Claims." *Reichert*, 203 Ill. 2d at 261 (citing *Rossetti Contracting Co. v. Court of Claims*, 109 Ill. 2d 72, 79, 485 N.E.2d 332, 334 (1985)).

¶ 44 An aggrieved party may file a petition seeking a writ of *certiorari* in the circuit court. *Lake v. State*, 401 Ill. App. 3d 350, 353, 928 N.E.2d 1251, 1255 (2010). The scope of the circuit court's review is narrow. *Id. Certiorari* is not available for review of the correctness of a Court of Claims decision based upon the merits of the case. *Reichert*, 203 Ill. 2d at 261. Thus, although Court of Claims decisions may be judicially reviewed to determine if the Court of Claims violated a claimant's due process rights, "[d]ue process does not guarantee against erroneous or unjust decisions by courts which have jurisdiction of the parties and the subject matter." *Reyes*, 299 Ill. App. 3d at 1105. If the circuit court concludes that the aggrieved party cannot prevail on the alleged due process violation or is otherwise not entitled to the review sought, the circuit court should deny the petition for a writ of *certiorari*. *Lake*, 401 Ill. App. 3d at 353 (citing *Tanner v. Court of Claims*, 256 Ill. App. 3d 1090, 629 N.E.2d 696 (1994)).

¶ 45 The supreme court addressed the standard for *certiorari* review of due process claims in *Reichert v. Court of Claims*: "Requirements of due process are met by conducting an orderly proceeding in which a party receives adequate notice and an opportunity to be heard." *Reichert*, 203 Ill. 2d at 261. The court also stated that "[d]ue process is not abridged where a tribunal misconstrues the law or otherwise commits an error for which its judgment should be reversed." *Id.*

¶ 46 In accordance with these guidelines, the Graters were not able to seek judicial review of the merits of their case against IDOT and were limited to raising a due process violation.

¶ 47 Procedurally, we note that this appeal stems from the trial court's entry of summary judgment. Section 2-1005(c) of the Code of Civil Procedure provides that a party is entitled to summary judgment as a matter of law if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2016). If there are outstanding genuine issues of material fact, the trial court should deny a motion for summary judgment. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). " 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' " *Monson v. City of Danville*, 2018 IL 122486, ¶ 12, 115 N.E.3d 81 (quoting *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 753 (2009)); see also *Koziol*, 309 Ill. App. 3d at 476.

¶ 48 Summary judgment is considered to be a drastic remedy and should not be granted unless the movant's right to judgment is unquestionable. *Monson*, 2018 IL 122486, ¶ 12

(citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 1256 (2004)); *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). The trial court must strictly construe all evidence in the record against the moving party and liberally in favor of the opponent. *Monson*, 2018 IL 122486, ¶ 12 (citing *Adams*, 211 Ill. 2d at 43); *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986); *Koziol*, 309 Ill. App. 3d at 476. Appellate courts review summary judgment orders on a *de novo* basis. *Monson*, 2018 IL 122486, ¶ 12 (citing *Barnett v. Zion Park District*, 171 Ill. 2d 378, 385, 665 N.E.2d 808, 811 (1996)); *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992).

¶ 49 In this case, we are asked to determine if the Court of Claims violated the Graters' due process rights to a fair trial by allowing IDOT's two Illinois Supreme Court Rule 213(f)(3) witnesses to testify at the hearing.

¶ 50 Rule 213(f) sets forth rules for the identity and testimony of witnesses. Ill. S. Ct. R. 213(f) (eff. July 1, 2002). Three types of witnesses are outlined in the rule: lay witnesses, independent expert witnesses, and controlled expert witnesses. *Id.* A "lay witness" is "a person giving only fact or lay opinion testimony." Ill. S. Ct. R. 213(f)(1). An "independent expert witness" is a "person giving expert testimony who is not the party, the party's current employee, or the party's retained expert." Ill. S. Ct. R. 213(f)(2). A "controlled expert witness" is "a person giving expert testimony who is the party, the party's current employee, or the party's retained expert." Ill. S. Ct. R. 213(f)(3).

¶ 51 The Graters contend that the three witnesses listed by IDOT in its Rule 213 disclosures fell into the "controlled expert witness" category. "For each controlled expert

witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S. Ct. R. 213(f)(3). In granting summary judgment, the trial court here agreed that the witness testimony went far beyond "lay witness" testimony. We also agree. Both witnesses were IDOT employees and, from our review of the record, their testimony did not just contain facts and/or lay opinions. Their testimony included opinions of persons with a specific knowledge of traffic flow, methods of traffic counts, and requirements that must be met before IDOT will install a traffic control device at an intersection. Wessel's testimony was partly based on guidelines contained in a federal manual not disclosed in this case. We agree that Wessel and Stumpf, as IDOT employees, were controlled expert witnesses, and therefore, IDOT's disclosures should have been compliant with all aspects of Rule 213(f)(3). Ill. S. Ct. R. 213(f)(3).

¶ 52 We further find that there is no question that IDOT violated discovery rules. The Graters filed interrogatories requesting IDOT disclose all 213(f) witnesses that it intended to call at the hearing before the commissioner. The commissioner set a discovery cutoff for February 1, 2010. IDOT did not answer the interrogatories. At that point, it was reasonable for the Graters to assume that IDOT did not plan to call any witnesses because they had disclosed no witnesses. IDOT then filed a motion for summary judgment. The arguments for summary judgment relied heavily on affidavits of undisclosed witnesses. On May 21, 2010, the Graters objected to these witnesses because of IDOT's failure to disclose. The commissioner summarily denied the motion for summary judgment. Thereafter on June 4,

2010, without asking for discovery to be reopened or for permission to file witness disclosures after the deadline, IDOT disclosed three IDOT employees to be called at the hearing to testify "regarding IDOT's decisions and actions" with respect to the St. Jacob intersection. The commissioner entered no order that legitimized the late interrogatory answers. The Court of Claims decision contained no language that legitimized the late interrogatory answers. From June 2010 until November 2011 when the commissioner conducted the hearing, the Graters made no attempt to determine the accuracy of IDOT's Rule 213 disclosures. On November 9, 2011, just before the hearing, the Graters filed a motion *in limine* asking the commissioner to bar the witnesses because they were not disclosed in compliance with the set discovery rules. The commissioner denied the *in limine* motion, referencing the 17-month period of time in which the Graters could have taken depositions or sought additional information about the witnesses. The commissioner stated that he wanted to ensure that there was a complete record for the Court of Claims judges and noted that the supreme court's case management rules promote leniency. See Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002) (case management orders should be "liberally construed to do substantial justice between and among the parties"). The commissioner offered the Graters a one-day delay of the hearing in order to take the depositions of the expected IDOT witnesses. The depositions were not taken, and the hearing went on as scheduled.

¶ 53 Illinois Supreme Court Rule 213 is designed to provide parties adequate and very specific information in order to prepare for trial without surprises. The committee comments state that the purpose of Rule 213(f) "is to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Ill. S. Ct. R. 213(f), Committee Comments

(adopted Mar. 28, 2002). The disclosures mandated by Rule 213 are "mandatory and subject to strict compliance." *Sullivan v. Edward Hospital*¸ 209 Ill. 2d 100, 109, 806 N.E.2d 645, 651 (2004). "Rule 213 permits litigants to rely on the disclosed opinions of opposing experts and to construct their trial strategy accordingly." *Id.* (citing *Firstar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 532, 714 N.E.2d 116, 120-21 (1999)). If a party fails to disclose opinion testimony pursuant to Rule 213, that party should not be allowed to gain "a tactical advantage by undermining the adverse party's strategy or undercutting cross-examination." *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 381, 805 N.E.2d 222, 234 (2003). To allow either party to ignore the plain language of Rule 213 would defeat the rule's purpose and encourage gamesmanship. *Sullivan*, 209 Ill. 2d at 109-10 (citing *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537, 690 N.E.2d 143, 147 (1998)). Noting that Rule 213 is stricter than its predecessor, the court quoted the appellate court:

> "Rule 213 establishes more exacting standards regarding disclosure than did Supreme Court Rule 220 ***, which formerly governed expert witnesses. Trial courts should be more reluctant under Rule 213 than they were under former Rule 220 (1) to permit the parties to deviate from the strict disclosure requirements, or (2) not to impose severe sanctions when such deviations occur. Indeed, we believe one of the reasons for new Rule 213 was the need to require stricter adherence to disclosure requirements." (Internal quotation marks omitted.) *Sullivan*, 209 Ill. 2d at 110 (quoting *Susnis v. Radfar*, 317 Ill. App. 3d 817, 828-29, 739 N.E.2d 960, 968 (2000)).

"These rules are neither aspirational nor mere suggestions; they are rules of procedure which have the force of law, creating a presumption that they will be obeyed and enforced as written." *Simpkins v. HSHS Medical Group, Inc.*, 2017 IL App (5th) 160478, ¶ 34, 93 N.E.3d 542.

¶ 54 In *Sullivan v. Edward Hospital*, Dr. Barnhart, an expert witness for the plaintiff, was disclosed as a Rule 213 witness who would testify that the defendant physician, " 'after having been advised of [the patient]'s three prior attempts to get out of bed and remove his IV[,] should have ordered restraints for [the patient].' " *Sullivan*, 209 Ill. 2d at 108. At trial, Dr. Barnhart elaborated on one of these notifications to the defendant physician, testifying that it was his opinion that a nurse failed to adequately communicate the patient's condition to the defendant physician. *Id.* at 109. Edward Hospital objected to this testimony. *Id.* Plaintiff argued that the "gist" of Dr. Barnhart's trial testimony regarding the nurse's telephonic conversation with this defendant physician was an "elaboration" or a "logical corollary" of, or "effectively" implicated, the plaintiff's Rule 213 disclosure. *Id.* The trial court and the supreme court disagreed. *Id.* at 110. The supreme court held that it was appropriate as a discovery sanction to strike Dr. Barnhart's testimony, stating: "Where a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party ***." (Internal quotation marks omitted.) *Id.* at 110 (quoting *Peirce*, 306 Ill. App. 3d at 533); see also *Crull*, 294 Ill. App. 3d at 538-39 (reversing the trial court's allowance of previously undisclosed expert evidence that deviated from the Rule 213 disclosures and stating in response to the trial court's statement that opponent's counsel should have filed a motion to strike the testimony before trial because she knew that the expert was likely going to offer inappropriate opinions at trial: "We decline to impose upon counsel any legal, moral, or professional obligation of any kind to inform her opponent of weaknesses in the opponent's case, witnesses, or proposed evidence. Neither Illinois law nor professional ethics require an attorney to advise his or her opponent of such deficiencies or how best to

present his or her case."); *Ashpole v. Brunswick Bowling & Billiards Corp.*, 297 Ill. App. 3d 725, 729-30, 697 N.E.2d 1238, 1241 (1998) (reversing and remanding for a new trial because the trial court erred in allowing the bowling alley to call an undisclosed employee eyewitness to the plaintiff's slip and fall); *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 109-10, 812 N.E.2d 389, 398-40 (2004) (affirming the trial court's sanction of barring a physician's testimony at trial connected to his review of various medical records after he had been deposed because this information was not specifically disclosed in a supplement to the Rule 213 interrogatory answers and the catchall statement that the medical providers' opinions may be based upon reviews of all medical records was insufficient and not in compliance with Rule 213).

¶ 55 To determine if exclusion of a witness is a proper sanction for violation of Rule 213, the supreme court provided six factors that must be considered: "(1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness." *Sullivan*, 209 Ill. 2d 110-11 (citing *Warrender v. Millsop*, 304 Ill. App. 3d 260, 268, 710 N.E.2d 512, 517-18 (1999)). A trial court's determination that an expert's opinion has been adequately disclosed and therefore can be admitted into evidence is reviewed under the abuse of discretion standard. *Chapman*, 351 Ill. App. 3d at 110 (citing *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 576, 755 N.E.2d 1021, 1029 (2001)).

¶ 56 In this case, we find that the first two of the six factors are particularly relevant—surprise by IDOT's undisclosed expert witnesses and the prejudicial effect resulting from the witnesses' testimony.

¶ 57 The Graters argue that the testimony of Wessel and Stumpf was surprising. The Court of Claims contends that they could not have been surprised because both were disclosed in IDOT's untimely Rule 213 disclosures and the Graters could have deposed both witnesses in the 17 months between disclosure and the hearing. The Court of Claims also contends that Wessel's testimony could not have been a surprise because his nine-year-old deposition, from a different but related case, had been provided to the Graters. To ameliorate the claimed surprise, the Court of Claims also argues that it offered the Graters' counsel the opportunity for a 24-hour delay of the hearing to allow the depositions of the witnesses.

¶ 58 We find that the Graters were legitimately surprised and should have been able to rely upon IDOT's untimely disclosures. Here, IDOT missed the discovery cutoff, did not comply with Rule 213 discovery rules, and failed to ask the commissioner for leave to reopen evidence or leave to file the disclosures late. Furthermore, the vague nature of the statement that the witnesses would testify "regarding IDOT's decisions and actions" was critically incomplete considering the actual testimony provided.

¶ 59 A common assertion urged by the Court of Claims against the surprise factor is that the Graters should have done more in order to ferret out the actual opinions IDOT's witnesses would provide. Based upon the untimely disclosures, the Court of Claims argues that the Graters' counsel should have contacted IDOT to inquire further. The passage of 17 months is cited as an example of the lack of diligence on the part of the Graters' counsel.

We respectfully disagree with this line of reasoning. IDOT disclosed its witnesses as IDOT employees who were going to testify about factual events regarding the St. Jacob intersection. Then, the testimony of the witnesses at the evidentiary hearing went beyond the typical "lay witness" factual evidence IDOT originally envisioned. Even if we theorize that IDOT's Rule 213 disclosures were timely, and that Wessel and Stumpf should have been allowed to testify as lay witnesses, that does not excuse IDOT's actual usage of the two witnesses as Rule 213(f)(3) controlled experts. Rule 213 rules are mandatory, and parties must comply with all the requirements. *Sullivan*, 209 Ill. 2d at 109. Again, if we theorize that IDOT's disclosures were timely, IDOT also did not comply with Rule 213(f)(3) in providing the necessary information about each witness: "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S. Ct. R. 213(f)(3). IDOT's noncompliant discovery responses inappropriately and unfairly limited the scope of the Graters' trial preparation and strategy. *Sullivan*, 209 Ill. 2d at 109.

¶ 60 We also disagree that the commissioner's proposed method to repair the Rule 213(f)(3) violation would have been an adequate sanction—a one-day delay of the hearing in order to allow counsel to depose IDOT's witnesses. By the scheduled day of the hearing, trial strategy was predetermined, discovery was then closed, and the hearing was to begin the next day. The ability to adequately counter any newly proffered opinions of Wessel and Stumpf that close to the beginning of the hearing was practically nonexistent. Furthermore, taking a continuance to allow the complaining party to depose undisclosed witnesses " 'does

not obliterate the surprise factor in light of the fact that the time factor prevents the testimony from being investigated.' " *Phelps v. O'Malley*, 159 Ill. App. 3d 214, 225, 511 N.E.2d 974, 981 (1987) (quoting *Ashford v. Ziemann*, 99 Ill. 2d 353, 370, 459 N.E.2d 940, 948 (1984)). "Time is needed prior to trial to investigate the credentials of proposed expert witnesses and to discuss the substance of the expert's testimony with one's own experts in order to properly prepare for cross-examination." *Id.* (citing *Fultz v. Peart*, 144 Ill. App. 3d 364, 376, 494 N.E.2d 212, 221 (1986)).

¶ 61 We are also unconvinced that the prior deposition of Wessel avoided surprise. The deposition was taken nine years prior to the hearing in a case where IDOT was not a defendant. As the Graters' counsel argued in oral argument, the way Wessel was examined in the deposition was not the same way that he was examined at the hearing. When Wessel was deposed, IDOT was not a defendant in that case and so the Graters and IDOT were strategically aligned in the Graters' efforts to establish that CSX bore liability. Furthermore, Wessel's own testimony at the hearing revealed that he had changed his opinion on at least one subject during the passage of the nine years—whether the addition of a traffic control device made an intersection safer.

¶ 62 For the same reasons that the Graters were surprised by the testimony of Wessel and Stumpf, the Graters were prejudiced by the late disclosure and commissioner-allowed testimony at the hearing. The only evidence IDOT presented in its defense was the testimony of Wessel and Stumpf. That evidence was quite effective and was relied upon by the Court of Claims in its conclusion that the Graters were unable to meet their burden of proof on the issue of breach of duty. The Court of Claims opinion found that the testimony

about the different traffic control device standards and how the required number of standards were not met for this intersection was a compelling finding that established that IDOT had not breached its duty of care. All of the Court of Claims' findings and conclusions on the issue of liability were based on the two undisclosed controlled expert opinions.

¶ 63 We are also unconvinced by the Court of Claims' argument that the Graters were not prejudiced because they had had 17 months to pursue discovery to determine the content of the witnesses' testimony. In *Adami v. Belmonte*, the appellate court affirmed the trial court's ruling that barred a previously undisclosed expert witness from testifying at trial. *Adami v. Belmonte*, 302 Ill. App. 3d 17, 704 N.E.2d 708 (1998). Plaintiff argued that the physician and the hospital were aware of this expert witness one year before, and therefore they were not prejudiced by the late disclosure. *Id*. at 23. While the physician and the hospital knew about this expert witness, they relied upon the nondisclosure and assumed that the expert would not be called, and therefore they did not seek a rebuttal expert. *Id.* at 24. Similarly, in this case, the Graters had the right to rely upon IDOT's untimely, limited, and vague disclosure and were therefore prejudiced by the expanded testimony of Wessel and Stumpf because they had no opportunity to obtain an expert to counter their opinions.

¶ 64 Having determined that the surprise and prejudicial effect factors favor sanctions, we briefly mention the remaining four factors. We conclude that factor three—the nature of the testimony factor, and factor five—the timely objection to the testimony factor, support an order barring the testimony of Wessel and Stumpf. The nature of the testimony involved the undisclosed expert opinions related to the duties that IDOT owes. The Graters' attorney objected to the disclosure of Wessel and Stumpf when their opinions were included in

IDOT's motion for summary judgment, and again in a motion *in limine*. In the context of our discussion of the surprise and prejudice factors, we have already addressed the fourth factor, the diligence of the Graters, and conclude that this factor favors sanctions. Finally, with respect to factor six, IDOT's good faith in calling these witnesses, we are not convinced that IDOT took this action in bad faith. We believe that IDOT missed the discovery cutoff and did not consider that omission until after the Graters objected to IDOT's motion for summary judgment because of the previously undisclosed witnesses. After the Graters objected, IDOT filed its untimely and incomplete Rule 213 disclosures.

¶ 65 Based upon our consideration of the six factors in this case, we find that exclusion of the testimony of Wessel and Stumpf would have been warranted for violation of Rule 213. *Sullivan*, 209 Ill. 2d 110-11 (citing *Warrender*, 304 Ill. App. 3d at 268).

¶ 66 Our analysis does not conclude, however, with our determination that it would have been appropriate to bar the testimony of both of IDOT's witnesses. We must still determine if the Court of Claims violated the Graters' due process rights by not barring the testimony of the two witnesses.

¶ 67 The due process clause of both the Illinois and United States Constitutions requires that parties have a full and fair opportunity to litigate an issue before they are bound by the resolution of the issue. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2. Due process mandates an orderly hearing "in which a party receives adequate notice and an opportunity to be heard." *Reichert*, 203 Ill. 2d at 261; *Reyes*, 299 Ill. App. 3d at 1104. "A fundamental requirement of due process is that a party be afforded the opportunity to be heard at a meaningful time and in a meaningful manner, with the operative term being

'meaningful.' " *Gapinski v. Gujrati*, 2017 IL App (3d) 150502, ¶ 63, 77 N.E.3d 1148 (citing *In re D.W.*, 214 Ill. 2d 289, 316, 827 N.E.2d 466, 484 (2005)). Due process is effectual when a party has a right to present evidence and argument, the right to cross-examine adverse witnesses, and impartiality in rulings based upon the evidence offered. *Piotrowski v. State Police Merit Board*, 85 Ill. App. 3d 369, 373, 406 N.E.2d 863, 866 (1980).

¶ 68 The Graters contend that their inability to discover and subsequently prepare for the testimony of Wessel and Stumpf negated a meaningful Court of Claims hearing as required by due process. In contrast, the Court of Claims contends that the Graters were provided an opportunity to be heard when presenting evidence in support of their motion *in limine*. The Court of Claims' argument directs the due process focus away from the Rule 213 violation and towards the hearing on the motion designed to remedy that violation.

¶ 69 The trial court found that the Graters' "meaningful opportunity to be heard" was solely tied to the motion *in limine*, and that they were not denied their due process rights because they argued the issue before the commissioner. The trial court stated, "To be certain, the purpose of disclosure of witness testimony is to 'avoid unfair surprise at trial', but this court finds that the surprise that might naturally attend an untimely disclosure does not necessarily rise to the level of a deprivation of a meaningful hearing for the purposes of due process analysis." In addition, the trial court found no precedent to suggest that Rule 213 is designed to protect the due process rights of the party in addition to protecting against surprise and gamesmanship. The trial court concluded that IDOT's lack of compliance with Rule 213 did not result in an infringement on the Graters' due process rights.

¶ 70 The Graters acknowledge that they have found no supporting case law that holds that a party's violation of Rule 213 can result in a due process violation. However, the Graters contend that Rule 213 inherently considers a party's due process rights. Rule 213 is intended to discourage gamesmanship and to avoid surprise and must be strictly followed. *Sullivan*, 209 Ill. 2d at 109; *In re Estate of Teall*, 329 Ill. App. 3d 83, 91, 768 N.E.2d 124, 132 (2002). If Rule 213 is not strictly followed, the trial court may bar the witness from testifying as a sanction. *Teall*, 329 Ill. App. 3d at 92 (citing *Warrender*, 304 Ill. App. 3d at 268). The Graters argue that considering compliance with Rule 213 in connection with due process mandates that a Rule 213 violation effectively deprives a party of the ability to meaningfully prepare for trial because the party cannot effectively cross-examine the witness.

¶ 71 Although we acknowledge that the Graters did not have a meaningful opportunity to counter IDOT's undisclosed expert opinions, we cannot conclude that the Rule 213 violations resulted in a due process violation. As stated earlier in this order, "[d]ue process is not abridged where a tribunal misconstrues the law or otherwise commits an error for which its judgment should be reversed." *Reichert*, 203 Ill. 2d at 261. Due process requirements are met when a party is given adequate notice and the opportunity to be heard. *Id.* (citing *Reyes*, 299 Ill. App. 3d at 1104-05). Here, the commissioner considered the Graters' motion *in limine* and argument seeking to bar the witnesses' testimony and chose not to bar the testimony or otherwise sanction IDOT although he expressed concern that IDOT had violated Rule 213. The Court of Claims did not make its own determination as to whether the denial of the Graters' motion *in limine* was correct although the commissioner suggested that the court review the issue. Despite the Court of Claims' error in this case, we are

constrained by law to find that this error did not result in a violation of the Graters' due process rights.

¶ 72 CONCLUSION

¶ 73 For the reasons stated in this order, we affirm the Madison County circuit court's orders granting summary judgment for the Court of Claims and denying the Graters' writ of *certiorari*.

¶ 74 Affirmed.