RULE 213 OPINION DISCLOSURES: RECENT CASES

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INTRODUCTION

While there is far less litigation over opinion and opinion witness disclosures under Rule 213 than there was under the old Rule 220, there nonetheless have been several recent decisions addressing those disclosures. A review of those cases may help develop a strategy for pre-trial disclosure that will avoid problems at trial.

In general, the cases either address the adequacy of a disclosure under Supreme Court Rule 213(f) or, in the alterative, they address the adequacy of a disclosure when a discovery deposition has been taken. A review of those recent cases provides some guidance in disclosing opinions and opinion witnesses. In light of these and other cases, the litigant must be cautious to make sure that they have fully disclosed every opinion to be relied on at trial. For lay witnesses and independent experts, like a treating physician, a disclosure will be considered sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the parties' knowledge of the facts known by, and opinions held by, the witness (S.Ct. Rule 213(f)(1) and (2)). For controlled expert witnesses, it is important to disclose not only the opinions, but "the bases therefore" (F.Ct. Rule 213(f)(3)(ii)).

RULE 213(F) AND (G) -

(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:

(1) *Lay Witnesses.* A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses.* 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. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) *Controlled Expert Witnesses.* 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. 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.

(g) Limitation on Testimony and Freedom to Cross-Examine. 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. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

OPINIONS HAVE TO BE DISCLOSED, BUT ONLY UPON INTERROGATORY -

Heriford v. Moore, 377 Ill.App.3d 849, 883 N.E.2d 81 (4th D. 2007). If a party does not propound Rule 213 Interrogatories requesting disclosure of opinions and the bases therefore, there is no duty to make that disclosure notwithstanding other obligations to disclose the identity of a witness.

American Service Insurance Company v. Olszewski, 324 Ill.App.3d 743, 756 N.E.2d 250, 258 Ill.Dec. 268 (1st D. 2001). Litigants must disclose the identity of lay trial witnesses in response to a Rule 213(f) Interrogatory. In this case, the witness at issue had not been deposed.

A WITNESS MAY ELABORATE ON AN OPINION DISCLOSED IN INTERROGATORY -

Lopez v. Northwestern Memorial Hospital, 375 Ill.App.3d 637, 873 N.E.2d 420 (1st D. 2007). "Rule 213(f)(3) requires parties to furnish, among other things, the subject matter, conclusions and opinions of controlled expert witnesses who will testify at trial. Rule 213(g) limits expert opinions at trial to 'the information disclosed in answer to a Rule 213(f) Interrogatory or at deposition'. A witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion rather than new reasons for it. Barton v. Chicago & Northwestern Transportation Company, 325 Ill.App.3d 1005, 1039 258 Ill.Dec. 844, 757 N.E.2d 533 (2001). Such testimony must be encompassed by the original opinion. Prairie v. Snow Valley Health Resources, Inc., 324 Ill.App.3d 568, 576, 258 Ill.Dec. 202, 755 N.E.2d 2021 (2001). A party's Rule 213 disclosures must "drop down to specifics." Sullivan, 209 Ill.2d at 109. While it is improper for a trial court to allow previously undisclosed opinions that advance a new negligence theory (Clayton v. County of Cook, 346 Ill.App.3d 367, 281 Ill.Dec. 854, 805 N.E.2d 222 (2003)), an opinion is not new merely because it refers to a more precise time than given in the expert's Rule 213 disclosure (Seef v. Ingalls Memorial Hospital, 311 Ill.App.3d 7, 23, 243 Ill.Dec. 806, 724 N.E.2d 115 (1999)). In this case, the expert's deposition testimony was broad enough to suggest a

range of times when the injury could have occurred. Therefore, his trial testimony regarding a more specific time was not inconsistent.

NEW TERMS, DESCRIPTIONS, CALCULATIONS, OR LANGUAGE CAN BE AN ELABORATION -

Johnson v. Johnson, 386 Ill.App.3d 522, 898 N.E.2d 145 (1st D. 2008). If an expert's opinion is disclosed and explained, the opinion will be admissible even if it is explained in different terms. "Although Plaintiffs are correct that the specific term 'reasonably expected' was not included in Jahiel's written opinions that Defendant disclosed prior to trial, the substance of her opinion remains consistent. Indeed, in her written opinion, she indicated that such a horse's kick response was 'a natural and predictable expression of the horse's surprise and flight.' Jahiel's testimony is no way constituted a surprise to Plaintiff."

Tyco Electronics Corporation v. Illinois Tool Works, Inc., 384 Ill.App.3d 830, 895 N.E.2d 976 (1st D. 2008). In his deposition, a disclosed expert testified that damages in a contract/warranty case were 3.94 million dollars. At trial, he testified the damages were 4.7 million dollars. The Court allowed the revised opinion to be introduced into evidence because the expert had thoroughly described and detailed the manner of calculation such that the calculation formula, rather than the conclusion, supported the trial testimony. "Sheets' disclosed opinion clearly identified the possible alternative formulations of the shipping and labor cost component of his damage calculation….Sheets' use of the latter calculation at trial, adding it to the 1.3 million production cost component and concluding that Tyco's damages were approximately 4.7 million, was consistent with his previously disclosed opinion and, therefore, not a violation of Rule 213 (384 Ill.App.3d at 833).

DISCLOSURE OF A WHOLLY NEW OPINION IS NOT AN ELABORATION -

Lisowski v. McNeil Memorial Hospital Association, 381 Ill.App.3d 275, 885 N.E.2d 1120 (1st. D. 2008). Noting that a witness may "elaborate" on a disclosed opinion as long as the testimony states logical corollaries to

the opinion, rather than new reasons for it (Barton v. Chicago and Northwestern Transportation Company, 235 Ill.App.3d 1005, 1039, 258 Ill.Dec. 844, 757 N.E.2d 533 (2001), the Court held that an expert's opinions regarding depression were not adequately disclosed by reference to another doctor's deposition in which depression was mentioned or by reference to "all of the other problems that resulted" from the injury.

A DISCLOSURE OF A GENERAL OPINION IN DISCOVERY WILL NOT ALLOW INTRODUCTION OF SPECIFIC OPINIONS AT TRIAL -

Sullivan v. Edward Hospital, 209 Ill.2d 100, 282 Ill.Dec.348, 806 N.E.2d 645 (2004). The Plaintiff had sued a hospital and a doctor for medical malpractice. The Plaintiff failed to disclose the expert's opinion that a nurse had deviated from the standard of care by not adequately communicating the Plaintiff's condition to the doctor. The Plaintiff argued that the specific opinion at issue was an "elaboration" or "logical correlator" of, or "effectively implicated" Plaintiff's Rule 213 disclosure. The Court held that the disclosure with respect to that specific opinion was not adequate: "as the trial court reasoned, 'you have to drop down to specifics.' (209 Ill.2d at 109).

Drakeford v. University of Chicago Hospitals, 994 N.E.2d 119, 373 Ill.Dec. 634 (1st D. 2013). Inferences drawn from facts can be considered opinions requiring disclosure. In the present case, a physician testified he had no recollection of the Plaintiff's case and no personal knowledge as to whether she ever requested an autopsy. The Court held that the doctor's inference that no autopsy was requested because there was no charting entry was in the nature of an opinion that required disclosure. The failure to make that disclosure barred the witness's testimony.

RULE 213(f) REQUIRES THE DISCLOSURE OF THE BASES FOR RETAINED EXPERT OPINIONS -

Wilbourn v. Cavalenes, 398 Ill.App.3d 837, 923 N.E.2d 937, 338 Ill.Dec. 77 (1st D. 2010). The parties must disclose the specific bases for a controlled expert's opinions. A witness may elaborate on a properly disclosed opinion (Becht v. Balac, 317 Ill.App.3d

1026, 1037, 251 Ill.Dec. 560, 740 N.E.2d 1131 (2000). The fact that the trial testimony is more precise than the opinion as originally disclosed does not necessarily result in a violation. Seef v. Ingalls Memorial Hospital, 311 Ill.App.3d 7, 243 Ill.Dec. 806, 724 N.E.2d 115 (1999). However, the witness's testimony must be encompassed by the original opinion (Becht, 317 Ill.App.3d at 1037, 251 Ill.Dec. 560, 740 N.E.2d 1131. The testimony cannot state new reasons for the opinion. Barton v. Chicago & Northwestern Transportation Company, 325 Ill.App.3d 1005, 1039, 258 Ill.Dec. 844, 757 N.E.2d 533 (2001). However, a logical corollary to an opinion or a mere elaboration of the original statement is acceptable. Seef, 311 Ill.App.3d at 21, 243 Ill.Dec. 806, 724 N.E.2d 115. The proponent of the evidence says the burden to prove that the opinions were provided in an answer to a Rule 213 Interrogatory or in the witness's discovery deposition.

DISCLOSURE OF LAY WITNESS OPINIONS NEED NOT DISCLOSE THE BASES -

Matthews v. Avalon Petroleum Company, 375 Ill.App.3d 1, 871 N.E.2d 859 (1st D. 2007). A truck driver tripped and fell over a piece of metal jutting up from a fuel pump. He sued the property owner. The Defendant offered testimony from a lay witness who conducted last minute measurements of an object at issue. In allowing the testimony, the Court noted that Rule 213 distinguishes between lay and expert opinions. Rule 213 only requires disclosure of the basis of an expert's opinion. For a lay opinion, the party only has to disclose the subject matter. The Court noted that the witness "was not testifying as an expert when he stated that there was no physical obstructions present on the site to prevent a person from walking around this particular pump." (375 Ill.App.3d at 12).

Greco v. Orthopedic & Sports Medicine Clinic, 2015 Ill.App.5th, 130370 (5th D. 2015). The decedent's sister was identified by Defendants in a witness disclosure statement. The disclosure statement indicated that it was "anticipated" that the testimony of the witness would be consistent with the testimony given in discovery depositions. During direct examination, the witness described a family history of

blood clots not previously discussed. The Court found that the disclosure of the opinion was not a violation of Rule 213. The Court went on to hold, however, that the testimony was irrelevant and had no probative value.

RULE 213 DOES NOT APPLY TO CROSS-EXAMINATION -

Stapleton v. Moore, 2010 WL 2465419 (Ill.App. 1st D. 2010). Rule 213 does not apply to cross-examination of an opposing party's opinion witness. Rule 213(g) does not require that a party disclose journal articles that party intends to use in cross-examining the opposing party's opinion witnesses. Cross-examination of an expert with reference to a recognized text or treatise is proper whether the Court has taken judicial notice of the author's competence, or, absent concession by the witness, the cross-examiner proves the text or treatise is authoritative. See also Maffett v. Bliss, 329 Ill.App.3d 562, 264 Ill.Dec. 741, 771 N.E.2d 445 (2002). Skubak v. Lutheran General Healthcare Systems, 339 Ill.App.3d 30, 273 Ill.Dec. 925, 790 N.E.2d 67 (2003).

DISCLOSURES OF OPINIONS MUST BE SUPPLEMENTED, AS MUST DISCLOSURES OF THE BASES. NEW INFORMATION MAY OR MAY NOT NEED TO BE DISCLOSED DEPENDING ON ITS IMPACT -

Coleman v. Abella, 322 Ill.App.3d 792, 752 N.E.2d 1150, 256 Ill.Dec. 908 (1st D. 2001). The Plaintiff failed to disclose that, after his deposition, Plaintiff's expert had reviewed additional information prior to trial. Even when the bases for the opinion expressed at trial is not broadened by the supplementary material and the opinion itself remains unchanged from that expressed at the deposition, an obligation remains on counsel to update answers to Rule 213 Interrogatories so the newly supplied material is disclosed to the opposing side. However, it is an abuse of discretion to bar the expert from testifying where the additional material has no bearing on the opinions stated in the deposition and the opinions to be offered at trial are the same as those disclosed in the deposition "It was an abuse of discretion to strike her entire testimony." 322 Ill.App.3d at 799.

Grillo v. Yeager Construction, 387 Ill.App.3d 577, 900 N.E.2d 1249 (1st D. 2008). At his discovery deposition, the treating physician testified about the Plaintiff's injury, treatment, and prognosis. Shortly before trial the parties learned that the doctor had examined and treated the Plaintiff subsequent to his discovery deposition. The surgeon's testimony and opinions were consistent with his opinions at his discovery deposition and so he was allowed to testify regarding the subsequent examination.

Kovera v. Envirite of Illinois, 26 N.E.3d 936, 389 Ill.Dec. 530 (1st D. 2015). The Trial Court did not abuse its discretion in allowing Defendant's expert to testify about force calculations, and to offer opinions arising from those calculations. The Rule 213(f)(3) disclosure stated that the expert would address force sustained during the impact and the Court found that the expert's testimony was a natural corollary to the opinions disclosed.

5 PART TEST -

Boyd v. City of Chicago, 378 Ill.App.3d 57, 880 N.E.2d 1033, 317 Ill.Dec. 41 (1st D. 2007). The factors that the Court must consider when imposing discovery sanctions for failure to disclose witnesses and testimony include: (1) the surprise of the adverse party; (2) the prejudicial effect of the witness's testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection, and (6) the good faith of the party who is offering the testimony.

Pancoe v. Singh, 376 Ill.App.3d 900, 876 N.E.2d 288 (1st D. 2007). The Plaintiff called Defendant's expert to testify at trial. Plaintiff failed to disclose Defendant's expert as his own witness. Defendant had disclosed the expert and his opinions, identified the topics on which he would testify, and was present when the expert was deposed. The expert's testimony in the Plaintiff's case did not exceed his deposition testimony. Finally, the Plaintiff had issued a Trial Subpoena to that expert. The Court held that although the Plaintiff did not include the defense expert in his Rule 213(f) disclosures, the Plaintiff could

introduce the expert's testimony. Interestingly, the Court did not refer to Supreme Court language 213(g) which specifically states "information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer". Although the Court did not address that language in Rule 213(g), the Court did allow the testimony to be admitted.

City of Chicago v. Eychaner, 2015 Ill.App. 131833 (1st D. 2015). The failure to disclose an expert witness or expert opinions within the 60 day timeframe prior to trial does not mean a Trial Court must automatically bar the witness. Before barring a witness, the Trial Court should consider prejudice and surprise. In the present case, however, the Appellate Court noted that the Trial Court continued the start of trial more than two months, and also noted that one of the parties had previously retained the same witness.