



¶ 4 McCoy filed her complaint on February 15, 2005, and an amended complaint November 16, 2009. The amended complaint alleged Dr. Kavuri and his professional corporation were negligent in ordering the nicotine patch despite McCoy's history of high blood pressure and diabetes, failing to monitor McCoy's blood pressure before and after administration of the nicotine patch, and failing to inform McCoy of the risks of the nicotine patch.

¶ 5 Trial began November 16, 2009. McCoy first called Dr. Kavuri as an adverse witness. McCoy then called Dr. Zev Labins, who testified it was a violation of the standard of care for Dr. Kavuri to have ordered application of the nicotine patch, given McCoy's medical history, particularly her high blood pressure and diabetes. Dr. Labins also testified Dr. Kavuri violated the standard of care by being unaware of and not considering McCoy's high blood pressure at the time he prescribed the patch, and by not monitoring her condition after the patch was administered.

¶ 6 After McCoy rested, Dr. Kavuri called Dr. George Duncan, McCoy's primary care physician. Dr. Duncan testified he had comanaged psychiatric patients with Dr. Kavuri on many occasions, but he was not involved in McCoy's admission. Dr. Duncan testified McCoy had variable hypertension in that her blood pressure would sometimes be up and sometimes be down. He met with her family after the February 14 stroke and surgery and discussed nicotine patches, explaining that the nicotine patch was nicotine replacement therapy, giving the body nicotine which would come from smoking anyway. It was to prevent the patient from going through withdrawal because the patient was in a hospital and could not smoke. Nicotine withdrawal can raise blood pressure. Dr. Duncan regularly prescribes nicotine patches for his smoking patients. McCoy's blood pressures during her hospitalization were 185/82, 197/94, and 109/53. As long

as the blood pressure was 200/100 or below, he would not hesitate to give the nicotine patch. His professional opinion is that the nicotine patch did not cause the stroke, a stroke is caused by damage to the vessels by hypertension over a period of years. In most patients, a nicotine patch is not likely to affect blood pressure when it is replacing the nicotine they usually get. Dr. Duncan's testimony was supported by defendant's experts, Dr. Morris Goldman, Dr. Mark Jeffrey Ratain, and Dr. Paul Allen Nyquist.

¶ 7 On November 24, 2009, the jury returned a verdict for defendant, and judgment was entered accordingly. On November 15, 2010, the trial court denied McCoy's posttrial motion. On December 7, 2010 McCoy filed her notice of appeal.

¶ 8 II. ANALYSIS

¶ 9 On appeal, McCoy argues that (1) Dr. Goldman's testimony should have been stricken, (2) McCoy should have been granted a directed verdict because of Dr. Kavuri's judicial admission, (3) McCoy timely disclosed a rebuttal witness, (4) Dr. Kavuri should have been prevented from blaming the nurses, and (5) the jury should have been instructed not to consider whether McCoy was insured.

¶ 10 The appellate court will not reverse a jury verdict because of an error on an evidentiary ruling unless the trial court abused its discretion and the ruling prejudiced the appellant. The appellant bears the burden of establishing prejudice. *Knight v. Chicago Tribune Co.*, 385 Ill. App. 3d 347, 355-56, 895 N.E.2d 1007, 1014 (2008). A trial court's determination whether a judicial admission exists is also reviewed under the abuse-of-discretion standard. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468, 914 N.E.2d 1258, 1268 (2009); *cf. Choate v. Indiana Harbor Belt RR. Co.*, 2011 IL App (1st) 100209, ¶ 86 ("Whether deposition testimony

constitutes a judicial admission because it is unequivocal is a question of law subject to *de novo* review."). The determination whether to give a particular jury instruction is reviewed under the abuse-of-discretion standard. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 203, 854 N.E.2d 635, 666 (2006). An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view. *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1055, 911 N.E.2d 553, 566 (2009).

¶ 11 A. Dr. Goldman's Testimony

¶ 12 McCoy first argues the trial court should have stricken the testimony of Dr. Goldman after defendant failed to disclose Goldman's "newfound opinions," in violation of Illinois Supreme Court Rule 213(I) Duty to Supplement (210 Ill. 2d R. 213(I) (eff. Jul 1, 2002)). During his deposition, Dr. Goldman had offered his general opinion that Dr. Kavuri had not violated the standard of care. Dr. Goldman did state that a doctor assumed responsibility for his nurses' actions, and doctors and nurses needed to talk to the patient about nicotine patches before administering them. At trial, Dr. Goldman testified that some of his statements at deposition had been wrong, that it really is the nurse "who is making all of these decisions," that the doctor doesn't order the patch but merely "gives the nurse the option of dispensing the patch." Dr. Goldman explained that during the deposition he was "[r]esponding to generalities when I believe I should have insisted on or tried to insist on more specific instances."

¶ 13 The trial court denied the motion to strike:

"And so, I believe, that if there has been any change in the doctor's testimony, having listened to it for some hours this morning, it was not that he had formed any new opinions and

had not disclosed them to anyone at this point. It was that under vigorous cross-examination, he was brought to the point of possibly contradicting himself or, at least, indicating that there were other points of view regarding patient care in this case which may have hit a nerve."

¶ 14 Rule 213 is designed to give those involved in the trial process a degree of certainty and predictability that furthers the administration of justice and eliminates trial by "ambush." *White v. Garlock Sealing Technologies, LLC*, 373 Ill. App. 3d 309, 326, 869 N.E.2d 244, 257 (2007) (quoting *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 381, 805 N.E.2d 222, 235 (2003)). In *White*, defendant's expert had stated the evidence was insufficient to support a determination to a reasonable degree of medical certainty that decedent suffered from asbestosis. At trial, he testified on cross-examination that decedent did not have asbestosis. In *White*, this court complimented the trial court for the obvious care and consideration it gave to the issues and its extensive discussion with trial counsel. *White*, 373 Ill. App. 3d at 328, 869 N.E.2d at 259. The same is true in this case. The trial court in *White* noted that it viewed the shift in opinion as significant, going to a critical issue in the case. *White*, 373 Ill. App. 3d at 316, 869 N.E.2d at 250. The trial court in the present case, noting that Dr. Goldman had consistently testified that the standard of care was not violated, viewed the matter differently: "So I do think it was a matter of effective cross-examination and impeachment as opposed to a suppression by the defense of newly discovered opinions on Dr. Goldman's part which should have been disclosed." We cannot say that the trial court abused its discretion.

¶ 15

B. Directed Verdict and Judicial Admission

¶ 16

Plaintiff argues that Dr. Kavuri, while testifying, made a judicial admission he violated the standard of care, and the trial court accordingly should have granted a directed verdict on negligence. Dr. Kavuri testified that because plaintiff was not on any hypertensive medications he considered her blood pressure to be normal. Plaintiff's counsel then asked, "Do you agree that ordering the application of the nicotine patch, a prescription for your patient, without being aware of or giving consideration to her existing blood pressure, that when you did that, you were not being reasonably careful?" Dr. Kavuri responded, "If you say so. Yes." Dr. Kavuri later testified that he did not see any need to monitor plaintiff's blood pressure after the patch was applied. Plaintiff's counsel then asked, "Okay. My question was: Do you agree with me that if you were acting and being careful, that's one of the things you would have done is monitor that?" Dr. Kavuri responded, "If would have been. Yes."

¶ 17

The trial court denied the motion for directed verdict, stating "This is one of the cases where the full record does not fully explain the responses of the witness. And my view of Dr. Kavuri's testimony was that, essentially, he was saying, yes, if that is the way you posit the facts and posit the argument, I would agree with you, but that is not the way that I agree my treatment of the patient unfolded." A judicial admission is defined as a deliberate, clear, unequivocal statement by a party about a concrete fact within that party's knowledge. *In re Estate of Rennick*, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998). Impeachment of a witness does not necessarily result in a judicial admission. *Choate*, ¶¶ 19-20. In *Rath v. Carbondale Nursing & Rehabilitation Center, Inc.*, 374 Ill. App. 3d 536, 871 N.E.2d 122 (2007), the judicial admissions were in the form of admissions in response to requests to admit, but even

there the plaintiff was allowed to present evidence on the subject. We conclude the trial court did not abuse its discretion in denying the directed verdict.

¶ 18 C. Plaintiff's Disclosure of Rebuttal Witness

Plaintiff had filed a motion to bar defendant's pharmacologist, Dr. Mark Rabin, who had refused, during his deposition in December 2008, to answer questions about income he received from pharmaceutical companies that make nicotine patches. On May 4, 2009, the trial court ordered Dr. Rabin to answer the questions, which he did on July 15, 2009. On July 21, 2009, plaintiff moved to disclose her rebuttal witness, James O'Donnell, a professor of pharmacology and a fellow of the American College of Clinical Pharmacology. On August 6, 2009, the trial court denied the motion, noting that plaintiff had deposed Dr. Rabin in December 2008, but plaintiff did not move to bar him until May 4, 2009. The trial court noted there was a September 14 trial date and he intended to stick with that date. The trial court noted that Dr. Rabin's opinions were known after the December 2008 deposition and that he had granted plaintiff several months after that to name additional experts. The court noted that plaintiff's decision to call another witness was not entirely dependent on whether Dr. Rabin was allowed to testify, rather plaintiff had to make a decision what was important and what was not important, and that could have been done after Dr. Rabin's deposition was taken in December 2008.

¶ 19 Supreme Court Rule 219(c) authorizes the circuit court to prescribe sanctions, including barring witnesses from testifying, when a party fails to comply with the court's orders regarding discovery. 166 Ill. 2d R. 219(c) (eff. July 1, 2002). Among the factors to be considered in determining whether a court has abused its discretion in applying a sanction, we should consider the diligence of the party seeing to disclose the expert and the harm that would

be caused by the late disclosure. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 620-21, 872 N.E.2d 431, 434-35 (2007). Plaintiff had sufficient opportunity to timely disclose the witness here, and the late disclosure would have resulted in a delay in the trial. The trial court did not abuse its discretion in barring the witness.

¶ 20

#### D. Blaming the Nurses

¶ 21

Prior to trial, plaintiff filed a motion *in limine* seeking to prevent defendants from communicating that any nurses or employees of St. Mary's Hospital were responsible for plaintiff's injuries. The trial court reserved ruling on the motion. Plaintiff argues that the trial court should have prevented defendant from blaming the nurses for the negligence of Dr. Kavuri. Defendant responds that plaintiff wants to pretend that there is no medical team and that Dr. Kavuri, not the nurses, takes the patient's blood pressure. A person who is guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence that contributed to the same injury. Thus, evidence of another person's liability is irrelevant to the issue of defendant's guilt. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 93, 658 N.E.2d 450, 455 (1995). In this case, however, all the defense witnesses testified that nothing was wrong with applying the nicotine patch and the nicotine patch did not cause plaintiff's stroke. No testimony suggested that any of the nurses did anything wrong. The only testimony regarding actions taken by the nurses was in response to plaintiff's argument that Dr. Kavuri did not take plaintiff's blood pressure and was unaware of plaintiff's blood pressure. Plaintiff complains of defense counsel's opening argument that "[w]e do know the nurses were supposed to call with abnormal vitals. We also know there is no evidence they did." That argument is not a complaint about the nurses, rather it is a suggestion that there were no abnormal vitals.

¶ 22

#### E. Insurance Instruction

¶ 23

During the jury instruction conference, plaintiff offered pattern jury instruction No. IPI 3.03 (Illinois Pattern Jury Instructions, Civil No. 3103, at 24 (2006)), which provides that "[w]hether a party is insured or not insured has no bearing on any issue that you must decide." The trial court refused the instruction. During cross-examination of plaintiff, defense counsel asked her, "Now you mentioned \*\*\* that you had people come in and help you. \*\*\* Do I understand correctly that you personally don't pay those people, do you?" Plaintiff's objection to the question was sustained. Dr. Duncan later testified that plaintiff was no longer a patient of his due to her insurance policy. The trial court could properly have concluded that sustaining the objection was sufficient, that Dr. Duncan's reference was appropriate, and adding another instruction would not have been helpful. The determination whether to provide a particular jury instruction is within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *York*, 222 Ill. 2d at 203, 854 N.E.2d at 666. No abuse of discretion occurred here.

¶ 24

#### III. CONCLUSION

¶ 25

It is apparent from the record that the trial court, over a period of days, listened carefully to counsel's arguments and understood them. The trial court saw and heard the witnesses and is in a much better position than are we to analyze the testimony. The trial court explained its rulings, and the trial court's explanations are persuasive. The standard of review in this case is appropriately deferential to the decisions of the trial court. We affirm the trial court's judgment.

¶ 26

Affirmed.