

No. 1-11-1848

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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FELIS ASPERA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	07 L 9236
RAUL L. MUNOZ and RSJM, RESTAURANT AND	)	
TAQUERI ATOTONILCO #1, LTD.,	)	Honorable
	)	Daniel J. Lynch,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Steele and Sterba concurred in the judgment.

**ORDER**

¶ 1 *Held:* A jury can find a pedestrian contributorily negligent when the pedestrian, crossing a street in a crosswalk with the light, steps directly into the path of a turning truck. A trial court does not abuse its discretion when it instructs the jury on a theory supported by very slight evidence. When the plaintiff decides not to have her physician examine her before the physician's deposition, while recognizing that such an examination would probably change some of the physician's opinions, the trial court does not abuse its discretion if it bars the physician from testifying about any new opinions he develops due to an examination performed shortly before trial and after the deposition. The appellate court will not disturb the jury's assessment of damages unless the jury ignored a proven element of damages, the

verdict resulted from passion or prejudice, or the award bears no reasonable relation to the loss suffered.

¶ 2 Felis Aspera sued Raul Munoz to recover damages for the extensive injuries she suffered when Munoz's truck struck her in 2007. The jury found that Aspera sustained total damages it valued at \$330,000, and the jury held Munoz liable for 90% of the damages. On appeal, Aspera argues that the court erred when it (1) denied her motion for a directed verdict on liability; (2) denied her motion for mistrial due to Munoz's closing argument; (3) granted Munoz's request for instructions on the issue of contributory negligence, and on the statutes Munoz argued Aspera violated; and (4) restricted her treating physician to opinions he expressed in his discovery deposition. Aspera also claims that the manifest weight of the evidence required a much greater award of damages.

¶ 3 We find sufficient evidence in the record to support the denial of the motion for a directed verdict and for the instructions on contributory negligence and the alleged statutory violations. The trial court did not abuse its discretion when it denied the motion for mistrial, and it did not abuse its discretion when it disallowed testimony from the treating physician about the results of the examination he gave Aspera on the eve of trial. We cannot say that the evidence required an assessment of more than \$330,000 in damages. Accordingly, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 On the morning of July 13, 2007, Aspera decided to go for a walk in her neighborhood. When she reached the intersection of Kedzie and 26th Street, she saw a truck stopped in the

intersection, preparing to turn left from eastbound 26th Street to the northbound lanes of Kedzie. She started to cross Kedzie. The truck hit her, breaking her leg, her arm, her wrist, her nose, her pelvis, and some of her ribs. She also suffered a concussion when she landed on her head.

¶ 6 Aspera sued the driver of the truck, Munoz, and his employer, RSJM Restaurant and Taqueri Atotonilco #1, Ltd. Munoz arranged for a deposition of Dr. Nishitkumar Patel, the orthopedic surgeon who treated Aspera. In answer to Rule 213 interrogatories (see Ill. S. Ct. R. 213 (eff. Jan. 1, 2007)) prepared before the deposition, Aspera said:

"[Dr. Patel is] expected to testify that Plaintiff's condition is permanent and the scar causes disfigurement as well as restriction of motion, including but not limited to pain and stiffness in her left hand. \*\*\* The doctor is also expected to testify to the Plaintiff's prognosis for the future. \*\*\* He is further expected to exam the patient to the extent necessary to comply with current case law so as to offer an opinion as to permanency at trial."

¶ 7 Munoz took Dr. Patel's deposition on October 21, 2010, 53 days before the scheduled trial date. Dr. Patel said he had last seen Aspera three years earlier, on October 8, 2007. At that time, Aspera's "prognosis was very good with regard to healing of the [leg] fracture and her functional recovery." Dr. Patel "believed that [Aspera] will make good progress with the physical therapy and/or occupational therapy for her hand and for her lower extremity." Dr. Patel did not know Aspera's current level of function, and he had no opinion on the effect the

injuries would have on her daily life.

¶ 8 Dr. Patel examined Aspera again on December 13, 2010. Thirteen days before trial, on December 28, 2010, Dr. Patel sent his report to Aspera's attorney, who immediately forwarded a copy to Munoz's attorney. In the report, Dr. Patel said that

"[Aspera] has a limp on the left side and she needs to use a cane in the right hand for mobility. \*\*\*

With regard to left upper extremity, she also reports pain in the left hand and wrist area. \*\*\*

\* \* \*

The left upper extremity reveals significant stiffness of the fingers and thumb. \*\*\* The active motion reveals that she cannot make a complete fist. \*\*\*

\* \* \*

\*\*\* [T]he hand function is significantly compromised. \*\*\*

\*\*\*

With regard to the possibility of surgery. I have told her that the femoral nail and the prominent screws can be removed and if the knee arthritis becomes more symptomatic, then the surgery such as total knee replacement can be considered in the future if the symptoms in the knee from the arthritis [] do not adequately get relieved by nonsurgical measures."

¶ 9 Munoz moved to bar Dr. Patel at trial from testifying to any opinions that depended on the December 2010 examination. At an evidence deposition held shortly before trial, Dr. Patel testified to those opinions. In a hearing on Munoz's motion to limit Dr. Patel's testimony, the court commented on the difference between the testimony at the discovery deposition and the testimony at the evidence deposition, and the defense's opportunity to respond to the new testimony at trial. The trial court granted Munoz's motion to strike from the videotape of the evidence deposition played at trial all testimony to observations and opinions derived from the December 2010 examination.

¶ 10 The jury addressed two central issues: liability and damages. On the issue of liability, Munoz said that he stopped the truck in the intersection, waited for westbound traffic on 26th Street to clear the intersection, and then he turned onto Kedzie. When he turned, and therefore when Aspera started to cross the street, the light for traffic on 26th Street was green. Munoz admitted that he did not see Aspera before the truck hit her. He said that at the time of impact, he had already passed through the crosswalk. He swore that the front of his truck did not hit Aspera. He said he was not using his cell phone at the time of the accident. AT&T's records showed that Munoz received a call on his cellphone at 7:56 a.m. Munoz could not remember from whom he received the call, although he had spoken to someone at the same number 20 minutes earlier on the morning of the accident. Aspera could not determine who had used the number from which Munoz received the call, because AT&T had since disconnected the number.

¶ 11 An officer who came to the scene of the accident said that the accident occurred about five

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minutes before 8 a.m. The court did not permit the officer to testify as an accident reconstruction expert.

¶ 12 Aspera, who testified through an interpreter, said that the front of Munoz's truck hit her, by the headlight on the passenger side of the truck. Aspera saw the truck stopped, and then she saw it as it hit her. Her attorney tried to establish that she did not cross Kedzie against the light. This interchange followed:

"[B]ack at the time of the accident, was there a traffic control light that controlled the cars that drove up Kedzie and 26th?

A. I don't understand. There was just the light.

Q. For the cars, the red, yellow, green light?

A. The light.

Q. Yes. Okay. As you're approaching the corner of Kedzie and 26th \*\*\*, can you tell the ladies and gentlemen of the jury what color the light was?

A. Green.

\* \* \*

Q. I was a little bit vague in asking you the light. When you reached the corner of the intersection, did you look at one of the lights that controls the intersection?

A. (Through the Interpreter) Yes.

Q. When you reached that corner, what light did you look at?

A. The one in front.

\*\*\*

Q. When you say the one in front, what street did that light control?

A. (Through the Interpreter) The ones that are controlling Kedzie towards north.

Q. Okay. And when you reached that corner, what color was the light that controlled 26th Street?

A. Green."

¶ 13 Aspera then turned to the issue of damages. She described her injuries, the painful recovery process, and her inability to walk and use her hands as she had before the accident. Aspera's husband also told the jury about the change in Aspera's activities. For some months after Aspera came home from the hospital, her family had to pull her up the stairs each time she returned to her home.

¶ 14 Aspera's physicians all testified by videotaped evidence depositions. The trauma surgeon described the breaks he and Dr. Patel successfully treated. Dr. Patel said that Aspera recovered well in the three month period after the accident. Dr. Patel did not think Aspera would need further surgery on her leg. Aspera's rehabilitation specialist testified about the traumatic brain injury Aspera suffered and its continuing effects. Aspera has some cognitive deficits and some problems with concentration and memory.

¶ 15 At the close of the evidence, Aspera moved for a directed verdict on liability, arguing that

no rational jury could find Munoz not at fault, and no rational jury could find her even partially at fault. The trial court denied the motion.

¶ 16 Aspera's attorney argued in closing that Munoz bore sole responsibility for the accident, and Aspera asked for damages of \$2.5 million. Munoz's attorney argued:

"And my opponents never introduced any evidence of what the 911 records or reporting –

\* \* \*

\*\*\* We don't know when any call was initially received by the authorities or when the police were dispatched. And plaintiff has the burden of proving that.

\*\*\*

\*\*\* [P]laintiffs could have brought in somebody who could have testified, yes, I was on the telephone with Mr. Munoz when he was involved in an accident. \*\*\*

You heard nothing about police investigating an alleged cell phone usage at the time of the accident. In fact, you heard very little from the investigating police officer about his investigation, what he did, what the results were.

\* \* \*

Now, it's possible some of you are just not sure what happened. You might be saying to yourself, you know, there's just so

many unanswered questions out there, there's so many important issues that haven't been resolved, there are some things we don't know about what happened. Whether it's photographs of the accident scene, if you don't feel that you were provided with all the information that's out there you need to resolve this case, you must hold that against the plaintiff."

The trial court overruled Aspera's objections and denied her motion for mistrial based on the remarks.

¶ 17 Munoz's attorney argued that Aspera bore most of the responsibility for the accident because she blindly stepped off the curb into the side of the truck. The attorney also suggested that Aspera's damages totaled no more than \$300,000.

¶ 18 The trial court instructed the jury about Aspera's theory that Munoz acted negligently, and added, over Aspera's objection, that Munoz claimed that Aspera acted negligently in that she

"A, failed to maintain a proper lookout for vehicles on the roadway;

B, failed to cross a roadway within a marked pedestrian crosswalk;

C, failed to yield the right of way to the defendant's vehicle;

D, left a curb or other place of safety and walked into the path of a moving vehicle which is so close as to constitute an immediate hazard."

¶ 19 The court read to the jury several statutes that Aspera claimed Munoz violated, including one that required turning vehicles to yield the right of way to pedestrians in the crosswalk, and one prohibiting use of cell phones while driving. The court added, over Aspera's objection:

"There was [in] force in the State of Illinois at the time of the occurrence in question a certain statute that provided that a pedestrian shall obey the instructions of any traffic control device specifically applicable to him unless otherwise directed by a police officer.

\*\*\*

There was [in] force in the State of Illinois at the time of the occurrence in question a certain statute which provided that no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a moving vehicle which is so close as to constitute an immediate hazard.

\*\*\*

There was [in] force in the State of Illinois at the time of the occurrence in question a certain statute which provided that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other

facts in determining to what extent, if any, a party was negligent before and at the time of the occurrence."

¶ 20 The jury found both parties at fault, and held that Munoz bore 90% of the responsibility for the accident. The jury assessed damages totaling \$330,000, which it itemized as: \$151,524 for medical expenses, \$36,000 for past pain and suffering, \$48,476 for future pain and suffering, \$7,000 for past loss of a normal life, \$82,000 for future loss of a normal life, and \$5,000 for disfigurement. Aspera now appeals.

¶ 21 ANALYSIS

¶ 22 In this appeal, Aspera argues that the court erred when it (1) denied her motion for a directed verdict on liability; (2) denied her motion for a mistrial after closing argument; (3) instructed the jury on contributory negligence and alleged statutory violations; and (4) struck evidence of Dr. Patel's recent examination of Aspera. Aspera also argues that the manifest weight of the evidence requires a finding that she suffered more than \$330,000 in damages. We review the liability issues first, and then we look to the issues concerning damages.

¶ 23 Directed Verdict

¶ 24 We review *de novo* the denial of a motion for a directed verdict. *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 167 (2003). The trial court should direct a verdict for Aspera on the issue of contributory negligence only if the evidence, viewed in its aspect most favorable to the defense, so overwhelmingly shows Aspera's freedom from contributory negligence that no verdict finding her at fault to any degree could ever stand. *Pedrick v. Peoria & Eastern Ry. Co.*, 37 Ill. 2d 494, 510 (1967). Our supreme court set out the relevant

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principles:

"The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." *Blumb v. Getz*, 366 Ill. 273, 277 (1937).

¶ 25 Aspera had a right to cross Kedzie when the light for crossing Kedzie turned green. Munoz testified that the light for crossing Kedzie was green when he turned from 26th Street onto Kedzie. In a similar situation, the court in *Brichacek v. Hampton*, 54 Ill. App. 2d 284, 292 (1964), held:

"the plaintiff was unquestionably where he had a right to be and was entitled to the benefit of the assurance that the law required oncoming drivers to yield him the right-of-way. \*\*\* [H]owever, \*\*\* plaintiff's right in this regard did not excuse negligence on his part contributing to the injury, and the question as to what constituted reasonable observation before entering upon the crossing was an issue to be considered by the jury in determining whether or not his conduct was negligent."

¶ 26 Here, the jury could have found that Aspera acted with some negligence when she failed to

see the truck turn and head directly at her as she crossed Kedzie. If she had paid any attention to traffic and taken a step back, the truck might have missed her. The jury here could have reasoned as did the court in *Poulos v. Cassara*, 383 Pa. 217, 220 (1955), where the court said:

"Even though a driver or a pedestrian has a light, that is a green light, in his favor, he must be vigilant and it is his duty to keep on looking as he crosses the street. A pedestrian, or if it is a driver of an automobile, as he drives along the street, it is his duty to keep on looking as he crosses an intersection, or goes through an intersection, even though he does have a green light in his favor. He has no authority to even cross on a green light blindly. He must look, keep on looking, as he crosses. So in this case even if the plaintiff had the right of way in his favor, if he proceeded blindly across [the street] without looking before he stepped out onto the street, and even if he did look before he stepped out onto the street and he didn't look as he crossed the street and he was struck by an automobile, he would be guilty of contributory negligence."

After reviewing the evidence in the record and the applicable law, we find that the trial court correctly denied the motion for a directed verdict on the issue of Aspera's contributory negligence.

¶ 27

#### Closing Argument

¶ 28 Aspera moved for a mistrial based on three remarks Munoz's attorney made in closing

argument. All three arguments apply only to Munoz's liability. "The scope of closing arguments is within the trial judge's sound discretion, and an argument must be prejudicial before a reviewing court will reverse on this basis." *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 543 (2004). We will not reverse a decision on a motion for mistrial unless the trial court abused its discretion. *Crump v. Universal Safety Equipment Co.*, 79 Ill. App. 3d 202, 210 (1979).

¶ 29 Aspera objected to several comments about the weakness of Aspera's evidence that Munoz was talking on a cell phone at the time of the accident. To prove this theory, Aspera presented the officers who responded to the call, who estimated that the accident occurred about five minutes before 8 a.m., and AT&T's records, which showed that Munoz received a call at 7:56 a.m. Munoz's attorney countered that Aspera could have proven the time of the accident more accurately with a record of the 911 call reporting the accident, Aspera could have located the person who called Munoz that morning, and Aspera presented no evidence that police investigated the possibility that Munoz might have been talking on his cell phone at the time of the accident.

¶ 30 "Comments in closing argument have been held improper where a party draws attention to an opponent's failure to call a witness when that witness is not under the opponent's control." *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 791 (1992). However, "[a] mistrial should be declared only when there is an occurrence of such character and magnitude as to deprive a party of a fair trial, and the moving party demonstrates actual prejudice as a result." *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 844 (1984). The court

in *Lewis v. Cotton Belt Route – St. Louis Southwestern Ry. Co.*, 217 Ill. App. 3d 94 (1991), addressed remarks that similarly mentioned the absence of a witness in the course of comments on the weakness of the opposing party's case. The *Lewis* court said, "We find that the court reasonably could have concluded that plaintiff was not commenting upon defendant's failure to call a witness or produce certain evidence within its control but was instead comparing or contrasting the evidence or commenting upon disparities and gaps in the testimony[.]" *Lewis*, 217 Ill. App. 3d at 111. The trial court here could have similarly concluded that the defense only legitimately commented on the weakness of Aspera's theory that Munoz was talking on his cell phone at the time of the accident.

¶ 31 Next, Munoz's attorney commented that the jury heard very little from the officer who came first to the scene. Aspera contends that she could not elicit more information from the officer, because the trial court barred the officer from testifying as an expert on accident reconstruction. But the officer could have testified about what he found at the scene and what steps he took to investigate the accident. We see no impropriety in the comment on the limited testimony Aspera elicited from the officer.

¶ 32 Munoz's attorney also commented that the jurors might find that the evidence left "many unanswered questions," and he invited the jurors to hold the unresolved issues against Aspera. We do not see this remark on the burden of proof as an improper insinuation that Aspera had withheld evidence from the jury.

¶ 33 We find little impropriety in Munoz's closing argument, even considering the remarks collectively. See *Rutledge*, 230 Ill. App. 3d at 794-95. Moreover, the jury found Munoz

liable, and 90% responsible for the accident, despite Aspera's admission that she did not see a truck slowly turning onto Kedzie as she walked directly into its path. Aspera has not shown that the closing argument caused the kind of prejudice necessary to warrant a mistrial. See *Tuttle*, 122 Ill. App. 3d at 844.

¶ 34 Instructions

¶ 35 Aspera objects to the instructions listing her alleged acts of contributory negligence, and she objects to the instructions reciting statutes she allegedly violated. She claims that no evidence supports either of the instructions. Again, we turn to precedent from our supreme court for a statement of the relevant principles:

"A litigant has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence. [Citation.] However, it is error to give an instruction not based on the evidence. [Citations.] The question of what issues have been raised by the evidence is within the discretion of the trial court. The evidence may be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion. [Citation.] The test in determining the propriety of tendered instructions is whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995).

"A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they

clearly misled the jury and resulted in prejudice to the appellant." *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002).

¶ 36 In the issues instruction, the court told the jury that Munoz accused Aspera of failing to keep a proper lookout, crossing outside the crosswalk, failing to yield to Munoz's vehicle, and leaving a place of safety to walk into the path of his truck. Aspera's own testimony could support a finding that she failed to keep a proper lookout, as she acknowledged that she did not see the truck turn towards her. Munoz's attorney explained that from Munoz's testimony that he passed the crosswalk before the collision, and from Aspera's testimony that the front passenger side of the truck hit her, the jury could infer that she had left the crosswalk before the collision. A pedestrian who crosses a street outside of the crosswalk must yield the right of way to vehicles (see *Brichacek*, 54 Ill. App. 2d at 292), so the evidence could further support a finding that Munoz had the right of way, and Aspera failed to yield to his truck. Aspera's testimony could also support a finding that she left the sidewalk, a place of safety, and walked into the path of the moving truck, and Munoz argued that by doing so, she acted negligently. In light of the evidence in the record, we cannot say that the trial court abused its discretion by giving the issues instruction it gave.

¶ 37 The court then instructed the jury about three separate statutes that, according to Munoz's attorney, Aspera may have violated. Because the jury could infer from part of Munoz's testimony and part of Aspera's testimony that the truck hit Aspera outside of the crosswalk, the evidence supports the use of the instruction about the duty of pedestrians outside of the crosswalk to yield the right of way. The fact that Aspera left the sidewalk and found herself

in front of a moving truck supports the use of the instruction on suddenly leaving a place of safety.

¶ 38 Munoz's attorney offered an extended explanation for the request for an instruction on the duty to heed traffic control devices. When Aspera's attorney asked her about the light, she first said that when she reached the corner, the light in front of her, which controlled traffic on Kedzie, was green. The jury could infer that the light for traffic on 26th Street was red. Yet Aspera then crossed Kedzie. Her next answer, that the light that controlled traffic on 26th Street was green, could cause confusion. The jury might have concluded, from the apparently contradictory testimony, that Aspera crossed against the light, even though Munoz testified that the light for traffic on 26th Street was green. We agree with the trial court that this slight evidence sufficed for the instruction on the statute.

¶ 39 Moreover, once again, we see no prejudice from any error in the instructions, as the jury found Munoz almost entirely at fault for the accident, despite Aspera's testimony that she did not notice a truck coming slowly towards her. We cannot say that the trial court abused its discretion in its jury instructions. Nor can we say that the instructions unfairly prejudiced Aspera. Accordingly, we find no reversible error in the judgment insofar as it ascribes 90% of the responsibility for the accident to Munoz.

¶ 40 Restriction of Dr. Patel's Testimony

¶ 41 In her answer to Rule 213 interrogatories, Aspera informed Munoz that she expected her treating orthopedic surgeon, Dr. Patel, to testify about the permanent nature of her injuries, and she expected Dr. Patel to examine her before trial so he could testify about her current

condition. At his deposition, held less than two months before the scheduled trial date, Dr. Patel admitted that he had not seen Aspera for about three years, not since three months after the accident. He said that when he last saw Aspera, her prognosis was very good. He expressed no opinion on the permanent nature of her condition.

¶ 42 Dr. Patel examined Aspera after the discovery deposition, and the new examination gave him new opinions about Aspera's condition and her permanent injuries. He sent Aspera's attorney a report of his new opinions two weeks before trial. Aspera had largely predicted the new opinions when she filed her responses to Rule 213 interrogatories a year before the trial. In his new opinions, Dr. Patel noted Aspera's difficulty walking and the possibility that she might need surgery on her knees. Aspera's fingers also progressed worse than Dr. Patel had anticipated, and he found Aspera's hand function significantly compromised.

¶ 43 Instead of seeking to reopen discovery and finding an expert to counter Dr. Patel's new opinions, Munoz sought to preclude Dr. Patel from testifying about his new opinions. The trial court limited Dr. Patel's testimony to the opinions he stated in his discovery deposition which Dr. Patel based on the examinations of Aspera in 2007, within three months of the accident. Aspera claims that the trial court committed reversible error by limiting Dr. Patel's testimony. We review the decision limiting Dr. Patel's testimony for abuse of discretion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004).

¶ 44 Rule 213 provides:

"(f) \*\*\* Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide

the following information:

\*\*\*

(2) \*\*\* 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. \*\*\*

\*\*\*

(g) \*\*\* 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. \*\*\* 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.

\*\*\*

(i) \*\*\* A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." Ill. S. Ct. R. 213 (f), (g), (i) (eff. Jan. 1, 2007).

¶ 45 The *Sullivan* court explained that "[t]he purpose behind Rule 213 is to avoid surprise and to discourage tactical gamesmanship. 'Rule 213 brings to a trial a degree of certainty and predictability that furthers the administration of justice.' " *Sullivan*, 209 Ill. 2d at 111 (quoting *Firststar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 536 (1999)). When a party

moves to exclude a witness as a sanction for a Rule 213 violation, "a court must consider the following factors: (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 at 110. The *Sullivan* court also adopted the appellate court's observation, in *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 538-39 (1998), that:

"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." *Crull*, 294 Ill. App. 3d at 538-39 (quoted in *Sullivan*, 209 Ill. 2d at 110).

¶ 46 Aspera contends that Dr. Patel's new opinions could not have surprised Munoz because Aspera predicted the opinions in her answers to Rule 213 interrogatories filed a year before trial. She also contends that the trial court erred when it did not explicitly make findings concerning all of the *Sullivan* factors before restricting Dr. Patel's testimony.

¶ 47 No statute or case law requires the court to expressly state on the record its findings concerning each of the *Sullivan* factors, and we will not read such a requirement into

*Sullivan*. See *Blum v. Koster*, 235 Ill. 2d 21, 38 (2009); *People v. Velez*, 388 Ill. App. 3d 493, 514 (2009). We presume that the trial court knew and followed the law unless the record indicates otherwise. *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). The court's comments focused on appropriate factors of surprise, prejudice and timeliness. The lack of explicit findings on each *Sullivan* factor does not warrant reversal here.

¶ 48 To decide whether the trial court abused its discretion, we find some guidance in *Baird v. Adeli*, 214 Ill. App. 3d 47 (1991), a case decided before our supreme court adopted the new Rule 213 to discourage tactical gamesmanship in discovery. In *Baird*, the defendant deposed the plaintiff's expert, and after the deposition the plaintiff showed the expert more information that altered the expert's opinion. The trial court confined the expert at trial to the opinions he expressed in his discovery deposition. The *Baird* court held:

"In this case, plaintiff's attorney withheld from plaintiff's witness, until shortly before trial, medical evidence and testimony. Based on the review of those documents, [the expert] changed his opinion. Some of the withheld evidence and testimony was available when the expert was deposed, and the remaining evidence and testimony was available for review at a time considerably in advance of plaintiff's attorney's request for such review by plaintiff's expert. The trial court could reasonably determine that the plaintiff's attorney utilized a procedure to avoid the \*\*\* requirement of ongoing disclosure of shifts in the expert's opinion testimony. The trial court

barred the expert from testifying in a manner inconsistent with his deposition testimony. No abuse of discretion has been demonstrated."

*Baird*, 214 Ill. App. 3d at 61.

¶ 49 We find that Aspera withheld from Dr. Patel evidence of her medical condition by failing to arrange for an examination prior to Dr. Patel's October 21, 2010, discovery deposition. Aspera's answers to interrogatories filed December 7, 2009, reveal that she knew that once Dr. Patel examined her, he would change his opinion about the permanent nature of her injuries and her general prognosis. Thus, like the plaintiff in *Baird*, Aspera had evidence of her condition prior to the doctor's discovery deposition. Under the reasoning of the *Baird* court, the trial court here could reasonably conclude that Aspera's attorney withheld the evidence so that, during the discovery deposition, Munoz would not learn about the evidence of permanent injury, and Munoz would have less time to prepare for the trial a response to the evidence of permanency.

¶ 50 Applying the *Sullivan* factors, we find that in light of the fact that Dr. Patel's discovery deposition took place less than two months before the scheduled trial date, Munoz could expect no significant change in Dr. Patel's opinions before trial. Munoz can claim surprise, despite Aspera's answers to interrogatories, because Dr. Patel's evidence deposition provided specific new opinions about Aspera's injuries, opinions not found in Dr. Patel's discovery deposition. Moreover, Dr. Patel's testimony could significantly affect the award of damages. Thus, the change in Dr. Patel's opinions from the discovery deposition to the evidence deposition had prejudicial effect. Dr. Patel's testimony in his evidence deposition concerned

opinions on the permanence of Aspera's condition. Munoz obtained Dr. Patel's deposition with due diligence, about two months before the scheduled trial date. Munoz immediately objected to the change from Dr. Patel's testimony at his discovery deposition to his testimony at his evidence deposition. In accord with *Baird*, we question Aspera's good faith in failing to submit to an examination by Dr. Patel before his deposition. Like the court in *Baird*, and acknowledging that our supreme court has made the applicable standards more stringent than those applied in *Baird*, we cannot say that the trial court abused its discretion when it struck from the videotape of Dr. Patel's evidence deposition all testimony that depended upon his December 2010 examination of Aspera.

¶ 51

#### Damages

¶ 52 Finally, Aspera argues that the evidence cannot support the jury's award of damages. Our supreme court said:

"Illinois courts have repeatedly held that the amount of damages to be assessed is peculiarly a question of fact for the jury to determine [citations] and that great weight must be given to the jury's decision [citations]. The very nature of personal injury cases makes it impossible to establish a precise formula to determine whether a particular award is excessive or not. [Citation.] Additionally, judges are not free to reweigh the evidence simply because they may have arrived at a different verdict than the jury. [Citations.] Indeed, a court reviewing a jury's assessment of damages should not interfere unless

a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered." *Snelson v. Kamm*, 204 Ill. 2d 1, 36-37 (2003).

¶ 53 The jury here awarded Aspera her medical costs, plus other damages totaling a little more than her medical costs: \$36,000 for past pain and suffering, \$48,476 for future pain and suffering, \$7,000 for past loss of a normal life, \$82,000 for future loss of a normal life, and \$5,000 for disfigurement. Munoz's attorney had suggested \$50,000 to \$75,000 total for past and future pain and suffering, and \$50,000 to \$75,000 total for past and future loss of a normal life, as he argued that "no medical evidence [showed] that our accident is preventing [Aspera] from leading a normal life." Thus, the jury awarded Aspera amounts somewhat in excess of the recommendations of Munoz's attorney for pain and suffering and loss of a normal life, and the amounts Munoz's attorney recommended for medical costs and disfigurement.

¶ 54 Aspera challenges only the awards for past pain and suffering and past loss of a normal life. Aspera suffered severe injuries from which she never completely recovered, and she testified without contradiction to her diminished ability to walk and to use her hand. Her traumatic brain injury significantly impaired her cognitive functioning for a considerable time after the accident. Nonetheless, we cannot say that the jury ignored any proven element of damages, we cannot say that the verdict resulted from passion or prejudice, and we cannot say that the award bears no reasonable relationship to the loss suffered. See *Branum v. Slezak Construction Co.*, 289 Ill. App. 3d 948, 952-53 (1997). Accordingly, we find no adequate

grounds to disturb the award of damages.

¶ 55

CONCLUSION

¶ 56

The evidence at trial supports the allocation of some responsibility for the accident to Aspera, because she admits she did not see the truck slowly turn to Kedzie, and she stepped into its path. Therefore, the trial court correctly denied Aspera's motion for a directed verdict on liability. Aspera has not shown that she suffered any prejudice due to misstatements in closing argument. The trial court did not abuse its discretion when it decided to instruct the jury on Munoz's theory that Aspera negligently crossed Kedzie outside of the crosswalk, against the light, and into the path of a moving truck, in violation of some traffic statutes. The trial court did not abuse its discretion in barring Dr. Patel from testifying about the examination he performed on Aspera after his deposition, where he supplied his revised opinions about two weeks before trial. We cannot say that the evidence required an assessment of more than \$330,000 in damages. Accordingly, we affirm the trial court's judgment.

¶ 57

Affirmed.