2019 IL App (4th) 180506-U

NO. 4-18-0506

FILED
March 21, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MATTHEW A. COOLEY,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
CENTRAL ILLINOIS ALLERGY & RESPIRATORY SERVICES, LTD.,	)	No. 09L174
Defendant-Appellee.	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiff's motion for a judgment notwithstanding the verdict or a new trial based on assertions that defendant committed various discovery violations, defendant was improperly permitted to present cumulative expert witness testimony, the jury verdict was against the manifest weight of the evidence, and the trial court improperly failed to dismiss a biased juror.

¶ 2 Plaintiff, Matthew A. Cooley, brought an action for medical negligence against defendant, Central Illinois Allergy and Respiratory Services, Ltd. A jury found in favor of defendant, and the trial court entered judgment on the jury's verdict. Plaintiff appeals, arguing (1) defendant committed a discovery violation by submitting "falsified discovery responses" and presenting "perjured testimony," (2) the trial court improperly permitted defendant to present cumulative expert witness testimony, (3) defendant failed to disclose expert witness opinions,

(4) defendant failed to disclose key evidence concerning plaintiff's weight and the notes of its expert witnesses, (5) the jury's verdict was against the manifest weight of the evidence, and (6) the court erred by refusing to dismiss a biased juror. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant is a medical clinic that specializes in allergy and respiratory services. From 1994 to 2003, plaintiff (born on July 10, 1989) received medical care and treatment for allergies and asthma from Dr. Glennon H. Paul at the defendant clinic. Dr. Paul's treatment of plaintiff involved the administration of corticosteroids. Treatment with corticosteroids ultimately resulted in plaintiff's development of side effects including a condition called Cushing's syndrome.

¶ 5 In July 2009, plaintiff filed a complaint against defendant alleging medical negligence. Originally, plaintiff's mother was also named as a plaintiff in the complaint and Dr. Paul was included as a defendant. However, counts related to those individuals were eventually dismissed, and the matter proceeded with only plaintiff and the clinic as named parties in the case.

¶ 6 In his complaint, plaintiff alleged that Dr. Paul, as an agent or employee of the defendant, owed him a duty "to exercise that degree of care commensurate with reasonably well[-]qualified physicians acting under the same or similar circumstances." He asserted Dr. Paul violated that duty by committing the following negligent acts or omissions:

> "a. Negligently prescribed and administered corticosteroids;
>
> b. Negligently failed to consult with an endocrinologist, pulmonologist, pediatrician, otolaryngologist, and orthopedist when prudent to do so;
>
> c. Negligently failed to properly inform Plaintiff and his parents of the

risks and benefits of the corticosteroid treatments prescribed and any alternative treatments;

d. Negligently failed to provide health maintenance to Plaintiff after prescribing and administering corticosteroids, such as calcium supplements and testosterone to a child on steroids;

e. Negligently failed to identify and diagnose steroid toxicity when it existed;

f. Negligently failed to treat and respond to Plaintiff's steroid toxicity and dependency;

g. Negligently failed to properly educate Plaintiff and his parents on asthma management;

h. Negligently failed to diagnose and treat Cushing's syndrome, severe osteoporosis and multiple infections;

i. Negligently administered and improperly interpreted multiple diagnostic reports over a [10] year period;

j. Negligently diagnosed asthma; and

k. Negligently managed Plaintiff's medical condition."

Plaintiff further alleged that, as a proximate result of Dr. Paul's negligent acts or omissions, plaintiff was not promptly and appropriately diagnosed and treated for his asthma and suffered from subsequent conditions that were also not promptly and appropriately diagnosed and treated. Those subsequent conditions included iatrogenic Cushing's syndrome, severe osteoporosis, multiple spinal compression fractures, humpback, "unsightly striae," migraines, pseudotumor

cerebri, impaired immunity, "impaired maturation," massive weight gain, and suppression of the pituitary-adrenal axis.

¶ 7 In October and November 2017, the matter proceeded to a jury trial. Evidence showed that plaintiff began treating with Dr. Paul at the defendant clinic in November 1994 at the age of five. He was diagnosed with allergies and asthma. Plaintiff's mother, Pamela Randall, testified she was told to take plaintiff to the clinic "[a]s soon as he started showing symptoms of being tight [in his chest], coughing, [and] not being able to catch his breath."

¶ 8 In 1997, Dr. Paul began treating plaintiff's asthma "flare-ups" by giving him steroids intravenously (IV), in an intramuscular injection, and through a prescription for oral medication. Randall testified plaintiff's visits to the clinic increased and he also gained weight while being treated by Dr. Paul. She asserted she was never told that the IVs or injections given to plaintiff contained steroids. Additionally, between 1997 and 2003, no one ever informed her of the possible dangers of overusing steroids. In April 2003, plaintiff began complaining about his back hurting after getting "bumped" into at school. Randall testified she took plaintiff to the doctor and learned he had compression fractures in his spine. Shortly thereafter, plaintiff stopped going to Dr. Paul and the clinic for treatment.

¶ 9 On cross-examination, Randall testified that after plaintiff's first visit with Dr. Paul, he was prescribed daily medication, a rescue inhaler, and a rescue medication for when his chest "start[ed] to act up." On occasions when the medications did not work and plaintiff's chest "stayed tight," Randall called and took plaintiff into the clinic. Randall testified that plaintiff's asthma "flare-ups" involved nasal symptoms and respiratory problems. The outset was rapid, and sometimes plaintiff would cough until he vomited. Randall stated plaintiff would occasionally

"wheeze" but described that symptom as "rare." When plaintiff had a "flare-up," Randall noticed coughing and "nasal stuff" and that it was hard for plaintiff to breathe.

¶ 10 Plaintiff presented the testimony of Dr. Sudha Prasad through a videotaped evidence deposition. Dr. Prasad testified she was a pediatrician with a subspecialty in allergy immunology and that she acted as plaintiff's allergist from June 2003 to January 2007. She commonly used steroids in the course and scope of her medical practice but had no opinion on whether Dr. Paul violated the standard of care in his treatment of plaintiff. Dr. Prasad identified the side effects of steroids as including Cushing's syndrome, weight gain, "buffalo hump," "moon face," striae, increased infections, adrenal suppression, osteoporosis, and growth suppression. She stated the risk of steroid side effects is increased the longer that steroids are taken and the higher the dose that is given. Dr. Prasad determined that plaintiff had Cushing's syndrome at his first visit, stating he had "the moon face," striae, "the buffalo hump," and trunk obesity. Her impression was that plaintiff developed Cushing's syndrome from taking steroids.

¶ 11 Dr. Prasad acknowledged that steroids could be administered through an IV, intramuscularly, or orally. When treating plaintiff, she prescribed oral prednisone in the form of a "burst taper" that started at 50 milligrams. She also prescribed inhaled steroids. Dr. Prasad testified she would call in prescriptions without seeing plaintiff so that he could have prednisone on hand because plaintiff was "quite [a] severe asthmatic at that given time." During her treatment of plaintiff, she also described him as having "moderate persistent asthma."

¶ 12 On cross-examination, Dr. Prasad testified that the method of administering steroids was a matter of "preference." When asked why a physician might prefer the IV or intramuscular methods of delivery, she testified that the "[o]nly reason [was] if a patient is vomiting or

[the] patient is so bad." She also stated that, in 1995, the standard of care did not require the use of peak flow meters. Further, Dr. Prasad testified that when a patient experienced a "flare-up" it was appropriate and necessary to treat him or her with corticosteroids. During the time periods she treated plaintiff, she gave him "a number of burst corticosteroid treatments." According to Dr. Prasad, plaintiff gradually improved throughout treatment but there were times that he did have "a severe flare-up."

¶ 13 Plaintiff presented the testimony of Dr. David Hoelzer, an endocrinologist. Dr. Hoelzer passed away prior to trial, and his evidence deposition was read to the jury. Dr. Hoelzer testified that he began seeing plaintiff in July 2003. Plaintiff was 13 years old and being seen "for evaluation of Cushing's [s]yndrome." Dr. Hoelzer described Cushing's syndrome as "a condition where you have excess glucocorticoids in the system." He identified photographs of plaintiff that were taken around the time of plaintiff's initial visit. Dr. Hoelzer agreed that the photographs depicted plaintiff with a "buffalo hump" on his upper back, striae over his trunk and extremities, and "moon face." Dr. Hoelzer described these as "classic findings" of Cushing's syndrome. He stated that although plaintiff "had the same basic fatty build as his father,' " his size and fat distribution were beyond what he would expect genetically.

¶ 14 Dr. Hoelzer determined that plaintiff suffered from Cushing's syndrome related to "exogenous steroids," *i.e.*, "receiving steroids." He testified that risks associated with exogenous steroid use included enhanced appetite and weight gain. Dr. Hoelzer also stated that exogenous steroid use caused adrenal suppression and that someone who has been on steroids for a long period of time tended to have very low cortisol production. Dr. Hoelzer described cortisol as the main natural glucocorticoid produced by the human body and stated that plaintiff was found to

have an undetectable level of cortisol. Dr. Hoelzer opined that claimant's low cortisol production was due to "taking exogenous steroid for a long period of time." He agreed that stopping steroids "cold turkey" could have been deadly for plaintiff or resulted in other serious repercussions. To treat plaintiff, Dr. Hoelzer recommended replacement doses of steroids and then "a very gradual tapering [off] program." Ultimately, plaintiff began producing cortisol at normal levels after treating with Dr. Hoelzer.

¶ 15 Dr. Hoelzer generally agreed that the goal when treating a patient with steroids was to first verify the necessity of the use of the steroid and then use the lowest dose possible for the shortest amount of time possible. He stated that goal "makes sense" because "that's our approach to all medicine." However, he qualified his answer by stating that he had "no expertise on using steroids to treat conditions other than adrenal insufficiency."

¶ 16 Dr. Eric Gershwin testified for plaintiff as an expert in allergy and asthma management. He described asthma as "an obstruction of the airways" and stated that asthma could be most easily categorized as mild, moderate, or severe. Dr. Gershwin testified that record keeping was important when treating asthma patients and a doctor could "lose [his or her] staff privileges" for failing to keep good records. He stated asthma was a chronic condition and it was important to monitor patients and know how they were doing on a daily basis. Further, he testified that "charting" was critical and in the medical community they "do something called evidence based medicine *** where basically if it isn't written, it wasn't done."

¶ 17 Dr. Gershwin described pulmonary function tests as involving the use of a machine to determine an asthma patient's airflow. The tests were typically performed three times because a portion of the testing was dependent on patient effort. Dr. Gershwin explained that a

patient might not understand how to blow into the machine and "the value might be wrong." He described a peak flow meter as a handheld device used by asthma patients at home to help determine when to see a doctor and increase medication.

¶ 18 Dr. Gershwin testified that inflammation was a major component of asthma and one way to treat inflammation was through the use of steroids. Steroids were "certainly" given in cases of severe asthma. They were also used in an inhaled form for prevention purposes. According to Dr. Gershwin, it was "most unusual" to give an asthma patient multiple types of steroids, *i.e.*, oral, injectable, and IV, on the same day. He stated that doing so would increase the risk of toxicity and not result in any improvement for the patient. Dr. Gershwin testified steroids could save a person's life, but he believed they were a last resort. He identified the dangers of steroid overuse as overeating, weight gain, psychological mood issues, striae, a face that "gets like a moon," "buffalo hump" due to a change in fat distribution, reduced height, osteoporosis, diabetes, and an increased risk of infection.

¶ 19 Dr. Gershwin testified he reviewed claimant's medical records from his treatment with Dr. Paul. Some of Dr. Paul's records were handwritten, and some had been transcribed. According to Dr. Gershwin, Dr. Paul's records showed that each year he used "more and more steroids" in treating plaintiff. However, Dr. Gershwin found nothing in plaintiff's medical records that indicated why such treatment was needed. In particular, he testified that on January 18, 2002, plaintiff's medical records showed he had a "normal" pulmonary function reading and was given steroids. Dr. Gershwin stated he could not justify the administration of steroids to plaintiff on that date. He further identified several other occasions when plaintiff was given steroids when his pulmonary function testing showed either a mild or moderate "restriction." Dr. Gershwin tes-

tified that the finding of a "restriction" was essentially an "un[-]interpretable" result because "you should not have restriction in somebody with asthma." Furthermore, a restriction was not treated with steroids.

¶ 20 Dr. Gershwin pointed out that plaintiff's medical records often showed the performance of only one pulmonary function test rather than three. Also, with the exception of one test, the remaining pulmonary function tests did not have plaintiff's weight on them. Dr. Gershwin testified that it was essential to have the age, height, and weight for a pulmonary function test, "[o]therwise, the computer is unable to do an interpretation." He stated that if an asthma patient came in and was "severe," he or she would not be asked to take a pulmonary function test because it takes time to do the testing. Instead, the patient would be given an IV, fluids, and oxygen, and a pulse oximetry would be performed.

¶ 21 Dr. Gershwin did not see any notation in Dr. Paul's records indicating that plaintiff was exhibiting signs of steroid toxicity. He further determined that from 1994 to 2003, Dr. Paul's records indicated plaintiff "might have been weighed once or twice" but there was "nothing consistent [in the medical records] about weight." Dr. Gershwin further testified that plaintiff visited the defendant clinic approximately 46 times in the last year he was treated there and that he received steroids on each of those occasions. Ultimately, Dr. Gershwin opined that defendant, by and through Dr. Paul, deviated from the standard of care in its treatment of plaintiff. He opined as follows: "I don't think [plaintiff] ever had severe asthma. I don't think those high dose steroids were ever indicated and certainly they were never indicated to give all three at once."

¶ 22 On cross-examination, Dr. Gershwin agreed that Dr. Paul prescribed maintenance and preventive medication and allergy treatment to plaintiff to prevent asthma "flare-ups." He

stated he did not disagree with that treatment. Dr. Gershwin further acknowledged that plaintiff did not seek treatment from Dr. Paul or the clinic until after he failed to respond to the "rescue medications" he had been given.

¶ 23 Dr. Gerswhin testified some of plaintiff's pulmonary function tests show that testing was performed both before and after treatment. However, he noted that many of the pulmonary function tests "say pre," indicating to him that they were all done before plaintiff received any type of treatment. Dr. Gershwin further testified that "[s]tandard of care is if you are in the urgent situation, you give it IV. After you're improved and the patient is improving, then you switch them over to the [oral] steroids." He agreed that he had "no idea" the "circumstance or the set-up at Dr. Paul's clinic." He also reiterated that he found the vast majority of plaintiff's pulmonary function tests were "un[-]interpretable, poor quality, or not consistent with asthma."

¶ 24 Plaintiff next presented the deposition of Dr. David Mack, who also passed away prior to trial. Dr. Mack was an orthopedic surgeon, and he treated plaintiff beginning in August 2003 for multiple compression fractures in his spine. He stated plaintiff had been diagnosed with osteoporosis secondary to Cushing's syndrome secondary to prednisone use. Dr. Mack opined plaintiff's fractures were "probably" caused by osteoporosis. He testified that, given plaintiff's age, multiple compression fractures meant "that he had a significant osteoporosis present."

¶ 25 Plaintiff further presented the video-recorded deposition of Dr. David Gelber, a neurologist. Dr. Gelber began seeing plaintiff in November 2004. He diagnosed plaintiff with pseudotumor cerebri, which he described as a condition that causes headaches and sometimes affects vision. He stated it was a side effect of long-term, high-dose steroids. Also, "the most common association with pseudotumor cerebri was obesity." Dr. Gelber opined plaintiff's

pseudotumor cerebri was caused by his Cushing's syndrome. On cross-examination, he stated plaintiff's presentation with "Cushingoid features" did not in and of itself suggest inappropriate treatment.

¶ 26 Dr. Dareen Siri testified she was board certified in allergy and immunology and internal medicine. She treated plaintiff from February 2007 to June 2011. Dr. Siri testified there were two instances during the four years she treated plaintiff when she prescribed steroids for an asthma "flare-up." One time was with an oral dose of prednisone "that was a burst taper," meaning "you start at a higher dose, and then over several days, we would decrease the amount daily." She also once gave plaintiff an intramuscular injection with 80 milligrams of Depo-Medrol. Dr. Siri testified steroids were sometimes necessary to treat people with asthma. She tried to use as little steroid medication as possible when treating plaintiff, stating it was "a basic tenant [*sic*] of medicine that [doctors] should use as little as possible particularly when it's with regards to children and pediatrics."

¶ 27 In 2011, at the end of her treatment of plaintiff, Dr. Siri diagnosed him with intermittent asthma, which meant he had normal lung function for the most part, but his asthma could be triggered on an occasional basis by an infection or allergy. She opined that plaintiff's asthma "was in relatively good control" when she treated him.

¶ 28 Dr. Siri further explained how pulmonary function tests worked. She testified it was "standard" to perform "three repeatable tests" to make sure that the patient was not doing something unusual, blowing poorly, giving a poor effort, or not understanding the instructions. Dr. Siri testified that for pulmonary function testing "[t]he weight is helpful but the necessary features are the age and the height." On cross-examination, Dr. Siri agreed that a peak flow me-

ter was "a very crude measure of lung function" and that an asthma action plan may or may not incorporate a peak flow meter.

¶ 29 Dr. Quentin Van Meter testified for plaintiff as an expert in the field of pediatric endocrinology. He reviewed plaintiff's medical records and opined plaintiff's Cushing's syndrome was caused by the steroids that were administered to him at the clinic. Dr. Van Meter described the doses given to plaintiff as "gigantic," stating as follows:

> "They're pretty much given for life-saving circumstances or anti-inflammatory circumstances, so they're not necessarily weight based, but when you looked at the pictures of [plaintiff] and you looked at the physical symptoms, he had literally almost every one of those things as a symptom manifesting Cushing's syndrome."

¶ 30 Finally, plaintiff presented the video deposition of Dr. Sonny Bal, an orthopedic surgeon who evaluated plaintiff in January 2014. Dr. Bal opined that plaintiff had osteoarthritis and degenerative disk disease as a result of compression fractures in his spine. He further testified "long-term use of steroids at a very young age" led to plaintiff suffering from severe osteoporosis, compression fractures, and arthritis in his back. Dr. Bal asserted plaintiff's condition would get worse because "the biomechanics of the spine [were] altered."

¶ 31 Dr. James Wedner testified for defendant as an expert allergist and immunologist. Dr. Wedner stated he reviewed plaintiff's medical records and the depositions of the parties and plaintiff's medical care providers. He determined that Dr. Paul "did apply the standard of care in his treatment of" plaintiff. He further opined that Dr. Paul did not cause injury to plaintiff, stating as follows:

> "I think that this was a young man who had bad asthma. He was treated appropriately for his bad asthma. He did what about [50%] of young children will do and that is he grew out of his asthma, and as of now, he really is not affected by any of the treatment that was provided for him by Dr. Paul."

¶ 32 Dr. Wedner did not dispute plaintiff "was cushingoid" at the end of his treatment with Dr. Paul. However, he testified that was not "an injury" caused by Dr. Paul. Dr. Wedner noted that patients with bad asthma are treated with corticosteroids, which can have side effects and a doctor must "balance the side effects with the treatment." He asserted that "the ability of steroids to cause *** Cushing[']s] syndrome varie[d] widely from patient to patient." Additionally, he testified that "once you are able to remove the steroid from the patient *** their Cushing[']s] syndrome goes away." Dr. Wedner stated that it was not possible to infer a breach of the standard of care due to the fact that a side effect of a drug occurred because "every drug has side effects."

¶ 33 Dr. Wedner testified there were various methods of administering steroids to a patient who needed them, including through pills, IV, and intramuscular injection. According to Dr. Wedner, "[i]t really doesn't matter how you give it," but there were guidelines that doctors used. He stated that "in each case, you have to give enough steroids to make the patient better" and that was "an accepted fact."

¶ 34 When asked about the standard of care with respect to documentation by a physician, Dr. Wedner responded: "I don't know that there is one." However, he testified that a physician "should put the important parts of an examination in the medical records." Dr. Wedner testified that when treating an acute asthma attack, many things would not be documented and "you

focus on the disease." In an acute situation, the patient is treated first, and documentation can be done later on.

¶ 35 Dr. Wedner further testified that the standard of care did not require a doctor to perform pulmonary function tests or perform them in a particular manner "when an acute presentation is made." He asserted that in an acute situation, having a patient blow into a machine "does you virtually no good." Pulmonary function tests require cooperation and effort, which cannot be given by a patient who is coughing, wheezing, and "trying to figure out if [he or she] can breathe." Dr. Wedner reviewed the pulmonary function tests in Dr. Paul's records. He asserted they were useful to monitor a patient like plaintiff once treatment had been given. When asked about the significance of a pulmonary function test where "the computer can't reach an answer," Dr. Wedner testified as follows:

> "So, that's just—the computer is there just to give you a suggestion. Sometimes the computer can't figure it out, but remember that what the machine does is it prints out the curve, which is called a flow volume loop, and the curve is something that we look at to determine whether the patient has gotten better or not."

¶ 36 Dr. Wedner agreed that the overwhelming number of plaintiff's visits involved "an acute asthma exacerbation." Further, there was evidence in the record that Dr. Paul made physician assessments of plaintiff. Dr. Wedner noted that when plaintiff went in for "an acute visit," he was "wheezing, coughing, [and had] shortness of breath." Also, on some occasions, plaintiff coughed so hard that he threw up. Dr. Wedner testified that "children [with asthma] cough more than they wheeze." He asserted it was within the standard of care for Dr. Paul to listen to plaintiff's chest and make treatment decisions accordingly.

¶ 37 Dr. Wedner testified that plaintiff's presentation was not always the same during the course of time he received treatment from Dr. Paul. He was initially treated for allergies and then "had an occasional episode." Later on, plaintiff "began having increasing severity of his asthma." Dr. Wedner testified that "half of all asthmatics will lose their asthma on or about puberty." Around approximately age 13, plaintiff's "asthma got much better." Dr. Wedner noted that following his initial visit to Dr. Paul, plaintiff was given an inhaler and rescue medicine. Dr. Wedner did not find Dr. Paul's treatment plan deficient because it did not include a peak flow meter for plaintiff. He testified as follows:

> "[T]here were some guidelines that suggested that every child should have a peak flow meter. So, what happened? After 1991, we started giving kids peak flow meters. It's amazing what a child can do with a peak flow meter, right? It is amazing what they won't do is they won't blow into it like they are supposed to, and so by the time the second guidelines came out, the peak flow meter disappeared."

Dr. Wedner opined that a doctor was better at assessing a patient's condition than a peak flow meter.

¶ 38 Dr. Wedner was shown a pulmonary function test that Dr. Paul performed on plaintiff on June 5, 1999. He testified that although the test stated "pre med," it was done after plaintiff "came in and got treatment," stating "if you read the medical records, you will find that this was done after he came in and got treated." Additionally, although the test results read "poor quality, no interpretation," there were graphs and other information useful to a physician. In particular, he testified the machine calculated plaintiff's "FEV1," *i.e.*, the total volume of air that a patient's lung can get out in one second. According to Dr. Wedner, FEV1 should be 80% or bet-

ter. Plaintiff's FEV1 was 77%, indicating that plaintiff responded well to therapy and could go home.

¶ 39 Dr. Wedner testified that plaintiff received medications from Dr. Paul through an IV, intramuscular injection, and orally. When plaintiff presented with an asthma flare-up, he administered aminophylline, a bronchodilator rather than a steroid, through an IV to "make [plaintiff's] bronchus open up very quickly." Dr. Paul also administered Solu-Medrol, a steroid, through the IV. The purpose of giving Solu-Medrol through an IV was "to get a rapid burst of the effective steroid." Dr. Wedner testified that plaintiff was given 20 milligrams of Solu-Medrol in his IV. He stated the drug would be "around for four to six hours and then it's gone." He described it as "a very short-acting, very potent steroid."

¶ 40 Dr. Wedner testified plaintiff received intramuscular injections with Depo-Medrol, also a steroid. When given intramuscularly, Depo-Medrol was long-acting and would "stay around for about two weeks." He stated Dr. Paul sometimes used the steroid triamcinolone, also called Aristocort. The amount of steroids given to plaintiff intramuscularly was 80 milligrams. Dr. Wedner testified that the steroids given intramuscularly did not "immediately become available *** to the patient's body." Rather, plaintiff would receive an average daily dose of less than 8 milligrams per day from the intramuscular injection.

¶ 41 Finally, Dr. Wedner testified plaintiff also received a "tapering dose" of oral prednisone, a corticosteroid, from Dr. Paul. Following an asthma attack, plaintiff would take 40 milligrams for the first three days and then 20 milligrams once a day. He would then "move to every other day dosing." The oral medication would last about 24 hours in plaintiff's system. On the day of the acute flare-up, plaintiff was instructed to take only 20 milligrams of prednisone.

¶ 42 Dr. Wedner stated there were times plaintiff did not respond to the treatment provided by Dr. Paul. He would return to the clinic "still wheezing and coughing or short of breath" and would receive another treatment. Dr. Wedner stated additional treatment was appropriate and within the standard of care. He described the standard of care as "find[ing] a therapeutic regimen for your patient that makes them better." He testified that Dr. Paul's treatment proved to be an effective method of treatment for plaintiff's acute asthma flare-ups.

¶ 43 Dr. Wedner testified the total steroids given to plaintiff by Dr. Paul were not considered "a whopping big dose." He considered the doses to be "modest." He testified that in children the maximum dose was "1.5 milligrams per kilogram up to 60 milligrams equivalent per day." Dr. Wedner testified that "all you have to do is figure out the weight in kilograms, and you know about how much you should be shooting for or at least staying under." He further asserted that plaintiff's dose per kilogram went down because although plaintiff grew larger, Dr. Paul's method of treating acute flare-ups never changed.

¶ 44 On cross-examination, Dr. Wedner agreed that from 2000 to 2003 plaintiff went to the clinic approximately 72 times and received steroid medication on all but 7 of those occasions. He further testified that he did not find any documentation in Dr. Paul's medical records that plaintiff was exhibiting any side effects of steroid use or signs of Cushing's syndrome.

¶ 45 Dr. Wedner also testified that the steroid medication given to plaintiff through IV, Solu-Medrol, came in 125-milligram canisters. From Dr. Paul's deposition testimony, he determined that Dr. Paul administered to plaintiff 20 milligrams of that steroid during a treatment. Dr. Wedner testified that he reviewed and relied upon Dr. Paul's typewritten medical records in forming his opinions. Additionally, he corrected his testimony on direct examination by stating

that around 2006 was when "they stopped using [peak flow meters] so much."

¶ 46 Dr. Paul testified he was 76 years old and practiced medicine for 50 years. He had "life-long" board certifications in internal medicine and allergy, asthma, and immunology. In May 2016, he retired. Dr. Paul testified he was very familiar with corticosteroids, how they should be utilized, and their potential side effects.

¶ 47 Dr. Paul stated that in November 1994, he provided plaintiff with an asthma action plan and told plaintiff's parents to "call in" if plaintiff became symptomatic and did not respond to his rescue medications. Dr. Paul testified he did not give plaintiff a peak flow meter to use because he did not commonly use them and only gave them to patients who hyperventilated and could not tell the difference between having asthma or hyperventilating. Dr. Paul also believed that plaintiff and his parents had good judgment regarding whether plaintiff was experiencing an acute asthma exacerbation, stating plaintiff "was pretty bad" when he was brought in to the clinic.

¶ 48 As plaintiff got older, he had more flare-ups of his asthma that resulted in more visits to the clinic and more medicine given. Dr. Paul testified that Dr. Wedner accurately described the treatment he gave plaintiff after 1997. He stated that he would give plaintiff only 20 milligrams of Solu-Medrol and that was "a procedure that [was] commonly used [10] times a day in [his] office." Using a 20-milligram dose of Solu-Medrol was not any different than prescribing 20 milligrams of prednisone except that it was faster and allowed the patient to avoid one dose of prednisone, which was usually prescribed at 20 milligrams twice a day. Dr. Paul testified that plaintiff weighed 91 pounds when he first saw him. Although plaintiff gained weight over time, Dr. Paul did not change the approach to plaintiff's acute asthma flare-ups.

¶ 49 Dr. Paul described the process of treating plaintiff when he came in with a flare-up, stating he would assess plaintiff to see what kind of problem he was having. If it was "significant asthma," plaintiff would be given an IV with aminophylline and Solu-Medrol and a nebulizer of albuterol. Plaintiff would then be given 80 milligrams of either Aristocort or Depo-Medrol, which Dr. Paul testified were "the same." After 35 or 40 minutes, a nurse would perform a pulmonary function study on plaintiff to see if he was stable and could go home. Dr. Paul would then assess plaintiff and prescribe prednisone to try to keep the asthma from recurring. According to Dr. Paul, plaintiff would receive a total of 50 milligrams of steroids on the day of treatment. Specifically, he testified as follows:

> "That would be 20 milligrams of [p]rednisone I would usually give him at night, *** and then I would give him 80 milligrams of Aristocort which is a Depo, and so when you give the Depo, it stays in the body but it doesn't release the drug right that day. It only releases a little bit that day and a little bit more the next day and the next day and the next day for about [10] or 12 days, and then I give him 20 milligrams of Solu-Medrol. So that would be [10] milligrams of Aristocort, 20 milligrams of Solu-Medrol. So, that's 30 milligrams, and then 20 milligrams at the most of [p]rednisone at night, which would be 50."

¶ 50 Dr. Paul testified he and Dr. Prasad both did essentially the same thing when treating plaintiff but with different modes of delivery. A benefit from using intramuscular injections was that the corticosteroid was long-acting and "you know at least you have got some corticosteroid in the body for about [10] days," which might prevent recurrence. The benefit of the steroid given through IV was that it was short-acting and eliminated the problem of delay in get-

ting the onset of the medicine.

¶ 51 Dr. Paul testified it was "probably not a good thing" to give plaintiff a pulmonary function test prior to treatment because he would have had a harder time getting a smooth exhalation and "it takes time." He acknowledged that the pulmonary function tests he performed on plaintiff stated "pre med"; however, he asserted that "pre med" was programmed into the computer and did not indicate that was when the test was actually performed. Dr. Paul testified he did not "do very many pre med things." Instead, he performed pulmonary function tests after treatment.

¶ 52 Dr. Paul opined that the amount of medication he gave plaintiff and the way in which it was delivered were within the standard of care. He denied that the amount of medication was excessive. Dr. Paul agreed that plaintiff had Cushing's syndrome when plaintiff left his care. He stated the symptoms started manifesting after January 2003. In particular, plaintiff developed "more swelling," "his striae became more," he developed "Buffalo hump," and he developed a "moon face." Dr. Paul testified he was aware of the development of those conditions and not surprised that they occurred. However, when the conditions appeared it was not possible to stop treatment with steroids. Dr. Paul testified he "had to stop the breathing problems." He believed the Cushing's syndrome would "go away" once plaintiff was no longer taking steroids.

¶ 53 Dr. Paul testified he kept medical records that he used and that were not used by anybody else. He documented what he felt was necessary for plaintiff's care. Dr. Paul agreed that plaintiff was not weighed at every visit because he "[d]idn't need it." He stated he could see that plaintiff was getting heavier "but why make an issue of it." Dr. Paul testified he did discuss weight with plaintiff but tried to be sensitive about it.

¶ 54 On cross-examination, Dr. Paul identified the medical file he kept for plaintiff. He testified that the purpose of a medical file was to help him "remember what goes on from visit to visit." He tried to write down "important stuff" that occurred during visits. Dr. Paul agreed that he made typewritten copies of his handwritten notes at the request of plaintiff's counsel.

¶ 55 During cross-examination, plaintiff's counsel began questioning Dr. Paul regarding his handwritten and typewritten medical records that were produced during discovery. Defendant's counsel objected. Outside the presence of the jury, plaintiff's counsel indicated he intended to cross-examine Dr. Paul regarding substantive inconsistencies contained within his typewritten copies of medical records that were originally produced and the corresponding handwritten medical records that were produced at a later date. The parties agreed to the following stipulation regarding the records, which was presented to the jury:

> "The original file tendered to [plaintiff's counsel's] office after the start of litigation included typed written records dated December 16, 2002, through June 3, 2003. Subsequently on April 4, 2011, Dr. Paul and the Defendant supplemented their disclosures and produced handwritten notes for the same dates and an explanation that the typed written records were for the purposes of the other treating doctors of [plaintiff] after he left [Dr. Paul's] care and treatment so they didn't have to read his handwritten notes."

¶ 56 On further cross-examination, Dr. Paul was questioned about inconsistencies between his handwritten and typewritten notes. He testified that he dictated the typewritten notes from memory and that they were typed eight or nine years after the dates of service. Dr. Paul acknowledged that his typewritten medical records contained information that differed from or

was not recorded in his handwritten records. The inconsistencies included references to giving "patient instructions," ratings of plaintiff's nasal congestion and wheezing symptoms on a "one to four scale," information regarding the length of time plaintiff had been experiencing asthma symptoms, descriptions of plaintiff's symptoms, directions on how to take medications, and notations that information was relayed to plaintiff's parents. Dr. Paul acknowledged several instances where he rated or described plaintiff's symptoms as being worse in his typewritten notes than in his handwritten notes. Dr. Paul stated he typed his handwritten notes for the benefit of other doctors. He asserted he was "trying to tell a story" and that they would not know what his handwritten notes meant.

¶ 57 On redirect, Dr. Paul testified that his handwritten records consisted of actual notes that he took at the "exact time" he saw plaintiff and that he used "shorthand" in making his notes. He stated he would also dictate his handwritten notes and "anything [he] remembered from that day from that appointment" so that they could be transcribed "at the end of the day." Dr. Paul testified that the typewritten records at issue were provided to Dr. Prasad. He stated those "might have been" prepared in 2003 or 2004, but he did not "exactly remember when [Dr. Prasad] wanted them." Dr. Paul testified he also provided plaintiff's counsel with a set of typewritten notes during the course of the litigation because plaintiff's counsel could not read his handwriting. He further testified that there were many times plaintiff presented with wheezing, coughing, and shortness of breath, which he documented in his handwritten notes.

¶ 58 On further cross-examination, Dr. Paul asserted that he had been mistaken in asserting that the typewritten records were prepared eight or nine years after the date of treatment. Instead, he stated they were "written up probably three or four years later" because Dr. Prasad

"didn't get them right away."

¶ 59 Defendant presented the testimony of another expert witness, Dr. Michael Kornblatt, an orthopedic surgeon. Dr. Kornblatt reviewed the orthopedic medical records in the case and opined that based on the radiographs and plaintiff's clinical presentation, plaintiff did not suffer from compression fractures in 2003. He determined that plaintiff's radiology studies from that time showed "wedging of the vertebra" and not fractures. He described "wedging" as "just a different shape of the vertebra" that "occurs because there's a difference in growth of the front of the vertebra versus the back of the vertebra." Dr. Kornblatt also stated that "wedging" was found in a condition called Scheuermann's kyphosis.

¶ 60 Defendant next presented the testimony of Dr. Raoul Wolf over plaintiff's objection that it was cumulative of Dr. Wedner's testimony. Dr. Wolf testified he was a physician and specialized in allergy and immunology and pulmonology. He reviewed medical records and depositions in the case. Specifically, he reviewed pulmonary function tests performed by Dr. Paul on plaintiff and looked at the "key values" from those tests. Dr. Wolf described the key values as "the FEV1 which is a measure of lung flow, and *** the peak flow which is also a measure of air flow." He described the "key values" as "totally objective" and stated they "reflect and give an indication of how much air was actually flowing out of the patient's lungs." From his review of those tests and values, Dr. Wolf opined plaintiff "certainly had severe bad asthma."

¶ 61 Dr. Wolf stated that in the years leading up to 2001, plaintiff probably had mild to moderate asthma with moderate acute episodes. He also had "considerable variability" with regard to both the pattern of his asthma and his response to treatment. Dr. Wolf asserted that treating "that type of unstable asthma" is more difficult. According to Dr. Wolf, plaintiff's asthma

"got considerably worse" in 2002 and 2003, as demonstrated by the "objective figures" on the pulmonary function tests. He stated there was also a time in 2002 and early 2003 when plaintiff's asthma became largely unresponsive to treatment.

¶ 62 Dr. Wolf testified that the only significance of the "interpretation" shown on a pulmonary function test was "that somebody programmed the machine to spit out a result." He did not believe "anyone pa[id]the slightest attention to it." Dr. Wolf identified a pulmonary function test performed on plaintiff in April 2003 and noted the "interpretation that the machine makes" showed that plaintiff had a "severe restriction." He asserted that interpretation was "completely incorrect" and, instead, plaintiff's airways were "extremely obstructed." Dr. Wolf stated plaintiff's FEV1 was "extremely low" and only 30% of the amount of air he should blow out. He further noted that the test indicated it was performed following treatment and that plaintiff had a "[v]ery poor" response to the treatment. Dr. Wolf characterized plaintiff as having a severe asthma exacerbation at that time because having a 30% FEV1 result after treatment was "indicative of a very poor starting point." Dr. Wolf testified that the graphs on the pulmonary function tests also provided reliable and accurate information. The graphs on the April 2003 pulmonary function test were similarly indicative of a severe asthma exacerbation.

¶ 63 Dr. Wolf testified that in February, March, and April 2003, plaintiff had a pattern of very low FEV1 numbers. He began showing improvement in May 2003, but his pulmonary function tests still showed "significant obstruction." Dr. Wolf opined that not treating a patient with the degree of obstruction that plaintiff had was not an option. He asserted that the appropriate treatment for plaintiff at that time was "[s]teroids in high doses."

¶ 64 Dr. Wolf agreed that plaintiff was administered corticosteroids via IV, intramus-

cularly, and orally. He opined that treatment in those forms was within the standard of care "[b]ecause there is no standard of care that says how the steroid should be delivered." According to Dr. Wolf, there was also no standard of care as to "how much steroid should be delivered." Instead, "[t]he standard of care is really to treat the acute episode with the one medication that is known to resolve and remit the acute episode which is corticosteroids." Dr. Wolf testified he was also aware of the doses of steroids plaintiff received from Dr. Paul and opined they were not excessive. He stated that when all three forms—IV, injection, and oral—were taken together, "the amount [plaintiff] got was actually less than he might have been given had he been hospitalized or treated in an emergency room."

¶ 65 Dr. Wolf further discussed plaintiff's Cushing's syndrome, opining it was highly unlikely from "pharmacologic principles" that he still had the condition. He explained that Cushing's syndrome was caused by an "excess of *** adrenal corticosteroids" that were "given from [the] outside." Dr. Wolf stated that "once those steroids from outside are removed, the adrenal glands recover *** because they are no longer being suppressed." Additionally, Cushing's syndrome then "goes away because those excess steroids have been taken away." Dr. Wolf further opined that "withholding steroids in a case like this one because there was any side effect would not be within the standard of care" and that withholding steroid treatment from plaintiff from the late fall of 2002 to the spring of 2003 "was never an option."

¶ 66 On cross-examination, Dr. Wolf testified he had never administered steroids to a patient using an IV, intramuscular injection, and burst doses of prednisone at the same time. He agreed that it was his opinion that plaintiff did not develop Cushing's syndrome as a result of the amount of steroids given to him. He testified that "not everybody responds to steroids the same

way." Dr. Wolf further agreed that reasonably careful physicians would monitor patients for side effects, educate patients to modify risk factors when treating with steroids, and look for side effects when treating a child with steroids. He also testified that it was "good practice" but not necessarily required by the standard of care to "chart significant matters in the medical records when they are found or observed." Dr. Wolf testified that a reasonably careful allergist who treats a child for more than seven years with steroids would list that child's weight on more than one occasion. He acknowledged that Dr. Paul "charted the weight" only about two times for plaintiff.

¶ 67 Finally, defendant presented the testimony of Dr. Donald Zimmerman, a pediatric endocrinologist. Dr. Zimmerman agreed that weight gain was a potential side effect of steroid treatment. However, he opined that the majority of plaintiff's weight gain was unrelated to corticosteroids. He stated plaintiff's weight was "markedly above" the normal range prior to receiving any treatment. Dr. Zimmerman testified plaintiff gained a lot of weight prior to, during, and after his treatment with Dr. Paul.

¶ 68 The jury returned a verdict in defendant's favor, and the trial court entered a judgment on the verdict. In December 2017, plaintiff filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial and sanctions. In July 2018, the trial court denied plaintiff's motion.

¶ 69 This appeal followed.

¶ 70 II. ANALYSIS

¶ 71 A. Motion to Strike and Dismiss

¶ 72 On appeal, defendant has filed a motion to strike plaintiff's brief in whole or in part and dismiss his appeal, which we have ordered taken with the case. In its motion, defendant

asserts that plaintiff's brief fails to comply with the requirements set forth in Illinois Supreme Court Rule 341(h) (eff. Nov. 1, 2017) in several respects. Specifically, it contends plaintiff's statement of facts was improper because plaintiff liberally used "argumentative and opinionated language," misstated facts and mischaracterized testimony, and failed to cite to the record on appeal. Defendant also contends "[p]laintiff's introductory paragraph exceeds the limits" of Rule 341(h) because it contained "obvious advocacy and superfluous detail." Finally, it argues plaintiff failed to properly set forth applicable standards of review for all but one of the issues he raised on appeal.

¶ 73 Although not filed in a separate motion, plaintiff similarly asserts in his reply brief that defendant's brief is "disqualifying and should be stricken." In particular, he contends defendant improperly reworded the issues he raised on appeal and "respond[ed] to them out of order." Additionally, he contends that defendant failed to include proper citations to the record in his brief, resulting in forfeiture of any unsubstantiated factual representations or argument.

¶ 74 Illinois Supreme Court Rule 341 (eff. Nov. 1, 2017) sets forth the requirements for appellate briefs. It provides that an appellant's brief must contain an "introductory paragraph" that states "(i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." Ill. S. Ct. R. 341(h)(2) (eff. Nov. 1, 2017). An appellant sets forth the issues presented for review and "must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." Ill. S. Ct. R. 341(h)(3) (eff. Nov. 1, 2017). Additionally, an appellant must include a "Statement of

Facts" in his or her brief, "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal ***." Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017).

¶ 75 "The rules of procedure concerning appellate briefs are not mere suggestions, and it is within this court's discretion to strike [a] plaintiff's brief for failing to comply with Supreme Court Rule 341." *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045, 904 N.E.2d 1183, 1190 (2009). However, "[t]he striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review." (Internal quotation marks omitted.) *In re Detention of Powell*, 217 Ill. 2d 123, 132, 839 N.E.2d 1008, 1013 (2005).

¶ 76 Here, both parties' briefs contain deficiencies that undoubtedly complicated review. In particular, we agree that plaintiff's statement of facts was improperly argumentative and mischaracterized some of the evidence presented at trial. His "introductory paragraph" was excessive, consisting of six paragraphs that also contained unnecessary commentary and argument. Further, plaintiff failed to include any reference to the applicable standard of review for one of the issues he raised on appeal. In its brief, defendant inexplicably and needlessly reorganized the issues presented by plaintiff for review. However, despite these deficiencies, both parties substantially complied with Rule 341 and our review of the issues presented is not unduly interfered with or precluded. Accordingly, we will disregard the improperly argumentative portions of plaintiff's brief but deny defendant's motion to strike his brief and dismiss the appeal. We also decline to strike defendant's brief as suggested by plaintiff in his reply brief.

¶ 77 B. Dr. Paul's "Alteration" of Plaintiff's Medical File

¶ 78 On appeal, plaintiff first argues the trial court erred in denying his posttrial request for sanctions against defendant pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). He contends defendant committed discovery violations related to the production of his medical records in that Dr. Paul "blatantly lied about *** [plaintiff's] personal medical records," "lie[d] about the origin of the retyped records," and "altered" the records "for the sole purpose of gaining an advantage at trial." Plaintiff asserts that he was prejudiced by these discovery violations and that "false, incomplete, or inaccurate discovery" must not be tolerated. He contends he is entitled to a judgment notwithstanding the verdict and a new trial solely on the issue of damages. Alternatively, plaintiff requests a new trial on all issues.

¶ 79 Pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), a trial court may enter "such orders as are just" to remedy a party's unreasonable failure to comply with the supreme court's discovery rules or orders entered under those rules. "A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123, 692 N.E.2d 286, 291 (1998). "When imposing sanctions, the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party." *Id.* "Under the appropriate circumstances, a trial court may order a new trial as a result of a discovery violation committed by the party who prevailed in the initial trial." *Kubicheck v. Traina*, 2013 IL App (3d) 110157, ¶ 29, 996 N.E.2d 307. "An order of dismissal with prejudice or a sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority." *Shimanovsky*, 181 Ill. 2d at 123.

¶ 80 "A motion for a new trial is within the trial court's discretion, and the trial court's decision will not be disturbed on appeal absent a clear abuse of that discretion." *Kubicheck*, 2013 IL App (3d) 110157, ¶ 30. "Likewise, the imposition of sanctions for failure to comply with discovery rules and orders, and decisions regarding what type of sanction to impose, are matters within the broad discretion of the trial court." *Id.* "A trial court abuses its discretion only when its decision is 'arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court.' " *Id.* (quoting *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E. 2d 1131, 1142 (2010)).

¶ 81 Additionally, when determining "what sanction, if any, to apply" under Rule 219(c), the trial court should consider the following factors:

> "(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." *Shimanovsky*, 181 Ill. 2d at 124.

In his reply brief, plaintiff asserts these factors are typically applicable to determining whether the exclusion of a witness is a proper sanction for nondisclosure and that they are not necessarily applicable when a party is seeking a new trial. However, in *Shimanovsky*, the court did not limit the application of these factors to only one context. It applied them when determining whether the sanction of a dismissal of an action with prejudice was appropriate under Rule 219(c) and explicitly stated these six factors were "[t]he factors a trial court is to use in determining what sanction, if any, to apply." *Id.* Thus, we find these factors are relevant and applicable to this case.

¶ 82 The record reflects plaintiff initially received approximately 33 pages of Dr. Paul's handwritten records. In October 2010, plaintiff moved to compel Dr. Paul to "translate" his handwritten records on the basis that they were illegible. The same month, the trial court granted the motion and gave Dr. Paul, then a defendant in the case, 21 days to comply. Thereafter, plaintiff was provided with typewritten records prepared by Dr. Paul. In April 2011, the attorney representing the clinic and Dr. Paul made a supplemental disclosure of Dr. Paul's handwritten office notes. In a letter accompanying the notes, he stated as follows:

> "In reviewing the records that Dr. Paul has regarding [plaintiff], Dr. Paul recently discovered the handwritten office notes he has regarding office visits with [plaintiff] on December 16, 2002 through June 3, 2003. You should already have in your possession typed notes for these visits. What happened in this particular case is Dr. Paul, at the time [plaintiff] was referred to other physicians, dictated the office records from the enclosed handwritten notes so that the physicians [plaintiff] was referred to would have typed notes for the visit and would not have to decipher Dr. Paul's writing. I am sure that you will find that the typewritten notes that you have are much easier to read than what I have enclosed. However, for completeness, I wanted to make sure that you had a copy of everything that we have received to date from Dr. Paul regarding [plaintiff]."

¶ 83 On appeal, defendant does not dispute that many discrepancies exist between the typewritten notes Dr. Paul prepared and his handwritten office notes upon which the typewritten records were purportedly based. However, after consideration of the relevant factors, we find that most weigh in favor of the trial court's decision to impose no sanction, and thus, we find no

abuse of discretion by the trial court.

¶ 84 Although plaintiff suggests he was surprised by the discrepancies in the record, we note that he ultimately possessed both sets of Dr. Paul's medical records well in advance of trial. In fact, the challenged records were fully disclosed over five years before the trial occurred and several months before the date of Dr. Paul's discovery deposition. Plaintiff also possessed information that the typewritten records were not prepared contemporaneously with either the dates of plaintiff's treatment with Dr. Paul or Dr. Paul's handwritten notes. Further, we note that the two sets of records look very different on their face. Even without the ability to decipher Dr. Paul's handwriting, the typewritten records appear to contain more information, or more detailed information, than what is plainly contained within the handwritten records. We note that plaintiff ultimately discovered the inconsistencies in Dr. Paul's records when his counsel compared the records side by side, a task that could have been accomplished any time after the handwritten records were given to plaintiff in April 2011. Accordingly, we find the first relevant factor for consideration, whether there was surprise to the adverse party, weighs in favor of the trial court's ruling.

¶ 85 An additional factor for consideration is the prejudicial effect of the proffered evidence. Here, plaintiff had the ability to cross-examine Dr. Paul at length regarding the differences between his handwritten and typewritten records. During that cross-examination, Dr. Paul acknowledged the many discrepancies in the typewritten records he provided and that the typewritten records were prepared well after the dates on which he provided treatment to plaintiff. We find that any prejudicial effect of the discrepancies was minimized through plaintiff's effective cross-examination.

¶ 86 Further, we note that despite the obvious differences in the appearance of Dr. Paul's handwritten and typewritten records, plaintiff raised no objection or assertions of a discovery violation until after trial and a verdict was rendered in favor of defendant. Finally, we find the record fails to demonstrate bad faith by defendant. As stated, full disclosure of all of Dr. Paul's medical records was made to plaintiff well in advance of trial.

¶ 87 Given the circumstances, we find no abuse of discretion by the trial court in denying plaintiff's motion for Rule 219(c) sanctions and his request for either a new trial or a judgment in his favor and a new trial on damages. The record fails to reflect that either sanction was warranted under the facts presented. Further, we find the cases cited by plaintiff on appeal are factually distinguishable.

¶ 88 C. Cumulative Expert Testimony

¶ 89 On appeal, plaintiff next argues the trial court abused its discretion in allowing defendant to present cumulative expert testimony. Specifically, he argues Dr. Wedner and Dr. Wolf discussed the same subject matter and offered cumulative standard-of-care testimony. Plaintiff maintains that the trial court's failure to exclude Dr. Wolf's testimony necessitates a new trial in the matter.

¶ 90 Whether to admit or exclude cumulative evidence is within the trial court's discretion. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495, 771 N.E.2d 357, 365 (2002) ("[T]he exclusion of cumulative evidence is within the discretion of the trial court ***."); *Moore v. Anchor Organization for Health Maintenance*, 284 Ill. App. 3d 874, 881, 672 N.E.2d 826, 832 (1996) ("[T]he admission of cumulative evidence is a matter within the discretion of the trial court."). On review, the court's ruling will not be reversed absent a clear abuse of discretion. *Dillon*, 199

Ill. 2d at 495.

¶ 91 Here, the record shows both Dr. Wedner and Dr. Wolf testified for defendant as expert allergists and immunologists. However, Dr. Wolf stated that he also specialized in pulmonology. Additionally, while there was certainly overlap in the testimony both experts provided, there were also differences. Dr. Wedner provided testimony that plaintiff grew out of his asthma, discussed the manner in which pulmonary function tests had to be performed, explained the importance of the "flow volume loop" on pulmonary function tests, described symptoms exhibited by plaintiff during Dr. Paul's treatment, and discussed the specific medications Dr. Paul prescribed. By contrast, Dr. Wolf primarily testified regarding plaintiff's condition in late 2002 and early 2003 and focused on the pulmonary function tests performed on plaintiff by Dr. Paul. Dr. Wolf described the "pattern" disclosed by plaintiff's pulmonary function tests during that time frame and discussed the importance of "key values" on those tests. Ultimately, we can find no clear abuse of discretion by the trial court in permitting both experts to testify.

¶ 92 D. Failure to Disclose Expert Opinions

¶ 93 Plaintiff further argues that the trial court erred in denying his motion for a new trial based on defendant's failure to disclose expert opinions in violation of Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). Specifically, he contends that both Dr. Wedner and Dr. Wolf gave testimony at trial that contradicted their previous expert disclosures. Plaintiff asserts Dr. Wedner contradicted his previous disclosures regarding peak flow meters and plaintiff's emergency room visits, while Dr. Wolf contradicted his previous disclosure regarding plaintiff's weight.

¶ 94 Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007) defines a "controlled ex-

pert witness" as "a person giving expert testimony who is the party, the party's current employee, or the party's retained expert." It further provides that a party must identify the following for each of its controlled expert witnesses: "(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." *Id.* Illinois Supreme Court Rule 213(g) (eff. Jan. 1, 2007) further provides as follows:

> "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."

Additionally, "[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(i) (eff. Jan. 1, 2007).

¶ 95 "The purpose behind Rule 213 is to avoid surprise and to discourage tactical gamesmanship." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 111, 806 N.E.2d 645, 653 (2004). Parties must strictly adhere to Rule 213's disclosure requirements. *Id.* at 110. A party claiming a Rule 213 violation "may move to (1) strike only the portion of the testimony that violates the rule ***[,] (2) strike the witness's entire testimony and bar the witness from testifying further, or (3) have a mistrial declared." *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 74, 8 N.E.3d 93. "[A]n appropriate remedy 'must ensure that the applicable sanction allows for a fair trial rather than

punish the party that committed the violation.' " *Id.* ¶ 75 (quoting *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 378, 805 N.E.2d 222, 233 (2003)). Ultimately, the admission of evidence under Rule 213 is within the trial court's discretion, " 'and the court's ruling will not be disturbed absent an abuse of that discretion.' " *White v. Garlock Sealing Technologies, LLC*, 373 Ill. App. 3d 309, 323, 869 N.E.2d 244, 255 (2007) (quoting *Sullivan*, 209 Ill. 2d at 109).

¶ 96 1. *Dr. Wedner's Testimony on Peak Flow Meters*

¶ 97 Plaintiff first challenges testimony Dr. Wedner gave at trial regarding peak flow meters. He points out that in answers to interrogatories, defendant disclosed that Dr. Wedner was expected to offer the following opinion regarding peak flow meters:

> "Peak flow monitoring and symptom monitoring are equally effective in identifying exacerbations of asthma. Use of peak flow monitoring is a matter of physician/patient preference, not a standard of care."

Plaintiff contends Dr. Wedner contradicted that previously disclosed opinion at trial when he gave the following testimony on direct examination:

> "Q. Now, [Dr. Paul's asthma plan for plaintiff] does not have a peak flow meter on it.
>
> A. It does not.
>
> Q. Does that mean that the plan is deficient?
>
> A. No.
>
> Q. Why not?
>
> A. Because if—there were some guidelines that suggested that every child should have a peak flow meter. So, what happened? After 1991, we started giving

kids peak flow meters. It's amazing what a child can do with a peak flow meter, right? It is amazing what they won't do is they won't blow into it like they are supposed to, and so by the time the second guidelines came out, the peak flow meter disappeared.

It was one of those ideas that everybody thought, 'Geez, it really sounds like a good idea,' and it didn't work, and by 1994, we weren't giving them out to anybody. They wouldn't use them.

They were a great hockey puck. You could throw them at your brother or sister and they wouldn't blow into it, and the parents didn't like it because they would spend a lot of time trying to get the child to get up every morning to blow into their peak flow meter and they wouldn't do it. So, it became an area of conflict between the parent and the child and that you never want.

Q. Within the assessment of patients as between, for instance, peak flow meter or clinical assessment by a physician, is there one that is better than the other?

A. Sure.

Q. Which one?

A. The doctor."

¶ 98 In response to plaintiff's claim on appeal, defendant argues that plaintiff forfeited any objection to Dr. Wedner's "peak flow meter" testimony because he did not raise a contemporaneous objection with the trial court. It also asserts that Dr. Wedner's testimony should not have been surprising to plaintiff because the opinions expressed in his trial testimony were fully set

forth and explored in his discovery deposition. (On appeal, this court granted a motion by defendant to supplement the record with Dr. Wedner's deposition and amend its brief to cite to the supplemental record.)

¶ 99 Initially, we agree that plaintiff forfeited this issue by failing to object to Dr. Wedner's testimony at trial. "[G]enerally, to be effective in preserving an error, an objection must be timely, meaning contemporaneous with the objectionable conduct." *White*, 373 Ill. App. 3d at 326. In *White*, this court stated that "the issue of the timeliness of a party's objection is left to the sound discretion of the trial court." *Id.* at 326-27. Further, we agreed with the trial court's determination that the complaining party's delay in objecting to an alleged Rule 213 violation did not forfeit the issue because the party raised the alleged violation "at her first opportunity to do so out of the presence of the jury when the court ordered a recess in the normal course." *Id.* at 327.

¶ 100 Here, the record reflects no objection by plaintiff to the challenged testimony. In his reply brief, plaintiff cites to objections he raised shortly following Dr. Wedner's peak flow testimony. However, the record shows that during a side bar, defense counsel raised only the following Rule 213 objection: "I don't believe there is a [Rule] 213 disclosure of any opinions of [plaintiff's] condition before 1994 and all of these records are before 1994." He also raised a hearsay objection based on defense counsel reading from medical records and objected to defense counsel asking "narrative questions." We fail to see how any of these objections address Dr. Wedner's peak flow testimony.

¶ 101 Additionally, in his posttrial motion, plaintiff generally challenged the trial court's denial of the Rule 213 objections he raised at trial. He did not raise any specific challenge to Dr.

Wedner's peak flow testimony. Accordingly, we agree that this claimed Rule 213 violation was not called to the trial court's attention either during or after the trial, and it has not properly been preserved for review.

¶ 102 Moreover, even if we were to excuse plaintiff's forfeiture, as pointed out by defendant, Dr. Wedner provided substantially similar testimony during his discovery deposition. He testified that in approximately "the early '80s," guidelines recommended the use of peak flow meters. Ultimately, however, it was "realized" that peak flow meters were "a *crummy way* to measure pulmonary function" because they were not being used properly by children or their parents. (Emphasis added.) He noted that children would take them apart, trade them, and "use them for hockey pucks." Accordingly, plaintiff's claim of error is without merit.

¶ 103 2. *Dr. Wedner's Testimony on Plaintiff's Emergency Room Visits*

¶ 104 Plaintiff next argues that Dr. Wedner gave testimony at trial that contradicted his previously disclosed opinions regarding plaintiff's emergency room visits. He points out that in answers to interrogatories, defendant disclosed the following opinion by Dr. Wedner:

> "The majority of [plaintiff's] visits to [the defendant clinic] were on an emergency basis. He did not ever go to the emergency room for an asthma exacerbation, because sufficient emergency facilities are available at the clinic."

Plaintiff argues Dr. Wedner provided contradictory testimony at trial on direct examination. In particular, the record reflects that during Dr. Wedner's testimony, he was shown a copy of records from an emergency room visit plaintiff had in May 2001. Dr. Wedner testified the emergency room visit was part of the records that he reviewed with respect to plaintiff's medical care and that he was aware of the visit as defense counsel had shown it to him. The following colloquy

then occurred:

> "THE WITNESS: This is a record from an emergency room visit. Patient came in. He received a nebulizer treatment. He had a very good response to the nebulizer treatment. They reexamined him and his chest no longer wheezing, coughing, or shortness of breath, and they felt that he was getting better because he took some medicine before he actually went to the emergency room, and they let him go home.
>
> BY MR. HUGHES [(defense attorney)]:
>
> Q. Is that what the asthma plan contemplates will happen?
>
> A. Sure."

¶ 105 Initially, we find the record again reflects that plaintiff failed to preserve his Rule 213 challenge to Dr. Wedner's testimony for review. Although plaintiff did object during Dr. Wedner's testimony, he simply stated, "Same objection, Judge." The record shows the immediately preceding objection was one based on defense counsel "asking narrative questions." Before that, the only objections raised concerned one based on hearsay and the objection previously discussed involving the lack of "a [Rule] 213 disclosure of any opinions of [plaintiff's] condition before 1994" and "records *** before 1994." None of these objections addressed the issue now presented on review concerning an emergency room visit that occurred in 2001.

¶ 106 Additionally, as defendant points out, Dr. Wedner's trial testimony reflects an error in the factual basis for his opinion rather than a contradictory opinion. Specifically, Dr. Wedner acknowledged an emergency room visit by plaintiff when he had previously based his

opinions on the fact that none had occurred. There is no indication from the record, however, that Dr. Wedner changed his ultimate opinion that "sufficient emergency facilities" were available at the defendant clinic. As stated, the purpose of Rule 213 is to avoid surprise. "[T]o avoid surprise, the subject matter of all opinions must be disclosed *** and *** no new or additional opinions will be allowed unless the interests of justice require otherwise." Ill. S. Ct. R. 213(g), Committee Comments (rev. June 1, 1995). Under the circumstances presented, no new or additional opinions were given, and we find no error.

¶ 107 3. *Dr. Wolf's Testimony on Documentation of Plaintiff's Weight*

¶ 108 Finally, plaintiff argues that Dr. Wolf provided testimony regarding Dr. Paul's documentation of plaintiff's weight that contradicted defendant's previous disclosures. Specifically, plaintiff maintains that defendant's expert witness disclosures stated that "Dr. Paul recorded [plaintiff's] weight and height on every pulmonary function study taken in his office." He then notes that, at trial, the following colloquy occurred between Dr. Wolf and his counsel during cross-examination:

> "Q. Would you agree with me that a reasonably careful allergist who treats a child for more than seven years with steroids would list that child's weight on more than one occasion, wouldn't they?
>
> A. Probably, yes.
>
> Q. In fact, in your disclosure, you actually said that Dr. Paul charted [plaintiff's] weight on every pulmonary function test that you reviewed. Did you disclose that?
>
> A. I did disclose that.

Q. But having re-reviewed those, you'd agree with me that at best, maybe two times in those [*sic*] nine-year timeframe that he charted the weight.

A. That is correct."

¶ 109 Again, the challenged testimony concerned an erroneous assertion of fact by the expert witness rather than a matter of opinion. Additionally, the testimony at issue from Dr. Wolf was not objected to; rather, it was elicited on cross-examination by plaintiff's counsel. "Without making disclosure under [Rule 213] ***, a cross-examining party can elicit information, including opinions, from the witness." Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). Through cross-examination, plaintiff's counsel established that Dr. Wolf made an erroneous factual determination when reviewing Dr. Paul's medical records. Dr. Wolf's acknowledgment of his previous error did not amount to contradictory, undisclosed expert opinion testimony and only benefited plaintiff's case. Accordingly, we find no error.

¶ 110 E. Failure to Disclose Key Evidence and Expert Witness Notes

¶ 111 Plaintiff additionally argues that he was entitled to a new trial based on defendant's failure to disclose key evidence concerning his weight and the notes of two of its expert witnesses, Dr. Zimmerman and Dr. Wolf.

¶ 112 Again, "[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) (eff. Jan. 1, 2007). "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." *Id.*

¶ 113 Further, as discussed, Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) provides for the imposition of sanctions for discovery violations. The imposition of sanctions is within the trial court's discretion. *Kubicheck*, 2013 IL App (3d) 110157, ¶ 30. When determining "what sanction, if any, to apply," a trial court should consider the following factors:

> "(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." *Shimanovsky*, 181 Ill. 2d at 124.

¶ 114 1. *Key Evidence Concerning Plaintiff's Weight*

¶ 115 Plaintiff first argues defendant committed a discovery violation because "Dr. Paul withheld [plaintiff's] weight record that was discovered on the inner jacket of [plaintiff's medical] file." The record shows that while cross-examining Dr. Zimmerman, plaintiff's counsel showed Dr. Zimmerman plaintiff's "original file" and directed his attention to a "sticky note" on the "inside cover." The sticky note had no name or other identifying information and set forth a series of numbers. Plaintiff's counsel questioned Dr. Zimmerman regarding the content of the note, which the record shows contained the following information:

> "5 – 91
>
> 10 – 182
>
> 12 – 222
>
> 14 – 257
>
> 15 – 241 [(271 according to defendant)]

16 8 mo – 297

20 – 327”

¶ 116 Following trial, plaintiff raised the issue of the “sticky note” in his posttrial motion and argued that defendant had purposefully failed to disclose key evidence. As a sanction for defendant’s alleged violation, plaintiff asked the court to enter a judgment notwithstanding the verdict; to strike the verdict, enter a directed verdict for plaintiff on the issue of negligence, and grant a new trial on causation and damages only; or strike the jury verdict and grant plaintiff a new trial. The trial court denied defendant’s motion. Following our review of the record, we find no abuse of discretion by the trial court.

¶ 117 Here, the record indicates the sticky note was found contained within Dr. Paul’s “original file” for plaintiff. There appears to be no dispute between the parties that the numbers on the sticky note represented plaintiff’s ages and corresponding weights from both before and well after his treatment with Dr. Paul. The source of the data in the note is unknown; however, we agree with defendant’s assertion that it appears to correspond with ages and weights for plaintiff that are set forth in his medical records and of which both parties were aware. The note does not reflect that Dr. Paul recorded plaintiff’s weight during his treatment of plaintiff more times than was otherwise shown in his properly disclosed medical records. Thus, while the sticky note itself appears to have been a surprise to plaintiff, its contents were not. Similarly, because the information in the note was available to plaintiff, we can find no prejudice. Additionally, the record does not reflect bad faith by defendant in failing to disclose the note. Given the circumstances presented, the trial court committed no error in denying plaintiff’s requested sanctions of a judgment notwithstanding the verdict or a new trial.

¶ 118 2. *Dr. Zimmerman's Notes*

¶ 119 Second, plaintiff argues he was entitled to a new trial based on Dr. Zimmerman's failure "to produce four pages worth of calculations he performed prior to his discovery deposition." At trial, plaintiff moved to bar Dr. Zimmerman's testimony on the basis that his notes were not produced. Plaintiff asserted that the notes involved "calculations" Dr. Zimmerman did "based on the amount of steroids he believed [plaintiff] was given." Defendant's counsel responded that Dr. Zimmerman was "not going to give opinions with respect to any aspect of dosing or standard of care." He asserted that Dr. Zimmerman's testimony would be "that there's no correlation between the treatment with steroids and [plaintiff's] weight gain, period" and that he was "not going to base his testimony on any amount of steroids given to [plaintiff]."

¶ 120 Upon questioning by the trial court and the parties, Dr. Zimmerman stated that the undisclosed material contained what he wrote down regarding "the amount of steroids" given to plaintiff as he "was just going through" a copy of plaintiff's medical record. He asserted the numbers in his notes were "verbatim" from the record he reviewed, and there was "no calculation that's different." Dr. Zimmerman noted that the record was "fairly voluminous" and he wanted to have the information "in one place *** so that [he] could think about that dose." Further, he testified that his opinions were not affected by the amount of steroids given to plaintiff.

¶ 121 Ultimately, the trial court ruled that Dr. Zimmerman could testify, stating as follows:

> "Well, I am going to allow him to testify. I don't want to hear anything about amounts of steroids, anything of that nature.
>
> I do think that these notes should have been turned over. I don't understand what

happened, and I am going to let [plaintiff's counsel] bring that out in front of the jury.

* * *

I don't want to hear anything about the amounts of steroids that were given either way, and I want it very limited as to the areas in question that are covered in here."

¶ 122 In this case, although a discovery violation did occur, the record reflects no abuse of discretion by the trial court in resolving the matter. The court questioned Dr. Zimmerman and determined that the undisclosed notes were matters contained within plaintiff's disclosed medical records regarding steroid doses. Dr. Zimmerman asserted his opinions were not affected by the amounts of steroids plaintiff received. Although the trial court determined Dr. Zimmerman could testify, it prohibited any discussion of "amounts of steroids that were given." On appeal, plaintiff has failed to demonstrate that he suffered any prejudice due to the discovery violation that occurred or the trial court's response. As a result, the circumstances presented do not entitle plaintiff to a new trial.

¶ 123 3. *Dr. Wolf's Notes*

¶ 124 Third, plaintiff contends he was also entitled to a new trial based on defendant's failure to disclose notes prepared by Dr. Wolf following his review of plaintiff's medical records. At trial, Dr. Wolf testified that the day before his testimony, he prepared a summary of the results of plaintiff's pulmonary function tests from Dr. Paul's records. Defendant raised no objection to Dr. Wolf's testimony at trial but did raise the issue in his posttrial motion, which the trial court denied.

¶ 125 Once again, we find no abuse of discretion by the trial court. Dr. Wolf's notes contained only a summary of information found in previously disclosed records. Plaintiff did not object to Dr. Wolf's testimony regarding the notes at trial and, on appeal, has not argued or shown any prejudicial effect from the lack of disclosure or Dr. Wolf's testimony. Accordingly, the circumstances presented do not warrant a new trial.

¶ 126 F. Whether the Jury's Verdict Was Against the Manifest Weight of the Evidence

¶ 127 On appeal, plaintiff further argues that the trial court erred in denying his motion for a judgment notwithstanding the verdict because the jury's verdict was against the manifest weight of the evidence. We note, however, that although plaintiff requests a judgment notwithstanding the verdict, the manifest weight of the evidence standard does not apply to such motions.

¶ 128 A motion for a judgment notwithstanding the verdict "should be granted only when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." (Internal quotation marks omitted.) *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37, 983 N.E.2d 414. "The standard for entry of judgment *n.o.v.* is a high one and is not appropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." (Internal quotation marks omitted.) *Id.* On appeal, we review *de novo* a trial court's decision to grant or deny a motion for a judgment notwithstanding the verdict. *Id.*

¶ 129 By contrast, "on a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Id.* ¶ 38. "A verdict is against the manifest weight of the evidence only where the opposite result is clearly

evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Id.* "This court will not reverse the trial court's ruling on a motion for a new trial unless it is affirmatively shown that the trial court abused its discretion." *Id.* "In determining whether the trial court abused its discretion, we consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 26, 14 N.E.3d 1278. "Conflicts in the evidence and disagreements among experts do not make a verdict against the manifest weight of the evidence." *Downey v. Dunnington*, 384 Ill. App. 3d 350, 389, 895 N.E.2d 271, 303 (2008).

¶ 130 Before the trial court, plaintiff filed a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. He challenged the jury's verdict arguing both the standard applicable to a motion for a judgment notwithstanding the verdict and the standard applicable to a motion for a new trial. The trial court denied plaintiff's motion under both standards. On review, we consider only whether the jury's verdict was against the manifest weight of the evidence as that is the only challenge to the jury's verdict raised by plaintiff on appeal.

¶ 131 In an action for medical negligence, the plaintiff must prove the following: "the proper standard of care against which the defendant's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the defendant's want of skill or care." *Garley v. Columbia LaGrange Memorial Hospital*, 351 Ill. App. 3d 398, 404, 813 N.E.2d 1030, 1036 (2004). "Unless the negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant's deviation from that standard." *Id.* at 404-05.

¶ 132 Here, we find no abuse of discretion by the trial court in determining that the jury's verdict was not against the manifest weight of the evidence. In particular, defendant presented evidence that plaintiff experienced severe asthma flare-ups that required the administration of steroids. He sought treatment when his asthma symptoms were unresponsive to his regular and rescue medications. Evidence showed plaintiff experienced symptoms of wheezing, coughing, and shortness of breath at times that he sought care from Dr. Paul and the clinic. Those symptoms were documented in Dr. Paul's handwritten records and not solely the "altered" records plaintiff challenges on appeal. Further, defendant presented expert testimony that pulmonary function tests performed on plaintiff supported a finding that plaintiff experienced severe asthma exacerbations. Defendant's experts also provided testimony that the amounts of steroids and the manner they were administered to plaintiff did not violate the standard of care. Although the record contains conflicting evidence, there was ultimately sufficient evidence presented to support the jury's verdict. An opposite conclusion is not clearly evident.

¶ 133 G. Juror Bias

¶ 134 Finally, on appeal plaintiff contends the trial court erred in refusing to dismiss a biased juror from the jury panel. The record reflects that towards the end of the trial, juror Peter Brusky reported to the court that he heard another juror, Gail Rexroad, make the following statement: " 'You want me to be unbiased, but, I'm sorry, a doctor saved my life. I can't be,' or, 'saved my husband's life. I can't be[.]' " In response, plaintiff's counsel asked that Rexroad be stricken from the jury panel for cause.

¶ 135 Juror Rexroad was then questioned by the trial court. She acknowledged that "a doctor did save [her] husband's life" and speaking with another juror about it; however, she de-

nied stating that she could not be "unbiased." When asked by the court if she thought she could be fair to both sides in the case, Rexroad responded, "Definitely, big time." She also agreed that she could "set aside" the matter with her husband and decide the case solely on its merits, stating, "Yeah, it has nothing to do with my husband, what he went through." The following colloquy also occurred:

> "THE COURT: And you don't know the law yet or anything else. So, obviously, you have not made your mind up.
>
> JUROR REXROAD: No, I haven't.
>
> THE COURT: Okay.
>
> MR. BRESNEY: Obviously, you can judge the actions of this doctor independently of your experiences of other doctors.
>
> JUROR REXROAD: Right. I mean, like I said, it has nothing to do, whole different—just whole different scenario to me."

The trial determined it would not "excuse [Rexroad] at [that] time."

¶ 136 The record next reflects that an off-the-record discussion took place. Thereafter, juror Heidi Bouvet, the individual to whom Rexroad had been speaking when making the statement at issue, was questioned by the trial court. Bouvet also denied that Rexroad stated she could not be "unbiased." She further explained their conversation as follows:

> "[H]ow that conversation started was we were talking about the [j]ury selection process, and there was a woman in the box with us behind us who flat out said, 'I don't trust doctors. I can't trust doctors. I don't trust doctors," and my son had cancer. We have had good experiences with doctors, and it came up and

[Rexroad] was like, 'Well, I could never say I don't trust doctors. A doctor saved my husband's life.' "

¶ 137 Following another break in the proceedings and an off-the-record discussion, the trial court made the following comments:

"All right, at the request of the parties, I met with Ms. Rexroad who is one of our [j]urors. She was upset visibly due to the other [j]uror reporting a conversation.

We talked again about the conversation. She reiterated that she wished to be a [j]uror, that she could be fair and impartial.

She stated to me she didn't know who made the allegation against her. She said she would not hold that against that person. We discussed the fact that maybe the other person had not listened to her whole story and her testimony as a [j]uror, her relating that she could be fair and impartial. She understood that.

I told her it was probably a misunderstanding, and she reiterated her wanting to remain on this [j]ury, and that she could be fair and impartial."

Plaintiff continued to request that Rexroad be stricken for cause, and the court denied that request.

¶ 138 "Litigants are entitled to an impartial panel of jurors who are free from bias or prejudice." *Addis v. Exelon Generation Co., L.L.C.*, 378 Ill. App. 3d 781, 792, 880 N.E.2d 685, 695 (2007). The standard for juror impartiality is whether the juror has such fixed opinions that he could not judge impartially. *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 20, 972 N.E.2d 351. "Mere suspicion of bias or impartiality is not evidence and does not disqualify a

juror." *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 48, 623 N.E.2d 246, 255 (1993). Whether a juror can be fair and impartial "involves a determination that must rest in sound judicial discretion." *Curtner*, 2012 IL App (4th) 110820, ¶ 21. "The trial court should inquire of the juror to discover as much information as possible." *Id.* "After the trial court has made an appropriate inquiry, it has wide discretion in deciding how to handle and respond to potential juror bias because it can appraise the juror face to face, something a court of review cannot do." *Id.*

¶ 139 Here, the trial court appropriately questioned Rexroad when presented with information that she had expressed an inability to be impartial. On examination, Rexroad denied stating that she could not be unbiased and clearly and consistently asserted that she would be impartial and resolve the case on its merits. Plaintiff's assertion on appeal that Rexroad gave equivocal responses regarding her impartiality or bias is not supported by the record. We note that plaintiff also asserts that the court agreed that Rexroad was biased and dismissed her from the jury before it "apparently changed its mind," that Rexroad had an "emotional outburst," and that Rexroad "violated the trial court's order and abandoned her place among the sequestered jury." However, these "facts" are not contained in the record on appeal. Ultimately, the record reflects the court acted appropriately in questioning Rexroad and does not reflect an abuse of discretion.

¶ 140 III. CONCLUSION

¶ 141 For the reasons stated, we affirm the trial court's judgment.

¶ 142 Affirmed.