

FOURTH DIVISION  
November 14, 2013

No. 1-12-2717

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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MICHAEL MAKs,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 L 009386
	)	
DANIEL T. IVANKOVICH, M.D.,	)	
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
NORMAN J. BARRY, JR., as counsel for defendant	)	
Daniel T. Ivankovich, M.D.,	)	Honorable
	)	Susan F. Zwick,
Contemnor-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.  
Justices Lavin and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's order granting plaintiff's motion for sanctions is reversed and the order of contempt is vacated. The trial court abused its discretion by sanctioning defendant and defendant's attorney for failure to comply with discovery rules because plaintiff's counsel cannot claim to have lacked knowledge of the existence of certain documents where plaintiff's counsel was in actual possession of the disputed documents during the deposition of a defense witness.

¶ 2 Plaintiff Michael Maks filed a medical malpractice claim against defendant Daniel T. Ivankovich, M.D., and West Suburban Medical Center (West Suburban). Plaintiff voluntarily dismissed West Suburban before trial, and West Suburban is no longer a party to these proceedings. (Hereinafter all references to defendant are to Ivankovich only.) Plaintiff's complaint alleged defendant was negligent in the treatment of plaintiff's broken heel. Defendant placed a cast on the injury. Plaintiff later learned the bone misaligned when it healed, requiring a surgical repair. Plaintiff's complaint alleged defendant should have initially treated plaintiff's injury surgically. The parties engaged in discovery during which plaintiff requested copies of images generated from a "CT" or "CAT" scan of his injured heel. During trial, plaintiff's attorney learned defendant's attorney was in possession of images that were generated from that CT scan that plaintiff's attorney claimed he did not possess and did not know existed. The trial court declared a mistrial and entertained plaintiff's motion for sanctions pursuant to Illinois Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. Jul. 1, 2002)) and petition for costs and attorney fees. The trial court granted plaintiff's motion and awarded costs and fees totaling \$44,677.09. The court later held defendant's attorney in civil contempt for failing to pay the judgment. For the following reasons, we reverse, vacate the contempt order, and remand for further proceedings.

¶ 3

### BACKGROUND

¶ 4 This appeal arises from the trial court's orders surrounding defendant's alleged discovery violation. Plaintiff first obtained some CT scan images from West Suburban before filing his lawsuit. Plaintiff received four pages of CT scan images accompanied by a report by the radiologist, Dr. Navraj Grewal. The images plaintiff claimed he received were the original or "native" images generated by an x-ray on the axial (vertical view) plane. A computer uses the native images to "reconstruct" images in additional planes of vision, specifically the sagittal (side view) and coronal (frontal view) planes. Plaintiff sent the images he received to Dr. Robert Mills for review. Dr. Mills opined that plaintiff's injury would have best been treated surgically. Plaintiff filed his complaint and subsequently filed a report by Dr. Mills pursuant to section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2008)). Dr. Mills' report states that "after review of the forwarded CT scan and radiographic images \*\*\* this intraarticular fracture \*\*\* would have been best served treated surgically." The report stated that absent contraindication for surgical fixation, it is below the standard of care to treat this in a nonsurgical manner. The report does not mention any inadequacy with regard to the CT scan images of plaintiff's injury. The report only states that the severity of plaintiff's injury is shown on early x-rays, and opines that the severity of the injury was not the result of noncompliance with instructions as much as it was a result of the initial trauma.

¶ 5 During discovery plaintiff served defendant a request pursuant to Illinois Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)) for production of documents, asking for "[a]ll photographs, slides or motion pictures taken subsequent to the alleged occurrence of the plaintiff

or other physical objects involved or of the scene of the alleged occurrence” and “[a]ll data, documents or computer information as to the physical or mental condition of the plaintiff(s) prior and subsequent to the alleged occurrence, including, *inter alia*, injuries sustained in other accidents.” Defendant responded on February 11, 2010, to both requests as follows: “None other than as may be included in plaintiff’s medical records, in materials obtained from plaintiffs’ [sic] attorneys, in materials obtained pursuant to subpoena with notice to all parties, and in the pleadings and discovery responses of the parties to this action.”

¶ 6 On March 15, 2010, plaintiff served defendant another request to produce asking for a complete copy for inspection and copying of any and all medical records of plaintiff, including copies of any radiological studies. On April 21, 2010, plaintiff filed a motion to compel defendant to answer the supplemental discovery *instante* and on the same day defendant filed his response to plaintiff’s supplemental Rule 214 request to produce. Defendant responded, in pertinent part, to plaintiff’s supplemental request as follows: “[T]his defendant is in possession of plaintiff Michael Maks’ medical records and imaging studies from \*\*\* West Suburban Medical Center \*\*\*. Copies of said records and imaging studies are available for copying at plaintiff’s attorney’s expense.”

¶ 7 On August 27, 2010, plaintiff filed his answers to interrogatories pursuant to Illinois Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. May 30, 2008)). Plaintiff identified Dr. Robert Mills and Dr. Richard Lange as plaintiff’s experts. Pursuant to Rule 213(f), plaintiff disclosed that Dr. Mills was expected to testify that defendant deviated from the standard of care by not performing a timely operative fixation of plaintiff’s significantly displaced calcaneus fracture.

The Rule 213(f) answer stated that the radiographic images of plaintiff's fracture show a degree of displacement and depression and that it was best served by treating it surgically in a timely fashion. It goes on to say: "The CAT scan, although not ideal, does show displacement in its axial views. The conventional films show the joint depression but, in addition, show the lateral wall extrusion, which is considered a lateral wall blowout. This also should have made [defendant] understand that this patient needed surgery." Plaintiff also disclosed that Dr. Lange was expected to testify as follows:

"[Defendant] deviated from the standard of care by not arranging for operative fixation surgery \*\*\*. \*\*\* [Defendant] fail [*sic*] below the standard of care because he misinterpreted the severity of the fracture displacement and had poor decision making with very inadequate case scans and further failed to provide [plaintiff] with adequate information to participate in an informed way with the treatment decision making. The original plain films taken after the accident show that there is a significant fracture and lateral wall fracture. The CAT scan merely would assist in determining the specifics of this type of surgery. Although the CAT scan was inadequate, [defendant] had enough information to know that [plaintiff] was a surgical candidate. The original CAT scans could have been reformatted in order to get additional images to be able to see the specifics of the injury of the foot."

¶ 8 Plaintiff attached to his Rule 213 answers to interrogatories a report by Dr. Lange written to plaintiff's attorney. In his report, Dr. Lange writes "I found the CT scan to be of very poor quality, with inadequate imaging sequences which, in my opinion, led to a misinterpretation of the severity of the fracture by the radiologist. \*\*\* The care provided by [defendant] falls below the standard of care, in my opinion, by misinterpreting the severity of the fracture displacement, decision-making with a very inadequate CT scan, and very inadequate documentation that the patient was provided with adequate information to participate, in an informed way, in the treatment decision-making."

¶ 9 On September 7, 2010, defendant filed a motion to bar one of plaintiff's two expert witnesses as cumulative. Defendant argued that plaintiff disclosed that each witness would opine that defendant deviated from the standard of care by not performing or arranging for operative fixation of plaintiff's fracture within the first 21 days after the injury. Defendant attached plaintiff's Rule 213 response to interrogatories to his motion to bar, including Dr. Lange's report written to plaintiff's attorney. The trial court denied the motion on September 14, 2010.

¶ 10 On November 15, 2010, defendant filed his Rule 213 disclosures. Defendant disclosed Dr. Steven Kodros as a witness expected to testify, based in part on his review of "all imaging studies produced in discovery," that the images are "of sufficient diagnostic quality."

¶ 11 On December 3, 2010, plaintiff filed a notice pursuant to Rule 237 (Ill. S. Ct. R. 237 (eff. Jul. 1, 2005)) to produce certain documents prior to trial. Rule 237 reads in part as follows: "The notice also may require the production at the trial or other evidentiary hearing of the originals of those documents or tangible things previously produced during discovery." Ill. S. Ct.

R. 237 (eff. Jul. 1, 2005). Plaintiff's notice to produce prior to trial listed any and all medical reports, including x-rays, any and all demonstrative evidence of any type which might be utilized at the time of trial, anything upon which any witness relied or consulted when formulating opinions with regard to this lawsuit, any thing upon which any witness will rely in giving testimony, and originals "of each and every item called for in any request or notice to produce, interrogatories or other discovery issued with request [*sic*] to this lawsuit, whether or not said item was previously produced."

¶ 12 Plaintiff deposed Dr. Kodros on January 4, 2011, and Dr. Grewal in March 2011. At the hearing on plaintiff's motion for sanctions, fees, and costs, the radiologist, Dr. Grewal, testified that axial imaging means that the "native" image was acquired in the axial plane, and reconstructions are done in other planes, but that information is not included in his radiology report. Dr. Grewal testified that he displayed images from different series, or reformatted images, during his deposition. Dr. Grewal testified that in his deposition, he talked about looking at the sagittal and coronal images and that he took them all into account when he prepared his radiology report. Dr. Grewal did not recall being asked to make copies of the reformatted images he displayed during his deposition.

¶ 13 On May 16, 2011, plaintiff filed a motion to compel directed solely to West Suburban seeking an order for it to respond to a previously served discovery request. Plaintiff served the discovery request at issue on October 1, 2009, and sought all x-rays, photographs, slides, or anything similar of plaintiff and the original medical records of plaintiff in West Suburban's possession, including x-ray reports, x-ray data and any and all information of any nature

whatsoever. Plaintiff attached to the motion an email to West Suburban's attorney referencing an x-ray of the right heel and foot taken on August 13, 2007, a CAT scan of the lower extremity taken on August 14, 2007, and an x-ray taken of the heel and foot on September 26, 2007. On May 25, 2011, the trial court granted plaintiff's motion and entered an order for West Suburban to produce the x-rays listed in the attachment for copying at plaintiff's expense. On September 14, 2011, the trial court entered another order granting another motion by plaintiff, ordering West Suburban to produce radiology studies and images reviewed by its expert.

¶ 14 Defendant's motion *in limine* number 10 sought to identify and limit plaintiff's claimed standard of care violations. Defendant argued that during discovery, plaintiff identified only one act or omission on the part of defendant that allegedly violated the standard of care: failing to perform open reduction internal fixation surgery or to refer plaintiff to a surgeon capable of performing that surgery. Defendant's motion identified several other potential criticisms of defendant that were not identified as alleged violations of the standard of care and asked to bar those criticisms for the reason that plaintiff failed to proffer any evidence that the criticisms identified in the motion rose to the level of a standard of care violation. None of the "criticisms" in defendant's motion *in limine* number 10 included a failure to obtain additional images of plaintiff's injury. Defendant's motion *in limine* number 13 sought to bar plaintiff's expert Dr. Lange from testifying in any way regarding the August 14 CT scan. Defendant's motion asserted that Dr. Lange testified in his deposition that the August 14 CT scan, taken at West Suburban when plaintiff was transported there after injuring his ankle at work, was not of a diagnostic quality and could not be read, and was not sufficient for him to identify the degree of



displacement and depression of the fracture. The motion stated that because Dr. Lange believes the August 14 CT scan could not be read and is not of diagnostic quality, he did not use it in any way in explaining his opinions at his deposition; therefore, the motion argues, under Illinois Supreme Court Rule 213(f)(3), Dr. Lange must be barred from expressing any opinions about the August 14 CT scan or relying on it in any way.

¶ 15 Trial began on September 27, 2011, with matters prior to jury selection. The parties did not “exchange 237s.” On September 28, 2011, the trial court granted plaintiff’s motion to voluntarily dismiss West Suburban.

¶ 16 At trial, during cross-examination of plaintiff’s expert, defendant’s attorney indicated that additional images from plaintiff’s CT scan existed which plaintiff’s expert had not reviewed. Plaintiff objected and, after a brief sidebar, the trial court permitted the case to proceed. On October 5, 2011, plaintiff filed his motion *in limine* number 43 seeking an order barring defendant’s expert Dr. Kodros from testifying that he reviewed any images other than axial views of plaintiff’s CT scan, which were the only images plaintiff’s counsel claimed he received. The motion asserted that the medical records produced both by defendant and West Suburban refer to a single radiology report, and that report refers to only axial views of the CT scan performed on August 14, 2007. The motion notes plaintiff’s two prior motions to compel West Suburban to produce complete radiology studies and asserts that each time the radiology studies West Suburban produced contained 4 pages of axial images taken on August 14, 2007.

¶ 17 The trial court declared a mistrial. The court entered an order for West Suburban to tender all images of plaintiff for reproduction. The court reopened discovery limited to

controlled expert witness discovery pertaining to the August 14, 2007 CT scan and entered a discovery order. In an answer to supplemental interrogatories, defendant stated that he is in possession of all imaging studies from West Suburban as previously disclosed. Defendant's response listed the imaging studies as including an August 14, 2007 CT scan of the right foot consisting of 12 sheets including axial, sagittal and coronal views. Defendant's response also states that copies of the listed imaging studies "have previously been produced and are in plaintiff's attorney's possession."

¶ 18 At the evidentiary hearing, plaintiff's counsel stated their position was that plaintiff did not know additional images existed before trial. One of plaintiff's attorneys testified that after receiving defendant's expert's notes regarding the CT scan during the expert's deposition, plaintiff's attorney found the note contradictory to what had been produced in discovery and took steps to ensure that plaintiff's attorneys had all of the CT scan images. Plaintiff's attorney filed a motion to compel in May 2011, which the trial court granted. It was plaintiff's expert's expression of disbelief that only 4 pages of CT scan images in the axial view existed which also prompted counsel's concern that additional images existed and his filing of a motion to compel. As a result of that motion to compel, West Suburban sent CT and flat x-ray images to a copying service, and plaintiff's counsel received copies of the same four pages of CT scan images that were already in their possession.

¶ 19 Plaintiff's counsel agreed that the radiologist who reviewed the August 14 CT scan images testified in his deposition that he reviewed both axial views of the CT scan, as well as reformatted sagittal and coronal views of the CT scan. Plaintiff's counsel testified that despite

the radiologist's testimony regarding reformatted images, he did not know as a fact that images of sagittal and coronal views of the CT scan existed before trial. Plaintiff's counsel later admitted he did not ask Dr. Kodros to display the films he reviewed in forming his opinions. Dr. Kodros testified he had his entire file with him at the deposition. Dr. Kodros also had his notes at the deposition, which he provided to plaintiff's attorney and in which he wrote what CT scan images he reviewed. Dr. Kodros testified that his notes stated that he reviewed CT scan images from August 14, 2007, which included axial, sagittal, and coronal views. Plaintiff's counsel agreed that nothing in plaintiff's response to defendant's Rule 214 request would have alerted defendant's attorney to the fact plaintiff only had 4 pages of images. Plaintiff's counsel did not testify to what he subjectively understood from defendant's expert's testimony regarding axial, sagittal, and coronal views of the August 14 CT scan, but agreed that it was possible that a reader would know that those images existed from the testimony. Plaintiff's counsel did not recall whether West Suburban's counsel brought exhibits to trial prior to West Suburban being dismissed but did not ask West Suburban's counsel to view West Suburban's exhibits pursuant to Rule 237 before the start of trial.

¶ 20 Defendant's expert testified that the CT scan images defendant's attorney provided to him included not only an axial view, but also sagittal and coronal images from the scan. At trial, defense counsel asked West Suburban's attorney to leave the original CT scan films with him after West Suburban was dismissed because it was his understanding that there might be a question as to the quality of the copies that were produced in discovery. Defense counsel's impression of plaintiff's expert's criticism of the CT images he received was that the images

were blurry or otherwise nondiagnostic, not that the scan was incomplete or missing sequences. Counsel testified Dr. Lange did not express his impression that the scan was missing images directly to counsel, and counsel failed to appreciate that was the nature of his criticism. Defendant's attorney testified that Dr. Grewal displayed all 12 sheets of images from the August 14 CT scan at his deposition when plaintiff's attorney asked Dr. Grewal to "put up the CT scan." Those 12 sheets included the axial, and reformatted sagittal and coronal views. Defense counsel testified that plaintiff's attorney knew that the scan images displayed at Dr. Grewal's deposition were defense counsel's copy, and plaintiff's counsel never indicated there were missing images from West Suburban's production.

¶ 21 On May 23, 2012, the trial court entered a written memorandum order granting plaintiff's motion for sanctions and costs as found in plaintiff's motion *in limine* number 43, and ordering plaintiff to submit a petition for fees and costs claimed in conjunction with the failure to disclose the full CT scan by defendant. The trial court held that defendant had an obligation to supplement his discovery response under Rule 214.

¶ 22 Plaintiff filed the petition for fees and costs on June 6, 2012. On July 12, 2012, the trial court entered a memorandum order awarding plaintiff \$44,677.09 in attorney fees and costs to be paid by defendant or defense counsel. On August 20, 2012, the trial court entered an order finding one of defendant's attorneys, Norman J. Barry, Jr., in civil contempt for the failure and refusal of defendant and defense counsel to comply with the July 12, 2012 order. The court imposed a penalty on Mr. Barry in the amount of \$1.

¶ 23 This appeal followed.

¶ 24

ANALYSIS

¶ 25 Defendant argues the trial court abused its discretion in finding that defendant committed a discovery violation because (1) defendant was not responsible for West Suburban's error in providing only 4 of 12 pages of CT scan images; (2) the court had no basis to conclude that plaintiff sought to copy defendant's copy of the CT scan images, which included all 12 pages; and (3) defendant's attorney did not know that West Suburban failed to provide a complete set of images from the CT scan. "To determine whether a sanction order was just, a court must look to the conduct that gave rise to the sanction order and to the effect of that conduct on the parties." *Hartnett v. Stack*, 241 Ill. App. 3d 157, 173 (1993). "The imposition of sanctions against a party for noncompliance with discovery rules is a matter within the broad discretion of the trial court." *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, ¶ 22. "An abuse of discretion occurs when no reasonable person could agree with the trial court." *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 366 (2011).

¶ 26 Based on the record before us, we find that defense counsel's conduct giving rise to the trial court's sanction was not a violation of any discovery rule. Defendant's conduct had no effect on plaintiff's ability to obtain the images. Defendant did not hide their existence or location, and defendant did not hinder plaintiff's ability to obtain them. Accordingly, we hold that the trial court abused its discretion in sanctioning defendant and his attorney.

¶ 27 The trial court found that defendant had an obligation to supplement his prior response to plaintiff's request for production under Rule 214. We disagree. The trial court relied on the committee comments to Rule 214. "Committee comments to supreme court rules are not binding

but they may be used to determine the application of a rule.” *In re Estate of Burd*, 354 Ill. App.

3d 434, 437 (2004). The comments at issue read, in pertinent part, as follows:

“A party who has knowledge of documents, objects or tangible things responsive to a previously served request must disclose that information to the requesting party whether or not the actual documents, objects or tangible things are in the possession of the responding party. To the extent that responsive documents, objects or tangible things are not in the responding party’s possession, the compliance affidavit requires the producing party to identify the location and nature of such responsive documents, objects or tangible things. It is the intent of this rule that a party must produce all responsive documents, objects or tangible things in its possession, and fully disclose the party’s knowledge of the existence and location of responsive documents, objects or tangible things not in its possession so as to enable the requesting party to obtain the responsive documents, objects or tangible things from the custodian.” Ill. Sup. Ct. R. 214, Committee Comments (adopted June 1, 1995).

¶ 28 There is no dispute that defendant’s initial response to plaintiff’s request for production was adequate. Defendant’s initial discovery response was not the basis of the trial court’s order. The trial court found that the issue was: “once it was evident that opposing counsel did not

possess the entire radiographic films, was [defendant] under a duty to disclose the addition [sic] CT scans in his possession?” The trial court found it was evident that opposing counsel did not have the complete set of images “with the repeated requests and eventual motions directed toward West Suburban.” The trial court’s order based on these facts is an abuse of discretion because plaintiff’s motions directed at West Suburban did not trigger any obligations upon defendant under Rule 214. See *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶23 (“a trial court can abuse its discretion \*\*\* by applying the wrong legal standard [citation] or by using the wrong legal criteria”).

¶ 29 Plaintiff’s motions to compel were directed at West Suburban. West Suburban arguably violated the trial court’s discovery rules and orders when it failed to provide plaintiff with a complete set of CT scan images in response to plaintiff’s initial request and in response to orders on plaintiff’s subsequent motions to compel. West Suburban’s shortcomings are not attributable to defendant or his attorney, nor can they be blamed for them. The trial court acknowledged that plaintiff “repeatedly sought additional CT scans and radiographic images from a co-defendant, who by statute, had the duty and authority to maintain the original images.” The court sanctioned defendant because his attorney “knew of this issue, had a complete set of films, and did not advise either plaintiff or co-defendant they would surrender them.” The flaw in the trial court’s judgment is that defense counsel had no legal obligation under Rule 214 to surrender his CT images to plaintiff.

¶ 30 Defendant had already disclosed his knowledge of documents responsive to plaintiff’s discovery request when he produced them at Dr. Grewal’s deposition and plaintiff’s attorney was

freely allowed to examine them and question the witness about them but failed to do so.

Defendant produced all of the disputed images at Dr. Grewal's deposition. The CT images displayed at Dr. Grewal's deposition were defense counsel's copy, which plaintiff agreed could be sent to Dr. Grewal's attorney in preparation for the deposition. Plaintiff's attorney failed to identify each CT scan image, have it marked as an exhibit, and have Dr. Grewal discuss his findings as to each. All plaintiff's counsel had to do then was to get copies of all of the images attached to the deposition. Defense counsel had no obligation to educate plaintiff's counsel about the materials that were in plaintiff's counsel's hands in front of a witness competent to testify about them. See *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 538 (1998) ("We decline to impose upon counsel any legal, moral, or professional obligation of any kind to inform her opponent of weaknesses in the opponent's case, witnesses, or proposed evidence.").

¶ 31 Plaintiff knew the nature of the documents. Plaintiff conducted two depositions of two defense witnesses who described their reliance on the documents--specifically the sagittal and coronal images of plaintiff's CT scan--to formulate their opinion that plaintiff's injury was not indicated for surgery. Plaintiff knew the location of the documents. Plaintiff filed two motions to compel against the legal custodian to obtain them. The purpose of the rule with which the trial court found defense counsel did not comply is to "enable the requesting party to obtain the responsive documents \*\*\* from the custodian." Defendant was not the custodian of the CT images, West Suburban was. Defense counsel's "conduct" did not contribute in any way to plaintiff's counsel's failure to recognize and secure the documents. *Stack*, 241 Ill. App. 3d at 173. See also Jeffrey S. Kinler, Jay E. Grenig, *Civil Discovery, Responding to Discovery*



*Requests*, in Illinois Law & Practice § 14:25 (10 Ill. Law & Prac. § 14:25) (“Generally, this duty requires that a party supplement a prior response to a production request if the party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process.”). Here, if plaintiff was missing CT scan images, the “additional or corrective information,” *i.e.*, the existence of additional scan images, was made known to plaintiff’s counsel during the discovery process when defendant’s witnesses testified they relied on those additional images, and defense counsel provided all of those images for use at the deposition of the radiologist who examined them. There was nothing more defendant could do to enable plaintiff to obtain the images from West Suburban. Ill. Sup. Ct. R. 214, Committee Comments (adopted June 1, 1995). The trial court’s finding that defendant violated Rule 214 was an abuse of discretion.

¶ 32 Having found that the trial court abused its discretion in finding that defendant committed a discovery violation, we do not need to address the sufficiency of plaintiff’s petition for fees and costs or the trial court’s actual sanction. Defendant’s conduct was not sanctionable. The trial court’s order finding that the defense committed a discovery violation and imposing plaintiff’s costs and attorney fees as a sanction is reversed.

¶ 33 In light of the foregoing, the trial court’s August 20, 2012 order finding defendant’s attorney in civil contempt is vacated. “[C]ivil contempt occurs when a party fails to do something ordered by the trial court, resulting in the loss of a benefit or advantage to the opposing party.” *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶20. “Contempt of

court can result from a party's failure to comply with the terms of a court order. [Citation.]

Persons subject to the order of a court having jurisdiction must obey the order until it is reversed by a reviewing court or set aside or modified.” *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶62. Our disposition of this case renders defense counsel's compliance with the trial court's order moot. In light of our disposition, his conduct did not result in the loss of a benefit or advantage to plaintiff. Plaintiff is not entitled to recover fees or costs because no discovery violation occurred. “Moreover, a sanction must be vacated when it is evident that the sanction imposed is no longer fulfilling its original, coercive function. [Citation.]” (Internal quotation marks omitted.) *In re Estate of Hayden*, 361 Ill. App. 3d 1021, 1029 (2005).

¶ 34 Finally, defendant's request that this matter be remanded to a different trial judge is denied. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460 (2006), is inapposite. There, the court held that “[b]ecause the dismissal was disproportionate to plaintiffs' misconduct and came without warning, it was an unjust sanction. \*\*\* Accordingly, we reverse the dismissal order and remand the cause for further proceedings with a different circuit court judge, which may include a trial on the merits.” *Id.* at 471. Here, the trial judge conducted a lengthy evidentiary hearing on plaintiff's motion for sanctions. In light of our holding, there is no need for additional proceedings on the issue of sanctions. The matter may proceed with the court's order for limited discovery and trial.

¶ 35

## CONCLUSION

¶ 36 For all of the foregoing reasons, the trial court's judgment is reversed, the order of contempt is vacated, and the cause is remanded for further proceedings consistent with this order.

1-12-2717

¶ 37 Reversed, order vacated, and remanded.