2016 IL App (1st) 141693-U

FIRST DIVISION
April 8, 2016

No. 1-14-1693

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETER D. KASDIN, LTD., a professional corporation, and PETER D. KASDIN, individually, Plaintiffs-Appellants, v. REGINA P. ETHERTON, individually, and REGINA P. ETHERTON & ASSOCIATES, LLC, an Illinois limited liability company, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, No. 05 L 9745 Honorable Patrick J. Sherlock, Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment of the circuit court affirmed where court applied the correct burden of proof for lost profit damages, did not abuse its discretion in concluding that plaintiffs' Rule 213(f) disclosures inadequately disclosed witness as either a lay or expert witness to testify regarding lost profits, and did not abuse its discretion in barring witness's testimony as a discovery sanction pursuant to Rule 219(c).

¶ 2 Regina Etherton worked as a lawyer for Peter Kasdin at his personal injury law firm for nearly two decades before leaving in 2005 to start her own firm. Shortly thereafter, Kasdin and his firm (plaintiffs) sued Etherton and her firm (defendants) for slander, breach of fiduciary duty, and tortious interference with prospective economic advantage. In this suit, plaintiffs alleged, *inter alia*, that Etherton convinced certain clients to discharge the Kasdin firm upon her separation from the firm and to hire her instead.

Shortly before a jury trial was scheduled to begin, the circuit court heard arguments on the parties' various motions *in limine*, and determined that plaintiffs had failed to disclose Kasdin—or any other individual—as either a lay or expert witness with respect to lost profits, an element of proof required to sustain plaintiffs' breach of fiduciary duty and tortious interference claims. After hearing additional argument from the parties, the court barred Kasdin from testifying about lost profits during the trial. Immediately following this ruling, plaintiffs stated on the record that they wished to voluntarily dismiss their count for slander *per se* and waive their right to seek any damages beyond lost profits with respect to their claims for breach of fiduciary duty and tortious interference. The circuit court then entered judgment in favor of defendants on those two remaining claims.

¶ 3 On appeal, plaintiffs argue that the circuit court (1) erroneously shifted the burden of proving lost profits onto them and away from defendants; (2) incorrectly ruled that damages could only be proven by expert testimony; (3) abused its discretion in concluding that plaintiffs' Rule 213(f) (Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007)) disclosures failed to properly disclose Kasdin as either a lay or expert witness on lost profits; and (4) failed to consider the relevant factors before imposing the harsh sanction of barring plaintiffs' only witness prepared to testify regarding damages. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 For over a decade, the parties have been locked in a contentious struggle over the breakup of their professional relationship. Throughout their briefs, both sides accuse each other of engaging in a litany of unrelated discovery violations and tactical gamesmanship throughout the litigation, most of which have no bearing on our analysis of the discrete issues raised on appeal. The following brief discussion of the events leading up to the circuit court's contested rulings provides sufficient context for our opinion. Additional details are discussed, where relevant, in our analysis.

¶ 6 Plaintiffs commenced this action on September 6, 2005, asserting claims for slander *per se*, breach of fiduciary duty, and interference with prospective economic advantage. Plaintiffs alleged that Kasdin was the sole owner and managing officer of his law firm, and that Etherton was an attorney employed by the firm to work on personal injury cases on behalf of clients who signed contingency fee agreements with the firm. According to plaintiffs, in early 2005, Etherton approached Kasdin seeking to change her status within the firm and, when he rejected her proposals, began to contact the firm's clients and referring attorneys to convince them to leave the firm and hire her instead. In these communications, plaintiffs claimed Etherton disparaged Kasdin, stated that she had been doing all of the work at the firm for years, represented that she was taking the firm's staff with her, and drafted letters for the clients to prepare discharging the Kasdin firm and transferring their case files to Etherton. On May 16, 2005, Etherton gave the Kasdin firm two week's notice of her resignation in writing, asked that all correspondence and inquiries relative to cases she was prosecuting be forwarded to her new law firm. Between May 17 and June 9, 2005, Kasdin alleged that 14 clients ended his firm's representation of their cases. In connection with each of their claims, plaintiffs sought a money judgment for compensatory

and punitive damages. In connection with their breach of fiduciary duty claim, they also sought a constructive trust over the fees collected by defendants on the client matters at issue.

¶ 7 Defendants filed affirmative defenses and counterclaims for breach of contract, promissory estoppel, and fraudulent misrepresentation, alleging that plaintiffs owed them at least $300,000 in unpaid fees. Defendants also moved to dismiss the complaint, contending, *inter alia*, that Etherton was at all times an independent contractor and not an employee of the Kasdin firm, and thus owed the firm no fiduciary duty. On June 6, 2006, the circuit court denied defendants' motions to dismiss.

¶ 8 While the motion to dismiss was pending, plaintiffs filed a motion for a preliminary injunction asking the circuit court to order that all income received by defendants in connection with the client matters in question be deposited into an escrow account, for a receiver to be appointed, and for defendants to be enjoined from initiating lien adjudication proceedings in the remaining cases. Following a hearing, the circuit court denied plaintiffs' motion.

¶ 9 Discovery was a contentious battleground spanning seven long years. Defendants first served plaintiffs with written Rule 213(f) interrogatories on August 8, 2006. Over four years later, plaintiffs were ordered to disclose their Rule 213(f)(1) and (f)(2) witnesses by December 1, 2010. Plaintiffs disclosed a total of 52 witnesses in their initial disclosures and 75 witnesses in their April 29, 2011 amended disclosures. Defendants raised a number of issues with these first disclosures, arguing that they improperly included many witnesses who plaintiffs only stated might testify at trial, failed to specify which individuals were (f)(1) as opposed to (f)(2) witnesses, and failed to provide accurate contact information.

The circuit court granted defendants' motion to strike plaintiffs' October 2011 supplemental disclosures and issued another order requiring all Rule 213(f)(1) and (f)(2)

witnesses be disclosed by October 31, 2013. Plaintiffs served their second supplemental disclosures on August 9, 2013 and defendants again moved to strike, citing the same sorts of deficiencies and this time moving for sanctions. Plaintiffs then filed their third supplemental disclosures on August 19, 2013, designating three expert witnesses. On August 22, 2013, the court struck and barred from testifying at trial all witnesses named by plaintiffs that were duplicative, in addition to those disclosed without accurate contact information. Plaintiffs then responded by providing defendants with a first amendment to their third supplemental disclosures. Defendants moved to strike this disclosure as untimely, resulting in one additional witness being barred from testifying. Finally, on January 31, 2014, plaintiffs served their fourth supplemental disclosures, disclosing three additional experts.

¶ 10 Plaintiffs' third supplemental disclosures are the at issue disclosures naming Kasdin as a witness. The disclosures were made pursuant to Rule 213(f)(1) and (f)(2), but did not specify what section of the rule Kasdin was designated under. In the disclosures, plaintiffs stated "[t]he testimony from Peter Kasdin will include fact and opinion testimony at trial within the scope of the subject matter and the documents and exhibits itemized below," followed by 102 separate subjects of testimony. The phrase "lost profits" did not appear in any of these topics, nor did the disclosures state that Kasdin would provide opinion testimony regarding lost profits.

¶ 11 Prior to trial, the circuit court granted defendants' motions *in limine* nos. 4 and 16, barring plaintiffs from arguing at trial that the proper measure of lost profits was the entire fee paid to defendants in connection with the client matters at issue or that it was defendants' burden to establish lost profits. Citing the general rule that an expert is required to testify regarding the calculation of lost profits, and concluding that plaintiffs failed to disclose Kasdin as an expert witness, the court also granted defendants' motion *in limine* no. 33, seeking to bar all lost profits

testimony. Upon hearing additional argument on the morning the jury trial was set to begin, the court reconsidered, concluding that it was possible for Kasdin to establish lost profits with his own lay opinion testimony. The circuit court nevertheless concluded that plaintiffs' disclosures were inadequate even to disclose Kasdin as a lay opinion witness on this topic.

¶ 12 Plaintiffs then voluntarily dismissed their count for slander *per se* and waived their right to seek any damages other than lost profits with respect to their claims for breach of fiduciary duty and tortious interference. The circuit court entered judgment on those two remaining counts on May 5, 2014 and plaintiffs timely filed their notice of appeal on June 3, 2014. Jurisdiction is proper pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 13 ANALYSIS

¶ 14 A. Burden of Proof and Measure of Lost Profits

¶ 15 Plaintiffs initially argue that the circuit court erroneously shifted the burden of proof onto them and away from defendants when it ruled that the proper measure of lost profits was not what defendants gained, but what plaintiffs' profits would have been if the client matters in question had stayed with the Kasdin firm.[1] "[Q]uestions regarding the burden of proof and whether it was applied correctly in the trial court are *** questions of law that are subject to *de novo* review on appeal," (*In re Marriage of Dhillon*, 2014 IL App (3d) 130653, ¶ 23 (citing *1350 Lake Shore Associates v. Healey*, 223 Ill. 2d 607, 627 (2006))), as are questions regarding the measure of damages upon which a jury's computation will be based (*Tri-G, Inc. v. Burke*,

[1] Defendants argue that plaintiffs forfeited this issue by failing to specifically appeal from the circuit court's rulings on defendants' motions *in limine* nos. 4 and 16. Although "[p]oints not argued are waived" (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)), plaintiffs raised the substantive issues underlying these orders, even if they failed to refer to the specific motions *in limine* in their brief. Because plaintiffs' position on these intertwined issues is apparent from their opening brief, we find no forfeiture.

Bosselman & Weaver, 222 Ill. 2d 218, 252 (2006)). Our review of these related issues is therefore *de novo*.

¶ 16 Plaintiffs do not dispute that, in connection with their claim for tortious interference with prospective economic advantage, the proper measure of damages is the Kasdin firm's lost profits. With respect to their claim for breach of fiduciary duty, however, they contend that the proper measure of lost profit damages is instead the benefit defendants received as a result of their wrongful conduct. Plaintiffs argue that, as its employee, Etherton owed the Kasdin law firm a duty of loyalty that she breached when she misappropriated the firm's business expectations. They note that one of the remedies they sought in their complaint for this breach of fiduciary duty is a constructive trust, which is designed to deprive the wrongdoer of ill-gotten gains, not to compensate the injured party. Plaintiffs argue that the law places the burden on defendants to account for any wrongful gains associated with Etherton's breach of fiduciary duty, including any setoffs from the gross fee income defendants received that may be necessary to establish defendants net profit from the client matters at issue.

¶ 17 As they did in their arguments before the circuit court, plaintiffs seek to divorce the burden and measure of relief associated with a constructive trust and apply it to a determination of lost profits. This is incorrect. Although a constructive trust may involve the return of money, it is a distinct equitable remedy,[2] not a form of money damages. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 78 (1994). The primary case plaintiffs cite, *Hill v. Names & Addresses, Inc.*, 212 Ill. App. 3d 1065 (1991) illustrates this distinction. In *Hill*, an employer claimed its former

[2] We note that defendants cite several cases regarding a party's ability to seek an accounting, an independent cause of action that plaintiffs in this case did not assert. Because an accounting and a constructive trust are also distinct concepts (compare *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 501 (1986) and *Eychaner v. Gross*, 202 Ill. 2d 228, 274 (2002)), these cases are of little value to our analysis.

employee breached her fiduciary duty to the company when she caused six customers to take their business to her new firm. *Id.* at 1070, 1073. Following a bench trial, the circuit court entered judgment for the employer, awarding it the following alternative remedies: (1) to accept the imposition of a constructive trust on gains wrongfully realized by the employee and her new employer, or (2) to receive damages equal to the employer's lost profits resulting from the employee's actions. *Id.* at 1073. In this case, the law governing the distinct equitable remedy of a constructive trust had no bearing on the burden of proof for lost profit damages. It was plaintiffs' burden to establish, as one element of their claim for breach of fiduciary duty, that they suffered damages proximately caused by defendants' breach. *DOD Technologies v. Mesirow Insurance Serivces, Inc.*, 381 Ill. App. 3d 1042, 1046 (2008). We conclude the circuit court did not erroneously shift the burden of proof on lost profit damages to plaintiff.

¶ 18 Two of defendants' additional arguments—that plaintiffs were barred by the law-of-the-case doctrine from seeking an equitable remedy, and that plaintiffs waived their claim to such relief—raise the separate issue of whether a constructive trust was even available to plaintiffs. Because the resolution of that issue has no bearing on whether the circuit court's rulings correctly stated the law with respect to lost profits, we need not consider those arguments.

¶ 19 B. Need for Expert Testimony

¶ 20 Plaintiffs next argue that the circuit court erred by requiring them to establish lost profits through expert testimony. As the sole owner of his firm, Kasdin contends that he was qualified to testify regarding its lost profits as a lay opinion witness. Defendants agree that lost profits are not always complex enough to require expert testimony, but claim the testimony needed to establish plaintiffs' damages in this case was not so simple. Although the parties expend considerable time and effort debating this issue, our review of the record indicates that it is not properly before us

on appeal. According to the transcript of the hearing held a week before trial, the circuit court initially granted defendants' motion *in limine* no. 33 because it concluded that expert testimony was likely required and plaintiffs failed to disclose Kasdin as a Rule 213(f)(3) expert witness. After hearing argument and reviewing additional authority submitted by the parties on the day trial was to begin, however, the court reconsidered its earlier ruling, stating: "I agree with the plaintiff that under the Illinois Rules of Evidence 701, Mr. Kasdin probably could testify to his lay opinion as to profitability in this case." The court nevertheless concluded that plaintiffs' disclosures were inadequate even to disclose Kasdin as a lay opinion witness on this topic. Because the circuit court did not ultimately require plaintiffs to establish lost profits through expert testimony, we need not reach this issue.

¶ 21 C. Adequacy of Plaintiffs' Rule 213(f) Disclosures

¶ 22 Plaintiffs additionally contend the circuit court abused its discretion when it ruled that their Rule 213(f) disclosures failed to adequately disclose Kasdin as either a lay or an expert witness to testify regarding lost profits. The rule requires a party, upon written interrogatory, to provide the identity and address of every witness who will testify at trial. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). For lay witnesses, the party must also specify "the subjects on which the witness will testify." *Id.* at 213(f)(1). For "controlled expert witnesses"—witnesses who will provide expert testimony and who are "the party, the party's current employee, or the party's retained expert"—the party must also 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.* at 213(f)(3). At trial, a witness is limited to providing testimony that was disclosed in response to a Rule 213(f) interrogatory or provided at the witness's discovery deposition. *Id.* at 213(g). Rule 213 also

requires a party "to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." *Id.* at 213(i).

¶ 23 "[T]he provisions of Rule 213 are mandatory and must be strictly followed by both the trial court that must impose them and counsel who must operate pursuant to them during discovery," with any disagreements regarding whether testimony was properly disclosed to be construed against the proponent of the evidence. *Morus v. Kapusta,* 339 Ill. App. 3d 483, 489 (2003); *Department of Transportation v. Crull,* 294 Ill. App. 3d 531, 538–39 (1998) (noting that, compared with its predecessor, former Rule 220, Rule 213 has "more exacting standards" and courts "should be more reluctant" to allow parties to deviate from its strict disclosure requirements). The purpose of Rule 213's disclosure requirements is "to avoid surprise[,] *** discourage strategic gamesmanship" (*Thomas v. Johnson Controls, Inc.*, 344 Ill. App. 3d 1026, 1032 (2003)), and to "permit[] litigants to rely on the disclosed opinions of opposing experts and to construct their trial strategy accordingly" (*Firstar Bank of Illinois v. Peirce,* 306 Ill. App. 3d 525, 532 (1999)). Whether an opinion has been adequately disclosed under Rule 213 is a matter within the trial court's discretion. *Sullivan v. Edward Hospital,* 209 Ill. 2d 100, 109-10 (2004). Reversal for an abuse of discretion is appropriate only "where no reasonable [person] would take the view adopted by the circuit court." *Kim v. Mercedes-Benz USA, Inc.*, 353 Ill. App 3d 444, 452 (2004).

¶ 24 We first consider whether the court abused its discretion in concluding that plaintiffs failed to sufficiently disclose Kasdin as a controlled expert witness pursuant to Rule 213(f)(3). Plaintiffs argue on appeal that their disclosures satisfy the requirements for lay witnesses and then simply conclude, with no supporting argument or citations to authority, that the disclosures "indeed were also sufficient under Rule 213(f)(3)." This argument is forfeited. See Ill. S. Ct. R.

341(h)(7) (eff. Feb. 6, 2013) (noting argument must be accompanied by citation to relevant authorities and providing that points not argued on appeal are waived). Even absent this forfeiture, it is evident from the record that the circuit court did not abuse its discretion by ruling that plaintiffs failed to disclose Kasdin as an expert on lost profits. Plaintiffs' disclosures stated that "[t]he testimony from Peter Kasdin will include fact and opinion testimony at trial within the scope of the subject matter and the documents, and exhibits itemized below." They then listed over 100 subjects of potential examination. Nowhere did these disclosures state that Kasdin would provide an opinion regarding lost profits. The disclosures did not provide a damages sum, calculation, or methodology for arriving at lost profits. Nor did they identify documents relied upon by Kasdin to perform such a calculation.

¶ 25 Plaintiffs contend that their disclosures contained many topics constituting *elements* of a lost profits calculation. Although these might serve as inputs for a calculation of lost profits, what is still lacking is any sort of methodology. A damages expert's methodology is a key basis for any opinion he may offer, and must be disclosed. See, *e.g.*, *Crull*, 294 Ill. App. 3d at 537-39 (reversing circuit court's ruling allowing expert testimony regarding additional, undisclosed methodologies that could be used to reach a damages sum). Although it is true that an expert witness may elaborate on disclosed opinions or testify to "logical corollaries" of disclosed opinions (*Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812 (2009)), this would not permit a witness disclosed to testify regarding some factual predicate to a lost profits calculation to, for the first time, testify at trial regarding an actual calculation of damages arrived at pursuant to an undisclosed methodology. As our supreme court made clear in *Sullivan*, 209 Ill. 2d at 109, a party's Rule 213 disclosures must "drop down to specifics." (Internal quotation marks omitted.) See also *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill. App. 3d 275, 292 (2008)

(holding circuit court did not abuse its discretion in barring testimony where the topics of depression and suicide were never mentioned in plaintiff's disclosures and the catchall phrase "all of the other problems" was not specific enough to encompass those topics). Plaintiffs' Rule 213(f) disclosures contained none of the specific details required for the disclosure of a controlled expert witness.

¶ 26 We next consider whether the court abused its discretion in concluding that plaintiffs failed to sufficiently disclose Kasdin as a lay opinion witness pursuant to Rule 213(f)(1). Detailed disclosures are not required to sufficiently disclose a witness falling within this category. *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 12 (2007). A party need only "identify the subjects on which the witness will testify." Ill. S. Ct. R. 213(f)(1). Plaintiffs contend that, "simply because Kasdin did not specifically label himself as a lost-profits witness" does not mean that his disclosures where inadequate. They insist that "[t]he basic subject matter of losses to the firm was stated by Kasdin within his disclosures in a way that could not be ignored." We disagree. Our review of plaintiff's disclosures confirms that neither the phrase "lost profits" nor the word "losses" appear even once in the document. The words do appear in plaintiffs brief on appeal, however, as explanatory phrases enclosed in brackets to aid this court in understanding the excerpted original disclosures. Absent these explanatory phrases, we fail to see how these disclosed topics, sprinkled throughout over 100 wide-ranging areas of proposed testimony, could have effectively put defendants on notice that Kasdin intended to provide opinion testimony on plaintiffs' lost profits. At best, plaintiffs disclosed Kasdin to testify as a fact witness regarding predicate facts that could inform a lost profits analysis.

¶ 27 Plaintiffs cite *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812 (2009) for the proposition that specific words are not required to adequately disclose the topics a witness will testify to. *Spaetzel*

is distinguishable, not only because it involved expert disclosures pursuant to Rule 213(f)(3), but because the disclosures in that case clearly set forth the expert's opinion and the permitted testimony was merely "an elaboration on, or a logical corollary to, the originally revealed opinion." *Id.* at 813. Plaintiffs unconvincingly argue that the disclosure of certain facts that might be the logical corollary to a properly disclosed lost profits opinion can somehow excuse them from disclosing the opinion itself, or even the broader subject matter of that opinion. The argument fails.

¶ 28 Accordingly, the circuit court did not abuse its discretion when it ruled that plaintiff's Rule 213(f) disclosures were insufficient to disclose Kasdin as either a lay or expert witness on the subject of plaintiffs' lost profits.

¶ 29 D. Appropriateness of the Discovery Sanction

¶ 30 Plaintiffs alternatively argue that, even if their Rule 213(f) disclosures were inadequate, the circuit court abused its discretion when it barred Kasdin's testimony without considering the factors set forth by our supreme court in *Sullivan*, 209 Ill. 2d 100, which plaintiffs contend all weigh against such a harsh sanction. Defendants, on the other hand, argue that each of the factors supports the sanction imposed in this case and that the circuit court was not required to make specific findings but is instead presumed to know and have followed the law unless the record indicates otherwise.

¶ 31 "The decision whether or not to impose sanctions lies within the sound discretion of the trial court, and that decision will not be reversed absent an abuse of discretion" (*id.* at 110), *i.e.*, "where no reasonable [person] would take the view adopted by the circuit court" (*Kim*, 353 Ill. App 3d at 452). Illinois Supreme Court Rule 219 provides that the circuit court may bar a witness from testifying as a sanction for a party's failure to comply with the discovery rules. Ill.

S. Ct. R. 219(c)(iv) (eff. July 1, 2002). Our supreme court has admonished that "[w]here a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party, as Rule 213 demands strict compliance." (Internal quotation marks omitted.) *Sullivan*, 209 Ill. 2d at 110. "In determining whether the exclusion of a witness is a proper sanction for nondisclosure, a court must consider the following factors: (1) the surprise to the adverse party; (2) prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection [to] the testimony; and (6) the good faith of the party calling the witness." *Id.* "[N]o single factor is determinative." *Shimanovsky v. General Motors, Corp.*, 181 Ill. 2d 112, 124 (1998).

¶ 32 Shortly before trial, the circuit court in this case orally granted defendants' motion *in limine* no. 33, barring undisclosed lost profits opinion testimony. The court noted that defendants had failed to disclose a Rule 213(f)(3) witness on the topic and reasoned that "in order to sustain a claim for lost profits, there needs to be, generally, an expert that would testify as to how the profits are computed." Following the weekend, and on the day trial was to commence, plaintiffs sought leave to file a motion for a ruling that Kasdin could testify to plaintiffs' lost profits, explaining that they viewed the issue as case-dispositive and, if the court would not allow the testimony, there would be no reason to conduct a trial. The court heard argument from both sides and, over the lunch break, further examined the issue of whether an expert was necessarily required to present lost profits testimony. When they reconvened, each side presented additional argument, and the court made its ruling on the record, concluding that, although an expert is not necessarily required to present such testimony, Kasdin's testimony was properly barred where plaintiffs' failed to disclose him as either an expert or a lay witness on the topic. Neither the parties nor the court specifically addressed the factors set out in *Sullivan*, and the court gave, as

its reason for barring Kasdin's testimony, simply that he had failed to comply with Rule 213.

¶ 33 On this record, plaintiffs contend the circuit court failed to consider the relevant *Sullivan* factors. Defendants argue, however, that "[a] court is not required to expressly state its findings pursuant to such factors on the record." The cases defendants cite for this proposition are distinguishable, as they relate only to factors a court considers in making an award of maintenance under the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/501 *et seq.* (West 2012)) (see *Blum v. Koster*, 235 Ill. 2d 21, 38 (2009)) or in imposing a sentence in a criminal case (see *People v. Velez*, 388 Ill. App. 3d 493, 514 (2009)). In this case, Rule 219 specifically provides that "the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). This language unambiguously requires a circuit court to provide an explanation when it imposes discovery sanctions. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 14 (interpreting an identical provision of Rule 137).

¶ 34 Although the circuit court in this case did not reduce its reasons to writing, the record contains transcripts of the extensive argument it heard from the parties on this issue, including points made by defendants that we may presume the court found persuasive in reaching its decision. See *Nationwide Mutual Insurance Co. ex rel. Mika v. Kogut,* 354 Ill. App. 3d 1, 4 (2004) (failure to put in writing grounds for sanction, standing alone, did not require reversal where reviewing court could surmise the basis for the trial court's decision from the record). We conclude that the record supports the sanction imposed. See *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 48 ("it is well established that *** an appellate court may affirm a trial court's judgment on any grounds which the record supports").

¶ 35 With respect to the first factor, plaintiffs contend that defendants "could not have been

surprised that Kasdin would testify about lost profits" and that, "[b]ecause the complaint specifically alleged lost profits, there was no doubt that Kasdin would testify to lost profits." Citing *Heriford v. Moore*, 377 Ill. App. 3d 849, 853-54 (2007), they argue that plaintiffs should have been on notice of this fact "simply by reading the Third Amended Complaint" that Kasdin signed, in which plaintiffs alleged that, as a proximate result of plaintiffs' breach of fiduciary duty and tortious interference, they "lost clients, lost profits, and suffered general and special damage." *Heriford*, however, merely stands for the proposition that a party must first serve an opposing party with a written interrogatory before it can allege a violation of Rule 213. *Id.* The defendant in that case, put on notice by the pleadings that money damages would be sought to remedy repairs needed on the property in question, strategically failed to propound interrogatories regarding the costs of those repairs. *Id.* The appellate court rejected the notion that testimony regarding the costs should be barred at trial, where the lack of interrogatories meant the plaintiff's duty to disclose under Rule 213 was never triggered. *Id. Heriford* is inapposite where there is no question that the defendants in this case not only propounded interrogatories but repeatedly sought more detailed and complete disclosures from plaintiffs. It simply does not follow, from the notion that the pleadings may put a party on notice of the need to issue an interrogatory, that the pleadings may also serve to put a party on notice regarding the subject matter of opinion testimony for which no disclosure was made. This would negate the purpose of Rule 213(f). We likewise reject the notion that defendants' act of naming Kasdin in their own disclosures as a Rule 213(f)(3) witness regarding "all matters relevant to and that fall within the scope of the pleadings and issues in this case" somehow demonstrates that they were on notice that he would testify regarding lost profits.

¶ 36 As we have already held that the circuit court did not abuse its discretion in ruling that

plaintiffs' Rule 213(f) disclosures were inadequate, we reject plaintiffs' additional contention that defendants were put on notice of his proposed testimony by "the detailed disclosures that [he] provided" demonstrating that he would testify regarding the *elements* of lost profits. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359 (2011) is distinguishable. In that case, the appellate court found no abuse of discretion where the circuit court permitted the plaintiff's damages expert in a dispute over unpaid legal fees to testify, not only to the amount of fees incurred, but to what it determined was the necessarily encompassed fact that the amount was reasonable. *Id.* at 368. Here, by contrast, and as defendants argued at length in the circuit court, the notion that Kasdin would offer opinion testimony on lost profits was not encompassed by or a mere logical corollary to any disclosure plaintiffs provided that he would testify regarding some factual predicate to a calculation of lost profits. The circuit court agreed, explaining "the problem is you didn't explain how you got there *** You've got certain topics that you've disclosed *** topics that arguably would have been included within the opinion, but no opinion."

¶ 37 Plaintiffs essentially insist that defendants could not reasonably have assumed that plaintiffs would go to trial without a damages witness and thus should have concluded that Kasdin, as the sole owner and shareholder of his law firm and the one possessing knowledge of the financial components of a lost profits calculation, would be the one to provide that testimony. We cannot accept this proposed reversal of the parties' duties as they relate to discovery. Rule 213 disclosures are mandatory and place the duty of disclosure squarely on the party seeking to proffer evidence. Given that the rule is strictly enforced (*Sullivan*, 209 Ill. 2d at 109), it would not be proper to relieve a party of that burden simply because it believed its disclosures should be obvious to the other party. Defendants were entitled to rely on plaintiffs' actual disclosures

and the record supports a finding that they would have been unfairly surprised if the barred testimony had been allowed.

¶ 38 With respect to the second and third factors, plaintiffs argue that defendants would not have been prejudiced if the circuit court allowed Kasdin's lost profits testimony because Etherton's personal experience over the years working with him to calculate her compensation and bonuses, coupled with the fact that she "knew the basic elements of a claim for lost profits" would have allowed her to "readily contest his opinions with the information that she had." We reject this argument. To begin with, although plaintiffs contend the "damages here turn[ed] on basic mathematical calculations," defendants have always argued that the lost profits calculations at issue were more complicated. Just because Etherton may have known her own compensation formula does not mean that she knew how to calculate the finances of plaintiffs' entire law firm. Even assuming that what plaintiffs say is true—that defendants had the understanding and information necessary to rebut lost profits testimony essentially on the fly—this is not a valid reason to deprive them of the opportunity to make whatever preparations they deemed necessary in response to a proper disclosure. Defendants argue, just as they explained to the circuit court, that they would have been prejudiced "by the admission of new testimony for which they were not given a chance to hire experts, accountants, or economists to rebut."

¶ 39 Regarding the fourth and fifth factors, the record shows that defendants were diligent in sending their Rule 213 interrogatories to plaintiffs and filed their motion *in limine* in advance of trial and by the court-ordered deadline for doing so. They did not, like the defendant in *Shimanovsky*, 181 Ill. 2d at 125, completely fail to request relevant evidence or wait over five years to bring a motion to compel. Plaintiffs claim defendants waited until the morning of trial to challenge the disclosures when they should have objected to them three years prior, when they

were first served, or at least tested the disclosures at Kasdin's deposition. According to plaintiffs, "[i]f Etherton had raised the adequacy of the Kasdin disclosures at any of these times before trial, then Kasdin would have had an opportunity to argue his position and provide any supplemental disclosures that may have been required." Once again, plaintiffs seek to invert the parties' discovery burdens. Once served with a written interrogatory requesting the identity of opinion witnesses and the subject matter of their testimony, plaintiffs had an independent duty to provide adequate disclosures and to supplement those disclosures in a timely manner. Ill. S. Ct. R. 213(f) and (i). Defendants had no corresponding duty to ferret out the substance of undisclosed testimony.

¶ 40 Nor did defendants have any obligation to point out to plaintiffs that they failed to disclose a witness who could testify regarding a key element of their case. The situation is akin to that in *Crull*, 294 Ill. App. 3d 531. There, the circuit court allowed the defendants' opinion witness to testify regarding certain undisclosed opinions because it felt this would be "in the best interest of justice" where the plaintiff's counsel in that case knew the undisclosed testimony would be elicited and did not seek to bar it prior to trial. *Id.* at 533-34, 538. The appellate court reversed, explaining: "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. Neither Illinois law nor professional ethics require an attorney to advise his or her opponent of such deficiencies or how best to present his or her case." *Id.* at 538. The same is true here.

¶ 41 With respect to the sixth factor, the record supports a finding that plaintiffs did not act in good faith. In *Sullivan*, our supreme court noted that a "lapse in an otherwise detailed summary of [a witness's] anticipated testimony [did] not indicate good faith." 209 Ill. 2d at 111. Here, the

circuit court stated on the record that "notwithstanding the extreme length of the disclosure that was made by Mr. Kasdin, there [wa]s not a single disclosure as to what his lay opinion [wa]s as to the issue of lost profits." As a long-time lawyer and his law firm, plaintiffs are presumed to be well-acquainted with their discovery obligations under Illinois law. They failed to avail themselves of innumerable opportunities during the parties' protracted discovery negotiations to supplement their disclosures and clearly indicate that Kasdin would be testifying to lost profit damages, a required element of their claims. A reasonable judge could have concluded that plaintiffs did not act in good faith.

¶ 42 Finally, plaintiffs fault the circuit court for barring Kasdin's testimony, something they contend "had the effect of ending his case," where less drastic remedies were available. We first note that it is not clear that the court's ruling effectively ended plaintiffs' case. Plaintiffs are the ones who—after the court barred Kasdin's lost profits testimony and declined to certify the question for interlocutory appeal—voluntarily waived their ability to seek any damages beyond lost profit damages with respect to their claims for breach of fiduciary duty and tortious interference and voluntarily dismissed their separate count for slander *per se*. We therefore do not find instructive the cases plaintiff cites concerning the sanction of dismissal with prejudice. Given that plaintiffs had disclosed no other witness on what was an essential element of two of their causes of action, however, we do not deny that the practical effect of the circuit court's ruling was harsh. It is difficult to conclude what else the court should have done, however, where, following its ruling, plaintiffs made no argument that the sanction was too severe, even when the court asked "what do you want to do?" Plaintiffs now insist that "a short delay would not have unfairly prejudiced anyone," but they did not propose this at the time and it is undisputed that defendants were prepared to begin the trial that same day and had dozens of

witnesses scheduled to testify. Although "a just order of sanctions under Rule 219(c) is one that, *to the degree possible*, insures both discovery and a trial on the merits" ((internal quotation marks omitted and emphasis added) *King v. Clay*, 335 Ill. App. 3d 923, 927 (2002)), the circuit court was not required to cause extensive trial preparations to grind to a halt and reopen discovery to give plaintiffs another chance to meet their discovery obligations.

¶ 43 "Reversal of a trial court's decision to impose a particular sanction is only justified when the record establishes a clear abuse of discretion." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 67 (1995). On this record, we cannot say that the circuit court abused its discretion by barring Kasdin's undisclosed testimony.

¶ 44 CONCLUSION

¶ 45 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 46 Affirmed.