2012 IL App (5th) 100054-U

NO. 5-10-0054

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KENNETH BRADSHAW,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 06-L-14
	)	
UNION PACIFIC RAILROAD COMPANY,	)	Honorable
	)	Vincent J. Lopinot,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in fashioning a remedy for the defendant's violation of Supreme Court Rule 213 which did not effectively serve as a sanction, thereby warranting that the judgment be reversed and the cause remanded for a new trial.

¶ 2 The plaintiff, Kenneth Bradshaw, brought suit against the defendant, Union Pacific Railroad Company, for injuries to his knees allegedly sustained during the course of his employment. The cause proceeded to a jury trial with a verdict in favor of the defendant. The plaintiff raises five separate issues on appeal. For the following reasons, we reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 The plaintiff, Ken Bradshaw, worked for the railroad from approximately March 1960, at age 18, until January 20, 2003. He was first employed as a brakeman, but eventually worked his way up to the job of switchman and then conductor. On May 8, 2006, he filed

an amended two-count complaint against his employer, Union Pacific Railroad Company,[1] alleging a cause of action pursuant to the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq*. (2006)) and another pursuant to the Locomotive Inspection Act (LIA) (49 U.S.C. § 20701 *et seq*. (2006)), for injuries he sustained to his knees. Specifically, the plaintiff alleged that due to repetitive stresses stemming from his work activities for the defendant, he developed bilateral osteoarthritis in his knees. As a result, the plaintiff underwent a total knee replacement for each knee.

¶ 5 The matter proceeded to a trial by jury, commencing on April 27, 2009, and continuing through May 4, 2009. Ultimately, the jury returned a verdict in favor of the defendant. Although the plaintiff attempted to obtain posttrial relief, the trial court denied his motion on December 31, 2009. Subsequently, the plaintiff timely filed this appeal on January 25, 2010.

¶ 6 Dr. Robert Andres, a biomechanist and ergonomist, testified as the plaintiff's expert witness. In sum, Dr. Andres opined that (1) the plaintiff's work environment and job-related tasks exposed him to certain ergonomic risk factors associated with the development of knee osteoarthritis and (2) the defendant failed to provide its employees like the plaintiff with a comprehensive safety and ergonomics program. Dr. Andres began by explaining to the jury his opinion that osteoarthritis of the knee is commonly caused by reoccurring repetitive physical stress to the knees and that "the mechanical process of the stresses actually can increase the speed of a degenerative process." Regarding the plaintiff's work as a railroad brakeman or conductor, Dr. Andres listed the following associated activities which he believed posed as ergonimic risk factors to the plaintiff's knees: squatting to couple air hoses, flexing the knees to operate railroad track switches, climbing ladders on railroad cars,

[1]The plaintiff first worked for Missouri Pacific Railroad Company, which was the predecessor in interest to the defendant Union Pacific Railroad Company.

stepping onto equipment with varying ground heights, setting hand brakes on railroad cars, walking on uneven ballasted (rocked) surfaces to check switches and trains, carrying heavy objects, such as knuckles or end-of-train devices, while walking on ballast, getting on and off moving locomotives and railroad cars, and running alongside railroad cars to uncouple the cars. Such activities, Dr. Andres testified, involved the use of the plaintiff's knees, requiring that he either squat, kneel, lift, carry, or climb, as well as requiring that he walk on uneven ballasted surfaces.

¶ 7 Integral to Dr. Andres' testimony was his opinion concerning a study performed by the Burlington Northern Railroad Company in the early 1990s (the Burlington Northern study), which examined the total body forces experienced by a person upon dismounting a moving locomotive or railroad car. The Burlington Northern study found that a person dismounting a locomotive or railroad car moving at a rate of 8 miles per hour (mph) would experience about 15 times his total body weight in force. Drawing from this finding, Dr. Andres opined that the faster a locomotive or railroad car is going at the time a railroad worker dismounts it, the more total body force the worker will experience on his legs. Dr. Andres also testified that after the Burlington Northern study results were released, Burlington Northern Railroad Company stopped its practice of allowing its workers to get on and off moving locomotive or railroad cars, resulting in a 68% decrease in worker injuries.

¶ 8 Sometime also in the 1990s, the evidence showed that the defendant implemented a rule that its workers could only get on and off of a locomotive or railroad car if it was moving at a rate of 4 mph or less. Prior to that time, the defendant did not have a specific maximum speed, but advised its workers only to get on or off of a moving locomotive or railroad car when the speed was "safe." Sometime after the year 2000, the defendant implemented a rule prohibiting its workers from getting on and off moving locomotives and railroad cars

altogether.

¶ 9 During trial, the plaintiff testified that the defendant merely provided him with "on the job training" when he was initially employed as a brakeman. He further stated that he was never provided with specific training regarding how to mount or dismount moving locomotives and railroad cars, with the exception of simply being shown how to do it and warned to not get hurt. Because, for many years, the defendant had no implemented maximum speed allowance for getting on and off of moving locomotives, the plaintiff testified that he interpreted the defendant's advisement to only do so at "safe" speeds to mean that he should not risk speeds that would cause him to fall. The plaintiff stated that during his career with the defendant, he dismounted moving locomotive and railroad cars "thousands of times." He explained that he commonly did so while the locomotives and railroad cars moved at speeds of 8 to 12 mph, until the implementation of the defendant's maximum speed allowance rule of 4 mph. In addition, the plaintiff testified that he never received any educational training from the defendant regarding the possible ergonomic risks from getting on and off of moving locomotives and railroad cars, or methods to practice in order to reduce one's ergonomic risks.

¶ 10 Also testifying on behalf of the plaintiff was Dr. Forbes McMullin, an orthopedic surgeon. Dr. McMullin had previously conducted a medical examination of the plaintiff and reviewed his deposition transcript, among other things. Dr. McMullin testified that the forces exerted upon the plaintiff's knees during his employment with the defendant caused his bilateral knee osteoarthritis. The plaintiff also called his treating orthopedic surgeon, Dr. Robert Shivley, as a witness, who gave similar causation testimony.

¶ 11 As part of the defendant's case-in-chief, it sought to have two expert witnesses (also referred to as opinion witnesses) testify: Mr. Greg Weames and Mr. George Page. Upon being informed by the defendant that it intended to first call Mr. Weames as an expert

witness,[2] the plaintiff moved to bar any testimony from either Mr. Weames or Mr. Page, based on the defendant's failure to comply with the disclosure requirements of Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007). The plaintiff argued this motion during trial and outside of the presence of the jury, prior to resting his case-in-chief.

¶ 12 The basis for the plaintiff's motion stemmed from a pretrial interrogatory directed to the defendant, requesting disclosure of its expert witnesses, including their opinions and conclusions. The defendant initially responded on September 26, 2006, stating that it had not, at that time, designated any opinion witnesses to testify at trial, but would designate such witnesses in accordance with applicable Illinois Supreme Court rules and the case management order entered by the trial court. There were several amendments to the initial case management order, the last of which was entered on November 6, 2008, and required the defendant to make its disclosures pursuant to Illinois Supreme Court Rule 213 on or before November 30, 2008. The defendant provided its Rule 213 expert witness disclosures to the plaintiff on December 1, 2008.[3]

¶ 13 Regarding its disclosure for Mr. Weames, the defendant first described his qualifications and further stated the following:

> "Mr. Weames will provide expert and opinion testimony based upon his review of case materials, his observations, and measurements of the subject work places or substantially similar work places; and his experience in the railroad industry. Mr. Weames' testimony will address railroad musculoskeletal exposures generally; ergonomics in the railroad industry generally; and ergonomics within defendant's

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[2]The defendant later explained, during the hearing on the plaintiff's motion, that it intended to call both Mr. Weames and Mr. Page to testify on its behalf as expert witnesses.

[3]The plaintiff does not challenge the timeliness of the defendant's disclosures on appeal.

business organization, specifically; whether plaintiff's occupational environment was reasonably safe when compared to exposures associated with adverse health outcomes in the relevant peer-reviewed literature; comparison of plaintiff's exposures to occupational physical factors within published guidelines; and whether the defendant has implemented feasible occupational safety and health initiatives to provide plaintiff with a reasonably safe place to work."

¶ 14 Regarding its disclosure for Mr. Page, the defendant first described his qualifications and further stated the following:

"Defendant may call George Page to testify concerning internal ergonomics activities at the AAR; historical development of ergonomics process at Union Pacific Railroad, including analysis of tasks, tools and equipment, rules and processes, etc.; general safety and ergonomics processes at Union Pacific Railroad and the evolution of processes with expansion of relevant scientific knowledge; Defendant's use of external consultants on ergonomics; and epidemiological and scientific literature related to the hypothesized work-relatedness of musculoskeletal disorders of the spine and extremities.

Mr. Page is also expected to testify concerning the opinions and conclusions contained in his deposition of April 15, 2008."[4]

¶ 15 The plaintiff asserted that these particular disclosures violated Rule 213(f) in that the defendant failed to list any of the opinions or conclusions of either Mr. Weames or Mr. Page. Nor did the defendant ever supplement its disclosures. The plaintiff explained that it was not until the court granted his motion to compel his fourth request for production that the

[4]Mr. Page was designated by the defendant as a corporate representative to give a deposition on April 15, 2008, pursuant to Illinois Supreme Court Rule 206(a)(1) (eff. Dec. 1, 1999).

defendant finally complied by providing a compact disc (CD) of data collected by Mr. Weames. However, the plaintiff questioned the extent of the defendant's compliance, arguing that the CD contained "just a bunch of data, a bunch of graphs, a bunch of pie charts. It's just a bunch of stuff." Still notably lacking from the defendant's Rule 213 disclosures for Mr. Weames, the plaintiff observed, were any of his opinions or conclusions. Continuing, the plaintiff argued that they were now into the fourth day of trial and that the defendant had yet to disclose the opinions or conclusions of either Mr. Weames or Mr. Page.

¶ 16 During the hearing on the plaintiff's motion to bar the trial testimony of Mr. Weames and Mr. Page, the following colloquy occurred:

"THE COURT: What about their conclusions and opinions? I mean what about disclosure as to the conclusions and opinions under 213?

MR. JONES: It's what's contained within the disclosure, Judge.

THE COURT: Okay. All right.

MR. JONES: I mean that's what we have.

* * *

THE COURT: But I mean, Mr. Jones, are you saying–I mean can you elaborate? I mean here's the disclosure. Can you elaborate where the conclusions and opinions are?

MR. JONES: Judge, it is what it is. And the–it tells the subject matter of which they testify. Does it specifically go beyond that? It doesn't.

THE COURT: Well, what do you think I ought to do?

MR. JONES: Well, Mr. Gavin had an opportunity to depose these people. He elected not to do that.

* * *

THE COURT: Okay. I–frankly, you know, maybe a couple of the statements

you can–you could say is somewhat of a conclusion or so forth, but it's really light on that. And I don't think the–as Mr. Gavin says, I don't think the answer is always, well, just take a deposition if you feel like it. I mean the rule requires certain things. However, we are far along in this. I'm going to deny–I'm going to deny your motion, and I'm going to allow these gentlemen to testify. Weames and Page can testify as experts."

¶ 17 Shortly thereafter, court adjourned for the day. The following morning, outside of the presence of the jury and before the defendant commenced its case-in-chief, the trial court revised its ruling on the plaintiff's motion seeking to bar the trial testimony of Mr. Weames and Mr. Page in the following manner:

"THE COURT: Okay. Also, one other thing, after the jury left last night, we had a hearing with regard to expert witness disclosures. And I ruled last night, but I think–thinking about it overnight, I think that there ought to be a sanction with regard to that. And I am going to limit the testimony of defendant's expert witnesses to the conclusions and opinions that were expressed in the plaintiff's expert's testimony, Dr. Andres."

¶ 18 ANALYSIS

¶ 19 On appeal, the plaintiff raises five separate issues. The first is whether the trial court erred in permitting Mr. Weames and Mr. Page to testify despite the defendant's failure to comply with Illinois Supreme Court Rule 213(f)(3). The second issue on appeal is whether the trial court erred by refusing to instruct the jury as to the plaintiff's cause of action brought pursuant to the Locomotive Inspection Act (LIA). Third, the plaintiff appeals the trial court's decision permitting certain testimony which the plaintiff believes was irrelevant and prejudicial. Fourth, the plaintiff appeals the admission of the defendant's exhibits O, P, and Q to the jury for consideration during its deliberation. Lastly, the fifth issue on appeal is

whether the trial court erred in refusing to admit the plaintiff's exhibits 20, 24, 112, and 113. The plaintiff therefore seeks a reversal of the trial court's judgment denying his posttrial motion for relief and requests that a new trial be granted. We will now address these five issues on appeal, in turn.

¶ 20 *The Defendant's Rule 213 Disclosures Pertaining to Mr. Weames and Mr. Page*

¶ 21 As previously stated, the first issue on appeal is whether the trial court erred when it permitted the defendant's controlled expert witnesses to testify despite the defendant's failure to adequately comply with the requirements of Illinois Supreme Court Rule 213. Illinois Supreme Court Rule 213 deals with written interrogatories to parties and states, in pertinent part:

> "(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> * * *
>
> (3) Controlled Expert Witnesses. 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. 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.
>
> (g) Limitation on Testimony and Freedom to Cross-Examine. 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. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.
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> * * *
>
> (i) Duty to Supplement. 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 (eff. Jan. 1, 2007).

¶ 22 The admission of testimony pursuant to Rule 213 is within the sound discretion of the trial court, and such decision is not to be disturbed on appeal unless an abuse of discretion is shown. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). An abuse of discretion occurs upon a finding that no reasonable person would support the trial court's decision to admit the testimony. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010). The disclosure requirements of Rule 213 are "mandatory" and subject to a party's "strict compliance." *Sullivan*, 209 Ill. 2d at 109. Thus, a trial court should not hesitate sanctioning a party for its failure to adequately comply with the Rule 213 disclosure requirements. *Id.* Otherwise, noncomplying parties will virtually "ignore" the plain language of Rule 213, thereby "defeat[ing] its purpose and encourag[ing] tactical gamesmanship." *Id.* at 110 (citing *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998)).

¶ 23 Here, the plaintiff argues that although the trial court fashioned a sanction against the defendant by limiting the trial testimony of Mr. Weames and Mr. Page to the conclusions and opinions that were expressed by the plaintiff's expert, Dr. Andres, (in essence, rebuttal

testimony) such sanction had no basis in Rule 213 and, in effect, provided no meaningful restriction whatsoever. Because of the defendant's failure to disclose any conclusions or opinions of either Mr. Weames or Mr. Page pursuant to Rules 213(f) and (i), the plaintiff believes that the proper sanction under Rule 213(g) would have been for the trial court to completely exclude their testimony.

¶ 24 Opposing, the defendant appears to assert that its Rule 213 disclosures embodied the conclusions and opinions of both Mr. Weames and Mr. Page. The defendant also appears to advance the argument that the trial testimony of both its expert witnesses consisted of nothing more than factual observations. Assuming there was a Rule 213 disclosure deficiency, the defendant offers that such a deficiency was properly addressed by the trial court when it limited the testimony of Mr. Weames and Mr. Page.

¶ 25 To begin our analysis of the instant issue, we must determine whether the defendant did, in fact, violate Rule 213 and, if so, whether the trial court's limitation on the testimony of Mr. Weames and Mr. Page was an appropriate remedy for that violation. See generally *Copeland v. Stebco Products Corp.*, 316 Ill. App. 3d 932, 937-46 (2000). First, a plain reading of the defendant's Rule 213 disclosures clearly reveals that the defendant failed to disclose any conclusions or opinions in its interrogatory responses for either Mr. Weames nor Mr. Page. Further, the record fails to indicate any timely supplements made thereto. Also apparent from the record is the fact that neither Mr. Weames nor Mr. Page was deposed in their expert witness capacity. The trial transcript evinces the trial court's acknowledgment of the defendant's failure to disclose the conclusions and opinions of these two expert witnesses. As such, we find that the defendant violated the Rule 213 disclosure requirements.

¶ 26 Next, we must look to whether the trial court abused its discretion by denying the plaintiff's motion to bar the testimony of both Mr. Weames and Mr. Page and, instead,

limiting their testimony to the conclusions and opinions expressed by the plaintiff's expert, Dr. Andres. Deciding whether to completely bar the testimony of a witness, due to a Rule 213 violation, involves the consideration of the following factors: (1) the surprise to the adverse party, (2) the prejudicial effect of the testimony, (3) the nature of the testimony, (4) the diligence of the adverse party, (5) the timely objection to the testimony, and (6) the good faith of the party calling the witness. *Sullivan*, 209 Ill. 2d at 110.

¶ 27 Here, it would be a stretch to say that the plaintiff was completely surprised by the fact that the defendant intended to put either Mr. Weames or Mr. Page on the stand to testify on its behalf as an expert witness. While the defendant's Rule 213 disclosures were deficient, they at least identified these two men as expert witnesses and described the general subject matter of their anticipated testimony, along with their qualifications. The disclosures were made well in advance of the actual trial date, giving the plaintiff at least a modicum of notice. In other words, it is not as if the defendant failed to disclose these two expert witnesses at all and then sought to ambush the plaintiff during trial by attempting to put them on the stand. Yet, because the defendant's Rule 213 disclosures failed to reveal any conclusions or opinions of these two intended expert witnesses, it is fair to say that the plaintiff may have been surprised by the extent of their testimony. It is also fair to assume that the plaintiff may not have been able to effectively cross-examine these two expert witnesses, given that their conclusions and opinions remained unknown. So while the plaintiff cannot claim total surprise from the defendant's Rule 213 violation, it is certainly conceivable that the defendant's actions caught the plaintiff somewhat unaware.

¶ 28 The testimony of Mr. Weames and Mr. Page appears to be prejudicial, if only for the sake that it served to contradict the testimony of the plaintiff's expert, Dr. Andres, as well as the plaintiff's theory of the case. In essence, their testimony went to the fundamental issues of causation of the plaintiff's injury and the defendant's liability. Mr. Weames and Mr. Page

testified, in sum, that they were not aware of any valid medical or scientific studies supporting the theory that the job-related activities of a railroad worker, such as the plaintiff, posed any higher risk of developing osteoarthritis of the knee or that such repetitive stresses on the knees can cause osteoarthritis. Given that the jury returned a verdict in favor of the defendant, it is therefore conceivable that the testimony of Mr. Weames and Mr. Page had a prejudicial effect upon the plaintiff's case.

¶ 29 The sanction fashioned by the trial court limited Mr. Weames and Mr. Page to testifying only as to the conclusions and opinions expressed by the plaintiff's expert, Dr. Andres. Effectively, they were now to serve as rebuttal expert witnesses. However, we surmise that this is typically why a defendant hires an expert witness, to rebut a plaintiff's expert witness. However, one is still required to disclose expert witnesses, even if only used for rebuttal. See, *e.g.*, *Neal v. Nimmagadda*, 279 Ill. App. 3d 834, 845 (1996) (discussing requirements under former Illinois Supreme Court Rule 220, which formerly governed expert witness disclosure before being repealed); see also *Crull*, 294 Ill. App. 3d at 538-39 (discussing how Rule 213 requires stricter adherence than former Rule 220). Examining the deficient Rule 213 disclosures regarding Mr. Weames and Mr. Page, the most generous assumption one can make is that they might opine regarding the general safety of the railroad industry and the defendant's particular work environment, including ergonomic considerations, in comparison with other industries. Nothing contained within the defendant's disclosures indicates anything specific about the plaintiff, such as conclusions or opinions as to causation of the plaintiff's injuries. Therefore, the nature of the rebuttal testimony provided by Mr. Weames and Mr. Page exceeded even a generous interpretation of the defendant's deficient and vague Rule 213 disclosures.

¶ 30 As for whether the plaintiff was diligent in attempting to obtain sufficient Rule 213 disclosures, the record reveals that he was. The plaintiff served his initial interrogatories to

the defendant, filed a motion for a case management order requiring the Rule 213 disclosures, and even filed a fourth request for production seeking documents relied upon by the defendant's expert witnesses for which the plaintiff later moved to compel production. While the plaintiff did not take the deposition of either Mr. Weames or Mr. Page in their capacity as expert witnesses for the defense, case law shows that it is not the adverse party's responsibility to effectively "cure" a deficiency in the opposing party's evidence. See *Crull*, 294 Ill. App. 3d at 538 ("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.").

¶ 31 However, regarding his attempts to bar the trial testimony of Mr. Weames and Mr. Page, the plaintiff does not appear quite as diligent. The record shows that the plaintiff, before he rested his case-in-chief, argued such a motion. The plaintiff claims he did so at the "appropriate time after being informed by [the defendant] that it intended to call Mr. Weames as an expert to testify." Upon the plaintiff's motion being denied by the trial court, the record also reveals that the plaintiff made sufficient objections during the testimony of both Mr. Weames and Mr. Page (despite the defendant's argument that the plaintiff failed to properly do so for all of the testimony now at issue on appeal). Yet it remains unclear why the plaintiff did not make a pretrial motion to exclude Mr. Weames or Mr. Page from testifying as expert witnesses based on the defendant's Rule 213 violation. While it is true that the plaintiff did not know for sure whether the defendant would put either witness on the stand, he certainly could have anticipated this possibility, given that both were identified as expert witnesses in the defendant's Rule 213 disclosures. Perhaps this was a bit of strategy, the plaintiff not wishing to present the defendant with yet another opportunity to cure its

deficiency by supplementing its disclosures before trial. Alternatively, the plaintiff may not have wished to risk the denial of his pretrial motion, thereby allowing the trial court the opportunity to fashion a pretrial remedy by ordering that the parties conduct depositions of Mr. Weames and Mr. Page. In short, although the plaintiff's objection cannot be considered untimely, a pretrial motion, even if filed out of an abundance of caution, may have obviated this issue on appeal altogether.

¶ 32 The final factor to consider is whether the defendant acted in good faith by calling Mr. Weames and Mr. Page to testify as expert witnesses. As previously mentioned, this is not a situation where the defendant failed to identify its expert witnesses. On the other hand, its Rule 213 disclosures were devoid of any requisite conclusions and opinions. Further, the defendant fails to offer any adequate explanation for this deficiency, except that these two witnesses were merely presented to give factual testimony. Simply put, we are hard-pressed to believe that the defendant, represented by an experienced and reputable law firm, would go to the expense of hiring expert witnesses to merely provide factual testimony. If such were the case, it is puzzling, then, why the defendant identified these two witnesses specifically as "expert and opinion witnesses." Therefore, we cannot find that the defendant acted with complete good faith.

¶ 33 It appears that both parties acted with some gamesmanship. Recognizing that the nature of litigation can, at times, necessarily involve complex and risky strategies, the court must balance this with Rule 213's clear mandate to avoid tactical gamesmanship during the discovery process. Because the plaintiff did not move to exclude the testimony of Mr. Weames and Mr. Page until the fourth day of trial, we can certainly appreciate the bind in which the trial court found itself when attempting to fashion a remedy that was fair, but also sufficiently dealt with the Rule 213 violation. Unfortunately, limiting the testimony of Mr. Weames and Mr. Page proved to be no real limitation at all.

¶ 34 To explain, because the defendant failed to include the conclusions and opinions of either Mr. Weames or Mr. Page, there was no way of knowing the scope of their intended testimony. Without knowing the parameters, it is difficult to reduce those parameters. Allowing Mr. Weames and Mr. Page to serve as rebuttal witnesses could, in fact, have broadened the scope of their intended testimony. In any event, it does not appear from the record that the defendant was deprived in any way due to this imposed sanction. Therefore, we find that the trial court abused its discretion by fashioning a remedy that did not effectively serve as a sanction for the defendant's Rule 213 violation.[5] Accordingly, based upon this finding, the judgment is hereby reversed and the matter remanded for a new trial. Because we find that a new trial is warranted, the remaining issues on appeal shall also be addressed.

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[5]To be clear, we are not saying that any Rule 213 violation regarding the deficient disclosure of a party's expert witness begets exclusion of that witness. Although we find that the six factors for determining whether to exclude the testimony of Mr. Weames and Mr. Page weigh slightly more in favor of the plaintiff, this is not the only sanction the trial court had at its disposal. For example, the trial court may have, if feasible, recessed court for a short duration and allowed the parties to conduct depositions so that the plaintiff would know the extent of the conclusions and opinions expressed by the defendant's two expert witnesses and could have better prepared for their cross-examination. The trial court could further have ordered that these depositions be conducted at the defendant's expense, per Supreme Court Rule 219 (eff. July 1, 2002). However, if such an option were not feasible, the trial court may also have ordered the defendant to provide a supplemental disclosure of their conclusions and opinions and then given the plaintiff reasonable time to prepare. If the trial court's docket did not have the flexibility to allow for a brief continuance of trial, then of course, it could simply have excluded their testimony.

¶ 35 *Refusal of Plaintiff's Tendered Locomotive Inspection Act Claim Jury Instructions*

¶ 36 Next, the plaintiff argues that the trial court erred in refusing to instruct the jury as to his cause of action pled pursuant to the LIA (49 U.S.C. § 20701 (2006)). The plaintiff filed a two-count amended complaint against the defendant for injuries he sustained to his knees: count I stating a FELA claim and count II stating a claim pursuant to the LIA. Although the trial court denied the defendant's motion for directed verdict at the close of its case with respect to count II, it informed the parties that the same arguments could be made for its consideration with respect to count II during the jury instruction conference.

¶ 37 During the jury instruction conference, the defendant objected to the plaintiff's tendered jury instructions pertaining to his cause of action stated under the LIA. The trial court sustained the defendant's objections, thereby refusing the plaintiff's tendered jury instructions dealing with his claim made pursuant to the LIA, finding that there was insufficient evidence supporting his cause of action in order for it to reach the jury.

¶ 38 Contending that he properly pled a cause of action under the LIA, the plaintiff asserts that there was sufficient evidence introduced at trial supporting his cause of action under the LIA in count II and that his proposed Illinois Pattern Jury Instructions would have fairly and accurately instructed the jury. Conversely, the defendant argues that the trial court correctly refused the plaintiff's tendered instructions, as both the plaintiff's theory of liability and the evidence introduced at trial failed to meet the plain language requirements set forth in the LIA.

¶ 39 A trial court's decision to refuse a proposed jury instruction will not be disturbed absent a finding that the trial court abused its discretion; a new trial being warranted only where it is also found that the failure to give the proposed instruction resulted in the tendering party's loss of its right to a fair trial. *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). An abuse of discretion can be found when the refused instruction properly stated the

legal principles applicable to the case and was supported by the evidence. *Mikolajczyk v. Ford Motor Co*., 231 Ill. 2d 516, 549-51 (2008).

The LIA states, in pertinent part:

> "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances–
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury[.]" 49 U.S.C. § 20701 (2006).

¶ 40 Pertaining to count II of his amended complaint, the plaintiff alleges that the defendant violated the LIA by operating its locomotives at speeds that were unsafe for its employees, including the plaintiff, to mount and dismount, as well as required its employees, including the plaintiff, to dismount its locomotives from unsafe heights. Supporting this theory of liability, the plaintiff argues it is not necessary that a mechanical defect be present in the locomotive at issue to find that a railroad carrier, such as the defendant, has violated its absolute duty to provide safe equipment under the LIA. To this end, the defendant counters that the plaintiff failed to present any evidence during the trial demonstrating that either the speed at which the locomotive was moving when the plaintiff mounted and dismounted it or the heights from which he was required to dismount it violated any regulation.

¶ 41 During the hearing on the defendant's motion for a directed verdict, the trial court pointedly asked the plaintiff's attorney whether he had any case law to cite to support the argument that the operating speed could be considered an "unsafe condition" under the LIA. The plaintiff's attorney was unable to find anything on point. Nothing further has been revealed by the plaintiff's appellate briefings. While the purpose of the LIA is to be liberally construed in order to best protect railroad employees and others from the operation of unsafe railroad locomotives (*Lilly v. Grand Trunk Western R.R. Co.*, 317 U.S. 481, 485-86 (1943)),

we find that the plaintiff seeks to interpret the LIA too broadly.

¶ 42 The plain language of the LIA states that a violation will occur only when a railroad carrier operates a locomotive which is not in its proper condition or unsafe to operate without the unnecessary danger of personal injury. The evidence presented during trial did not indicate that the defendant's locomotives were, in and of themselves, unsafe to operate. Nothing is readily apparent from the record to show that the defendant's locomotives were not in their proper condition during any time of the plaintiff's employment. Rather, the record reflects that the plaintiff introduced evidence attempting to show only that the *manner* in which the defendant allowed the locomotives to be operated created the allegedly unsafe conditions.[6] While we do not find such a claim to be frivolous, nothing from either the plain language of the LIA itself or germane case law supports an interpretation that the liability under the LIA arises from the manner in which a railroad locomotive is operated. As such, we find that the trial court did not err in refusing the plaintiff's proposed jury instructions with regard to count II of his amended complaint.

¶ 43 *Testimony Regarding Wages and Employment Benefits Paid by the Defendant*

¶ 44 The third issue raised on appeal is whether the trial court erred in permitting testimony regarding the wages and employment benefits paid by the defendant. The plaintiff asserts that such testimony was irrelevant and prejudicial, as he made no claim for either lost wages or lost employment benefits. As the plaintiff's past or future wage loss was not at issue during trial, he further asserts that such testimony improperly created an erroneous impression among the jurors that he "had been given enough pay and other benefits to

[6]Although the plaintiff alleges and argues that the defendant also violated the LIA for requiring its employees to dismount moving locomotives from unsafe heights, we find nothing of evidentiary substance either in the plaintiff's appellate briefings or from the record to such claim.

compensate him for taking the risks inherent in this job, such as recurring repetitive trauma [to his knees]."

¶ 45 The defendant does not dispute the plaintiff's assertion that assumption of risk is not a defense under FELA (45 U.S.C. § 54 (2006)). Due to the plaintiff's objection to the wage and fringe benefit testimony, he tendered a curative jury instruction, which advised the jury that assumption of risk is not a defense in a FELA case. The trial court gave this instruction to the jury over the defendant's objection. The defendant argues that it elicited such testimony not for the purpose of implying that the plaintiff assumed the risk of injury, but rather, to rebut the plaintiff's suggestion that he was required to work long hours for the defendant without adequate compensation. Moreover, the defendant argues that the plaintiff should be estopped from raising this issue because of his curative jury instruction. Yet, the plaintiff argues that this jury instruction failed to cure the prejudice caused by the admission of such irrelevant evidence. Because the plaintiff characterizes the language of the jury instruction as too "general" in nature, he further argues that the jury was unable determine that this instruction was to apply to the "erroneously-admitted wage and employment benefits testimony."

¶ 46 The instruction was given as jury instruction number 18 and reads as follows:

> "At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad, or by reasons of any defect, due to the railroad's negligence, in its cars, engines, machinery, roadbed or other equipment." Illinois Pattern Jury Instructions, Civil, No. 160.09 (2006).

¶ 47 A trial court's admission of evidence will not be disturbed on appeal absent an abuse

of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). Additionally, unless it is shown that the erroneous admission of evidence "substantially prejudiced the aggrieved party and affected the outcome of the case," a reversal is not warranted. *Wilbourn*, 398 Ill. App. 3d at 848. The following testimony is what the plaintiff contends constituted improperly admitted assumption of risk evidence, the first portion of which was elicited by the defendant during the cross-examination of witness Don Qualls, a former employee of the defendant now on disability retirement:

"Q: [MR. JONES] Right. And the railroad pays well, correct?

MR. GAVIN: Your honor, I object. That's completely irrelevant to whether Ken [the plaintiff] got hurt getting on and off moving equipment and so forth.

THE COURT: How is it relevant?

MR. JONES: I'm just–the suggestion that these guys had to work these long hours, they were compensated for it.

THE COURT: I'm going to allow it.

Q: [By MR. JONES] You were compensated for all the work that you did out there, correct?

A: Well, there are a lot of variables on the railroad. There–you don't just go and work so many hours and get paid. There's miles you run. And there's–you know, not as much as there used to be, but like agreements and so forth and so on. But as far as being a well paying job, compared to what? You know I don't think I made what you do, you know–I mean–.

Q: Well regardless of whether you make as much as I do, did you feel you were fairly compensated for the work you did out there?

A: Yes.

MR. GAVIN: Again, Your Honor, I object on relevance.

THE COURT: It's overruled. He can answer.

Q: [By MR. JONES] Go ahead and answer, sir:

A: Do I feel like I was paid pretty well?

Q: Yes.

A: I'd say, I worked a lot.

* * *

Q: Now, as far as also the fringe benefits you received, there's a whole package of fringe benefits that came with that, including time off, correct?

MR. GAVIN: Your Honor, may I have a continuing objection to these irrelevant questions?

THE COURT: We will so show. Go ahead.

Q: [By MR. JONES] Time off. Did you get vacation?

A: Yes.

Q: Okay. And, of course, the more years you have, the more vacation you get.

A: Yes, sir.

Q: By the time you retired, how many weeks of paid vacation did you get?

A: Five weeks.

* * *

Q: In addition to that, you get paid holidays?

A: Not on most of the jobs I worked I didn't.

Q: Some jobs did?

A: That's–there again, variables, and every job is different. You know, different types–types of jobs got–some got holidays. Some didn't.

Q: Did you get personal days?

A: Yes.

Q: How many of those do you get a year?

A: I think the maximum was like 11."

¶ 48 The second portion of the testimonial evidence which the plaintiff complains was admitted by the trial court in error for being improper assumption of risk evidence occurred during the defendant's cross-examination of the plaintiff:

"Q: Now, I know you told the ladies and gentlemen of the jury, your first day on the job–I think you said something about getting paid $50.00. What was–your last full year of employment in 2002? How much were you making and did you make in 2002?

MR. GAVIN: Your Honor, I object. That's irrelevant.

THE COURT: I'm going to overrule that objection. The witness can answer.

A: I really don't know. Don't remember.

Q: [By MR. JONES] You have no recollection?

A: No.

Q: Was it more than $50.00?

A: Well, absolutely.

Q: Was it more than $60,000?

A: It might be $60,000. I do not remember. I–it was probably that.

* * *

Q: Okay. So from the time you got off this Reserve Board[7] of seven years not working for the railroad except for those short periods of time you went down to Texas that you told us about, from 1993 to 2000, you worked about three days a week.

---

[7]The plaintiff explains that the Reserve Board refers to a period of time during the plaintiff's employment for the defendant that he was not required to perform work due to the terms of a collective bargaining agreement.

And then from 2000 to 2003 you worked three to four days a week.

MR. GAVIN: Your Honor, again, I object. That misrepresents his testimony.

THE COURT: Overruled. The witness can answer.

* * *

Q: [By MR. JONES] Okay. When you got off [the Reserve Board in 1993] ***. But the job you were working out of Chester, the Chester local, from 1993 up until 2000, that was a job that you worked three days a week but got paid for six?

A: That's correct.

Q: And then the job that you took after that, the Associated Electric job from 2000 to the time you retired in 2003, that was a job that you got your guarantee because you were marked up and available, but you only had to work three and sometimes four days a week, correct?

* * *

A: Correct."

¶ 49 The defendant counters that the testimony regarding wages and benefits elicited from Mr. Qualls and the plaintiff served only to rebut the implication brought out during the plaintiff's direct examination that he worked long hours without adequate compensation. During the plaintiff's direct examination, the defendant points out that the plaintiff testified that when he first started working for the defendant, he worked 10 to 12 hours a day and made $50 per day. In addition, the defendant contends that the plaintiff's attorney "opened the door on direct examination" by eliciting such testimony.

¶ 50 Reviewing the testimony at issue, we do not agree with the plaintiff's assertion that it constitutes improper assumption of risk evidence, especially in light of the fact that nothing in the record indicates that assumption of risk was ever raised or implied by the defendant as an affirmative defense during trial. Therefore, because the testimony served to rebut

testimony elicited by the plaintiff's attorney during direct examination, the trial court did not err in allowing the wage and benefits testimony. Even assuming that such testimony did imply assumption of risk, we further find that jury instruction number 18 served to cure any prejudice caused by the admission of such testimony, especially when read in conjunction with the remainder of the jury instructions dealing with the elements of the plaintiff's cause of action; these instructions focus on a determination of the employer's negligence and causation, as well as the employee's contributory negligence, if any. There is no mention or implication of assumption of risk. Moreover, prior cases have found that a curative instruction such as jury instruction number 18, which advises the jury that a FELA plaintiff cannot be held to have assumed the risks of employment, is proper when the question of assumption of risk is either expressly or implicitly before the jury. See, *e.g.*, *Green v. Union Pacific R.R. Co.*, 269 Ill. App. 3d 1075, 1085 (1995); *Hamrock v. Consolidated Rail Corp.*, 151 Ill. App. 3d 55, 63 (1986). In sum, we find that the trial court's admission of testimonial evidence regarding wage and benefits does not constitute reversible error.

¶ 51 *Submission to the Jury of the Defendant's Exhibits Containing Highlighted Text*

¶ 52 The fourth issue raised by the plaintiff on appeal is whether the trial court erred in allowing the defendant's exhibits O, P, and Q, which contained highlighted portions of text, to be submitted to the jury during its deliberation. The record reflects that the trial court submitted these exhibits over the plaintiff's objections. The plaintiff argues that the defendant's exhibits O, P, and Q, which are excerpts from the defendant's rule books, were prejudicial because they contained highlighted portions of text. These highlighted portions of text, the plaintiff further argues, unfairly emphasized rules that seemingly place all responsibility for safety on the defendant's employees, thereby improperly shifting the defendant's nondelegable duty to use reasonable care. The defendant contends, however, that the highlighted rules or portions thereof were actually what was read to the jury during trial

and therefore to submit them to the jury, as such, was proper.

¶ 53 The trial court has great discretion in determining which exhibits may be submitted to the jury for deliberation, as well as the manner in which the exhibits may be submitted. *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 394 (2000) (finding that the trial court did not abuse its discretion by requiring certain portions of exhibits to be redacted before submitting to jury). Neither party points to any authority standing for the proposition that it is improper to allow highlighted exhibits to be submitted to the jury for its deliberation. Because the highlighted portions of the text in defendant's exhibits O, P and Q were actually read to the jury, we do not find that the trial court abused its discretion by allowing these exhibits to be submitted to the jury and certainly, such action does not rise to the level of reversible error. While it may have been more prudent to have allowed the defendant to submit non-highlighted copies, again, the trial court is given a wide scope to make such determinations.

¶ 54 *Refusal of the Plaintiff's Exhibits 20, 24, 112, and 113*

¶ 55 As his final issue raised on appeal, the plaintiff argues that the trial court erred by refusing to admit his exhibits 20, 24, 112, and 113 into evidence. The plaintiff identifies exhibit 20 as a listing of repetitive trauma claims made against the defendant from the 1980s to present. The plaintiff's exhibit 24 is identified as a collection of reports filed by the defendant's employees for personal injuries claimed to have been caused by walking on ballasted surfaces. The plaintiff identifies his exhibit 113 as a list of repetitive trauma claims made against the defendant, produced to the plaintiff pursuant to a court order, and exhibit 112 is the defendant's discovery response reflecting its production of the list marked as the plaintiff's exhibit 113.

¶ 56 The plaintiff asserts that these exhibits are relevant and would have directly contradicted Mr. Page's testimony that there was no risk in walking on ballast or getting on

and off moving locomotives, by demonstrating the many instances where the defendant's employees were, in fact, injured from walking on uneven or unstable ballast. Also, the plaintiff believes these exhibits, which present a history of employee musculoskeletal disorder claims, were necessary to show the need for an ergonomics program, as well as the defendant's prior notice of this need, thereby serving to contradict the defendant's assertion that an ergonomics program was not required.

¶ 57 Responding, the defendant counters that the plaintiff's exhibits 20, 24, 112, and 113 are irrelevant, prejudicial, and inadmissible as they do not evidence prior injuries substantially similar to that of the plaintiff's knee osteoarthritis. Instead, the defendant characterizes these exhibits as an overly broad "list of all non-traumatic claims regardless of craft, body part, alleged mechanism of injury (i.e. alleged carpal tunnel syndrome resulting from keyboarding), and geographic area," as well as "a list of acute or traumatic (one instance) injury reports from slipping, tripping or falling on ballast." In short, the defendant argues that the incidents of employee injuries contained in these exhibits are not substantially similar to the plaintiff's allegation that getting on and off of moving locomotives and walking on large and uneven ballast for years caused his knee osteoarthritis and, therefore, the trial court did not err in refusing to admit these exhibits into evidence. Moreover, the defendant argues that it is not legally required to implement an ergonomics program nor should its lack of such program be a consideration in determining whether it was liable under FELA. To this end, the plaintiff asserts that evidence of prior accidents need not be substantially similar in order to establish that the defendant had notice of the history of such claims, thereby also showing the defendant's knowledge of its need for an ergonomics program.

¶ 58 As previously stated, it is within the sound discretion of the trial court to determine which exhibits will be admitted into evidence. *Magna Trust Co.*, 313 Ill. App. 3d at 394. Generally, when a plaintiff wishes to demonstrate that a particular or specific hazard exists,

evidence of prior accidents will only be admitted if a foundation is laid to show they are substantially similar to the accident or injury at issue in the case. *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 917 (2007). However, if evidence of prior accidents is offered "only to show that the defendant had notice of the generally hazardous nature of the accident site," then it is unnecessary to establish substantial similarity between the prior accidents and the accident at issue in the case. *Id*. at 918. Yet, should a plaintiff offer evidence of dissimilar accidents to simply demonstrate the defendant's awareness of the general hazardous nature of the accident site, a plaintiff may not further offer details of the prior dissimilar accidents, as such would be unduly prejudicial to the defendant. *Henderson v. Illinois Central Gulf R.R. Co.*, 114 Ill. App. 3d 754, 758 (1983).

¶ 59 Reviewing the record in this case, it appears that the trial court refused to admit the plaintiff's exhibits as the plaintiff failed to convince it that the prior accidents were substantially similar to the claim in the present case: that a railroad employee could suffer knee osteoarthritis as a result of years of getting on and off of moving locomotives and walking on uneven or unstable ballast. We do not find that the trial court abused its discretion in this ruling. The exhibits at issue are too varied in the location and description of the accident site and/or the nature of the injury allegedly arising therefrom. Even if these exhibits were admitted as "dissimilar prior accidents" to show that the defendant had notice of the hazardous nature of uneven ballast or of dismounting moving locomotives, this evidence would not be *per se* indicative of the need to establish an ergonomics program. The plaintiff has offered nothing in the way to show that the defendant is legally obligated to have an ergonomics program or that its failure to establish such program properly supports the plaintiff's theory of the defendant's negligence under FELA.

¶ 60 CONCLUSION

¶ 61 For the reasons discussed herein, we find that the trial court abused its discretion by

failing to adequately sanction the defendant for its Rule 213 violation in regards to its expert witness disclosures for Mr. Weames and Mr. Page. We further find that the trial court did not abuse its discretion as to the remaining four issues on appeal. Accordingly, the judgment of the trial court is reversed, and the cause is remanded for a new trial.

¶ 62 Reversed and remanded for new trial.