

First District holds a party's Rule 213(f) disclosure may be used to impeach that party in the face of contradictory testimony

In *Perez v. St. Alexius Medical Center*, 2020 IL App (1st) 181887, Plaintiff brought a wrongful death action against various defendants related to the alleged failure to diagnose and treat metastatic pelvic abdominal cancer. Among those defendants was Dr. Chung, a radiologist who interpreted an ultrasound.

Prior to trial, Dr. Chung filed a Rule 213(f) disclosure regarding his own anticipated trial testimony. That disclosure indicated that based on his custom and practice, Dr. Chung would have reviewed a prior CT scan and report, would have been aware of the finding of a teratoma on that CT scan, and would have compared the ultrasound he interpreted to that prior CT scan.

At trial, Dr. Chung testified he could not recall whether he reviewed the CT scan, and that he did not document reviewing the CT scan as would have been his custom and practice had he reviewed the CT scan. Plaintiff sought to use Dr. Chung's Rule 213(f) disclosure as an evidentiary admission that he was aware of the teratoma identified on the prior CT scan when he later interpreted the patient's ultrasound.

The trial court (Judge Harmening presiding) barred plaintiff from using Dr. Chung's Rule 213(f) disclosure as an evidentiary admission, or in the alternative, as a means of impeachment. The court reasoned that because the 213(f) disclosure had been signed by Dr. Chung's attorney, not Dr. Chung himself, allowing plaintiff to cross-examine Dr. Chung regarding the disclosure raised concerns about waiving the attorney-client privilege.

On appeal, the First District vacated the ruling of the trial court, ruling it was prejudicial error to prohibit plaintiff from confronting Dr. Chung with his Rule 213(f) disclosure. The Appellate Court reasoned plaintiff should have been permitted to confront Dr. Chung with the disclosure, not only as impeachment of his credibility, but as an admission tending to show his awareness of the findings of the prior CT scan and his awareness that not comparing the CT scan and the ultrasound was not proper care. The First District found the trial court's concern over attorney-client privilege was "earnest but excessive." The Court reasoned Rule 213(f)(3) does not distinguish between a party controlled expert and a nonparty controlled expert, and therefore a party can be impeached with their 213(f) disclosure just as a retained expert witness could be.

The *Perez* holding is a reminder of the importance of ensuring defendant physicians are familiar with the substance of their Rule 213(f)(3) disclosures and are prepared to testify consistently with those disclosures. Defendants should anticipate they will face questioning about the substance of those disclosures just as retained experts are.