Post-Trial Motion (Pursuant to Code of Civil Procedure- Section 5/2-1202)

NOW COMES the Plaintiff, ROBIN PRAIRIE, Special Administratrix of the Estate of ANNA PRAIRIE, deceased, individually, and on behalf of the Estate, by her attorney, Mark E. Wohlberg, and moves this Honorable Court, pursuant to Section 5/2-1202 of the Illinois Code of Civil Procedure, for post-trial relief from the judgment entered against her as to both Defendants on all counts, a jury verdict having been rendered on February 15, 2000, and judgment on that verdict having been entered by this Court on that same date. The Plaintiff moves this Court for alternative forms of relief: arrest of judgment, vacating the verdict of the Jury, vacating the findings of the Jury on the special interrogatories, and entering judgment notwithstanding the verdict on her behalf on all counts filed by the Plaintiff and against one or both of the Defendants; in the alternative, if the foregoing relief is denied, the Plaintiff moves this Court to set aside the verdict of the Jury and the judgment thereon, vacate the special findings of the Jury on the special interrogatories, and grant the Plaintiff a new trial on all issues raised on all counts against one or both of the Defendants. Plaintiff further moves to strike the testimony of Drs. Marwaha, Fintel, Hulesch, and Androwich; and, alternatively, to bar their testimony if a new trial is granted. Plaintiff also moves for sanctions against both Defendants for Rule 213 violations and prays that this Court order them to pay the trial costs the Plaintiff incurred in bringing in her experts to testify at trial in the amount of $14,925.79, and further requests as a sanction the barring of Drs. Fintel, Hulesch, Androwich and any opinions of Dr. Marwaha. Plaintiff would further move for any further relief that may be appropriate under Section 5/2-1202. In support of this motion, the Plaintiff states as follows:

FACTS

It is undisputed that Plantiff's decedent, Anna Prairie, entered the Defendant Snow Valley Nursing Home on May 24, 1994 to recover from surgery for diverticulitis. It is further undisputed that she was found on the floor of her bed and taken to Good Samaritan Hospital in Downers Grove, Illinois on June 5, 1994. She gave a history to emergency room porsomnel at Good Samaritan Hospital and to Defendant Marwaha of being pulled from her bed by a resident of the Defendant Snow Valley rursing home and she was found to be in atrial fibrillation. It is undisputed that she had never suffered from this condition prior to that day. She was treated by her attending physician, the Defendant R. Marwaha, M.D. for this condition. He gave her digoxin and verapamil, and she was eventually released back to Snow Valley on June 9, 1994. Dr. Marwaha testified that he had a standing order in place at Snow Valley that a patient such as Anna Prairie, suffering from atrial fibrillation, must have her vital signs taken at least once per shift (his own expert, Dr. Fintel, as well as both of the Plaintiff's experts, Drs. Breall and Buschman, all agreed that the vital signs of Anna Prairie should have been taken at least three times daily after her return to the Snow Valley Nursing Home on June 9th). Dr. Marwaha also had a written order placed in Anna Prairie's chart that she was to restarted on digoxin and verapamil on June 13, 1994. Snow Valley's vital sign charting of Anna Prairie reflect that her vital signs were taken once on June 9, once on June 10, once on June 11, and none on June 12, 1994 (see Exhibit #1 attached herein). Anna Prairie was found dead on the evening of June 12, 1994.

Plaintiff's nursing expert, Dr. Marybeth Buschman, opined that Defendant Snow Valley agents deviated from the standard of care for bth nurses and CNA's in failing to protect Anna Prairie from cognitively impaired patients prior to her being pulled from her bed on June 5, 1994, and alternatively, in failing to protect her from the risk of falling from her bed on June 5, 1994; and lastly, in failing to properly take Anna's vital signs at least three to four times daily after her return to Snow Valley on June 9, 1994. Dr. Breall opined that the negligent actions of the nursing home agents on June 5, 1994, in failing to protect Anna, caused her to develop atrial fibrillation that necessitated treatment at Good Samaritan Hospital from June 5 to June 9, 1994; he further opined that Anna should have had her vital signs taken at least three times daily after her return to Snow Valley on June 9th, her digoxin levels should have been taken, she should have been placed back on a maintenance dose of digoxin and verapamil by June 10, 1994 (because she was back at normal levels by June 9, 1994), and that all these breaches in the standard of care led to Anna re-developingatrial fibrillation and dying on June 12, 1994.

Dr. Dan Fintel, Defendant Marwaha's expert, opined that Dr. Marwaha's decision to start the digoxin on June 13, 1994, was within the standard of care, and that Anna's death was not caused by a re-occurrence of atrial fibrillation(he agreed that Anna should have had her vitals taken at least three times a day upon her return to the nursing home, which he said was Snow Valley's responsibility, but that any failure to do so did not proximately cause Anna's death). He opined that there were two equally likely causes of death, as well as a number of less likely ones (which Plaintiff submits is cause for striking this portion of his testimony and granting a new trial, that will be discussed later in this motion). Dr. Marwaha also gave certain opinions, in which the Plaintiff claims error, including his failure at trial to testify to his opinion as to the cause of death, which was totally different from his own experts opinion, and for which a “missing witness” instruction tendered by the Plaintiff to the Defendants should have been given.

Lastly, Defendant Snow Valley used two official experts: Dr. Hulesch and Dr. Androwich. much of Dr. Hulesch's testimony was stricken by this Court, and although he had opined on the cause of death of Anna Prairie (at his deposition and in 213 Answers), the Defendant failed to elicit this opinion at trial (Plaintiff would submit that a 5.01 “missing witness” instruction that had been tendered by the Plaintiff to the Defendants for this purpose (see Wohlberg Affidavit- Exhibit #2 attached herein) should have been given, although the Plaintiff is not absolutely sure if this Court ruled on this submission). Dr. Androwich's testimony is also the subject of claimed error by the Plaintiff, which will also be discussed later in this motion.

CLAIMS OF ERROR

1. 213 (G) Opinions:

a) Interjection of issue of “assessment” into case by both Defendants:

The supreme court rules on discovery are mandatory rules of procedure that courts and counsel must follow. See*Department of Transportation v. Crull.* 294 Ill. App. 3d 531, 690 N.E.3d 143. The purpose behind Rule 213 is to avoid surprise and to discourage tactical

gamesmanship. *Crull,* 294 Ill. App. 3d at 537, 690 N.E.2d 143. Because DuPage County Circuit Court has a policy in place that does not accept discovery filings, including answers to 213 interrogatories (leaving a trial court with no prior pre-trial knowledge on the record of a party's opinion testimony), it is especially critical that the good faith of attorneys on 213 issues be scrutinized very carefully. In this case, one of the major issues in the case was the failure of the nursing home (and/or Dr. Marwaha) to take “vital signs” after Anna Prairie's return from Good Samaritan Hospital on June 9th. Both of Plaintiff's expert witnesses gave opinions that it was critical that “vital signs” be taken at least three times daily at Snow Valley to guard against the return of Anna'satrial fibrillation. It is undisputed that the Snow Valley vital sign chart reflected that Anna's “vitals” were taken once on June 9, 10, and 11, and were not taken at all on June 12th, the day she died (see Exhibit #1 attached herein). Dr. Fintel, Dr. Marwaha's expert, did not dispute this issue (see Fintel deposition, p. 23-24, Exhibit #3 attached herein, Fintel trial transcript, p. 33, Exhibit #4 attached herein). Dr. Marwaha himself agreed that “vitals” needed to be taken at least three times daily in Anna's case, and that he had a standing order at Snow Valley that the nurses were to do so (see Marwaha deposition, pgs. 34-35, attached herein as Exhibit #5). To get around this critical weakness in their case, both Defendants engaged in a deliberate, calculated, joint flouting of Rule 213 when they completely changed their theory of the case on this issue during the trial itself when they injected opinions on “nursing assessments,” a much more nebulous term that allowed the Defendants “wriggle room” on the previously clear-cut issue of the taking of “vitals.” On this issue, the Plaintiff has attached to this motion the following documentation to establish that the deliberate introduction of this new issue of “assessments” was reversible error and is grounds for a new trial, as well as grounds for sanctioning, pursuant to Supreme Court Rule 219, both Defendants for the trial costs of the Plaintiff in the amount of $14,925.79 (see the bills of Drs. Breall and Buschmann, airfare of Dr. Breall, and hotel room for Dr. Breall, all attached as Exhibit #6 herein): a) the 213 Answers of Snow Valley (see Exhibit #7 attached herein) and Dr. Marwaha (see Exhibit #8 attached herein) in which the issue of “assessments” is absent from both; b) the discovery depositions of Drs. Androwich (see Exhibit #9 attached herein) and Marwaha (see Exhibit #5 attached herein), both again absent of any opinion on the “issue” of “assessments;” c) selected portions of the trial transcripts of both these witnesses: the direct testimony of Dr. Marwaha during his case in chief on February 14, 2000 (see Exhibit #10 attached herein, pages 28-33), sets the deliberate, successful attempt to change the whole defense theory of this case; the direct examination of Dr. Androwich during Snow Valley's case in chief on February 10, 2000 (see Exhibit #11 attached herein, pages 45-46), which injected the “assessment” issue into the trial with respect to the actions of the CNA's and nurses on June 12, 1994 (the day Anna died). The trial court, especially in DuPage County where the Court does not have any access to 213 Answers and experts' depositions, can only rely on the “good faith” of the attorneys involved in ruling on these 213 issues in the middle of a trial with a jury sitting waiting for a snap decision. Unfortunately in this case, the Defense attorneys were in “bad faith” and the interjection of these new opinions was very prejudicial to the Plaintiff's case.

These actions were calculated and contumacious. Instead of having the Defendant Marwaha, his expert Dr. Fintel, and all of the Plaintiff's experts agreeing on this one issue that “vitals” needed to be taken a minimum of three times daily in Anna's case, it allowed both of these Defendants to slip around this issue and present a united front, claiming that “assessments” were within the standard of care. This improper change by both Defendants of their theory of the case was then argued extensively during closing arguments (see closing argument of Snow Valley's attorney on February 15, 2000, pgs. 14-15, 24, attached herein as Exhibit #12). This Court unknowingly abused its discretion in allowing this testimony to come into evidence. See also *Warrender v. Millsop,* 304 Ill. App. 3d 260, 710 N.E. 2d 512. This Court should not hesitate to sanction both Defendants for their deliberate and calculated violation of Rule 213. As stated in *Crull,* supra: “...trial courts should be more reluctant under Rule 213 than they were under Rule 220 (1) to permit the parties to deviate from the strict disclosure requirements, or (2) not to impose severe sanctions when deviations occur.” In addition to the sanction to impose the trial costs of the Plaintiff as requested above, the Plaintiff would further pray that this Court entertain the sanction of striking instanter the entire testimony of both Dr. Marwaha and Dr. Androwich for the deliberate, contumacious change in their theory of defense, entering judgment notwithstanding the verdict, and setting this matter down for a trial on damages only. In the alternative, should this Court enter a new trial on all issues, Dr. Marwaha should be barred from testifying as to any opinions in his own defense at any new trial due to his very vague, unresponsive 213 Answers and his deliberate flouting of the strictures of Rule 213 in changing his theory of defense in the middle of the trial, and Dr. Androwich's testimony should likewise be barred based upon her vague and unresponsive 213 Answers, on her lack of any previous experience as an expert testifying in court, and as a sanction for the deliberate flouting of Rule 213 by the Defendant Snow Valley in changing its theory of the case as well.

b) Debra Pesek's opinion testimony concerning the strength of nursing home resident “Vivian:”

Debra Pesek was called as a witness by Defendant Snow Valley and was asked over objection if in her opinion the resident known as Vivian possessed the strength to pull the Plaintiff's decedent Anna Prairie from her bed. Aside from the fact that Anna Prairie gave a history to the Good Samaritan emergency room personnel, as well Dr. Marwaha, that a resident of the nursing home pulled her from her bed on June 5, 1994, there was additional evidence adduced that Vivian may have been the one who did it. From the Plaintiff's perspective, the identity of the resident who did the deed is really irrelevant to any of the issues of negligence alleged against the nursing home, and in fact it took the focus off of the issues in the case. The issues with regard to the June 5th incident of being pulled from bed were simple: did Snow Valley protect Anna from other residents who were known by the nursing home to harrass persons such as the Plaintiff, and alternatively, did Snow Valley protect Anna from the risk of falling from her bed. The Plaintiff's position was that it did not matter whether Anna fell from bed or was pulled- the nursing home was negligent in either

respect. In fact, the Defendant Snow Valley used poor Vivian to turn the Jury's focus from the true issues in the case in two ways: 1) by making her behavior one of the issues of the case- did she do it or didn't she, did she have the strength or didn't she; and 2) by introducing a cute, cuddly totally irrelevant photo of her dressed in a Halloween costume the only posiible purpose of which was to create sympathy for her and to prejudice the Plaintiff's case for persecuting (and by inference prosecuting) her (this will be dealt with in a later section). A clear reading of Defendant Snow Valley's Answers to 213 Interrogatories (Exhibit #7 attached) reveals only Dr. Hulesch and Dr. Androwich as 213 opinion experts. Debra Pesek is listed as a 213 (f) witness, and nowhere in that portion of the answer is there an indication that she will give an opinion as to the relative strength of Snow Valley resident "Vivian." The deposition of Debra Pesek was taken on December 17, 1998, and nowhere in its 88 pages of transcript was this opinion as to the strength of "Vivian" ever divulged (see Wohlberg Supplemental Affidavit attached herein as Exhibit #13). It was total "surprise" "ambush" opinion testimony. Further, it was irrelevant and immaterial to the issues of Snow Valley's negligence, and it was testimony more properly the province of a physician, and not this particular CNA, who took a course in her senior year of high school to become a certified nurse assistant. See *Tyler v. Tyler,* 401 Ill. 435, 82 N.E. 2d 346, 349, for the proposition that physicians are better qualified to testify to medical conditions than laymen (although laymen are allowed to testify to mental capacity as well as physicians). Furthermore, under ordinary circumstances, an opinion or conclusion of a nonexpert witness, which is what Ms. Pesek was in this case, may not be admitted into evidence, and her testimony must be confined to a report of the facts only. See *Robinson v. Greeley and Hansen,* 111. App. 3d 720,449 N.E.2d 250, 257. It also was highly prejudicial because it underscored and highlighted the "Vivian" issue, which should never have been an issue in the first place. Finally, there was no proper foundation established to allow this opinion testimony to be admitted. The Jury deliberated for approximately six hours on this matter; the case was obviously close, and the Plaintiff would submit that this testimony could have easily tipped the scales in favor of the Defendants. See *Quiggley* case, infra.

c) The use of the *Braunweld* textbook as substantive opinion testimony on direct examination of Defendant Marwaha's expert, Dan Fintel, M.D., over objection, was error on two grounds- 1) it was beyond the scope of 213 opinions, and 2) its use as direct, substantive evidence is not allowed by the case law:

The 213 Answers of Defendant Marwaha are attached herein as Exhibit #8 (which include the opinions of Dr. Fintel), as is the discovery deposition of Dr. Fintel (Exhibit #3), and there is absolutely no reference in either of these to the*Braunweld* text that was read from and used substantively at the trial (see trial transcript of Dr. Fintel, pages 65-69, attached as Exhibit #4 herein). Specifically, Dr. Fintel was allowed to read into evidence from p. 487 of the *Braunweld*treatise certain opinions concerning the use of digoxin and verapamil (see p. 66 of the Fintel trial transcript, Exhibit #4, lines 5-24, p. 67, whole page, p.68, lines 1-2, lines 21-24, and p. 69, lines 1-9). The attorney for Defendant Dr. Marwaha also had blow-ups of these pages from the *Braunweld* text displayed in the courtroom. With respect to the issue

that the use of this material is beyond the 213 opinions of Dr. Fintel, the Plaintiff will rely on the case law (*Warrender,* supra) and argument already cited and discussed above. With regards to the use of the *Braunweld*treatise as substantive testimony, the Plaintiff would cite the case of *Mielke v. Condell Memorial Hospital,* 124 Ill. App. 3d 42, 463 N.E. 2d 216, 224-227, as being dispositive on this issue. The *Mielke* court cites two additional cases for the proposition that medical literature (which would obviously include treatises such as *Braunweld)* can not be used as substantive evidence during direct testimony because to do so would allow the introduction of hearsay into evidence, and the authors would not be available for cross-examination: *Fornoff v. Parke-Davis &Co.,* 105 Ill. App. 3d 681, 434 N.E. 2d 793, and *Mehochko v. Gold Seal Co.* 66 Ill. App. 2d 54, 213 N.E. 2d 581. The *Fornoff* court states "...the rule prohibiting introduction of medical *treatises* (emphasis added) as substantive evidence is one of long-standing." See also *Piano v. Davison,* 157 Ill. App. 3d 649, 510 N.E. 2d 1066.

2. Introduction of Photograph of "Vivian":

Defendant Snow Valley called Debra Pesek, a CNA (certified nurses' assistant), during its case in chief and introduced, over Plaintiff's objection, a photograph of the resident of Snow Valley known as "Vivian" (Snow Valley Exhibit #9, which is attached as Exhibit #14 herein). Despite the fact that Plaintiff had served a Rule 237 Notice to Produce upon the attorney for Snow Valley on February 2, 2000 (see attached as Exhibit #15 herein), requiring her to produce any photographs and exhibits to be used at trial prior to the commencement of the trial, these were never shown to the Plaintiff's attorney until well after the trial had commenced (see Wohlberg Affidavit attached as Exhibit #2 herein). Plaintiff's theory against Snow Valley as to the incident of June 5, 1994, as set out above, was an alternative one: Snow Valley employees fell below the standard of care, or were negligent, in failing to protect Anna from: a) being pulled out of bed by other residents suffering from Alzheimers' disease, or b) falling out of bed due to lack of handrails and/or restraints. Vivian is not and never was an issue in this case. Anna herself told Dr. Marwaha and others at Good Samaritan Hospital (where Anna was taken on June 5, 1994, after the incident in question, to be treated for atrial fibrillation) that another "..woman had pulled her sheets and pulled her right out of bed..." (see emergency room history attached herein as Exhibit # 16). Anna also told Dr. Marwaha a similar history. The name "Vivian" was not used by her. There was absolutely no purpose served by admitting the photograph of "Vivian" into evidence other than to improperly focus the attention of the Jury on this adorable elderly lady dressed up for Halloween who was being vilified by the Plaintiff. There was no material, no relevant reason to admit the photograph of "Vivian" into evidence. The general rule is that a photograph is admissible if it has a reasonable tendency to prove a material fact in issue. See *Slavin v. Saltzman,* 268 Ill. App. 3d 392, 643 N.E. 2d 1383, 1388. This photograph had no probative value at all; its only value was to prejudice the Jury against the Plaintiff and divert the focus of the Jury away from the case's real issues. In *Ouiggley v. Snoddy,* 102 Ill. App. 2d 232, 242 N.E. 2d 776, the appellate court, in finding the introduction of a photograph reversible error, relied on two cases from the Illinois Supreme Court in, reaching its decision. In *Duffy v. Cortesi,* 2 111. 2d

511, at p. 517, 119 N.E. 2d 241, at p. 245, the Supreme Court said: “Where error is shown to exist, it will compel reversal, unless the record affirmatively shows the error was not prejudicial.” In the *Quiggley* case, the appellate court, in deciding that the introduction of the photo in question constituted reversible error, held that “...where the case is a close one on the facts, and the jury might have decided either way, any substantial error which might have tipped the scales in favor of the successful party calls for reversal.” Snow Valley's attorney, during closing argument, discussed the “Vivian” issue in two separate areas of her closing argument (see pgs. 11-12 and p.16 of transcript attached herein as Exhibit #12).

3. Introduction of misdemeanor ordinance violation complaint and conviction into evidence during cross-examination of Plaintiff by the attorney for Defendant Marwaha was in violation of Plaintiff's motion in limine and case law:

Plaintiff had served a 237 Notice to Produce at Trial upon both Defendants' attorneys on February 2, 2000, which in part, requested that all exhibits to be used at trial be produced prior to the commencement of the trial (see attached herein Exhibits #15, 17). The attorney for Defendant Marwaha never produced Marwaha Exhibit #26 (attached herein as Exhibit #18) prior to its use, although a number of other blow-up exhibits of this Defendant were produced (see Affidavit of Attorney Wohlberg attached as Exhibit #2). Additionally, this Court ordered in limine that Defendants were barred from introducing any unrelated litigation into evidence without first obtaining leave of Court to do so outside the presence of the Jury (see Motion in Limine, paragraph #14, attached herein as Exhibit #19, and transcript of this Court's order concerning this issue, transcript of February 7, 2000, attached herein as Exhibit #20). Attorney Wohlberg was totally unaware of this ordinance violation, and had brought the motion because of a prior lawsuit in which he had represented the Plaintiff(see Affidavit attached as Exhibit #2). It is apparent from reading this transcript of February 7th that the attorney for Dr. Marwaha was planning on using this undisclosed document on the pretext that there was allegedly some question as to the Plaintiff's identity. There had never, ever been an issue in this case as to the Plaintiff's identity and that she was Anna's granddaughter. A review of the 213 Answers of Marwaha (see Exhibit #8 herein) disclose no witnesses of Marwaha intended to dispute this issue. The sole reason to spring this trap on the unsuspecting Plaintiff and her attorney was to improperly impeach her with a very prejudicial document. Evidence of a misdemeanor criminal conviction not involving theft or dishonesty is black letter law not admissible under any circumstances. In *People v. Montgomery,* 47 Ill. 2d 510, 516, 268 N.E. 2d 695, our supreme court set the standards for the use of a witness' prior convictions to impeach the credibility of the witness. A conviction is only admissible if it is punishable by over a year in prison or involves dishonesty, has occurred within the past ten years, and if its probative value outweighed the prejudicial effect. The actions of the Defendant Marwaha violated not only the motion in limine and the 237 Notice to Produce at Trial, but also Illinois case law of longstanding.

4. Introduction of incident reports of June 5th and June 10th, 1994 was error:

Plaintiff had served a 237 Notice to Produce at Trial on the Defendant Snow Valley on February 2, 2000 (see attached herein as Exhibit #21), as well as a Supplemental Notice to

Produce at Trial (see Exhibit #22 herein), requesting all exhibits to be used at trial be produced prior to the commencement of the trial. Sometime after the trial had begun, the Defendant Snow Valley furnished copies of three incident reports to the Plaintiff's attorney. These were reports that had been requested for years during the course of discovery, but had never been produced. A number of deposed Snow Valley employees had said there should have been an incident report, and Plaintiff's expert witness Dr. Buschmann also had opined that an incident report for June 5th should have been generated. Plaintiff had intended to use a 5.01 "missing witness" instruction as to these "missing' reports, but they suddenly were "found," after being "missing" for over five years (see Affidavit attached herein as Exhibit #2, and the proposed instruction #5.01, attached as Exhibit #23). The allowance of the reports for the June 5th incident and for a second incident on June 10th forced an alteration in the Plaintiff's blueprint for trial. It also introduced a written report on a fall out of bed by Anna on June 10, 1994, which did not really go to any of the issues at the trial, and only drew unnecessary, and perhaps prejudicial attention, to a "subsequent" accident involving the Plaintiff's decedent, Anna Prairie. There were no issues of contributory negligence in this case, and this emphasis on another "incident" was not warranted.

5. Improper Closing Argument concerning burden of proof:

Defendant Snow Valley's attorney compared the Plaintiff's burden of proof to "...climbing a mountain. For each count there are three mountains that Plaintiff has to climb to get to the top of" (February 15, 2000, transcript of Snow Valley closing argument, p. 20, lines 21-24, p.21, lines 1-11, attached herein as Exhibit #12). This analogy is totally improper. It sets out a burden of proof even more stringent than the criminal law burden of "beyond a reasonable doubt." This analogy of the Defendant's attorney left the Jury with the impression that there could be no room for doubt on the Plaintiff's burden of proof- the top of a mountain is the pinnacle. If Defendant wanted to use this analogy to a mountain, then it would have been proper to say that the Plaintiff had to reach just over the middle of the mountain. The overruling of Plaintiff's objection gave credence to this improper standard, and Plaintiff would submit could very well constitute reversible error.

The Plaintiff would submit that above errors are each individually cause to grant the Plaintiff's request for a new trial in an arguably close case (if Plaintiff's motions to strike the Defendants' experts are not stricken, which the Plaintiff is by no means suggesting this Court do). See *Quiggley,* supra. Assuming arguendo that they are not, the Plaintiff would alternately suggest that the cumulative effect of all the above error leads inexorably to the conclusion that the only fair course of action would be to grant the Plaintiff a new trial on all issues. See *Aaarvark Art v. Lehigh/Steck-Warlick,* 284 Ill. App. 3d 627, 672 N.E. 2d 1271, 1278.

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR NEW TRIAL

Plaintiff has also prayed that this Court enter judgment notwithstanding the verdict. This would be based on the Court striking all the Defendants' experts, as well as any "opinions" rendered by Dr. Marwaha, as a sanction for the contumacious disregard for Supreme Court Rule 213 both Defendants exhibited durig this trial. Additional bases for striking testimony:

Dr. Marwaha's testimony is also beyond his 213 Answers, Dr. Fintel's opinion as to causation should be stricken, (he had testified to two different, equal causes of death of Anna and on cross-examination, he had opined as to additional causes, leaving any "opinion" on this issue as being too speculative- see *Collins by Collins v. Straka,* 164 Ill. App. 3d 355, 517 N.E. 2d 1147; *Netto v. Goldenberg,* 266 111. App. 3d 174, 640 N.E. 2d 948,953), Dr. Androwich's and Dr. Hulesch's testimony were each highly incredible, and their 213 opinions were also unworthy of any credibility. If this Court strikes this testimony, then a judgment notwithstanding the verdict would be proper, and a trial on damages appropriate.

See *McClure v. Owens Corning,* 188 Ill. 2d 102, 720 N.E. 2d 242 for the standard for JNOV: should be entered only the evidence, when viewed in light most favrable to the opponent, so favors the movant that no contrary verdict could stand. The standard for a new trial is when the verdict is contrary to the manifest weight of the evidence. See *McClure* as well. The Plaintiff would submit that it meets this test, especially if this Court strikes some or all of the witnesses' for the Defendants testimony, including Debra Pesek's.

Additional error: Reference in closing argument to when Plaintiff "filed" her 213 Answers- totally irrelevant and improper; not allowing the paid medical bills into evidence (see Exhibit #24 attached herein); allowing the juror who stated he had a hard time believing in this case during voir dire not being excused for cause.

WHEREFORE, the Plaintiff prays for all of the various relief sought in her preamble, in addition to all the points of error she has discussed in this motion.