

Nos. 1-09-2983, 1-09-3072

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARISELA DURAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois.
)	
)	
)	No. 06 L 010073
v.)	
)	
DR. ELLIS NAM and DR. MARTA HERDA,)	The Honorable
)	Eileen Brewer and
Defendant-Appellees.)	The Honorable
)	James P. McCarthy
)	Judges Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

MODIFIED ORDER UPON DENIAL OF PETITION FOR REHEARING

¶ 1 *Held:* Trial court did not abuse its discretion in striking plaintiff's late response to the motion for summary judgment by defendant Nam, but should not have stricken the late affidavit filed on the date of the hearing pursuant to section 2-1005(c) of the Illinois Code of Civil Procedure. In addition, trial court did not err in granting defendant's motion for summary judgment in a medical malpractice action where the evidence introduced against defendant Nam did not establish breach of the standard of care or causation. Further, trial court properly denied plaintiff's

motion to reconsider and vacate summary judgment where plaintiff did not introduce any new evidence that could not have been obtained at the time of the hearing. Additionally, in the trial against co-defendant Herda, the trial court did not err in refusing to instruct the jury with respect to defendant's alleged negligence in positioning plaintiff where there is no evidence that defendant breached the standard of care in positioning plaintiff. Further, the trial court did not err in giving the jury a sole proximate cause instruction. Lastly, the trial court properly permitted expert to testify to the other possible causes of plaintiff's injury where such testimony was within his knowledge and he did not clearly violate any orders *in limine*.

¶ 2 Plaintiff Marisela Duran appeals from an order of the circuit court of Cook County granting summary judgment in favor of defendant Dr. Ellis Nam, and from a judgment from the circuit court of Cook County, following a jury trial, in favor of defendant Dr. Marta Herda. Plaintiff contends that the trial court erred in granting summary judgment in favor of Dr. Nam, in striking plaintiff's response to Dr. Nam's motion for summary judgment, and in denying plaintiff's motion for reconsideration as to the summary judgment on the basis of new evidence. Plaintiff further contends that the trial court deprived her of a fair trial against Dr. Herda by refusing to instruct the jury in regard to plaintiff's allegations that Dr. Herda improperly positioned plaintiff. Plaintiff also contends that the trial court erred in instructing the jury as to the allegation that the conduct of a person other than Dr. Herda was the sole proximate cause of plaintiff's injury. Lastly, plaintiff contends that the trial court erred in allowing an

anesthesiologist to testify in Dr. Herda's trial that Dr. Nam's orthopedic traction caused plaintiff's injury.

¶ 3 BACKGROUND

¶ 4 On September 25, 2006, plaintiff filed a complaint alleging medical malpractice against Dr. Herda, an anesthesiologist, in count I, and against Dr. Nam, an orthopedic surgeon, in count II. In her complaint, plaintiff alleged that on September 27, 2004, plaintiff underwent surgery to repair her rotator cuff under the care of Dr. Nam, an orthopedic surgeon, and Dr. Herda, an anesthesiologist. Plaintiff further alleged that Dr. Nam was negligent in positioning plaintiff on the operating table, and in failing to protect her from excessive traction to her left brachial plexus, causing or contributing to injury to plaintiff's left brachial plexus. In addition, plaintiff alleged Dr. Herda was negligent in administering a left interscalene block to plaintiff, causing or contributing to injury to plaintiff's left brachial plexus. Plaintiff also alleged that Dr. Herda negligently failed to ensure the appropriate positioning of plaintiff on the operating table and to protect her from excessive traction to plaintiff's left brachial plexus, resulting in or contributing to severe injury to her left brachial plexus. On July 3, 2007, plaintiff filed her first amended complaint with similar allegations as the original complaint, and an amended affidavit from Dr. Fernando Soler, an internist, in support of plaintiff's allegations.

¶ 5 On March 23, 2009, the trial court entered an order setting plaintiff's case for trial on July 13, 2009. The court also granted plaintiff until April 22, 2009 to disclose her expert witness pursuant to Supreme Court Rule 213(f)(3)-(1), and ordered that plaintiff's expert was to be deposed by May 22, 2009. In addition, the trial court granted defendants until June 22, 2009 to disclose their 213(f)(3)-(1) experts, and ordered that defendants' experts were to be deposed by

the date of trial. In compliance with that order, on April 22, 2009, plaintiff disclosed Dr. Paul Kudowitz, an anesthesiologist, as her 213(f)(3)-(1) witness.

¶ 6 On June 26, 2009, plaintiff deposed Dr. Herda's expert, Dr. Lubenow, an anesthesiologist. In that deposition, Dr. Lubenow testified that there are only two potential causes of plaintiff's injury, namely, traction applied during surgery by Dr. Nam, or the interscalene block administered by Dr. Herda. He further testified that in his opinion, the most likely cause of plaintiff's injury, brachial plexopathy, was the traction applied by Dr. Nam. The doctor also testified that Dr. Nam positioned plaintiff's left upper extremity prior to surgery, and that the positioning cause or contributed to plaintiff's injury because positioning the patient "comes hand-in-hand with the potential for traction, and/or traction injury." In addition, Dr. Lubenow testified that Dr. Nam was the only one to apply traction, and that it was his opinion, with a reasonable degree of medical certainty, that it was that traction that caused plaintiff's injury, not the interscalene block administered by Dr. Herda. Dr. Lubenow agreed with Dr. Nam's deposition testimony that it is a breach of the standard of care to apply too much traction for too long of a period of time, which can cause nerve damage. However, Dr. Lubenow also testified that for someone to have sustained an injury such as plaintiff's, it does not necessarily mean that the traction applied was excessive. Additionally, Dr. Lubenow testified that had not been trained in orthopedic surgery, and that he did not have any opinion as to Dr. Nam's care and treatment of plaintiff, or as to whether Dr. Nam had deviated from the standard of care.

¶ 7 On July 2, which was four business days after Dr. Lubenow was deposed and the last business day before the hearing, plaintiff filed her response to Dr. Nam's motion for summary judgment. In that response, plaintiff noted that in his deposition, Dr. Nam acknowledged that

applying too much traction for too long a period of time during surgery is a breach of the standard of care, and that too much traction for a prolonged period can cause nerve damage to a patient. Plaintiff argued in her response that Dr. Nam's testimony to the standard of care, in addition to Dr. Lubenow's testimony that the most likely cause of plaintiff's injury was the traction applied by Dr. Nam, created a genuine issue of material fact as to whether Dr. Nam breached the standard of care and proximately caused plaintiff's injury. In addition, plaintiff argued that she should not be penalized for filing her response past the June 10 deadline because defendants' experts' depositions had not been completed by that date, and that plaintiff needed to take those depositions before responding to Dr. Nam's motion.

¶ 8 On July 6, 2009, the date of the hearing on Dr. Nam's motion for summary judgment, plaintiff filed the affidavit of Dr. Robert Fink, an orthopedic surgeon. In his affidavit, Dr. Fink stated that it was his opinion, to a reasonable degree of medical certainty that it is a breach of the standard of care on the part of the orthopedic surgeon to apply traction that causes nerve damage including brachial plexopathy. At the hearing, on that same date, the trial court struck plaintiff's response and granted Dr. Nam's motion for summary judgment, stating that the "the summary judgment stands unopposed as filed by Dr. Nam." The court further stated that it was "perplexed as to the position of the plaintiff in regard to the standard of care, and the court does not understand why no orthopedic surgeon was presented, retained or disclosed to the defendants before today." The trial court then noted that the trial date was the following Monday, that Dr. Fink's affidavit was prejudicial to Dr. Nam in his defense of that action, and that plaintiff was required to disclose her expert witnesses by April 22, 2009. In addition, the court stated that "[t]here was no evidence as to how Dr. Nam deviated from the standard of care by a competent

witness. *** [A]nd I think it's a little late in the game for plaintiff to present an affidavit of an orthopedic surgeon in regard to Dr. Nam. We only have one week before trial." Plaintiff filed a motion to reconsider that order order, which was denied.

¶ 9 On July 13, 2009, plaintiff proceeded to a jury trial against Dr. Herda, the only remaining defendant. At trial, plaintiff first called Dr. Kudowitz, an anesthesiologist who testified that Dr. Herda breached the standard of care while performing the interscalene brachial plexus block on plaintiff. According to Dr. Kudowitz, it is a deviation from the standard of care to perform the interscalene block while the patient is not awake and unable to respond to a noxious injection. In addition, Dr. Kudowitz stated that it is a deviation from the standard of care to place the needle into a patient's brachial plexus and injecting the anesthetic into the nerve, rather than around it. Dr. Kudowitz further testified that based upon the records that he reviewed, that was what Dr. Herda did. Dr. Kudowitz further testified that in his opinion, to a reasonable degree of medical certainty, plaintiff's brachial plexus injury was caused by Dr. Herda striking plaintiff's nerve with a needle when performing the interscalene block. According to Dr. Kudowitz, plaintiff's injury is consistent with nerve trauma caused by striking her brachial plexus nerve with a needle. Dr. Kudowitz admitted that a brachial plexus injury can be caused by traction during surgery and be unrelated to an interscalene block, but stated that he did not believe that there was substantial traction during plaintiff's surgery to cause that type of injury.

¶ 10 Dr. Herda was called by plaintiff as an adverse witness, and she later testified during the defense's case-in chief. In the interest of compositional economy, we now combine the relevant portions of her testimony. Dr. Herda testified that she did not have an independent memory of plaintiff, but stated that when an interscalene brachial plexus block is performed, the patient is

generally on her back. The doctor further testified that it is her opinion, to a reasonable degree of medical certainty, that she did not deviate from the standard of care in her care and treatment of plaintiff in September 2004. On the issue of whether Dr. Herda was negligent in administering the interscalene block, Dr. Herda testified that in her opinion, the interscalene block was performed before the general anesthesia because she always does that procedure with the patient awake so that she knows how the patient reacts. According to Dr. Herda, that is also consistent with the anesthetic record, which Dr. Herda prepared in the ordinary course of providing anesthesia to a patient, and with plaintiff's deposition testimony, in which plaintiff stated that she felt a pinch on her neck. In addition, it was Dr. Herda's opinion, based on the anesthetic record, that she did not place the needle into plaintiff's nerve and that she did not inject the medication into plaintiff's nerve, and that her nerve was not injured. Dr. Herda acknowledged that if she had injected the medication into the brachial plexus nerve, she would have breached that standard of care.

¶ 11 On the question of whether she was negligent in positioning plaintiff, Dr. Herda testified that she was responsible for positioning plaintiff for the interscalene block and for the administration of anesthesia. The doctor stated that before she performed the nerve block on plaintiff, she positioned plaintiff's left arm at the side of the body to lower the left shoulder so the landmarks of plaintiff's muscles would be more prominent. In addition, Dr. Herda testified that she has an obligation to prevent nerve stretching injuries when she positions a patient for anesthesia. Dr. Herda further testified that the standard of care requires a patient to be properly positioned while receiving an interscalene block, and that such a standard of care is breached if an anesthesiologist who administers an interscalene block fails to properly position the patient.

Additionally, Dr. Herda acknowledged that if she had injured plaintiff's arm when she was positioning it, she would have breached the standard of care owed to plaintiff. However, Dr. Herda also testified that she did not have any responsibility for positioning the extremity after she performed the block. Dr. Herda further testified that it was Dr. Nam's responsibility to position plaintiff's arm and to apply the traction device for the orthopedic surgery.

¶ 12 Plaintiff next called Dr. Nam. He testified, in relevant part, that to his knowledge, the only two potential surgical complications that could cause a brachial plexus injury are traction on the arm for too long a period of time or too much weight, or an interscalene block. In addition, Dr. Nam testified that before proceeding with surgery, nurses, anesthesiologists and Dr. Nam himself work together and position the patient on the operating table after the anesthesia is adequate. Dr. Nam explained that the traction device holds the patient's arm in place for surgery, and that he used two positions with the traction device during plaintiff's surgery. Dr. Nam further testified that he continued to follow plaintiff after the surgery, and in October 2004, he did not believe that the traction was the cause of plaintiff's injury because the procedure was not long enough for that to be a cause. Dr. Nam admitted, however, that he also felt, and explained to plaintiff, that the injury might have been caused by the traction device. Dr. Nam also stated that he could not say whether plaintiff's brachial plexus injury was "secondary" to the interscalene block because he was not a neurologist.

¶ 13 Plaintiff next offered the testimony of Dr. Jose Medina by way of video conference deposition. Dr. Medina testified, in relevant part, that he is a neurologist, and that he treated plaintiff for her brachial plexus injury. Dr. Medina further testified that plaintiff's injury was widespread, and it involved more than a single nerve. In addition, the doctor admitted that he

could not know the specific cause of plaintiff's injury, but stated that there are only there are only two possible causes for plaintiff's brachial plexus injury. Dr. Medina also testified that the number one cause of plaintiff's injury is traction, or prone position of the limb, which could have been done by the anesthesiologist or the surgeon by placing the limb in the wrong position. According to Dr. Medina, the other possible cause of plaintiff's injury would be an "unusual complication" from the injection of anesthesia by Dr. Herda. Dr. Medina further stated that Dr. Herda and Dr. Nam were both responsible for positioning plaintiff's limb during surgery, and that the traction could have been applied by Dr. Nam, Dr. Herda, or both. The doctor then testified that if one of the doctors agreed to control the patient's position, that doctor would take responsibility for the traction.

¶ 14 After plaintiff's case-in-chief, defendant called Dr. Herda's expert, Dr. Lubenow, to testify. Before Dr. Lubenow's testimony, the court addressed a motion *in limine* filed by plaintiff, which sought to bar Dr. Lubenow from testifying that traction caused plaintiff's brachial plexus injury. In that motion, plaintiff contended that since Dr. Lubenow is an anesthesiologist and has no training in orthopedic surgery, he lacks the necessary knowledge, skill, experience, training and education to state that traction caused plaintiff's injury. Plaintiff also contended that Dr. Lubenow's testimony that traction caused plaintiff's injury is not grounded in ascertainable record facts and it lacks foundation.

¶ 15 The trial court granted plaintiff's motion in part, and denied it in part. In doing so, the court stated that "**** he can sit down and say based upon his training and expertise and the materials he's looked at that he has formed an opinion to a reasonable degree of medical certainty that this anesthesiologist's procedures and treatment of the plaintiff's didn't cause this

injury." The trial court further noted that " *** if he believes based upon his opinion that he says that it was not caused by the anesthesiologist's procedures, *** on the basis of causation he can say that it was caused by some other source." In addition, the court stated that Dr. Lubenow is "ruling out one of the [possible causes] by his testimony. *** By implication the material is there that says it's somebody else's doing, not ours or not the doctor's." When plaintiff's counsel stated "[b]ut he can't say who specifically it was as the sole proximate cause," the court responded "[e]xactly. *** [H]e's not giving an orthopedic's surgeon's case." Lastly, the court stated that "Dr. Lubenow is an anesthesiologist [sic] is going to be allowed to give his opinions that goes to the weight whether it's his inability to specifically tell you whether it was the nurse, whether it was when the arm was rotated or the assistant person or something else. But the fact that on the issue of causation, the doctor will be able to give that opinion."

¶ 16 Following that ruling, Dr. Lubenow testified, with respect to his qualifications, that he is a certified anesthesiologist, and that he spends a portion of his time working in the operating room delivering care for patients having surgery. In regard to the cause of plaintiff's injury, that he could not specifically pinpoint when the injury occurred, or a specific mechanism through which it occurred. Dr. Lubenow further testified that despite that, he believed that plaintiff's injury was a traction injury. The doctor stated:

¶ 17 "There are two aspects of traction when one does surgery like this. There's a certain amount of static traction. There's an apparatus that holds the arm out at a certain number of degrees to the side and a certain number of degrees forward. And then during the conduct of this, the surgical team needs to manipulate the arm in order to do surgery and so there's certain traction or pulling *** during the conduct of surgery."

¶ 18 When asked whether Dr. Herda was responsible for positioning plaintiff's shoulder and arm for the surgery, Dr. Lubenow responded negatively, and testified that the "surgical team" was responsible for that. Dr. Lubenow further testified that in his opinion, Dr. Herda did not injure plaintiff's nerve by performing the interscalene block because the worst part of plaintiff's injury is to the side and lower than the area where the nerve block was performed. Dr. Lubenow also based his opinion on the fact that plaintiff had indicated in her deposition that she remembered a prick in her neck when the nerve block was performed, but did not remember any type of painful sensation radiating down her arm, which patients usually experience when a nerve is injured during that procedure. Dr. Lubenow acknowledged that Dr. Nam indicated in his records that plaintiff was placed under general anesthesia before the interscalene nerve block was performed, and that is that is true, she would not have felt any pain radiating down her arm. However, Dr. Lubenow also testified that the anesthesia records, which are kept during the conduct of anesthesia, indicated that the nerve block was performed before the general anesthesia, which is consistent with plaintiff's testimony that she remembers a prick in her neck when the nerve block was being done. Additionally, Dr. Lubenow testified that he did not believe that it was possible that the positioning of plaintiff for anesthesia by Dr. Herda caused plaintiff's injury, or that the traction by the surgeon and the anesthesiologist caused the injury together.

¶ 19 In addition, on the issue of the standard of care, Dr. Lubenow testified that Dr. Herda was responsible for positioning plaintiff while she did the nerve block and then positioning plaintiff while she was putting plaintiff to sleep to put the breathing tube in place. Dr. Lubenow further testified that it is the anesthesiologist's duty with respect to positioning a patient's arm for

anesthesia to make sure that there is no undo pressure on the nerves that typically could be injured when the arm is being positioned for anesthesia. He also testified that the brachial plexus nerve could be injured during the course of positioning the patient's arm for anesthesia if the patient is supine. In addition, Dr. Lubenow testified when a patient is in the supine position, the standard of care requires an anesthesiologist to position the patient's arms in a pain-free, comfortable position. Dr. Lubenow acknowledged, however, that plaintiff's record did not mention whether she was in the supine position. Lastly, Dr. Lubenow testified that if Dr. Herda did not properly position plaintiff, that would have been a breach of the standard of care.

¶ 20 On July 21, 2009, the trial court held a jury instruction conference, at which plaintiff sought to present to the jury in her 20.01 instruction, stating that plaintiff claimed, and Dr. Herda denied, that Dr. Herda was professionally negligent in, *inter alia*, "improperly positioning the plaintiff while performing anesthesia." Dr. Herda objected to that instruction because plaintiff's expert, Dr. Kudowitz, did not have an opinion on the issue of improper positioning of plaintiff, and because plaintiff offered no testimony that Dr. Herda deviated from the standard of care in positioning plaintiff. The trial court sustained Dr. Herda's objection to that item in plaintiff's 20.01 instruction, which says "improperly positioning the plaintiff while performing anesthesia." Plaintiff's counsel noted that Dr. Lubenow and Dr. Herda testified that there was the anesthesiologist has a duty to prevent nerve stretching injuries when positioning a patient. He also noted that Dr. Herda acknowledged that if the anesthesiologist, in positioning a patient, had exerted sufficient traction to cause injury, that would be a breach of the standard of care. In sustaining Dr. Herda's objection, the trial court noted that "there's been no testimony that says

that what [Dr. Herda] did with the arm violated the standard of care by any standard of care witness."

¶ 21 In addition, the trial court granted defendant's long form of 12.04 instruction, which stated:

¶ 22 "More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that her negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

¶ 23 However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant."

¶ 24 Defendant objected to the long form of that instruction and contended that there was no evidence that the sole proximate cause of plaintiff's injury was the conduct of some person other than Dr. Herda. The trial court gave defendant's long form of 12.04 over plaintiff's objection, noting that the jury could choose to believe Dr. Herda's version that nothing she did caused plaintiff's injury, which would mean that the injury had another cause.

¶ 25 On July 22, 2009, the trial court entered a judgment on the jury's verdict in favor of Dr. Herda. After Dr. Herda's trial concluded, plaintiff filed a motion to reconsider its order granting Dr. Nam's motion for summary judgment, and presented additional evidence adduced in Dr. Herda's trial as grounds for vacating the summary judgment in favor of Dr. Nam. Plaintiff now appeals from the judgment in favor of Dr. Herda and from the order denying her motion to reconsider and vacate the summary judgment entered in favor of Dr. Nam.

¶ 26 ANALYSIS

¶ 27 I. Regarding the Summary Judgment in Favor of Dr. Nam

¶ 28 On appeal from the trial court's order relating to Dr. Nam, plaintiff contends that the court erred in striking her response to Dr. Nam's motion for summary judgment and finding the motion "unopposed." Plaintiff argues that the trial court effectively deprived her of a chance to respond to Dr. Nam's motion for summary judgment by requiring plaintiff to file her response on June 10, 2009, which was before defendants were required to disclose their expert witnesses. Plaintiff further argues that she could not have filed her written response before June 2, 2009 because Dr. Lubenow's deposition was "key" in plaintiff's ability to respond to Dr. Nam's motion. In addition, plaintiff contends that she presented an affidavit from Dr. Fink, which she could not have presented sooner because it was not until Dr. Lubenow's deposition that plaintiff's counsel learned that he would need an orthopedic surgeon.

¶ 29 Under Supreme Court Rule 183 (S. Ct. R. 183), trial courts may extend the time within which a party may file any pleading if a showing of good cause has been made. *Premier Elect. Const. Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 454 (1993). The rule provides that:

¶ 30 "The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited time, either before or after the expiration of that time." S. Ct. R. 183.

¶ 31 Rulings made pursuant to Rule 183 are within the trial court's discretion. *Premier Elect. Construction Co.*, 257 Ill. App. 3d at 454; *Krilich v. Millikin Mortgage Co.*, 196 Ill. App. 3d 554, 560 (1990). In fact, where parties filed motions for summary judgment about two years after the complaint was filed, this court found that it was not a abuse of discretion for a trial court to strike one of the parties' brief for being filed two days late. *Krilich*, 196 Ill App. 3d at 560. However, section 2-1005 (c) of the Illinois Civil Code of Civil Procedure provides that "[t]he opposite party [to a summary judgment motion] may prior to or at the time of the hearing on the motion file counteraffidavits." 735 ILCS 5/2-1005(c) (West 2009).

¶ 32 In *Krilich*, 196 Ill. App. 3d at 560, this court found that the trial court did not abuse its discretion in denying plaintiffs' motion to extend their time to file their amended motion for summary judgment and in striking plaintiffs' brief which was filed two days late, but held that the trial court improperly struck the affidavits attached to the brief. In that case, plaintiffs and defendant filed motions for summary judgment on October 23, 1987, which was about two years after plaintiffs filed their complaint. *Krilich*, 196 Ill. App. 3d at 556-57. On February 5, 1988, the trial court allowed plaintiffs until February 16, 1988, to file an amended brief in support of their motion and scheduled the hearing for February 26, 1988. *Krilich*, 196 Ill. App. 3d at 558. Plaintiffs did not file their amended brief until February 18, 1988, to which they attached supplemental affidavits. *Krilich*, 196 Ill. App. 3d at 558. The trial court denied plaintiffs' motion for leave to file the amended brief, and struck plaintiffs' brief and the attached affidavits for being filed late. *Krilich*, 196 Ill. App. 3d at 559. The reviewing court found that under those circumstances, the trial court did not abuse its discretion in striking the brief because it was late. *Krilich*, 196 Ill. App. 3d at 560. However, the court held that the trial court erred in not

considering the affidavits filed with plaintiffs' brief because under section 2-2005(c) of the Code, plaintiffs properly filed those affidavits before the hearing. *Krilich*, 196 Ill. App. 3d at 560. In doing so, the court noted that plaintiffs' affidavits in support of their own motion for summary judgment could be construed as counteraffidavits because they also attacked defendant's basis for their motion for summary judgment. *Krilich*, 196 Ill. App. 3d at 560; see also *Amaral v. Woodfield Ford Sales, Inc.*, 220 Ill. App. 3d 357, 360-61 (1991) (trial court found to have properly denied plaintiff leave to file counteraffidavit before the final ruling, only after determining that the hearing had already concluded when plaintiff moved to file it).

¶ 33 In this case, plaintiff filed her original complaint against both defendants on September 25, 2006, and on March 23, 2009, the trial court granted plaintiff until April 22, 2009 to disclose her expert witnesses. Dr. Nam filed a motion for summary judgment on May 6, 2009. The trial court allowed plaintiff until June 10, 2009, to respond to the motion and set the hearing date for July 6, 2009. On June 5, 2009, plaintiff filed a motion for extension of time to respond, which the trial court denied. Plaintiff filed her response on July 2, 2009, citing to the deposition testimony of Dr. Nam with regard to the standard of care, and to Dr. Lubenow's deposition testimony with regard to causation of her injury. Both doctors' depositions were attached to her late response. On July 6, the date of the hearing, plaintiff filed Dr. Fink's affidavit, in which he stated that it is a breach of the standard of care for an orthopedic surgeon to apply so much traction that causes nerve injury.

¶ 34 At the hearing, the trial court struck plaintiff's response, and stated that Dr. Fink's affidavit was prejudicial to Dr. Nam in his defense of that action, and that "it's a little late in the game for plaintiff to present an affidavit of an orthopedic surgeon in regard to Dr. Nam."

Similarly to *Krilich*, plaintiff's complaint in this case had been filed more than two years before the summary judgment motion. In addition, after the deadline set by the trial court for filing a response, plaintiff attempted to submit her response and later on the date of the hearing, submitted her counteraffidavit. While it was within the latitude of the trial court's discretion to strike plaintiff's response, since it was filed after the deadline albeit before the hearing, the trial court did not have discretion to block the submission of the counteraffidavit since, in accordance to *Krilich* and under the explicit provision of section 2-1005(c), of the Code, that counteraffidavit could be filed "prior to or at the time of the hearing on the motion ***." 735 ILCS 5/2-1005(c)).

¶ 35 Dr. Nam's reliance on *Prather v. Decatur Memorial Hospital*, 95 Ill. App. 3d 470, 473-74 (1981) is misplaced because unlike Dr. Fink's affidavit, that case involved an affidavit that was filed *after* the court entered an order on summary judgment. In fact, several cases acknowledge that the trial court has discretion to strike counteraffidavits filed after the hearing on summary judgment, but no authority has been provided for the proposition that a trial court may strike a counteraffidavit filed up until the date of the hearing, contrary to the statutory language. See e.g. *Napoli v. Hinsdale Hosp.*, 213 Ill. App. 3d 382, 390 (1991) (finding that the trial court properly struck counteraffidavit filed after the hearing on the motion for summary judgment); Cf. *Krilich*, 196 Ill. App. 3d at 560 (court improperly struck counteraffidavit filed late but before the hearing). Accordingly, we conclude that the trial court did not abuse its discretion in striking plaintiff's response to Dr. Nam's motion, but erred in finding that the motion was "unopposed" and not considering Dr. Fink's affidavit in its ruling.

¶ 36 In her petition for rehearing, plaintiff contends that no distinction should be drawn between depositions and counteraffidavits with respect to timeliness. In support of that contention, she cites *Cnota v. Palatine Area Football Ass'n*, 227 Ill. App. 3d 640, 652 (1992), as well as *Abel v. General Motors Corp.*, 155 Ill. App. 3d 208 (1987), and *Stando v. Grossinger Motor Sales, Inc.*, 89 Ill. App. 3d 898 (1980), upon which *Cnota* relies. These cases are inapposite insofar as they simply reflect the well established rule that depositions, like counteraffidavits, may be used to oppose motions for summary judgment, in that they would establish genuine issues of material fact. However, these cases do not purport to interpret the provisions of section 2-1005(c) with respect to timeliness. While section 2-1005(c) specifically enumerates the various documents, including "pleadings, depositions, and admissions on file, together with the affidavits****" to establish entitlement to summary judgment, it focuses exclusively on counteraffidavits in permitting late filings of such counteraffidavits "prior to or at the time of the hearing on the motion." Thus, to blur the line between counteraffidavits and depositions for purposes of late filings would be to ignore the specificity of that provision in singling out only counteraffidavits with regard to timeliness, notwithstanding the specific inclusion of depositions as well as affidavits and other documents in determining whether summary judgment is appropriate, which is dealt with in the latter portion of that same statutory provision.

¶ 37 Having established that the trial court properly struck plaintiff's response to Dr. Nam's motion to summary judgment, but that it should have considered Dr. Fink's affidavit in ruling on that motion, we now turn to plaintiff's overall contention that the trial court erred in granting summary judgment in favor of Dr. Nam. Plaintiff maintains that Dr. Fink's affidavit and other

materials cited in her response, namely, deposition testimony from Dr. Nam and Dr. Lubenow, created a genuine issue of material fact as to Dr. Nam's medical negligence. Plaintiff argues that at the hearing, she presented Dr. Fink's affidavit stating that it is a breach of the standard of care on the part of an orthopedic surgeon applying traction during an arthroscopic rotator cuff surgery to apply traction that causes nerve damage such as brachial plexopathy. Plaintiff also notes that on her original response to the motion, she presented Dr. Nam's own deposition testimony that it is a breach of the applicable standard of care to apply too much traction for too long a period of time during this type of surgery, which can cause nerve injury. Plaintiff further states that she presented testimony from Dr. Lubenow that the traction applied by Dr. Nam was the most likely cause of plaintiff's injury. Thus, plaintiff contends that Dr. Lubenow's testimony, combined with the testimony from Dr. Nam and Dr. Fink, provided evidence from which the trier of fact could conclude that Dr. Nam deviated from the standard of care by applying too much traction during plaintiff's surgery, proximately causing her injury.

¶ 38 Plaintiff's contention cannot prevail because, as discussed above, the trial court did not abuse its discretion in striking plaintiff's response, in which she presented the testimony from Dr. Nam and Dr. Lubenow. Additionally, even Dr. Fink's affidavit had been considered by the trial court in reaching its ruling, it still would not have been sufficient to create a genuine issue of material fact in regard to Dr. Nam's alleged negligence.

¶ 39 Summary judgment is appropriate in medical or other professional malpractice cases where there is no issue of material fact and the movant is entitled to judgment as a matter of law. *Bennett v. Raag*, 103 Ill. App. 3d 321, 326 (1982). It is well established that the purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of

material fact existed. *Northern Illinois Emergency Physicians et al. v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). Thus, at the preliminary stage of a summary judgment proceeding, the non-movant is not required to prove her case, but must simply present some factual basis that would support her claim. *Prairie v. University of Chicago Hospital*, 298 Ill. App. 3d 316, 326 (1998). Since summary judgment is a drastic means of disposing of litigation, courts must exercise extraordinary diligence in reviewing the record so as not to preempt a party's right to fully present the factual basis for his or her claim. *Landau*, 216 Ill. 2d at 305-06. Accordingly, although summary judgment is appropriate when a plaintiff cannot establish an element of her claim, it should be granted only where the right of the moving party is clear and free from doubt. *Landau*, 216 Ill. 2d at 306, citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998).

¶ 40 Additionally, the granting or denying of a motion for summary judgment is not discretionary, and such decisions by the trial court are reviewed *de novo*. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 10 (2000). Thus, in reviewing an order granting summary judgment, a reviewing court must ascertain whether the trial court properly concluded that there were no issues of material fact, and if there were no such issues, whether judgment for the moving party was correct as a matter of law. *People, Dept. of Professional Regulation v. Manos*, 326 Ill. App. 3d 698, 702 (2001).

¶ 41 In a medical malpractice action, a plaintiff must prove the standard of care by which defendant physician's conduct is to be measure, that the doctor was unskillful or negligent under those standard, and that his want of skill caused plaintiff's injury. *Walski v. Tiesega*, 72 Ill. 2d 249, 255-56 (1978). To defeat a motion for summary judgment, a plaintiff must substantiate her

allegations through expert testimony which will raise the necessary inferences to defeat the motion. *Rohe v. Shivde*, 203 Ill. App. 3d 181, 197 (1990). In doing so, plaintiff may establish the applicable standard of care through the testimony of defendant physician. In addition, a defendant-doctor may submit his own affidavit as evidence of the applicable standard of care in support of a motion for summary judgment. *Solon v. Godbole*, 163 Ill. App. 3d 845, 849 (1987).

¶ 42 As discussed above, a motion for summary judgment is to be granted if the pleadings, depositions and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988). Although the pleadings, depositions, admissions and affidavits on file must be construed against the movant and in favor of the opponent, the opponent of a motion cannot simply rely on his complaint or answer to raise an issue of fact when the movant " 'supplies facts, which if not contradicted, would entitle such a party to judgment as a matter of law.' " *Addison*, 124 Ill. 2d at 294, quoting *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). Additionally, where a plaintiff has failed to present evidence which would indicate expert medical opinion to sustain the allegations of the complaint as contrasted with affidavits filed by defendant, or that plaintiff would be able to obtain such opinion in the future, summary judgment in favor of defendant is proper. *Bennet*, 103 Ill. App. 3d at 327.

¶ 43 In this case, Dr. Nam included in his motion for summary judgment his own sworn deposition testimony in which he described the applicable standard of care, stated that he complied with that standard, and that his care was not the proximate cause of plaintiff's injury. In plaintiff's response to Dr. Nam's motion, plaintiff cited to that testimony from Dr. Nam as to the applicable standard of care and to Dr. Lubenow's testimony that the traction applied by Dr.

Nam during patient's surgery was the cause of her injury. As discussed above, the trial court properly struck plaintiff's response for being filed late, and therefore will not be considered as reviewing Dr. Nam's summary judgment order.

¶ 44 In addition, plaintiff filed Dr. Fink's affidavit in opposition of Dr. Nam's motion for summary judgment, which, as discussed above, should have been considered in the ruling on Dr. Nam's motion. In that affidavit, Dr. Fink averred that it was his opinion, to a reasonable degree of medical certainty that it is a breach of the standard of care on the part of the orthopedic surgeon to apply traction that causes nerve damage such as brachial plexopathy. However, Dr. Fink did not state in his affidavit that Dr. Nam did, in fact, apply traction that causes nerve damage during plaintiff's surgery. Thus, although plaintiff brought forth expert testimony of the applicable standard of care, Dr. Fink did not state in his affidavit any opinion as to whether Dr. Nam deviated from that standard, or whether any of his actions proximately caused plaintiff's injury. Thus, plaintiff did not present expert evidence that supports the allegations in her complaint, or that she would be able to obtain such opinion on the future. Accordingly, we conclude that the trial court properly granted Dr. Nam's summary judgment because plaintiff failed to substantiate her allegations through expert testimony that raises the necessary inferences to defeat the motion. *Rohe v. Shivde*, 203 Ill. App. 3d 181, 197 (1990).

¶ 45 Plaintiff next contends that the trial court erred in denying plaintiff's motion to reconsider and vacate its prior summary judgment order in favor of Dr. Nam because plaintiff presented new evidence that Dr. Nam's deviation from the standard of care proximately caused plaintiff's injury, and reintroduced the affidavit of Dr. Fink on the standard of care. In her motion for reconsideration, plaintiff submitted the trial testimony from Dr. Nam and Dr. Medina

gave at Dr. Herda's trial, which plaintiff argues was new evidence that was not available at the time of the first hearing on Dr. Nam's motion for summary judgment.

¶ 46 A trial court's decision on a motion to reconsider an order will not be disturbed absent abuse of discretion. *Woolums v. Huss*, 323 Ill. App. 3d 628, 639 (2001). In addition, motions to vacate summary judgment are addressed to the equitable powers of the court and should be granted or denied in the interest of justice and fairness. *Woolums*, 323 Ill. App. 3d at 639. The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the first hearing, changes in the law, or errors in the court's previous applications of existing law. *Gardner v. Navistar International Transportation Corp.*, 213 Ill.App.3d 242, 248 (1991). Submission of new matter on a motion to reconsider summary judgment lies in the discretion of the trial court and should not be allowed absent a reasonable explanation of why it was not available at the time of the original hearing. *Delgatto*, 131 Ill.2d at 195.

¶ 47 In *Woolums*, 323 Ill. App. 3d at 640, plaintiffs filed a response to defendants' motion for summary judgment with two affidavits attached, and after the hearing was continued, plaintiffs filed a motion to file an amended affidavit of one of their expert witnesses. No hearing was scheduled on plaintiffs' requests, and the court granted summary judgment in favor of defendants. *Woolums*, 323 Ill. App. 3d at 640. Plaintiffs filed a motion to reconsider, to which they attached a more detailed affidavit from one of their expert witnesses and an affidavit from a new expert witness. *Woolums*, 323 Ill. App. 3d at 640. The trial court denied plaintiffs' motion, and in affirming the trial court's decision, the reviewing court noted that there was no indication

that plaintiffs could not have produced a more detailed affidavit from their first expert witness, or the affidavit from their new witness earlier. *Woolums*, 323 Ill. App. 3d at 640.

¶ 48 In this case, plaintiff presented with her motion to reconsider, Dr. Madina and Dr. Nam's trial testimony, along with the affidavit from Dr. Fink, which he had already presented at the hearing on Dr. Nam's motion. The evidence on record indicates that in her direct response to Dr. Nam's motion to summary judgment, plaintiff cited to Dr. Nam's discovery deposition, which Dr. Nam had also attached to his motion. The content of his testimony during that deposition was essentially the same as his testimony at trial, which supports the inference that the facts and opinions elicited during Dr. Nam's trial testimony had already been submitted and were, in effect, already considered in its original ruling. In addition, the evidence on record indicates that Dr. Medina was plaintiff's own expert witness, who had been treating plaintiff as a neurologist since December 1, 2004. It is also apparent from the record that Dr. Medina he gave an evidence deposition on July 7, 2009, one day after the hearing on defendant's motion. Such evidence supports the inference that plaintiff had notice of the content of Dr. Medina's testimony before the hearing on summary judgment on July 6. Finally, Dr. Fink's affidavit was not new, but was a resubmission of his original affidavit, which was presented at the hearing on July 6.

¶ 49 Plaintiff's reliance on *Kirk v. Michael Reese Hospital and Medical Center*, 275 Ill. App. 3d 170 (1995) is misplaced. In that case, no affidavits or evidence were presented at the hearing, and the new evidence was presented after plaintiff retained new counsel. *Kirk*, 275 Ill. App. 3d at 171-72. Unlike the trial court in this case, the court in *Kirk*, 275 Ill. App. 3d at 174, seems to have based its decision on equitable grounds to save plaintiff from an apparently inadequate first attorney. See *Woolums*, 323 Ill. App. 3d at 641 (distinguishing its facts from those in *Kirk*.)

Accordingly, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion.

¶ 50 II. Regarding the Trial Court's Judgment in Favor of Dr. Herda

¶ 51 In her appeal from the trial court's judgment entered in favor of Dr. Herda, plaintiff first contends that the trial court deprived plaintiff of a fair trial when it refused to give the jury plaintiff's 20.01 instruction, which would allow the jury to find that Dr. Herda improperly positioned her during the performance of the interscalene nerve block. Plaintiff argues that her allegation that Dr. Herda's improper positioning of her arm caused or contributed to her injury was supported by sufficient evidence to entitle her to a jury instruction on that theory of liability. Plaintiff maintains that such evidence consists of testimony from Dr. Herda and Dr. Lubenow that such improper positioning would be a breach of the standard of care, and by Dr. Medina's testimony that the "number one" cause of plaintiff's injury is traction, which could have been done by Dr. Nam or Dr. Herda.

¶ 52 It is well established that a litigant has the right to have the jury clearly and fairly instructed on each theory that was supported by evidence. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995). Nonetheless, it is an error to give an instruction not based on evidence. *Leonardi*, 168 Ill. 2d at 100; see also *Black v. Peoria Marine Construction Co.*, 169 Ill. App. 3d 357, 365 (1987). The question of what issues have been raised by the evidence presented is within the discretion of the trial court, and the reviewing court may not reweigh the evidence or determine whether it should lead to a particular conclusion. *Leonardi*, 168 Ill. 2d

at 100; see also *Burge v. Morton*, 99 Ill. App. 3d 266, 269 (1981). In addition, refusal by the trial court to give an instruction will result in a new trial only where the party shows serious prejudice to her right to a fair trial. *Hajian v. Holy Family Hospital*, 273 Ill. App. 3d 932, 937 (1995). A trial court's determination to grant or deny a new trial will not be disturbed absent an abuse of discretion. *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 1116 (2008).

¶ 53 As previously noted, a plaintiff in a medical malpractice action has the burden to prove by affirmative evidence, that the defendant-physician was unskillful or negligent under the applicable standard of evidence. *Walski*, 72 Ill. 2d at 255-56. Thus, where a plaintiff fails to prove the defendant's deviation from the relevant medical standard, the trial court's refusal to instruct on that issue is proper. *Kemnitz v. Semrad*, 206 Ill. App. 3d 668, 676 (1990). In *Kemnitz*, 206 Ill. App. 3d at 669, the trial court refused to instruct the jury in a medical malpractice action on the issue of whether that defendant had improperly retracted the plaintiff's radial nerve during surgery to repair a fractured humerus. The only evidence that defendant deviated from the applicable standard of care was the testimony of a physician who concluded that defendant had deviated from that standard, which was based solely on the presence of a neuroma, a symptom of plaintiff's injury. *Kemnitz*, 206 Ill. App. 3d at 675. In affirming the trial court's refusal, the reviewing court found that under ordinary negligence theory, plaintiff could not establish negligence through the mere presence of an injury. *Kemnitz*, 206 Ill. App. 3d at 675. Thus, the court held that since the evidence presented was insufficient to establish a deviation of the standard of care, the trial court properly refused to instruct the jury on that issue.

¶ 54 In this case, the trial court refused to give plaintiff's instruction that Dr. Herda was negligent in improperly positioning plaintiff, stating that there had been no testimony that Dr.

Herda violated the standard of care. On that issue, Dr. Herda testified that the standard of care requires a patient to be properly positioned while receiving an interscalene block, and that such a standard is breached if the anesthesiologist fails to properly position the patient. Dr. Herda also testified that if she had injured plaintiff's arm when she was positioning it, she would have breached the standard of care owed to plaintiff. However, Dr. Herda did not state that she failed to properly position plaintiff for the administration of anesthesia, or that she injured plaintiff in positioning her arm when administering the block. In addition, Dr. Lubenow testified that the standard of care requires an anesthesiologist to position the patient's arms in a pain-free, comfortable position, and that it would have been a breach of that standard if Dr. Herda did not properly position plaintiff. Dr. Lubenow did not, however, testify that he had any indication that Dr. Herda had not properly positioned plaintiff's arm in a comfortable position. Further, Dr. Medina testified that the number one cause of plaintiff's injury is traction, or prone position of the limb, which could have been done by the anesthesiologist or the surgeon by placing the limb in the wrong position. When asked if either Dr. Nam or Dr. Herda could have caused this injury with traction, Dr. Medina answered that both doctors were responsible for positioning plaintiff's limb during surgery, and that the traction could have been applied by Dr. Nam, Dr. Herda, or both. While Dr. Medina's testimony may have speculated that Dr. Herda could have been a cause of plaintiff's injury by applying traction during surgery, there is no evidence on the record to indicate that Dr. Herda positioned plaintiff's limb for surgery, after she had finished administering the anesthesia.

¶ 55 Although both Dr. Herda and Dr. Lubenow testified that it *would* be a deviation of the standard of care for Dr. Herda not to properly position plaintiff to administer anesthesia, neither

witness testified that Dr. Herda did, in fact, deviate from that standard in positioning plaintiff. Additionally, although Dr. Medina stated that both Dr. Herda and Dr. Nam were responsible for positioning plaintiff's arm during surgery, and that traction was the most likely cause of plaintiff's injury, he did not testify that either Dr. Herda or Dr. Nam deviated from the standard of care in positioning plaintiff's arm.

¶ 56 Plaintiff's reliance on *Adams v. Family Planning Association Group, Inc.*, 315 Ill. App. 3d 533 (2000) is misplaced. In that case, the trial court refused to instruct the jury on a theory of *res ipsa loquitur*, where plaintiff presented expert testimony that her decedent's death would not occur in the absence of negligence. *Adams*, 315 Ill. App. 3d at 546. Further, the trial court in *Adams*, 315 Ill. App. 3d at 548, refused to instruct the jury on bylaws and internal policies to establish the standard of care, where plaintiff introduced specific evidence of those bylaws and policies. In contrast, none of the witnesses in the case at bar affirmatively testified to Dr. Herda's deviation from the standard of care. In such absence of affirmative evidence that Dr. Herda breached the applicable standard of care in positioning plaintiff, we conclude that the trial court's refusal to instruct the jury on improper positioning was not an abuse of discretion.

¶ 57 Plaintiff next contends that if the trial court properly refused to instruct the jury on her theory that Dr. Herda was negligent in positioning plaintiff, then it was an error to give Dr. Herda's long form of 12.04 instruction, which allowed the jury to find that the sole proximate cause of plaintiff's injury was the conduct of some person other than Dr. Herda. In doing so, plaintiff argues that as a result of this error, the jury was deprived of a chance to consider the possibility that Dr. Herda's traction in combination with Dr. Nam's traction proximately caused plaintiff's injury. Plaintiff maintains that in being given the long form of 12.04 and not

plaintiff's instruction on improper positioning, the jury had no basis to find Dr. Herda liable, and was therefore left only with the option of finding that Dr. Nam's traction was the sole proximate cause of plaintiff's injury.

¶ 58 As discussed above, a trial court has considerable discretion in determining which issues have been raised by the trial evidence, and refusal to give an instruction will result in a new trial only where the party shows substantial prejudice. *Haijan*, 273 Ill. App. 3d at 937.

¶ 59 The record in this case shows that Dr. Lubenow testified that he believed that plaintiff's injury was caused by traction, and that he did not believe that it was possible that the positioning of plaintiff by Dr. Herda caused plaintiff's injury, or that the traction by Dr. Nam and Dr. Herda caused the injury together. While Dr. Medina's testimony was inconsistent with Dr. Lubenow's, both doctors' testimony would allow for the possibility that the sole proximate cause of plaintiff's injury was traction by Dr. Nam, which supports the trial court's decision to instruct the jury that it could find that the sole cause of plaintiff's injury was conduct from a person other than Dr. Herda. In contrast, there is no indication that Dr. Herda deviated from the applicable standard of care in positioning plaintiff's arm, which would be necessary to entitle plaintiff to an instruction that Dr. Herda was negligent in positioning her limb.

¶ 60 Moreover, although the jury was precluded from finding that Dr. Herda was liable for plaintiff's injury for improperly positioning her arm, the jury was not precluded from finding the doctor liable for negligently administering the interscalene block. Plaintiff presented testimony of Dr. Kudowitz, who testified that he believed that Dr. Herda breached the standard of care while performing the interscalene brachial plexus block on plaintiff, and that plaintiff's brachial plexus injury was caused by Dr. Herda striking plaintiff's nerve with a needle when performing

the interscalene block. Thus, the jury was not left with the only option of finding that Dr. Nam's traction was the sole cause of plaintiff's injury because it could have believed that the cause of that injury was Dr. Herda's breach of the standard of care in administering the interscalene nerve block.

¶ 61 Plaintiff next contends that the trial court erred in permitting Dr. Lubenow, to testify that surgical traction caused plaintiff's injury because that testimony lacked foundation. Plaintiff maintains that, as an anesthesiologist, Dr. Lubenow was not qualified to testify regarding the orthopedic cause of plaintiff's injury.

¶ 62 Expert testimony is admissible if the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education, and that testimony will assist the trier of fact in understanding the evidence. *Reed v. Jackson Park Hospital*, 325 Ill. App. 3d 835, 842 (2001). In a medical malpractice case, "[i]t must be established that the expert is a licensed member of the school of medicine about which he proposes to express an opinion [citation] and the expert witness must show that he is familiar with the methods, procedures, and treatments ordinarily observed by other physicians, in either the defendant physician's community or a similar community." *Ayala v. Murad*, 367 Ill. App. 3d 591, 597, quoting *Purtill v. Hess*, 111 Ill. 2d 229, 243 (1986); see also *Gill v. Foster*, 157 Ill.2d 304, 316, 193 (1993). The decision of whether to admit expert testimony is within the discretion of the trial court (*People v. Miller*, 173 Ill. 2d 167, 187 (1996)), and a ruling will not be reversed absent showing abuse of that discretion (*People v. Reid*, 179 Ill. 2d 297, 313 (1997)).

¶ 63 Whether a medical “expert is qualified to testify is not dependent on whether he is a member of the same speciality or subspeciality as the defendant, but, rather, whether the allegations of negligence concern matters within his knowledge and observation.” *Jones v. O’Young*, 154 Ill.2d 39, 43 (1992). In *Ayala*, 367 Ill. App. 3d at 600, a physician expert who was certified in obstetrics and gynecology, worked with three medical oncologists in the decision-making process on patients’ cancer treatment, proposed to testify about what would have been the appropriate course of treatment for plaintiff. The reviewing court, in reversing the trial court’s ruling limiting the expert’s testimony, found that since he was a licensed doctor with experience in management and treatment of cancer patients, was qualified to testify as an expert concerning the potential course of treatment if plaintiff’s cancer had been diagnosed sooner. *Ayala*, 367 Ill. App. 3d at 600.

¶ 64 In fact, the "same school of medicine rule" does not apply to a defense expert’s testimony that addresses only the causation and injury issues. *Davis v. Kraff*, 405 Ill. App. 3d 20, 322 (2010). In that case, the court held that ophthalmologists were qualified to offer their opinions concerning the effects of medications on the pupils because although their specialty fell outside of pharmacy or pharmacology, their testimony was offered only on the issue of causation. *Davis*, 405 Ill. App. 3d at 322. The court further noted that it was not aware of any authority that prevented an ophthalmologist from giving an opinion in a suit against an ophthalmologist. *Davis*, 405 Ill. App. 3d at 322.

¶ 65 In this case, the relevant part of Dr. Lubenow testimony was that he believed that plaintiff’s injury was a traction injury, that it was not caused by Dr. Herda’s administration of

the interscalene block or by Dr. Herda's positioning of plaintiff for anesthesia, and he did not believe that the traction by the anesthesiologist and the surgeon caused it together. Dr. Lubenow also explained that there is traction applied during this type of surgery, and that the "surgical team" was the one responsible for positioning plaintiff for surgery. The doctor also testified that Dr. Herda was responsible for positioning plaintiff to administer anesthesia, but stated that Dr. Herda was not responsible for positioning plaintiff for surgery. Thus, Dr. Lubenow did not explicitly testify that plaintiff's injury was caused by surgical traction, but only that the injury was caused by traction which was not applied by Dr. Herda, and that the surgical team would have applied traction in positioning plaintiff for this type of surgery.

¶ 66 Since Dr. Lubenow was certified in anesthesiology, and experienced in this type of procedure, the issues of whether the traction applied by Dr. Herda during anesthesia could have caused plaintiff's injury and whether the administration of the interscalene block caused that injury were within his knowledge. *Ayala*, 367 Ill. App. 3d at 600. Further, although Dr. Lubenow was not an orthopedic surgeon, his experience in administering anesthesia in connection with surgery, the issue of whether the surgical team would apply traction when positioning a patient for surgery would be within his knowledge and observation, similarly to the expert witness in *Ayala*, 367 Ill. App. 3d at 600. In addition, Dr. Lubenow's testimony concerning traction applied during surgery was offered solely on the issue of causation, and he does not have to be licensed in the same school as Dr. Nam to offer that testimony. *Davis*, 405 Ill. App. 3d at 322. Accordingly, the trial court did not abuse its discretion in allowing Dr. Lubenow that plaintiff's injury was caused by traction, that it was not caused by Dr. Herda's

positioning, and that the surgical team applied traction to her arm in positioning plaintiff for surgery.

¶ 67 Plaintiff next contends that the trial court erred in allowing Dr. Lubenow to testify that surgical traction caused plaintiff's injury because that testimony violated the trial court's order on a motion *in limine* and deprived plaintiff of a fair trial. She argues that Dr. Lubenow's testimony that orthopedic traction caused plaintiff's injury violated the trial court's ruling on her motion *in limine* because it could not have specified who or what caused the injury.

¶ 68 For a violation of an *in limine* order to serve as the basis of a new trial, the order must be specific in its prohibitions, any violation must be clear, such violations must have deprived plaintiff of a fair trial. *Kwon v. M.T.D. Products, Inc.*, 285 Ill. App. 3d 192, 198 (1996); see also *Chiricosta v. Winthrop-Breon*, 263 Ill. App. 3d 132, 149 (1994) (expert witness' testimony on his on studies, and references to studies by other experts repeating his findings was found not to be a clear violation of an order *in limine* barring witness from bringing other texts in support of his opinion).

¶ 69 In this case, the trial court stated, in ruling on plaintiff's motion *in limine*, that Dr. Lubenow could say that Dr. Herda's care of plaintiff did not cause her injury, and that if Dr. Lubenow does say that, "he can say it was from some other source." In addition, the court stated that if he rules out one of the causes, "[b]y implication the material is there that says it's somebody else's doing, not ours or not the doctor's ***." The court then stated that Dr. Lubenow would be allowed to "give his opinion that goes to the weight whether it's in his inability to specifically tell you whether it was the nurse, whether it was when the arm was

rotated by the doctor or the assistant person or something else." Next, the court ruled that "on the issue of causation, the doctor will be able to give that opinion." When plaintiff's counsel responded that "he can't say who specifically it was as the sole proximate cause," the trial court replied "[e]xactly." Thus, the trial court limited Dr. Lubenow's testimony in that he could not say that Dr. Nam was the sole proximate cause of the injury. However, it allowed the doctor to testify that if it was not Dr. Herda, the materials that he reviewed showed that it was another source. During his testimony, Dr. Lubenow stated that he believed plaintiff's injury was caused by traction, and he described the types of traction that are applied when positioning a patient during this type of surgery. In addition, he testified that the "surgical team," and not Dr. Herda, was responsible for positioning plaintiff's shoulder and arm for the surgery. However, Dr. Lubenow also testified that Dr. Herda was responsible for positioning plaintiff while she did the nerve block and then positioning plaintiff while she was putting her to sleep. Although Dr. Lubenow testified that he did not believe that the traction applied by Dr. Herda could have caused plaintiff's injury he did not specifically testify that it was the traction applied by Dr. Nam that caused plaintiff's injury. Under these circumstances, it does not appear that Dr. Lubenow committed any clear violations of the trial court's order *in limine*. Even assuming, *arguendo*, that Dr. Lubenow's testimony clearly violated the trial court's order *in limine*, it did not deprive plaintiff of a fair trial because, as discussed above, Dr. Lubenow was properly qualified to give that testimony and it was correctly admitted at trial. See e.g. *Ayala*, 367 Ill. App. 3d at 600. Accordingly, the trial court did not abuse its discretion in allowing Dr. Lubenow to testify to the cause of plaintiff's injury.

¶ 70 Lastly, plaintiff contends that if Dr. Lubenow's testimony concerning causation is inadmissible, the trial court erred in giving Dr. Herda's long 12.04 form instruction regarding another person's conduct as a proximate cause of plaintiff's injury. Plaintiff maintains that without Dr. Lubenow's testimony, there is no competent evidence that supports that instruction.

¶ 71 Having decided that the trial court correctly allowed Dr. Lubenow's testimony concerning the causation of plaintiff's injury, we need not address that contention.

¶ 72 For the foregoing reasons, we affirm the order of the circuit court of Cook County granting summary judgment in favor of Dr. Nam, and the judgment of the circuit court of Cook County in favor of Dr. Herda.

¶ 73 Affirmed.