2021 IL App (4th) 200424-U

NO. 4-20-0424

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 20, 2021
Carla Bender
4th District Appellate
Court, IL

CHAYA R. BRUNK and RAY BRUNK,	)	Appeal from
Plaintiffs-Appellees,	)	Circuit Court of
v.	)	Sangamon County
STEPHEN J. PINEDA, M.D. and SPRINGFIELD CLINIC, LLP,	)	No. 14L164
Defendants-Appellants.	)	Honorable
	)	Christopher G. Perrin,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly denied defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial where (1) plaintiff's expert provided applicable standard of care testimony that supported the verdict, (2) plaintiff established a *prima facie* case of proximate cause, and (3) plaintiff filed her cause of action within the statute of limitations.

¶ 2 In July 2014, plaintiffs, Chaya R. Brunk and Raymond Brunk, filed a medical malpractice action against defendants, Stephen J. Pineda, M.D., an orthopedic surgeon, and Springfield Clinic, LLP. In June 2015, plaintiffs filed a second amended complaint against defendants, alleging Dr. Pineda (hereinafter defendant)—during plaintiff's October 2011 spinal surgery—deviated from the standard of care when he failed to remove a StaXx medical device when there was incomplete fusion or an unstable fusion which resulted in plaintiff sustaining damage to her spine when the StaXx device migrated into her spinal cord and she suffered injury

to her body as a whole. In November 2019, a jury found in favor of plaintiff and awarded her $1,255,000 in damages.

¶ 3 Defendants appeal, arguing the trial court erred in denying their motion for judgment notwithstanding the verdict or, in the alternative, a new trial where (1) plaintiff's expert provided inadequate standard of care testimony which lacked adequate foundation and did not support the verdict, (2) plaintiff failed to establish a *prima facie* case of proximate cause through her expert witness, and (3) the statute of limitations barred plaintiff's action because plaintiff failed to meet her burden of proof with regard to the discovery rule. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2014, plaintiffs filed a medical malpractice action against defendants stemming from an October 2011 spinal surgery performed by defendant. In November 2019, the matter proceeded to a jury trial. We summarize the evidence necessary to resolve this appeal.

¶ 6 A. Plaintiff's Surgeries and Injuries

¶ 7 In 2010, plaintiff started experiencing back pain, which she stated came on gradually after being in a car accident when she was younger. Plaintiff sought chiropractic care from Dr. Kain and treatment from her primary care physician, Dr. Gill. Dr. Gill recommended plaintiff schedule an appointment with defendant. Subsequently, plaintiff scheduled an appointment with defendant and told him she suffered from back pain and "occasional leg pain." Plaintiff described the pain as feeling like she "needed to be pulled apart, basically, that's what my back felt like."

¶ 8 1. *September 29, 2010, Surgery*

¶ 9 On September 29, 2010, defendant performed a discectomy and fusion at two levels of plaintiff's spine, L4-5 and L5-S1. Defendant testified that "the procedure involves

removing portions solely or only of the disc. One of the hallmarks is that you don't remove the bone. Once you start removing the bone, you're starting to destroy the skeleton." Defendant used a StaXx XD device for plaintiff's fusion surgery. Defendant testified he implanted the StaXx XD device, also called a cage, into plaintiff's spine with a gun. The StaXx XD device is attached to a cartridge, and then the cartridge is attached to the gun. The gun and the cartridge then push components called "wafers" into the top and bottom piece of the cage. Specifically, the wafers have interlocking teeth that clamp the device together. Defendant testified that "[t]he most important engineering component of this is that these teeth cannot come out. The more weight you put on the system, the more you squeeze it, the tighter it locks."

¶ 10 After plaintiff's September 29, 2010, surgery, defendant continued to evaluate plaintiff by taking X-rays and performing a clinical exam. Defendant reviewed the X-rays and testified, "I saw the instrumentation. I saw the fusion. And what I saw was that the spine was stable. That is probably the most important series of factors that I was looking for on the x-rays." Defendant identified no instability on the X-rays nor in the radiology reports.

¶ 11 Plaintiff testified that after the September 29, 2010, surgery, she initially felt better but as time went on, she could feel the screws and bar in her spine. Plaintiff testified she "occasionally" had leg pain. Defendant testified that in July 2011 plaintiff reported pain in her back and "much more" pain in her leg. Defendant reviewed plaintiff's computed tomography (CT) scan and determined "everything appeared stable." However, defendant discussed with plaintiff options to alleviate the pain. In September 2011, plaintiff continued to complain of pain on her right side. Specifically, plaintiff reported tenderness around the screws. Defendant recommended either doing nothing or exploratory surgery "to explore the fusion, access it, and then approach it in that manner. And remove the screws if that's appropriate."

¶ 12 2. *October 20, 2011, Surgery*

¶ 13 On October 20, 2011, defendant performed a second surgery on plaintiff where he removed screws that initially affixed the two implanted devices. Defendant testified that during the second surgery, he worked outside the spinal canal. Defendant first identified the screws and then loosened and removed the screws. Defendant left both StaXx cages in place. Once defendant removed the screws, he could access the fusion mass where he palpated the spine to test for movement. Defendant testified his customary practice is to place his hands on the fusion, shake it and use instruments to apply pressure. In his operative report, defendant noted, "We palpated the area, and there appeared to be some fusion mass. It did not appear to be 100% complete but was certainly present." Defendant testified "some fusion mass" refers to "the presence of bone." Defendant found no instability.

¶ 14 Plaintiff testified that after the October 2011 surgery, her symptoms initially improved. Specifically, plaintiff stated the following: "Well, with the screws and stuff being out, of course my back started feeling a little bit better. Still occasional leg pain, you know, occasionally." Defendant testified that postoperative imaging confirmed plaintiff's spine remained stable. Defendant also testified that plaintiff reduced her pain medication intake. Defendant testified he last saw plaintiff in June 2012. Defendant admitted that when he last saw plaintiff, she lacked a 100% or complete union or fusion.

¶ 15 3. *December 2012 Snowblower Incident*

¶ 16 In December 2012, plaintiff assisted her father in removing a snowblower from his truck. After that event, plaintiff started having more pain. Specifically, plaintiff described the pain as "[s]hooting down my right side on my buttocks and into my leg all the way down to my toes." Plaintiff testified she had never had that kind of pain before. Specifically, plaintiff

testified that while she had "occasional" leg pain, she had never felt that kind of pain prior to December 2012 and it "was unbearable pain."

¶ 17 Plaintiff's husband, Raymond Brunk, testified that after having lost confidence in defendant, the couple sought treatment for plaintiff from another physician. Subsequently, plaintiff sought chiropractic care from Dr. Kain. Plaintiff also unsuccessfully sought care from Dr. Salvacion, a pain management specialist who gave plaintiff an epidural injection, and primary care physician, Dr. Klinefelter. Dr. Klinefelter recommended plaintiff see orthopedic surgeon, Dr. Timothy VanFleet.

¶ 18 On February 5, 2013, Dr. VanFleet assessed plaintiff who complained of pain across her right buttocks and down her right leg. Dr. VanFleet testified that when he took a history from plaintiff, she indicated the pain exacerbated or became worse in December 2012. Dr. VanFleet also noted plaintiff's history included a 2010 fusion surgery where plaintiff continued to have pain in her back resulting in the removal of screws in 2011, and that, following severe leg pain in December 2012, an epidural steroid injection provided no relief.

¶ 19 Dr. VanFleet ordered an X-ray, magnetic resonance imaging scan (MRI), and a CT scan of plaintiff's spine. Dr. VanFleet stated the X-ray and MRI showed no slippage of the intervertebral devices at L4-5 and L5-S1 but something was affecting the L5 nerve root. Dr. VanFleet viewed the CT scan and found no evidence of fusion at L4-5 or L5-S1. Dr. VanFleet also discovered a wafer had broken off from one of the cages and lodged into plaintiff's spinal canal. Specifically, Dr. VanFleet stated the following: "And so with—with the nonunion, the pressure in the cage actually just broke that cage. Part of that cage went backwards when it broke[.]"

¶ 20 4. *February 21, 2013, Surgery*

¶ 21 On February 21, 2013, Dr. VanFleet removed the disassembled cage at L4-5, retrieved the broken pieces and broken wafer that had lodged inside the nerve root, and regrafted the inner space to obtain fusion at that level. Dr. VanFleet used screws to reinforce the cage remaining in place at L5-S1. Dr. VanFleet then used a Concord spacer to replace the cage that failed and inserted a second spacer at L5-S1. Dr. VanFleet testified that when he performed the surgery, he did not observe fusion at either level. Ultimately, Dr. VanFleet concluded the cage had catastrophically failed. Dr. VanFleet testified the wafer causing the pressure on the nerve root was the mechanism that led to plaintiff's chronic pain.

¶ 22 Plaintiff testified that after surgery she "felt better I recovered. I mean, you know how recovery is. My back started feeling better. I still hurt some but it felt better. My leg, it wasn't in as much pain after the surgery but it just basically stopped and it just—it just kept hurting all the time every day." Plaintiff indicated that ultimately, her leg pain decreased after Dr. VanFleet performed surgery. However, she did testify to continued leg pain which prevented her from doing quite a bit. Plaintiff also testified that after talking with Dr. VanFleet, she learned that the cage had broken and that it kind of looked like a toothpick had launched into her nerve. Dr. VanFleet showed plaintiff a picture of the broken cage, and she understood that to be why she had the leg pain.

¶ 23 5. *Plaintiffs' July 7, 2014, Lawsuit*

¶ 24 On July 7, 2014, plaintiffs filed a medical malpractice action against defendants. In the initial complaint, plaintiffs alleged September 29, 2010, as the date of the negligent treatment and argued defendant "negligently and carelessly failed to remove a StaXx device when he knew or should have known that there was an incomplete fusion or an unstable fusion"

resulting in plaintiff sustaining injury to her body. Plaintiff's husband also asserted two claims for loss of consortium due to his wife's injuries.

¶ 25 In June 2015, plaintiffs filed a second amended complaint against defendants, alleging October 20, 2011, as the date of the alleged negligent treatment and pled plaintiff "did not discover that her injury was wrongfully caused until a discussion with Dr. VanFleet on February 15, 2013, wherein he indicated that there was a nonunion with catastrophic failure of the StaXx cage." Defendants filed an answer to the second amended complaint and asserted an affirmative defense, alleging that the applicable statute of limitations expired prior to the filing of this lawsuit.

¶ 26 B. Pretrial Issues

¶ 27 1. *Dr. VanFleet's Evidence Deposition*

¶ 28 In August 2019, Dr. VanFleet sat for a video evidence deposition. At his evidence deposition, Dr. VanFleet testified to his educational background and training and about the February 21, 2013, surgery he performed on plaintiff. We summarized above Dr. VanFleet's testimony regarding the February 2013 surgery.

¶ 29 Dr. VanFleet also testified about the possible causes of the cage failure in plaintiff's case. According to Dr. VanFleet, he attributed the failure of the cage to movement but noted that motion may occur in the disc space even with a solid construct, with screws and rods in place. Dr. VanFleet testified that he photographed the StaXx device he removed from L4-5 because he had never seen the failure of an expandable cage like in plaintiff's case.

¶ 30 2. *Dr. Randy Davis's Evidence Deposition*

¶ 31 In October 2019, Randy Davis, M.D. sat for a video evidence deposition. Dr. Davis, an orthopedic spine surgeon, provided standard of care testimony critical of defendant

based on his performance of plaintiff's October 20, 2011, surgery. Dr. Davis testified to his background and that he regularly performed the type of procedure plaintiff underwent. Dr. Davis testified he is an associate professor of orthopedics in neurosurgery at Johns Hopkins University and an associate professor of orthopedics at the University of Maryland. He regularly teaches fellows and medical students how to perform the type of surgeries plaintiff underwent. Dr. Davis testified he also was the director of the Spine Center for 10 years.

¶ 32 Dr. Davis based his standard of care opinion on his training, education, background, performing this particular surgery at least 50 times per year, using the StaXx cage 20 plus times, his familiarity with the product and literature on the product, and his review of all the requisite medical records and depositions. Dr. Davis determined defendant deviated from the standard of care in October 2011 when he failed to reinstrument the spine at the time he removed the screws. Specifically, Dr. Davis stated that "the failure to re-instrument the spine in the face of a definite pseudarthrosis that was found at the time of the removal of the hardware was a violation of the standard of care." Dr. Davis defined reinstrumenting as placing larger screws, changing the trajectory of the screws, or possibly extending fusion to another level. Dr. Davis opined that defendant, during the October 2011 surgery, should have reinstrumented the screws in the spine or removed the StaXx cage device "and packed bone and have an un-instrumented fusion."

¶ 33 Dr. Davis reviewed defendant's October 2011 operative report and testified to its contents. Specifically, Dr. Davis stated that "[defendant] said very specifically, 'It does not appear to be 100 percent complete.' And if it's not 100 percent complete, it's not fused." Further, Dr. Davis testified that one of the best ways to determine whether there is a solid fusion is "if there is still pain with motion, and also if the CT scan that was not done until later, shows

that the facet joints are specifically gone and fused together, and that was not the case." Dr. Davis also reviewed the CT scan taken by Dr. VanFleet and saw no evidence of any fusion at all. Dr. Davis testified that without supplemental fixation, the device was placed in excessive stress with continued motion, which caused the cage to fail by disassembling. Specifically, Dr. Davis testified defendant's failure to use supplementary spinal fixation was "the direct and absolute cause of why the device ultimately disassembled and then went into the spinal canal, because there was not a solid fusion obtained."

¶ 34 During his deposition, Dr. Davis relied on the StaXx XDL 510(k) summary dated August 19, 2011. SpineWave, the manufacturer who created the StaXx cage, prepared the 510(k) summary in seeking approval from the federal Food and Drug Administration (FDA) for a new product, the XDL system. Dr. Davis read from the 510(k) summary and stated that the device was to be "used with autograft or allograft in supplemental spinal fixation. So again, every indication is that the device is to be used with supplemental spinal fixation." The 510(k) summary stated "The StaXx XDL System described in this submission is substantially equivalent to the following devices[,]" which included the StaXx XD system. Dr. Davis also addressed that the 510(k) summary discusses "other predicate devices." Specifically, he testified SpineWave submitted the 510(k) summary for the XDL device but it is substantially equivalent to a variety of other devices and they all have the same indications to use supplemental posterior fixation. Dr. Davis opined that defendant failed to follow the intended use as described in the 510(k) summary.

¶ 35 Dr. Davis testified that in his opinion the wafer that lodged into plaintiff's spinal canal contributed to plaintiff's nerve pain. Specifically, Dr. Davis stated, "I think particularly the degree of intrusion, how far it is going into the canal, immediately at the time when that wafer

popped into the back it caused significant damage almost immediately, which persisted until it was removed and then some healing could occur." When asked if defendant had provided the supplemental fixation at the time of the October 2011 surgery, would plaintiff have nerve pain, Dr. Davis stated, "I believe that she would not have the degree of nerve dysfunction and scarring that she has now which she continues to suffer from."

¶ 36 When asked "[i]f what was done during the operation performed by Dr. VanFleet had been done in the surgery done by [defendant] in October 2011, do you have an opinion as to whether or not the cage would have broken," Dr. Davis responded, "Yes, I do. I think that it would not have. I think that we would not be here today." Dr. Davis testified he could not exclude a possible defect in the device itself caused the wafer to dislodge at L4-5. However, Dr. Davis stated, "I am not an engineer." Specifically, Dr. Davis stated, "I know how the device works from a surgical perspective, but I do not know the means of its assembly and I am not familiar with the specific load tolerances. The only thing I know is that the device is recommended to be used with supplemental fixation." Dr. Davis testified he was personally familiar with the StaXx device where he used the device 20 plus times, worked with the company that manufactured the device for a period of time, and participated in teaching programs they had.

¶ 37 During Dr. Davis's deposition, he testified to a 510(k) summary dated December 2013, which defendants objected to as post-event literature. Defendants asserted a standing objection to "anything that is post any date that he has any criticism of [defendant's] care." Defendant also filed motions *in limine* regarding post-event literature. The trial court struck any testimony of Dr. Davis's related to the 510(k) summary dated December 2013.

¶ 38 C. November 2019 Trial Proceedings

¶ 39 At plaintiff's November 2019 trial, plaintiff's husband voluntarily withdrew his loss of consortium claims, and the case proceeded solely on behalf of plaintiff.

¶ 40 1. *Plaintiff's Case-in-Chief*

¶ 41 During plaintiff's case-in-chief, plaintiff presented the testimony of plaintiff and Raymond, provided in relevant part above. Plaintiff also presented the testimony of Dr. Davis, her retained medical expert, and Dr. VanFleet, through their videotaped evidence depositions. Both Dr. Davis's and Dr. VanFleet's video-taped evidence depositions were played for the jury. Plaintiff also introduced admissions from defendant's May 27, 2016, discovery deposition and moved to admit plaintiff's medical records. The trial court admitted plaintiff's medical records into evidence without objection.

¶ 42 2. *Directed Verdict*

¶ 43 After plaintiff rested, defendants raised two arguments seeking a directed verdict. First, defendants cited the statute of limitations as a basis for directed verdict. Defendants argued the evidence did not support plaintiff's contention that she did not discover defendant's negligence until after Dr. VanFleet's surgery. Thus, the alleged negligence was outside the two-year statute of limitations. Plaintiff argued she could not have possibly known the cage failed until speaking with Dr. VanFleet in February 2013, within the statute of limitations. The trial court denied defendants' motion with respect to the statute of limitations.

¶ 44 Defendants also challenged the sufficiency of Dr. Davis's testimony given his reliance on the StaXx XDL 510(k) summary dated August 19, 2011. Defendants argued the 510(k) summary pertained to a device marketed on August 19, 2011, and pertained to a different device than the cages implanted in plaintiff's spine in September 2010. Accordingly, defendants moved for a directed verdict on the basis Dr. Davis lacked a sufficient foundation for his two

criticisms of defendant. In response, plaintiff argued defendants never raised this issue at the time of Dr. Davis's deposition, and she argued Dr. Davis had additional grounds for his standard of care opinion. Defendants also argued plaintiff failed to meet her burden of proof on proximate cause, as well as standard of care. Again, the trial court denied defendants' motion for directed verdict.

¶ 45 3. *Defendants' Case*

¶ 46 a. Dr. Michael Zindrick

¶ 47 Michael Zindrick, M.D., an orthopedic surgeon specializing in disorders of the spine, testified on defendant's behalf. Dr. Zindrick testified to his education, training, and experience as an orthopedic surgeon. Dr. Zindrick concluded defendant complied with the standard of care in his treatment of plaintiff during her October 20, 2011, surgery. Dr. Zindrick addressed Dr. Davis's criticisms of defendant. Specifically, Dr. Zindrick stated, "My understanding is that he's critical that [defendant] did not reinsert screws after he removed the screws or removed the cages at the time of the second operation."

¶ 48 First, Dr. Zindrick testified defendant was not required to reinstrument or put the screws back in the spine at the time of the second surgery. Dr. Zindrick opined,

> "[I]f [defendant] determined at the time that he took the hardware out that there was no motion at the surgical site that would lead one to believe more likely than not the fusion is solid, there would be no point in reinserting the screws. In fact, he was taking out screws that were painful. He would just be putting screws back in the same spot that would have the same risk."

Further, Dr. Zindrick testified that while X-rays and CT scans help a surgeon to determine whether fusion exists, directly inspecting and surgically exploring the spine is the gold standard.

¶ 49 Dr. Zindrick also addressed Dr. Davis's second criticism that defendant should have removed the cages as an alternative to reinserting the hardware during the second surgery. Dr. Zindrick stated defendant met the standard of care in exploring the fusion, removing the hardware, and not putting new hardware back in. Dr. Zindrick opined that Dr. Davis advocated for a "totally inappropriate" course of action because digging through scar tissue, retracting the nerve root far enough to expose the cage, and inserting an extractor would have been a risky procedure. Additionally, taking the cages out requires taking apart bone graft surrounding the cage. Dr. Zindrick stated that pulling out bone graft would have created an unstable spine that, more likely than not, would collapse and become painful.

¶ 50 On cross-examination, Dr. Zindrick testified it would be a deviation from the standard of care to remove the screws but leave the cage in place if there was evidence of motion that would suggest the fusion was not solid. Dr. Zindrick also indicated that pain can be an indication that the fusion is not solid. Plaintiff impeached Dr. Zindrick with his deposition testimony where he stated, "Well, I have a problem with partially fused. It's like saying you're partially pregnant. It's either fused or it's not fused[.]" Dr. Zindrick agreed that defendant stated in his October 2011 operative report that fusion did not appear 100% complete. Dr. Zindrick also agreed defendant's October 2011 operative report never mentioned the word motion. Dr. Zindrick could not tell from the operative report whether defendant observed motion.

¶ 51 Dr. Zindrick testified that for his standard of care opinions, he based his opinions on defendant's Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018) interrogatory answer where defendant stated he did not find any motion in plaintiff's spine during the October 2011 surgery.

Defendant prepared his answers to his interrogatory six years after the October 2011 surgery. Dr. Zindrick agreed that Dr. VanFleet testified he found no evidence of fusion during his February 2013 surgery. Dr. Zindrick testified there was a risk that the cage could break and the wafer could go into the spinal canal if the screws were removed and there was not solid fusion.

¶ 52 Dr. Zindrick testified it was likely the cage failed during the December 2012 incident, and that something appeared to be "amiss in that x-ray." Dr. Zindrick agreed the cage failure provided some indication that there was no fusion. Further, Dr. Zindrick stated there had to have been some motion for the cage to fail. Dr. Zindrick testified it is a deviation of the standard of care to remove the screws but leave the cage if there was evidence of motion.

¶ 53 b. Defendant

¶ 54 Defendant first testified to his education, training, and background. Defendant also testified about the two surgeries he performed on plaintiff's spine. We recounted his testimony above. Defendant further testified that he met the standard of care in his treatment of plaintiff. Defendant stated he discussed the options with plaintiff on how to alleviate her pain after the first surgery. Defendant recommended either doing nothing or exploratory surgery "to explore the fusion, access it, and then approach it in that manner. And remove the screws if that's appropriate." Defendant testified removing the cages would have presented a risk with no benefit because the cages were not causing plaintiff's pain. Defendant would have had to dissect the nerves from the bone and tissue to remove them, a procedure presenting a high risk of substantial nerve injury.

¶ 55 Defendant addressed his operative report from the October 2011 surgery. Defendant testified he wrote in the report that there appeared to be some fusion mass. Defendant opined that "One never has a hundred percent fusion mass. That just does not happen."

Defendant testified had instability been the source of plaintiff's pain, her pain would have worsened after he removed the screws. Defendant stated that plaintiff's symptoms initially improved after the surgery.

¶ 56 Defendant also stated Dr. Davis's reliance on the StaXx XDL 510(k) summary was improper where it pertained to a different medical device and a different spine surgery. Defendant testified the 510(k) summary Dr. Davis relied on described a surgery prompted by major traumas or a tumor. By contrast, on September 29, 2010, defendant performed a discectomy and a fusion at the disc space. Defendant also testified the 510(k) summary pertained to the XDL device approved on August 19, 2011, and introduced to the market as a new vertebral body replacement product sometime thereafter. Defendant testified the XDL device did not exist when he performed plaintiff's September 29, 2010, surgery. Rather, defendant used the XD device in plaintiff's surgery. Defendant testified that in September or October 2011, the XD device had been in use since 2004 with no known failures.

¶ 57 On cross-examination, defendant admitted that at his deposition he was asked the question, when you last saw plaintiff, had she had 100% complete union or fusion? Defendant agreed that when he responded to the question he said, "I would suggest the answer is no. When we define a successful fusion surgery, there's a few components. One of the components, the main component is relief of symptoms, relief of pain. And since she had not had relief of pain the answer is no." Defendant testified he was aware Dr. VanFleet found no evidence of fusion mass during his February 2013 surgery.

¶ 58 4. *Jury Instructions and Verdict*

¶ 59 At the close of evidence, the trial court instructed the jury on negligence and expert testimony. Defendants did not object to the instructions at trial. Ultimately, the jury found in favor of plaintiff and awarded her $1,255,000 in damages.

¶ 60 D. Defendants' Posttrial Motion

¶ 61 In December 2019, defendants filed a posttrial motion for judgment notwithstanding the verdict or, in the alternative, a new trial. In the motion, defendants argued (1) the statute of limitations barred plaintiff's action where plaintiff failed to meet her burden of proof with regard to the discovery rule; (2) the trial court denied defendants' motion for directed verdict despite the fact plaintiff did not put on testimony concerning the applicable and proper standard of care or proximate cause; and (3) it was error to permit Dr. Davis "to offer opinions in the field of engineering because, by his own admission, Dr. Davis lacked the Proper Qualifications to Give Opinions on the Reason for the Failure of the StaXx Cage: Proximate Cause."

¶ 62 In August 2020, the trial court denied defendants' posttrial motion. The court found (1) plaintiff met her burden of proof regarding the discovery rule; (2) Dr. Davis's "testimony as to the standard of care was based on numerous factors including his knowledge; experience; use of the device; spinal surgeries performed; and work with the company that developed of [*sic*] the StaXx device"; and (3) Dr. Davis's "opinions were based on his experience in using the device; experience as a spinal surgeon; and work with the company that developed of [*sic*] the StaXx device and not on engineering standards."

¶ 63 This appeal followed.

¶ 64 II. ANALYSIS

¶ 65 On appeal, defendants argue the trial court erred in denying their motion for judgment notwithstanding the verdict or, in the alternative, a new trial where (1) plaintiff's expert provided standard of care testimony which lacked adequate foundation and did not support the verdict, (2) plaintiff failed to establish a *prima facie* case of proximate cause through her expert witness, and (3) the statute of limitations barred plaintiff's action because plaintiff failed to meet her burden of proof with regard to the discovery rule. We address each issue in turn.

¶ 66 A. Standard of Review

¶ 67 A judgment notwithstanding the verdict is properly entered when all the evidence, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict could ever stand. *Maple v. Gustafson*, 151 Ill. 2d 445, 453, 603 N.E.2d 508, 512 (1992). "In ruling on a motion for a judgment n.o.v., a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id.* A judgment notwithstanding the verdict may not be granted merely because a verdict is against the manifest weight of the evidence. *Id.*

¶ 68 Because a motion for judgment notwithstanding the verdict presents a question of law, it will be granted only if there is a total failure to prove any essential element of the plaintiff's case. *Cohan v. Garretson*, 282 Ill. App. 3d 248, 257, 667 N.E.2d 1325, 1332 (1996). " 'Where the parties offer conflicting medical testimony regarding the applicable standard of care and [the] defendants' breach of that standard, the jury is uniquely qualified to resolve the conflict, and the judgment *n.o.v.* is not required.' " *Id.* (quoting *Piano v. Davison*, 157 Ill. App. 3d 649, 666, 510 N.E.2d 1066, 1078 (1987)).

¶ 69 Alternatively, when considering a motion for a new trial, the trial court may weigh the evidence and order a new trial when the verdict is against the manifest weight of the evidence. *Maple,* 151 Ill. 2d at 454. A jury verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or where the jury findings are unreasonable, arbitrary, and not based on the evidence. *Id.* A trial court's denial of a motion for a new trial will not be reversed on appeal unless the court abused its discretion. *Cohan,* 282 Ill. App. 3d at 258. Further, when reviewing a trial court's decision on a motion for a new trial, the reviewing court should remember the trial court had the opportunity to personally observe the witness testimony. *Maple,* 151 Ill. 2d at 456.

¶ 70 B. Standard of Care

¶ 71 Defendants argue the trial court erred in denying their motion for judgment notwithstanding the verdict where plaintiff failed to establish defendant deviated from the applicable standard of care during plaintiff's October 2011 surgery. Defendants assert Dr. Davis's testimony regarding the standard of care applicable to defendant's treatment of plaintiff lacked a reliable foundation where Dr. Davis relied on the StaXx XDL 510(k) summary dated August 19, 2011. In the alternative, defendants argue plaintiff failed to establish the applicable standard of care through Dr. Davis's testimony and the jury's verdict was against the manifest weight of the evidence. Further, defendants assert they are entitled to a new trial for the additional reason that plaintiff introduced testimony on the standard of care for a product not on the market when defendant removed the screws from plaintiff's spine on October 20, 2011.

¶ 72 Plaintiff argues (1) the trial court correctly denied defendants' motion for judgment notwithstanding the verdict, (2) plaintiff established the applicable standard of care through Dr. Davis's testimony and the trial court correctly denied defendants' motion for

directed verdict, and (3) the trial court did not abuse its discretion in denying the motion for a new trial. We agree with plaintiff.

¶ 73 To succeed on a medical malpractice claim, the plaintiff must prove (1) the standard of care a medical provider should have followed, (2) the defendant failed to meet the standard of care, and (3) the plaintiff's injuries were proximately caused by the defendant's failure to meet the standard of care. *Guerra v. Advanced Pain Centers S.C.*, 2018 IL App (1st) 171857, ¶ 30, 122 N.E.3d 345. Expert testimony is used to establish the medical standard of care. *Suttle ex rel. Central Trust Bank v. Lake Forest Hospital*, 315 Ill. App. 3d 96, 102-03, 733 N.E.2d 726, 731 (2000).

¶ 74 Whether to admit expert testimony is within the sound discretion of the trial court, and a ruling will not be reversed absent an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003). "Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Id.* The basis for an expert's opinion generally does not affect his standing as an expert; rather, such matters go only to the weight of the evidence, not its sufficiency. *Id.* at 26-27. "The weight to be assigned to an expert opinion is for the jury to determine in light of the expert's credentials and the factual basis of his opinion." *Id.* at 27.

¶ 75 1. *Judgment Notwithstanding the Verdict*

¶ 76 Defendants argue plaintiff failed to establish defendant deviated from the applicable standard of care where plaintiff presented standard of care opinion evidence through Dr. Davis who relied on literature that described a medical device different than the device defendant used in plaintiff's surgery. Plaintiff disagrees and argues she met her burden of proof by showing that defendant deviated from the standard of care when he removed the screws from

the StaXx cage implanted in her back because her back was not fused and therefore, capable of movement. Plaintiff asserts her reliance on Dr. Davis's testimony was proper where Dr. Davis based his standard of care testimony on numerous factors. We agree with plaintiff.

¶ 77 During his evidence deposition, Dr. Davis first testified to his background and qualifications. Dr. Davis, an orthopedic spine surgeon, testified he regularly performed the type of procedure plaintiff underwent. Further, Dr. Davis provided he is an associate professor of orthopedics in neurosurgery at Johns Hopkins University and an associate professor of orthopedics at the University of Maryland. He regularly teaches fellows and medical students how to perform the type of surgeries plaintiff underwent. Dr. Davis also served as director of the Spine Center for 10 years.

¶ 78 Dr. Davis based his standard of care opinion in this case on his training, education, background, performing this particular surgery at least 50 times per year, using the StaXx cage 20 plus times, his familiarity with the product and literature on the product, and his review of all plaintiff's medical records and the requisite depositions. Dr. Davis determined defendant deviated from the standard of care during plaintiff's October 20, 2011, surgery when he failed to reinstrument the spine at the time he removed the screws. Specifically, Dr. Davis stated, "the failure to re-instrument the spine in the face of a definite pseudarthrosis that was found at the time of the removal of the hardware was a violation of the standard of care." Dr. Davis opined that defendant during the October 2011 surgery should have reinstrumented the screws in the spine or removed the StaXx cage device "and packed bone and have an un-instrumented fusion."

¶ 79 Defendants argue Dr. Davis based his standard of care opinion solely on the StaXx XDL 510(k) summary dated August 19, 2011. Defendants assert Dr. Davis's reliance on

the 510(k) summary was improper where the summary described a different device intended for a different use than the device defendant used in plaintiff's case. Specifically, the August 19, 2011, 510(k) summary described the StaXx XDL device, but defendant used the StaXx XD device in plaintiff's case. We find that while Dr. Davis did rely on the 510(k) summary dated August 19, 2011, to support his standard of care opinion, he also relied on a plethora of other information in reaching his standard of care opinion. Further, to the extent defendants argue Dr. Davis based his opinion on a different device than what defendant used in plaintiff's surgery, we find Dr. Davis addressed this issue during his deposition where he stated the August 19, 2011, 510(k) summary also applied to a variety of other predicate devices that all have the same indications to use supplemental posterior fixation.

¶ 80 Specifically, Dr. Davis testified SpineWave prepared the August 19, 2011, 510(k) summary in seeking approval from the FDA for a new product, the XDL system. During his deposition, Dr. Davis read from the 510(k) summary and stated that the device is to be "used with autograft or allograft in supplemental spinal fixation. So again, every indication is that the device is to be used with supplemental spinal fixation." Further, Dr. Davis testified the 510(k) summary discusses "other predicate devices." Specifically, he testified SpineWave submitted the 510(k) summary for the XDL device but it is substantially equivalent to a variety of other devices and they all have the same indications to use supplemental posterior fixation. Moreover, the 510(k) summary specifically stated, "The StaXx XDL System described in this submission is substantially equivalent to the following devices[,]" which included the StaXx XD system. The 510(k) summary also stated, "[the] XDL System has been shown to be substantially equivalent to the predicate devices identified in this submission."

¶ 81 The crux of this case is whether defendant deviated from the standard of care during plaintiff's October 20, 2011, surgery when he failed to reinstrument the spine at the time he removed the screws. As stated above, Dr. Davis testified that defendant deviated from the standard of care when he failed to reinstrument the spine in the face of a "definite pseudarthrosis." Dr. Davis opined that defendant during the October 2011 surgery should have reinstrumented the screws in the spine or removed the StaXx cage device "and packed bone and have an un-instrumented fusion."

¶ 82 Defendants provided standard of care testimony through Dr. Zindrick. Dr. Zindrick testified defendant complied with the standard of care during plaintiff's October 2011 surgery. Dr. Zindrick addressed Dr. Davis's criticisms "that [defendant] did not reinsert screws after he removed the screws or remove the cages at the time of the second operation." Specifically, Dr. Zindrick stated that if defendant "determined at the time that he took the hardware out that there was no motion at the surgical site that would lead one to believe more likely than not the fusion is solid, there would be no point in reinserting the screws." Further, Dr. Zindrick stated defendant met the standard of care in exploring the fusion, removing the hardware, and not putting new hardware in. Dr. Zindrick opined that Dr. Davis advocated for a "totally inappropriate" course of action because digging through scar tissue, retracting the nerve root far enough to expose the cage, and inserting an extractor would have been a risky procedure. Dr. Zindrick testified that he based his opinions on defendant's Rule 213 interrogatory answer where he stated he did not find any motion in plaintiff's spine during the October 2011 surgery.

¶ 83 However, on cross-examination, Dr. Zindrick testified it would be a deviation from the standard of care to remove the screws but leave the cage in place if there was evidence of motion that would suggest the fusion was not solid. Dr. Zindrick agreed that defendant stated

in his October 2011 operative report that fusion did not appear 100% complete. Dr. Zindrick also agreed defendant's October 2011 operative report never mentioned the word motion. Dr. Zindrick could not tell from the operative report whether defendant observed motion. Dr. Zindrick agreed the fact that the cage failed was some indication that there was no fusion. Further, Dr. Zindrick stated there had to have been some motion for the cage to fail. Dr. Zindrick testified it was a deviation from the standard of care to remove the screws but leave the cage if there was evidence of motion.

¶ 84 Based on the evidence, we find the trial court properly denied defendants' motion for judgment notwithstanding the verdict. While Dr. Davis and Dr. Zindrick both opined it would be a deviation of the standard of care to remove the screws if the back is still capable of movement, and thus not solidly fused, the experts offered conflicting testimony regarding whether defendant breached the standard of care. Accordingly, in the present case the jury was uniquely qualified to resolve the conflict between the experts' opinions. See *Cohan*, 282 Ill. App. 3d at 257. Moreover, "[t]he weight to be assigned to an expert opinion is for the jury to determine in light of the expert's credentials and the factual basis of his opinion." *Snelson*, 204 Ill. 2d at 24. When viewing the evidence in the light most favorable to plaintiff, we do not find the evidence so overwhelmingly favored defendant that the verdict cannot stand. Thus, the trial court properly denied defendant's motion for judgment notwithstanding the verdict.

¶ 85 In the alternative, defendants argue plaintiff failed to establish the applicable standard of care through Dr. Davis's testimony and the jury's verdict was against the manifest weight of the evidence. Specifically, defendants argue the jury's verdict rested on baseless expert testimony regarding the standard of care where Dr. Davis based his opinion on the August

19, 2011, 510(k) summary which described the StaXx XDL device and not the StaXx XD device used in plaintiff's case.

¶ 86 Plaintiff disagrees and argues Dr. Davis based his standard of care opinion on his (1) training, (2) education, (3) background, (4) experience performing this particular surgery at least 50 times per year and having used the StaXx cage 20 plus times, (5) familiarity with the product and literature on the product, and (6) review of all of plaintiff's medical records and the requisite depositions. Further, plaintiff argues it was the removal of the screws without solid fusion during the second surgery that constituted the deviation from the standard of care as opposed to whether the device inserted in the first surgery required supplemental fixation, which was not in dispute.

¶ 87 As stated above, it is within the sound discretion of the trial court whether to admit expert testimony. *Snelson*, 204 Ill. 2d at 24. It is then up to the jury to determine the weight to be assigned to the expert's opinion based on the expert's credentials and the factual basis of his opinion. See *id.* Accordingly, where the jury heard all the evidence and observed the witnesses, we find the verdict was not against the manifest weight of the evidence.

¶ 88 2. *Motion for a New Trial*

¶ 89 Defendants next contend the trial court erred when it denied their motion for a new trial because plaintiff introduced testimony on the standard of care for a product not on the market when defendant removed the screws from plaintiff's spine on October 20, 2011. Specifically, defendants assert the August 19, 2011, 510(k) summary qualified as post-occurrence literature. Plaintiff argues the trial court did not abuse its discretion in denying the motion for a new trial.

¶ 90 In *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 423, 836 N.E.2d 784, 791 (2005), the trial court allowed a defense expert to use irrelevant post-occurrence literature as an aid to interpret the applicable standard of care. The appellate court reversed the judgment finding the "trial court abused its discretion when it allowed defendants to introduce postoccurrence literature, unavailable to the treating doctors, as an aid to interpreting the applicable standard of care." *Id.*

¶ 91 Here, defendants argue neither Dr. Davis nor any other competent witness testified that the documentation pertaining to the XDL device was available to orthopedic surgeons by October 20, 2011, the date of the exploratory surgery, and certainly not by the date of the fusion surgery one year earlier. Thus, Dr. Davis's reliance on the August 19, 2011, 510(k) summary resulted in confusion and unfair prejudice. Plaintiff argues Dr. Davis relied on multiple factors in reaching his standard of care opinion and the August 19, 2011, 510(k) summary did not qualify as post-occurrence literature where it was dated two months prior to plaintiff's October 20, 2011, surgery. Further, Dr. Davis explained his opinion with regard to the August 19, 2011, 510(k) summary as relating to "other predicate devices."

¶ 92 As stated above, it is up to the jury to assess the weight to be assigned to the expert's opinion. Dr. Davis testified he based his standard of care opinion on multiple factors, including his training and education, reviewing plaintiff's medical records, his familiarity with the product and literature on the product, and his performance of this particular surgery. Dr. Davis never testified he relied solely on the August 19, 2011, 510(k) summary to reach his standard of care opinion. Further, Dr. Davis and Dr. Zindrick both testified to the applicable standard of care. Based on the evidence, we find the jury's verdict was not against the manifest

weight of the evidence. Accordingly, we find the trial court did not abuse its discretion when it denied defendants' motion for a new trial. See *Maple*, 151 Ill. 2d at 456.

¶ 93 C. Proximate Cause

¶ 94 Defendants next argue plaintiff failed to present a *prima facie* case on the element of proximate cause where plaintiff based her causation theory on a single expert witness whose testimony rested on speculation. Plaintiff argues Dr. Davis was qualified to testify as an expert and she met her burden of proof with regard to proximate cause. We agree with plaintiff.

¶ 95 "To prove proximate cause in a medical malpractice case, the plaintiff must show that it is 'more probably true than not true' that the doctor's failure to adhere to the standard of care proximately caused injury." *Guerra*, 2018 IL App (1st) 171857, ¶ 30 (quoting *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 424, 328 N.E.2d 301, 305 (1975)). " 'Proximate cause in a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative, or merely possible.' " *Id.* (quoting *Ayala v. Murad*, 367 Ill. App. 3d 591, 601, 855 N.E.2d 261, 270 (2006)). "A plaintiff is not obligated to prove he or she would have gotten a 'better result' if the doctor followed the proper standard of care. Instead[,] the plaintiff must prove that the breach of the standard of care more likely than not caused the injury." *Id.* (citing *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 106-07, 679 N.E.2d 1202, 1207 (1997)).

¶ 96 Defendants argue plaintiff failed to offer qualified expert testimony regarding proximate causation where Dr. Davis relied on speculation as to how the cage could break without supplemental fixation. Defendants argue Dr. Davis lacked engineering expertise in identifying the cause of the failure of the cage at L4-5 and cite *Guerra*, in support of their argument. In *Guerra*, the trial court found that a judgment notwithstanding the verdict was

warranted because plaintiff failed to offer expert testimony to establish proximate causation to link the alleged deviations from the standard of care to decedent's death. *Id.* ¶ 31. The plaintiff's expert, a psychiatrist, admitted he did not treat addiction but instead referred patients to addictionologists to determine the course of addiction treatment. *Id.* ¶ 38. Therefore, the court found the psychiatrist's testimony alone did not establish proximate cause. *Id.* ¶ 39. We find *Guerra* distinguishable.

¶ 97 Here, as stated above, it is within the sound discretion of the trial court whether to admit expert testimony. *Snelson*, 204 Ill. 2d at 24. In ruling on defendants' posttrial motions, the trial court found Dr. Davis's "opinions were based on his experience in using the device; experience as a spinal surgeon; and work with the company that developed of [*sic*] the StaXx device and not on engineering standards." Thus, the basis of Dr. Davis's opinion goes to the weight of the testimony not the admissibility. See *id.* at 26-27.

¶ 98 Dr. Davis testified defendant's failure to reinstrument the cage during the October 2011 surgery where there was not a solid fusion allowed movement which caused the cage to fail and a wafer to go into plaintiff's spine. Dr. Davis stated that without supplemental fixation, the device was placed in excessive stress with continued motion, which caused the cage to fail by disassembling. Specifically, Dr. Davis testified defendant's failure to use supplementary spinal fixation was "the direct and absolute cause of why the device ultimately disassembled and then went into the spinal canal, because there was not a solid fusion obtained."

¶ 99 Dr. Davis was then asked the following: "If what was done during the operation performed by Dr. VanFleet had been done in the surgery done by [defendant] in October 2011, do you have an opinion as to whether or not the cage would have broken?" Dr. Davis responded, "Yes, I do. I think that it would not have. I think that we would not be here today." However,

Dr. Davis testified he could not exclude a possible defect in the device itself as what caused the wafer to dislodge at L4-5. Further, Dr. Davis testified that in his opinion the wafer that lodged into plaintiff's spinal canal contributed to plaintiff's nerve pain.

¶ 100 Dr. VanFleet testified that in February 2013, he performed surgery on plaintiff where he removed the disassembled cage at L4-5 and retrieved the broken pieces and broken wafer that had lodged inside the nerve root. Dr. VanFleet testified that when he performed the surgery, he did not observe fusion at either level. Specifically, Dr. VanFleet stated, "And so with—with the nonunion, the pressure in the cage actually just broke that cage. Part of that cage went backwards when it broke[.]" Dr. VanFleet testified the wafer causing the pressure on the nerve root was the mechanism that led to plaintiff's chronic pain. Dr. VanFleet attributed the failure of the cage to movement but noted that motion may occur in the disc space even with a solid construct, with screws and rods in place.

¶ 101 Dr. Zindrick testified there is a risk that the cage could break and the wafer could go into the spinal canal if the screws were removed and there was not solid fusion. Dr. Zindrick testified it was likely the cage failed during the December 2012 snowblower incident. Dr. Zindrick agreed the fact that the cage failed was some indication that there was no fusion. Further, Dr. Zindrick stated there had to have been some motion for the cage to fail.

¶ 102 Based on the record, a reasonable jury could conclude defendant's failure to reinstrument the cage during the October 2011 surgery where there was not a solid fusion allowed movement which caused the cage to fail and a wafer to go into plaintiff's spine. We also note the outcome of this case depended upon the credibility of several witnesses and the jury was in the best position to observe the witnesses and assess their credibility. Accordingly, the

trial court did not err in denying defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

¶ 103 D. Statute of Limitations

¶ 104 Last, defendants argue the statute of limitations barred plaintiff's action where plaintiff failed to meet her burden of proof with regard to the discovery rule. Plaintiff argues she properly filed her cause of action within the statute of limitations where she did not discover her injury and know that it was wrongfully caused until February 2013. We agree with plaintiff.

¶ 105 "A statute of limitations is a designated period of time during which a cause of action must be brought or forever barred." *Roper v. Markle*, 59 Ill. App. 3d 706, 707, 375 N.E.2d 934, 935-36 (1978). Illinois law imposes a two-year statute of limitations to medical malpractice actions arising out of patient care. 735 ILCS 5/13-212(a) (West 2010). The limitations period begins to run when "the claimant knew, or through the use of reasonable diligence should have known" of the injury for which damages are sought in the action. *Id.* "Whether [a] plaintiff knew or should have known that a condition was the result of the possibly negligent act of another is a question of fact." *Roper*, 59 Ill. App. 3d at 714.

¶ 106 "The legislature's adoption of a discovery rule limitations statute which applies to all medical malpractice cases was prompted by our supreme court's decision in *Lipsey v. Michael Reese Hospital*, [46 Ill. 2d 32, 262 N.E.2d 450 (1970)]." *Id.* at 709. "[The] 'discovery rule' applicable to medical malpractice cases tolls the running of the statutory time period until such time as the potential plaintiff knew or should have known both that he has a physical injury and that it may be a result of someone's negligence." *Id.* at 707.

¶ 107 Here, on October 20, 2011, defendant performed a second surgery on plaintiff where he removed the screws that initially affixed the two implanted cage devices. Plaintiff

testified that after the surgery she still had "occasional leg pain." In December 2012, plaintiff assisted her father in removing a snowblower from his truck. Plaintiff testified that afterwards, she began to feel "unbearable pain" in her right leg. Specifically, plaintiff described the pain as "[s]hooting down my right side on my buttocks and into my leg all the way down to my toes." Plaintiff testified she had never had that kind of pain before.

¶ 108 Raymond testified that around this time after having lost confidence in defendant, the couple sought treatment for plaintiff from another physician. Plaintiff sought chiropractic care from Dr. Kain. Plaintiff also sought care from Dr. Salvacion, a pain management specialist, who gave plaintiff an epidural injection which failed to provide plaintiff any relief, and primary care physician, Dr. Klinefelter. Dr. Klinefelter recommended plaintiff see orthopedic surgeon, Dr. VanFleet.

¶ 109 On February 5, 2013, Dr. VanFleet saw plaintiff who complained of pain across her right buttocks and down her right leg. Dr. VanFleet ordered an X-ray, MRI, and a CT scan of plaintiff's spine. After reviewing the CT scan, Dr. VanFleet discovered a wafer had broken off from one of the cages and lodged into plaintiff's spinal canal. On February 21, 2013, Dr. VanFleet performed surgery on plaintiff where he removed the disassembled cage at L4-5, retrieved the broken pieces and broken wafer that had lodged inside the nerve root, and regrafted the inner space to obtain fusion at that level.

¶ 110 Plaintiff testified that in February 2013, after talking with Dr. VanFleet, she learned that the cage had broken and that "[i]t kind of looked like a toothpick" had launched into her nerve. Dr. VanFleet showed plaintiff a picture of the broken cage, and she understood that to be why she had the leg pain.

¶ 111 On July 7, 2014, plaintiff filed her medical malpractice action against defendants. In her second amended complaint, plaintiff alleged October 20, 2011, as the date of the alleged negligent treatment and pled she "did not discover that her injury was wrongfully caused until a discussion with Dr. VanFleet on February 15, 2013, wherein he indicated that there was a nonunion with catastrophic failure of the StaXx cage."

¶ 112 Plaintiff asserts she did not discover her injury until December 2012 and know that it was wrongfully caused until February 2013. Specifically, plaintiff asserts she learned of her injury following the December 2012 snowblower incident, which resulted in her experiencing "unbearable" right leg pain, and she learned in February 2013 that her injury may have been wrongfully caused after talking with Dr. VanFleet, "wherein he indicated that there was a nonunion with catastrophic failure of the StaXx cage." Defendants argue plaintiff failed to meet her discovery rule burden where she failed to present any testimony as to when she felt her injuries potentially were "wrongfully caused." We disagree.

¶ 113 "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416, 430 N.E.2d 976, 980-81 (1981). For purposes of the discovery rule, plaintiff would not have been put on notice of an injury to her spine until she began to feel "unbearable" pain in December 2012. Plaintiff testified she had never experienced that kind of pain before. Further, it was not until February 2013 that she became aware of the cause of her "unbearable" leg pain and that it was a result of "a nonunion with catastrophic failure of the StaXx cage." Specifically, prior to Dr. VanFleet ordering a CT scan which showed the cage had broken and a wafer had lodged into plaintiff's spinal canal, plaintiff was unaware of the cause of her pain.

¶ 114 Based on the evidence, we find plaintiff filed her cause of action within the statute of limitations. Both the date which plaintiff learned of her injury, December 2012, and the date she learned it may have been wrongfully caused, February 2013, fell within the two-year statute of limitations. Accordingly, where plaintiff met her discovery rule burden of proof, we find the trial court did not err in denying defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

¶ 115 III. CONCLUSION

¶ 116 For the reasons stated, we affirm the trial court's judgment.

¶ 117 Affirmed.