

the defendants' patient, and improperly and inadequately answering the jury's written questions during deliberations. We reverse and remand.

¶ 4

FACTS

¶ 5 After experiencing persistent abdominal pain for over a year, the plaintiff sought treatment from Dr. O'Neil, an obstetrician-gynecologist licensed to practice medicine in Illinois. On May 4, 2005, Dr. O'Neil performed a diagnostic laparoscopy and lysis of adhesions on the plaintiff. During the procedure, Dr. O'Neil located a portion of the plaintiff's bowel that was tethered to the inside of her abdominal wall by fatty tissue and used monopolar electrosurgical scissors to cut the fatty tissue to release the bowel. Unknown to Dr. O'Neil during this procedure, the plaintiff suffered a thermal injury, or burn, to the bowel. After the procedure, the plaintiff complained of abdominal pain and vomiting, and on May 6, 2005, Dr. O'Neil performed an exploratory laparotomy and attempted bowel repair on the plaintiff. The plaintiff's abdominal pain continued and she underwent a repeat laparotomy, lysis of adhesions, and small bowel resection by Dr. John Wieland on June 1, 2005.

¶ 6 On September 14, 2006, the plaintiff filed her medical malpractice complaint alleging that Dr. O'Neil committed medical negligence in treating her because he failed to operate through a vertical midline incision, failed to adequately examine the bowel for evidence of injury, failed to properly repair the injured bowel, failed to consult with a general surgeon for management of the bowel injury, and failed to timely diagnose and treat complications which arose following his attempted bowel repair. The plaintiff alleged that Dr. O'Neil acted as an agent of O'Neil Associates, S.C.

¶ 7 During the May 2010 jury trial, the parties presented Dr. O'Neil's operative note from the May 4, 2005, diagnostic laparoscopy and lysis of adhesions, which stated, in relevant part:

"It was felt by this examiner that there was adequate distance from the bowel lumen to allow transection. Using electrosurgical scissors, the loop of bowel was transected carefully with the scissors placed very tensely against the peritoneum. A bleeding point was encountered on the bowel mucosa following this, and a 12-mm trocar was placed through the paramedian location; and tenting this lesion with a grasping forceps, a titanium Ligaclip was placed around this area. The omental adhesion appeared to be quite vascular as well and required two titanium Ligaclips and was then transected. *** The patient tolerated the procedure well with no untoward intraoperative sequelae and was taken to recovery in satisfactory condition."

¶ 8 Dr. O'Neil's utilization of a monopolar setting on the electrosurgical scissors, as opposed to a bipolar setting on the unit, required the placing of a grounding pad on the plaintiff's left thigh during surgery. Diana Ducett, a registered nurse at Bloomington Normal Healthcare Surgery Center, explained that if a bipolar electrosurgical unit were used, there would have been no need for a grounding pad because the electrical current within the bipolar electrosurgical unit would have been confined to the tip of the instrument.

¶ 9 In the operative note for the subsequent May 6, 2005, procedure, Dr. O'Neil listed the preoperative diagnosis as "Peritonitis with probable ilial perforation as a complication of endoscopic adhesiolysis." In Dr. O'Neil's discharge summary following this procedure, he stated:

"The patient continued to have pain and did have an endoscopic evaluation a week prior to the day of discharge as an outpatient. There was concern at the time that there may have been some electrosurgical bowel injury and the patient had been given advice to call promptly if any abdominal pain w[ere] to develop.

She did develop peritoneal signs and was admitted 6 days prior to [discharge on May 11, 2005]. The following day, the patient was taken to the operating room,

underwent a laparotomy and was noted to have a very small perforation of the ileal area that was in question that had been taken down. This area was resected and repaired in the usual manner and the patient has pursued a relatively unremarkable postoperative progress."

¶ 10 At trial, the plaintiff testified that after the May 4, 2005, surgery, Dr. O'Neil told her that he had nicked or perforated her bowel and advised her not to eat for two days. The plaintiff testified that she did not eat anything until the following evening, when she ate three bites of meatloaf and immediately felt intense pain and began vomiting. The plaintiff testified that she was admitted to the hospital and underwent the second surgery to repair her bowel on May 6, 2005. The plaintiff testified that Dr. O'Neil had advised her that the perforation had leaked.

¶ 11 The plaintiff testified that after the second procedure, she continued to experience pain. The plaintiff testified that at a follow-up visit with Dr. O'Neil, he told her that during the first surgery, he did not expect to scrape adhesions, that he did not have the right tools to scrape adhesions, and that he wished he had sewn her up and taken her to the hospital to perform the surgery.

¶ 12 The plaintiff testified that she returned to the hospital on May 30, 2005, where Dr. Wieland performed surgery and discharged her on June 7, 2005. The plaintiff testified that once Dr. Wieland removed necrotic tissue of the small intestines and removed the abscesses, she recovered fairly well, and her body was able to heal.

¶ 13 At trial, Dr. John Davis, an obstetrician-gynecologist at the University of Florida College of Medicine, recognized that Dr. O'Neil's May 4, 2005, surgery was a laparoscopic adhesiolysis in which Dr. O'Neil used a monopolar electro-surgical unit. Dr. Davis testified that in performing diagnostic laparoscopic procedures, he had also used electro-surgical unit tools to safely apply electricity to cut tissue and stop bleeding. Dr. Davis testified, however,

that in the approximately 300 laparoscopic procedures he had performed, he always utilized a bipolar electro-surgical unit, especially if near bowel, because the bipolar current stayed within the device, there was minimal transfer through the patient, and it was a safer type of electricity to use. Dr. Davis explained that when using a bipolar unit, the current flows down one part of the electrode and through tissue, comes back to another part of the electrode, and returns to the device, causing minimal spread of electricity into the patient. Dr. Davis explained that when using the monopolar device, the current goes out the tip, through the tissue, out a grounding pad that is placed on the patient, and then returns. Dr. Davis opined that monopolar electro-surgical units were unsafe and that he did not use them.

¶ 14 Dr. Davis testified that on May 4, 2005, the plaintiff experienced a monopolar thermal burn injury to the ileum, which is the last portion of the small bowel before turning into the large bowel. Dr. Davis testified that Dr. O'Neil's use of the monopolar electro-surgical unit in such close proximity to the bowel was beneath the standard of care and would not have been appropriate or acceptable by most prudent providers. Dr. Davis testified that in using the monopolar device, Dr. O'Neil subjected the plaintiff to a greater risk of thermal injury to surrounding tissues, including the bowel. On cross-examination, Dr. Davis acknowledged that the use of the monopolar electro-surgical unit, in and of itself, did not violate the standard of care.

¶ 15 Dr. Davis testified that Dr. O'Neil also failed to comply with the standard of care during the second surgery by performing an excision of the monopolar electro-surgical unit burn site. Dr. Davis opined that in the May 6, 2005, procedure, Dr. O'Neil did not remove enough tissue and should have instead performed a resection.

¶ 16 Dr. Davis testified that the plaintiff was required to undergo subsequent surgery by Dr. Wieland in June 2005 because she had a pelvic abscess and a small bowel obstruction, caused by Dr. O'Neil. Dr. Davis testified that during the first surgery, there was leakage of

small bowel contents out of the repair site, these contents leaked into the abdominal cavity and into the pelvis, and the plaintiff subsequently developed the pus pocket that caused blockage of her small bowel. Dr. Davis concluded, to a "very high degree of medical probability," that the injury to the bowel that Dr. Wieland treated was caused by Dr. O'Neil's inadequate care.

¶ 17 The defense presented the testimony of Dr. Richard Olen. Dr. Olen testified that, in his opinion, Dr. O'Neil complied with the standard of medical care. Dr. Olen opined that the monopolar cautery device was an appropriate device for Dr. O'Neil to use to cut through the plaintiff's adhesion. Dr. Olen testified that a patient can experience a thermal injury even when the physician complies with the standard of care and commits no negligence. Dr. Olen testified that he also used a monopolar electro-surgical unit for bowel resections.

¶ 18 Dr. Olen opined that Dr. O'Neil complied with the standard of care during the second procedure on May 6, 2005, and properly repaired the hole without resectioning the bowel. Dr. Olen testified that the May 6, 2005, procedure was required to treat the thermal injury that had occurred during the May 4, 2005, procedure.

¶ 19 Dr. O'Neil testified that he appropriately used the monopolar electro-surgical unit during the plaintiff's May 4, 2005, surgery and that he at no time during the procedure nicked the plaintiff's bowel. Dr. O'Neil testified that during the second surgery on May 6, 2005, he excised a three-millimeter eschar, resulting from the May 4, 2005, operation, at the perforation site. Dr. O'Neil testified that the plaintiff had sustained an electro-surgical injury that he did not see at the time of the previous operation. Dr. O'Neil testified that on May 6, 2005, he did not perform a bowel resection but that he resected the thermal injury. Dr. O'Neil testified that during the procedure, he confirmed that the plaintiff had peritonitis related to the previous surgery, the result of leakage of bowel contents.

¶ 20 Dr. O'Neil testified that during the first two years after having peritonitis, there is a

risk of bowel obstruction, which is what the plaintiff developed in June 2005. Dr. O'Neil testified that the plaintiff did not have persistent peritonitis, which is a deadly disease that would not allow someone to walk around for three weeks. Dr. O'Neil testified that he recognized that the plaintiff had a bowel obstruction so he contacted Dr. Wieland.

¶ 21 Dr. O'Neil acknowledged that he was not a board-certified surgeon, that he did not have privileges to perform general surgery, and that he did not have privileges to perform a bowel resection. Dr. O'Neil testified, however, that he did not perform a bowel resection but instead performed an excision of the thermal injury to the plaintiff's ileum. Dr. O'Neil testified that he had privileges to perform the bowel excision during the exploratory laparotomy, which, Dr. O'Neil asserted, was a gynecological procedure he was authorized to perform.

¶ 22 The record reflects that after Dr. O'Neil's testimony the circuit court held a jury instruction conference. Thereafter, the defense presented the testimony of Dr. Fred Duboe, an obstetrician-gynecologist, who testified that Dr. O'Neil complied with the standard of care in his treatment of the plaintiff. In opining that Dr. O'Neil properly repaired the bowel, Dr. Duboe stated:

"[Dr. O'Neil] did an elliptical incision in a longitudinal manner, resecting what he felt was an eschar lesion, meaning damaged area of bowel probably from an electrosurgical or thermal surgery from heat he provided on the prior surgery on the fourth, most likely as a complication."

During the plaintiff's cross-examination of Dr. Duboe, the following ensued:

"[Plaintiff's counsel:] *** What I want you to assume is that Dr. Davis's first criticism was with reference to the outpatient surgery on the fourth.

* * *

[Defense counsel:] The reason I object is there's the issues instruction. The

issues instruction has nothing to do with the 5/4 procedure of Dr. *** take a look at it.

[Plaintiff's counsel:] *** He has expressed an opinion, and I'm going to have to amend my listing, that the use of a monopolar [electrosurgical unit] was beyond the standard of care.

[Defense counsel:] That's beyond the scope. This is the instruction. This is the instruction he wanted. This is the instruction that was admitted. He *** well, you can't do that. You can't have it both ways.

* * *

THE COURT: Yeah. I mean, all he's testified about is the procedures that he's addressed, but there's been no testimony about, from this witness about it, so you can't *** you can only *** I mean, you can ask him *** well, it's beyond the scope."

¶ 23 When the plaintiff's counsel questioned Dr. Duboe whether he knew the difference between monopolar and bipolar surgical instruments, defense counsel again objected. The court stated that it was "not going to allow any questions about Dr. Davis's opinions or this witness's opinions about, you know, whether he violated the standard of care using monopolar." The court allowed the plaintiff an offer of proof, during which Dr. Duboe acknowledged that in his deposition, he had testified that he "use[d] bipolar more than [he] use[d] monopolar [because] of its safety margin" and that, theoretically, when using a monopolar device, one could get an electrical current anywhere in the abdomen. Dr. Duboe further testified that he "use[d] bipolar more often because *** there's less chance that the current is going to go somewhere else" but that he did not consider it a deviation from the standard of care to use monopolar.

¶ 24 Defense counsel argued that the testimony elicited during the offer of proof, *i.e.*, that

Dr. Duboe used bipolar more than monopolar because of the safety margin and the possibility of a burn throughout the abdomen, was beyond the scope of direct examination and was not an issue included in the jury instructions. Defense counsel argued that the initial jury instruction submitted by the plaintiff did not include Dr. O'Neil's use of the monopolar device as a basis for negligence. Defense counsel read the jury instruction into the record as follows:

"Plaintiff, Amy O'Connell, claims that she was injured and sustained damage and that the [d]efendants were negligent in one or more of the [following] respects. Number A, failing to operate through a vertical midline incision and failing to adequately examine the bowel for evidence of injury. *** [B,] failing to properly repair the injured bowel. *** C, failing to consult with a general surgeon for management of a bowel injury. *** D, failing to timely treat and diagnose complications, which arose following Dr. O'Neil's attempted bowel repair."

¶ 25 The plaintiff argued that in opining that Dr. O'Neil's performance complied with the standard of care, Dr. Duboe opined that his use of a monopolar electrosurgical unit was appropriate, a proper subject for cross-examination. The plaintiff's counsel stated that the plaintiff would tender a modified jury instruction adding Dr. O'Neil's use of the monopolar electrosurgical unit during the May 4, 2005, procedure as an additional basis for negligence. Defense counsel argued that such an amendment would be prejudicial to the defense because they relied on the instruction during their direct examination of Dr. Duboe.

¶ 26 After a brief recess, the circuit court stated that it had reviewed the transcript and that, although Dr. Duboe had testified that he had reviewed all the records and opined that there was no deviation from the standard of care, the defense structured its testimony in accordance with the jury instruction that had been tendered. Accordingly, the circuit court sustained the defense's objection and directed the plaintiff to make no further "mention with

this witness *** about the monopolar use and anything to do with *** the electrosurgery problems to the bowel in the first surgery, other than as it [wa]s reflected in May 6th and beyond."

¶ 27 Dr. Duboe thereafter testified that there was a thermal injury that occurred during the May 4 procedure, which caused a delayed breakdown that began to leak in the plaintiff's distal ileum a few days later. Dr. Duboe testified that Dr. O'Neil took down one area of isolated bowel that was discreetly adhered to the abdominal wall. Dr. Duboe testified that the leak was in the general area where the take-down of adhesions took place. Dr. Duboe testified that it was "more likely than not that *** the area of resecting this abnormal tissue, this eschar lesion, which is classically from a thermal injury, probably took place where the dissection [of] those adhesions was performed on the fourth of May."

¶ 28 As rebuttal testimony, Dr. John Wieland testified that on June 1, 2005, he resected about 30 centimeters of the plaintiff's distal small bowel. Dr. Wieland testified that the bowel would not have repaired itself or fully functioned after the surgery if he had not performed the surgery.

¶ 29 After the close of evidence, the plaintiff tendered the revised jury instruction that included as a basis for negligence Dr. O'Neil's use of the monopolar device for the plaintiff's outpatient surgery on May 4, 2005. The modified jury instruction read as follows:

"The plaintiff *** claims that she was injured and sustained damage, and that the defendants were negligent in one or more of the following respects:

- a. using a monopolar electrical surgical instrument in the 5/4/05 procedure[;]
- [b.] failing to operate through a vertical midline incision and to adequately examine the bowel for evidence of injury;
- [c.] failing to properly repair the injured bowel;
- [d.] failing to consult with a general surgeon for management of the bowel injury;

and

[e.] failing to timely diagnose and treat complications which arose following George O'Neil's attempted bowel repair."

The court denied the plaintiff's request on the basis that the plaintiff did not tender the jury instruction before Dr. Duboe's testimony.

¶ 30 In closing arguments, the plaintiff's counsel argued that "it was negligent of Dr. O'Neil to use that monopolar device because *** the electrical current is running through the abdomen and exiting the patient's leg, and you know, if you have any type of thermal injury, electrical injury, it can be anywhere in the abdomen." The plaintiff's attorney stated: "I think he shouldn't have used that monopolar device. I think the monopolar device did cause the injury, but again, we're going to move beyond that and focus on what he started to do on the sixth."

¶ 31 While deliberating, the jury submitted to the circuit court a question, asking when the plaintiff's appendix had been removed. At trial, Dr. Wieland had testified that the plaintiff's appendix had been removed, while Dr. O'Neil testified to the contrary. The court instructed the jury to rely on the testimony and exhibits presented during trial. Thereafter, the jury submitted a second question regarding the meaning of the term "adequately" as used in the issue instruction alleging that the defendants failed "to adequately examine the bowel for evidence of injury." The court instructed the jury to refer to the instructions of the court that were previously given.

¶ 32 On May 21, 2010, the jury returned a verdict in favor of the defendants, and the circuit court entered judgment on the verdict. On June 4, 2010, the plaintiff filed her posttrial motion, which the circuit court denied on August 30, 2010. At the hearing on the plaintiff's posttrial motion, the defendants argued that they based their direct examination of their expert, Dr. Duboe, on the jury instruction that was previously tendered by the

plaintiff and would have been prejudiced had the plaintiff cross-examined him and instructed the jury on the use of the monopolar electrosurgical unit. The plaintiff filed her timely notice of appeal.

¶ 33

ANALYSIS

¶ 34 The plaintiff argues, *inter alia*, that the circuit court improperly denied her request to amend her jury instruction and improperly restricted her right to cross-examine the defendants' expert. We agree.

¶ 35 Section 2-1107(c) of the Code of Civil Procedure states, in pertinent part:

"At the close of the evidence or at any earlier time during the trial that the court reasonably directs, any party may tender instructions and shall at the same time deliver copies thereof to counsel for other parties. *** The court shall hold a conference with counsel to settle the instructions and shall inform counsel of the court's proposed action thereon prior to the arguments to the jury. If as a result of the arguments to the jury the court determines that additional instructions are desirable, the court may after a further conference with counsel approve additional instructions. The court shall instruct the jury after the arguments are completed." 735 ILCS 5/2-1107(c) (West 2006).

¶ 36 "In Illinois, the parties are entitled to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). A party has the right to have the jury clearly and fairly instructed upon each theory which is supported by some evidence in the record. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406 (1998); *Stapleton v. Moore*, 403 Ill. App. 3d 147, 163-64 (2010); *Swartz v. Sears, Roebuck & Co.*, 264 Ill. App. 3d 254, 265 (1993). "The threshold for giving an instruction in a civil case is 'not a high one.'" *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549 (2008) (quoting *Heastie v.*

Roberts, 226 Ill. 2d 515, 543 (2007)). "Whether the jury would have been persuaded is not the question. All that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Heastie*, 226 Ill. 2d at 543.

¶ 37 "While questions as to what issues actually have been raised by the evidence [and thus which jury instructions are warranted] rest with the discretion of the trial court, the court must instruct the jury on all issues reasonably presented by the evidence." *Arellano v. SGL Abrasives*, 246 Ill. App. 3d 1002, 1011 (1993). Nevertheless, we will reverse a trial court's ruling on a jury instruction only if the trial court committed a clear abuse of its discretion. *Stapleton*, 403 Ill. App. 3d at 163. "A new trial should not be granted because of improper jury instructions unless a party's right to a fair trial has been seriously prejudiced." *Stapleton*, 403 Ill. App. 3d at 164.

¶ 38 The defendants acknowledge in their brief that the issue of "monopolar electrosurgery arose several times prior to the jury instruction conference, including throughout [the] [p]laintiff's case-in-chief and early in [the] [d]efendant's case." The defendants acknowledge that the plaintiff's expert, Dr. Davis, testified extensively during his direct examination about the use of monopolar electrosurgical units and that the defendants were allowed to cross-examine him on this theory. The defendants acknowledge that they raised the issue during their direct examination of Dr. Olen and that the plaintiff cross-examined Dr. Olen on the theory.

¶ 39 The defendants argue that because the plaintiff did not include the theory in the instruction submitted during the initial jury instruction conference, prior to Dr. Duboe's testimony, she was precluded from doing so thereafter. The defendants cite no case for this proposition, nor have we found any.

¶ 40 Instead, we find that the plaintiff had the right to introduce proof upon all the theories

of recovery which she desired and had the right to have the jury clearly and fairly instructed upon each theory supported by evidence. See *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 102 (1995). The plaintiff introduced evidence to support the theory that Dr. O'Neil's use of the monopolar electrosurgical unit fell below the standard of care and properly tendered an amended instruction upon this theory. See *Ervin v. Sears, Roebuck & Co.*, 65 Ill. 2d 140, 145 (1976). Consequently, the circuit court abused its discretion in refusing the plaintiff's amended instruction where there was sufficient evidence to warrant giving the instruction. Further, we cannot conclude that the error in this instruction was not so pervasive or prejudicial as to create a likelihood that it may have affected the jury's decision on the issue of liability. See *Greenfield v. Consolidated R. Corp.*, 150 Ill. App. 3d 331, 341 (1986).

¶ 41 Likewise, we find that the circuit court improperly denied the plaintiff her right to cross-examine the defendants' expert on the use of the monopolar electrosurgical unit. While the scope of cross-examination is generally limited to a witness's testimony on direct, a party may properly develop on cross-examination circumstances lying within the witness's knowledge which explain, discredit, or destroy the witness's testimony on direct, even though that material may not have been raised on direct examination. *People v. Franklin*, 135 Ill. 2d 78, 97 (1990); *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 245 (1988). "Generally, any permissible kind of impeaching matter may be developed on cross-examination, since one of the purposes of cross-examination is to test the credibility of the witnesses." *People v. Collins*, 106 Ill. 2d 237, 269 (1985).

¶ 42 Moreover, "[t]he scope of cross-examination is not limited to the actual material discussed during direct examination but to the subject matter of direct examination." *Bell v. Hill*, 271 Ill. App. 3d 224, 231 (1995); see also *Leonardi*, 168 Ill. 2d at 106 (where plaintiffs questioned expert on direct examination concerning deviations from the standard

of care by defendants, defendants' cross-examination inquiring whether the deviations proximately caused the injuries was proper). "[W]ide latitude should be granted to attorneys in their cross-examination of expert witnesses, in order to test their opinions, which are usually on subjects which are not of common knowledge. *Darling v. Charleston Community Memorial Hospital* (1965), 33 Ill. 2d 326 ***; *City of Chicago v. Avenue State Bank*, (1972), 4 Ill. App. 3d 235 ***." *Montefelice v. Terminal R.R. Ass'n of St. Louis*, 100 Ill. App. 3d 858, 861 (1981). "The extent of proper cross-examination falls within the broad discretion of the trial court and the trial court's determination regarding the scope of cross-examination will not be reversed in the absence of an abuse of that discretion." *Bell*, 271 Ill. App. 3d at 231.

¶43 After denying the plaintiff the opportunity to cross-examine Dr. Duboe regarding the use of the monopolar electrosurgical unit, the court allowed the plaintiff an offer of proof, during which Dr. Duboe acknowledged that in his deposition, he testified that he "use[d] bipolar more than [he] use[d] monopolar [because] of its safety margin" and that, theoretically, when using a monopolar device, one could get an electrical current anywhere in the abdomen. Dr. Duboe further testified that he "use[d] bipolar more often because *** there's less chance that the current is going to go somewhere else" but that he did not consider it a deviation from the standard of care to use monopolar.

¶44 Neither the plaintiff's questions on cross-examination nor Dr. Duboe's responses fell outside the subject matter of the defense's direct examination, during which Dr. Duboe testified that Dr. O'Neil complied with the standard of care in his treatment of the plaintiff. See *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 1004 (2007); *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730, 756 (1994) (although an expert's testimony that he would have acted differently is not directly relevant to the standard of care, testimony regarding his personal preference is admissible when it addresses issues of the

witness's credibility and the persuasiveness of the expert's testimony). Because the plaintiff's questions did not fall outside the scope of the subject matter of the defendants' direct examination but involved permissible impeaching matter to be properly developed on cross-examination (see *Collins*, 106 Ill. 2d at 269), the circuit court erred in denying the plaintiff her right to properly cross-examine Dr. Duboe.

¶ 45 Contending that a party may not cross-examine a physician witness about surgical methods if those methods were not raised in the witnesses's direct examination, the defendants cite *Adams*, 369 Ill. App. 3d at 998-99, and *Glassman*, 259 Ill. App. 3d at 757.

¶ 46 In *Adams*, in ruling on the defendants' posttrial motion, the trial court held that the direct examination of the expert witness who repaired the plaintiff's injury did not include any questions regarding the standard of care or breach thereof. *Adams*, 369 Ill. App. 3d at 999 (court found that the plaintiff's attorney "steered clear" of any inquiries about the standard of care). The appellate court found the trial court's decision that the defendants' cross-examination on the issue of standard of care went beyond the scope of the plaintiff's direct examination did not constitute an abuse of discretion. *Adams*, 369 Ill. App. 3d at 1000. Likewise, in *Glassman*, the plaintiff sought to cross-examine the expert witness concerning care of postoperative seizures, although the expert admitted that he was not an expert on seizures and the defendants on direct had not asked the expert about postoperative treatment. *Glassman*, 259 Ill. App. 3d at 757.

¶ 47 Here, unlike *Adams* and *Glassman*, during the defendants' direct examination of Dr. Duboe, Dr. Duboe testified that Dr. O'Neil had complied with the standard of care in his treatment of the plaintiff. Thus, the plaintiff's questions regarding the safety of utilizing the monopolar device, *i.e.*, whether Dr. Duboe utilized the bipolar electrosurgical unit more often because of its safety margin, did not fall beyond the scope of direct examination and involved permissible impeachment and, unlike *Glassman*, did not fall outside the range of

Dr. Duboe's expertise. Moreover, as previously noted, the issue of monopolar electrosurgery arose numerous times during trial. Accordingly, we find that the circuit court improperly restricted the plaintiff's cross-examination of Dr. Duboe. See *Montefelice*, 100 Ill. App. 3d at 862 (where a medical witness makes a diagnosis based entirely or in part on the success or failure of a surgical procedure, that witness's knowledge or experience concerning that procedure is a proper subject for cross-examination).

¶ 48 In sum, we conclude that the plaintiff was improperly denied her right to have the jury properly instructed on the additional basis for negligence and that this error, in addition to the circuit court's improper refusal to allow the plaintiff to properly cross-examine the defendants' expert on the use of the monopolar electrosurgical unit, seriously prejudiced the plaintiff's right to a fair trial. Because we reverse and remand on this basis, we need not address the plaintiff's contentions regarding the jury's selection and written questions during trial, circumstances that are unlikely to reoccur.

¶ 49 We note, however, that we reject the plaintiff's argument that the circuit court committed reversible error by refusing evidence of Dr. O'Neil's failure to present and preserve the plaintiff's surgical pathology specimen of May 6, 2005. The plaintiff argues that the pathology specimen would have shown whether Dr. O'Neil performed a minor excision or a resection. However, the record reveals that the witnesses, including the plaintiff's expert witness, Dr. Davis, consistently testified that Dr. O'Neil did not perform a resection but instead performed an excision of the burn site. The plaintiff failed to show how the evidence served to establish a fact in controversy or rendered a matter in question more or less probable (*Fettson v. James*, 298 Ill. App. 3d 77, 83 (1997)) and failed to show how the collateral matter, which was irrelevant to establish a fact of consequence, amounted to proper impeachment (*Kincaid v. Ames Department Stores, Inc.*, 283 Ill. App. 3d 555, 567 (1996)). Accordingly, we cannot conclude that the circuit court abused its discretion, under

the particular facts presented in this appeal, by excluding evidence that Dr. O'Neil did not present and preserve plaintiff's surgical pathology specimen.

¶ 50

CONCLUSION

¶ 51 For the foregoing reasons, we reverse the order of the circuit court of McLean County, and we remand the cause for a new trial.

¶ 52 Reversed and remanded.