No. 2—10—0692
Order filed June 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TAMELA ANDERSON,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 07—L—555
	)	
RODNEY W. RIEGER, M.D. and FOX VALLEY ORTHOPAEDICS ASSOCIATES, S.C.,	)	
	)	Honorable
	)	Stephen Sullivan,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: Where there were no genuine issues of material fact with respect to whether defendants breached the applicable standard of care, and defendants established that they were entitled to judgment as a matter of law, the trial court did not err in granting summary judgment in defendants' favor.

Plaintiff, Tamela Anderson, appeals from an order of the circuit court of Kane County granting defendants' motion for summary judgment. For the reasons that follow, we affirm.

BACKGROUND

On October 22, 2007, plaintiff filed a medical malpractice complaint against defendants. Count I alleged that defendant, Dr. Rodney W. Rieger, negligently performed bilateral osteotomies on plaintiff's feet. Specifically, plaintiff alleged that Rieger:

> "a. placed both threaded osteotomy fixation screws across the tarsometarsal joint and left them in place causing irreversible damage to the articular surfaces of the joint which led to arthritis in the joints;
>
> b. used improper fixation screws when performing the simultaneous bilateral osteotomies in that he used threaded screws, which having been left in place, led to post traumatic arthritis of the metatarsal joints; and
>
> c. failed to provide post operative care and instruction after performing simultaneous, bilateral osteotomies when such post operative care would have required immobilization and strict non weight bearing status. This led to improper healing at the osteotomy sites."

Count II repeated the allegations of count I against defendant, Fox Valley Orthopaedics Associates, S.C., asserting that Rieger had acted as its employee or agent.

On February 19, 2010, defendants jointly filed a motion for summary judgment and attached the depositions of defendant Rieger and defendants' proffered expert witness, Dr. Thomas Francis Gleason, an orthopedic surgeon. On March 4, 2010, the trial court ordered plaintiff to respond to defendants' summary judgment motion by April 1, 2010, and set the hearing on the motion for May 20, 2010.

On May 19, 2010, plaintiff filed a notice of filing her response to defendants' motion for summary judgment and attached her response. The response included attached excerpts from the deposition of plaintiff's proffered expert witness, Dr. Margaret M. Baker, an orthopedic surgeon.

On the same date, plaintiff also filed a notice of filing an emergency motion for leave to file her response to defendants' summary judgment motion. The emergency motion itself does not appear in the record. On May 20, 2010, the trial court entered an order denying plaintiff's emergency motion for leave to file a response. The court then heard argument on defendants' motion for summary judgment and took the matter under advisement.

On June 3, 2010, the court entered its ruling, noting that both Rieger and Gleason had testified in their depositions that Rieger had complied with the standard of care. The court found that Baker's deposition was not part of the record in the case, and that there was no other evidence in the record that supported plaintiff's allegations of negligence. The court entered summary judgment in defendants' favor. Plaintiff timely appealed.

ANALYSIS

Plaintiff argues that the trial court erred in (1) denying her leave to submit the Baker deposition at the hearing on defendants' motion for summary judgment, and (2) entering summary judgment in favor of defendants. We address each in turn.

Plaintiff first argues that section 2—1005(c) of the Code of Civil Procedure (Code) (735 ILCS 5/2—1005(c) (West 2008)) allows the nonmovant in summary judgment proceedings to file counteraffidavits "prior to or at the time of the hearing on the motion." Plaintiff also notes that Supreme Court Rule 212(a)(4) (eff. Jan. 1, 2011) provides that a discovery deposition may be used "for any purpose for which an affidavit may be used." Thus, according to plaintiff, because Baker's deposition excerpts qualified as an affidavit, she properly presented them in opposition to defendants' summary judgment motion prior to the hearing, and, under section 2—1005(c), the court was required to consider them.

Defendants initially ask this court to strike, as not properly part of the record on appeal, plaintiff's response to their summary judgment motion, including the attached portions of Baker's deposition, because the trial court never granted plaintiff leave to file it. Defendants further point out that plaintiff did not seek leave to submit the Baker deposition; rather, plaintiff filed a motion for leave to file only the late response to the motion for summary judgment. According to defendants, plaintiff has failed to demonstrate any error or abuse of discretion on the part of the trial court for denying her motion for leave to file a late response. Defendants contend that, because plaintiff failed to provide the report of proceedings from May 20, 2010, this court should presume that the trial court acted in conformity with the law when denying plaintiff leave to file her response.

We agree with defendants. The record reflects that the trial court ordered plaintiff to respond to defendants' summary judgment motion by April 1, 2010. The record further reflects that it was not until May 19, 2010, that plaintiff filed a notice of filing her response to defendants' motion for summary judgment and attached her response (including the attached excerpts of Baker's deposition), and a notice of filing an emergency motion for leave to file her response (the emergency motion itself does not appear in the record). The record contains the trial court's May 20, 2010, order in which it denied plaintiff's emergency motion for leave to file a response. The trial court's June 3, 2010, order indicates that on May 20 the court heard argument on defendants' motion for summary judgment and took the matter under advisement. The June 3 order further reflects that the trial court expressly stated that the Baker deposition was not part of the record.

As defendants point out, plaintiff has not provided the May 20, 2010, report of proceedings. As appellant, plaintiff bore the burden of presenting a sufficiently complete record for us to review. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1008 (2007) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-

92 (1984)). On the record provided by plaintiff, we have no way of determining what happened at the May 20 hearing. Did plaintiff request that the court consider the Baker deposition excerpts? Did defendants object to consideration of the excerpts? Given that the trial court made a written finding in its June 3, 2010, order that the Baker deposition was not part of the record, perhaps the parties did argue the sufficiency of the excerpts as constituting a counteraffidavit in opposition to defendants' motion for summary judgment. However, we cannot speculate. "The appellant is not entitled to have the judgment reversed without presenting a record that supports his claim that the trial court erred." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 278 (2006). Plaintiff has failed to provide a record in support of her claim of error. Accordingly, we must presume that the trial court properly denied plaintiff leave to file her response and acted in conformity with the law when it excluded the Baker deposition excerpts from the hearing on defendants' summary judgment motion. See *Koppel*, 374 Ill. App. 3d at 1008 (any doubt arising from an incomplete record is resolved against the appellant).

We now turn to plaintiff's argument that the trial court erred in entering summary judgment in defendants' favor. Summary judgment is proper when the pleadings, admissions, depositions, and affidavits on file, viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 518 (2008). The grant or denial of a motion for summary judgment is reviewed *de novo*. *Hernandez*, 384 Ill. App. 3d at 519. In light of our holding above, our *de novo* review of the record will not include the Baker deposition excerpts. See *Brandeis*, 206 Ill. App. 3d at 39 (holding that, where the plaintiffs failed to respond to the defendant's summary judgment motion, and the plaintiffs never made the transcript of the defendant's deposition part of the record in the trial court, the trial court did not err in disregarding

the deposition, and the deposition should not be considered by the appellate court). Additionally, given our exclusion of the Baker deposition excerpts from our consideration, defendants' request that we strike them from the record on review is essentially moot.

To establish a claim for medical malpractice, a plaintiff needs to establish (1) the standard of care against which the defendant medical professional's conduct must be measured, (2) the defendant's failure to comply with that standard of care, and (3) that the defendant's negligence proximately caused the injuries for which the plaintiff seeks damages. *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007). When the defendant in a medical malpractice case moves for summary judgment supported by an affidavit establishing that he was not negligent, the plaintiff must come forward with expert testimony substantiating her claims. *Brandeis v. Salafsky*, 206 Ill. App. 3d 31, 36 (1990). " 'The plaintiff must then prove by affirmative evidence that, judged in light of these standards, the doctor was unskillful or negligent and that his want of skill or care caused the injury to the plaintiff.' " *Brandeis*, 206 Ill. App. 3d at 36 (quoting *Borowski v. Von Solbrig,* 60 Ill. 2d 418, 423 (1975)). Here, the parties dispute whether plaintiff established a genuine issue of material fact as to defendants' breach of the applicable standard of medical care. Plaintiff contends that the Baker and Gleason depositions present "a classic case of dueling medical experts, each armed with opposite opinions concerning the conduct of the defendant." As noted above, the Baker deposition excerpts are not properly before us. Thus, we consider whether the remaining depositions in the record, viewed in the light most favorable to plaintiff, demonstrate that there is no genuine issue of material fact and that defendants were entitled to judgment as a matter of law. Plaintiff frames the issue of the standard of care specifically as whether defendant Rieger deviated from the standard of care by placing fixation screws in plaintiff's foot joints during the osteotomies he performed on both of plaintiff's feet.

With their motion for summary judgment, defendants presented the deposition of defendant, Dr. Rieger. Rieger testified that the fixation screws were "close to th[e] joints" and asserted that his screw placement met the standard of care. A defendant doctor's affidavit in support of his summary judgment motion, averring that he was familiar with and complied with the standard of care is sufficient for the entry of summary judgment in his favor if the plaintiff failed to present evidence to the contrary. *Rohe v. Shivde*, 203 Ill. App. 3d 181, 193 (1990).

Moreover, defendants also attached to their summary judgment motion the deposition of their proffered expert, Dr. Gleason. Gleason testified that the screws that defendant Rieger placed in plaintiff's feet "did not cross the joint." However, Gleason stated that, under certain circumstances, it would not necessarily be a deviation from the standard of care to have the screws cross the joint in the patient's foot during an osteotomy. Gleason stated that he was not of the opinion that Rieger had felt it necessary to "cross over to the joint" on plaintiff.

Both Rieger and Gleason testified that Rieger did not place the fixation screws in the joints of plaintiff's feet and did not breach the applicable standard of care. Thus, to survive the summary judgment motion, plaintiff needed to respond with affirmative evidence in the form of expert testimony supporting her claims. *Brandeis*, 206 Ill. App. 3d at 36; see also *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1145 (2005) (nonmovant cannot rely on pleadings once movant provides evidentiary facts that, if left uncontradicted, entitle movant to judgment as a matter of law). Plaintiff failed to provide any affirmative evidence that Rieger breached the standard of care. Absent that, the testimony of Rieger and Gleason must be taken as true and deemed admitted. See *Crichton*, 358 Ill. App. 3d at 1145 (where nonmovant fails to file counteraffidavits, the statements in the movant's affidavits are deemed admitted, and the nonmovant risks entry of summary judgment); *Piquette v. Midtown Anesthesia Associates*, 192 Ill. App. 3d 219, 222 (1989)

("Where facts contained in an affidavit in support of a motion for summary judgment are not contradicted by a counteraffidavit, such facts are admitted and must be taken as true."). Consequently, there was no genuine issue of material fact as to Rieger's compliance with the standard of care. Accordingly, defendants were entitled to judgment as a matter of law, and the trial court did not err in entering summary judgment in their favor. See *Higgens v. House*, 288 Ill. App. 3d 543, 547 (1997) (holding that the entry of summary judgment was proper as a matter of law where there was no genuine issue of material fact because the nonmovant plaintiffs failed to file a response to the motion); *Northrop v. Lopatka,* 242 Ill. App. 3d 1, 8 (1993) ("In medical malpractice cases plaintiffs generally have an affirmative duty ***, apart from any affidavits filed by defendants, to come up with expert testimony supporting their case, and their failure to do so will justify the entry of summary judgment against them."); *Diggs v. Suburban Medical Center*, 191 Ill. App. 3d 828, 834 (1989) (affirming entry of summary judgment in defendants' favor and noting the many cases where the "failure of a nonmovant in a medical malpractice case to bring forth experts, who will raise the necessary inferences sufficient to defeat a motion for summary judgment, is fatal and will result in the entry of summary judgment to the movant").

Yet, plaintiff also maintains that the Gleason deposition "itself recognized that a genuine issue of material facts [*sic*] existed regarding the elemental issue of whether Dr. Rieger deviated from the applicable standard of care." During Gleason's deposition, plaintiff's attorney read portions of Baker's deposition to Gleason. Gleason acknowledged that he disagreed with Baker's "opinion that there was screw fixation across the joints." Upon further questioning, the following exchange occurred:

> "Q. [plaintiff's counsel]: Do you disagree with Dr. Baker's opinion that the placement of the screws through the joint caused the injury that [plaintiff] is complaining of?

A. [Dr. Gleason]: I disagree that Dr. Rieger's placement of the screws into or through the joint caused the arthritis which—about which [plaintiff] may be complaining.

Q. And that is because in your opinion the screws never went into the joint, correct?

A. Well, that is because Dr. Rieger did not place them into or through the joint, correct."

We reject plaintiff's argument. The trial court in summary judgment proceedings has a duty to construe the record strictly against the movant and liberally in favor of the nonmovant. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). However, plaintiff ignores that she bore the burden of producing affirmative evidence in support of her claims because defendants' summary judgment motion was supported by evidence that, if uncontradicted, would entitle defendants to judgment as a matter of law. See *Brandeis*, 206 Ill. App. 3d at 36. That Gleason testified that he disagreed with the portions of Baker's deposition that were read to him during his deposition does not constitute affirmative evidence. See *Northrop,* 242 Ill. App. 3d at 8 (noting a medical malpractice plaintiff's affirmative duty to produce expert testimony supporting her case, "apart from any affidavits filed by defendants").

Finally, we note that over the course of a 10-month period, plaintiff failed to comply with four trial court orders to make Baker available for deposition. We also glean from the record that the suit at issue was a refiled version of a previous suit voluntarily withdrawn by plaintiff after two years of discovery had taken place. Attached to the complaint in the instant case was an August 5, 2004, letter to plaintiff's previous counsel from Baker indicating her opinion that defendants failed to comply with the standard of care. Baker was finally deposed on May 28, 2009. This was well before the court-imposed April 1, 2010, deadline for plaintiff to respond to the summary judgment motion. Plaintiff offers no explanation for her attempted late filing of her response on May 19, 2010,

let alone good cause for it. The record contains a May 19, 2010, e-mail from plaintiff's attorney to defendants' attorney apologizing for the delay in filing the response, and indicating that the emergency motion for leave to file the response (which is not in the record) would include the reason for the delay.

On this record, where plaintiff does not allege that she had insufficient time to respond to defendants' summary judgment motion, and where plaintiff's proffered expert was deposed almost one year prior to the deadline for her response, we conclude that plaintiff had ample time to fully respond to the motion for summary judgment and cannot now be said to be unfairly deprived of the opportunity to present her expert evidence. See *Rohe*, 203 Ill. App. 3d at 198 (noting that, while courts should afford plaintiffs every opportunity to secure expert testimony before granting summary judgment based on the failure to do so, entry of summary judgment was not premature where five years had elapsed from the filing of the initial complaint and the plaintiffs did not contend that they could have produced the necessary experts); *Bennett v. Raag*, 103 Ill. App. 3d 321, 329 (1982) (affirming entry of summary judgment in the defendants' favor because the plaintiffs failed to present evidence necessary to rebut the defendants' affidavits, and rejecting the plaintiffs' argument that they could have proved their case at trial, where there was no allegation that the plaintiffs had insufficient time to respond to the motion for summary judgment).

Based on the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.