No. 124318

Appeal to the Supreme Court of Illinois

COLLIN CRIM, a minor, by his parents and next friends, KRISTOPHER CRIM and TERRI CRIM, Individually,	)	Appeal from the Appellate Court, Fourth District, No. 4-17-0864
Plaintiffs-Appellees,	)	Appeal from the Eighth Judicial Circuit Adams County, Illinois
v.	)	Case No. 06 L 89
GINA DIETRICH, D.O.,	)	Honorable Mark Drummond Judge Presiding
Defendant-Appellant.	)	

Plaintiffs-Appellees' Response Brief

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COLLIN CRIM, a minor, by his parents and next friends, KRISTOPHER CRIM and TERRI CRIM, Individually

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

This appeal is an inappropriate effort by Defendant-Appellant, Gina Dietrich, D.O., to collaterally attack the settled law of *Crim v. Dietrich*, 2016 IL App. (4th) 150843 ("*Crim I*"). This is the second appeal involving the erroneously directed verdict entered by the trial court during the trial. In the first appeal, *Crim I*, the Appellate Court ruled that the directed verdict on the issue of informed consent was error and, as a result, remanded the case for a new trial. Defendant failed to seek a rehearing before the Appellate Court and failed to file a petition for leave to appeal before this Court after the ruling in *Crim I*. Consequently, the ruling of the Appellate Court in *Crim I* became final requiring a new trial on all issues.

The Fourth District issued its Opinion on November 7, 2016 in *Crim I*. The Order in that Opinion stated "we reverse the trial court's judgment and remand for a new trial." (SR 94, ¶48). The Mandate was issued on December 14, 2016. (SSR 39). Nearly six months later, on May 30, 2017, defense counsel apparently first considered the possibility that the result of the appeal could be stretched to an interpretation that precluded one of Plaintiffs' theories of recovery. To that end, Defendant filed a Motion *in Limine* seeking to prevent Plaintiffs from presenting any claim at the re-trial other than the theory of lack of informed consent. Having understood at all times that a general remand for new trial meant a new trial *on all issues*, Plaintiffs opposed the Motion, and the present appellate litigation has resulted.

This appeal, *Crim v. Dietrich*, 2018 IL App. (4th) 170864 ("*Crim II*"), deals with one issue only, the meaning of the Opinion and Mandate issued by the Appellate Court in *Crim I*. In this Rule 308 interlocutory appeal which is *Crim II*, the Appellate Court confirmed its intent that the remand was for a new trial on all issues. Instead of accepting the decision of the Appellate Court in *Crim II*, Defendant is now attempting to relitigate *Crim I,* **even**

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though Defendant failed to make such an appeal after *Crim I.* Defendant, and her attorneys, should not be permitted to collaterally attack the decision in *Crim I* when they failed to take the required procedural action after *Crim I* was decided.

ISSUE PRESENTED FOR REVIEW

I. Whether the ruling of the Appellate Court, 2016 IL App (4th) 150843, reversing the judgment and remanding this case for a new trial requires a trial *de novo* on all claims.

STATEMENT OF FACTS

A. The Entry of the Erroneous Directed Verdict

The trial was conducted from September 10, 2015 to September 21, 2015. At issue was paragraph 11 of Plaintiffs' Second Amended Complaint which alleged twelve (12) acts of negligence against the Defendant, as follows:

a. Failed to perform an ultrasound after 35 weeks gestation when physical examination consistently measured that the baby was large and continued to get larger as revealed by examination;

b. Failed to perform an ultrasound on June 8, 2005 when the fundal height measured 43 cm;

c. Failed to discuss the risks and benefits of vaginal birth vis-à-vis cesarean section and the high risk of shoulder dystocia, brachial plexus injury in the event of vaginal birth with Terri Crim;

d. Failed to offer Terri Crim the option of delivering by cesarean section;

e. Failed to recognize that fundal height does not correspond to gestational age after 32 weeks of gestational age;

f. Failed to recognize the significance of Terri Crim's fundal heights as they related to the diagnosis of fetal macrosomia, especially after 32 weeks;

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g. Failed to perform an assessment of fetal weight upon Terri Crim's admission to the hospital on June 15-16, 2005 for the induced labor and delivery of her child, Collin Crim;

h. Failed to properly recognize certain risk factors for shoulder dystocia that were present in this case;

i. Failed to obtain or order a follow up ultra sound at 38 weeks or later when Terri Crim's fundal height continued to be abnormal;

j. Failed to estimate fetal weight within a reasonably proximate time frame to the moment Terri Crim's labor was induced;

k. Applied more traction than a reasonable obstetrician/gynecologist would apply under the same or similar circumstances during during [*sic*.] the delivery of Collin Crim;

l. Failed [to] manage and resolve the incident of shoulder dystocia that occurred during the birth of Collin Crim in a manner consistent with the standard of care applicable to obstetrician/gynecologist during an incident of shoulder dystocia occurring during the delivery of a child.

(SR 4-5).

After the Plaintiffs rested their case-in-chief, Defendant moved for a directed verdict as to paragraphs a-j above, arguing that they were all part of the Plaintiffs' lack of informed consent claim. (SR 143). The Defendant based her argument on the case of *St. Gemme v. Tomlin*, 118. Ill. App. 3d 766 (4th Dist. 1983), contending that a directed verdict was necessary on the lack of informed consent theory because Plaintiffs had not submitted expert testimony on the issue of proximate cause. (SR 144-165). The trial judge granted the directed verdict as to paragraphs a-j, which consisted of all the alleged negligent conduct prior to Collin Crim's birth. (SSR 36-37) The trial then continued as to paragraphs k and l, which were the alleged acts of negligence which took place during the delivery. Ultimately, the jury entered a verdict in favor of the Defendant on paragraphs k and l. (SR 10).

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The Plaintiffs filed a Notice of Appeal within thirty days of the entry of the judgment, on October 15, 2015. (SR 11-15). On November 7, 2016, the Fourth District issued its Order reversing the trial court's judgment and remanded the case for a new trial (SR 79-94)(*Crim I*). Defendant did not seek any additional relief from the Appellate Court (either by means of a petition for rehearing or a motion for clarification) nor did Defendant file a Petition for Leave to Appeal to this Court. As a result, the case returned to the trial court for the re-trial of the case.

On May 30, 2017, Defendant filed a Motion *in Limine*, for the first time arguing that the re-trial should be limited to the informed consent claim and not include any claim for negligence during Collin Crim's birth. (SR 95-99). The trial court heard argument on the Motion *in Limine* on August 16, 2017. (Sup R 4-33). On October 27, 2017, the trial court entered a Supplemental Order denying the Motion *in Limine* and stating "[t]he Plaintiff argues that directing a verdict on informed consent did change the tenor of the rest of the trial. The court finds this argument to be persuasive and, therefore, denies the Defendant's Motion in Limine." (SR 138). Further, the trial court entered a second Order on October 27, 2017, also denying the Motion *in Limine* and certifying "the following question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a):

> 1. Whether the ruling of the Appellate Court, 2016 IL App (4th) 150843, reversing the judgment and remanding this case for a new trial requires a trial *de novo* on all claims."

(SR 137). The Order certifying the question for interlocutory appeal was submitted by agreement of the parties. (SSR 109-111). At the time the trial court entered its Order certifying the question for appeal, the Defendant agreed that the only issue before the Appellate Court was the question of whether the Appellate Court intended by its Order in

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Crim I that the re-trial be *de novo*, in other words, a trial on all issues as if the first trial had never happened. (SSR 109-111).

On November 28, 2017, Defendant filed her Application for Interlocutory Appeal Pursuant to Illinois Supreme Court Rule 308. The Fourth District allowed Defendant's Application for Interlocutory Appeal on January 4, 2018. On October 10, 2018, the Appellate Court entered its Order ruling as follows:

> "Our mandate reversed the trial court's judgment, and our opinion ordered a new trial based on the first issue we considered: the directed verdict on informed consent. We did not limit the issues in the new trial, and we did not address relevant issues presented to us on appeal. Based on our review of the mandate and prior opinion, we conclude that a new trial on all issues was required."

Crim II, October 10, 2018 Order ¶52.

Defendant then filed her Petition for Leave to Appeal to this Court on December 10, 2018. In this appeal, the Defendant is again arguing that the new trial should not include the claims arising from the delivery of Collin Crim, but should be limited only to the informed consent issues. Consequently, Defendant agrees that there will be a new trial regardless of the result of this appeal. Furthermore, it should be emphasized that Defendant also agrees that the trial court's ruling granting the partial directed verdict was in error. Therefore, Defendant agrees that ten theories of negligence (a-j above listed) are all properly before the trial court on remand, and the only dispute involves the two remaining theories.

B. Defendant's Claim That Plaintiffs Abandoned Any Claim Is False

Specifically, the Notice of Appeal in *Crim I* appealed from "[e]ach and every decision and order which were further steps in the procedural progression of enforcing or otherwise remaining consistent with the Court's Order granting, in part, the Defendant's

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Motion for Directed Verdict should be reversed." (Appellant's Brief at 6, quoting SR 43). The prayer for relief was phrased similarly. It requested, in relevant part, reversal of Defendant's Motion for a Directed Verdict "and all prior and subsequent judgments, orders and findings relating to, or in the procedural progression of, the September 17, 2015 Order" granting the aforesaid Motion, and further requesting "reversal of the Circuit Court's September 23, 2015, Judgment, and all prior judgments, orders and findings relating to, or in the procedural progression of, the September 23, 2015 Judgment." (SR 13-14). Defendant understood and opposed this request in *Crim I*, in a section titled "Plaintiffs Skeletal Argument That Every Decision and Order Should be Reversed is Waived." (SR 71). Rather than arguing, as here, that Plaintiffs had "expressly abandoned" the issue of the jury verdict, three years ago the Defendant's position was that Plaintiffs' request for relief was "overly broad" and "suffer[ed] from a number of serious problems." (Id). To be clear, Defendant does, in fact, know that Plaintiffs never "expressly abandoned" the argument that the erroneous granting of the directed verdict poisoned the jury's verdict on the remaining issues.

Defendant omits these facts in her Appellant's Brief. Instead, Defendant's Statement of Facts consistently misconstrues the text of Plaintiffs' Notice of Appeal as intentionally notifying the Appellate Court that Plaintiffs did not intend to challenge the verdict of the jury in Defendant's favor on the medical negligence claim (as opposed to the lack of informed consent claim), while glossing over her own contemporaneous understanding of the scope of Plaintiffs' requested relief. Needless to say, this is not a faithful recounting of the facts.

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C. Defendant Omitted Facts from the *Crim II* Opinion

In addition to misconstruing Plaintiffs' own statements, Defendant did not accurately describe the reasoning contained in the Fourth District's Order in *Crim II*. As demonstrated in the discussion in Section B, *supra*, the representation to this Court that the jury verdict was "expressly abandoned" is not accurate. It therefore follows that the further representation to this Court that the Appellate Court in *Crim II* "wholly omitted the fact" that Plaintiffs supposedly abandoned that issue cannot be supported. In fact, the Appellate Court provides a full and faithful explanation of these facts in its analysis, in a subsection titled "The Arguments of the Parties" (*Crim II*, ¶¶ 32, 33):

> Dietrich argues that (1) the Crims forfeited any challenge to the verdict on negligence during delivery and (2) they are barred by the law-of-the-case doctrine from raising the issue on remand. Dietrich contends a party is required to file a posttrial motion to preserve any issues for appeal following a jury verdict, except when a directed verdict is entered. Because the Crims did not file a posttrial motion, Dietrich claims they only preserved the informed consent issue, and the jury verdict became law-of-the-case. Dietrich also claims the Crims forfeited the issue of the propriety of the jury's verdict by failing to specifically address it in their appellate brief, request a new trial on all issues, or support these points with citation to authority.
>
> The Crims respond that they preserved all issues for review by specifically including the final judgment entered on the jury's verdict in their notice of appeal and by requesting a new trial in their brief. The Crims contend several Illinois cases make clear that when a judgment is reversed and remanded without specific directions, the judgment is entirely abrogated and the trial court must conduct a trial *de novo* on all issues. Because the error that was reversed and remanded for a new trial occurred prior to the jury's verdict, the Crims argue, the entire trial is abrogated.

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Crim II, October 10, 2018 Order ¶¶ 32-33. In short, Defendant has represented her position to this Court as fact, omitted any reference whatsoever to Plaintiffs' consistently-held stance, and cast aspersions on the Appellate Court for not accepting Defendant's own, contested (and shifting) version of events as the unvarnished truth.

ARGUMENT

I. THE SOLE ISSUE BEFORE THIS COURT IS THE SCOPE OF THE FOURTH DISTRICT'S MANDATE IN *CRIM I*

Defendant has identified four issues purportedly before this Court (while paradoxically complaining of Plaintiffs' disregard for principles of judicial economy):

> I. Whether the Appellate Court's Decision to Resurrect a Claim That Has Been Expressly Abandoned Prior to Appeal Undercuts Fundamental Principles of Finality and Statutory Law.
>
> II. Whether the "Order on Appeal" Referenced in the Appellate Court's Mandate Encompasses the Jury's Verdict.
>
> III. Whether, Upon Expiration of the Deadline for Filing a Post-Trial Motion, the Jury's Verdict Became a Final Judgment and the Law of the Case.
>
> IV. Whether Plaintiffs Deliberately Abandoned Their Claim for Professional Negligence When They Abandoned Any Claim that the Evidence Was Intertwined.

(Appellant's Brief at p. 2).

With these four points, Defendant exposes the real purpose of this appeal: to improperly contest the holding of *Crim I.* There is only one issue properly before this Court, and it can be found in the question that the parties agreed was certified for this appeal: "Whether the ruling of the Appellate Court, 2016 IL App (4th) 150843, reversing the

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judgment and remanding this case for a new trial requires a trial *de novo* on all claims." (See SSR 109-111). Based on the agreement of the parties, the certified question was as narrowly limited as one could imagine, effectively requesting only that the Fourth District review its own Mandate and Opinion in *Crim I* and clarify for the parties what it meant. It did so: "the trial court is to return to that moment in the trial when that judgment was entered and that the court was to proceed as if no trial had taken place." *Crim II*, October 10, 2018 Order, ¶ 43.

II. THIS APPEAL IS AN IMPERMISSIBLE ATTEMPT BY DEFENDANT TO RELITIGATE THE ISSUES FROM *CRIM I*

A. Under Supreme Court Rule 308, this Appeal Has Reached its Ultimate Conclusion: the 4th District Clarified its Mandate and Decision from *Crim I*

When an appeal involves a Rule 308 certified question, the only issue is the certified question. Defendant's strategy here is thus laid bare: this is an attempt to relitigate *Crim I* in the hopes of fixing purported mistakes made three years ago, in a completed appeal. Such an effort is not permitted under Rule 308.

The procedures governing a Rule 308 appeal are as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

IL Sup. Ct. Rule 308. As the Appellate Court explained, "when addressing an interlocutory appeal pursuant to Rule 308, the appellate court only answers the certified question and does

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not look to the merits of the trial court's decisions." *Crim II*, October 10, 2018 Order, ¶ 50. Since *Crim II* only involved seeking the Appellate Court's guidance as to the meaning of its ruling in *Crim I*, there is no basis for Defendant to be raising any other questions before this Court.

This Court has also stated that its review in Supreme Court Rule 308 appeals is limited to the question certified by the trial court. *De Bouse v. Bayer, AG*, 235 Ill. 2d 544, 550 (2009); *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 57-58 (2007). Plaintiffs are aware that these cases also stand for the proposition that, once this Court answers the certified question it is not restricted solely to the issue raised in the Supreme Court Rule 308 certified question. *See De Bouse, supra; Barbara's Sales, supra*. However, this case is different because it involves a situation where the Defendant failed to raise these issues before *Crim I* became final. As discussed below, Defendant had that opportunity after *Crim I* was decided and failed to pursue it. It was only because Defendant filed the Motion *in Limine* many months after *Crim I* became final that the certified question was presented for appeal. Defendant should not be rewarded for her lack of diligence.

B. It Is Too Late for Defendant to Seek to Relitigate *Crim I*

Defendant's Brief paints a neat, tidy picture:

1. The Plaintiffs failed to file a post-trial motion;

2. On appeal in *Crim I*, Plaintiffs "expressly abandoned" one of their claims, leaving the Appellate Court able only to reverse and remand the lone claim before it: informed consent;

3. "Upon remand," Defendant brought a Motion *in Limine* to clarify the scope of the decision in *Crim I*; and

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4. "Remarkably, the Appellate Court chose to accept" that Plaintiffs had raised the remaining negligence claim in *Crim I*, and effectively reversed the clear and obvious effect of its prior decision.

The pretty picture advanced by Defendants' disingenuous version of events does not stand up to the facts. In truth:

1. Plaintiffs did not file a post-trial motion because this Court has held that no post-trial motion was required (*See Mohn v. Posegate*, 184 Ill. 2d 540 (1998); *Larson v. Harris*, 38 Ill. 2d 436 (1967); *Keen v. Davis*, 38 Ill. 2d 280 (1967);

2. Plaintiffs placed all issues at trial before the Appellate Court in *Crim I* by requesting the Appellate Court "reverse each and every decision and order entered in the trial court which were further steps in" enforcing the erroneous directed verdict;[1]

3. Despite claims to uncertainty about the effect of the ruling in *Crim I*, Defendant understood and opposed the scope of relief sought by Plaintiffs, only feigning confusion about the outcome six months after *Crim I* became final; and

4. The Appellate Court was apparently unswayed by Defendant's repeated assertions that saying an appeal is "not based on" a jury verdict necessarily means that the jury verdict is not still being challenged by virtue of intertwined events.

Taken together with a review of the procedural facts, Defendant's strategy is clear: she is engaged in an Quixotic quest to overturn the decision in *Crim I.* This is evident in her flagrant misrepresentation of the facts, and equally evident in the presentation of four "Issues Presented for Review," when only the Certified Question of the trial court is appropriately before this Court. Defendant does not even pretend to limit her challenge to the scope of the certified question to which she agreed. Instead, Defendant is attempting to relitigate issues

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[1] Defendant's assertion that Plaintiffs have only now changed their minds about pursuing these claims rings hollow when confronted with her own Appellee's Brief from *Crim I*, in which she explicitly addressed Plaintiffs' request for the reversal of all steps in the procedural progression of enforcing the directed verdict. (Appellant's Brief at p. 21).

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from *Crim I*, violating her own agreement as to what the scope of review was before the Fourth District and, now, this Court.

This Court held in 1970 that "the rule is that *no question which was raised* or could have been raised in a prior appeal on the merits can be urged on subsequent appeal and those not raised are considered waived." *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 413 (1970) (emphasis added). Further, "a second appeal brings up nothing except proceedings subsequent to the remandment, for the reason that a party will not be permitted to have his cause heard part at one time and the residue at another." *Jackson v. Glos*, 249 Ill. 388, 392 (1911). In *Crim I*, Defendant raised all the issues which she now seeks to raise before this Court in *Crim II*, despite the fact that she failed to file a petition for rehearing or a petition for leave to appeal after *Crim I* was decided. As set forth in Illinois Supreme Court Rule 341(i) and subsequent case law, the waiver rule applies equally to appellees. Defendant raised the issue, and the Appellate Court rejected Defendant's claims and granted Plaintiffs their sought-after reversal and remandment. Defendant did nothing at that point to litigate the issues in *Crim I*. Therefore, Defendant's basis for this appeal was forfeited – nearly three years before it was filed. *Kazubowski*, *supra*; *Jackson, supra*.

This exact scenario was before the Appellate Court in the case of *Krentz v. Johnson*, 59 Ill. App. 3d 791, 792 (2d Dist. 1978), in which the Appellate Court ruled as follows:

> "Defendants, both in the trial court after remand, and on this appeal, are essentially trying to relitigate the merits of this court's former decision. This, of course, is entirely improper. The issues which defendants now seek to raise should all properly have been brought to the attention of this court in the prior appeal by a petition for rehearing. Defendants chose not to do so. Additionally if the defendants were dissatisfied or felt that this court had erred in its opinion in awarding specific performance and denying defendants' attorney's fees,

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> a further remedy would have been a petition for leave to appeal to the Supreme Court of this state. This they likewise chose not to do. In failing to raise these issues in the proper manner, defendants have waived them."

Defendant had her chance to raise the issues she now seeks to litigate after the *Crim I* decision was rendered by the Appellate Court. Defendant failed to file either a petition for rehearing or a petition for leave to appeal. Under long-standing Illinois law, the Defendant is now precluded from pursuing those issues in this appeal.

III. THERE WAS NO ABANDONMENT OF ANY ISSUE BY PLAINTIFFS

A core underlying flaw in Defendant's appeal is exposed by one sentence in her summary: "The appellate court's ruling stands for the proposition that, where an appellate court overlooks the fact that a party knowingly and expressly abandoned a portion of its claim, the appellate court's error allows the claim to spring back to life in the event that the party later changes her mind." In that sentence, Defendant showcases her refusal to deal with the reality that Plaintiffs have been reiterating since this issue was raised in Defendant's Motion *in Limine* before the trial court in 2017: Plaintiffs did not expressly abandon any portion of their claim. In filing a timely appeal pursuant to an erroneous directed verdict, and asking the Appellate Court for a blanket reversal and remandment in *Crim I* for an error that occurred at trial, Plaintiffs sought a new trial on all issues. The "express abandonment," on which Defendant's appeal is largely based, is nothing more than Defendant's wishful thinking, arrived at by flagrantly twisting Plaintiffs' words. A faithful reading of Plaintiffs' Appellant's Brief in *Crim I* demonstrates that there is only one possible meaning and outcome from that Appellate decision: Plaintiffs were entitled to, *and were granted*, a new trial on all issues.

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Moreover, Defendant was fully aware of the relief that was being sought by Plaintiffs in *Crim I*, and opposed it at that time. If she believed the Appellate Court's decision was in error, or if she was unclear of the impact of the blanket reversal and remand for new trial, the time to obtain clarification is long past. Without the Appellate Court granting a timely petition for rehearing, or this Court allowing leave to appeal, the decision in *Crim I* became final when it was entered. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 304-06 (1981).

All that remains now is a cynical effort to rewrite history. Defendant's oft-repeated position – that Plaintiffs "expressly abandoned" the professional negligence claims by stating in *Crim I* that their appeal was not "based on" a jury verdict – is plainly in bad faith. On June 9, 2016, Defendant seemed less confused about the relief sought in *Crim I*, arguing that Plaintiffs' request "that each and every decision and order 'which were further steps in the procedural progression of enforcing or otherwise remaining consistent with the Court's order granting Defendants' [*sic*.] motion for partial directed verdict be reversed' . . . suffers from a number of serious problems." (SR 71). Defendant clearly understood at that time that Plaintiffs were requesting a new trial on all issues. She opposed it. She lost. If Defendant believed the Appellate Court erred in *Crim I*, there were avenues available to resolve the purported error at that time. By failing to petition for rehearing, or for leave to appeal to this Court at that time, *Defendant is the one who failed to protect her procedural rights*, even according to her own cited authority in *Stauffer v. Held*, 16 Ill. App. 3d 750, 752 (4th Dist. 1974).

Finally, contrary to Defendant's claim, the jury verdict did not become a final judgment separate from the issues appealed by Plaintiffs. Plaintiffs' Notice of Appeal

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sought reversal of the directed verdict and all subsequent orders and judgment. Once the Notice of Appeal was filed in *Crim I*, the entire case was under the jurisdiction of the Appellate Court. "It is often stated that a notice of appeal confers jurisdiction on a court of review to consider only the judgments or part thereof specified in the notice of appeal." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979). In *Crim I*, the Notice of Appeal specifically raised the directed verdict as well as the judgment ultimately entered by the trial court. That Notice of Appeal was more than sufficient to put Defendant on notice that the entire judgment was the subject of the appeal in *Crim I*:

> Although the cases often speak in terms of jurisdiction, it is generally accepted that a notice of appeal is to be liberally construed. The notice of appeal serves the purpose of informing the prevailing party in the trial court that the unsuccessful litigant seeks a review by a higher court. Briefs, and not the notice of appeal itself, specify the precise points to be relied upon for reversal. Courts in this State and the Federal courts have repeatedly held that a notice of appeal will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal.

Id. at 433-434. In this case, the Notice of Appeal in *Crim I* clearly placed the Defendant on notice that the entire case was on appeal and that Plaintiffs were seeking a new trial on all issues - a fact that Defendant knew during the time that *Crim I* was being litigated. Defendant should not now be permitted to claim that she was unaware of the result sought by Plaintiffs in *Crim I* when it is clear that she knew the issue was before the Appellate Court based on the Notice of Appeal, both because there was no abandonment by the Plaintiffs and because it is too late for the Defendant to make that argument because it has been waived.

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IV. *CRIM I* WAS PROPERLY DECIDED ON THE MERITS

Defendant's transparent effort to relitigate *Crim I* is all the more cynical for its futility. Reversal and remand for trial *de novo* was, and remains, the only proper outcome of *Crim I*. Plaintiffs were not required to file a futile post-trial motion. Plaintiffs are entitled to a new trial on all issues because, as Illinois law unequivocally recognizes, error at trial prior to the entry of a jury's verdict requires a trial *de novo.* Two conclusions naturally follow: (1) the trial court's error did not need to be argued in a post-trial motion; and (2) the specific issue of negligence during Collin Crim's birth did not need to be raised to the Fourth District, as the reversal and remandment requested in Plaintiffs' original appeal would necessarily place the entire cause of action before the trial court anew.

Plaintiffs were not legally required to raise the two outstanding claims before the Appellate Court in *Crim I*. Regardless, whether they were required to raise it on appeal is moot, as they did raise all claims in *Crim I* by requesting reversal and remandment for a new trial, and by explicitly requesting reversal of the September 23, 2015 Judgment, and all prior judgments, orders, and findings related to, or in the procedural progression of, that Judgment. Defendant's revisionist history notwithstanding, Plaintiffs properly appealed the entirety of their case in *Crim I*, and the Fourth District properly reversed and remanded the cause in its entirety.

A. The Rule in Illinois Is That Reversal and Remandment by an Appellate Court Without Specific Directions Necessitates a New Trial on All Issues

When a court of review does not determine the merits of a case but merely reverses and remands without specific directions, the judgment of the court below is entirely abrogated and the cause stands as if no trial had occurred. *People ex rel. Borelli v. Sain*, 16

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Ill. 2d 321, 326 (1959), citing *Kinney v. Lindgren*, 373 Ill. 415 (1940). Plaintiffs were therefore automatically entitled to a new trial on all issues, as the Appellate Court's ruling in *Crim I* rendered the previous verdict as a nullity. Moreover, Plaintiffs' post-trial motion would have been futile in the context of the trial court's erroneous directed verdict. This is not only the logical conclusion, it is recognized as law in *Keen v. Davis*, 38 Ill. 2d 280, 282 (1967). According to long-standing precedent, "where the errors have intervened prior to the entry of the judgment, and the cause is reversed therefor, it must be remanded for a trial *de novo*." *Rigdon v. More*, 242 Ill. 256, 259 (1909). In recognition of the foregoing, Plaintiffs needed only to challenge the clear error at trial and request reversal and remandment for a new trial – precisely the actions they took – meaning they were under no obligation to file a futile and ultimately meaningless post-trial motion.

B. Reversal of Error Prior to Final Judgment Results in a New Trial *de Novo* as If the Remainder of the Trial Never Took Place

For over a hundred years, Illinois Supreme Court precedent has been clear that when an error occurs prior to final judgment, and an appellate court enters a reversal with directions for a new trial, the case is remanded for a whole new trial as if the erroneous ruling had never taken place. *Rigdon v. More,* 242 Ill. 256, 259 (1909). This Court reaffirmed this principle in 1937 in *Ziolkowski v. Continental Casualty Co.*, 365 Ill. 594, 600 (1937), holding as follows:

> "A reversal and remandment deprive the trial court of the right to allow amendments to pleadings and to hear additional testimony, only when the merits of the case and the ultimate rights of the parties have been passed upon by the reviewing court. . . But the trial court has the same powers, after a reversal and remandment without directions, that it had when the case was first tried. **The case must stand the same in the court in which it is to be tried anew, upon the trial *de***

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> ***novo*, as it did before a judgment or decree was rendered."**

Id., (citations omitted) (emphasis added).

In both *Ziolkowski* and *Rigdon*, this Court has specifically ruled that, in cases like this, upon entry of a reversal and an order of a new trial, the new trial takes place as if the first trial never happened. This is particularly true where, as here, the error found by the Appellate Court occurred prior to an entry of the jury's verdict and the final judgment. Therefore, under Illinois law, Plaintiffs are entitled to a new trial on all issues.

This principle was followed in *In re Marriage of McMahon*, 82 Ill. App. 3d 1126, 1133. In *McMahon*, the Appellate Court cited *Borelli*, and held that, "[w]here a court of review does not determine the merits of the case but merely reverses and remands without specific directions, the judgment of the court below is entirely abrogated and the cause stands as if no trial had occurred." *Id.* In this case, the Appellate Court reversed and remanded without providing specific directions other than that there will be a new trial. Therefore, the judgment of the lower court was entirely reversed, with the Plaintiffs entitled to trial *de novo* as if the previous trial had not occurred.[2]

This Court, not to mention multiple appellate courts in Illinois, specifically ruled that the new trial takes place as if the first trial never happened, upon entry of a reversal and order of a new trial, especially when the error found occurred prior to entry of the jury's verdict and the final Judgment.

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[2] As noted in the Facts Section of this Brief, the Appellate Court reversed the entirety of the September 23, 2015 Judgment, not just the partial directed verdict that had been entered on September 18, 2015. *Crim I*, 2016 IL App. at §§ 48-49.

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C. The Reason a Trial *de Novo* on All Issues Is Required Is Because the Trial Court's Error Prejudiced Plaintiffs' Remaining Theory of Liability

Not only is a new trial on all issues the proper application of the law, it is necessitated by a basic logical analysis. It is evident from the record at trial that the husk of Plaintiffs' case which was allowed to reach a jury was prejudiced by the partial directed verdict. While the professional negligence claim culminated during the birth of Collin Crim, it nevertheless arose from Defendant's failure to gain the appropriate information before delivery to enable her to conduct the delivery as required by the standard of care and to prevent injury to Collin Crim.[3]

Because the directed verdict tainted the jury deliberations by removing allegations that impacted the remaining theories of recovery, it follows that there was no requirement under *Keen* to make such an argument to the trial court in a post-trial motion; or, at the least, that the proper court to make such a determination was the Fourth District in *Crim I*.

The erroneous directed verdict as to a substantial portion of Plaintiffs' case prejudiced the Plaintiffs as to the remainder of the trial. This prejudice was found both by the trial court and affirmed by the Appellate Court in *Crim II.* In its ruling denying the

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[3] The ten theories on which Defendant was granted a directed verdict, pleaded as paragraph 11, subparagraphs (a) - (j), have repeatedly been characterized as relating to Plaintiffs' theory of "failure to obtain informed consent," while the other two have been characterized as "professional negligence." Yet a faithful analysis reveals more nuance. In truth, only subparagraphs (c) and (d) – "Failed to discuss the risks and benefits of vaginal birth vis-à-vis cesarean section and the high risk of shoulder dystocia, brachial plexus injury in the event of vaginal birth with Terri Crim" and "Failed to offer Terri Crim the option of delivering by cesarean section" – are *exclusively* theories of failure to obtain informed consent. The other seven allegations are distinct breaches of the standard of care that ultimately describe Defendant's failure to collect the information she needed to perform her job up to the standard of care.

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Motion *in Limine*, the trial court stated that "[t]he Plaintiff argues that directing a verdict on informed consent did change the tenor of the rest of the trial. The court finds this argument to be persuasive and, therefore, denies the Defendant's Motion in Limine." (SR 138). Similarly, the Appellate Court ruled that the trial court was in the best position to determine if the erroneous directed verdict had affected the verdict by the jury. *Crim II*, October 10, 2018 Order ¶49.

Because the directed verdict fundamentally affected the evidence put before the jury by removing a logical underpinning of the remaining theory of liability, it follows that there was no requirement under *Keen* to make such an argument to the trial court in a post-trial motion. Indeed, there is precedent for this application of the *Keen* doctrine for cases where a partially directed verdict has tainted a case before it reached the jury. For example, in a 2015 case in which the trial court erroneously directed a verdict on the issue of lost earning potential and capacity, the Appellate Court held as follows: "[i]n this case, the trial court directed a verdict in defendant's favor as to the issue of plaintiff's lost earning potential and capacity. Under *Keen*, therefore, plaintiff was not required to file a 'proper' posttrial motion—*i.e.*, one requesting a new trial—to preserve her issue for appeal, and her motion to reconsider's failure to request a new trial is not fatal." *Keiser-Long v. Owens*, 2015 IL App (4th) 140612, ¶ 26 (2015).[4]

When the Appellate Court held that the directed verdict was error, it had to determine what effect that had on the remainder of the case. The Appellate Court (and the trial court) appropriately recognized that the issues the trial court precluded the jury from considering

[4] The plaintiff in *Keiser-Long* did file a post-trial motion, but it did not request a new trial, nor did it attack the judgment on the verdict. *Id*. at 917.

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deprived the Plaintiffs of a fair trial. This is why the Appellate Court reversed and remanded for a new trial. This is also why the law has long been that a trial on remand from an error prior to judgment must be a trial *de novo*, as if the first trial never took place.

Finally, Defendant cites to *Clemons v. Mechanical Devises Co.,* 202 Ill. 2d 344 (2002) and *Kreutzer v. Illinois Commerce Commission*, 2012 IL App (2d) 110619, for the proposition that when an appellate court reverses and remands for a new trial without specific directions, it is up to the trial court to examine the reviewing court's opinion and to proceed in conformity with the views expressed in it.[5] In this case, that is exactly what the trial court did after the Appellate Court issued its Opinion and Mandate in *Crim I*. Having heard all the evidence, the trial court was in the best position to determine that its erroneous directed verdict prejudiced the Plaintiffs as to the rest of their case. After the trial court made that determination, the Appellate Court entered its order for a new trial confirming that Plaintiffs were prejudiced as a result of the erroneous directed verdict and that the new trial should be as to all issues, i.e. *de novo*. There is no legal basis for this Court to substitute its judgment for that of either the trial court or the Appellate Court.

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[5] Plaintiffs submit that those cases do not change the long-standing rule set forth herein that a reversal and remand for new trial without specific instructions requires a trial *de novo*.

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CONCLUSION

WHEREFORE, Plaintiffs-Appellees, Collin Crim, a minor, by his parents and next friends Kristopher Crim and Terri Crim, Individually, pray that this Court affirm the Appellate Court's order and remand with instructions entitling Plaintiffs to a new trial *de novo on* all issues.

Respectfully submitted,

By: /s/ David A. Axelrod
COLLIN CRIM, a minor, by his parents and next friends, KRISTOPHER CRIM and TERRI CRIM, Individually

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CERTIFICATE OF COMPLIANCE

I certify that this Plaintiffs-Appellees' Response Brief conforms to the requirements of Rules 341(a) and (b). The length of this Plaintiffs-Appellees' Response Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 22 pages.

By: /s/ David A. Axelrod
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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on June 13, 2019, I electronically filed and transmitted the foregoing **Plaintiffs-Appellees' Response Brief** with the Clerk of the Court using the Odyssey eFileIL system.

I further certify that the other individuals in this case, named below will be served via electronic mail.

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Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure [735 ILCS 5/1-109], I certify that the statements set forth in this Certificate of Filing and Proof of Service are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

By: /s/ David A. Axelrod

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