

No. 124318

Appeal to the Supreme Court of Illinois

**COLLIN CRIM, a minor, by his parents and next friends
KRISTOPHER CRIM and TERI CRIM, Individually,
Plaintiff-Appellee,**

v.

**GINA DIETRICH, D.O.,
Defendant-Appellant.**

Appeal from the Appellate Court, Fourth District No. 4-17-0864
Appeal from the Eighth Judicial Circuit, Adams County, Illinois
Law No. 06 L 89
The Honorable Judge Mark Drummond

Appellant's Brief

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Oral Argument Requested

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NATURE OF THE CASE

This appeal arises from a jury trial involving claims of failure to obtain informed consent and professional negligence. At the close of Plaintiffs' case, Defendant moved for a directed verdict on the claim for lack of informed consent, which the trial court granted. The case proceeded on the remaining claim of professional negligence and the jury rendered a verdict in favor of Defendant.

Plaintiffs appealed the order granting the directed verdict without filing a post-trial motion. The Introductory Paragraph in their opening brief stated that their appeal was not based on the jury's verdict, but was instead directed solely toward the partial directed verdict on the theory of lack of informed consent. The brief contained no argument addressing the claim for professional negligence, nor did Plaintiffs' prayer request that the jury's verdict be overturned. The Appellate Court reversed the trial court's order granting the partial directed verdict without addressing any issues involving the jury's verdict on the claim for professional negligence.

On remand, Defendant filed a motion *in limine* requesting that all evidence and testimony in the second trial be limited to the sole claim raised on appeal, lack of informed consent. Plaintiffs replied that a new trial should be held on all issues, including the claim for professional negligence. The trial court denied Defendant's motion *in limine* and certified the question for interlocutory appeal pursuant to Supreme Court Rule 308(a).

The Appellate Court acknowledged Defendant's argument in the first appeal that Plaintiffs had expressly abandoned their claim for professional negligence. Nevertheless, the Appellate Court held that its general mandate issued in the first appeal did not limit the issues to be raised upon remand and, therefore, a new trial must be held on all issues.

ISSUES PRESENTED FOR REVIEW

- 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.

STATEMENT OF JURISDICTION

The Appellate Court issued its Order on October 10, 2018, and Defendant filed a timely petition for rehearing on October 31, 2018. On November 5, 2018, the Appellate Court denied the petition for rehearing, and on December 10, 2018, Defendant filed a timely petition for leave to appeal in the Illinois Supreme Court. On March 1, 2019, the Court granted the Appellant's motion for extension of time up to and including April 10, 2019 to file its opening brief. The Court has jurisdiction over this matter pursuant to Illinois Supreme Court Rule 315.

STATUTE CONSTRUED**735 ILCS 5/2-1202(b), (e)****Reserved ruling on motion for directed verdict – Post-trial motions in jury cases**

(b) Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. Relief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made or if made was denied or ruling thereon reserved. The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief. Relief sought in post-trial motions may be in the alternative or may be conditioned upon the denial of other relief asked in preference thereto, as for example, a new trial may be requested in the event a request for judgment is denied.

(e) Any party who fails to seek a new trial in his or her post-trial motion, either conditionally or unconditionally, as herein provided, waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict.

STATEMENT OF FACTS

Plaintiffs' Fourth Amended Complaint alleged two claims subsumed under a single count: failure to obtain informed consent and professional negligence (S.R. 4-5). The charging allegations fall into two categories: conduct occurring *prior* to delivery, and conduct occurring *during* the delivery. The allegations supporting the pre-delivery claim for failure to obtain informed consent claim are found in paragraph 11, sub-paragraphs (a) thru (j):

- 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 [sic] 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 cesarian [sic] 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;
- 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.

(S.R. 4-5). The allegations concerning Dr. Dietrich's conduct during the delivery of the child, which form the basis of the claim for professional negligence, are found in sub-paragraphs (k) and (l):

- 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.

(S.R. 5).

The case proceeded to jury trial and, at the close of Plaintiffs' case, Defendant moved for a partial directed verdict on the issue of informed consent (S.R. 143). The trial court granted the motion and entered a partial directed verdict as to paragraph 11, sub-paragraphs (a) thru (j) (S.R. 159; S.S.R. 36). The remaining claim alleging professional negligence during the delivery of Collin Crim, sub-paragraphs (k) and (l), went to the jury (S.S.R. 36-37). Over objection, the trial court instructed the jury that the "issues pertaining to the care provided prior to the delivery of Collin Crim are no longer an issue in this case. You should not speculate as to the reason why these issues are no longer an issue in this case" (S.R. 165-66).

The jury returned a verdict in favor of Defendant and against Plaintiffs on the claim for professional negligence (S.R. 10). Plaintiff elected not to file a post-trial motion, but filed a timely notice of appeal on October 15, 2015 (S.R. 11).

In an Introductory Paragraph in their opening brief, Plaintiffs stated:

The Plaintiffs' Fourth Amended Complaint included two theories of liability, (1) professional negligence and (2) the doctrine of informed consent. The jury rendered a verdict for the Defendant on the theory

of professional negligence. The trial court granted a partial directed verdict on the theory based upon the doctrine of informed consent. While this case was tried to verdict, this appeal is not based upon the verdict of a jury. This appeal reviews the trial court's order granting a partial directed verdict in favor of the Defendant on the Plaintiffs' theory of negligence based upon the doctrine of informed consent.

(S.R. 19) (emphasis added).

Plaintiffs divided the Argument portion of their opening brief into three sections:

- I. The trial court erred when it granted the Defendant's Motion for Partial Directed Verdict on the issue of informed consent, and should be reversed.
- II. 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, in part, the Defendant's Motion for Directed Verdict should be reversed.
- III. The trial court erred when it granted the Defendant's Motion to Strike certain portions of the testimony of Dr. Benson, because the Defendant waived this point, when the Defendant failed to make a timely motion to strike.

(S.R. 32, 43, 44). Plaintiffs argued on appeal that the trial court erred in striking a portion of Dr. Benson's testimony because defense counsel did not raise an objection during his cross-examination. Instead, he waited until Plaintiffs' counsel finished with his redirect examination (S.R. 44). Plaintiffs argued that to "be considered timely, the Defendant's motion to strike should have been made as soon as the objectionable character of the testimony became apparent" (S.R. 44).

Plaintiffs argued that while Dr. Benson's testimony "is not necessary for the Plaintiffs to support the third element of the doctrine of informed consent, it does

bolster the Plaintiffs' position and should be considered in conjunction with the argument and analysis contained in Section I of this brief" (S.R. 45). Section I of their brief was limited to a discussion of the issue of informed consent (S.R. 32).

Plaintiffs made no argument that the trial court's order striking a portion of Dr. Benson's testimony had any connection with the jury's verdict on the claim for professional negligence. Indeed, Plaintiffs presented no argument in either their opening brief or reply brief addressing the jury's verdict. Plaintiffs' prayer for relief in the Conclusion to their opening brief asked this Court to "reverse each and every decision and order entered in the trial court which were further steps in the procedural progression of enforcing or otherwise remaining consistent with the Court's Order granting the Defendant's Motion for Directed Verdict" (S.R. 46). The prayer for relief did not mention anything about the jury's verdict on the claim for professional negligence.

This Court issued a published decision limited to an analysis of the partial directed verdict on the issue of informed consent. *Crim v. Dietrich*, 2016 IL App (4th) 150843 (S.R. 79). The Court did not address any issue involving the jury's verdict on the professional negligence claim. The Court concluded that:

For the foregoing reasons, we reverse the trial court's judgment and remand for further proceedings.

Crim v. Dietrich, 2016 IL App (4th) 150843, ¶ 51 (S.R. 94). The Court's mandate stated that it was the decision of the Court that "the order on appeal from the circuit court be REVERSED and the cause be remanded to the Circuit Court for the

Eighth Judicial Circuit Adams County, for such other proceedings as required by order of this court” (S.S.R. 40).

Upon remand, Defendant filed a motion *in limine* pointing out that Plaintiffs did not appeal the jury’s verdict in favor of Defendant on the issue of professional negligence in the delivery of Collin Crim (S.R. 95). Defendant sought to limit the issues and evidence presented at the upcoming trial to the sole issue that Plaintiffs appealed, namely the issue of informed consent and the events occurring prior to delivery of Collin Crim (S.R. 97). Plaintiff responded that directing a verdict on informed consent changed the tenor of the rest of the trial and the new trial should encompass claims for both lack of informed consent *and* professional negligence (S.R. 104). The trial court agreed and denied the motion *in limine* (S.R. 137).

The trial court certified the following question for interlocutory appeal under Supreme Court Rule 308:

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

The appellate court held that, based on the general mandate issued in the first appeal, a trial should be held on all issues, *Crim v. Dietrich*, 2018 IL App (4th) 170864, ¶ 52. The court noted that its prior opinion contained no specific instructions as to how the proceedings should continue following remand “though we easily could have.” *Crim*, 2018 IL App (4th) 170864 ¶ 43. The court explained that:

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 issue 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.

Id. at ¶ 52. The appellate court wholly omitted the fact that the Crims expressly abandoned the issue of the jury's verdict in its initial appeal, nor did the court address the effect of Plaintiffs' failure to file a post-trial motion.

ARGUMENT

I. 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.

A. Standard of Review as to All Issues

A trial court's ruling on motions *in limine* will not be disturbed on review absent an abuse of discretion. *People v. Oscar H. (In re Leona W.)*, 228 Ill. 2d 439, 460 (2008).

B. Introduction

Over 90 years ago, this Court articulated a basic rule of law that continues in full force today:

When a judgment or decree is reversed and the cause remanded without specific directions, the judgment of the court below is entirely abrogated and the cause then stands in that court precisely as if no trial had occurred.

Roggenbuck v. Breuhaas. 330 Ill. 294, 300 (1928). Put simply, this general rule has no relevance to claims that a party has expressly abandoned. An appellate court's general mandate cannot resurrect claims that have been discarded prior to appeal.

That conclusion rests on a solid foundation of statutory law, Supreme Court Rules, and above all, common sense.

Until now, no court has allowed a new trial of a jury's verdict absent a post-trial motion. Nor has any reviewing court in Illinois resurrected a claim on remand where a party explicitly abandoned the claim in its appellate brief. And finally, no reviewing court has allowed a new trial on an abandoned claim as a result of the reviewing court's decision not to address the fact that the claim was never raised on appeal.

It is a basic rule of law that a jury's verdict becomes a final judgment upon expiration of the 30-day deadline for filing a post-trial motion. 735 ILCS 5/2-1202. But that basic principle of finality appears to have lost all meaning under circumstances where a reviewing court issues a general mandate. The Appellate Court's ruling in this case lies in direct conflict with Section 2-1202 of the Code of Civil Procedure, Illinois Supreme Court Rules 366 and 341, and if upheld, will lead to substantial confusion to both litigants and the courts as to the effect of a general mandate.

The appellate court's ruling is perplexing. The court acknowledged Defendant's argument that Plaintiffs had forfeited any claim involving the jury's verdict. Then, in perfunctory manner, the court remarked that "the Crims asserted that their notice of appeal and brief included a request to reverse the jury's verdict." *Crim*, 2018 IL App (4th) 170864 ¶ 22.

Remarkably, the Appellate Court chose to accept that assertion at face value, ignoring the fact that Plaintiff expressly abandoned the issue of the jury's verdict with the statement that "this appeal is not based upon the verdict of a jury" (S.R. 19). Nor did the court reveal that Plaintiffs raised no argument in their brief addressing the jury's verdict. Any question as to whether Plaintiffs had abandoned the issue is put to rest by the Conclusion in their initial and reply briefs – Plaintiffs never asked the court to afford them a new trial as to professional negligence.

The appellate court chose to ignore these facts in *Crim II*, just as it had ignored them in the first appeal. The appellate court remarked:

Our opinion in *Crim* did not contain any specific instructions on how the proceedings should continue in the trial court on remand *though we easily could have*.

Id. at ¶43 (emphasis added). It is difficult to understand what the appellate court is saying here. Is the court admitting that it made a mistake in failing to give specific instructions? If that is the case, then one would expect the appellate court to correct its error, acknowledge that the Crims had abandoned the jury verdict issue in the first appeal, and exercise its authority under Rule 366(a)(4) to "make any order that ought to have been given or made."

But the appellate court declined that option, choosing instead to find that its general mandate, ostensibly issued in error, must control the outcome of the case. And in doing so, the appellate court undermined some of the most fundamental rules of law.

C. Upholding the Appellate Court's Ruling Requires this Court to Re-Write Section 2-1202 of the Code of Civil Procedure.

By law, a failure to file a post-trial motion following a jury trial amounts to a failure to preserve any matters for review. *In re Parentage of Kimble*, 204 Ill. App. 3d 914, 916 (2d Dist. 1990); *Wing v. Chicago Transit Auth.*, 2016 IL App (1st) 153517, ¶ 6. There are only two exceptions to this rule of law: (a) where the jury failed to reach a verdict under § 2-1202(e), and (b) where the trial court granted a directed verdict. The exception for directed verdicts originates from a decision of this Court, *Keen v. Davis*, 38 Ill. 2d 280 (1967), where the Court adopted the following rationale:

When a judge directs a verdict at any stage of the trial, in effect, he has removed the case from the realm of the rules relating to jury cases and the rules applicable to bench trials should apply. It seems illogical to require a party to address the same arguments to the same judge on the identical questions before proceeding to review by an appellate tribunal.

Keen, 38 Ill. 2d at 281-82. This rationale is perfectly sound as to claims resolved by directed verdict, but has no relevance to a claim decided by a jury.

The primary purpose of a post-trial motion is to call to the attention of the trial court possible errors and give it the first opportunity to review its rulings in order to avoid multiplicity of litigation and piecemeal appeals. *Sadler v. County of Cook*, 108 Ill. App. 3d 175, 179 (1st Dist. 1982). Plaintiffs deliberately chose not to exercise that right and in doing so, deprived the trial court of the opportunity to address any perceived trial errors that may have prejudiced their case. Plaintiffs then

compounded this error by failing to raise the issue on appeal, which deprived the appellate court of an opportunity to correct any perceived errors.

Plaintiffs' claims fall into two entirely separate categories: conduct prior to delivery that should have been communicated to the Plaintiffs in order to satisfy the requirement of informed consent, and conduct *during* delivery of the child relevant to Plaintiffs' claim for professional negligence. If prejudicial errors occurred during trial of Dr. Dietrich's purported negligence in delivering the child, then those errors should have been addressed in the first instance by the trial court, which had full authority to either grant a new trial on that claim or enter judgment *n.o.v.* Plaintiffs' decision to forego filing a post-trial motion, and then, upon remand, demand that a claim fairly tried to a jury verdict be retried, completely undermines any notion of fairness and judicial economy.

As this Court explained, public policy clearly favors correction of errors at the trial level. *People v. Marker*, 233 Ill. 2d 158, 168-69 (2009). See also, *People v. Heil*, 71 Ill. 2d 458, 461 (1978) (relevant statutes and court rules "demonstrate the intent that in criminal as well as civil matters the circuit court be given the opportunity to reconsider final appealable judgments and orders within 30 days of their entry"). The appellate court's ruling, that a judgment fairly tried to a jury and uncontested in either the trial court or on appeal, should be retried undermines both public policy, statutory law, as well as established principles of law.

Section 2-1202(b) provides that relief desired after trial in jury cases must be sought in a single, post-trial motion. 735 ILCS 5/2-1202(b). Sub-section (e)

provides that, any party “who fails to seek a new trial in his or her post-trial motion...waives the right to apply for a new trial, except in cases where the jury has failed to reach a verdict.” 735 ILCS 5/2-1202(e). The Appellate Court’s ruling effectively nullifies this statutory scheme. Under the Appellate Court’s analysis, the jurisdictional requirements laid out in Section 2-1202(e) can be washed away merely by issuing a general mandate in an appeal of an entirely separate claim.

The Appellate Court’s ruling establishes a third, unwarranted exception to the post-judgment motion rule, one which the General Assembly could not possibly have intended. Now, a party may be relieved from the constraints under § 2-1202(b) and (e) if a court of review mistakenly issues a general mandate, thereby breathing new life into a claim that a party expressly abandoned. No rule of law, nor any measure of common sense, justifies that outcome.

As the Appellate Court, Fourth District, explained, “procedural rules are not designed as a trap for the unwary, but as guidelines for the diligent in an adversary proceeding.” *Stauffer v. Held*, 16 Ill. App. 3d 750, 752 (4th Dist. 1974).

[A]dherence to these recognized procedural rules in this instance is not an onerous imposition thwarting the ends of justice, but rather is an implementation of required orderly procedure to resolve judicial issues on review.

Stauffer, 16 Ill. App. 3d at 752. Though they had every opportunity to do so, Plaintiffs have never once asserted any claim of error involving the jury’s verdict. Their failure to adhere to basic rules of procedure should not be rewarded with a new trial on a claim fairly tried to verdict.

II. The “Order on Appeal” Referenced in the Appellate Court’s Mandate Does Not Encompass the Jury’s Verdict.

The appellate court opened its analysis with the proposition that the correctness of a trial court's action on remand is to be determined from the appellate court’s mandate, as opposed to the appellate court opinion. Order, ¶ 38; *PSL Realty Co. v. Granite Inv. Co.*, 86 Ill. 2d 291, 308 (1981). The mandate stated:

It is the decision of this court that the order on appeal from the circuit court be REVERSED and the cause be REMANDED to the Circuit Court for the Eighth Judicial Circuit Adams County, for such other proceedings as required by the order of this court.

(S.S.R. 40). In short, the mandate states that the “order on appeal” has been reversed. This raises a fundamental question: what did the “order on appeal” consist of? As explained below, the order on appeal had but one component: the trial court’s directed verdict. The jury’s verdict was never before the appellate court.

The underlying case consisted of two separate trial court rulings. The first was the order directing a verdict on a claim of failure to obtain informed consent. No one disputes that this was the “order on appeal.”

But that is not true for the second order, which arose from the jury’s verdict. The General Assembly made it very clear that, following a jury trial, a party who fails to seek a new trial in a post-trial motion “waives the right to apply for a new trial.” 735 ILCS 5/1202(e). A plain reading of the Plaintiffs’ initial brief and reply brief, as well as their prayer for relief in both briefs, confirms that they raised no issue regarding the jury’s verdict.

A key point in the appellate court's analysis is that it never addressed the forfeiture in its ruling. As the Court explained:

[W]e did not determine which arguments were preserved and which were forfeited despite being presented with the issue. We did not address forfeiture because we reversed based on just one issue.

Order, ¶ 46. That statement rests on a critical assumption. The appellate court assumed that the issue of forfeiture was actually before the court. It was not. Under the Code of Civil Procedure, a new trial cannot be granted as to a jury's verdict in the absence of a post-trial motion. Accordingly, the issue was foreclosed the moment the 30-day deadline for filing a post-trial motion expired. This is a matter of jurisdictional importance. Once the 30-day deadline expired, any attempt to obtain a new trial of the jury's verdict was foreclosed. As one court explained, because the defendant did not file a post-trial motion following a jury verdict, the court was "*legally* unable to decide any of the substantive issues raised on appeal." *American Nat'l Bank & Trust Co. v. J & G Restaurant, Inc.*, 94 Ill. App. 3d 318, 319 (1st Dist. 1981) (emphasis added).

This Court has acknowledged the "familiar proposition that waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Jackson v. Bd. of Election Comm'rs*, 2012 IL 111928, ¶ 33. That rule is commonly applied in cases

where, for example, a litigant raises an argument for the first time on appeal, or perhaps fails to support an argument with citation to authority.

But it does not apply in cases where the General Assembly, as opposed to the courts, has expressly barred litigants from obtaining relief in a court of review. As noted earlier, until now, no court in Illinois has *ever* determined that it was *authorized* to order a new trial of a jury's verdict in the absence of a post-trial motion. The reason for that is readily apparent. A reviewing court is not *authorized* to address such a claim.

Where a litigant violates Supreme Court Rules resulting in a waiver or forfeiture, our courts of review are, in some cases, entitled to exercise discretion in deciding whether to address the issue. But as to post-trial motions in jury trials, no such discretion exists. The question of whether a new trial can be granted absent a post-trial motion in a case decided by a jury has but one answer, and the General Assembly has given it to us. The issue cannot be decided in any other way.

Accordingly, for the appellate court to suggest that it "did not determine which arguments were forfeited" makes little sense. Order, ¶ 46. There was nothing for the appellate court to decide; the issue was never before it. There was only one issue before the appellate court in the initial appeal: whether the trial court correctly directed a verdict as to the claim of lack of informed consent.

The appellate court's mandate explicitly reversed the "order on appeal." How is it that a claim can be found to be incorporated within the "order on appeal" where the appellant explicitly advised a reviewing court that the issue is *not* being

appealed? When the appellate court reversed the “order on appeal” it did so only to those matters which were actually on appeal. The jury’s verdict was not. By the appellate court’s own logic, a new trial must, by operation of law, be limited to the sole order on appeal – the claim for lack of informed consent.

The appellate court found the decision in *Kreutzer v. Ill. Commerce Comm’n*, 2012 IL App (2d) 110619, to be instructive, but completely misconstrued its holding. In *Kreutzer*, like the case at bar, the petitioners argued that, where specific directions in a mandate are lacking, it is presumed that the lower tribunal’s judgment is abrogated. The *Kreutzer* court disagreed.

Quoting this Court’s decision in *Kaneville v. Meredith*, 361 Ill. 556, 563 (1935), the court explained:

If the cause has been remanded, the court to which it is remanded can take only such proceedings as conform to the judgment of the appellate tribunal. If specific directions are given, the court can do nothing but carry out such directions; *if not given, it must be determined from the nature of the case what further proceedings would be proper and not inconsistent with the opinion.*"

Kaneville, 361 Ill. App. 3d at 568; *Kreutzer*, 2012 IL App. (2d) 110619, ¶ 34 (emphasis in original). The court noted that these comments suggest that, if specific directions are lacking, the body of the appellate court's judgment must be examined *to determine the court's intent* for the proceedings on remand. More recently, this Court addressed the issue in *Clemons v. Mech. Devices Co.*, 202 Ill. 2d 344 (2002), stating:

[I]t is not required that a reviewing court state specific directions in an order reversing a judgment and remanding a cause. In such a

case, it is then the duty of the court to which the cause is remanded to examine the reviewing court's opinion and to proceed in conformity with the views expressed in it.

Clemons, 202 Ill. 2d at 353. Applying these principles, the *Kreutzer* court determined that the general mandate it issued in the first appeal did not abrogate the Commission's entire judgment "because petitioners challenged only a portion of the judgment and that portion was distinct from the remainder of the judgment." *Kreutzer*, 2012 IL App. (2d) 110619, ¶ 35. The court concluded that the only principles articulated in its analysis in the first appeal were those governing the specificity and evidentiary requirements for a utility easement. "Hence, our remand directive contemplated no proceedings beyond those pertaining to the easement issue." *Id.*

The same principle should apply to the case at bar. The appellate court decided not to address the forfeiture of the jury verdict claim and limited its analysis solely to the issue of the directed verdict. Accordingly, because the appellate court's analysis did not contemplate proceedings beyond those pertaining to the directed verdict, the fact that it issued a general verdict did not abrogate the entire proceedings below.

III. 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.

The appellate court's ruling lies in direct conflict with law of the case doctrine. The law of the case doctrine provides that a rule established as controlling in a particular case will continue to be the law of the case in the absence of error or a

change in facts and is applicable upon remand, “where the final ruling of the circuit court was unchallenged or affirmed on appellate review.” *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 1045 (1st Dist. 2007).

Under the doctrine, where a party fails to challenge a legal decision when she has the opportunity to do so, she forfeits the right to challenge the decision at a later time and the decision becomes the law of the case for future stages of the same litigation. *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540, 547 (1997); *People ex rel. Madigan v. Cochonour (In re Estate of Hayden)*, 361 Ill. App. 3d 1021, 1027 (4th Dist. 2005). A final judgment is required to sustain application of the doctrine. *People v. Patterson*, 154 Ill. 2d 414, 469 (1992). Upon expiration of the 30-day deadline in which to file a post-trial motion, the jury’s verdict became a final judgment. Nothing prevented Plaintiffs from filing a post-trial motion in this case. Indeed, it was incumbent upon them to do so if they intended to retry the claim.

The appellate court relied upon *Filipetto by Filipetto v. Village of Wilmette*, 254 Ill. App. 3d 461 (1st Dist. 1993), for the proposition that issues presented and not decided on appeal are not the law of the case. *Crim*, 2018 IL App (4th) 170864, ¶ 46. But, unlike *Filipetto*, the issue of the jury’s verdict was never *presented* for review. On a fundamental basis, the rule expressed in the *Filipetto* decision has no relevance to a situation where the issue was forfeited *prior to appeal* as a result of a party’s deliberate decision to not file a post-trial motion. Indeed, application of this rule to an issue that a party expressly abandoned in their opening brief would appear to be make no sense.

IV. When Plaintiffs Deliberately Abandoned Their Claim for Professional Negligence, They Abandoned Any Claim that the Evidence Was Intertwined.

Plaintiffs argued in the second appeal that the directed verdict fundamentally affected the evidence put before the jury on the claim for medical negligence (Appellee's brief, p. 2). If that is so, then why did they expressly abandon the issue of the jury's verdict in the first appeal? There was no mention of intertwined evidence in the first appeal. If the evidence was indeed intertwined such that a new trial on all issues was necessary, it was incumbent upon the Crims to ask for it and take the necessary procedural steps to ensure that possibility.

The appellate court held that:

Given the context that this court declined to consider the evidentiary and forfeiture issues in the first appeal, the trial court's ruling denying the motion *in limine* was reasonable, especially in light of its potentially overbroad jury instruction to disregard issues pertaining to care prior to delivery. The trial court certainly could have found the two theories were interrelated when examining our opinion and the prior trial.

Id. at ¶ 51. With respect, that statement suffers from a number of serious flaws. First, Plaintiff never presented "evidentiary" issues to the appellate court. As noted above, Plaintiffs never argued in the first appeal that the evidence involving the delivery of the child was somehow intertwined with the *prior* conduct involving informed consent. How is it possible then for the trial court to examine the appellate court's ruling and derive any meaning at all regarding the interrelatedness of the evidence?

And how is it possible that evidence of conduct occurring during delivery of the child could somehow be relevant to conduct that occurred in the preceding months? Plaintiff alleged that, during delivery, Dr. Dietrich applied more traction than a reasonable obstetrician/gynecologist would apply under the same circumstances. They also alleged that Dr. Dietrich failed to manage and resolve the incident of shoulder dystocia that occurred during delivery. How could that evidence possibly be relevant to the issue of whether Dr. Dietrich properly informed her patient of the risks of the natural child birth she demanded?

Regardless, when Plaintiffs deliberately abandoned their claim for professional negligence, they abandoned all that goes with it. Plaintiffs made a choice, they consciously declined to take the necessary procedural steps that would afford them the opportunity to argue that the evidence was so intertwined that they must be allowed a new trial on all claims. To the extent they believed that the evidence was intertwined, they should have made that argument to both the trial and appellate courts.

SUMMARY

As noted above, public policy clearly favors correction of errors at the trial level. *People v. Marker*, 233 Ill. 2d 158, 168-69 (2009). The appellate court's ruling that a cause of action fairly tried to a jury and uncontested in either the trial court or on appeal should be retried undermines both public policy and statutory law, as well as established principles of law.

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. On a fundamental basis, one has to question why our courts would want to adopt such a scheme. What benefit is bestowed upon our courts by rewriting § 2-1202 to allow for a wholly new exception to the post-trial motion requirement? How does it benefit our judicial system to allow a litigant a new trial following an appeal on an issue that they expressly avowed that they were not appealing? More to the point, why should our courts abandon the policy rationale requiring a party to file a post-trial motion following a jury verdict merely because a reviewing court failed to acknowledge that a claim had been abandoned?

Defendant submits that the appellate court's ruling creates a manifest injustice that undermines the principle that trial courts must be allowed the opportunity, in the first instance, to correct errors at trial. The general rule is that, when a judgment is reversed and the cause remanded without specific directions, the judgment of the court below is entirely abrogated. But that rule cannot reasonably be applied to claims that have been expressly disavowed.

CONCLUSION

WHEREFORE, Defendant-Appellee, GINA DIETRICH, D.O., prays that this Court vacate the Appellate Court's order and remand with instructions to limit a new trial to the claim for lack of informed consent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Appellant's brief conforms to the requirements of Rules 341(a) and (b). The length of the Appellant's 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 24 pages.

BY: /s/Craig L. Unrath
Craig L. Unrath

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on April 12, 2019, I electronically filed and transmitted the foregoing **APPELLANT'S BRIEF** with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other individuals in this case, named below have been served via the Odyssey eFileIL system on April 12, 2019.

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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.

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APPENDIX

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No. 4-17-0864

Appeal to the Appellate Court of Illinois
Fourth Appellate District

Collin Crim, a minor, by his parents and next friends, KRISTOPHER CRIM and
TERRI CRIM, individually

v.

Gina Dietrich, D.O.

Law No. 06 L 89

(Pending in the Adams Circuit Court)

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STATE OF ILLINOIS
APPELLATE COURT
 FOURTH DISTRICT

CLERK OF THE COURT
 (217) 782-2586

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 SPRINGFIELD, IL 62794-9206

RESEARCH DIRECTOR
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In the APPELLATE COURT sitting at SPRINGFIELD, within and for the State of Illinois.

Present: Honorable ROBERT J. STEIGMANN, Judge
 Honorable LISA HOLDER WHITE, Judge
 Honorable THOMAS R. APPLETON, Judge

BE IT REMEMBERED, that on the 7th day of November, 2016, the final judgment of said Appellate Court was entered of record as follows:

COLLIN CRIM; A Minor, By His Parents and
 Next Friends, KRISTOPHER CRIM and TERI
 CRIM, Individually,
 Plaintiffs-Appellants,
 v.
 GINA DIETRICH, D.O.,
 Defendant-Appellee.

General No: 4-15-0843

Appeal from the
 Circuit Court of
 Adams County
 06L89

It is the decision of this court that the order on appeal from the circuit court be REVERSED and the cause be REMANDED to the Circuit Court for the Eighth Judicial Circuit Adams County, for such other proceedings as required by the order of this court.

Costs, if any, to be taxed in accordance with the law.

As Clerk of the Illinois Appellate Court for the Fourth Judicial District and keeper of the records, files and Seal thereof, I certify that the foregoing is a true statement of the final order of said court in the above entitled cause, of record in my office.

IN WITNESS WHEREOF, I have set my
 hand and affixed the Seal of the Illinois
 Appellate Court for the Fourth Judicial
 District this 14th day of December, 2016.

Carla Bender

Clerk, Appellate Court for the
 Fourth Judicial District

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2018 IL App (4th) 170864

NO. 4-17-0864

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 10, 2018

Carla Bender

4th District Appellate

Court, IL

COLLIN CRIM, a Minor, by His Parents and Next)	Appeal from the
Friends, KRISTOPHER CRIM and TERI CRIM,)	Circuit Court of
Individually,)	Adams County
Plaintiffs-Appellees,)	No. 06L89
v.)	
GINA DIETRICH, D.O.,)	Honorable
Defendant-Appellant.)	Mark A. Drummond,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justice DeArmond concurred in the judgment.

Justice Turner dissented.

ORDER

¶ 1 *Held:* The appellate court held trial court was required to conduct a new trial on all issues on remand from prior appeal, answering certified question in the affirmative.

¶ 2 In August 2015, plaintiffs, Kristopher Crim and Teri Crim, acting on behalf of their son Collin Crim, filed a fourth amended medical malpractice claim against defendant, Gina Dietrich, D.O., alleging that she failed to comply with the standard of care applicable to an obstetrician. The Crims' claims were based on two theories. First, the Crims alleged Dietrich negligently failed to obtain Teri's informed consent prior to Collin's natural birth, which resulted in severe injuries to Collin's right shoulder, arm, and hand. Second, the Crims alleged Dietrich negligently delivered Collin causing his injuries.

¶ 3 In September 2015, the matter proceeded to a jury trial. At the close of the

Crims' evidence, Dietrich moved for a partial directed verdict on the issue of informed consent, which the trial court granted. After the presentation of additional evidence and argument, the jury returned a verdict in favor of Dietrich and against the Crims on their remaining claims.

¶ 4 The Crims did not file a posttrial motion. Instead, the Crims appealed, arguing the trial court erred by entering a directed verdict on their informed consent claim. *Crim ex rel. Crim v. Dietrich*, 2016 IL App (4th) 150843, ¶ 3, 67 N.E.3d 433. This court agreed and reversed the trial court's judgment, remanding the case for a new trial. *Id.* ¶ 48.

¶ 5 On remand, Dietrich filed a motion *in limine* to bar the presentation of any evidence relating to the negligent delivery claim. The Crims responded that this court reversed the judgment in its entirety, and therefore, a new trial on all issues was required. The trial court, unsure which party was correct and eager to avoid multiple trials and appeals, denied the motion *in limine* but invited the parties to move for a certified question pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017).

¶ 6 The trial court certified the following question for appeal: "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." We answer the certified question in the affirmative.

¶ 7 I. BACKGROUND

¶ 8 A. The Crims' Claims

¶ 9 In August 2015, the Crims, acting on behalf of their minor son, Collin, filed a fourth amended medical malpractice claim against Dietrich, alleging that she failed to comply with the standard of care applicable to an obstetrician. The Crims claimed Dietrich failed to inform Teri during her pregnancy that (1) natural childbirth would place Collin at risk for injury

due to his increasing weight and (2) delivery by cesarean section (C-section) was a viable alternative to lower the risk of injury. In June 2005, Teri delivered Collin by natural childbirth. During the delivery, Collin suffered shoulder dystocia—that is, an obstructed labor whereby after the delivery of the head, the anterior shoulder of the infant cannot pass or requires significant manipulation. Consequently, Collin suffered a broken clavicle and extensive nerve damage in his right shoulder, arm, and hand.

¶ 10

B. The Jury Trial

¶ 11 In September 2015, a jury trial was conducted. The Crims presented evidence that Dietrich knew or should have known that Collin was an unusually large baby (known as “macrosomic” in medical parlance) and that injuries could result with the natural delivery of a macrosomic baby. However, Dietrich did not discuss Collin’s weight with Teri and did not advise that a C-section could avoid the risk of injury. The Crims further presented evidence that Dietrich was surprised by Collin’s size and unprepared for the shoulder dystocia—possibly due to her failure to discover Collin’s macrosomia—which caused her to respond improperly. The Crims also presented extensive evidence of the nature and extent of Collin’s injuries.

¶ 12

At the close of the Crims’ case in chief, Dietrich moved for a directed verdict on the informed consent claim. Dietrich argued that *St. Gemme v. Tomlin*, 118 Ill. App. 3d 766, 455 N.E.2d 294 (1983), requires a plaintiff in an informed consent case to present expert testimony that a reasonable patient would have pursued a different form of treatment. The trial court granted Dietrich’s motion for a directed verdict. The court instructed the jury that “[t]he issues pertaining to the care provided prior to the delivery of Collin Crim are no longer an issue in this case. You should not speculate as to the reason why these issues are no longer an issue in this case.”

¶ 13 Thereafter, Dietrich presented testimony in her case in chief, and the case was submitted to the jury. The jury returned a verdict in Dietrich's favor and against the Crims, who did not file any posttrial motions.

¶ 14 C. The First Appeal

¶ 15 The Crims filed a notice of appeal. On appeal, the Crims argued the trial court erred by granting a directed verdict on the issue of informed consent. The Crims asserted that expert testimony was not required to show what a reasonable patient would have done. Instead, the Crims sufficiently presented a claim on informed consent by offering Teri's testimony that she would have had a C-section had she known about Collin's size and the risks associated with the natural birth of a macrosomic baby. The Crims also argued the court erred by excluding certain expert medical testimony.

¶ 16 Dietrich responded that in *St. Gemme*, 118 Ill. App. 3d at 769, this court made clear that all but the most gross malpractice cases must be supported by expert testimony, including to establish negligence and proximate cause. Because the Crims failed to present any expert testimony that a reasonable patient would have opted for a C-section, Dietrich claimed the trial court correctly directed a verdict in her favor. Dietrich further contended that the Crims had forfeited all issues except the directed verdict by failing to file a posttrial motion. Specifically, Dietrich claimed the Crims forfeited the issue of whether the court erred in excluding certain expert medical testimony because they failed to raise the argument in the trial court.

¶ 17 In our decision in *Crim*, we identified two issues: whether the trial court erred by "(1) granting Dietrich a directed verdict on the issue of informed consent and (2) barring certain medical testimony." *Crim*, 2016 IL App (4th) 150843, ¶ 3. We examined our decision in *St. Gemme* and the First District's holding in *Coryell v. Smith*, 274 Ill. App. 3d 543, 653 N.E.2d

1317 (1995). *Crim*, 2016 IL App (4th) 150843, ¶¶ 38-41, 46. We concluded that expert testimony was not required to establish the causation element of the Crims' lack of informed consent claim. *Id.* ¶ 46. "Accordingly, we reverse[d] the trial court's judgment and remand[ed] for a new trial." *Id.* ¶ 48. Because we reversed and remanded for a new trial, we declined to examine the Crims' evidentiary claim. *Id.* ¶ 49. We did not address Dietrich's forfeiture argument. See *id.*

¶ 18 In December 2016, we issued the mandate in this case, which stated "that the order on appeal from the circuit court be REVERSED and the cause be REMANDED to the Circuit Court *** for such other proceedings as required by the order of this court."

¶ 19 D. The Proceedings on Remand

¶ 20 In May 2017, Dietrich filed a motion *in limine* to exclude any evidence relating to the professional negligence claim. In essence, Dietrich requested that the new trial be conducted solely on the issue of informed consent. Dietrich argued that the Crims failed to file a posttrial motion or raise any issue on appeal concerning the jury's verdict on negligence during Collin's delivery. As a result of this failure, Dietrich claimed the Crims had forfeited the issue and the trial court was barred by the law-of-the-case doctrine from relitigating the jury's verdict. Dietrich also asserted the appellate court opinion addressed only the informed consent claim, and therefore, a new trial should be conducted on only that claim.

¶ 21 The Crims responded that the mandate was a general one. The appellate court had reversed the trial court's judgment in its entirety and ordered a new trial without expressing any limitation on the issues to be addressed. The Crims argued that when a case is reversed without specific instructions, the proceeding below is entirely abrogated as if no trial took place, and the trial court has the same authority over the case that it had in the first instance. In other

words, when an error prior to final judgment is reversed on appeal, on remand, the case continues anew from the point at which the error occurred.

¶ 22 Regarding forfeiture, the Crims asserted that their notice of appeal and brief included a request to reverse the jury's verdict. Accordingly, the Crims claimed they had not forfeited any issues. Additionally, the Crims contended they were not required to file a posttrial motion to challenge a directed verdict and the directed verdict had changed the tenor of the entire trial, making a new trial on all the issues appropriate.

¶ 23 In August 2017, the trial court conducted a hearing on the motion *in limine*. The court expressed sympathy for both parties. On the one hand, it understood that this issue of negligence during delivery had been tried to a verdict and the Crims had never contested that verdict either in the trial court or on appeal. On the other, the court acknowledged that (1) it had incorrectly instructed the jury to disregard the issue of negligence occurring prior to Collin's delivery and (2) that error could have affected the jury's decision on the remaining theory.

¶ 24 Recognizing that case law supported each party's position, the court suggested certifying a question for appeal. Both parties agreed that they would appeal the issue after trial if the court ruled against them. The court stated it wanted to avoid multiple trials and appeals and believed the circumstances were appropriate for a certified question. Therefore, the court took the motion *in limine* under advisement and informed the parties it would entertain a motion to certify a question for appeal if they thought it appropriate.

¶ 25 E. The Certified Question

¶ 26 In October 2017, the parties submitted a joint proposed order certifying a question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). The proposed question was "[w]hether 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.”

¶ 27 Later in October, the trial court entered an order denying the motion *in limine* and certifying the agreed question for interlocutory appeal. In a supplemental order, the court found that there were “substantial grounds for differences of opinion and an immediate appeal of this issue would materially advance the ultimate termination of litigation.” The court also explained it denied the motion *in limine* because it found to be persuasive the Crims’ argument “that directing a verdict on informed consent did change the tenor of the rest of the trial.”

¶ 28 Thereafter, Dietrich filed an application for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017) with this court. We granted the application and now answer the certified question.

¶ 29 II. ANALYSIS

¶ 30 The trial court certified the following question for appeal: “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?” We answer the question in the affirmative.

¶ 31 A. The Arguments of the Parties

¶ 32 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.

¶ 33 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.

¶ 34 To answer the certified question, we need only interpret our prior mandate and opinion to determine the scope of the trial court’s authority on remand. We conclude a new trial on all issues was appropriate and answer the certified question in the affirmative.

¶ 35 B. Scope of Appeal and Standard of Review

¶ 36 When considering an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), the appellate court is limited to reviewing the question certified by the trial court and may not consider the propriety of the order entered. *De Bouse v. Bayer*, 235 Ill. 2d 544, 550, 922 N.E.2d 309, 313 (2009). Certified questions are questions of law reviewed *de novo*. *Id.*; *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21, 102 N.E.3d 162.

¶ 37 C. The Law of Interpreting Appellate Mandates

¶ 38 The scope of the trial court’s proceedings “on remand is to be determined from the appellate court’s mandate, as opposed to the appellate court opinion.” *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 308, 427 N.E.2d 563, 571 (1981). The trial court may take only such actions that are directed in the mandate and lacks authority to act beyond its dictates. *Id.* at 308-09.

¶ 39 “[W]hen the appellate court gives specific directions on how the cause should proceed, the trial court can do nothing except carry out those explicit instructions.” *People ex rel. Department of Transportation v. Firststar Illinois*, 365 Ill. App. 3d 936, 939, 851 N.E.2d 682, 685 (2006). By contrast, as a general rule,

“[I]f the appellate court's decision fails to give specific instructions, the trial court's judgment is entirely abrogated and the cause, on remand, stands as if no trial had taken place. [Citation.] At that point, the trial court has the same control over the record that it had before entering its judgment, and, as such, it may allow the introduction of further evidence as long as such a step is not inconsistent with the appellate court's decision.” *Id.* (citing *Kinney v. Lindgren*, 373 Ill. 415, 420, 26 N.E.2d 471, 473 (1940)).

¶ 40 “[I]f the direction is to proceed in conformity with the opinion, then, of course, the content of the opinion is significant.” *PSL Realty Co.*, 86 Ill. 2d at 308. In such a case, “it is then the duty of the court to which the cause is remanded to examine the reviewing court’s opinion and to proceed in conformity with the views expressed in it.” *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 353, 781 N.E.2d 1072, 1079 (2002). In other words, the trial court must determine what further proceedings are necessary and not inconsistent with the mandate based on the appellate court’s opinion. *In re Marriage of Ludwinski*, 329 Ill. App. 3d 1149, 1155, 769 N.E.2d 1094, 1099 (2002); *Firststar*, 365 Ill. App. 3d at 941-42.

¶ 41 D. The Mandate in *Crim*

¶ 42 In this case, our mandate stated “that the order on appeal from the circuit court be REVERSED and the cause be REMANDED to the Circuit Court *** for such other proceedings as required by the order of this court.” Therefore, the trial court was required to review our

opinion in *Crim*, in which we stated we “reverse[d]” based on the Crims’ first argument that “the trial court erred by *** granting Dietrich a directed verdict on the issue of informed consent[.]” *Crim*, 2016 IL App (4th) 150843, ¶ 3. At the conclusion of our discussion on the merits of this issue, we stated, “Accordingly, we reverse the trial court’s judgment and remand for a new trial.” *Id.* ¶ 48. We expressly “decline[d] to address the Crims’ evidentiary claims.” *Id.* ¶ 49. Nor did we address Dietrich’s forfeiture argument. See generally, *id.*

¶ 43 Our opinion in *Crim* did not contain any specific instructions on how the proceedings should continue in the trial court on remand though we easily could have. We merely stated that a new trial was required without limiting the issues or the trial court’s authority on remand. Our mandate and opinion use general language rather than specific instructions. In reversing the trial court’s directed verdict, it would appear 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. *Firststar*, 365 Ill. App. 3d at 940; *Clemons*, 202 Ill. 2d at 354 (quoting *Roggenbuck v. Breuhaas*, 330 Ill. 294, 298, 161 N.E. 780, 781–82 (1928)). In other words, the decisive wording in *Crim* implies the entire judgment was abrogated and the trial court is to proceed as if hearing the case for the first time. *Firststar*, 365 Ill. App. 3d at 940; *Roggenbuck*, 330 Ill. at 298, 300. In *Roggenbuck*, the court held “[i]f a judgment in an ordinary suit at law in which the parties are entitled to a jury trial is reversed for errors intervening prior to the entry of the judgment and the cause is remanded generally, the parties are entitled to a trial *de novo*.” *Roggenbuck*, 330 Ill. at 300. The Illinois Supreme Court in *Clemons* stated “*Roggenbuck* contains a thorough and still valid discussion of proceedings that may take place after remand.” (Internal quotation marks omitted.) *Clemons*, 202 Ill. 2d at 354.

¶ 44 Accordingly, it is not inconsistent with our opinion to require a new trial on all

issues, and we answer the certified question in the affirmative.

¶ 45 In reaching this conclusion, we find *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, 980 N.E.2d 1238, instructive. In *Kreutzer*, the appellate court rejected the claim that its prior opinion entirely abrogated the agency's decision. *Id.* ¶ 35. In the first appeal, the court was careful to "identify precisely" which issues had been preserved for review and which had been forfeited. *Id.* Therefore, the opinion made clear it only contemplated further proceedings on remand relating to a particular issue. *Id.* ¶¶ 35-36. The court concluded the only way another issue could be re-addressed is "if the matters were interrelated, which they were not [in that case]." *Id.* ¶ 35.

¶ 46 *Kreutzer* is distinguishable because we did not determine which arguments were preserved and which were forfeited despite being presented with the issue. We did not address forfeiture because we reversed based on just one issue. Additionally, although we addressed only one issue, we specifically declined to address the Crims' evidentiary issue. Generally, issues presented and not decided on appeal are not law of the case and may be relitigated on remand. *Filipetto v. Village of Wilmette*, 254 Ill. App. 3d 461, 466, 627 N.E.2d 60, 64 (1993).

¶ 47 Moreover, examining the operative language in *Kreutzer*, a new trial on both theories presented in the first trial would be required if the theories "were interrelated."

¶ 48 Dietrich argues that the two cases are not interrelated. She claims the two theories of recovery are completely separate in time: the informed consent issue covers everything *prior* to the birth, and the professional negligence count covers everything *during* the birth. The Crims counter that the trial court instructed the jury to disregard all evidence pertaining to negligence prior to delivery but some of that evidence was relevant to the issue of professional negligence during delivery. For instance, the Crims assert that they presented

evidence that Dietrich was surprised by Collin's size and was unprepared for delivering a macrosomic baby and that her failure to recognize his size *before* delivery led to complications *during* delivery. The Crims also note that the trial court found "persuasive" their claim that the directed verdict changed the "tenor" of the rest of the trial.

¶ 49 The record on appeal is unclear as to whether or not the claims are interrelated. It is true that the legal theories are separate and distinct, but it is equally true that the claims arise out of the same set of operative facts. What matters is how those facts are presented and the inferences that may be drawn from them. We did not address the Crims' evidentiary concerns in the prior appeal, and the trial court is likely in the best position to determine if those issues or its instruction to the jury that "[t]he issues pertaining to the care provided prior to the delivery of Collin Crim are no longer an issue in this case" affected the verdict.

¶ 50 For the purposes of this appeal, though, it makes no difference; when addressing an interlocutory appeal pursuant to Rule 308, the appellate court only answers the certified question and does not look to the merits of the trial court's decisions. *Bayer*, 235 Ill. 2d at 550. However, the court "may look at the record of the trial court proceedings and beyond the limits of the certified question to address whether the underlying order is appropriate in order to reach an equitable result in the interest of judicial economy." *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 21, 975 N.E.2d 203.

¶ 51 In this case, under either standard, the result is the same. Given the context that this court declined to consider the evidentiary and forfeiture issues in the first appeal, the trial court's ruling denying the motion *in limine* was reasonable, especially in light of its potentially overbroad jury instruction to disregard issues pertaining to care prior to delivery. The trial court certainly could have found the two theories were interrelated when examining our opinion and



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November 5, 2018

RE: Crim, Collin et al. v. Dietrich, Gina
General No.: 4-17-0864
Adams County
Case No.: 06L89

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Carla Bender

Clerk of the Appellate Court

c: Adrian Edward Harless
Craig Leonard Unrath
David Alan Axelrod
Jonathan Thomas Nessler
Matthew R. Axelrod



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January 31, 2019

In re: Collin Crim, etc., et al., Appellees, v. Gina Dietrich, D.O.,
Appellant. Appeal, Appellate Court, Fourth District.
124318

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Gosbell

Clerk of the Supreme Court