No. 126748

IN THE SUPREME COURT OF ILLINOIS

JILL M. BAILEY, as Independent Representative of the Estate of JILL M. MILTON-HAMPTON, Deceased, *Plaintiff-Appellee,* vs. MERCY HOSPITAL AND MEDICAL CENTER, *et al.* *Defendants-Appellants.*	On Appeal from the Illinois Appellate Court, First Judicial District, Case No: 1-18-72 Circuit Court of Cook County, County Department, Law Division Honorable Thomas V. Lyons III Trial Judge Presiding

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-18-0072
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2013 L 008501.
The Honorable **Thomas V. Lyons, II**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE

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NATURE OF THE CASE

Plaintiff-Appellee, JILL M. BAILEY, (Plaintiff) Independent Administrator of the Estate of Jill M. Milton-Hampton, Deceased, filed a medical negligence lawsuit against Emergency Medicine Physicians of Chicago, LLC., Mercy Hospital and Medical Center and Defendants-Appellants as its agents. In sum, Plaintiff alleged the negligent delay in diagnosis and treating her daughter, Jill Milton-Hampton (Jill) for a bacterial infectious condition - sepsis and toxic shock syndrome- resulted in Jill's death on March 18, 2012.

On March 16, 2012, Jill presented to the emergency department complaining of nausea, vomiting, diarrhea, and abdominal pain with an accompanying elevated heart rate. Defendant, Dr. Brett Jones (Dr. Jones), considered Jill to have several life-threatening illnesses, including sepsis. Dr. Jones did not perform a diagnostic work-up or initiate treatment medical treatment. He wanted to admit Jill but did not inform her the reason for admission was suspected life-threatening illnesses. Therefore, Jill declined. Dr. Jones discharged Jill the next morning with instructions to return if her condition worsened.

The same evening Jill returned to the hospital with worsening symptoms. Dr. Helene Connolly (Dr. Connolly) was the physician in triage. Jill remained in the waiting area for 4-5 hours. Jill was then evaluated by Dr. Amit Arwindekar (Dr. Arwindekar) then admitted to a general observation unit where she suffered cardiopulmonary arrest. Jill was transferred to the intensive care unit where she was properly diagnosed with sepsis and treatment was initiated 36 hours after her initial presentation to the hospital. Unfortunately, it was too late. Jill died hours later after suffering multiple cardiopulmonary arrests.

The case proceeded to trial in the Circuit Court of Cook County, Law Division. Plaintiff requested Illinois Pattern Jury Instruction, Civil No. 105.07.01 (2011), the informed consent instruction and a Non-IPI instruction on the loss of chance doctrine. Both requests were denied. The jury returned a verdict in favor of all defendants and against plaintiff.

Plaintiff appealed to the Illinois Appellate Court, First District, pertinently asserting that she had been deprived of a fair trial based on the trial court's failure to give Illinois Pattern Jury Instructions, Civil No. 105.07.01 (2011), the informed consent instruction and her Non-IPI instruction on the loss of chance doctrine. The three-justice majority, in an opinion written by the Honorable Maureen Connors, held these errors were prejudicial and ordered a new trial. Defendants-appellants filed a petition for leave to appeal, which this Court allowed. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

> Whether Plaintiff had a right to have the jury instructed on her legal theory of the case if Plaintiff established a *prima facie* case for loss of chance doctrine by submitting evidence on every essential element of the cause of action.
>
> A jury instruction should accurately convey the law and legal principles to be applied to the evidence. Whether a single-line reference to informed consent incorporated into a different instruction and couched between elements of a different instruction accurately or correctly conveyed the legal principles to be applied to the evidence of informed consent.

Statement of Relevant Facts

HOSPITAL COURSE

First Emergency Room Visit – March 16, 2012

On March 16, 2012, at 6:45 p.m., Jill, a 42-year-old mother, walked into the emergency department of Mercy Hospital and Medical Center (Mercy) complaining of

abdominal pain, nausea, vomiting diarrhea. (C5759 V5 at 44). Jill had an elevated heart rate of 124. (C 7592 V5 at 95.) [1] *Id*. After the initial nursing triage assessment, Jill was sent to and remained in the waiting area for more than four hours. (C 7592 V5 at 94.) Five hours and fifteen minutes later Jill was evaluated by Dr. Scott Heinrich (Dr. Heinrich). (C 7592 V5 at 94) Jill's skin appeared pale. (C 7582 V5 at 54) Dr. Heinrich ordered tests which revealed Jill's hemoglobin was 7.5. (SEC C 1471). The normal adult hemoglobin is 12.0 – 15.5 mg/dl. *Id*. Dr. Heinrich ordered intravenous fluids and intravenous morphine for pain. (C 7585 V5 at 66-67.) The next morning at 12:26 a.m., Jill's heart rate was 116, respiratory rate 24 and blood pressure 88/58.[2] At or around 3:00 a.m. on March 17, 2012, Dr. Heinrich transitioned Jill's care to Defendant, Brett Jones, M.D. (Dr. Jones). (C 7587 V5 at 75).

For the next several hours Dr. Jones was responsible for Jill's overall care and treatment. (SEC C 132). Dr. Jones evaluated Jill and was concerned she had life-threatening conditions, including sepsis. (SEC C 123 at 14); (SEC 121-122); (SEC C at 44). Sepsis involves life-threatening organ dysfunction and the body's inappropriate response to infection. (SEC 1146 at 64). According to Dr. Jones, the proper workup for suspected sepsis included obtaining a chest x-ray, and blood and urine cultures, pulse oximetry and performing an electrocardiograph (EKG). (SEC C 123-124). Dr. Jones did not order a chest x-ray or obtain blood or urine cultures on Jill. Id. Dr. Jones did not order pulse oximetry or an EKG to be performed on Jill. Id. The treatment for sepsis is

[1] A normal resting heartrate for a 42-year-old woman is 60-100. (C 7592 V5 at 95); respiratory rate 14-20, blood pressure 90-140/60-90.

[2] Between the time of triage, March 16, 2012, at 6:45 p.m. and March 17, 2012, at 12:15 a.m. there were no recorded blood pressures, heart rates or respiratory rates for Jill.

intravenous antibiotic therapy. Because sepsis is a life-threatening condition, the earlier the administration of antibiotics the better to improve the outcome. (SEC C 123 at 14); (SEC C 125).

Dr. Jones did not order intravenous fluids, intravenous antibiotics, or diagnostic tests for Jill. (SEC C 123 at 19, SEC C 124). On March 17, 2012, at 7:12 a.m., Dr. Jones discharged Jill from Mercy Hospital. (SEC C 1451-1459).[3] Prior to discharge, Dr. Jones informed Jill he was concerned about her "tachycardia" [4] and nausea. Dr. Jones did not inform Jill he suspected she had the life-threatening conditions, including sepsis, or that she could die by leaving the hospital without treatment or workup. (SEC C 1181); (SEC C 130 at 43); (SEC C 132). Jill was discharged without knowing she could die from the life-threatening conditions considered by Dr. Jones. (SEC C 1181).[5]

Period Between First and Second Emergency Room Visits

Several hours later, as instructed upon discharge, Jill returned to the emergency department the same evening. Prior to Jill's arrival, Jill's ex-husband informed Dr. Heinrich Jill was not doing better and was on her way back to the emergency room. (C 7590 V5 at 86). Dr. Heinrich called Helene Connolly, M.D. (Dr. Connolly), the emergency medicine triage physician, and informed her Jill was returning to the emergency department. *Id.* Dr. Heinrich requested Dr. Connolly order certain laboratory studies and a CT scan of the abdomen when Jill arrived. *Id.* Dr. Connolly agreed. (C 7777 V5 at 19-

[3] After being in the emergency room since 6:45 p.m. on March 16, 2021, Jill desired to go home and recover.

[4] There was no testimony adduced at trial or in the record to suggest Jill had a medical or nursing background or understood the medical significance of "tachycardia."

[5] Jill did not leave against medical advice or sign out against medical advice. Jill was discharged by Dr. Jones.

20.) Dr. Connolly was aware Jill had been discharged earlier the same day and was returning with worsening symptoms. (C 7783 V5 at 44.) Dr. Connolly did not inform the triage nurse Jill was returning or that Jill has discharged from the emergency department earlier the same day. (C at 40).

Second Emergency Room Visit, March 17, 2012, and Admission to Mercy Hospital and Medical Center

Emergency Department:

At 5:45 p.m. on March 17, 2012, approximately ten hours after discharge from the hospital by Dr. Jones, Jill returned to the emergency department. (C 7865 V5 at 205). This time Jill was not walking but arrived in a wheelchair. *Id.* Jill's chief complaint was documented as – "seen…[earlier and] released at 6:00 a.m., cough, diarrhea, sob [shortness of breath] and chest pain." (SEC C 355). Jill's heart rate was abnormal at 116 with a blood pressure of 90/53. mmHg. (SEC C 360-361).

Jill's abdominal pain level was rated a 10 out of 10. (SEC C 355). According to Dr. Connolly, a level 10 was the worst possible pain Jill could experience. (C7782 V5 at 41); (SEC C 326). Jill's chest pain was rated at a level 8. *Id.* A level 8 chest pain was described as being pretty painful and near the worst possible chest pain a patient could experience. (SEC C 357). No EKG was ordered or performed. (C 7782 V5 at 39). Dr. Connolly, as requested by Dr. Heinrich, ordered a CT scan of Jill's abdomen. (C 7777 V5 at 20.)

As the triage physician, Dr. Connolly was responsible for Jill's medical needs. Jill's triage data [problems breathing/shortness of breath, chest and abdominal pain, nausea, and vomiting] was available to Dr. Connolly at the time Dr. Connolly ordered tests on Jill. (C 7785 V 5 at 52). Dr. Connolly did not ask about the reason for Jill's return;

nor did she examine Jill. (C 7778 V5 at 25); (C 7780 V5 at 32-33). Jill's hemoglobin was lower the second visit. It dropped to 7.2. (C 7866 V5 at 207). At 8:00 p.m., more than 2 hours after Jill's arrival, Dr. Connolly ended her shift without examining Jill and left the hospital without transitioning Jill's care to another physician. (Id at 44). Dr. Connolly left Jill still sitting in the waiting room where she remained several hours after her arrival. *Id.*

Four hours after her arrival Jill was taken to the main treatment area where she came under the defendant-physicians' care. They treated her with more intravenous pain medication – morphine. A couple of hours later Dr. Rodriguez, a resident physician, noted Jill continued to experience pain, but was improving. (C 6984 V5).[6] At 12:54 a.m. Jill had a CT scan of the abdomen due to her shortness of breath, persistent abdominal pain, and vomiting. (SEC C 1304). The CT scan revealed, in part, pleural effusion,[7] associated atelectasis[8] and a heterogenous density within the vagina, which the radiologist stated, should be clinically correlated. (SEC C 1305); (SEC C 1239). The attending emergency medicine physician, Amit Arwindekar, M.D. (Dr. Arwindekar), did not take any measures to determine whether Jill had a retained tampon. (C7864 V5 at 201). Dr. Arwindekar did not clinically correlate the finding as suggested by the radiologist. *Id.*

Dr. Arwindekar did review the triage notes which documented Jill's presenting complaints of abdominal pain 10/10, chest pain 8/10 and shortness of breath. (SEC C 355); *See also*, (C 7867 V 5 at 210). Dr. Arwindekar also reviewed the chart of Jill's first emergency room visit, which documented her initial presenting complaints. *Id.* Jill remained in pain the entire time she was in the emergency department under Dr.

[6] Dr. Amit Arwindekar was the attending emergency room physician.
[7] Pleural effusion is a build of extra fluid between the lungs and chest wall.
[8] Atelectasis is a complete or partial collapse of the lung or an area of the lung.

Arwindekar's care. (C 7866 V 5 at 207). Dr. Arwindekar did not initiate antibiotic therapy or investigate the fluid accumulation in Jill's lung identified on the chest x-ray. (SEC C 175). Jill's last recorded vital signs prior to being transferred out of the emergency department were taken March 18, 2012, at 1:59 a.m. (C 7863 V5 at 196). Jill did not receive a sepsis work up or intravenous antibiotics while in the emergency room; she received antibiotics for the first time after she coded and was transferred to the intensive care unit. (SEC C 1215).

General Observation Floor

At 4:35 a.m., Jill was transferred from the emergency department and admitted to the observation unit. (C 7861 V5). She was transferred out of the emergency department without a sepsis work up, intravenous antibiotics, or investigation of the heterogenous density in her vagina. *Id*. Within an hour of admission, Jill suffered a cardiopulmonary arrest or code blue. (SEC C 1301). Jill was resuscitated and subsequently transferred to ICU. *Id.*

Intensive Care Unit

In ICU, more than 36 hours after her initial presentation to the emergency department, Jill was properly diagnosed with sepsis and intravenous antibiotic therapy initiated by the ICU critical care team. (SEC C 1306); (C 7862 V5 at 192); and (SEC C 1215). After suffering multiple episodes of cardiopulmonary arrests Jill died within hours of being transferred to ICU.

POST-MORTEM EXAMINATION

Laura Woertz, Cook County Medical Examiner, conducted a post-mortem exam. (C 4488 V 3). The blood drawn by the Cook County Medical Examiner grew an isolated

pathogen, staphylococcus aureus. (C 4499 V 3).[9] Dr. Woertz identified sepsis resulting from Methicillin Resistant Staphylococcus Aureus (MRSA sepsis) as a cause of death. (C 4494 V3). [10] Despite billing Jill's insurer, Aetna, for the diagnosis and treatment of sepsis and septicemia, at trial defendants denied Jill was septic or had sepsis. (C 4570 V 3).[11]

PROCEDURAL HISTORY

The case proceeded to trial. Plaintiff argued defendants' negligent delay in diagnosing and treating Jill for sepsis lessened the effectiveness of treatment, decreased Jill's chance of survival, and resulted in her death. Defendants denied Jill had sepsis. Of the instructions tendered by Bailey, two are at issue before this Court, Bailey's instruction No.8, Non IPI Loss of Chance, and No. 105.07.01, Informed Consent. (C 4601 V 3) and (C 4603 V 3), respectively. Plaintiff contends she submitted evidence on every element of the Loss of Chance doctrine (SEC C 25), and she submitted the following instruction for the court's consideration:

> If you decide or if you find that plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in Jill Milton-Hampton lessened the effectiveness of the medical services which she received, you may consider such delay one of the proximate causes of her claimed injuries or death.

(C 4601 V 3) Plaintiff averred her experts established to a reasonable degree of medical certainty that the delay in diagnosis and treatment, including a delay in the administration of intravenous antibiotics "diminished the effectiveness of treatment" Jill ultimately

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[9] During trial Plaintiff argued Jill's sepsis resulted, in part, from Methicillin Resistant Staphylococcus Aureus.

[10] A second autopsy was performed by Dr. Bryant which did not contain the diagnosis identified in the Autopsy performed by the Cook County Medical Examiner. (SEC C 1416).

[11] This documented was entered into evidence and published as Plaintiff's exhibit No. 58.

received and caused her death.[12] (SEC C 25). Notably, Defendants did not object to Plaintiff's proposed Non-IPI loss of chance instruction. Id. The court refused the instruction stating "this is a Non-IPI instruction. It's going to be refused." Id.

On the issue of informed consent, Plaintiff submitted proposed jury instruction No.11, IPI 105.07.01 (SEC C 25). Plaintiff submitted the following instruction:

> The plaintiff claims that the defendant, Brett Jones, M.D., failed to inform Jill Milton-Hampton of the risks associated with pulmonary embolism, gastrointestinal bleed, infection and sepsis prior to being discharged the morning of March 17, 2012, which a reasonably careful emergency medicine physician would have disclosed under the same or similar circumstances;
>
> The plaintiff further claims that if the defendant had disclosed those risks, a reasonable person in Jill Milton-Hampton's position would not have left the hospital the morning of March 17, 2012; and
>
> The plaintiff further claims that Jill Milton-Hampton was injured, and that the defendant's failure to disclose the aforementioned risks was a proximate cause of her injury.
>
> The defendant denies that he failed to inform the plaintiff of those risks which a reasonable careful emergency medicine physician would have disclosed under the same or similar circumstances; denies that Jill Milton-Hampton was injured and denies any failure to disclose risks was a proximate cause of any harm or injury.

(C 4603 V 3). Defendants objected arguing the instruction highlighted a particular physician and the instruction deals more with battery and the request of administering medication without consent. (SEC C 25). The court acknowledging Plaintiff submitted sufficient evidence on inform consent stated:

> I do think there was sufficient testimony about the – and there was testimony that the standard of care would have required

[12] Plaintiff's experts also testified a delay in the diagnosis and treatment caused Jill's death. (SEC C 1124, SEC C 1216, SEC C 151, SEC C 497, SEC C 177).

> the doctor to say certain things. I agree with the defense. I don't think a separate instruction is appropriate…add in your issues instructions a line…I will permit you to add 'failed to adequately inform.

(SEC C 25). The court sustained defendant's objection and "refused" the proposed instruction. *Id*; (SEC C 26). The court permitted a single-line instruction on informed consent to be inserted between other lines in the issues instruction. *Id.*

The jury returned a general verdict for Defendants, including EMP. (C 8455 V 5). Bailey filed her post-trial motion which was denied. (C 8432 V 5) On December 24, 2018, Bailey filed her notice of appeal seeking a new trial. (C 8450 V 5). IL App (1st) 182

Appellate Court Proceedings

In a published opinion the Appellate Court reversed in part based on jury instruction error.

Loss Chance Instruction

The Appellate Court agreed that Plaintiff was denied a fair trial when the trial court refused her instruction on loss of chance. *Bailey v. Mercy Hospital and Medical Center*, 2020 IL App (1st) 182702, ¶95, ¶108. The Appellate Court found the proposed non-IPI instruction met the criteria for a non-instruction. *Id*. At ¶112. It was "simple, brief, impartial and free from argument." *Id*. In reaching its conclusion, the First District noted that it had previously held, in *Cetera v. DiFilippo*, 404 Ill. App.3d 20 (2010), the "proximate cause instruction provided in IPI Civil 3d No. 15.01 "properly stated the law in lost chance medical malpractice cases." *Id*. at ¶ 113.

The Court continued that under this Court's decision in *Holton v. Memorial Hospital*, 176 Ill. 2d 95 (1997), which allows that a "plaintiff may submit evidence and recover on a loss of chance theory" it could not "continue to follow *Cetera* and the cases

that have found no error where a trial court gives IPI Civil No. 15.01 and refuses to give a nonpattern instruction on the loss of chance [because] a plaintiff may never be able to submit an instruction explaining a loss of chance theory to the jury." *Id.* at ¶114. The Court then held that a lost chance instruction was required:

> As laypersons, juries "are not trained to separate issues and to disregard irrelevant matters. That is the purpose of jury instructions." *Dillon*, 199 Ill. 2d at 507. Thus, when a trial court refuses a loss of chance instruction, the jury is forced to understand a plaintiff's loss of chance theory argued at trial without an instruction to guide them on the law and how it should be applied to the general proximate causation concept described in IPI Civil (2011) No. 15.01. See *Dillon*, 199 Ill. 2d at 507 ("[t]he function of jury instructions is to convey to the jury the correct principles of law applicable to the submitted evidence"). Further, while a plaintiff may argue a loss of chance theory during argument, as here, the jury is instructed that arguments are not evidence, and therefore, the jury may not consider the theory when it considers the general proximate cause instruction in IPI Civil (2011) No. 15.01. However, if the trial court properly instructs the jury about the loss of chance theory, the theory will be properly before the jury, and the jury will likely give it more consideration.

Id.

The Court further explained that the problem with IPI Civil (2011) 15.01, standing alone is that it "does not distinctly inform the jury about loss of chance, i.e., that the jury may consider, as a proximate cause of a patient's injury, that a defendant's negligence lessened the effectiveness of the treatment or increased the risk of an unfavorable outcome to a plaintiff [citation omitted]" *Id.* at ¶115. And that "[a]ccordingly, because plaintiff submitted sufficient evidence to support her loss of chance theory and because she was entitled to have the jury instructed on her theory of the case, she was denied a fair trial when the court refused her instruction on loss of chance. Thus, we reverse and remand the case for a new trial against Jones, Heinrich, Connolly, Arwindekar, and EMP." *Id.* at ¶116.

Even though Bailey pled Jones, Heinrich, Connolly, Arwindekar were apparent agents of Mercy Hospital and Medical Center, the Court was silent in this regard.

Informed Consent Instruction

With respect to Plaintiff's proposed informed consent instruction No. 11, the Appellate Court held "the trial court should have allowed plaintiff to submit her informed consent instruction based on IPI Civil No. 105.07.01. *Id*. at ¶95. The Appellate Court quoted the following from the notes on use: "if the evidence shows that some other factor (ie., relative benefits or lack of benefits or alternative treatments) should have been disclosed, then the instruction may be modified accordingly." *Id*. at ¶88. The Court held "the one-line informed consent…was an inaccurate statement of the applicable law…and did not explain the elements of informed consent…" *Id*. at ¶97. It resulted in "prejudice to plaintiff and denied her a fair trial." *Id*.

ARGUMENT

I. THE APPELLATE COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE THE COURTS OPINION ADVANCES THIS COURT'S STATED GOAL OF PROVIDING CONSISTENCY TO THE CIVIL JUSTICE SYSTEM AND RATIONALLY FOLLOWS THIS COURT'S PREVIOUS DECISIONS RELATED TO LOST CHANCE INSTRUCTIONS .

Defendants aggressively argue the decision by the Appellate Court in Bailey is a sharp departure from all prior cases citing Holton. (Brief at 13, 16.); See, Holton v. Memorial Hospital, 176 Ill.2d 95 (1997). Not true. In reaching its unanimous decision, the Appellate Court in Bailey simply embraced and adhered to a stated goal of this Court: "providing rationality" to our civil justice system. Best v. Taylor Machine Works, 179 Ill. 2d 367, 406 (1997); see also Bailey, 2020 IL App (1st) 182702. The Appellate Court followed the example and directive of this Court's jurisprudence, and rose to the occasion

when justice demanded reversing laws, legal concepts or principles that were no longer in the best interest of the public, litigants, or society at large. A few of this Court's decisions are discussed below.

In *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 383 (1997), this court recognized the gravity of its decision, stating that "Plaintiff's complaint challenging the constitutionality of Public Act 89-7 *portends the ripening seeds of litigation*." (Emphasis added.) Best involved a consolidated appeal from personal injury causes of actions challenging the constitutionality of certain provisions in Public Act 89-7 (Act), particularly involving a cap on non-economic injuries. *Id.* at 375. At issue on appeal was the constitutionality of several provisions of the Act. With the "*stated goal of providing consistency and rationality to the civil justice system*, this Court engaged in a detailed analysis of the legislative history and intent of the Act, as well as the purpose and effect of the Act on the general public and litigants, and found that the provisions of the Act were unconstitutional. *Id.* at 406. Although arguably a departure from the status quo, this Court recognized: "the problems addressed in the briefs and in oral arguments in the case at bar represent some of the most critical concerns which confront our society today." *Id.*

This Court took a similar step away from the status quo in recognition of critical societal concerns namely, the protection of a fundamental right granted to the sick and injured, when it held "that a plaintiff must be permitted to recover for *all* demonstrated injuries" is at issue in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504 (2002). *(Emphasis in original).*"Today's decision represents a departure from the previous holdings of this Court." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002). In *Dillon*, plaintiff alleged defendants were negligent by failing to completely remove a surgically inserted catheter.

A medical negligence suit followed; the case proceeded to trial. *Id.* at 486. There was no Illinois pattern jury instruction on the element of damages plaintiff sought – damages for increased risk for future harm. *Id*. at 487. Consequently, plaintiff submitted, and the court allowed, a modified jury instruction which include the element of increased risk of future injuries. *Id.* at 487. The jury awarded damages based on this instruction. Defendants appealed. The Appellate Court affirmed the jury verdict against certain defendants and in favor of plaintiff. Defendants appealed to this Court.

After an exhaustive review of legislative history, historical perspectives and opinions from other jurisdictions, this Court held "in Illinois, the parties are entitled to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to prove this verdict." *Id.* at 505. Ultimately this Court held the pattern jury instructions were "inadequate and an additional instruction was appropriate." *Id*. at 505. The court's ruling in *Dillon* represented a sharp departure from inconsistent court opinions on the issue. This Court in reaching its conclusion held "we have now definitely spoken on this issue." *Id.* at 507.

The *Dillion* Court also recognized that "[t]he theories of lost chance of recovery and increased risk of future injury have similar theoretical underpinnings." *Id.* at 503. Similarly, a jury instruction is needed to protect the rights of plaintiffs when a theory of recovery has been recognized by this Court. Holton v. Memorial Hospital, 176 Ill.2d 95 (1997). In *Dillion, supra*, this Court held "a plaintiff must be permitted to recover for *all* demonstrated injuries." *Dillion v. Evanston Hospital*, 199 Ill. 2d 483, 504 (2002). *(Emphasis in original).* Without an instruction on loss of chance, similar to that provided

by this Court in *Dillion*, a plaintiff may never be "permitted to recover for *all* demonstrated injuries. *Id.*

The Appellate Court in the instant case followed the path forged by this Court in *Dillion* and *Holton,* and concluded that the loss of chance instruction should have been given to the jury. Their decision was not a departure from the status quo, but a natural progression in the jurisprudence related to loss of chance. Furthermore, the appellate court's opinion comports with the laudable goal articulated by the Court in *Best*—to bring consistency and rationality to Illinois Jurisprudence. See also *Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 29 (1999) ("This appeal comes before us of amiss great changes to the relationships among physicians, patients, and those entities paying for care"); *Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 28 (1999) ("This Court has never addressed a question of whether an HMO may be held liable for medical malpractice…").

II. THE APPELLATE COURT CORRECTLY HELD THAT PLAINTIFF WAS DENIED A FAIR TRIAL WHEN HER PROPOSED NON-IPI LOSS OF CHANCE INSTRUCTION WAS NOT GIVEN TO THE JURY.

Plaintiff contends the trial court erred when it denied Plaintiff's submission of jury instruction No.8, a non-IPI instruction on the loss of chance theory. The denial of submission of the instruction to the jury seriously and substantially prejudiced Plaintiff and denied her a fair trial.

A. Standard of Review

"It is within the trial court's discretion to grant or deny a particular jury instruction." *Perky v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 69. Unless the issue is whether the instruction accurately stated the law, it is reviewed under the abuse of discretion standard. *Id*. "The standard for deciding whether a trial court abused its discretion is whether, taken

as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Schultz v. N.E. Illinois Regional Commuter Railroad Corp*., 201 Ill.2d 260, 273-274 (2002); *LaSalle Bank, N.A. v. C/HCA Development Corp*., 384 Ill.App.3d 806 (1st Dist. 2008).

B. Applicable Legal Principles Regarding Jury Instructions

"It must be remembered that juries are composed of laypersons who are not trained to separate issues and to disregard irrelevant matters." *Dillon v. Evanston Hospital*, 199 Ill.2d 483, 507 (2002). The purpose of jury instructions is to "inform the jurors of the issues presented, the principles of law to be applied and the facts needed to be proved in support of the verdict." *Perkey*, 2016 IL App (2d) 120470, at ¶69. "The function of the jury instructions is to convey the correct principles of law applicable to the submitted evidence and, as a result, jury instructions must state the law fairly and distinctly and must not mislead the jury or prejudice a party." *Dillon,* 199 2d at 507; *Ono v. Chicago Park District*, 235 Ill. App. 3d 383 (1st Dist. 1992); *Pride v. Alton & Southern Ry. Company*, 233 Ill. App. 3d 197 (5th Dist. 1992).

Moreover, "a litigant has the right to have the jury *clearly* and *fairly* instructed upon each theory which was supported by the evidence." (Emphasis added). *Ruv v. Conrail*, 331 Ill. App. 3d 692, 710 (1st Dist. 2002). Each instruction should be "self-contained and differ from the other…" *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶83. Moreover, a jury instruction should be clear and not mislead the jury. *Dillon*, 199 Ill.2d at 505.

In this case, Plaintiff sought to instruct the jury with a non-IPI instruction that properly stated the relevant principles of law, informed the jurors of the issues presented,

and was supported by the facts presented through properly admitted evidence. The trial court's decision to decline to issue that instruction to the jury was prejudicial to Plaintiff and should be reversed.

C. A Plaintiff is Entitled to Compensation if "the Chance of Recovery or Survival is Lessened by the Malpractice."

Plaintiff's position on the loss of chance instruction is fully supported by this court's long-standing precedent. In *Holton v. Memorial Hospital*, 176 Ill.2d 95, 119 (1997), this court adopted the loss of chance doctrine and stated:

> There is nothing novel about requiring health care professionals to compensate patients who are negligently injured while in their care. ***To the extent a plaintiff's chance of recovery or survival is lessened by the malpractice***, he or she should be able to present evidence to a jury that the defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery… To hold otherwise would free health care providers from legal responsibility for even the grossest acts of negligence, …….(Emphasis added).

In *Holton*, the plaintiff presented to emergency department of defendant hospital with complaints of neurological symptoms that became progressively worse post-admission but went unrecognized by the hospital staff. *Id.* at 101. Thereafter, she experienced numbness from her waist down and minimal movement of her legs and became paralyzed. *Id.* at 101. She was subsequently diagnosed as osteomyelitis. *Id.* at 103.

The plaintiff filed suit against various physicians and the hospital alleging medical negligence resulting in complete paralysis. *Id*. at 99. At trial with the hospital defendant, the long form IPI 15.01 on proximate cause and a nonpattern instruction were given. The jury found in favor of plaintiffs and against the hospital. *Id.* at 103. Defendant appealed

and the appellate court affirmed. *Id.* at 104. Defendant appealed to this Court and the lower courts judgments were reversed. *Id.* at 115.

It is significant that the issue before this court in *Holton* was whether the application of the loss of chance doctrine in a medical malpractice context lessened the plaintiff's proximate cause burden. *Id*. at 98. This Court was not asked to address loss of chance as a separate injury; nor was it asked to consider the propriety of an instruction on loss of chance. It is even more significant that in *Holton,* this Court did Not hold that a loss of chance an instruction was not necessary or permitted when the long form IPI instruction on proximate cause is given. On the contrary, the *Holton* court recognized and adopted the loss of chance doctrine into Illinois jurisprudence.

Although in *Holton*, the long form IPI Civil 15.01 was given, this court never rejected the notion of providing a non-pattern instruction on loss of chance. There was no suggestion by this Court that a long form IPI instruction on proximate cause negates the need for an additional instruction on loss of chance. *Id.*

D. Plaintiff Submitted Sufficient Evidence to Support Her Theory That EMP's Negligent Delay in Diagnosis or Treatment Lessened the Effectiveness of Jill's Treatment.

At the outset, it is important to note that defendants have never asserted, at trial, in the appellate court, on in its briefs before this Court, that the loss of chance instruction was properly denied because it was unsupported by the evidence. Defendants could not make a valid argument to that effect because the evidence at trial in support of Plaintiff's loss of chance theory was overwhelming in light of the testimony of Plaintiff's retained experts including Michael Noto, M.D. (Dr. Noto), board certified in infectious disease, Hilton Hudson, M.D. (Dr. Hudson) and Michael D'Ambrosio, M.D. (Dr. D'Ambrosio).

With respect to Plaintiff's first emergency room visit, Dr. Michael Noto, Plaintiff's causation expert, who specializes in pulmonary critical care and infectious disease medicine, holds a Ph.D. in microbiology, and extensively studies pathogens such as staphylococcus aureus, (the pathogen at issue in the instant case), testified plaintiff was a completely healthy and functional woman who died of sepsis, a suspected or confirmed source of infection that is most often bacterial, spreads throughout the body, and constitutes a medical emergency. (SEC C 1207); (SEC C 1200); (SEC C 1192-94); (SEC C 1204). Dr. Noto opined that when Jill presented to the emergency room on March 16, 2012, *she met the criteria for sepsis*. (SEC C 1204). When treating sepsis the goal is early recognition and *immediate* administration of intravenous antibiotics. (SEC C 1205). The earlier sepsis is recognized, and the earlier intervention takes place the better the outcome. (SEC C 1205).

Dr. Michael D'Ambrosio, Bailey's retained emergency medicine expert, has been board certified in emergency medicine since 1998 and in Neurology since 1994, and is a full-time emergency physician at a hospital which has the capacity of and functions similar to that of Northwestern Memorial Hospital or Rush University Medical Center. (SEC C 162-64). Dr. Ambrosio opined to a reasonable degree of medical certainty that Jill had sepsis from the beginning and antibiotics for sepsis were to be initiated within 90 minutes after the third liter of fluids was infused. (SEC C 171). He testified that when the exact source of the infection is not known, "the earlier treatment" the better the outcome, and noted that the reason for treatment even though the specific source is unknown is because "***sepsis kills people***; or they get very injured. Treatment of sepsis is time sensitive." (SEC C 170). Dr. Ambrosio further opined that Dr. Henrich's failure to initiate a sepsis work up

and administer intravenous antibiotics to Jill was a deviation from the standard of care, lessened the effectiveness of treatment and caused and/or contributed to her death. (SEC C 170).; (SEC C 116).

Further, the evidence showed that Jill was under Dr. Jones' care for more than four hours. Dr. Jones testified he could have ordered any test he desired but ordered none. (SEC C 124). Dr. Jones testified he was concerned Jill had an infection – sepsis (SEC C 122). Sepsis, sometimes known as *blood poisoning* is an "overwhelming infection" which includes the body's inflammatory response to infection (SEC C 176); (SEC C 1216). Despite his concern, Dr. Jones did not perform a sepsis work up or initiate treatment with intravenous antibiotic therapy. (SEC C 176). Dr. Jones' failure to initiate a sepsis work up and administer intravenous antibiotics to Jill was a deviation from the standard of care, lessened the effectiveness of treatment and caused and/or contributed to her death. (SEC C 172). (SEC C 116).

With respect to Plaintiff's second emergency room visit, according to Dr. Noto, when Jill returned to the emergency room the evening of March 17, her condition worsened, and she was in toxic shock. (SEC C 1205, 1212); (SEC C 1211). She had new symptoms which included shortness of breath and chest pain. *Id.* On radiological studies, there was a heterogenous density in her vagina, thought by Dr. Noto to be a tampon and the source of infection. (SEC C 1210). The findings on the chest x-ray, which was available at 1:00 a.m., were consistent with the sepsis. *Id*. As a result of the sepsis, Jill's blood vessels were overfilled. (SEC C 1211). Jill's white blood cells count was elevated at 12.2. *Id*. There was evidence of injury to her lungs, lab abnormalities and evidence of liver injury all due to sepsis. (SEC C 1212). Jill continued to decompensate and arrested. (SEC

C 1213). Mercy Hospital's critical care pulmonologists noted the leading cause of Jill's collapse was septic shock.

According to Dr. D'Ambrosio, Dr. Connolly was the physician in triage and Dr. Arwindekar the attending in the main emergency department during the second emergency room visit. (SEC C 173). The same failures to take appropriate measures such as performing a sepsis work up and administering intravenous antibiotics lessened the effectiveness of treatment and caused and/or contributed to Jills death. (SEC C 116). In failing to do the workup, Drs. Connolly and Arwindekar deviated from the standard of care. (SEC C 174); (SEC C 179).

Dr. Harry Jacob, a professor of medicine who both graduated *cum laude* from and teaches at Harvard Medical School, is a distinguished hematologist, is board certified in internal medicine, and practices extensively in the fields of hematology and oncology, testified for Plaintiff and opined on the probability of Jill's survival. (SEC C 495). Dr. Jacob testified that Jill lost her ability to survive during the day on March 18, 2012. (SEC C 537). Not only is it more probably true than not that Jill would have survived, had she received timely and appropriate treatment she had a high probability of survival. (SEC C 516).

Dr. Hilton Hudson is a heart surgeon and is very experienced in treating patients in the intensive care unit and managing patients with infectious diseases. (SEC C 146-47). His practice involves the diagnosis and treatment of septic patients. (SEC C 149). Dr. Hudson described Jill as an otherwise healthy woman. (SEC C 150). She walked an 80,000 square foot warehouse without difficulty. *Id.* Dr. Hudson opined to a reasonable degree of medical certainty sepsis overwhelmed Jill's body and caused her death. (SEC C 149). If

sepsis is not aggressively treated, death follows. (SEC C 160). Had Jill received the proper course of treatment it is more probably true than not, she would have survived. (SEC C 150). That is why if Jill were *appropriately* and *timely* treated it is more probably true than not that she would have survived. (SEC C 160).

The totality of the evidence presented to the jury demonstrated that the treatment for sepsis included aggressive intravenous fluid resuscitation, early search for the source of the infection, and very early initiation of an appropriate antimicrobial/antibiotics targeting the suspected source. (SEC C 1215). Jill had staphylococcal toxic shock syndrome that evolved into sepsis and ultimately septic shock. *Id*. Early administration of antimicrobials was required. *Id*. But no antibiotics were ordered or administered to Jill until after she sustained her initial cardiac arrest – more than 36 hours after her initial presentation to the emergency room *Id*.

Each hour delay in treating sepsis *increased Jill's risk of death by about 7 percent*. *Id*. Jill's septic condition was a medical emergency and early administration of antibiotics was required for survival. Sepsis not being diagnosed during the first two admissions and antibiotics not being administered *lessened the effectiveness of treatment* **and** *increased the risk of Jill dying* from her condition and lessened the effectiveness of treatment. (SEC C 1216). Early recognition of sepsis and intravenous antibiotics administration are associated with improved survival. (SEC C 271).

There can be no doubt that the evidence was more than sufficient to justify a loss of chance instruction in this case. Moreover, there can be no doubt that the jury did not have the adequate tools to assess loss of chance, in light of this evidence and the law, without a specific, distinct instruction on the issue.

E. IPI Civil 15.01 Fails to Completely and Accurately Instruct the Jury on the Law for Loss of Chance.

"There are situations where the IPI instruction is inadequate and additional instruction is appropriate." *Balestri v. Terminal Freight Coop. Ass'n*, 76 Ill.2d 451, 454-455 (1979); *Dillon*, 199 Ill.2d at 505. It is self-evident that standing alone, IPI Civil No. 15.01 neither distinctly nor accurately instructs the jury on plaintiff's theory of the case. IPI 15.01 only defines the term "proximate cause" *generally*:

> 15.01 Proximate Cause--Definition
>
> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

This instruction does not give the jury even a hint at how a jury is to assess proximate cause for loss of chance. It does not explain when or at what point the "concept" of the loss chance doctrine should enter into the proximate cause analysis. It fails to explain the elements of the loss chance doctrine and how it fits into the overall scheme of damages. "Juries are composed of *laypersons* who are not trained to separate issues and to disregard irrelevant matters." (Emphasis added). *Dillon*, 199 Ill.2d at 507.

As it relates to loss of chance, IPI Civil 15.01 (15.01) fails at its most fundamental purpose "to inform the jurors of the issues presented, the principles of law to be applied and the facts needed to be proved in support of the verdict." *Perkey*, 2013 IL App (2d) 120470, ¶69. A cursory review of IPI 15.01 easily reveals it does not inform the jury on several legal principles implicit in the loss of chance doctrine, such as:

- What it means for plaintiff to suffer a decreased chance of survival?
- What does lessened effectiveness of treatment mean?
- A better result is not required;

- Evidence of the precise time plaintiff suffered a decreased chance of survival is not required,; or
- Plaintiff is not required to prove the precise time treatment became less effective.

In sum, 15.01 does not "fairly, fully [nor] comprehensively apprise the jury of relevant legal principles" as it relates to loss of chance. *Schultz v. N.E. Illinois Regional Commuter Railroad Corp.*, 201 2d 260, 273-74 (2002).

Moreover, a careful reading of IPI 15.01 reveals that it is inaccurate and confusing in a loss of chance case. 15.01 did not allow the jury to consider law of loss of chance and apply it to the facts. Therefore, the jury was not instructed on this theory of Plaintiff's case. *Bailey*, 2020 IL App (1st) 182702 ¶108. Because the jury was not instructed on loss of chance "[P]laintiff was denied a fair trial…" *Id*. In the instant case, 15.01, standing alone, without an additional instruction on loss of chance was prejudicial error. *Id*.

F. The trial court's failure to give the jury the proposed loss of chance instruction was error and the Appellate Court's judgment should be affirmed.

Defendants only contend that the Appellate Court erred in holding that the trial court should have granted plaintiff's request to have the jury instructed with the following, non-pattern jury instruction on the loss of chance doctrine:

> If you decide or if you find that plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in Jill Milton-Hampton lessened the effectiveness of the medical services which she received, you may consider such delay one of the proximate causes of her claimed injuries or death.

There is no merit to defendant's assertion that the Appellate Court's holding represents "a sudden departure from precedent and that it is "based on an erroneous characterization of loss chance' as a unique 'theory' of causation." (Brief at 15.) There is nothing "unique" about plaintiff's "theory" of causation. As noted, in ***Holton***, this Court

unequivocally recognized loss of chance as a theory of liability and characterized it as a "doctrine."

In holding that juries need to be fully and properly instructed in addition to IPI 15.01 in cases involving loss of chance, the Appellate Court simply followed the *Holton* doctrine and rightfully held that an instruction should have been given on loss of chance when the tendered instruction appropriately stated the law. The Appellate Court's logic was impeccable.

First, is should be beyond dispute that the Appellate Court correctly reasoned that this instruction met all the criteria for a non-pattern instruction because "it was simple, brief, impartial and free from argument." Id. at ¶ 112. Defendants do not claim otherwise. The Appellate Court recognized this as a proper statement of Illinois law. *Bailey*, 2020 Ill App (1st) 182702, ¶ 112.

Second, it should be equally indisputable that "jury instructions must state the law fairly and *distinctly* and must not mislead the jury or prejudice a party." (Emphasis in Original). *Dillon*, 199 Ill.2d, at 507 (2001). They must state the law *accurately* as well. *Schultz*, 201 Ill.2d 260, 273 (2000). The Appellate Court got this right too.

Third, the Appellate Court properly recognized that *Holton, supra*, established that "[t]o the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidence to a jury that the defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or loss of chance of recovery." *Bailey, supra,* at ¶ 114, quoting Holton, *supra,* at 119.

Fourth, the Appellate Court correctly noted that the Illinois Pattern Jury Instructions provide no instruction on loss of chance. *Bailey, supra,* at ¶ 114.

Defendant cannot honestly disagree with any of these propositions.

From these clear and settled legal propositions the Appellate Court then reasoned that *if* a trial court could refuse to give a loss of chance instruction, "a plaintiff may never be able to submit an instruction explaining a loss of chance theory to the jury." (Emphasis added). *Id.* This is obviously true. The Appellate Court then astutely continued:

> As laypersons, juries "are not trained to separate issues and to disregard irrelevant matters. That is the purpose of jury instructions." See *Dillon*, 199 Ill.2d at 507 ("the purpose of jury instructions is to convey to the jury the correct principles of law applicable to the submitted evidence"). Furthermore while a plaintiff may argue a loss of chance theory during argument, as here, the jury is instructed that arguments are not evidence, and therefore, the jury may not consider the theory when it considers the general proximate cause instruction in IPI Civil (2011) No. 15.01, However, if the trial court properly instructs the jury about the loss of chance theory, the theory will be properly before the jury, and the jury will likely give it more consideration.
>
> We recognize that this court has previously held that the loss of chance theory is encompassed in the long form proximate cause instruction in IPI Civil (2011) No. 15.01, which was given here. However, "jury instructions must state the law fairly and *distinctly* and must not mislead the jury or prejudice a party." (Emphasis in original.) *Dillon,* 199 Ill. 2d at 507. The proximate cause instruction in IPI Civil (2011) No. 15.01 provides that the cause "need not be the only cause, nor the last or nearest cause" but does not distinctly inform the jury about loss of chance, *i.e.*, that the jury may consider, as a proximate cause of a patient's injury, that a defendant's negligence lessened the effectiveness of the treatment or increased the risk of an unfavorable outcome to a plaintiff (*see* Hemminger, 2014 IL App (3d) 120392, ¶ 16, 381 Ill. Dec. 889, 11 N.E.3d 825 (loss of chance in medical malpractice is where the malpractice lessened the effectiveness of treatment or increased the risk of an unfavorable outcome)).
>
> *Id*. at ¶¶ 114-115.

This Court should affirm the Appellate Court's finding that: "The trial court should have permitted [P]laintiff to submit her nonpattern jury instruction on the loss of chance, which would have required the jury to consider whether a negligent delay in the diagnosis

and treatment of sepsis in Jill lessened the effectiveness of the medical services that she received and was one of the proximate causes of her death." *Bailey*, 2020 IL App (1st) 182702 ¶112.

Having previously determined loss of chance is a compensable element of damages, this Court is asked to consider whether the jury was properly instructed on the loss of chance doctrine. *Holton*, 176 Ill. 2d at 119; *Dillon*, 199 Ill. 2d at 504; *Bailey*, 2020 IL App (1st) 182702 ¶114. The Appellate Court correctly held:

> The Illinois Pattern Jury Instructions do not provide an instruction on the loss of chance doctrine. If we continue to follow *Cetera* and the cases that have found no error where a trial court gives IPI Civil No. 15.01 and refuses to give a nonpattern instruction on the loss of chance, a plaintiff may never be able to submit an instruction explaining a loss of chance theory to the jury. As laypersons, juries are not trained to separate the issues and to disregard irrelevant matters. That is the purpose of jury instructions.

Bailey, 2020 IL App (1st) 182702 ¶114; *Dillon*, 199 Ill.2d at 507; Section E, above.

G. The Appellate Court Properly Concluded that the Proposed Instruction Should Have Been Given Because Jurors Need Guidance to Separate Issues and Disregard Irrelevant Matters and the Function of Jury Instructions is to Convey Correct Principles of Law Applicable to the Submitted Evidence.

It is self-evident that a juror can only properly consider the law as instructed by the trial court. Plaintiff could not find one case explaining how, absent an instruction on loss of chance, a lay juror would know how, when or at what point the "concept" of loss of chance enters into the proximate cause analysis. Without an instruction on loss of chance lay jurors would have no direction on how to separate damages resulting from loss of chance as distinct from any other element of damages claimed by Plaintiff. If jurors are only given IPI Civil 15.01, which is devoid of any language on loss of chance such as *lessened the effectiveness of treatment* or *increased the risk of harm*, how would lay jurors

know they are permitted to consider loss of chance as an element of plaintiff's damages? Moreover, without an instruction it is unreasonable to expect a lay juror to figure out *how to compensate* plaintiff for this very specific element of damages as distinct from any other elements of damages claimed by a plaintiff.

To reach correct, legally sound, and factually supported verdicts, jurors need to be instructed on the issues presented at trial, the principles of law to be applied, and the facts to be proved. See *Perkey*, 2016 IL App (2d) 120470, ¶69. This is a legal principle well-grounded in Illinois jurisprudence and should not be treated as novel or uncommon simply because it is being applied to in the context of the loss of chance doctrine. Illinois has instructions on other elements of damages such as loss of society and increased risk of harm, and the goal behind offering these instructions is to adequately inform the jury. Juries likewise need to be adequately informed about the doctrine of loss of chance. Treating loss of chance differently is logically and legally inappropriate.

Without an instruction, we are asking lay jurors to go beyond what attorneys and courts have been able to accomplish – agree on the meaning, legal principles, and calculation of compensation for plaintiffs who claim loss of chance as an element of damages. It is unreasonable to expect a lay juror to figure out what the legal community has not- *how, when and at what point* does loss of chance enters into the proximate cause analysis. Indeed, for decades it has been difficult for the members of the legal community who are well-educated, trained on the law and have a plethora of legal resources at their disposal to come to the same understanding. For lay jurors it is impossible.

This Court must take the opportunity to rectify this serious deficit and direct trial courts unequivocally to instruct accordingly. Without an instruction on lost chance, a legal

theory/concept previously determined by this Court to be a compensable element of damages, the legal community will remain in chaos, lay jurors will be confused and a plaintiff would never be "permitted to recover for *all* demonstrated injuries." (Emphasis in original). *Dillon*, 199 Ill. 2d at 504.

III. THE APPELLATE COURT CORRECTLY HELD THE TRIAL COURT ERRED IN GIVING THE ONE-LINE INSTRUCTION ON INFORMED CONSENT AS IT WAS AN INACCURATE STATEMENT OF THE LAW.

The trial court erred when it denied Plaintiff's submission of jury instruction No.11, IPI Civil instruction 105.07.01 on informed consent, though acknowledging Plaintiff submitted sufficient evidence and the standard of care did require the defendant inform Jill of certain things. (SEC C 24). The denial of submitting Plaintiff's instruction No. 11 to the jury seriously and substantially prejudiced Plaintiff, denied the jury accurate instruction on the applicable law, and denied her a fair trial.

"If the issue is whether a jury instruction accurately conveyed the applicable law, the issue is a question of law, subject to *de novo* review." *Perkey v. Portes-Jarol*, 2016 IL App (2d) 120470, 69. "Where IPI instructions accurately state the law applicable in a case and adequately charge the jury, they should be used exclusively." *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, 80. "A litigant has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence." *Ruv v. Conrail*, 331 Ill. App. 3d 692, 710 (1st Dist. 2002).

"A trial court must use an Illinois Pattern Jury Instruction when it is applicable unless the court determines that the instruction does not accurately state the law." *Bailey*, at ¶84; *Schultz v. Northeast Illinois Regional Commuter R.R. Corp*., 201 Ill. 2d 260, 273 (2002). IPI Civil No. 105.07.01 is the Illinois Pattern Jury Instruction on informed consent.

IPI Civil No. 105.07.01 notes on use state "if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits or alternative treatments) should have been disclosed, then the instruction may be modified accordingly." *Bailey,* at ¶88. *citing,* IPI Civil No. 105.04.01, Notes on use.

"Generally, if a verdict is tainted by an erroneous instruction, then the entire verdict is called into question, unless the instruction pertains to the issue of damages. *Doe,* at ¶96. Here, the hybrid single-line instruction on informed consent submitted to the jury was "an inaccurate statement of the law…[and] did not explain the elements of informed consent, including, Dr. Jones duty to disclose material risks." *Bailey,* at ¶97. Accordingly, the error called the entire verdict into question and a new trial is warranted.

A. The Appellate Court Correctly held Plaintiff was Prejudiced Because the One-Line Instruction on Informed Consent Was an Inaccurate Statement of the Law and Denied Her a Fair Trial.

To prevail on a claim of lack of informed consent, the Plaintiff must prove the defendant had a duty to disclose certain risks, defendant failed or inadequately disclosed those risks and as a proximate cause of the defendant's failure, Plaintiff was harmed. *Coryell v. Smith,* 274 Ill. App. 3d 543, 545 (1st Dist. 1995). Plaintiff satisfied this burden by submitting evidence on each element of informed consent. Consequently, Plaintiff "was entitled to have the jury instructed on her theory of the case and the failure to do so may require a new trial." *Doe*, at ¶9.

In *Doe*, the plaintiff, a transplant patient, filed a medical-negligence action against defendants alleging the defendants "failed to inform her of the high-risk behavior of the kidney donor and as a result she contracted HIV." *Id*. at ¶1, ¶10. The disputed issue at trial was whether the defendants complied with the standard of care governing informed

consent. *Id*. at ¶12. Jury instructions from both the plaintiff and the defendants related to the contested issue were submitted to the jury. The jury returned a verdict for the defendants and plaintiff appealed.

At issue on appeal was whether the jury instruction submitted by the defendant accurately stated the applicable law and submission of additional instructions did not cure the error. *Id.* at ¶82 The appellate court held the instructions given set forth inaccurate statements of the law and giving additional instructions did not cure the error. *Id.* at ¶¶84, 88. "In the absence of the [instruction at issue] the jury could have found UCMC responsible for the plaintiff's injury…" *Id.*

> **Each instruction was *self-contained*** and differed from the other…a retrial was required because the *jury was inadequately instructed* and was therefore, **unable to apply the correct legal principles** to the submitted evidence.

Id. at ¶97. (*Concurring opinion). Emphasis added.*

Similarly, here, despite Plaintiff submitting evidence on each element of informed consent, she was denied the right to place before the jury an instruction on her theory of the case which accurately stated the law on informed consent. As a result, the "jury was inadequately instructed…and therefore, unable to apply the correct legal principles to the submitted evidence. *Id.* Instead, Plaintiff was relegated to a single-line which asked the jury whether "Doctor Brett Jones failed to inform Jill Milton-Hampton of the risks of leaving the hospital." (SEC C 8). This instruction is an inaccurate statement of the law and failed to adequately instruct the jury on the correct legal principles on informed consent. *Bailey,* at ¶97.

B The Evidence Presented at Trial Supported the Informed Consent Instruction.

The informed consent instruction should have been given because the evidence presented to the jury established that Dr. Jones had a duty to inform Jill of the risks of discharge and his suspicion that she was suffering from a potentially lethal illness.

Defendant, Brett Jones, M.D. (Dr. Jones) testified he was concerned that during his care and treatment of Jill she may have various life-threatening conditions, including sepsis, a serious infection sometimes referred to as blood poisoning. (SEC C 121); (SEC C 122); (SEC C 176); (SEC C 1216). Plaintiff argued that sepsis is the condition that caused Jill's death.

Dr. Michael D'Ambrosio, Plaintiff's emergency medicine expert, opined that Dr. Jones had a duty to inform Jill of his concerns for her health and what could go wrong if she chose to leave the hospital instead of remaining for additional observation and medical treatment. (SEC C 172). Even if Jill wanted to go home, Dr. Jones had a duty to make good informed consent. Id. Dr. Jones had a duty to perform the necessary tests for a septic work up and informed Jill she required the administration of intravenous antibiotics and could die without treatment. *Id*; Despite his suspicion and duty of informed consent, Dr. Jones conceded he did not inform Jill she could die. (SEC C 130). Moreover, Dr. Jones could not testify with any level of certainty whether he even informed Jill she had a life-threatening condition. *Id.*

Jill was in Dr. Jones' care for more than four hours. Dr. Jones testified he could have ordered any test he desired, but he did not order any tests for Jill. (SEC C 124). Dr. Jones' failure to order the required tests and inform Jill he suspected she had life-

threatening conditions, including blood poisoning, was a deviation from the standard of care. (SEC C 172).

Dr. D'Ambrosio's opinion was supported by defendants' own expert. Dr. Ward, Dr. Jones' retained standard of care expert made various concessions and offered striking testimony on this issue. Dr. Ward conceded that if an emergency medicine physician, such as Dr. Jones, suspected a patient had a life-threatening condition, then he was ***required*** by the standard of care to inform the patient [Jill] of that concern prior to discharge. (SEC C 42). Dr. Ward further testified to conditions Dr. Jones suspected Jill had, such as pulmonary embolism, could be life threatening; *Id*. at 21. (SEC C 122). Dr. Ward even went so far as to testify that if Dr. Jones did not inform Jill of his concerns, he would have a "real problem defending him in this action." (SEC C 43). When Dr. Ward was asked if Dr. Jones failed to explain his concerns to Jill, whether the failure to do so would be a deviation from the standard of care, Dr. Ward ultimately answered *yes*. *Id*.

Dr. Courtney, defense standard of care expert, also testified that if Dr. Jones suspected Jill had potential life-threatening conditions the standard of care required him to at least inform Jill of his concerns. (SEC C 629 at 167.) He further conceded the conditions described by Dr. Jones as being concerning to him could be life-threatening. (SEC C 629 at 168.)

At no time prior to discharge did Dr. Jones inform Jill that she would be leaving the hospital with suspected life-threatening illnesses including gastrointestinal bleeding, pulmonary embolism and sepsis or blood poisoning. (SEC C 121); (SEC C 122). Moreover, he discharged Jill without informing her that her life could be in jeopardy. *Id*. Sadly, as discussed, *supra*, prior to discharge, Dr. Jones failed to inform Jill she could die.

(SEC C 130). Unfortunately, that is exactly what happened. Jill ultimately died from sepsis.

Plaintiff's emergency medicine standard of care expert testified to the following:

> So, in this setting, if somebody wants to leave, you have a *duty* to tell them what are the things that could go wrong by them leaving and not staying. Part of that though is to make good informed consent. You have to tell them specifically what your concerns are. In this case, the concerns were that she ha[d] an untreated infection . . and ***most importantly*** just that he [Dr. Jones] was worried about it, and say look you have a blood infection, we can treat this in the hospital…we need to give you antibiotics. . .**if you go home and you don't get his treatment, you could *die*** or be severely injured.

(SEC C 172). Dr. Jones failure to inform Jill of his concerns and the necessary testing required was a deviation from the standard of care which caused or contributed her injuries and death. (SEC C 172); (SEC C 179).

At the instructions conference the court acknowledge the testimony adduced at trial was sufficient to establish Dr. Jones was required by the standard of care to disclose certain information. The court said:

> **I do think there was *sufficient* testimony about the – and there was testimony that the standard of care would have required the doctor to say certain things**. I agree with the defense. I don't think a separate instruction is appropriate…add in your issues instructions ***a*** line…I will permit you to add 'failed to adequately inform."

(SEC C 25). However, Plaintiff was not permitted to have the jury instructed on her theory of the case, applicable law, and that the "the standard of care required [Dr. Jones] to say certain things" as acknowledged by the trial court. *Id*. Instead, Plaintiff was relegated to a *single-line* instruction on informed consent which inaccurately stated the law. Like the

court in *Doe, supra,* the trial court in the instant case made a significant omission. *Doe*, at ¶66; see also (SEC C 16).

In the instant case, the entire instruction submitted to the jury on informed consent read: "*Doctor Brett Jones, failed to inform Jill Milton-Hampton of the risks associated with leaving the hospital*." (SEC C 7). The single-line jury instruction submitted to the jury did not "accurately convey the law" on informed consent and seriously prejudiced Plaintiff. *Bailey,* at ¶97; *Perkey*, at ¶69.

Significantly, the jury was not instructed that they could find for the Plaintiff on the issue of informed consent if the material risks Dr. Jones failed to inform Jill of were risks *a reasonably careful emergency medicine physician would have disclosed under the same or similar circumstances and that the failure to disclose harmed Jill*. (SEC C 7); *See also,* (C 4603 V3). There was nothing in the instruction that gave the jury the option. Dr. Jones' failure to inform Jill of the risks associated with being discharged from the hospital with suspected life-threatening illnesses was a deviation from the standard of care. (SEC C 172).

Because the jury did not receive an instruction that "accurately conveyed the applicable law" the jury was *unable* to apply the law to the evidence submitted. *Doe*, at ¶96. (*concurring opinion*). The jury could not adequately consider whether Dr. Jones had the same duty of disclosure to Jill as any other reasonably careful emergency medicine physician would have under the same or similar circumstance. The jury could not measure Dr. Jones conduct against what a reasonably careful emergency medicine physician was required to disclose under the same or similar circumstances. As a consequence, Plaintiff was seriously and substantially prejudiced and denied a fair trial.

"[W]here the case is a close one on the facts and the jury might have decided either way, any substantial error which might have tipped the scales in favor of the successful party calls for reversal." *Booth v. Nelson*, 31 Ill. 2d 511, 514 (1964); *Solich v. George & Anna Portes Cancer Prevention Center*, 273 Ill. App. 3d 977, 988 (1st Dist. 1995). The court's erroneous denial of Plaintiff's IPI 105.07.01 instruction despite sufficient evidence justifying its submission to the jury, in conjunction with the other errors identified by Plaintiff, seriously and substantially prejudiced Plaintiff and denied her a fair trial.

In summary, it is important to highlight a few facts. There is no evidence in the record and none was adduced at trial that Jill signed out against medical advice (AMA). Because she did not. Jill was discharged by Dr. Jones the morning of March 17, 2012, without being informed she could die as a result of life-threatening illness he suspected. (SEC C 12122); (SEC C 130). Any attempts by defendants to argue otherwise is without merit. Defendants **did not** file an affirmative defense asserting Jill was careless and negligent and breached her duty of reasonable care for her safety. Nor did they file an affirmative defense alleging the claimed injuries were caused by careless and negligence on Jills part. They did not because they could not. So, we are left with Dr. Jones who discharged Jill without informing her she could die and jurors who were not instructed he had a *duty* to do so. Yes, Plaintiff's standard of care expert testified Dr. Jones has a duty to notify Jill she could die if she was discharged without treatment. (SEC C 172). However, the opinion of Plaintiff's expert was supported by two emergency medicine defense experts, Dr. Ward and Dr. Courtney. (SEC C 42); (SEC C 629 at 167-68). Certainly, under the circumstances of this case, with the testimony of the defendant himself, Dr. Jones, that he suspected life-threatening illness and did inform Jill, in addition

to three retained emergency medicine physicians testifying he had a duty to inform Jill she could die, an IPI instruction on informed consent was required.

IV. THE APPELLATE COURT ERRED WHEN IT AFFIRMED THE JURY'S VERDICT IN FAVOR OF MERCY HOSPITAL AND MEDICAL CENTER.

On July 13, 2013, Plaintiff filed her Complaint at Law against various defendants including Mercy Hospital and Medical Center. (C 82-83). In her Complaint, Plaintiff alleges Defendant-Appellants, Drs. Jones, Heinrich, Connolly and Arwindekar were actual/apparent agents of Mercy Hospital. *Id.* At trial Plaintiff submitted her proposed jury instruction No.20, IPI Civil No. 105.10, instruction on apparent agency. (C 4611 V3). During the instructions conference Plaintiff's instruction on apparent agency was accepted without objection. (SEC C 26). In its ruling, the Appellate Court "reversed the jury's verdict finding against Plaintiff and in favor of defendants Brett Jones, Scott Heinrich, Amit Arwindekar, Helene Connolly…" and affirmed against Mercy Hospital and Medical Center, even though Defendant-Appellants were alleged to have been the apparent agents of Mercy. *Bailey,* ¶137. Plaintiff agrees with EMP that if this Court affirms the Appellate Court's holding that the "trial court erred in giving the one-line instruction on informed consent as it was an inaccurate statement of the applicable law...result[ing] in prejudice to plaintiff because it denied her right to have the jury instructed on her theory of the case and that "Plaintiff was denied a fair trial when the trial court refused her instruction on loss of chance and only gave IPI Civil No. 15.01, then the jury's verdict finding in favor of Mercy Hospital should be reversed. *Bailey,* ¶97, ¶112 and ¶137, respectively.

V. DEFENDANTS CITE NO AUTHORITY THAT SUPPORTS THE ARGUMENT THAT THE APPELLATE COURT ERRED IN FINDING THAT PLAINTIFF'S INSTRUCTION ON THE DOCTRINE OF LOSS CHANCE SHOULD HAVE BEEN GIVEN TO THE JURY.

Defendants cite 26 cases in support of their position on loss of chance. Many of the cases cited by defendants were decided prior to the *Holton* decision and thus have no bearing on the case at bar and should not be considered by this Court. This court has spoken on the viability of the loss of chance doctrine in Illinois jurisprudence and any pre-*Holton* case stating a contrary opinion need not be considered by this Court. See *Borowski v. Von Solbrig*, 60 Ill. 2d 418 (1975); *Curry v. Summer*, 136 Ill. App. 3d 468 (4th Dist. 1985); *Russell v. Subbiah*, 149 Ill. App. 3d 268 (3rd Dist. 1986); *Hare v. Foster G. McGaw Hosp*., 192 Ill. App. 3d 1031 (1st Dist. 1989); and *Netto v. Goldenberg*, 266 Ill. App. 3d 174 (2nd Dist. 1994); *Northern Trust Co. v. Louis A. Weiss Mem'l Hosp.,* 143 Ill. App. 3d 479 (1st Dist. 1986); *Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr*., 155 Ill. App. 3d 458 (1st Dist. 1987); *Pumala v. Sipos*, 163 Ill. App. 3d 1093 (2nd Dist. 1987); *Galvin v. Olysav*, 212 Ill. App. 3d 399 (5th Dist. 1991); and *Hajian v. Holy Family Hosp*., 273 Ill. App. 3d 932 (1st Dist. 1995).

Defendant also cites numerous cases described as "post-*Holton* decisions applying *Holton* analysis" (Brief at 29-32.), but these cases likewise have no bearing on the instant case and are best described as "red herrings" that warrant no consideration by this Court. Generally, these cases address whether the evidence presented at trial supported the proposed instruction, an issue not raised by any party in this matter. See *Aguilera v. Mount Sinai Hosp. Med. Ctr*., 293 Ill. App. 3d 967 (1st Dist. 1997); *Townsend v. University of Chi. Hospitals*, 318 Ill. App. 3d 406 (1st Dist. 2000); *Reed v. Jackson Park Hospital*

Foundation, 325 Ill. App. 3d 835 (1st Dist. 2001); *Scardina v. Nam*, 333 Ill. App. 3d 260 (1st Dist. 2002); *Krivanec v. Abramowitz*, 366 Ill. App. 3d 350 (1st Dist. 2006); *Meck v. Paramedic Servs.*, 296 Ill. App. 3d 720 (1st Dist. 1998); *Suttle v. Lake Forest Hosp.*, 315 Ill. App. 3d 96 (1st Dist. 2000); *Perkey v. Portes-Jarol*, 2013 Il App (2d) 120470; *Hemminger v. LeMay*, 2014 Il App (3d) 120392; *Vanderhoof v. Berk*, 2015 Il App (1st) 132927.

Defendants cite additional cases that purportedly support their position, but each of those are readily distinguishable. In *Henry v. McKechnie*, 298 Ill. App. 3d 268, 274 (4th. Dist. 1998), the plaintiff developed a post-surgical infection and had his leg amputated. *Id.* at 271. The plaintiff filed a lawsuit alleging medical negligence against the defendant physician and hospital. At trial, plaintiff tendered an instruction on loss of chance: "*A person who undertakes to render serves to another is liable for physical harm resulting from his failure to exercise reasonable care if their failure increased the risk of harm." Id.* at 272. The trial court refused plaintiff's instruction but allowed plaintiff to argue the loss of chance theory to the jury. *Id*. The long form IPI 15.01 instruction was given. *Id.* at 275. The jury found for defendants. Plaintiff appealed arguing the court erred in refusing her non-pattern jury instruction. *Id.* at 270.

The appellate court affirmed and held that plaintiff's proposed instruction was properly rejected because it was misleading and presented confusing language. *Id*. at 274-275. The refusal had nothing whatsoever to do with whether a loss of chance instruction would prove beneficial to the jury. *Id.* At no time did the *Henry* court state, intimate or suggest an instruction on loss of chance was unnecessary or improper. Moreover, unlike the instruction tendered by plaintiff in *Henry*, Plaintiff's instruction was not confusing or

misleading. *Bailey*, 2020 IL App (1st) 182702, ¶112. It was "simple, brief, impartial, and free from argument." *Id*; *See also*, Ill. S. Ct R. 239 (a) (eff. Apr. 8, 2013). Notably, in reaching its decision the *Henry* court did not explain how or in what way 15.01 contemplates the loss of chance doctrine. It simply held the instruction was sufficient. *Id*.

In *Lambie v. Schneider*, 305 Ill. App. 3d 421, 429 (4th. Dist. 1999), the plaintiff's baby was born premature and doctors employed a surgical technique which later resulted in injury to a nerve which affected breathing. *Id.* at 424-25. The plaintiff filed a lawsuit alleging medical negligence. *Id.* at 425. The jury returned a verdict for defendants; plaintiff appealed. *Id*. at 423. The relevant issue on appeal was whether the trial court erred when it refused plaintiff's nonpattern instruction on increased risk of harm which stated:

> A physician who undertakes to render medical services to a patient which he should recognize as necessary for the protection of the patient is subject to liability to the patient for physical harm resulting from his failure to exercise reasonable care to perform his medical services, if his failure to exercise such care increases the risk of harm to the patient.

Id. at 427-28.

In its analysis, the appellate court first noted two important facts: 1) the Supreme Court already held "a plaintiff may recover… when malpractice deprives him of a chance to survive or recover from a health problem, lessens the effectiveness or treatment or increases the risk of an unfavorable outcome;" and 2) "to recover the plaintiff ***must only*** show with a reasonable degree of medical certainty that the medical malpractice lessened the effectiveness of the treatment." (Emphasis added). *Id.* at 426; *Holton*, 176 Ill. 2d at 111. As to the proffered instruction, the court reasoned it was "unnecessary and confusing." *Id.* at 427.

The court did not hold that an instruction on loss of chance was not necessary. In fact, it held the opposite: "While an instruction that properly sets out the lost chance rule may be appropriate, where **no such instruction** is submitted without technical defects" the IPI Civil Instruction on proximate cause is adequate. (Emphasis added). *Id.* at 429; *Hajian v. Holy Family Hospital*, 273 Ill. App. 3d 932, 941 (1st Dist. 1995). Unlike the instruction tendered by plaintiff in *Lambie*, Bailey's instruction does not include language from the Restatement and was based on a correct statement of Illinois law. *Bailey*, 2020 IL App (1st) 182702, ¶112; Ill. S. Ct R. 239 (a) (eff. Apr. 8, 2013).

In *Sinclair v. Berlin*, 325 Ill.App.3d 455, 465 (1st Dist. 2001), the plaintiff alleged that the defendant's delay in the diagnosis and treatment of an eye condition resulted in the plaintiff's blindness. At trial, the plaintiff submitted a non-pattern instruction on loss of chance which was rejected by the court. The plaintiff's instruction read:

> Proximate causation may be established by proving or showing that Defendant's conduct increased the risk of harm to the Plaintiff, or lessened the effectiveness of the Plaintiff's treatment.

Id. at 466. The jury returned a verdict for defendant and the plaintiff appealed, asserting the trial court erred when it refused her proposed instruction on loss of chance. *Id*. at 463. The court held that the long form proximate cause instruction that was given fairly and accurately stated the law on loss of chance. *Id*. at 466. It further noted loss of chance is not a separate theory but a concept that enters in the proximate cause analysis, and noted the plaintiff was allowed to argue loss of chance in closing. *Id.* at 467.

In reaching its decision, the *Sinclair* court did not explain how or when the "concept" of loss of chance enters in the proximate cause analysis, nor did it explain how the jury would be apprised of when and how the "concept" should enter into the proximate

cause analysis. *Id*. at 467. However, *Sinclair* should not be followed because laypeople are not trained to parse out when the application of a law should begin or end, nor are they trained to understand what a "concept" is and when it should "enter into" and analysis or where it should enter.

In *Cetera v. DiFilippo*, 404 Ill. App. 3d 2010 (1st Dist.), plaintiff filed a medical negligence cause of action alleging defendant was negligent in diagnosing and treating an infection. The case proceeded to trial on various theories, including the loss of chance doctrine. The jury returned a verdict in favor of defendant and against plaintiff. *Id*. Plaintiff appealed arguing the trial court erred in failing to tender her non-pattern jury instruction on loss of chance. *Id*. The court simply adopted the outcome of other cases where non-standard instructions had been proffered and rejected. *Id*. at 45. Without any analysis of the loss of chance doctrine, its application to the facts of the case, or how or why plaintiff believed the instructions should have been submitted to the jury. This case sheds no light on the issue before this Court and need not be followed.

In *Grentencord-Szobar v. Kokoszka*, 2021 IL App (3d) 20001, ¶3, plaintiff filed a medical malpractice action against a physician and its corporate entity after her husband went to the hospital complaining of abdominal pain and died without receiving surgical treatment. The plaintiff sued and tendered the following instruction on loss of chance at trial:

> If you decide or if you find that the plaintiff has proven that one or more of the negligent acts claimed, deprived Stephen Szobar of a chance at a better recovery or deprived him of a chance of a better outcome, you may consider such a delay in treatment a proximate cause of the damages in this case.

Grentencord-Szobar , 2021 IL App (3d) 20001, ¶46. The jury found in favor of defendants. *Id.* at ¶1. Plaintiff appealed. *Id.*

In asserting that the trial court erred in refusing plaintiff's non-IPI instruction on loss of chance, the plaintiff relied, in part, on the appellate court's decision in the instant case. The defendants insisted *Bailey* was wrongly decided. Despite defendants' insistence, the court did not express an opinion on *Bailey*. It specifically stated, "we need not go there." *Id.* at ¶47. Instead, the court distinguished *Bailey*: "The *Bailey* case involved an allegation that defendants' negligent delay reduced the effectiveness of later treatment. Such is not the case here. Plaintiff's theory of this case is that defendants negligently failed to perform surgery; that is, it was defendants' failure to perform surgery that proximately caused plaintiff's damages." (Emphasis added). *Id.*, at ¶49. The court held that 15.01 properly stated the law on loss of chance based on the facts of that case. In support of its decision, the court stated, "courts have consistently affirmed refusals of similar proffered nonstandard [loss of chance] instructions…" *Id*. at ¶47.

The *Gretencord-Szobar* court did not comment on whether *Bailey* was properly decided. It offered no opinion on the language of the proffered instruction. It simply determined, based on the evidence, that plaintiff did not meet the criteria for submission of an instruction on loss of chance. *Id.* at ¶49.

Defendant cites no authority to support its position that the appellate court's judgment regarding the loss of chance instruction offered in this case should be reversed. Accordingly, this Court should follow the long-established authority cited by Plaintiff and affirm the lower court's judgment.

VI. The Jury's Verdict is Against the Manifest Weight of the Evidence Requiring a New Trial.

"A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." Simmons v. Garces, 198 Ill.2d 541, 561 (2002). For all of the reasons stated herein Plaintiff contends the jury's verdict was against the manifest weight of the evidence.

CONCLUSION

"[W]here the case is a close one on the facts and the jury might have decided either way, any substantial error which might have tipped the scales in favor of the successful party calls for reversal." *Booth v. Nelson*, 31 Ill. 2nd 511, 514 (1964); *See also Solich v. George & Anna Portes Cancer Prevention Center*, 273 Ill.App.3d 977, 988 (1st, Dist. 1995). Each trial error identified by Plaintiff independently and in conjunction with other trial errors seriously and substantially prejudice Plaintiff, denied her a fair trial materially affected the outcome of the trial.

WHEREFORE, Plaintiffs request this Court affirm the holding of the Appellate Court reversing the jury's verdict finding against Plaintiff and in favor of Brett Jones, Scott Heinrich, Amit Arwindekar, Helen Connolly and Emergency Medicine Physicians of Chicago, LLC and remand for a new trial against these defendants and reverse the holding of the Appellate Court affirming the jury's verdict finding in favor of Mercy Hospital and Medical Center and remand for a new trial against Mercy Hospital and affirm the Appellate Court on the issue of instructing the jury on loss of chance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b) and 345. The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341 (h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), contains 13, 656 words.

/s/ *Vivian Tarver-Varnado*
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