

No. 124318

In the Supreme Court of Illinois

**COLLIN CRIM, a Minor, by his parents and Next Friends,
KRISTOPHER CRIM and TERI CRIM, Individually,**

Plaintiffs-Appellees

Vs.

GINA DIETRICH, D.O.,

Defendant-Appellant.

Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 17-0864
There Heard on Appeal from the Circuit Court of the Eighth Judicial Circuit,
Adams Count, Illinois, No. 06 L 89.
The Honorable Mark Drummond, Judge Presiding.

**BRIEF OF *AMICUS CURIAE* ILLINOIS TRIAL LAWYERS' ASSOCIATION
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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STATEMENT OF INTEREST OF AMICUS

The Illinois Trial Lawyers' Association, ("ILTA") is a non-profit organization comprised of more than 2,000 lawyers statewide who are committed to representing people injured or damaged by wrongful conduct throughout Illinois. ITLA's members have been active in protecting the rights of those wrongfully injured and in securing access to the courts. This Court has regularly permitted ITLA to file *amicus* briefs in such cases in recognition of the fact that the general public has a stake in the outcome of this Court's decisions in these cases that should be protected.

This case raises important questions concerning the Appellate Court's inherent power to explain or define the scope of its own mandates. This Court is being called upon to decide the Appellate Court's ability to clarify its mandate remanding a case for a new trial after the reversal of a directed verdict to better define the issues to be tried on remand. The Illinois Defense Counsel ("IDC") and the Defendant are improperly attempting to collaterally attack the initial decision in this case in 2016 IL App (4th) 150843, ("*Crim I*"), by arguing that if the mandate remanding this case for trial in Crim I included the issue of Defendant's negligence during delivery, as the Appellate Court held in 4-17-0864 ("*Crim II*"), *Crim I* was wrongly decided.

ITLA's brief will demonstrate that the rule for which the IDC advocates will not "promote uniformity and predictability" as the IDC contends, but will lead to chaos, will needlessly and interminably prolong litigation, and will delay or deny justice for severely injured plaintiffs like Collin Crim. Once the Appellate Court has ruled, and no petition for rehearing or for leave to appeal to this Court has been filed, or if filed, denied, the

propriety of the Appellate Court's initial decision should not be challenged in a second appeal by contesting the scope of the mandate.

ARGUMENT

I. THE APPELLATE COURT CLEARLY HAD JURISDICTION TO DEFINE, CLARIFY OR EXPLAIN ITS OWN MANDATE.

The IDC argues that the issue before this Court is a matter of jurisdiction. Nothing could be farther from the truth. The IDC and the Defendant did not, and do not, challenge the jurisdiction of the Appellate Court to hear *Crim I* or *Crim II*. Nor do the IDC and the Defendant assert that reversing the directed verdict in Defendant's favor was erroneous. Rather, the IDC contends that the Plaintiff waived the right to seek review of the jury's verdict in Defendant's favor on her alleged negligence during Collin Crim's birth by not filing a post-trial motion and by purportedly affirmatively waiving an appeal from that verdict. The IDC is wrong for two reasons:

First, this case does not involve a litigant trying to avoid dictates of code civil procedure to improperly obtain reversal of a ruling by not filing post trial motion, as the IDC claims. This case concerns a litigant who *properly* appealed the granting of directed verdict without filing a post-trial motion, as this Court has repeatedly held he was *entitled* to do. *Mohn v. Posegate*, 184 Ill 2d 540 (1998); *Larson v. Harris*, 38 Ill. 2d 436 (1967); *Keen v. Davis*, 38 Ill. 2d 280 (1967). Neither the IDC nor the Defendant are asking this Court to reverse these cases. The IDC and the Defendant therefore concede that the propriety of granting the directed verdict was legitimately before the Appellate Court.

The erroneous granting of a directed verdict did not happen in a vacuum; it took issues away from the jury's consideration that it had been told since the start of the trial

were for it to decide. For this reason, it often is reversible error to fail to inform a jury that a verdict has been directed on some of the issues in the case. *Wille v Navistar Transportation International*, 222 Ill. App. 3d 833, 839 (1st Dist. 1991). It is also well-settled that the erroneous granting of a directed verdict can “taint the subsequent verdicts” in a trial, so as to require a new trial of the *all issues* in the case, not just those involved in the directed verdict. *Rittenhouse v. Tabor Grain Co.*, 203 Ill. App. 3d 639, 653 (4th Dist. 1990). For these reasons, it necessarily follows that the Appellate Court in *Crim II* had not only the power, but the *duty* to rule on the effect the erroneous granting of a directed verdict had on the remainder of the trial. Accordingly, the Appellate Court had jurisdiction to determine the scope of the issues to be tried on remand.

The IDC’s reliance on *Keiser-Long v. Owens*, 2015 Il App (4th) 140612 is misplaced. In *Keiser*, the trial court granted a directed verdict on the issues of damages for lost earning capacity and earning potential. The jury later found in favor of plaintiff and awarded damages. *Id.*, ¶ 2. The court held that under this Court’s decision in *Keen*, the plaintiff could file a direct appeal and was not required to file a “proper” post-trial motion to preserve the issue of obtaining a new trial on lost earning capacity and earning potential. *Id.*, ¶ 26. *Keiser* therefore supports ITLA, not the IDC.

Moreover, *Keiser* was decided on the *initial appeal*. No issue was raised in *Keiser*, as there is here, on whether the failure to file a post-trial motion limited the appellate court’s ability in a later appeal to explain its own mandate. This Court should, therefore, ignore *Keiser*.

Second, the IDC’s claim that the Plaintiff affirmatively waived his right to appeal

from the jury's verdict in his brief in *Crim I* is demonstrably false. Plaintiff's notice of appeal in *Crim I* requested reversal of the directed verdict in Defendant's favor "and all prior and subsequent judgments, orders and findings relating to, or in the procedural progression of" the granting of the directed verdict, and sought "reversal of the Circuit Court's ... judgment, all prior judgments, orders and findings relating to, or in the procedural progression of" the trial court's ruling. (SR 13-14).

The second point for reversal argued by Plaintiff in his brief in *Crim I* is quoted by Defendant on page 6 of its brief in this Court: "II. Each and every decision and order and order which were further steps in the procedural progression of enforcing or otherwise remaining consistent with the Court's Order granting ... Defendant's Motion for a Directed Verdict should be reversed."

Limiting the jury's consideration of the case to Defendant's negligence during the delivery by directing a verdict on acts or omissions prior to delivery was a "further step in the procedural progression of... the Court's Order granting [the directed verdict] or enforcing or otherwise remaining consistent with" that order. In other words, if granting the directed verdict on Defendant's negligence prior to delivery prejudiced the Plaintiff by tainting the jury's consideration and verdict on Defendant's negligence during delivery, that was "a further step in the progression" of the error in granting a directed verdict. While the notice of appeal and the Plaintiff's brief in *Crim I* could have been better phrased, Plaintiff clearly sought reversal of *any and all* rulings of the trial court that flowed from, or were a consequence of, the error in granting the directed verdict. Plaintiff did not, therefore, expressly waive consideration of the question of whether

grating the directed verdict “changed the tenor of the entire trial, making a new trial on all of the issues appropriate”, as the Appellate Court held in *Crim II*, ¶¶’s 22, 52.

The question then becomes whether the Appellate Court had the power to define or explain the scope of its own mandate to hold in *Crim II* that its mandate in *Crim I* was that a new trial should be had on all issues. The law is crystal clear that the Appellate Court had not only the ability, but the obligation to do so.

It is axiomatic that a trial court’s action on remand is to be determined from the appellate court’s mandate. This Court has explained that in “construing the language, matters which are implied may be considered embraced by the mandate”. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 308 (1981). It should be obvious that an Appellate Court has the power to determine what is “implied” and “embraced by the mandate”. The Appellate Court therefore has the inherent power to “correct clerical mistakes, [and] to clarify its opinion or mandate”. *Lurie v. Wolin*, 2017 Il App (1st) 161571, ¶30. The Appellate Court has the power to revisit its own decisions to clarify the intent of its rulings. *Hamilton v. Williams*, 237 Ill. App. 3d 765, 773 (2d Dist. 1992).

This is what the Appellate Court did in *Crim II*, by holding that the error in granting a directed verdict deprived Plaintiff of a fair trial on the issues submitted to the jury was “implied... [and] ... considered embraced by its mandate” *PSL*, 86 Ill.2d at 308, in *Crim I*: “the decisive wording in *Crim* implies that the entire judgment was abrogated and the trial court is to proceed as if hearing the case for the first time.” *Crim II*, ¶ 43.

The Appellate Court in *Crim II* also correctly observed that the doctrine of the law of the case did not prevent it from explaining the scope of its mandate in *Crim I*. *Id.*, ¶ 46.

The law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*.(citation omitted). [A] court may depart from the law of the case to correct clerical mistakes, to *clarify its opinion or mandate*, to remedy fraud on the court or other misconduct, to avoid divergent results in cases pending simultaneously, or to minister to other similar aberrations." *Lurie v. Wolin*, 2017 Ill App (1st) 161571, ¶30. (Emphasis added). Stated differently, "the law of the case turns on whether a court previously 'decide[d] upon a rule of law' *** no on whether, or how well, it explained the decision". *Hamilton v. Williams*, 237 Ill. App. 3d 765, 773 (2d Dist. 1992).

The power of a court of review to correct misunderstandings about the issues to be tried on remand does not, and should not, depend upon whether a litigant has filed a post-trial motion. Where, as here, the *parties agree* that the Appellate Court *properly* reversed a directed verdict in the absence of a post-trial motion, the Appellate Court's inherent power to define, clarify or explain its mandate by delineating the issues to be tried on remand does not evaporate because no post-trial motion was brought. No court has ever held that an Appellate Court's inherent ability to clarify, explain or define the scope of its own rulings is limited or constrained by whether a litigant filed a post-trial motion. There is no basis in the Code of Civil Procedure or in the Law for his Court to do so.

The Appellate Court in *Crim II*, therefore, had every right and the ability to clarify its mandate in *Crim I*. This necessarily includes the power to define the scope of the issues to be tried on remand. Thus, the holding in *Crim II* that granting a directed verdict unfairly tainted the trial of the issues the jury was allowed to consider so as to require a

new trial on all issue was well within the Appellate Court's power. This is true entirely without regard to whether Plaintiff filed a post-trial motion. Accordingly, this Court should reject the IDC's contentions based on a purported lack of jurisdiction or waiver.

II. THE PARTIES ARE NOT LITIGATING A SECOND APPEAL BECAUSE PLAINTIFF "WAIVED" ANY ISSUE. THE ONLY REASON THERE IS A SECOND APPEAL IS BECAUSE THE DEFENDANT IMPROPERLY SOUGHT TO CHALLENGE THE PROPRIETY OF THE APPELLATE COURT'S INITIAL DECISION.

It is hard to understand how the IDC can argue with a straight face that the Plaintiff is responsible for a second appeal in this case. (IDC brief, p. 4). The *only* reason there was a second appeal, indeed now a *third* appeal to this Court, is because the *Defendant* filed a motion *in limine* asserting that the decision in *Crim I* limited the issues to be tried on remand. Unsatisfied with the trial court's ruling, it was the Defendant who appealed to the Fourth District and then, yet again, to this Court.

If Defendant had any doubts about the scope of the mandate in *Crim I*, or the ability of the Appellate Court to hold that granting a directed verdict deprived the Plaintiff of a fair trial on the remaining claims, it could, and should, have filed a petition for rehearing in the Appellate Court, or a petition for leave to appeal *Crim I* to this Court. Without the Appellate Court granting a timely petition for rehearing, or this Court allowing leave to appeal, the decision in *Crim I* became final when it was entered. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 304-06 (1981).

While the IDC argues the Plaintiff's lack of a post-trial motion rendered the verdict a final judgment, the IDC and the Defendant forget that the judgment at issue here is the decision in *Crim I*, not the jury's verdict. The Defendant's election not to seek

further review of *Crim I* made that opinion final. Under *PSL*, Defendant's failure to file a petition for rehearing of *Crim I* in the Appellate Court, or a petition for leave to appeal *Crim I* to this Court, operates as a waiver of any further review of *Crim I*. Defendant may not, therefore, improperly collaterally attack *Crim I* by contesting the scope of the issues to be tried on remand.

Thus, the lack of "certainty" or "predictability" which the IDC decries can not be blamed on Plaintiff.

In fact, adopting the IDC's position would lead to uncertainty and interminably prolong litigation by encouraging unsuccessful appellants to improperly collaterally attack an appellate decision under the guise of seeking "guidance" on the scope of the Appellate Court's mandate. Defendants and the IDC are not seeking "guidance" on construing the mandate in *Crim I* but are clearly and obviously arguing that *Crim I* was wrongly decided if it permitted a new trial on all issues. This is a highly improper collateral attack on *Crim I*.

This Court held in a similar case involving multiple appeals seeking to contest the decision in an initial appeal by litigating the meaning of the Appellate Court's mandate, that "[t]here must be an end to litigation. This case appears to be interminable, and will certainly prove to be so if the various courts through which it passes consider and reconsider each question several times". *PSL Realty Co., v. Granite Investment Co.*, 86 Ill. 2d 291, 313 (1981). This Court's admonition in *PSL* applies with equal force here.

Collin Crim was born June 17, 2005. The case was tried in September, 2015. *Crim I* was not decided until November 7, 2016. Defendant's motion *in limine* was not

filed until May, 2017. The trial court denied that motion in October, 2017. *Crim II* was not decided until October 10, 2018. This case has been pending and litigated for 13 years without resolution. How many times can, or should, the same questions be considered and reconsidered? Certainty and predictability are not at stake in this case; justice for Collin Crim and others like him is.

This Court can and should put a stop to these endless appeals, prevent improper collateral attacks on appellate opinions, and remand this case for trial on all issues, as the Appellate Court has now twice held.

CONCLUSION

Wherefore, *amicus*, the Illinois Trial Lawyers' Association, prays that this Court affirm the opinion and result in *Crim II*, and remand this cause for trial on all issues.

Respectfully submitted,

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this *amicus* brief confirms to the requirements of Rule 341(a) and (b).

The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the notice of filing and proof of service, and those matters appended to the brief under Rule 342(a) is 9 pages.

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