No. 126748

IN THE

SUPREME COURT OF ILLINOIS

JILL M. BAILEY, as Independent Representative of the Estate of Jill M. Milton-Hampton, Deceased, and JILL M. BAILEY, Individually, Plaintiff-Appellee, v. MERCY HOSPITAL AND MEDICAL CENTER, Defendant, SCOTT A. HEINRICH, M.D., BRETT M. JONES, M.D., AMIT ARWINDEKAR, M.D., HELENE CONNOLLY, M.D. Defendants-Appellants, TARA ANDERSON, R.N., Defendant, And EMERGENCY MEDICINE PHYSICIANS OF CHICAGO, LLC. Defendant-Appellant.	On Appeal From The Illinois Appellate Court, First Judicial District, Case No. 1-18-2702 On Appeal to that Court from the Circuit Court of Cook County, County Department, Law Division, Case No. 2013-L-8501 Honorable Thomas V. Lyons II, Trial Judge Presiding

REPLY BRIEF FOR DEFENDANTS-APPELLANTS SCOTT A. HEINRICH, M.D., BRETT M. JONES, M.D., AMIT ARWINDEKAR, M.D., HELENE CONNOLLY, M.D., AND EMERGENCY MEDICINE PHYSICIANS OF CHICAGO, LLC

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Argument

I THE APPELLATE COURT ERRED IN HOLDING THAT A NEW TRIAL IS REQUIRED DUE TO FAILURE TO GIVE A NON-PATTERN "LOSS OF CHANCE" JURY INSTRUCTION.

A. A Separate "Loss Of Chance" Jury Instruction Is Neither Required Nor Appropriate, Where "Loss Of Chance" Is Not A Distinct Theory Of Causation.

During the almost twenty-five years since *Holton v. Mem'l Hosp.*, 176 Ill. 2d 95 (1997) was decided by this Court, the Supreme Court Committee on Jury Instructions has declined to create a separate "loss of chance" instruction, and the Illinois appellate courts have declined to require such an instruction. Plaintiff and amicus Illinois Trial Lawyers Association (ITLA) now contend that adoption of a "loss of chance" instruction is essential because, without it, a jury supposedly cannot understand how to apply traditional proximate cause in a case such as this one. This supposed inability to understand traditional proximate cause in medical malpractice cases is belied by the fact that juries have been applying the standard of traditional proximate cause, as explained and clarified by *Holton*, for many years, with no finding by any court of jury confusion due to supposed lack of adequate instruction--until this case was decided.

Plaintiff and ITLA rely heavily on the general proposition that jury instructions should "fairly" and "distinctly" explain to the jury the principles of law that the jury is to apply. Defendants do not disagree with this general proposition. The converse, however, also is true: a non-pattern instruction need be given only where the pattern instruction is inadequate, and should be used only when necessary to ensure a fair trial; and where a jury instruction, and particularly a non-pattern jury instruction, is not necessary to instruct the jury on a particular principle of law and would confuse or mislead the jury, it need not, and

should not, be given. *Henry v McKechnie*, 298 Ill. App. 3d 268, 277 (4th Dist. 1998). Rather than a general debate about the purpose or efficacy of jury instructions, the question presented in this case is a much more specific and limited one: if the "loss of chance" doctrine continues to be recognized as it was explained in *Holton,* does the "loss of chance" doctrine require a trial court to give a separate proximate cause instruction on "loss of chance"; or, is the "loss of chance" "doctrine" or "concept" an issue that goes only to whether judgment as a matter of law is or is not appropriate, rather than to the application of a "theory" by a jury?

Plaintiff and ITLA contend that *Holton* does not explicitly address the question of whether a "loss of chance" instruction should be given. It is true that the issue addressed in *Holton* did not specifically involve discussion of a proposed "loss of chance" instruction. No such instruction either was given or requested in that case, and the plaintiff prevailed at trial, such that no remand for a new trial was necessary. It is not accurate, however, to suggest that *Holton* has nothing to say about whether a separate "loss of chance" proximate cause instruction is either appropriate or necessary.

The issue presented in *Holton* was whether a defendant was entitled to a judgment as a matter of law on the ground that the plaintiff is unable to establish traditional proximate cause, where the plaintiff was unable to prove a greater than fifty percent chance, i.e. a more probable than not chance, of a better result. *Holton* held that a plaintiff in a medical malpractice action can avoid judgment as a matter of law and present a claim to a jury, even if the plaintiff only is able at best to present evidence to establish that the malpractice lessened the effectiveness of treatment, and is not able to establish that a better result probably would have been achieved without malpractice. Thus, the rule established under

Holton is that a plaintiff is entitled to avoid judgment as a matter of law and seek recovery from a jury in cases in which--even if the patient probably would have died or suffered the same injury regardless of whether the defendant did not or did not commit malpractice--the defendant's negligence increased the likelihood of death or injury by lessening the effectiveness of treatment. The rule of *Holton* is that there is no distinction to be made between "more probable than not" causation and "less probable than not" causation. "Less probable than not" cases are to be assessed under the same standard as other medical malpractice cases.

The jury in *Holton* was instructed that "proximate cause" means

> …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. [*Holton,* 176 Ill. 2d at 110-111, 133-134.]

Holton affirmed the use of this instruction in that case, concluding that it accurately captures the appropriate "proximate cause" standard to be applied in all medical malpractice actions, and in negligence actions in general. *Id.* at 110-111.

Thus, a typical "loss of chance" case differs from a "traditional" medical malpractice case in that the plaintiff only is able to present evidence that the defendant caused the patient to lose a less-than-even chance of survival or better result. Under *Holton,* a defendant is not entitled to judgment on its favor on the basis that the initial chance of survival or better result is less than even. The jury is instructed that, if it finds that the defendant(s)' failure to diagnose or treat a condition is professional negligence, the professional negligence is a "proximate cause" of the injury if the negligence is a cause that produced the injury "in the natural or ordinary course of events," and that the negligence need not be the only cause and may combine with another cause.

Given this understanding of the "loss of chance" doctrine as explained in *Holton*, there is no need for the jury to be instructed separately that a delay in diagnosis or treatment that "lessened the effectiveness of treatment" can be considered a proximate cause of the injury (which is the only really distinct or new information conveyed by the instruction approved by the Appellate Court in this case). The instruction approved here can be understood in one of two ways: either (1) it entirely replaces the governing standard of "traditional" proximate cause in IPI (Civil) 15.01, or (2) it clarifies for the jury that the jury can find proximate cause in this scenario. If (1), the instruction is inconsistent with *Holton*, which holds that the formulation in IPI (Civil) 15.01 applies in such cases and the "traditional" proximate cause standard applies. If (2), the instruction is unnecessary and confusing, because, given the pattern instruction indicating that negligence need not be the only cause, there would be no reason for the jury to conclude that a delay in diagnosis that lessens the effectiveness of treatment cannot be a proximate cause.

Amicus ITLA contends that declining to affirm the Appellate Court's sanction of a new, non-pattern "loss of chance" instruction would improperly allow defendants to argue at trial that the plaintiff has "no right" to recovery if the plaintiff cannot prove a greater than 50% chance of survival or a better result. There is no need, however, for an instruction to address this issue. *Holton* has established the applicable rule. That rule can and should be applied through trial rulings on arguments and evidence.

Plaintiff (or amicus) also cites *Dillon v. Evanston Hosp.*, 199 Ill.2d 483 (2002), for the proposition that a "loss of chance" instruction is required here. In *Dillon*, the plaintiff presented expert testimony that the defendant physician was negligent in leaving a catheter fragment in her heart, that there was up to a 20% chance that the plaintiff would suffer

infection in the future, and that there was a less than 5% chance of the occurrence of several other potential future harms. *Id.* at 497. The trial court modified two pattern instructions on damages to inform the jury that it could award damages for "[t]he increased risk of future injuries," as well for as other categories of damages already included in the pattern instructions. *Id.* at 497. The jury awarded damages for the increased risk of future injuries. This Court held that the modified instruction was inadequate because, although it appropriately permitted the jury to award damages for the increased risk of future injuries, it failed to instruct the jury that (1) the increased risk must be based on evidence and not speculation, and that (2) the size of the damages award must reflect the probability of occurrence. *Id.* at 506. The Supreme Court Committee on Jury Instructions thereafter adopted pattern damages instructions, IPI (Civil) 30.04.03 and 30.04.04, to address the increased risk of future harm.

Dillon does not support the contention that a separate "loss of chance" proximate cause instruction, much less the particular instruction approved here, is required or appropriate. *Dillon* held that a new trial was required because, where the jury actually awarded damages for increased risk of future harm, the instruction given was insufficiently favorable to the defense because it did not inform the jury that its award must be based on evidence or instruct the jury that the recovery under this theory must be limited to the percentage of increased risk caused by the defendant. *Dillon* also involved an instruction on the jury's ability to award and calculate a category of damages, not an instruction that would replace or modify a causation instruction, IPI (Civil) 15.01, as was approved here. Unlike "loss of chance," a pattern instruction was adopted in *Dillon* shortly after the decision, but no such instruction was adopted for "loss of chance," presumably because the

Committee concluded that *Holton* did not require such an instruction.

Amicus ITLA also incorrectly contends that adoption of "loss of chance" jury instructions in other jurisdictions supports adoption of a "loss of chance" instruction such as the one approved here. ITLA acknowledges that fewer than half of the states (24) have adopted the "lost chance" doctrine at all, while 17 states have rejected it. Of the 24 states that have adopted "lost chance" doctrine, only half (12 states) have adopted a pattern "lost chance" instruction (ITLA amicus brief, p 13).[1] Therefore, other jurisdictions' approach to this issue does not even really support adoption of a "lost chance" doctrine, much less a pattern "loss of chance" instruction. Twenty-six states do not recognize loss of chance at all, and well over half of the states--35--do not require, or have not approved, jury instructions on loss of chance.

Plaintiff and amicus ITLA also fail to clearly and specifically explain why they believe IPI (Civil) 15.01 is inadequate to explain the jury's duty to determine proximate cause in a "loss of chance" case, beyond general assertions that it creates "confusion" or fails to set forth the "loss of chance theory." Plaintiff does contend that IPI (Civil) 15.01 is inadequate because it does not explain "loss of chance," or what it "means" to suffer a "decreased chance of survival," or what the "lessened effectiveness of treatment" means, or that a "better result" is not required, or that evidence of the "precise time" the plaintiff suffered a "decreased chance of survival" or the treatment became less effective is not required. Curiously, the instruction plaintiff proffered and the Appellate Court approved also does not explain any of these things, or set forth a true "loss of chance theory." It

[1] ITLA asserts that 14 states have adopted pattern "lost chance" instructions and includes Massachusetts in this number, but a closer review reflects that Massachusetts has not adopted a pattern instruction. See *Matsuyama v. Birnbaum,* 890 N.E.2d 819 (Mass. 2008).

states only that, if the jury finds that a negligent delay in diagnosis and treatment "lessened the effectiveness" of medical services the patient received, the jury "may consider" the delay one of the proximate causes of the injury or death.

B. Alternatively, Even If A Separate "Loss of Chance" Instruction Is Warranted In Certain Cases, The Loss Of Chance Instruction Proffered By Plaintiff And Approved By The Appellate Court In This Case Is Not Appropriate.

Alternatively, even if a separate "loss of chance" instruction could be warranted in certain cases, the "loss of chance" instruction approved here by the Appellate Court is inappropriate and does not adequately instruct the jury on this doctrine. The "loss of chance" instruction approved by the Appellate Court in this case states that "if you decide or if you find that the plaintiff has proven that a negligent delay in the diagnosis or 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." This instruction proffered by plaintiff, approved by the Appellate Court, and advocated by amicus ITLA does not correctly instruct the jury. In fact, the pattern instructions from other jurisdictions cited by amicus ITLA aptly demonstrate many of the flaws in this proposed instruction.

1. The instruction improperly assumes that the disputed issues of negligence and the existence of injury already have been established.

First, by framing the issue as whether the plaintiff has proven that a "negligent delay in the diagnosis or treatment of sepsis in Jill Milton-Hampton" lessened the effectiveness of treatment, the instruction improperly suggests that it has already been established, or that the jury should assume, that (1) there was a "negligent delay" in diagnosis or treatment, and (2) that this patient actually had a bacterial sepsis that could

have been "timely" diagnosed and treated, "but for" that delay. Both questions were disputed. Either issue alone could have formed the basis for the jury's general defense verdict.

The assumption of negligence inherent in this framing of the instruction is one of the problems with a similar instruction rejected by the Appellate Court in *Hajian v. Holy Family Hosp.,* 273 Ill. App. 3d 932, 941 (1st Dist. 1995). This problem also is illustrated by the fact that several of the other jurisdictions cited by amicus ITLA have adopted instructions that explicitly inform the jury that it must first find that the defendant(s) breached the standard of practice, before reaching the issue of whether the breach caused a loss of chance of survival or increased risk of harm (see instructions from Indiana, Iowa, Kansas, Missouri, and New Jersey, ITLA Appendix A1-11). At an absolute minimum, any instruction should reflect that the instruction only applies "if you find that plaintiff has proven" professional negligence by one or more defendants (as adopted in Washington and Wyoming, see ITLA Appendix A-10-11).

2. The instruction, though purporting to reflect a "loss of chance" theory, departs from all other jurisdictions and this Court's decision in *Dillon* by failing to establish any causation threshold or limit recovery of damages to the percentage of "lost chance."

Second, in contrast to almost all of the "loss of chance" instructions adopted in other jurisdictions, and in contrast to the instruction approved by this Court in *Dillon v. Evanston Hosp.,* 199 Ill. 2d 483 (2002), the instruction approved by the Appellate Court in this case (which offers the jury either an alternative to, or a clarification of, "traditional" proximate cause), imposes neither any requirement of the degree of proof required to establish a causal connection, nor any limitation on the recovery of damages. In fact, this

instruction, if affirmed and not altered, would represent the broadest and most permissive formulation of the "loss of chance" doctrine adopted in any jurisdiction.

As the *Holton* Court recognized, jurisdictions that have recognized a "loss of chance" doctrine generally have done so in one of two ways: (1) by adopting a "relaxed" causation standard that requires proof only that the defendant's conduct was a "substantial factor" in causing injury, or (2) by adopting a "separate injury" approach (also called a "proportional damages" or "true lost chance" theory), which recognizes the lost chance of survival or recovery, as distinct from the death or injury itself, as a separate "injury" measured by the difference between the percentage chance of survival or avoidance of injury with and without malpractice, and permits recovery only of the damages attributable to the percentage lost chance of surviving or avoiding the injury, not the entirety of the damages for the death or injury. *Holton*, 112 fn. 1. *Holton* rejected the first view ("relaxed causation"), and declined to address the second, "separate injury" approach. *Id.* at 112-114, 112 fn. 1. *Holton* did not adopt either approach because it held only that recognizing "lost chance" means removing a legal bar to recovery, not that "lost chance" is a new or alternative causation standard or theory to be presented to a jury.

Consistent with the analysis in *Holton*, the other jurisdictions identified by the ITLA that have recognized "loss of chance" as a distinct theory warranting a "loss of chance" instruction have included in the instruction either (1) a specific standard of proof designed to ensure that effect of the defendant's conduct on the chance of survival or a better result is not merely "negligible"; or (2) a "pure" loss of chance theory, with an instruction that reflects the limitation of the plaintiff's recovery to the percentage of the damages representing the "loss of chance"; or (3) some hybrid form of both types of

theories/requirements.

Of the 12 jurisdictions identified by amicus ITLA in Appendix A-1-11 that have adopted pattern "loss of chance" instructions, nine of the 12 have adopted instructions reflecting that recovery of damages must be limited to the percentage loss of chance, with the jury instructed to determine the total amount of damages and assess the difference between the chance of survival/better result with and without malpractice, and either the jury or the judge required to multiply the calculated percentage against the total amount of damages. This calculation reflects a "pure lost chance" theory. Of those 9 jurisdictions, 6 adopted both this "percentage" limitation on recovery, and an additional requirement of proof designed to ensure that the effect of the defendant's conduct is not merely negligible: either requiring the jury to assess the patient's initial chance of survival, or requiring the jury to consider the degree to which the defendant's conduct affected the patient's loss of chance.

For example, Missouri adopted an instruction requiring the jury to determine (1) whether the decedent had a "material chance" of survival, and (2) whether, as a "direct result" of defendant's negligence, the decedent lost all or a material part of such chance of survival; and (3) to assess the total amount of damages and the percentage of lost chance, with the judge later responsible for multiplying the percentage of lost chance by the total amount of damages (see ITLA Appendix A-6). Three other jurisdictions (Indiana, New Jersey, and New York) adopted a "pure lost chance" theory by requiring the jury to assess total damages and percentage of lost chance, and also require the jury to determine whether the defendant's negligence or the increased risk of harm due to defendant's negligence was a "substantial factor" in causing harm, or whether the negligence was a "substantial factor"

in increasing the risk of harm or reducing the chance of a better result (ITLA Appendix A1-11).

Oklahoma's instruction requires the jury to assess the percentage of lost chance and total amount of damages (with the judge required to multiply the two) and to determine whether the patient had a "significant chance of survival" before treatment. Minnesota requires both (1) an assessment of percentage of loss of chance and (2) that defendant's negligence was a "direct cause" of the decreased chance of survival (ITLA Appendix A1-11). Three jurisdictions—Iowa, Washington, and Ohio--require the jury to assess percentages of loss of chance and limit recovery accordingly (a true "pure lost chance theory) but do not require either a "significant" initial chance of survival or that defendant's conduct was a "substantial factor." *Id.*

Only three of the jurisdictions cited by ITLA that adopted pattern instructions did not require recovery of damages to be limited by means of a mathematical formula applied by the jury to that percentage of total damages representing the percentage of lost chance. Each jurisdiction takes a different approach. Louisiana, which adopted a pattern instruction that does not require assessment and multiplication of percentage of lost chance against the total amount of damages, nevertheless has recognized that the plaintiff is not entitled to full recovery of damages for wrongful death, but only is entitled to a jury assessment of the lump sum value of the lost chance of survival, a "separate injury." See *Smith v Department of Health and Hosps*, 676 So.2d 543 (1996). Kansas does not require the jury to specifically assess percentage of lost chance or reduce total damages by that percentage, but does require the jury to determine both (1) whether the decedent would have had both a "substantial" chance of survival with timely diagnosis and treatment, and (2) whether any

failure to comply with the standard of care was a "substantial factor" in causing the death (ITLA Appendix, A3-A4). West Virginia does not limit the recovery, but requires that the patient's initial chance of survival must be greater than 25%, and that the defendant's negligence caused the patient to lose a greater than 25% chance of survival (a modified version of the "substantial" or "significant" initial chance and "substantial factor" causation tests) (ITLA Appendix, A-10).

Two of the jurisdictions identified by ITLA, Pennsylvania and Montana, did not adopt pattern instructions but approved proposed instructions using the "substantial factor" test. *Hamil v. Bashline*, 392 A.2d 1280 (Penn. 1978) (holding that once a plaintiff has demonstrated that a defendant's acts or omissions have increased the risk of harm to another, the factfinder may determine that the increased risk was a "substantial factor" in bringing about the resultant harm); *Aasheim v. Humberger,* 695 P.2d 824 (Mont. 1985) (holding that the plaintiff is entitled to a "loss of chance" instruction based on Restatement of Torts section 323; instruction must require plaintiff to prove that defendant's negligence was a "substantial factor" in reducing plaintiff's chances of obtaining a better result). Massachusetts, in contrast, adopted a "separate injury" approach, rejected the Restatement as a basis for the "loss of chance" theory, and required the factfinder to calculate proportional damages. See *Matsuyama v. Birnbaum,* 890 N.E.2d 819 (Mass. 2008).

Thus, plaintiff's and ITLA's suggestion that this Court should affirm an instruction that includes neither a limitation to recovery of proportional damages nor any standard of proof to protect against imposition of liability based on a merely "negligible" effect of defendant's conduct on the chance of survival or better result should be rejected, as it is inconsistent with either of the recognized views of "loss of chance" as a distinct theory of

causation, and is inconsistent with the analysis in all other jurisdictions.

Plaintiff's proposed instruction also is inconsistent with *Dillon v Evanston Hosp.*, 199 Ill. 2d 483 (2002). The Court in *Dillon* held that a jury could be permitted to award damages for "increased risk of future harm," but that a jury must be informed that the recovery of such damages is limited to the percentage of the increased risk. The pattern instructions adopted after *Dillon* represent a version of a true "proportional damages" theory. See IPI (Civil) No. 30.04.03 and 30.04.04. To the extent that *Dillon*'s damages theory for "increased risk of harm" is analogous to the "loss of chance" causation issue presented here (as plaintiff contends it is), *Dillon* does not support the instruction approved here, but would only support a "proportional damages" instruction that limits recovery to the percentage of "lost chance."

In fact, by contending that the traditional "proximate cause" instruction is insufficient because a jury would not be instructed on "how to separate damages resulting from loss of chance as distinct from any other element of damages," plaintiff assumes a "separate injury"/proportional damages approach that is not at all reflected in the instruction that plaintiff proffered and now advocates should be given in this case.

3. The instruction does not address in which cases it should be given, and, as set forth below, is not properly given in cases like this one.

Third, as set forth below, the instruction as approved by the Appellate Court does not include any guidance as to the circumstances in which it can be given. The directive to apply the instruction in this case, which is not truly a "loss of chance" case, is incorrect and will cause significant confusion in future cases.

C. Even If A "Loss Of Chance" Instruction Could Be Appropriate In Some Cases, It Should Only Be Given In True "Loss of Chance" Cases, Not In Cases Like

This One.

Plaintiff and amicus ITLA assert that a "loss of chance" instruction is appropriate in any, or every, medical malpractice case where the plaintiff asserts that a negligent delay in medical diagnosis and treatment "lessened the effectiveness" of medical treatment. This extremely broad definition would encompass all medical malpractice actions in which there is any claim of delay in diagnosis or treatment. In every such case, the plaintiff necessarily will present evidence that the delay "lessened the effectiveness of treatment" or "increased the risk of an unfavorable outcome." The operative question that defines a "loss of chance" case, however, is by how much the effectiveness of treatment was lessened or the risk increased. The approved instruction fails to address this issue at all.

Other jurisdictions that recognize the "loss of chance" doctrine and also adopted pattern jury instructions on "loss of chance," recognize that the "loss of chance" theory and instruction does not apply to all cases involving delay in diagnosis or treatment, but only to cases in which the plaintiff is asserting a theory that the defendant's treatment caused the plaintiff to lose a less-than-even or less than 50% chance of survival. In Iowa, the "alternative claim" for "lost chance of survival" only is decided if the plaintiff fails to prove the "traditional" negligence claim (see ITLA Appendix A-2). In Washington, the instruction states that the plaintiff is claiming a reduction or loss in a "50% or less chance of survival" (see ITLA Appendix A-10). See also *McMullen v Ohio State Univ Hosp,* 88 Ohio St 3d 332, 2000-Ohio-342 (explaining that, if the chance of recovery or survival was 50% or more, the loss of chance theory does not apply and the instruction should not be given).

In cases that do not involve "loss of chance," the plaintiff will be able to present expert testimony to establish that the delay "lessened the effectiveness of treatment" or

"increased the risk of an unfavorable outcome" such that it can be said that "but for" the delay, the patient more probably than not would have survived or achieved a more favorable outcome (a greater than 50% chance of survival or a better outcome). In other cases, the plaintiff will be unable to present any expert testimony to establish that, "but for" delay, the patient had a greater than 50% chance of surviving or achieving a more favorable outcome. In such cases, where it is undisputed that the patient more likely than not would have died or incurred the same injury even if there had been no delay, the plaintiff only will be able to present expert testimony that the delay "lessened" the effectiveness of treatment or increased the risk of harm, such that the plaintiff might have been able to avoid death or injury, but not to a greater than 50% probability.

It is the latter group of cases, where the plaintiff is unable to establish a "better-than-even" chance of survival or avoiding injury, that primarily have been the focus of the "loss of chance" doctrine in Illinois. See *Holton, supra* (plaintiff only needs to prove a "good probability"); *Meck v. Paramedic Servs.,* 296 Ill. App. 3d 720 (1st Dist. 1998) (plaintiff could not establish greater than 50% chance of survival)*; Perkey v. Portes-Jarol,* 2013 IL App (2d) 120470 (initial chance of recovery was 36% or 12%).

The suggestion that a "loss of chance" instruction should be given in all cases, or in all cases like this one, also is inconsistent with the pattern damages instruction adopted after *Dillon, supra* for "increased risk of harm" (an instruction and theory that plaintiff and ITLA assert is analogous to "loss of chance"). The comment to those instructions (IPI (Civil) 30.04.03 and 30.04.04) reflects that the instructions are only to be given in cases in which plaintiff cannot establish that the likelihood of occurrence of future damages is greater than 50%. Where the plaintiff claims damages that are greater than 50% likely to

occur, the instruction is not to be given.

Plaintiff's description of the evidence she submitted to support a "loss of chance" theory actually demonstrates that this case is not a "loss of chance" case. Plaintiff acknowledges that two of plaintiff's experts, Dr. Jacob and Dr. Hudson, explicitly testified that the plaintiff probably (greater than 50% chance) would have survived with "timely" diagnosis of sepsis and "proper" antibiotic treatment (plaintiff's brief, pp. 20-21). The fact that some of plaintiff's experts also stated the general principle that "earlier is better" with respect to antibiotic treatment of a bacterial infection, and that one of plaintiff's experts (Dr. Noto) asserted that the risk of death increased by 7 percent for each hour of delay, does not identify this as a "loss of chance" case. Not only was plaintiff able to present sufficient evidence to establish proof of a greater than 50% chance of survival to satisfy "traditional" proximate cause by any standard (even without the need to rely on *Holton*), but none of plaintiff's experts actually affirmatively testified that there was a less-than-even chance of survival at the time of the alleged malpractice so as to identify or support an alternative "loss of chance" "theory."

II NO SEPARATE "INFORMED CONSENT" INSTRUCTION WAS REQUIRED OR APPROPRIATE IN THIS CASE OR IN CASES LIKE THIS ONE, AND THE INSTRUCTIONS GIVEN HERE WERE APPROPRIATE.

The Appellate Court erred in holding that the trial court's refusal to give a proffered modified "informed consent" instruction requires a new trial. Plaintiff contends that a modified pattern instruction should be given when applicable, a general proposition with which defendants do not disagree.

Plaintiff, however, cites no authority whatsoever for the proposition that the modified "informed consent" instruction should be given, or that an "informed consent"

theory ever can apply, in medical malpractice cases like this one where the patient did not actually consent to treatment, and where there is no claim that consented-to treatment caused injury. Even the case relied upon by plaintiff—*Doe v. University of Chicago Med. Center*. 2014 IL App (1st) 121593—involves a patient who consented to, and received, a kidney transplant, and claimed that the defendants failed to inform her of the risk of contracting HIV from the transplant she received. *Id.* at P10. As set forth in defendants' primary brief, both the case law on "informed consent" and the pattern instruction itself reflect that the recognition of "informed consent" as a distinct theory of malpractice—as contrasted with a "garden variety" malpractice claim of failure to timely diagnose and treat the patient's condition—is dependent on the existence of certain facts. Namely, the "informed consent" theory applies in the unique circumstance where the patient has consented to treatment but claims that the consent was not "informed" because the risks of or alternatives to treatment were not adequately or fully conveyed by the physician. See *Coryell v. Smith,* 274 Ill. App. 3d 543 (1st Dist. 1995); IPI (Civil) No. 105.07.02. Where the patient has not consented to treatment, and the claim is a "garden variety" claim of failure to timely diagnose and provide treatment, there is no need for a separate instruction to explain how the jury should address the unique circumstance of "informed consent."

Plaintiff also incorrectly contends that the "single-line instruction" did not "adequately" instruct the jury on plaintiff's theory. Plaintiff asserts that the instruction did not inform the jury that it was plaintiff's claim that the "risks" identified in the instruction were "risks" that a reasonably careful emergency physician would have disclosed, or that plaintiff was claiming that the failure to disclose those "risks" harmed the patient. The instructions, however, must be viewed in their entirety. *Leonardi v. Loyola Univ.,* 168 Ill.

2d 83 (1995). When viewed in their entirety, the instructions given here did inform the jury that (1) a breach of the standard of practice in this case is defined in part as a failure by the emergency physician to do something that an ordinary emergency physician would have done, under the same or similar circumstances; (2) that the plaintiff is claiming that Dr. Jones breached the standard of practice by failing to disclose the risks of leaving the hospital when he actually recommended that the patient stay for further observation; and (3) that the plaintiff is claiming that all of the identified breaches of the standard of practice asserted by plaintiff (which included the claim that Dr. Jones breached by failing to disclose the risks of leaving the hospital) proximately caused injury to the plaintiff (C.4373 V 3; C. 4385 V.3). Plaintiff essentially is arguing that it was error to advise the jury of these elements in separate instructions, rather than in one instruction. Where plaintiff never asserted that the separate instructions were inadequate to convey to the jury its responsibility to decide all of the other claims of breach, the instructions were adequate to convey this information as to this claim of breach as well.

III THE JURY VERDICT IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The jury verdict here is not against the manifest weight of the evidence. In cases where there is conflicting expert testimony on the standard of care and causation, it may not be said that the verdict is against the manifest weight of the evidence. *Schuchman v. Stackable* (1990), 198 Ill. App. 3d 209, 222. Defendants presented expert testimony to establish that Ms. Milton-Hampton did not have a nidus of infection, more specifically a retained tampon; that the imaging studies identified by plaintiff's expert as a tampon was in fact the patient's urethra; that Ms. Milton-Hampton did not have signs or symptoms of sepsis or toxic shock syndrome; that Ms. Milton Hampton did not have bacterial sepsis,

but in fact a viral myocarditis; that there was no antibiotic treatment or any other treatment available for the viral myocarditis; and that the ER physicians acted appropriately when they did not diagnose and treat a bacterial sepsis that did not exist (C. 6661-6663 V 5, C. 6684-6689 V 5, C.6717-6738 V 5, C. 6805 V 5, C. 6809-6814 V 5, C. 6821-6831 V 5, C. 6968-6973 V 5, C. 7004 V 5, C. 7927-28 V 5, C. 7087-7145 V 5, C. 8029-8030 V 5, C. 9927-28 V 5, Sec. C. 672-64). The jury could have found for the defense based on a conclusion of no breach of the standard of care or no causation, based on any or all of this evidence. The jury heard the evidence for over three weeks of trial and unanimously agreed upon a finding for the Defendants on all counts. The Appellate Court's decision to set aside that unanimous verdict based upon the trial court's failure to give unwarranted non-IPI or modified IPI instructions is clear error.

Conclusion

Defendants-Appellants Scott A. Heinrich, M.D., Brett M. Jones, M.D., Amit Arwindekar, M.D., Helene Connolly, M.D. and Emergency Medicine Physicians of Chicago, LLC, respectfully request that this Honorable Court reverse the decision of the Appellate Court and remand for entry of judgment in favor of all defendants, or alternatively reverse the decision in part and remand for a new trial in accord with the positions set forth in the primary brief.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages or 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 and the certificate of service is 19 pages.

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NOTICE OF FILING AND PROOF OF SERVICE

You are hereby notified that on August 3, 2021, I submitted for filing a copy of the Supreme Court Reply Brief by Defendants-Appellants pursuant to Supreme Court Rule 315 to the Office of the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, IL 62701 via E-File electronically on the Clerk's office via Odyssey and (upon approval of the court, file-stamped copies mailed to the office of the Clerk of the Supreme Court via U.S. mail) and a copy to each of the opposing counsel named in the service list below by e-mail as well as depositing the same in the U.S. mail, proper postage pre-paid at 5:00 p.m. on August 3, 2021.

[X] Under penalties as provided by law pursuant To 735 ILCS 5/1-109 the undersigned Certifies that the statements set forth Herein are true and correct.

/s/Chad Wilkinson
Chad Wilkinson

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