No. 124318

Appeal to the Supreme Court of Illinois

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

v.

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

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

Appellant's Reply Brief

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Oral Argument Requested

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ARGUMENT

I. Introduction.

A recurring theme in Plaintiffs' argument is the suggestion that limiting the retrial to the issue of informed consent was a new idea that Defendant concocted shortly after the appellate court filed its ruling in *Crim I*. They claim that it was only after the appellate court ruling that Defendant "first considered the possibility that the result of the appeal could be stretched to an interpretation that precluded one of Plaintiff's theories of recovery" (Brief, p. 1). One can only imagine Plaintiffs' counsel's shock and surprise at such a development. And yet, their surprise was likely tempered with the knowledge that they had expressly abandoned their claim of professional negligence in the very first paragraph of their appellate brief in the initial appeal. It was not Defendant's idea to abandon that claim, it was Plaintiffs'.

Plaintiffs protest that they never "expressly abandoned" the argument that the directed verdict "poisoned the jury's verdict on the remaining issues" (Brief, p. 6). Technically, this is correct. Plaintiffs opened their brief in the initial appeal with the statement that, while "the case was tried to verdict, this appeal is not based upon the verdict of a jury" (S.R. 19). They went on to state that the appeal "reviews the trial court's order granting a partial directed verdict…" *Id.* Accordingly, there is no express abandonment of their new claim that the evidence is intertwined.

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But their brief contains no mention of intertwined evidence, nor did they ask the appellate court to make any such finding. The prayer for relief merely asked the court to:

> [R]everse each and every decision and order entered in the trial court which were further steps in the procedural progression of enforcing or otherwise remaining consistent with the Court's Order granting the Defendant's Motion for Directed Verdict.

(S.R. 46). Plaintiffs opened and closed their brief with the assertion that the appeal was limited to the directed verdict on the issue of informed consent. There is not a single sentence in their brief suggesting that they intended to preserve the issue of professional negligence for retrial, nor did they even hint that evidence between that claim and the claim for lack of informed consent were somehow intertwined.

Nevertheless, Plaintiffs argue that Defendant unfairly criticized the appellate court's ruling for having wholly omitted the fact that "Plaintiffs supposedly abandoned" the issue of professional negligence (Brief, p. 7). Defense counsel respectfully submits that its criticism of the appellate court's ruling is well-founded. A key issue in *Crim II* was whether the appellate court had authority to address a claim that the appellant had expressly abandoned. The fact that the appellate court chose to ignore the Introductory Paragraph in Plaintiffs' opening brief in *Crim I* was a serious oversight.

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II. Plaintiffs Deliberately Abandoned Their Claim for Professional Negligence.

As discussed above, Plaintiffs opened their brief with the contention that it is the Defendant who first argued that the retrial be limited to the sole issue raised in Plaintiffs' initial appeal as though this was some clever new idea. And yet, they never explain how that theory comports with the express abandonment of the professional negligence claim in their initial brief. In the Argument portion of their brief, they follow the same tack, suggesting that it is the Defendant, not Plaintiffs, who waived this argument on appeal. The ingenuity of the argument nearly makes up for its lack of substance.

Plaintiffs argue that Defendants are attempting to re-litigate *Crim I*. Nothing could be further from the truth. The trial court granted the directed verdict on the claim for informed consent based on the Fourth District's ruling in *St. Gemme v. Tomlin*, 118 Ill. App. 3d 766 (4th Dist. 1983), which held that expert testimony was required to prevail on a claim of lack of informed consent. A later decision, *Coryell v. Smith*, 274 Ill. App. 3d 543 (1st Dist. 1995), arrived at the opposite conclusion. The appellate court was charged with the burden of resolving this conflict in the law, which it did. Although the ruling went against Defendant, counsel welcomed the fact that this conflict in the appellate court had finally been put to rest. Plaintiffs' suggestion that Defendant is engaged in a "Quixotic quest" to overturn the decision in *Crim I* is simply untrue (Brief, p. 11).

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

Plaintiffs then go on the attack, claiming that Defendant presented a "disingenuous version of events" and engaged in "flagrant misrepresentation of the facts" (Brief, p. 11). But they identify no specific instances of these purported misrepresentations. Instead, they offer the following reasons for their conduct in this case.

First, they contend that they did not file a post-trial motion because this Court held that no post-trial motion is required. *Keen v. Davis*, 38 Ill. 2d 280 (1967). That is absolutely correct when dealing with an appeal of a directed verdict. But Plaintiffs fail to account for the statutory requirement that a post-trial motion is required to preserve issues on appeal following a jury trial. 735 ILCS 5/2-1202(b). Plaintiffs' decision to forego filing a post-trial motion demonstrates that they intended to abandon the issue of professional negligence, as they explained in the first page of their brief in *Crim I*.

Next, Plaintiffs point out that they placed all the issues at trial before the appellate court by requesting that the court reverse each and every decision and order which were further steps in enforcing the erroneous directed verdict (Brief, p. 11). But as Plaintiffs surely know, the jury's verdict had nothing to do with the directed verdict. Certainly, the jury's verdict could not be a "further step" toward the directed verdict when it occurred afterwards.

Next, Plaintiffs contend that Defendant knew all along about the scope of relief sought by Plaintiffs, "only feigning confusion" about the outcome six months later (Brief, p. 11). Apparently, Plaintiffs' counsel is privy to the

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innermost thoughts of defense counsel which, if true, is profoundly distressing. But they offer no evidence to support the claim. To the extent that Plaintiffs' counsel's tactics surprised defense counsel, that surprise was fully justified. Plaintiffs did everything possible to convince Defendant (and the courts) that they would not contest the jury's verdict. But upon remand, they had a change of heart and claimed that a verdict fairly tried and expressly abandoned on appeal should be resurrected.

This raises an interesting question. If it was their plan all along to seek a retrial of the professional negligence claim, why would Plaintiffs risk losing that opportunity by declining the opportunity to contest the jury's verdict in both the trial and appellate courts? Why would they take that risk? This is a case of first impression under Illinois law. No court has ever allowed a plaintiff to retry a jury verdict after failing to file a post-trial motion. How could Plaintiffs be confident that they would be able to retry the jury's verdict after explicitly informing the court and opposing counsel that they would not appeal it, and never asking for that relief on appeal? It makes no sense.

Plaintiffs argue:

> Plaintiffs did not expressly abandon any portion of their claim. In filing a timely appeal pursuant to an erroneous directed verdict, and asking the Appellate Court for a blanket reversal and remandment in *Crim I* for an error that occurred at trial, Plaintiffs sought a new trial on all issues.

(Brief, p. 13). There a number of problems with this argument. First, Plaintiffs appear to be incapable of coming to terms with the statement they made in the

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

Introductory Paragraph to their opening brief in *Crim I*. They informed the court that the appeal was not based on the jury's verdict, but was instead aimed solely at the directed verdict. The fact that they did not raise a single argument related to the jury's verdict establishes beyond question that they considered the issue abandoned.

Second, the trial court's order directing a verdict was not erroneous at the time it was made. Judge Drummond correctly believed he was following Fourth District precedent. He reluctantly directed a verdict because he reasonably believed he had no choice.

Third, Plaintiff *never* asked for a blanket reversal and remand in *Crim I*, nor did they ever ask for a new trial on all issues. They opened their brief with an explicit assertion that they did not intend to appeal the jury's verdict, and they held true to their word, at least for a while.

III. Plaintiffs Never Sought a New Trial on all Claims in Their Initial Appeal.

Plaintiffs continue their attack claiming that Defendant is engaged in "a cynical effort to rewrite history" and that the reference to the Introductory Paragraph of their brief in *Crim I*, is "plainly in bad faith" (Brief, p. 14). They support this attack by reference to Defendant's appellee brief in *Crim I*, where Defendant asserted that Plaintiffs failed to raise any argument addressing the jury's verdict. From this, Plaintiffs argue:

> Defendant clearly understood at that time that Plaintiffs were requesting a new trial on all issues. She opposed it. She lost.

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

(Brief, p. 14). Nothing in Defendant's brief suggested that Plaintiffs were requesting a new trial on all issues. Rather, Defendant merely pointed out to the court that Plaintiffs had, in fact, abandoned the issue. Defendant did not "oppose" Plaintiffs on this point for the simple reason that there was nothing to oppose. Nor can it be said that Defendant "lost." The appellate court never addressed the issue, nor should it have in light of the fact that Plaintiffs' chose not to file a post-trial motion and expressly abandoned the issue in their Introductory Paragraph to their brief.

Plaintiff contends that it was incumbent upon Defendant to file a petition for rehearing in *Crim I* in order to protect her rights. But those rights were already protected by operation of statute, the law of the case doctrine, and Supreme Court Rules. 735 ILCS 5/2-1202(b), (e); *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 547 (1997) (where a party fails to challenge a legal decision when she has the opportunity to do so, she forfeits the right to challenge the decision at a later time and the decision becomes the law of the case for future stages of the same litigation); Ill. S. Ct. R. 366(b)(2)(iii); *In re Parentage of Kimble*, 204 Ill. App. 3d 914, 916-17 (2d Dist. 1990) (Failure to file a post-trial motion following a jury's verdict amounts to a failure to preserve the issue for appeal).

Plaintiffs then points to their notice of appeal, which they claim put Defendants on notice of their intent to seek reversal of the jury verdict. They cite *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427 (1979) for the proposition that

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

notices of appeal should be liberally construed. Buried in the middle of their block quotation is the following statement:

> Briefs, and not the notice of appeal itself, specify the precise points to be relied upon for reversal.

Burtell, 76 Ill. 2d at 433. Needless to say, Plaintiffs brief offered no hint that they intended to contest the jury's verdict, nor did the brief contain any suggestion that Plaintiffs would seek to retry that claim.

This raises another critical point. Had the plaintiffs stated in the conclusion of their brief in *Crim I* that they sought a new trial on all issues, the appellate court would most certainly have ruled against them. The appellate court would have had no choice but to affirm the jury's verdict due to: (a) failure to allow the trial court to correct errors in the first instance via post-trial motion; (b) failure to identify any error underlying the jury's verdict; and (c) failure to present any argument or cite any authority in support of a claim of error. In other words, the only way to obtain a new trial on all issues was to conceal their intentions.

IV. The Rule That, Following a General Remand, a Trial Court Has the Same Powers it Had When the Case Was First Tried Has No Relevance Where the Appellant Abandons a Claim That Could Have Been Contested on Appeal.

Plaintiffs rely on this Court's decision in *People ex rel. Borelli v. Sain*, 16 Ill. 2d 321 (1959), for the proposition that, where a court of review *does not determine the merits of a case* but merely reverses and remands without specific directions, the judgment of the lower court is entirely abrogated and the cause stands as if no trial had occurred. An example illustrating this rule would be a reviewing court's

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

finding that a trial court committed reversible error in admitting certain evidence. If the appellate court remanded without instructions, then yes, a new trial would be held on all issues because the reviewing court did not rule on the merits.

But the circumstances at issue in the case at bar are completely different. In this case, the appellate court *did* rule on the merits of the case on the sole issue presented—the trial court's order directing a verdict. Accordingly, the rule expressed in the *Borelli* decision has no relevance to this case.

The same is true for another case cited in Plaintiffs' brief, *Rigdon v. More*, 242 Ill. 256 (1909). In that case, this Court issued a general remand in a case involving the collection of real estate commissions. The sole question on appeal was whether the remanding order was conclusive as to the judgment to be entered by the trial court or whether the case was sent back for a trial *de novo*. The court explained:

> [W]e think it is clear from the opinion and remanding order that it was sent back for a trial *de novo*; that the error pointed out by this court was of such character that it might have been obviated by additional evidence on the second trial. Both parties on the second trial were entitled to a jury.

Rigdon, 242 Ill. at 259 (internal citation omitted). Like *Borelli*, the court did not rule on the merits in the first appeal. The basis of its ruling was that further evidence was needed.

Plaintiffs cite *Rigdon* for the proposition that, where "the errors have intervened prior to the entry of the judgment, and the cause is reversed, it must

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

be remanded for a trial *de novo*" (Brief, p. 17). But that rule presumes that all issues were actually raised in the initial appeal. Here, they were not.

The same analysis applies to another case Plaintiffs rely upon, *Ziolkowski v. Continental Casualty Co.*, 365 Ill. 594 (1937), where the Court held that the trial court has the same powers after a reversal and remandment without directions that it had when the case was first tried. But that rule presumes that all issues were presented for review. It has no relevance to a case where the appellant explicitly abandoned an issue that it could have contested on appeal.

A recent appellate court decision illustrates a problem with the proposition that a trial *de novo* is warranted where errors occur prior to judgment. In *Keiser-Long v. Owens*, 2015 IL App (4th) 140612, the trial court granted a partial directed verdict in favor of defendant on the issue of lost earning capacity. The case proceeded on the remaining claims and the jury found for the plaintiff. The plaintiff appealed the directed verdict and the appellate court reversed and remanded for a new trial limited to solely to the issue of lost earning capacity.

Plaintiffs' in the case at bar argue that a reversal of a partial directed verdict necessarily leads to a trial *de novo* on all issues, even as to those issues not raised on appeal. If that is true, then the defendant in *Keiser-Long* should have been allowed a new trial on all claims, including the claims the jury decided in the first trial. In other words, Plaintiffs' argument potentially cuts both ways. A defendant-appellee would have the same right to retry the entire case as plaintiff-appellant, even when the jury verdict was not litigated on appeal.

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

Finally, Plaintiffs contend that a post-trial motion would have been futile and that they were under no obligation to file an "ultimately meaningless post-trial motion" (Brief, p. 17). The flaw in that assertion is plain to see. The obligation to file a post-trial motion to obtain review of a jury verdict is clearly laid out in the Code of Civil Procedure. 735 ILCS 5/2-1202.

Nor can it be said that the post-trial motion would have been futile. If the verdict was in error, it was incumbent upon Plaintiffs to allow the trial court the opportunity to address those errors in the first instance. The purpose of a post-trial motion is to allow "the decision maker who is most familiar with the events of the trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes that his earlier decision was incorrect." *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349 (1980). Plaintiffs bypassed this requirement and now demand a new trial on a claim that was presumably fairly tried to a jury.

V. Plaintiffs' Allegations of Lack of Informed Consent Have No Logical Connection to a Physician's Conduct during Delivery.

Plaintiffs argue that it is "evident from the record" that the directed verdict on their claim for lack of informed consent prejudiced their claim for professional negligence (Brief, p. 19). They contend that the directed verdict tainted the jury deliberations "by removing allegations that impacted the remaining theories of recovery." *Id.* But they leave it to our imagination to explain exactly how the two issues are intertwined.

SUBMITTED - 5615265 - Laura Berry - 7/9/2019 9:34 AM

The claim for professional negligence is comprised of two charging allegations:

- That Dr. Dietrich applied more traction than a reasonable obstetrician would apply under the same circumstances; and
- That she failed to manage and resolve the incident of shoulder dystocia that occurred during childbirth in a manner consistent with the standard of care

(S.R. 5). In other words, the allegations are directed solely toward her conduct in delivering the child. These allegations have no connection at all to the allegations for lack of informed consent. For example, how is it possible that the following allegations would have any relevance to Dr. Dietrich's conduct in delivering the child?

- Failed to perform an ultrasound after 35 weeks gestation;
- Failed to discuss the risks of vaginal birth;
- Failed to offer the option of caesarian section.

(S.R. 4-5). Not one of the allegations involving Dr. Dietrich's conduct prior to birth has any relevance to a claim that she applied too much traction or that she did not properly resolve the incident of shoulder dystocia. Plaintiffs contend that the directed verdict removed "a logical underpinning of the remaining theory of liability" but never explains what that that underpinning is. *Id.* In fact, the claims involving conduct *prior* to delivery have no connection at all with claims of negligent conduct *during* childbirth. Finally, to the extent that any reasonable argument could be made to support the notion that the evidence was somehow

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intertwined, it was incumbent upon Plaintiffs to raise that claim in their initial appeal.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Appellant's Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of the Appellant's Reply Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

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

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on July 1, 2019, I electronically filed and transmitted the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Supreme Court for the by using the Odyssey eFileIL system.

I further certify that the other individuals in this case, named below will be served via the Odyssey eFileIL system on July 1, 2019.

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

BY: /s/Laura Berry

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