

NOTICE

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2018 IL App (4th) 170864

NO. 4-17-0864

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 10, 2018

Carla Bender

4th District Appellate

Court, IL

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

JUSTICE STEIGMANN delivered the judgment of the court.

Justice DeArmond concurred in the judgment.

Justice Turner dissented.

ORDER

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

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

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

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

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

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

¶ 6 The trial court certified the following question for appeal: "Whether the ruling of the Appellate Court, 2016 IL App (4th) 150843, reversing the judgment and remanding this case for a new trial requires a trial *de novo* on all claims." We answer the certified question in the affirmative.

¶ 7 I. BACKGROUND

¶ 8 A. The Crims' Claims

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

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

¶ 10

B. The Jury Trial

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

¶ 12

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

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

¶ 14 C. The First Appeal

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

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

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

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

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

¶ 19 D. The Proceedings on Remand

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

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

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

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

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

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

¶ 25 E. The Certified Question

¶ 26 In October 2017, the parties submitted a joint proposed order certifying a question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). The proposed question was "[w]hether the ruling of the Appellate Court, 2016 IL App (4th) 150843,

reversing the judgment and remanding this case for a new trial requires a trial *de novo* on all claims.”

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

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

¶ 29 II. ANALYSIS

¶ 30 The trial court certified the following question for appeal: “Whether the ruling of the Appellate Court, 2016 IL App (4th) 150843, reversing the judgment and remanding this case for a new trial requires a trial *de novo* on all claims?” We answer the question in the affirmative.

¶ 31 A. The Arguments of the Parties

¶ 32 Dietrich argues that (1) the Crims forfeited any challenge to the verdict on negligence during delivery and (2) they are barred by the law-of-the-case doctrine from raising the issue on remand. Dietrich contends a party is required to file a posttrial motion to preserve any issues for appeal following a jury verdict, except when a directed verdict is entered. Because the Crims did not file a posttrial motion, Dietrich claims they only preserved the informed consent issue, and the jury verdict became law-of-the-case. Dietrich also claims the Crims forfeited the issue of the propriety of the jury’s verdict by failing to specifically address it in their

appellate brief, request a new trial on all issues, or support these points with citation to authority.

¶ 33 The Crims respond that they preserved all issues for review by specifically including the final judgment entered on the jury's verdict in their notice of appeal and by requesting a new trial in their brief. The Crims contend several Illinois cases make clear that when a judgment is reversed and remanded without specific directions, the judgment is entirely abrogated and the trial court must conduct a trial *de novo* on all issues. Because the error that was reversed and remanded for a new trial occurred prior to the jury's verdict, the Crims argue, the entire trial is abrogated.

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

¶ 35 B. Scope of Appeal and Standard of Review

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

¶ 37 C. The Law of Interpreting Appellate Mandates

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

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

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

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

¶ 41 D. The Mandate in *Crim*

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

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

¶ 43 Our opinion in *Crim* did not contain any specific instructions on how the proceedings should continue in the trial court on remand though we easily could have. We merely stated that a new trial was required without limiting the issues or the trial court’s authority on remand. Our mandate and opinion use general language rather than specific instructions. In reversing the trial court’s directed verdict, it would appear the trial court is to return to that moment in the trial when that judgment was entered and that the court was to proceed as if no trial had taken place. *Firststar*, 365 Ill. App. 3d at 940; *Clemons*, 202 Ill. 2d at 354 (quoting *Roggenbuck v. Breuhaus*, 330 Ill. 294, 298, 161 N.E. 780, 781–82 (1928)). In other words, the decisive wording in *Crim* implies the entire judgment was abrogated and the trial court is to proceed as if hearing the case for the first time. *Firststar*, 365 Ill. App. 3d at 940; *Roggenbuck*, 330 Ill. at 298, 300. In *Roggenbuck*, the court held “[i]f a judgment in an ordinary suit at law in which the parties are entitled to a jury trial is reversed for errors intervening prior to the entry of the judgment and the cause is remanded generally, the parties are entitled to a trial *de novo*.” *Roggenbuck*, 330 Ill. at 300. The Illinois Supreme Court in *Clemons* stated “*Roggenbuck* contains a thorough and still valid discussion of proceedings that may take place after remand.” (Internal quotation marks omitted.) *Clemons*, 202 Ill. 2d at 354.

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

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

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

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

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

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

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

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

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

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

