No. 122974

In the
Supreme Court of the State of Illinois

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, deceased,

Plaintiff-Appellee,

v.

LORI ORTBERG, individually, and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
Second Judicial District, No. 2-16-1086
There Heard on Appeal from the Circuit Court of the Seventeenth Judicial Circuit,
Winnebago County, Illinois, No. 2014 L 35
The Honorable **J. Edward Prochaska**, Judge Presiding

ADDITIONAL BRIEF OF DEFENDANTS-APPELLANTS

Hugh C. Griffin
Stevie A. Starnes
HALL PRANGLE & SCHOONVELD, LLC
200 S. Wacker Drive, Suite 3300
Chicago, Illinois 60606
TEL: (312) 345-9600
FAX: (312) 345-9608
Email: hgriffin@hpslaw.com
sstarnes@hpslaw.com

Laura G. Postilion
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
Phone: (312) 566-0040
Fax: (312) 566-0041
Email: laura.postilion@qpwblaw.com

Attorneys for Defendants-Appellants

ORAL ARGUMENT REQUESTED

E-FILED
5/25/2018 2:51 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 122974

In the
Supreme Court of the State of Illinois

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, deceased,

Plaintiff-Appellee,

v.

LORI ORTBERG, individually, and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
Second Judicial District, No. 2-16-1086
There Heard on Appeal from the Circuit Court of the Seventeenth Judicial Circuit,
Winnebago County, Illinois, No. 2014 L 35
The Honorable **J. Edward Prochaska**, Judge Presiding

ADDITIONAL BRIEF OF DEFENDANTS-APPELLANTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

This appeal arises from a wrongful death action brought by plaintiff Zachary Stanphill, seeking to recover for the suicide of his father, Keith Stanphill ("Mr. Stanphill"). Defendants are Lori Ortberg, a licensed clinical social worker and her employer, Rockford Memorial Hospital d/b/a Rockford Memorial Health Systems ("Rockford Memorial") (collectively "Ortberg/Rockford Memorial").

Plaintiff alleged that Ms. Ortberg was professionally negligent, *i.e.*, that she violated the standard of care applicable to a reasonably careful licensed clinical social worker in her assessment of Mr. Stanphill on September 30, 2005, and that her professional negligence was the proximate cause of Mr. Stanphill's suicide on or about October 9, 2005. Rockford Memorial was sued solely on the theory of vicarious liability as Ms. Ortberg's employer.

The case was tried in the Circuit Court of Winnebago County before the Honorable Edward J. Prochaska and a jury. On June 2, 2016, the jury returned a general verdict in favor of plaintiff. (R. 1941) (A. 98). However, the jury also answered "no" to the following special interrogatory:

> "Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?"
>
> YES_____ NO___X___

(R. 1942) (A. 99).

Based on the jury's answer to this special interrogatory, Judge Prochaska entered judgment in favor of the defendants Ortberg/Rockford Memorial. (R.

1947, C4741) (A. 94). On November 23, 2016, Judge Prochaska denied plaintiff's post-trial motion in its entirety. (R. 1988-89, C5798) (A. 43). Plaintiff appealed.

On October 31, 2017, the Second District Appellate Court reversed and remanded with directions to enter judgment in favor of plaintiff on the general verdict. *Stanphill v. Ortberg*, 2017 IL App (2d) 161086 (A. 1-20). This Court granted Ortberg/Rockford Memorial's Petition for Leave to Appeal on March 21, 2018. (A. 35).

JURISDICTION

The Appellate Court had jurisdiction under Ill. S. Ct. R. 301 and 303 governing appeals from final judgments. The final judgment in favor of Ortberg/Rockford Memorial was entered on June 2, 2016. (R. 1947; C4741) (A. 94). Plaintiff's timely post-trial motion was denied on November 23, 2016. (R. 1988-89, C5798) (A. 43). Plaintiff timely filed his notice of appeal on December 21, 2016. (R. C5799-5804) (A. 37-42). This Court has jurisdiction under Ill. S. Ct. R. 315(a). This Court granted Ortberg/Rockford Memorial's Petition for Leave to Appeal on March 21, 2018 (A. 35), and thereafter extended the time for Ortberg/Rockford Memorial to file their Additional Defendants-Appellants' Brief to May 25, 2018. (A. 36).

ISSUES PRESENTED FOR REVIEW

1. Did plaintiff preserve his appeal objections to the form of the special interrogatory, and if so, was the interrogatory in proper form?

2. Was the jury's negative answer to the special interrogatory inconsistent with the jury's general verdict?

STATEMENT OF FACTS

Mr. Stanphill and His Family

In September 2005, decedent Keith Stanphill was 47 years old. (R. 2014). He had been married for 18 years to Susan Stanphill and they had two children – Zachary, age 9, and Kayla, age 3. (R. 626). Mr. Stanphill had a strong work ethic and had been a successful car salesman for 20 years. (R. 627, 762). The family was very religious, regularly attending church every Wednesday night and twice on Sunday. (R. 629).

Mr. Stanphill had a close relationship with his father-in-law, Wesley Poe, and his wife, Glenda Poe. Mr. Poe was Pastor of the Pentecostal Church that Mr. Stanphill and his family attended. (R. 629, 758-59). Mr. Stanphill had known Mr. Poe for 25-30 years. (R. 760).

Marital Problems

Mrs. Stanphill testified that marital problems between her and Mr. Stanphill began in late 2001 when Mrs. Stanphill's mother died and their daughter Kayla was born with serious medical issues that caused stress and financial strain. (R. 633-34). In 2005, Mrs. Stanphill began a "relationship" with Michael Barnhart,

the security guard for the school at which she worked. (R. 637, 693-95, 798-99). Mrs. Stanphill told Mr. Stanphill about the relationship. (R. 693-95). Also in late August, Mr. Barnhart's wife sent Mr. Stanphill romantic emails that had been exchanged between Mr. Barnhart and Mrs. Stanphill . (R. 640-41). These emails made Mr. Stanphill concerned about his marriage and whether his wife would leave him. (R. 640-41). Mrs. Stanphill reassured him that she was willing to do whatever was needed to save their marriage. (R. 641). Mrs. Stanphill also recommended that Mr. Stanphill see their family physician, Dr. Thomas Schiller. (R. 646-47). Dr. Schiller did not see Mr. Stanphill but in response to a phone call from Mrs. Stanphill, he prescribed an antidepressant (Wellbutrin XL) that Mr. Stanphill began taking on September 8, 2005. (R. 647-48, 715-18, 1342-43).[1] Mrs. Stanphill also asked Mr. Stanphill if he would be willing to see a counselor, and he said yes. (R. 655). Mrs. Stanphill then called her employer's Employee Assistance Program (EAP) and made arrangements for Mr. Stanphill to see an EAP counselor. (R. 655).

Mr. Stanphill Visits Lori Ortberg on September 30, 2005

Mr. Stanphill had a one-time, one hour EAP session with Lori Ortberg on September 30, 2005. (R. C7241) (R. 464, 467, 973). Ms. Ortberg was employed by Rockford Memorial Hospital (R. 488-89) and had been serving the Rockford community as a mental health care counselor since 1981. (R. 459-60). She

[1] Dr. Schiller and his Clinic were also initially sued (R. C129-140), and they ultimately settled. (R. C3684).

completed a Master's program and became a licensed clinical social worker in 1999. (R. 461). By the time of her session with Mr. Stanphill, Ms. Ortberg had been working in the EAP setting for more than a decade (R. 462).

Although at the time of trial Ms. Ortberg did not have an independent recollection of the visit with Mr. Stanphill, she testified about the EAP session relying upon the notes she contemporaneously made on Mr. Stanphill's EAP self-assessment form, on her custom and practice, and on her typed-up EAP Progress Record wherein she summarized their hour-long EAP session. (R. 476, 482, 485, 1639, C7241, C7250) (Supp. R. 14-15). Plaintiff's social worker expert agreed that it was not unusual that a counselor would not remember a one-time, one-hour session with a patient. (R. 969).

Mr. Stanphill told Ms. Ortberg why he was there and how he was feeling (R. 467, 474, 478, 973). Based on the information that Mr. Stanphill shared with her, Ms. Ortberg felt that he was being open and honest with her. (R. 514-15, 2016-17, 2020) (Supp. R. 25). Mr. Stanphill had answered questions on his self-assessment form stating that he had feelings of harming himself or others most of the time; felt sad most of the time; had sleep changes most of the time; had appetite changes all the time; had feelings of anxiety, nervousness, worry and fear all of the time; sudden unexpected panic attacks most of the time; and felt on the verge of losing control most of the time. (R. 74-86; C7259) (Pl. Ex. 19). Thus, Ms. Ortberg and Mr. Stanphill discussed the issues of homicidal and suicidal ideation and suicide plan. (R. 2011, 2026). As Ms. Ortberg and Mr. Stanphill

further explored his mindset, Mr. Stanphill told Ms. Ortberg that he did not have suicidal ideation, and he did not have a suicide plan. (R. 2026, C7241, C7250).

Ms. Ortberg knew that she had explored suicide with Mr. Stanphill because of an entry she made on the self-assessment form, and because of the session summary that she documented on the EAP Progress Record. (R. 514-15, 2026, C7241, C7250). On the self-assessment form, in the box next to Question No. 3 ("Negative Thoughts"), Ms. Ortberg wrote "denies plan." (R. 1644-45, 2010-11, 2026, C7250). Summarizing the session, Ms. Ortberg also made the following entry in the EAP Progress Record: "No homicidal/suicidal ideation or plan identified." (R. 2010-11; 2026, C7241). Based on Mr. Stanphill's denials of suicidality and based on her overall assessment of him during that hour in the EAP office, Ms. Ortberg did not believe that Mr. Stanphill was imminently suicidal on September 30, 2005. (R. 1709, 2055). If Ms. Ortberg had believed that, she would have taken steps to get him to an emergency room (R. 2055). In the exercise of her clinical judgment, Ms. Ortberg diagnosed Mr. Stanphill with "adjustment disorder with depressed mood" and determined that Mr. Stanphill was not in imminent danger of harming himself on the date she assessed him. (R. 1517, 1709, 2042, 2046, 2055).

Also, on September 30, 2005, Mr. Stanphill did not meet any of the "danger to self" requirements for an adult patient hospital admission set forth in the EAP Managed Care Manual (Pl. Ex. 22) (R. C7261-64, C7316), *i.e.,* he had no specific plan to harm himself; he had not made an attempt to harm himself in the past 24

hours; and he had not rejected available social/therapeutic support. (R. 1425-26, 1449).

Given Mr. Stanphill's difficulty in adjusting to the current state of his marriage, Ms. Ortberg did recommend that Mr. Stanphill see Mr. Norm Dasenbrook, a well-regarded, licensed counselor who specialized in marital issues. (R. 2027-30, 2043-44, C7241). Mr. Stanphill signed a document authorizing Ms. Ortberg to release his records to Mr. Dasenbrook. (R. C7428). Before Mr. Stanphill left her office, Ms. Ortberg gave him documents that included the EAP office's address and phone number. (R. 2039-40). Based upon her custom and practice, she also would have told Mr. Stanphill that the counselors at the EAP office were available to address Mr. Stanphill's concerns 24 hours a day, 7 days a week, and that he could call the EAP counselors for advice any time of day or night. (R. 2035-40).

Developments: September 30 – October 9, 2005

After seeing Ms. Ortberg on September 30, 2005, Mr. Stanphill continued to go to work, attend church services, and interact with his family. (R. 650-51, 733, 1427). Mr. Stanphill discussed the EAP session with his wife, they reviewed the EAP paperwork together, and they discussed making an appointment with Mr. Dasenbrook. (R. 657). Mr. Stanphill and his entire family (wife, daughter and son) attended church together on October 2, 2005. (R. 844).

On October 4, 2005, Ms. Ortberg documented in Mr. Stanphill's EAP Progress Record that Mr. Stanphill had made an appointment with

Mr. Dasenbrook. (R. 661, C7241). Mrs. Stanphill testified that she heard Mr. Stanphill on the phone with Mr. Dasenbrook's office and confirmed with him that he had made an appointment to see Mr. Dasenbrook. (R. 659-60). She then called the EAP office on October 4, 2005 to let the EAP staff know that her husband had made an October 11, 2005 appointment with Mr. Dasenbrook and to ascertain how many visits with Mr. Dasenbrook her insurance would cover. (R. 660-61, 1296). Ms. Ortberg considered it reassuring that Mr. Stanphill had followed through on the treatment plan and had made an appointment with Mr. Dasenbrook. (R. 2038). There was no evidence that Mr. Stanphill or his wife ever attempted to contact Lori Ortberg or the EAP office after October 4, 2005.

On October 6, 2005, Mrs. Stanphill and the two children left on a pre-planned trip to visit her sister in Louisville, Kentucky. (R. 665-66). It was something that she did every year, and Mrs. Stanphill had no concerns about leaving her husband alone that weekend because he was taking anti-depressant medication and he had made an appointment to see Mr. Dasenbrook. (R. 666-67, 727-28). Likewise, Mr. Stanphill expressed no concerns about the trip. (R. 666). On that evening, Mr. Stanphill had dinner with the Poes and asked to take the leftovers home so that he could eat them at work the next day. (R. 781, 838, 852-53). He stayed and watched some TV with the Poes and then went home. (R. 781, 852-53).

October 9, 2005: Mr. Stanphill Found Dead in His Garage

Mr. Stanphill did not show up for work on October 7 or 8, 2005 (R. 876), and Mrs. Stanphill was unable to reach him by phone. (R. 668). On October 9, 2005, Mr. Poe went to the Stanphill home and found Mr. Stanphill dead on the floor of the garage next to his car. (R. 669, 785). The car ignition was still on and the gas tank was empty. (R. C7449). He had left a suicide note: "The day my heart broke forever. When I read these emails." (Pl. Ex. 66) (R. C7396, C7498-7501). The romantic emails between Mrs. Stanphill and Mr. Barnhart were attached to the note. (R. C7397-99). An autopsy determined that Mr. Stanphill died of asphyxia resulting from acute carbon monoxide poisoning. (R. C7239, C7450, C7558).

Mr. Stanphill's Family Never Thought He Was Suicidal

Mrs. Stanphill testified that she never thought her husband was suicidal. (R. 736). He had never before attempted to commit suicide, or expressed any thoughts of suicide to her. (R. 734-35). Likewise, the Poes never suspected that Mr. Stanphill was suicidal. Mr. Poe, who provided religious counseling to his parishioners (R. 760), testified that Mr. Stanphill never told him that he was thinking about suicide or had any suicidal plan, and Mr. Poe never suspected that Mr. Stanphill was someone about to commit suicide. (R. 805-06). Mrs. Poe likewise testified that she never felt Mr. Stanphill was at imminent risk for suicide. (R. 852-53). Mr. Stanphill never mentioned any thoughts of suicide to her. (R. 843). The Poes did not think Mr. Stanphill had given up hope on his marriage (R.

806, 851-52), and Mr. Stanphill had never expressed to them that he felt as if he were in a hopeless or helpless situation. (R. 806, 843).

Lawsuit

Mrs. Stanphill, as Administrator of the Estate of Keith Stanphill, Deceased, initially filed a wrongful death action against Ortberg/Rockford Memorial in 2007, and then re-filed it on February 7, 2014. (R. C2-25). Upon reaching his eighteenth birthday, Zachary Stanphill was substituted in place of his mother as the Administrator of the Estate. (R. C2646-50). The case proceeded to jury trial from May 23, 2016 to June 2, 2016.

Expert Testimony – Standard of Care

Plaintiff and Ortberg/Rockford Memorial each called a social worker to testify as to Ms. Ortberg's compliance with the standard of care for a licensed clinical social worker. Plaintiff's social worker expert, Daniel Potter, opined that Ms. Ortberg violated the standard of care by determining that Mr. Stanphill was not suicidal and not referring him to a hospital emergency room or to a psychiatrist for further assessment. (R. 933-34, 958-60). Defendants' social worker expert and EAP specialist, Terri Lee, testified that Ms. Ortberg complied with the standard of care in all respects, that she properly diagnosed Mr. Stanphill, and that she was not required to refer him to a hospital emergency room or to a psychiatrist. (R. 1608-09, 1626, 1643, 1651-52, 1656, 1672, 1674). Ms. Lee emphasized that Ms. Ortberg's referral of Mr. Stanphill to Norm Dasenbrook for

outpatient counseling was proper and compliant with the standard of care. (R. 1626, 1643, 1651-52 1656).

Expert Testimony – Causation – Reasonable Foreseeability

Both plaintiff and Ortberg/Rockford Memorial called a psychiatrist to testify on the issue of proximate cause/reasonable foreseeability. Plaintiff's psychiatrist expert, Dr. George Bawden, opined that "it was reasonably foreseeable" to Lori Ortberg on September 30, 2005 that Mr. Stanphill would commit suicide about a week later (R. 1131), although he somewhat qualified that opinion on further cross-examination. (R. 1132-35).

Defense psychiatrist expert, Dr. Steven Hanus, testified it was not reasonably foreseeable to Ms. Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005. (R. 1398). He testified that there was no evidence Mr. Stanphill was at imminent risk of harming himself on September 30, 2005, the date of the EAP session (R. 1398) given that: Mr. Stanphill denied having any suicidal ideation or suicidal plan during the EAP session (R. 1449); Ms. Ortberg specifically documented that Mr. Stanphill denied having suicidal thoughts or a suicidal plan on September 30, 2005 (R. 1425); Mr. Stanphill had not made a suicide attempt before (R. 1449); there was no family history of suicide (R. 1449); the EAP documentation demonstrated that Mr. Stanphill was working (R. 1425, 1449); Mr. Stanphill was religious and was receiving pastoral care from his father-in-law Mr. Poe, who had been his pastor for more than twenty years (R. 1449); Mr. Stanphill had been recently staying

overnight at the Poe's home and had a close relationship with both Mr. and Mrs. Poe (R. 1425); Mr. Stanphill was seeing his children every day (R. 1425, 1449); Mr. Stanphill was keeping up with his hygiene (R. 1425-26); and Mr. Stanphill, at the end of his EAP session with Ms. Ortberg, agreed to outpatient therapy with a highly-qualified social worker, Norm Dasenbrook. (R. 1426, 1449).

The fact that Mr. Stanphill followed the treatment plan and that he made an appointment with Mr. Dasenbrook for outpatient mental health counseling provided further reassurance to Ms. Ortberg that he was not suicidal. (R. 1440). Dr. Hanus explained that someone who was actively suicidal on September 30, 2005 would not have actually made a follow-up counseling appointment for a future date. (R. 1441).

On the issue of causation, *i.e.,* what would have happened if Ms. Ortberg had referred Mr. Stanphill to an emergency room or to a psychiatrist on September 30, 2005, defense expert psychiatrist, Dr. Hanus, believed that there would have been no different outcome, and that a psychiatrist or emergency room personnel would have concluded that Mr. Stanphill was not suicidal on that date and would have recommended that he follow up with Mr. Dasenbrook on an outpatient basis. (R. 1449-50). Plaintiff's psychiatrist expert, Dr. Bawden, testified that if Ms. Ortberg had referred Mr. Stanphill to a hospital emergency room or to a psychiatrist his suicide would have been prevented (R. 1200), although he conceded that a hospital's ultimate decision as to whether to admit Mr. Stanphill would have been made by an emergency room physician and that he was not

qualified to render an opinion as to the standard of care applicable to an emergency room physician. (R. 1158).

Jury Instructions

The jury instructions included an issues instruction wherein plaintiff alleged that Lori Ortberg was professionally negligent as follows: a) failed to recognize that Keith Stanphill was suicidal; b) failed to properly diagnose Keith Stanphill's depression; c) failed to evaluate Keith Stanphill with the proper mental health assessment; d) failed to refer Keith Stanphill to a psychiatrist; and e) failed to refer Keith Stanphill to a hospital emergency room. (R. C4783).

Accordingly, the trial court also gave the "professional negligence" instruction (IPI 105.01) as follows:

> "A licensed clinical social worker must possess and use the knowledge, skill, and care ordinarily used by *a reasonably careful licensed clinical social worker.* The failure to do something that a reasonably careful licensed clinical social worker would do, or the doing of something that a reasonably careful licensed clinical social worker would not do, under circumstances similar to those shown by evidence, is 'professional negligence.'
>
> The phrase 'deviation from the standard of care' means the same thing as 'professional negligence.'
>
> The law does not say how *a reasonably careful licensed clinical social worker* would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified witnesses or evidence of policies. You must not attempt to determine how *a reasonably careful licensed clinical social worker* would act from any personal knowledge you may have." (Emphasis added.) (R. C4781).

Jury Also Given Special Interrogatory Approved By First District In *Garcia*

Ortberg/Rockford Memorial submitted a special interrogatory, essentially identical to that approved in *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 10, *pet. for leave to appeal den.*, 962 N.E.2d 481 (Table) (A. 21-34). In *Garcia*, plaintiff's decedent died after jumping out of a nursing home window. The jury returned a general verdict in favor of plaintiff, but the First District upheld the entry of judgment in favor of the defendant (Lee Manor) on the basis of the jury's negative answer to the following special interrogatory:

> "Prior to Roberto Garcia's death, was it reasonably foreseeable to [defendant][2] that he would commit suicide or act in a self-destructive manner on or before April 21, 2004?" *Garcia*, ¶ 10 (A. 25).

The First District held that the jury's negative answer to this interrogatory was inconsistent with the general verdict and that the special interrogatory was in proper form. *Garcia*, ¶¶ 46, 50, 51-55. (A. 32-34).

In the instant case, plaintiff objected to inclusion of the "or act in a self-destructive manner" language (R. 1576, 1586, 1588-89) (A. 117, 127, 129-30), and thus that phrase was deleted from the special interrogatory that was given to the *Stanphill* jury as follows:

> "Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?" (R. 1942) (R. C4769) (A. 99).

---

[2] Seneca Nursing Home, Inc. d/b/a Lee Manor. (A. 21).

Closing Arguments

Both plaintiff's counsel and defense counsel vigorously argued the foreseeability issue and addressed the special interrogatory in their closing arguments to the jury. Plaintiff's counsel argued:

> "You're going to get a special interrogatory in this case. The Judge has already told you about that, that you're going to have to determine and sign was it reasonably foreseeable to Lori Ortberg on September 30th that he would commit suicide? The answer is absolutely yes, without question. Absolutely yes, without question." (R. 1827).

Defense counsel urged the jury to return the opposite answer:

> "This is our special interrogatory that the Judge has read to you. And the question is: Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005? And I would ask that you check the box no." (R. 1924).

Jury Verdict, Special Interrogatory Answer, and Judgment

On June 2, 2016, the jury returned a general verdict in the amount of $1,495,151 in favor of plaintiff, but answered the special interrogatory "No." (R. 1941-42) (A. 98-99). In accordance with the *Garcia* decision and 735 ILCS 5/2-1108, the trial judge (Hon. Edward Prochaska) ruled that the answer to the special interrogatory was inconsistent with the general verdict and entered judgment in favor of the defendants. (R. 1946, C4741) (A. 103). Judge Prochaska subsequently denied plaintiff's post-trial motion. (R. 1988-89, C5798) (A. 43).

However, in the course of his post-trial ruling, Judge Prochaska expressed his personal view that the First District's decision in *Garcia* was "wrongly decided." (R. 1985) (A. 78). He urged the Second District to "take a hard look" at *Garcia*, not to follow *Garcia*, and to reverse and enter judgment in favor of plaintiff on the general verdict. (R. 1989) (A. 82). Judge Prochaska was further critical of the language in the interrogatory asking whether Mr. Stanphill's suicide was "reasonably foreseeable to Lori Ortberg." (R. 1985-87) (A. 78-80). However, Judge Prochaska also readily acknowledged that:

> "The whole trial was about whether or not she [Lori Ortberg] should have foreseen the suicide. It's throughout the record." (R. 1986) (A. 79).

Second District Does Not Follow Garcia – Orders Judgment Entered In Favor Of Plaintiff On The General Verdict

Quoting Judge Prochaska's criticisms of and disagreement with *Garcia* (Opinion, ¶ 19) (A7-9), the Second District reversed the judgment in favor of Ortberg/Rockford Memorial entered on the special interrogatory answer and remanded the case with directions to enter judgment in favor of the plaintiff on the general verdict. (Opinion ¶ 47) (A20).

Contrary to the First District's decision in *Garcia*, the Second District held that the special interrogatory answer was not inconsistent with the general verdict and the interrogatory was not in proper form. (Opinion, ¶¶ 29-36) (A12-16). The Second District held that the form of the special interrogatory was improper because (as in *Garcia*) it asked the jury to determine whether the suicide was

reasonably foreseeable to the defendant (Lori Ortberg), when it should have asked whether the suicide was foreseeable to "a reasonable person." (Opinion, ¶¶ 32-33, 36) (A13-15). The Second District further concluded that the special interrogatory answer was not "necessarily inconsistent" with the general verdict because the jury may have found that Mr. Stanphill's suicide was not reasonably foreseeable to Ms. Ortberg because Ms. Ortberg was negligent and did not act reasonably in assessing Mr. Stanphill's suicide risk. (Opinion, ¶¶ 29, 33) (A12, 14).

ARGUMENT

Standard of Review

This case concerns the long-established special interrogatory procedure now set forth in 735 ILCS 5/2-1108 as follows:

> **5/2-1108. Verdict – Special interrogatories**
>
> § 2-1108. Verdict – Special interrogatories. Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly.

"A special interrogatory serves 'as guardian of the integrity of a general verdict in a civil jury trial,'" [citation] and "[i]t tests the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). The reason underlying the rule is that '"a

jury more clearly understands a particularized special interrogatory than a [general verdict, which is] a composite of all the questions in a case."' *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 885 (1st Dist. 2008) (Theis, J.), citing *Borries v. Z. Frank, Inc.*, 37 Ill. 2d 263, 266 (1967).

The issues of whether a special interrogatory was properly given and whether the jury's answer to the special interrogatory was inconsistent with the general verdict are issues of law reviewed *de novo*. *Ahmed*, 385 Ill. App. 3d at 885, citing *Simmons*, 198 Ill. 2d at 556; 735 ILCS 5/2-1108.

I. The Form Of The Special Interrogatory Was Proper.

A. Plaintiff Did Not Preserve His Appeal Objections to the Wording of the Special Interrogatory.

In *Simmons*, this Court stated: "A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons*, 198 Ill. 2d at 555. To the extent that a form objection raises the consistency issue, plaintiff did preserve that issue for appeal, and Ortberg/Rockford Memorial accordingly address that issue in Point II. *infra.*

To the extent, however, plaintiff argued and the Appellate Court held that the wording of the special interrogatory was not proper, that issue was not preserved in the trial court proceedings. "Pursuant to Section 2-1008 of the Code, special interrogatories are to be objected to and ruled upon as in the case of

instructions." *Ahmed*, 385 Ill. App. 3d at 888. That portion of the instruction conference pertaining to the special interrogatory is found at R. 1573-89 and is reproduced in the Separate Appendix. (A. 114-130). Plaintiff's only objection to the wording of the special interrogatory pertained to one phrase ("or act in a self-destructive manner") that had been included in the interrogatory given in *Garcia*. (R. 1574-75) (A. 115-16). The trial court struck that phrase (R. 1586-87) (A. 127-28), and plaintiff's counsel then stated that they were "okay" with the wording of the special interrogatory because it "would be in conformance with the *Garcia* case." (R. 1576-77, 1588-89) (A. 129-30). Plaintiff's counsel made no objection to the inclusion of "Lori Ortberg" in the interrogatory and made no argument that her name should be replaced by reference to a "reasonable person" or a "reasonable licensed clinical social worker." (R. 1574-89) (A. 114-130) (Opinion, ¶¶ 32-33) (A. 13-14). In any event, the forfeiture issue is academic because, contrary to plaintiff's appeal arguments and the Appellate Court's holding (Opinion, ¶ 33) (A. 14), the wording of the special interrogatory was proper.

B. The Special Interrogatory Was Properly Worded.

The Second District held the special interrogatory should not have asked whether Mr. Stanphill's suicide was reasonably foreseeable to defendant Lori Ortberg, but rather should have asked whether Mr. Stanphill's suicide was foreseeable to "a reasonable person." (Opinion, ¶¶ 32-33, 36) (A. 13-16). While many cases, including decisions of this Court, *e.g.*, *First Springfield Bank & Trust Co. v. Galman*, 188 Ill. 2d 252, 258-59 (1999), have analyzed legal causation in

terms of foreseeability to a "reasonable person," those cases are not professional negligence cases.

In the instant case, many "reasonable persons" – including the members of Mr. Stanphill's family – did not foresee that he would commit suicide. (R. 734-36, 805-06, 843, 851-53). Thus, had the special interrogatory been worded as the Second District suggests, plaintiff would indeed have had a valid basis to claim that a negative answer was not inconsistent with the general verdict. A negative answer to such a "reasonable person" interrogatory would not establish whether Mr. Stanphill's suicide was reasonably foreseeable to Lori Ortberg because, as a licensed clinical social worker, she was held to a higher standard of foreseeability than that of a "reasonable person." See *Advincula v. United Blood Services*, 176 Ill. 2d 1, 23 (1996) ("Professionals, in general, are required not only to exercise reasonable care (*i.e.*, due care) in what they do, *but also to possess and exercise a standard minimum of special knowledge and ability.*" (emphasis added)).

This professional knowledge standard applies not only to what professionals do or do not do, but also to what they should reasonably foresee. See, *e.g., Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 982-83 (1st Dist. 2005) (holding that legal cause in a professional negligence action against lawyers is determined by what "a reasonable attorney would see as a likely result of his or her conduct"; therefore, the cause of action for legal malpractice could proceed because the jury could conclude that the outcome "was foreseeable *to the Clifford defendants* – thus, satisfying the legal cause component of proximate

cause." (emphasis added)). Here, as in *Clifford*, it was necessary to test foreseeability from the perspective of what "was reasonably foreseeable to Lori Ortberg," because it was Lori Ortberg's professional actions, as a licensed clinical social worker, that were alleged to constitute professional negligence that proximately caused Mr. Stanphill's suicide. (R. C4783).

The Second District further suggested that the interrogatory might have passed muster if it had referred to the foreseeability of "a reasonable licensed clinical social worker." (Opinion, ¶ 33) (A14). However, the Second District's suggestion overlooked this Court's holding in *Simmons*, 198 Ill. 2d at 563, that "[a] special interrogatory is to be read in context with the court's other instructions to determine how it was understood and whether the jury was confused." Accord *Bruske v. Arnold*, 44 Ill. 2d 132, 136-37 (1969); *La Pook v. City of Chicago*, 211 Ill. App. 3d 856, 866 (1st Dist. 1991); *Snyder v. Curran Twp.*, 281 Ill. App. 3d 56, 63 (4th Dist. 1996); *Vuletich v. Bolgla*, 85 Ill. App. 3d 810, 817 (1st Dist. 1980) ("Special interrogatories must be considered together with and in light of other instructions of the court.").

In *Bruske*, this Court held that the language of the contributory negligence special interrogatory was "defective" because it did not include a reference to proximate cause. *Bruske*, 44 Ill. 2d at 136. Despite the "defective" special interrogatory, this Court found no reversible error because "[t]he jury was fully and adequately instructed on the law concerning contributory negligence, including the requirement of proximate cause." *Id.* at 136. In *Snyder*, a special

interrogatory on contributory negligence omitted the word "negligence," but the court found no error because the jury had been fully instructed on negligence in the contributory negligence instructions. *Snyder*, 281 Ill. App. 3d at 62-63.

Here the jury was properly instructed, pursuant to IPI 105.01, that in determining the reasonableness of Ms. Ortberg's conduct, Ms. Ortberg was held to "possess and use the knowledge, skill, and care ordinarily used by *a reasonably careful licensed clinical social worker*." (Emphasis added.) (R. C4781). The jury is presumed to have followed that instruction. *Powers v. Illinois Cent. Gulf R. Co.*, 91 Ill. 2d 375, 385 (1982). Thus, "considered together" *and* "in context with the court's other instructions," the given special interrogatory – asking the jury whether Mr. Stanphill's suicide "was *reasonably* foreseeable to Lori Ortberg on September 30, 2005" (emphasis added) – asked the jury to decide whether Lori Ortberg, as a reasonable licensed clinical social worker, should have foreseen Mr. Stanphill's suicide at the time of their one-hour EAP session.

Ultimately, the Second District's analysis of the special interrogatory ignored the word "reasonably" altogether when it concluded that the interrogatory asked the jury to determine foreseeability through the "eyes" of Lori Ortberg. (Opinion, ¶ 36) (A15). Ignoring the word "reasonably" in the special interrogatory would create a subjective standard totally at odds with the concept of "reasonable foreseeability" which, as this Court held in *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 369 (1979), "is measured by an objective standard."

The cases relied on by the Second District, *e.g.*, *Lancaster v. Jeffrey Galion, Inc.* 77 Ill. App. 3d 819, 826 (2d Dist. 1979) and *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 406 (2005) (Opinion, ¶¶ 27-29, 37) (A11-12,14), do not support its analysis. Neither of these cases dealt with a suit for professional negligence. In *Lancaster*, 77 Ill. App. 3d at 821, the jury answered affirmatively to a special interrogatory asking whether plaintiff had misused the product at issue in a strict liability case. The court held that the special interrogatory was not controlling because it failed to advise that misuse was not a defense unless it was "not reasonably foreseeable *by the defendants*, or "not reasonably foreseeable *by the manufacturer*." (Emphasis added.) *Id.*at 823. Thus, to the extent *Lancaster* is relevant, it supports the language of the instant interrogatory asking whether Mr. Stanphill's suicide was "reasonably foreseeable to [defendant] Lori Ortberg." A similar result was reached in *Beretta*, a nuisance action brought against firearms manufacturers, distributors and dealers by the City of Chicago and Cook County to recover compensation for the costs of gun violence. This Court, citing Prosser & Keeton on Torts, affirmed the circuit court's dismissal of the action, stating:

> "These excerpts from the treatise illustrate the link between the questions of the existence of a duty and the existence of *legal cause*. *Both depend on an analysis of foreseeability.* In the present case, *the question is* whether *dealer defendants*, given the nature of the product they sell, their awareness of Chicago ordinances regarding firearms, and their knowledge that some of their customers are Chicago residents, *could reasonably foresee* that the guns they lawfully sell would be illegally taken into the city in such numbers

> and used in such a manner that they create a public nuisance. We conclude not." (Emphasis added.) *Beretta*, 213 Ill. 2d at 410.

Beretta and *Lancaster* thus recognize that even in cases outside the professional negligence realm, it is not error to measure legal cause by what the defendant could reasonably foresee.[3] But, as set forth above, such a measure is *mandatory* in a professional liability case. *Advincula,* 176 Ill. 2d at 23. Here the jury concluded that Mr. Stanphill's suicide was not reasonably foreseeable to Lori Ortberg – held to the standard of what a reasonably careful licensed clinical social worker should foresee. See also *Jinkins v. Evangelical Hospitals Corp.*, 336 Ill. App. 3d 377, 384 (1st Dist. 2002) (upholding summary judgment in favor of the defendants in a suicide case "because the *defendants* could not reasonably have foreseen" that the suicide would occur (emphasis added)).

Suicide cases from other states further demonstrate that it is appropriate to analyze reasonable foreseeability *to the defendant* whose negligence is alleged to have resulted in the decedent's suicide: See, *e.g.*, *DeLozier v. Smith,* 522 P.2d 555, 556 (Ariz. App. 1974) (appellate court quoted with approval a jury instruction providing: "If you find the decedent committed suicide and it was *not*

---

[3] For other cases describing proximate cause in terms of what was reasonably foreseeable to the defendant, see, *e.g.*, *Carroll v. McGrath*, 25 Ill. App. 3d 436, 443 (1st Dist. 1974) (describing the issue therein as "whether *defendants* should have reasonably foreseen" that the condition of a tree house would likely result in a child's injury); *Carrillo v. City of Chicago*, 2013 WL 883975 *3 (N.D. Ill. 2013) (stating plaintiff's burden to prove that his arrest "was a foreseeable event to the *defendant* officers"); *Driscoll v. C. Rasmussen Corp.*, 35 Ill. 2d 74, 78 (1966) (noting that "*[d]efendant* could hardly have foreseen" the accident that occurred); *Williams v. Material Service Co.*, 1985 WL 896 fn.2 (N.D. Ill.) (noting that the accident "was not reasonably foreseeable as to *defendant* MSC"). (All emphasis added.).

reasonably foreseeable to the defendants, then you must find for the defendants" (emphasis added)), *rev'd on rehearing*, 524 P.2d 970, 971 (the court holding "that if the jury found the decedent committed suicide and it was *not reasonably foreseeable to appellant*, then it must likewise find for him" (emphasis added)); *Haynes v. Wayne County*, 2017 WL 1421220 * 10 (Tenn. App. 2017) (holding that proximate cause was not established in a suicide case because "there is no evidence that Mr. Haynes's conduct or demeanor *should have given Officer Sanders any reason to foresee* or anticipate that he would do so [commit suicide]" (emphasis added)). In affirming summary judgment for defendants, the Tennessee Court of Appeals further noted that "[n]o rational trier of fact could conclude that Mr. Haynes's suicide was *foreseeable to Defendant* at the time of his release," and "it was not *foreseeable to Defendant* that he would commit suicide." (Emphasis added.) *Id.* * 7-8.

In sum, there was nothing confusing or ambiguous about the form or the wording of the special interrogatory. It asked a single question on a determinative issue of material fact in terms that were simple and understandable, and it was not repetitive or misleading. *Simmons*, 198 Ill. 2d at 563; *Garcia*, ¶¶ 49-55. (A. 33-34).

II. The Jury's Negative Answer To The Special Interrogatory Was Inconsistent And Irreconcilable With The General Verdict.

While a jury's answer to the special interrogatory is deemed inconsistent with a general verdict only where the jury's special interrogatory answer and the

general verdict "are 'clearly and absolutely irreconcilable'" [citation], *Simmons*, 198 Ill. 2d at 556, and all reasonable presumptions are exercised in favor of the general verdict, *id.*, here the jury's finding that Mr. Stanphill's suicide was not reasonably foreseeable to Lori Ortberg cannot be reconciled with the general verdict against Ortberg/Rockford Memorial. See *Garcia*, ¶46: "[W]e cannot reconcile the jury's answer to the special interrogatory with the general verdict in plaintiff's favor." (A. 32). As stated in *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 8 (1st Dist. 2006), holding that the trial court in that suicide case committed reversible error in failing to give a special interrogatory on reasonable foreseeability:

> "Without foreseeability, legal cause cannot be established. Without legal cause, proximate cause cannot be established. Without proximate cause there can be no negligence. Foreseeability was the only subject of defendants' special interrogatory. We believe that the requested interrogatory would have addressed the material issue of ultimate fact on which the rights of the parties depended. A negative answer would have been irreconcilable with the general verdict against defendants. The interrogatory should have been allowed."

Despite the logic espoused by the First District in both *Garcia* and *Hooper*, and the extensive legal precedent on which the First District relied, the Second District in this case found no inconsistency between the jury's negative answer to the special interrogatory and the general verdict, stating:

- "A juror could conclude that, because she was negligent, it was not reasonably foreseeable to her [Lori Ortberg] that Keith would commit suicide approximately nine days after he met with her." (Opinion, ¶ 29) (A12).

- "Although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to plaintiff's theory did not act reasonably) would have." (Opinion, ¶ 33) (A14).

The Second District in essence accepted the general verdict in its entirety, and then conflated that verdict and the special interrogatory answer together in an attempt to find consistency. No case allows that kind of composite analysis of the general verdict and the special interrogatory answer. To the contrary, the jury's answer to the special interrogatory on a material question of ultimate fact is to be reviewed *separate and apart* from the general verdict, and, if inconsistent with that verdict, then the jury's answer to the special interrogatory controls. See *La Pook*, 211 Ill. App. 3d at 866, 868, where the appellate court rejected a similar kind of strained "technical" or "analytical construction" of the special interrogatory answer, noting "the jury's ability to more clearly understand a particularized special interrogatory than a general verdict which is a composite of all the questions in a case." Likewise, in *Snyder*, 281 Ill. App. 3d at 62, the appellate court cautioned against including all the elements of the claim in the special interrogatory, given that the interrogatory is intended "to clarify and sharpen the jury's consideration of the questions presented."

A special interrogatory "tests the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Simmons*, 198 Ill. 2d at 555. Accepting the general verdict as correct, and then melding the special interrogatory answer into the general verdict in an attempt to create a

consistent composite answer, as the Second District did, wholly eliminates this "test" purpose of a special interrogatory and undermines the entire intent and purpose of the special interrogatory statute. 735 ILCS 5/2-1108. Moreover, in its effort to find consistency, the Second District again read the word "reasonably" out of the special interrogatory.

Nor does the inconsistency of the jury's general verdict and its answer to the special interrogatory allow for any finding of jury confusion or ambiguity:

> "A trial court may not conclude from the mere fact of inconsistency between a general verdict and a special interrogatory that the jury was confused by the interrogatory.
>
> * * *
>
> *To do so would nullify the provision of Section 2-1108 of the Code of Civil Procedure that states that a special interrogatory controls where there is inconsistency.*" (Emphasis added.) *Simmons*, 198 Ill. 2d at 563-64.

Considering the jury's answer to the special interrogatory on its own and separate and apart from the general verdict – as it must be – the trial court correctly entered judgment on the special interrogatory in favor of Ortberg/Rockford Memorial. Whether Mr. Stanphill's suicide was reasonably foreseeable to Lori Ortberg during their one-hour EAP session on September 30, 2005 was a determinative issue on each of plaintiff's negligence charges in the issues instruction. (R. C4783). As the trial court correctly noted: "The whole trial was about whether or not she [Lori Ortberg] should have foreseen the suicide." (R. 1986) (A. 79). Ms. Ortberg's conduct alleged in the issues

instruction could not be the legal cause of Mr. Stanphill's suicide if his suicide was not reasonably foreseeable to her on September 30, 2005. *Garcia*, ¶ 46 (A. 32); *Hooper*, 366 Ill. App. 3d at 8-10. Accordingly, the general verdict here "was irreconcilable with the special interrogatory answer, and as a result the trial court properly vacated the judgment in plaintiff's favor and entered judgment for defendant based on that answer." *Garcia*, ¶ 46. (A. 32).

Conclusion

For all the reasons set forth herein, the special interrogatory was in proper form and the jury's negative answer to the interrogatory was inconsistent with the general verdict. Accordingly, the circuit court's judgment entered on the special interrogatory answer in favor of defendants should be affirmed, and the Appellate Court's contrary judgment should be reversed.

Respectfully submitted,

By: */s/ Hugh C. Griffin*
Hugh C. Griffin, one of the attorneys for
Defendants–Appellants Lori Ortberg, individually, and as an agent of Rockford Memorial Hospital d/b/a Rockford Memorial Health Systems; and Rockford Memorial Hospital d/b/a Rockford Memorial Health Systems

Hugh C. Griffin (hgriffin@hpslaw.com)
Stevie A. Starnes (sstarnes@hpslaw.com)
HALL PRANGLE & SCHOONVELD, LLC
200 South Wacker Drive, Suite 3300
Chicago, Illinois 60606
Phone: (312) 345-9600
Fax: (312) 345-9608

Laura G. Postilion (laura.postilion@qpwblaw.com)
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
Phone: (312) 566-0040
Fax: (312) 566-0041

Supreme Court Rule 341 (c) Certification of Compliance

Pursuant to Supreme Court Rule 341(c), I certify that this Additional Brief conforms to the requirements of Rules 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, and the matters contained in the Separate Appendix is 30 pages.

Respectfully submitted,

By: */s/ Hugh C. Griffin*
Hugh C. Griffin, one of the attorneys for *Defendants–Appellants Lori Ortberg, individually, and as an agent of Rockford Memorial Hospital d/b/a Rockford Memorial Health Systems; and Rockford Memorial Hospital d/b/a Rockford Memorial Health Systems*

Hugh C. Griffin (hgriffin@hpslaw.com)
Stevie A. Starnes (sstarnes@hpslaw.com)
HALL PRANGLE & SCHOONVELD, LLC
200 South Wacker Drive, Suite 3300
Chicago, Illinois 60606
Phone: (312) 345-9600
Fax: (312) 345-9608

Laura G. Postilion (laura.postilion@qpwblaw.com)
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
Phone: (312) 566-0040
Fax: (312) 566-0041

No. 122974

In the
Supreme Court of the State of Illinois

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, deceased,

Plaintiff-Appellee,

v.

LORI ORTBERG, individually, and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
Second Judicial District, No. 2-16-1086
There Heard on Appeal from the Circuit Court of the Seventeenth Judicial Circuit,
Winnebago County, Illinois, No. 2014 L 35
The Honorable **J. Edward Prochaska**, Judge Presiding

SEPARATE APPENDIX OF DEFENDANTS-APPELLANTS

Hugh C. Griffin
Stevie A. Starnes
HALL PRANGLE & SCHOONVELD, LLC
200 S. Wacker Drive, Suite 3300
Chicago, Illinois 60606
TEL: (312) 345-9600
FAX: (312) 345-9608
Email: hgriffin@hpslaw.com
sstarnes@hpslaw.com

Laura G. Postilion
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
Phone: (312) 566-0040
Fax: (312) 566-0041
Email: laura.postilion@qpwblaw.com

Attorneys for Defendants-Appellants

ORAL ARGUMENT REQUESTED

E-FILED
5/25/2018 2:51 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

APPENDIX

TABLE OF CONTENTS

[1] On March 24,2017, the Appellate Court granted Plaintiff-Appellant's Motion to Supplement the Record on Appeal with the sealed jury verdict and jury documents and to release and permit viewing by Counsel. Accordingly, the same have not been attached hereto since the release was only for counsel viewing.

2017 IL App (2d) 161086
No. 2-16-1086
Opinion filed October 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ZACHARY STANPHILL, Administrator of the Estate of Keith Stanphill, Deceased, Plaintiff-Appellant, v. LORI ORTBERG, Individually and as an Agent of Rockford Memorial Hospital, d/b/a Rockford Memorial Health Systems; and ROCKFORD MEMORIAL HOSPITAL, d/b/a Rockford Memorial Health Systems, Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County. No. 14-L-35 Honorable J. Edward Prochaska, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices McLaren and Burke concurred in the judgment and opinion.

OPINION

¶ 1 The defendant, Lori Ortberg, performed a suicide screening of Keith Stanphill and determined that Stanphill was not at imminent risk of harming himself. Nine days after that screening, Keith killed himself. The plaintiff, Zachary Stanphill, Keith's son and the administrator of his estate, filed a wrongful death and survival action against Ortberg and her employer, Rockford Memorial Hospital. Following a jury trial, the jury returned a general verdict in the plaintiff's favor and awarded almost $1.5 million in damages. The jury, however, also answered in the negative a special interrogatory that asked whether Ortberg could

reasonably foresee that Keith would commit suicide nine days after his meeting with her. The trial court entered judgment in favor of the defendants, based on the special interrogatory answer. The plaintiff appeals, arguing that the jury's answer to the special interrogatory was not irreconcilable with the general verdict or, alternatively, that the special interrogatory should never have been given. We reverse and remand with directions.

¶ 2 BACKGROUND

¶ 3 Between May 24 and June 2, 2016, the trial court conducted a jury trial on the plaintiff's complaint. The relevant portions of that trial are summarized below.

¶ 4 In the last month of his life, Keith's physical and psychological condition deteriorated substantially, based on his concerns that his wife, Susan, was having an extramarital affair. At the time of his suicide, he and Susan were no longer sleeping in the same house. From late August until September 30, 2005, he had lost nearly 15 pounds, he walked around in a lethargic state, he was pale, and his eyes were sunken. He was slipping in his performance at work as a car salesperson, and he had effectively withdrawn his participation in the church of which he had been a lifelong member. Susan believed he needed help and arranged for him to see a counselor through the Employee Assistance Program (EAP) at Rockford Memorial Hospital, which was a benefit provided under her health insurance plan through the Rockford School District.

¶ 5 On September 30, 2005, Keith met with Ortberg, a licensed clinical social worker who was employed by Rockford Memorial Hospital. Ortberg's responsibilities included assessing whether her patients posed threats of imminent suicide or potentially lethal violence. Ortberg had Keith complete a questionnaire as to his psychological condition. On that questionnaire, Keith indicated that he had (1) feelings of harming himself or others most of the time; (2) feelings of sadness most of the time; (3) sleep changes most of the time; (4) appetite changes

all of the time; (5) feelings of anxiety, nervousness, worry, and fear all of the time; (6) sudden unexpected panic attacks most of the time; and (7) feelings of being on the verge of losing control most of the time. Keith also indicated on the questionnaire that he was seeing a primary care physician for "mood."

¶ 6 At trial, Ortberg testified that she had no specific recollections of Keith other than what was reflected in her chart of his meeting with her. Her chart indicated that Keith denied having ideas of suicide or a plan of how he would commit such an act. Her chart also indicated that he had lost weight and was taking an anti-depressant. She was not able to reconcile the conflict between Keith's answers to the questionnaire, indicating that he had thoughts of harming himself, and her conclusion in her chart that he did not have ideas of suicide. Her chart did not indicate (1) how much weight Keith had lost over what period of time, (2) what his eating or sleeping disturbances entailed, (3) any trouble he was having at work, or (4) how he physically presented himself. Ortberg acknowledged that issues involving sleep, appetite, work life, changes in mood, and changes in concentration or focus were all signs of depression that could lead someone to being suicidal.

¶ 7 Ortberg diagnosed Keith with adjustment disorder with depressed mood and referred him to a marriage counselor. Ortberg acknowledged that Keith's answers to the self-assessment questionnaire were indicators of depression. She further acknowledged that major depression is much more severe than adjustment disorder with depressed mood and that there is a correlation between major depression and suicide.

¶ 8 Ortberg testified that, when she determines that a patient is suicidal, the standard of care requires certain actions on her part. Specifically, she would (1) not let the patient leave her office, (2) call a family member and have them pick up the patient and take them to an

emergency room and explain the situation, and (3) if a family member could not be contacted, call 911 or the police and take whatever steps are necessary to get the patient to the emergency room to be evaluated. Ortberg acknowledged that she took none of those steps in Keith's case.

¶ 9 On October 4, 2005, Susan called the EAP office to confirm that Keith had scheduled an October 11 appointment with the marriage counselor whom Ortberg had recommended. However, on October 9, 2005, Keith was found dead on the floor of his garage with his car ignition on and the gas tank empty. He left a suicide note, attaching copies of romantic e-mails between Susan and her coworker. An autopsy determined that Keith had died from asphyxia resulting from acute carbon monoxide poisoning.

¶ 10 Keith's estate filed a wrongful death action against Ortberg and Rockford Memorial in 2007 and then refiled it on February 7, 2014. At trial, both parties called experts in the area of social work and psychiatry to review the counseling that Ortberg had provided Keith.

¶ 11 Daniel Potter, a licensed clinical social worker for 22 years, testified as an expert for the plaintiff. He testified that Ortberg breached the standard of care by failing to recognize that Keith was suicidal. Ortberg failed to do a proper mental health evaluation, lethality assessment, and mental status exam. Potter testified that, had Ortberg performed a proper mental health assessment, she would have recognized that Keith was suicidal—thus triggering a duty to take immediate action. Potter further testified that Ortberg had breached the standard of care by misdiagnosing Keith as having adjustment disorder, when in fact he had major depression. Potter explained that there is a high correlation between major depression and suicide. Potter believed that Ortberg's misdiagnosis of adjustment disorder was the reason she failed to recognize that Keith was suicidal.

¶ 12 Terri Lee, a licensed clinical social worker, testified as a defense expert. She stated that Ortberg conducted a thorough assessment and complied with the standard of care for a reasonably careful licensed clinical social worker in her one-hour counseling session with Keith. Lee believed that Keith was not suicidal on the day he met with Ortberg. This was evident because he scheduled a follow-up date with the counselor whom Ortberg had recommended. Lee testified that someone who is planning to kill himself does not make an appointment for a future date.

¶ 13 Dr. David Bawden, the plaintiff's expert psychiatrist, testified that he had been practicing for 37 years and evaluated 10 to 20 people per day for suicidal risk. He worked in psychiatric hospitals and had been called into emergency rooms to evaluate patients for suicidal risk and involuntary admission. He had extensive training in what happens when there is a referral to an emergency room, a psychiatrist, or a psychiatric facility and the evaluation that must be conducted for involuntary admission.

¶ 14 Dr. Bawden testified that he agreed with Potter's opinions concerning Ortberg's failure to recognize Keith as suicidal, her misdiagnosis of his level of depression, and her failure to properly assess his mental health. Dr. Bawden testified that each of those failures, individually, was a proximate cause of Keith's death. He believed that Keith had a high risk of suicide on September 30, 2005, and that, had he been referred to an emergency room or a psychiatrist or a psychiatric facility, his suicide could have been prevented. He explained that the vast majority of persons who are suicidal and treated, whether on voluntary or involuntary admission, ultimately are released safely. He testified that Ortberg's failure to properly refer Keith to an emergency room or a psychiatrist was a cause of Keith's death.

¶ 15 Dr. Steven Hanus, the defendants' expert psychiatrist, testified that it was not reasonably foreseeable to Ortberg on September 30, 2005, that Keith would kill himself on or before October 9, 2005. He believed that Keith was not at imminent risk of harming himself, because (1) Ortberg specifically documented that Keith had no ideas of suicide; (2) he had not made a suicide attempt before; (3) there was no family history of suicide; (4) the EAP documentation demonstrated that Keith was working; (5) he was religious and receiving pastoral care; (6) he was living with his in-laws, with whom he had a close relationship; (7) he was seeing his children every day; (8) he was keeping up with his hygiene; (9) at the end of the EAP session, he had agreed to outpatient therapy; and (10) he had actually scheduled a follow-up appointment. Dr. Hanus believed that someone who was suicidal would not schedule a follow-up counseling appointment for some future date. Dr. Hanus opined that, even if Ortberg had referred Keith to a psychiatrist or an emergency room on September 30, 2005, Keith's suicide would not have been foreseeable to a psychiatrist or to hospital personnel on that date, for the same reasons that Keith's suicide was not foreseeable to Ortberg.

¶ 16 At a jury instruction conference, the defendants asked the court to submit a special interrogatory to the jury regarding the foreseeability of Keith's suicide. The interrogatory read as follows:

> "Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?"

The defendants drew the wording of the interrogatory from *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085. The plaintiff objected to the interrogatory, arguing that Keith's death was "not reasonably foreseeable under [the plaintiff's] theory in the case to Lori Ortberg because she didn't do a full assessment, she didn't do the right diagnosis, *** she didn't do the job [and]

[s]he didn't meet the standard." As the jury could reasonably answer the special interrogatory "no" based on a finding that Ortberg had breached the standard of care, the plaintiff maintained that the question did not test the general verdict and therefore should not be given. The trial court overruled the objection and submitted the interrogatory to the jury.

¶ 17 In closing arguments, the plaintiff encouraged the jury to vote "yes" on the special interrogatory. The defendants encouraged the jury to answer the question "no."

¶ 18 The jury returned a general verdict finding the defendants liable for negligence and awarding the plaintiff $1,495,151. However, the jury also answered the special interrogatory in the negative, finding that it was not reasonably foreseeable to Ortberg that Keith would commit suicide within nine days of his meeting with her. Based upon the jury's answer to the special interrogatory, the trial court entered judgment in favor of the defendants.

¶ 19 The plaintiff filed a motion to reconsider the judgment on the special interrogatory and to enter judgment on the general verdict. Following a hearing, the trial court denied the plaintiff's motion. The trial court explained that it was bound by the decision in *Garcia*, which had entered judgment in favor of the defendant based on a similar special interrogatory. The trial court, however, questioned the correctness of the decision in *Garcia*, stating:

> "I think *Garcia* was wrongly decided. I think *Garcia* is an anomaly. I don't think *Garcia* sets forth what the law of the State of Illinois is or should be with respect to whether or not suicide is reasonably foreseeable. How in the world can a jury figure out how to answer that question? [I]t says was it reasonably foreseeable to Lori Ortberg, the defendant.
>
> How can that not be ambiguous? I can't imagine how that can't be ambiguous. Because Lori Ortberg was charged with several elements of negligence, one of which was

that she didn't foresee the suicide. It was one of the things that the jury had to consider in terms of whether she was negligent. It was the number one thing. The whole trial was about whether or not she should have foreseen the suicide. It's throughout the record.

And—and so—and the jury found in favor of the plaintiff. They found that she was negligent. And so we have to consider that special interrogatory as saying this: Was it reasonably foreseeable to a negligent Lori Ortberg that this suicide was—that Keith Stanphill would commit suicide on or such a date[?]

* * *

And so how can we issue a special interrogatory about Lori Ortberg before we know what the jury—whether she was negligent or not negligent. How can that not be ambiguous? Because it seems to me it's perfectly understandable that the jury would find that she was negligent, award—award damages to the plaintiff, and then say all right, was it reasonably foreseeable to Lori Ortberg? No, it wasn't foreseeable to her, she was negligent. So no, it wasn't foreseeable to Lori Ortberg because she was negligent. She didn't foresee it was suicide, we already found that, so we're going to check that box no.

That makes perfect sense to me, and that's one of the arguments the plaintiff[] [has] raised here, that it's consistent with the verdict. And yet the *Garcia* Court approved that special interrogatory.

* * *

Garcia is the case that the Second Appellate District needs to take a good, strong, hard look at and decide whether or not it was properly decided or wrongly decided.

I think it was wrongly decided. I think if we're going to give any kind of a special interrogatory in a suicide case where the defendant is allegedly negligent for not

foreseeing the suicide, that the special interrogatory needs to not have the defendant's name in it. It needs to say was it foreseeable or was it reasonably foreseeable to a reasonably careful social worker that so and so would commit suicide on such and such a date.

That's what it should say if we're going to give special interrogatories at all in a case like this. It shouldn't have the defendant's name because it throws terrible ambiguity into the special interrogatory.

And if there's one thing Illinois case law is clear about, it's that you shouldn't give an ambiguous special interrogatory. It should be clear. This is anything but clear. It's—it's muddy.

* * *

I think the Second District should take a hard look at *Garcia*, and if they find that plaintiff[']s arguments are appropriate, which, quite frankly, I think they are, then it should not follow *Garcia* and it should reverse this case and enter judgment in favor of the plaintiff[]."

¶ 20 Following the trial court's ruling, the plaintiff filed a timely notice of appeal.

¶ 21 ANALYSIS

¶ 22 On appeal, the plaintiff contends that the trial court erred in either (1) entering judgment in the defendants' favor, because the jury's answer to the special interrogatory was not irreconcilable with the general verdict, or (2) giving the special interrogatory, because it was not in the proper form.

¶ 23 At the outset, we note that the defendants argue that the plaintiff forfeited his objection to the special interrogatory, because he failed to object to the specific form of the special

interrogatory. Generally, a party's failure to raise a specific objection to the form of an interrogatory forfeits that ground for appeal. *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 450 (1997). Based on our review of the record, we believe that the plaintiff sufficiently objected to the form of the interrogatory in the trial court. We will therefore consider the merits of his appeal.

¶ 24 Special interrogatories are governed by section 2-1108 of the Code of Civil Procedure (735 ILCS 5/2-1108 (West 2016)), which reads in full as follows:

> "Verdict—Special interrogatories. Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly."

We review *de novo* as a question of law a trial court's decision on whether to give a special interrogatory that has been requested by a party. See *id.*

¶ 25 Special interrogatories are designed to be the "guardian of the integrity of a general verdict in a civil jury trial," and they "test[ ] the general verdict against the jury's determination as to one or more specific issues of ultimate fact." (Internal quotation marks omitted.) *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). As section 2-1108 explains, an answer to a special interrogatory controls the judgment when it is "inconsistent" with the general verdict. 735 ILCS 5/2-1108 (West 2016). The special interrogatory controls, however, only when it is "clearly and

absolutely irreconcilable with the general verdict." (Internal quotation marks omitted.) *Simmons*, 198 Ill. 2d at 556. As the supreme court has explained:

> "If a special interrogatory does not cover all the issues submitted to the jury and a 'reasonable hypothesis' exists that allows the special finding to be construed consistently with the general verdict, they are not 'absolutely irreconcilable' and the special finding will not control. [Citation.] In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict. [Citation.]" *Id.*

¶ 26 The trial court's duty to instruct the jury to answer a special interrogatory arises only when the interrogatory is in the proper form. *Garcia*, 2011 IL App (1st) 103085, ¶ 49. "[A] special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons*, 198 Ill. 2d at 563. Additionally, the interrogatory "should be a single question, stated in terms that are simple, unambiguous, and understandable; it should not be repetitive, confusing, or misleading." *Id.*

¶ 27 We observe that our court addressed a similar alleged inconsistency between a general verdict and a special interrogatory in *Lancaster v. Jeffrey Galion, Inc.*, 77 Ill. App. 3d 819, 826 (1979). In *Lancaster*, the plaintiff was injured in a road paving accident by a tandem roller manufactured by the defendant. The defendant asserted that the plaintiff's injuries were a result of coworker Ronald Herbig's misuse of the roller. *Id.* at 820. Over the plaintiff's objection, the trial court gave the jury the following special interrogatory that the defendant had requested:

> " 'Does the jury find from a preponderance of the evidence that the misuse of the roller by Ronald Herbig, an employee of Rockford Blacktop, was the proximate cause of the injuries sustained by the plaintiff in the occurrence in question?' " *Id.* at 821.

The jury returned a general verdict in the plaintiff's favor, but answered affirmatively to the special interrogatory. The trial court determined that the jury's findings were inconsistent and therefore entered judgment for the defendant. *Id.*

¶ 28 On appeal, this court reversed, holding that the general verdict and the special interrogatory were not necessarily inconsistent. We explained that the jury's general verdict implicitly found that the roller was in an unreasonably dangerous condition when it left the manufacturer's control and that the roller was being used and operated in a manner either intended or reasonably foreseeable. *Id.* at 823-24. We concluded that the jury's answering "yes" to the question of whether the injury was caused by Herbig's misuse was not inconsistent with the jury's general verdict, as its general verdict implicitly found that the misuse was reasonably foreseeable to the manufacturer. *Id.* at 824.

¶ 29 Here, as in *Lancaster*, we hold that the general verdict and the answer to the special interrogatory are not necessarily inconsistent. The plaintiff's theory at trial was that Ortberg was negligent in the performance of her duties when she counseled Keith on September 30, 2005. A juror could conclude that, because she was negligent, it was not reasonably foreseeable to her that Keith would commit suicide approximately nine days after he met with her. As the general verdict and the answer to the special interrogatory were not clearly and absolutely irreconcilable, the trial court should have entered judgment in favor of the plaintiff. See *Simmons*, 198 Ill. 2d at 556.

¶ 30 Even if we were to construe the general verdict and the answer to the special interrogatory as inconsistent, we would still hold that the answer should not prevail over the general verdict, because the special interrogatory was not in the proper form. In addressing the foreseeability of Keith's suicide, the special interrogatory was really asking whether Ortberg's conduct was a proximate cause of Keith's suicide. Proximate cause is one of three elements a plaintiff must prove to succeed in a negligence action: (1) the defendant owed a duty of care, (2) the defendant breached that duty, and (3) the plaintiff's resulting injury was proximately caused by the breach. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). Whether the defendant owed a duty to the plaintiff is a question of law to be decided by the court. *Id.* Whether the defendant breached his duty and whether the breach was the proximate cause of the injury are factual questions for a jury to decide, as long as there is a genuine issue of material fact about breach and causation. *Id.*

¶ 31 A claim of medical malpractice is proven when the plaintiff shows that there was a standard of care by which to measure the defendant's conduct, the defendant negligently breached that standard of care, and the defendant's breach was the proximate cause of the plaintiff's injury. *Northern Trust Co. v. University of Chicago Hospitals & Clinics*, 355 Ill. App. 3d 230, 241 (2004). A plaintiff must prove these elements by presenting expert medical testimony. *Id.* at 242.

¶ 32 There are two requirements for a showing of proximate cause: cause in fact and legal cause. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992); see also *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 556 (2005). At issue in this case is legal cause. Legal cause is established if an injury was foreseeable as the type of harm that a *reasonable person* would expect to see as a likely result of his conduct. *Lee*, 152 Ill. 2d at 456. Although the

foreseeability of an injury will establish legal cause, the extent of the injury or the exact way in which it occurs need not be foreseeable. *Knauerhaze*, 361 Ill. App. 3d at 556 (citing *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 45 (1997)). By requiring a plaintiff to show legal cause for an injury, the law sets limits on how far a defendant's legal responsibility should extend for his actions. *Lee*, 152 Ill. 2d at 455. Accordingly, here, it would have been appropriate to submit a special interrogatory on the question of foreseeability, as assurance from the jury that it found Keith's suicide to be the type of injury that a reasonable person would expect to see as a likely result of the defendants' conduct. See *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 7 (2006).

¶ 33 However, the special interrogatory presented to the jury was not in the proper form, because it did not ask whether Keith's suicide was foreseeable as the type of harm that a *reasonable person* (or a *reasonable* licensed clinical social worker) would expect to see as a likely result of her conduct. See *Lee*, 152 Ill. 2d at 456. Rather, the interrogatory asked whether Keith's suicide was foreseeable to Ortberg. By substituting "Lori Ortberg" for a "reasonable person" or a "reasonable licensed clinical social worker," the interrogatory distorted the law and became ambiguous and misleading to the jury. Although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to the plaintiff's theory did not act reasonably) would have. As such, the interrogatory was confusing and should not have been given. See *Simmons*, 198 Ill. 2d at 563.

¶ 34 In so ruling, we reject the defendants' contention that *Garcia* requires us to reach a different result here. In *Garcia*, the decedent was a resident of the defendant nursing home when he ejected himself from a fifth-floor window, causing his own death. *Garcia*, 2011 IL App (1st)

103085, ¶ 1. The decedent's estate filed a wrongful death and survival action against the defendant. At trial, upon the defendant's request, the trial court gave the following special interrogatory:

> " 'Prior to Roberto Garcia's death, was it reasonably foreseeable to [the defendant] that he would commit suicide or act in a self-destructive manner on or before April 21, 2004.' " *Id.* ¶ 10.

The jury entered a general verdict for the estate but answered the special interrogatory in the negative. The trial court therefore entered judgment in favor of the defendant. *Id.* ¶ 13.

¶ 35 On appeal, the plaintiff argued that the interrogatory was not in proper form, because the jury was required to make the following four factual findings: "(1) [whether] Roberto committed suicide, and (2) if so, was it foreseeable, or (3) whether Roberto committed a self-destructive act, and (4) if so, was it foreseeable?" *Id.* ¶ 51. The reviewing court disagreed and affirmed the trial court's decision, finding that the question was properly phrased as a single question regarding the foreseeability of two alternatives in the disjunctive and that an affirmative answer to either alternative required an affirmative answer to the entire interrogatory. *Id.* Thus, the court concluded that the interrogatory's construction was not impermissibly compound. *Id.*

¶ 36 We note that the plaintiff in *Garcia* did not raise, and the reviewing court did not consider, whether the interrogatory was improper because it tested foreseeability through the eyes of the individual defendant rather than a reasonable person. As the *Garcia* court did not consider that issue, its decision cannot establish that the proper basis to test foreseeability is through the eyes of the individual defendant. See *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (a decision that does not squarely address an issue allows the issue to be addressed on the merits at a later date); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)

(issue not "raised in briefs or argument nor discussed in the [previous] opinion of the Court" cannot be taken as "a binding precedent on th[e] point"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

¶ 37 Although *Garcia* did not squarely address the issue, the defendants insist that numerous other cases have held that a defendant will not be found negligent if the harm that befell the plaintiff was not foreseeable to the individual defendant. We disagree with the defendants' characterization of the law. Our supreme court has repeatedly held that the appropriate test for foreseeability is whether a reasonable person would anticipate the harm that occurs to the plaintiff. See *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 406 (2004) (the relevant inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his conduct); *Lee*, 152 Ill. 2d at 455 (same).

¶ 38 By contrast, in the litany of cases they cite, the defendants rely upon only one Illinois Supreme Court case—*American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29 (1992). That case, however, does not advance the defendants' cause. In *American National Bank*, the supreme court addressed foreseeability in the context of duty, not proximate cause. See *Beretta*, 213 Ill. 2d at 394 (the question of foreseeability plays a pivotal role in both the question of the existence of a duty and the determination of legal cause). Although "reasonable foreseeability" is relevant to both duty and proximate cause, courts must take care to keep duty and proximate cause analytically independent by differentiating between "two distinct problems in negligence theory—the unforeseen plaintiff problem and the problem of the foreseeable injury resulting from unforeseen means." (Internal quotation marks omitted.) *Colonial Inn Motor Lodge*, 288 Ill. App. 3d at 41. Since *American National Bank* dealt with the

duty element of negligence, its discussion of foreseeability is inapplicable here. See *Hooper*, 366 Ill. App. 3d at 10.

¶ 39 Moreover, we also reject the defendants' argument that, in light of the proper jury instructions and the plaintiff's counsel's closing statement asking the jury to vote "yes" on the special interrogatory, this court should find that the general verdict and the answer to the special interrogatory were inconsistent and therefore affirm the trial court's judgment. The test for construing the meaning of a jury instruction "is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions." *Reivitz v. Chicago Rapid Transit Co.*, 327 Ill. 207, 213 (1927). Here, the trial court itself stated that it found the special interrogatory ambiguous and confusing. The trial court's difficulty in deciphering the special interrogatory is compelling evidence that the jury likely would have experienced similar confusion. Consequently, even though the plaintiff's counsel requested the jury to vote "yes" on the special interrogatory, that does not negate the ambiguity in the interrogatory.

¶ 40 We next turn to the defendants' argument that we should affirm on the alternate basis that the plaintiff failed to establish proximate cause. In making this argument, the defendants essentially ask us to enter judgment in their favor notwithstanding the jury's general verdict in favor of the plaintiff. Judgment notwithstanding the verdict should not be entered unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 109 (1997). We do not believe that the evidence in the case at bar so overwhelmingly favors the defendants that no contrary verdict could ever stand.

¶ 41 Proximate cause means any cause that, in natural or probable sequence, produced the injury complained of. *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 937 (2003). It need not be the sole cause or the last or nearest cause. *Shannon v. Boise Cascade*, 336 Ill. App. 3d 533, 543 (2003). Issues involving proximate cause are fact-specific and therefore uniquely for the jury's determination. *Holton*, 176 Ill. 2d at 107. When a plaintiff comes to a hospital already injured and while in the care of the hospital is negligently treated, the question of whether the defendant's negligent treatment is a proximate cause of the plaintiff's ultimate injury is ordinarily one of fact for the jury. *Id.*

¶ 42 Here, Potter testified that Ortberg had misdiagnosed Keith as not being suicidal when she had evaluated him. Ortberg acknowledged that, had she diagnosed Keith as suicidal, it would have been her duty to take steps to get him further care from a mental health specialist. Because Ortberg did not refer Keith to a mental health specialist, the jury could reasonably infer that Ortberg had breached her duty of reasonable care.

¶ 43 Dr. Bawden testified that one who has suicidal thoughts has a very treatable condition and that, if Ortberg had properly referred Keith, Keith would not have killed himself. Dr. Bawden's testimony was sufficient for the jury to conclude that Ortberg's misdiagnosis and misevaluation of Keith was a proximate cause of his death. *Cf. Holton*, 176 Ill. 2d at 107-08 (defendant nurses' failure to accurately and timely report plaintiff's information to doctors was proximate cause of plaintiff's injuries because nurses' conduct prevented doctors from having opportunity to treat her condition); *Wodziak v. Kash*, 278 Ill. App. 3d 901 (1996) (evidence was sufficient to establish that defendant's delay in diagnosing the decedent's illness lessened the effectiveness of the treatment, and plaintiff was not required to show in absolute terms that a

different outcome would have occurred had defendant made an earlier diagnosis of the decedent's condition).

¶ 44 The defendants point to several cases in which courts have found that a lack of expert testimony prevented the plaintiffs from establishing that the defendants' conduct was a proximate cause of the plaintiffs' injuries. See, *e.g.*, *Snelson v. Kamm*, 204 Ill. 2d 1, 42-43 (2003); *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 298-99 (2008); *Townsend v. University of Chicago Hospitals*, 318 Ill. App. 3d 406, 414-15 (2000); *Susnis v. Radfar*, 317 Ill. App. 3d 817, 825-27 (2000); *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 974-76 (1997). The defendants argue that, because Dr. Bawden was not an emergency room physician, he could not provide expert testimony as to whether a referral to an emergency room would have prevented Keith's suicide. Absent such expert testimony, the defendants insist, this court must enter judgment in their favor.

¶ 45 The plaintiff points out that the defendants made no objection at trial to the foundation of Dr. Bawden's opinion, and therefore he contends that the defendants' objections to his testimony now on appeal are forfeited. We agree. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 (arguments not raised before the trial court are forfeited and cannot be raised for the first time on appeal). Further, even overlooking the defendants' forfeiture, based on Dr. Bawden's qualifications as a psychiatrist for 37 years with extensive experience in evaluating patients in an emergency room setting, we believe that he was able to provide expert testimony as to whether a referral to an emergency room or a psychiatrist would have prevented Keith's suicide. The defendants' contention to the contrary, therefore, is without merit.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed, and the cause is remanded with directions to enter judgment for the plaintiff on the general verdict.

¶ 48 Reversed and remanded with directions.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Smart v. City of Chicago, Ill.App. 1 Dist., October 9, 2013

2011 IL App (1st) 103085
Appellate Court of Illinois,
First District, Second Division.

Philemon GARCIA, Special Administrator of the Estate of Roberto A. Garcia, Plaintiff–Appellant,
v.
SENECA NURSING HOME, d/b/a Lee Manor, Defendant–Appellee.

No. 1–10–3085.
|
Aug. 16, 2011.

Synopsis

Background: Administrator of nursing home resident's estate brought wrongful death and survival action against nursing home, based on resident's death after he ejected himself from fifth floor window. After jury returned general verdict finding negligence but answered in the negative a special interrogatory that dealt with foreseeability of resident's death, the Circuit Court, Cook County, John Grogan, J., entered judgment for nursing home. Administrator appealed.

[Holding:] The Appellate Court, Connors, J., held that special interrogatory asking jury to determine whether it was reasonably foreseeable to nursing home that resident would commit suicide or act in self-destructive manner, encompassed not only the deliberate act of suicide but also accidental death, and thus, jury's negative answer was inconsistent with the general verdict.

Affirmed.

West Headnotes (22)

[1] **Appeal and Error**
⇨ Necessity of objections in general

Appeal and Error
⇨ Necessity in General

Ordinarily, an appealing party forfeits review of an issue unless the party both objected to an error at the jury trial and included it in a written posttrial motion. Sup.Ct.Rules, Rule 366(b)(2)(iii).

2 Cases that cite this headnote

[2] **Appeal and Error**
⇨ Review of objections to verdict, findings, or judgment

Administrator of nursing home resident's estate, in favor of whom trial court originally entered judgment, based on jury's general verdict in wrongful death and survival action against nursing home, was required, in order to preserve for appellate review claims that trial court erred in giving a special interrogatory that was not in proper form and that jury's answer to the special interrogatory was not irreconcilable with the general verdict, to file a posttrial motion following trial court's decision, on nursing home's posttrial motion, to vacate the judgment in administrator's favor and enter judgment in nursing home's favor, based on jury's answer to special interrogatory. S.H.A. 735 ILCS 5/2–1202; Sup.Ct.Rules, Rule 366(b)(2)(iii).

3 Cases that cite this headnote

[3] **Trial**
⇨ Operation and Effect of Motion or Request

A directed verdict is a complete removal of an issue from the province of the jury.

Cases that cite this headnote

[4] **Appeal and Error**
⇨ Scope and Effect of Objection

A posttrial motion serves three purposes: (1) it allows 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; (2) the

required statement of the specific grounds urged as support for the claim of error allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings; and (3) the required statement of the specific grounds urged as support for the claim of error prevents the claimants from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. Sup.Ct.Rules, Rule 366(b)(2)(iii).

1 Cases that cite this headnote

[5] **Appeal and Error**
Necessity in General

The rule requiring posttrial motions, in order to preserve appellate review in jury cases, has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals. Sup.Ct.Rules, Rule 366(b)(2)(iii).

1 Cases that cite this headnote

[6] **Courts**
Dicta

As a general rule, obiter dictum is not binding as authority or precedent within the stare decisis rule.

Cases that cite this headnote

[7] **Courts**
Dicta

"Judicial dictum," which is an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court but not essential to the disposition of the cause, is entitled to much weight, and should be followed unless found to be erroneous.

Cases that cite this headnote

[8] **Courts**
Dicta

Even obiter dictum of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court.

Cases that cite this headnote

[9] **Appeal and Error**
Necessity of presentation in general

The appellate forfeiture rule is an admonition to the parties and does not impose a limitation on the reviewing court, which may overlook forfeiture in the interest of developing a sound body of law, and may review any issue so long as the record contains facts sufficient for its resolution.

1 Cases that cite this headnote

[10] **Appeal and Error**
Cases Triable in Appellate Court

Appellate court reviews de novo as a question of law a trial court's decision on whether to give a special interrogatory that has been requested by a party. S.H.A. 735 ILCS 5/2–1108.

3 Cases that cite this headnote

[11] **Trial**
Special findings accompanying general verdict

Special interrogatories are designed to be the guardian of the integrity of a general verdict in a civil jury case, and they test the general verdict against the jury's determination as to one or more specific issues of ultimate fact.

Cases that cite this headnote

[12] **Trial**
Findings Inconsistent with General Verdict

An answer to a special interrogatory controls the judgment when it is inconsistent with the general verdict. S.H.A. 735 ILCS 5/2–1108.

3 Cases that cite this headnote

[13] **Trial**

Remedies and proceedings to determine consistency in general

The special interrogatory controls only when it is clearly and absolutely irreconcilable with the general verdict. S.H.A. 735 ILCS 5/2–1108.

Cases that cite this headnote

[14] **Trial**

Remedies and proceedings to determine consistency in general

If a special interrogatory does not cover all the issues submitted to the jury and a reasonable hypothesis exists that allows the special finding to be construed consistently with the general verdict, they are not absolutely irreconcilable and the special finding will not control. S.H.A. 735 ILCS 5/2–1108.

1 Cases that cite this headnote

[15] **Trial**

Remedies and proceedings to determine consistency in general

In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict. S.H.A. 735 ILCS 5/2–1108.

1 Cases that cite this headnote

[16] **Trial**

Findings Inconsistent with General Verdict

Special interrogatory in wrongful death and survival action against nursing home, asking jury to determine whether it was reasonably foreseeable to nursing home that resident, who died after he ejected himself from fifth floor window, would commit suicide or act in self-destructive manner, encompassed not only the deliberate act of suicide but also accidental death, and thus, jury's negative answer to the interrogatory was inconsistent with jury's general verdict finding nursing home liable in negligence, so the answer to the special interrogatory was controlling, in action in which estate presented evidence that resident had accidentally fallen to his death while deliriously trying to leave the nursing home.

1 Cases that cite this headnote

[17] **Trial**

Form in general

A trial court's duty to instruct the jury to answer a special interrogatory requested by a party arises only when the interrogatory is in the proper form. S.H.A. 735 ILCS 5/2–1108.

Cases that cite this headnote

[18] **Trial**

Form in general

A special interrogatory is in proper form if: (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned.

3 Cases that cite this headnote

[19] **Trial**

Form in general

Trial

Misleading and confusing issues

A special interrogatory should be a single question, stated in terms that are simple, unambiguous, and understandable, and it should not be repetitive, confusing, or misleading.

Cases that cite this headnote

[20] **Trial**

Multifariousness or Duplicity

Special interrogatory in wrongful death and survival action against nursing home, asking jury to determine whether it was reasonably foreseeable to nursing home that resident, who died after he ejected himself from fifth floor window, would commit suicide or act in self-destructive manner, was not impermissibly compound; interrogatory was phrased as single question about foreseeability of two alternatives in the disjunctive, and an affirmative answer to either alternative would require an affirmative answer to the entire question.

1 Cases that cite this headnote

[21] **Trial**

Misleading and confusing issues

Special interrogatory in wrongful death and survival action against nursing home, asking jury to determine whether it was reasonably foreseeable to nursing home that resident, who died after he ejected himself from fifth floor window, would commit suicide or act in self-destructive manner, was not confusing, though jury was not provided with definition of "act in self-destructive manner"; during closing arguments, attorney for resident's estate asserted that whether resident's death was caused by suicide, or instead, as estate contended, it was caused by an accident that occurred while resident was delirious, "[e]ither way, it's self-destructive."

Cases that cite this headnote

[22] **Trial**

Language

The test for construing the meaning of a jury instruction is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions.

Cases that cite this headnote

Attorneys and Law Firms

*1008 Steven M. Levin, Patricia L. Gifford, Jason E. Hammond, Levin & Perconti, Stephen A. Gorman, Chicago, for Plaintiff–Appellant.

Omar J. Fayez, Hugh C. Griffin, Krista D. Luzio, Hall, Pringle & Schoonveld, LLC, Chicago, for Defendant–Appellee.

OPINION

Justice CONNORS delivered the judgment of the court, with opinion.

**880 ¶ 1 Roberto Garcia died after he ejected himself from a fifth-floor window while he was in the care of defendant Seneca Nursing Home for various physical and mental illnesses. Plaintiff Philemon Garcia, Roberto's son and the administrator of his estate, brought the instant wrongful death and survival action against defendant. Following a jury trial, the jury returned a general verdict in plaintiff's favor and awarded $1 million in damages. The jury, however, also answered in the negative a special interrogatory that dealt with the foreseeability of Roberto's death. The trial court entered judgment in favor of defendant based on the special interrogatory answer. Plaintiff appeals, arguing that the jury's answer to the special interrogatory was not irreconcilable with the general verdict or, alternatively, that the special interrogatory should never have been given. We affirm.

¶ 2 I. BACKGROUND

¶ 3 This appeal follows an 8–day jury trial during which 18 witnesses testified, including 4 expert witnesses. However, the facts relevant to this appeal are **881 *1009 straightforward and relatively uncontested.

¶ 4 Roberto suffered from paranoid schizophrenia. He also suffered from a number of other physical ailments, including blindness, dystonia (abnormal muscle tone), akathisia (a type of chronic restlessness), and tardive dyskinesia, which manifests as involuntary twitching and grimacing. Roberto's wife cared for him as long as she could, but in July 2003 she placed Roberto in the care of defendant, a nursing home licensed under the Illinois

Nursing Home Care Act (210 ILCS 45/1–101 *et seq.* (West 2010)).

¶ 5 Roberto was eventually placed in a room on the fifth floor of the facility, which is the secured floor for mentally ill patients. At the time of his death in 2004, the fifth floor housed 42 patients under the care of 6 staff members. The doors to the floor were secured and alarmed, and the elevators required a secure access device in order to operate them. The floor was also equipped with windows, but these only opened slightly over eight inches and were covered with a screen.

¶ 6 While at defendant's facility, Roberto was largely confined to a wheelchair and had difficulty walking or even moving his wheelchair at times. Roberto also exhibited a significant amount of delusional behavior, including wandering away, hiding, taking off his clothes at inappropriate times, and hallucinations. Roberto apparently did not enjoy living at defendant's facility, and he expressed to at least two witnesses on multiple occasions that he wanted to "go home" or "get out of [the facility]". Although there was ample testimony about Roberto's mental infirmities, behaviors, and his various psychological evaluations, he was never found to be at risk of suicide, self-harm, or escape.

¶ 7 On at least two occasions, defendant's staff noticed Roberto exploring the window in his room. A chart notation on November 2, 2003, noted that Roberto "tried to climb the window," but the staff member who made the notation explained at trial that Roberto appeared to be merely feeling the window. The staff member did not notify her superiors or other staff and she did not ask Roberto what he was doing at the time, but she mentioned the behavior to Roberto's psychologist. The next day, November 3, 2003, the psychologist visited Roberto and noted that he was again "trying to climb the window" and appeared to have "his hip up on the window."

¶ 8 The psychologist notified Roberto's psychiatrist of this behavior, but no significant action was taken and no care plan was ever created. According to Roberto's psychologist and psychiatrist, they were unaware that the windows on the fifth floor could open at all. Had they been aware of this fact, they testified that they would have been much more proactive in creating a treatment plan for Roberto's behavior.

¶ 9 On April 21, 2004, a nurse noticed that the window in Roberto's room was open and the screen was pushed out. After a brief search, Roberto was discovered lying on the ground, five stories below the window. At the time the paramedics arrived Roberto was still responsive, but he died of his injuries on the way to the hospital. Roberto's death was later ruled a suicide by the Cook County medical examiner.

¶ 10 Roberto's administrator filed the instant action against defendant and several of its staff members, including Roberto's psychiatrist. Among other causes of action not relevant to this appeal, the complaint alleged negligence against defendant for Roberto's death. At the jury instruction conference, defendant asked the court to submit a special interrogatory to the jury regarding the foreseeability of Roberto's ****882** ***1010** actions. The interrogatory read as follows:

> "Prior to Roberto Garcia's death, was it reasonably foreseeable to [defendant] that he would commit suicide or act in a self-destructive manner on or before April 21, 2004?"

Defendant drew the wording of the interrogatory verbatim from the case of *Hooper v. County of Cook*, 366 Ill.App.3d 1, 303 Ill.Dec. 476, 851 N.E.2d 663 (2006). Plaintiff objected to the interrogatory, but following argument the trial court agreed to submit the interrogatory to the jury.

¶ 11 The jury returned a general verdict finding defendant liable in negligence and awarding $1 million for Roberto's pain and suffering prior to his death. However, the jury also answered the special interrogatory in the negative, meaning that the jury found that it was not foreseeable to defendant that Roberto would commit suicide or act in a self-destructive manner. Defendant moved for entry of judgment in its favor based on the jury's answer to the special interrogatory. After extensive argument about the proper procedure to follow in this situation, the trial court decided to enter judgment on the general verdict in plaintiff's favor, but to enter and continue defendant's motion in order to consider it as part of defendant's posttrial motion.

¶ 12 Defendant timely filed a posttrial motion, arguing that the general verdict was irreconcilable with the

special interrogatory answer and required judgment in defendant's favor. Defendant also moved for judgment notwithstanding the verdict or a new trial based on other grounds and alleged errors not relevant here. In opposition to defendant's motion, plaintiff maintained that although the trial court's decision to give the interrogatory was error, the jury's answer was not irreconcilable with the general verdict. Plaintiff urged the trial court to deny the motion and leave the general verdict intact. Notably, plaintiff did not move to vacate the answer to the special interrogatory and did not argue that the trial court's alleged error in submitting the interrogatory to the jury warranted a new trial.

¶ 13 Following full briefing and extensive oral arguments, the trial court held that the interrogatory answer could not be reconciled with the general verdict. Accordingly, the trial court vacated the judgment on the general verdict in plaintiff's favor and entered judgment in defendant's favor on the special interrogatory answer. Plaintiff did not file a posttrial motion following entry of judgment in defendant's favor. Instead, plaintiff filed timely notice of appeal. This case is now before us.

¶ 14 II. ANALYSIS

¶ 15 Plaintiff makes two intertwined arguments on appeal, namely, (1) that judgment in defendant's favor was improper because the jury's answer to the special interrogatory was not irreconcilable with the general verdict, or (2) in the alternative, that the trial court erred by giving the special interrogatory because it was not in proper form. Before we may reach the merits, however, we must first consider whether plaintiff has forfeited review of these issues because he did not file a posttrial motion after the trial court entered judgment for defendant.

¶ 16 A. Forfeiture

[1] ¶ 17 In a jury case, Illinois Supreme Court Rule 366(b)(2)(iii) (eff. Feb. 1, 1994) states that "[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion." Ordinarily, an appealing party forfeits review of an issue unless the party both "object[ed] to an error at trial and includ[ed] it in a written posttrial motion." *Thornton v. Garcini*, 237 Ill.2d 100, 106, 340 Ill.Dec. 557, 928 N.E.2d 804 (2009); see also *In re* ****883** ***1011** *Parentage of Kimble*, 204 Ill.App.3d 914, 916, 150 Ill.Dec. 138, 562 N.E.2d 668 (1990) ("Petitioner's failure to file a post-trial motion following the jury trial amounted to failure to preserve any matters for review."). This is in contrast to a nonjury civil trial, in which "[n]either the filing of nor the failure to file a post-judgment motion limits the scope of review." Ill. S.Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994).

[2] ¶ 18 It is undisputed that plaintiff did not file a posttrial motion following the trial court's decision to vacate judgment in plaintiff's favor and enter judgment in defendant's favor on the special interrogatory. This situation is somewhat unusual because plaintiff initially won judgment in his favor. Plaintiff argues that he is not required to file a posttrial motion in this situation because all of the issues that would have been raised in such a motion had already been raised in defendant's own posttrial motion, making any posttrial motion filed by plaintiff redundant. Moreover, plaintiff argues that a posttrial motion is unnecessary because the trial court effectively made this into a nonjury case because the judgment that it entered in defendant's favor was contrary to the general verdict.

¶ 19 Posttrial motions in jury cases are governed by section 2–1202 of the Code of Civil Procedure (735 ILCS 5/2–1202 (West 2010)). Under section 2–1202(b),

> [r]elief desired after trial in jury cases * * * must be sought in a single post-trial motion. * * * The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief." 735 ILCS 5/2–1202(b) (West 2010).

Section 2–1202(c) requires a posttrial motion to be filed within 30 days of entry of judgment or the failure of a jury to reach a verdict, including extensions granted by the court. See 735 ILCS 5/2–1202(c) (West 2010). In cases like this one where a posttrial motion is successful, section 2–1202(c) states that "[a] party against whom judgment is entered pursuant to a post-trial motion shall have like time [*i.e.*, 30 days] after the entry of the judgment within which

to file a post-trial motion." 735 ILCS 5/2–1202(c) (West 2010). Finally, section 2–1202(e) warns that "[a]ny party who fails to seek a new trial in his or her post-trial motion * * * waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict." 735 ILCS 5/2–1202(e) (West 2010).

¶ 20 As applied to this case, section 2–1202 explicitly granted plaintiff 30 days in which to file his own posttrial motion after the trial court granted defendant's posttrial motion and entered judgment in defendant's favor. The question, however, is whether filing a posttrial motion is merely allowed or is mandatory before seeking review of an issue on appeal in this procedural situation.

¶ 21 In arguing that a posttrial motion is unnecessary to preserve issues for appeal, plaintiff relies on the line of cases following *Keen v. Davis,* 38 Ill.2d 280, 230 N.E.2d 859 (1967). In *Keen,* the supreme court resolved a dispute among the districts of this court regarding whether it is necessary to file a posttrial motion following entry of a directed verdict in a jury case in order to preserve issues for appeal. See *id.* at 281, 230 N.E.2d 859. The supreme court held that a posttrial motion is unnecessary in that situation, quoting with approval the following reasoning from a Second District case on the subject:

> "When a judge directs a verdict at any stage of the trial, in effect, he has removed the case from the realm of the rules relating to jury cases and the rules applicable to bench trials should apply. It seems illogical to require a party to **884 *1012 address the same arguments to the same judge on the identical questions before proceeding to review by an appellate tribunal." [Internal quotation marks omitted.] *Id.* at 281–82 (quoting *Larson v. Harris,* 77 Ill.App.2d 430, 434, 222 N.E.2d 566 (1966)).

¶ 22 *Keen's* holding has been settled law in Illinois for close to half a century, and *Keen* has been followed by a number of cases that plaintiff relies on in support of his position. See, *e.g., Johnson v. Transport International Pool, Inc.,* 345 Ill.App.3d 471, 280 Ill.Dec. 704, 802 N.E.2d 1225 (2003); *Takecare v. Loeser,* 113 Ill.App.2d 149, 251 N.E.2d 724 (1969). The problem with the cases cited by plaintiff, however, is that they are inapposite to the procedural posture of this case. As defendant correctly points out in its surreply[1] brief, this situation is not analogous to a directed verdict. Unlike a directed verdict, the trial court did not take the case away from the jury and enter judgment on its own. In fact, quite the opposite happened. Although the trial court vacated the judgment that had been previously entered based on the general verdict, the trial court then entered judgment on the jury's answer to the special interrogatory, which is a scenario explicitly envisioned by section 2–1108 of the Code of Civil Procedure (735 ILCS 5/2–1108 (West 2010) ("When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly.")). Judgment in this case was entered on a finding by the jury, not on a directed verdict entered by the court without regard to findings by the jury. See Ill. S.Ct. R. 240 (eff.Jan. 1, 1967) ("The order of the court granting a motion for a directed verdict is effective without any assent of the jury.").

[3] ¶ 23 This fact is critical because it removes this case from the province of *Keen.* As the supreme court explained in *Robbins v. Professional Construction Co.,* 72 Ill.2d 215, 224, 20 Ill.Dec. 577, 380 N.E.2d 786 (1978), "[a] directed verdict is a *complete removal* of an issue from the province of the jury." (Emphasis added.) *Robbins* dealt with an order of the trial court that set aside in part a general verdict and granted the plaintiff a new trial on the question of damages. See *id.* The supreme court found that *Keen* was inapposite in this situation, reasoning that "[w]here the jury already has reached a general verdict in favor of plaintiff, setting aside that verdict in favor of a new trial on the question of damages does not remove the question of liability from the province of the jury, because the first jury's verdict on that question remains intact." *Id. Keen* is consequently a "narrow exception" (*id.* at 225, 20 Ill.Dec. 577, 380 N.E.2d 786) to the general requirement of filing a posttrial motion in order to preserve issues in a jury case.[2]

*1013 **885 ¶ 24 The supreme court reiterated the limited applicability of *Keen* in *Mohn v. Posegate,* 184 Ill.2d 540, 544–47, 235 Ill.Dec. 465, 705 N.E.2d 78 (1998), in which it held that filing a posttrial motion following summary judgment is unnecessary to preserve an issue for appeal. In comparing summary judgment to a directed verdict, the supreme court noted:

> "In the same way that the jury does not determine the verdict when it is directed, the jury makes no factual determination concerning the issue or issues disposed of by entry of summary judgment before trial of the case upon the remaining undetermined issues. Thus, we

conclude that, as in a nonjury case in which a post-judgment motion need not be filed, a party need not raise in a post-trial motion any issue concerning the pretrial entry of summary judgment as to part of a cause of action in order to preserve the issue for review." *Id.* at 546–47, 235 Ill.Dec. 465, 705 N.E.2d 78.

As *Mohn* demonstrates, the difference between the situations exemplified by *Keen* and *Robbins,* and consequently whether a posttrial motion is required to preserve alleged error, is whether the jury has rendered a decision on the issues before it. Plaintiff's reliance on cases that follow *Keen* and its progeny in support of his argument that no posttrial motion is required is therefore misplaced because the jury made a factual determination in this case and the trial court entered judgment based on that determination.

[4] [5] ¶ 25 Plaintiff raises two additional points that we must consider. First, plaintiff argues that requiring him to file a posttrial motion in this particular procedural situation is unnecessarily duplicative because the issue of the special interrogatory was extensively argued and briefed before the trial court in response to defendant's own posttrial motion. As the supreme court has explained, a posttrial motion serves three purposes:

"First, it allows 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. [Citations.] Second, by requiring the statement of the specific grounds urged as support for the claim of error, the rule allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings. Third, by requiring the litigants to state the specific grounds in support of their contentions, it prevents them from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. [Citations.] The rule, which is not limited to questions concerning jury instructions, has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals." *Brown v. Decatur Memorial Hospital,* 83 Ill.2d 344, 349–50, 47 Ill.Dec. 332, 415 N.E.2d 337 (1980).

¶ 26 Although the trial court in this case did have the opportunity to thoroughly consider this issue, satisfying the second policy concern, plaintiff's argument overlooks the other two policy bases for the posttrial motion requirement. In particular, plaintiff's failure to file a posttrial motion in this case deprived the trial court of the opportunity to consider the specific relief requested by plaintiff on appeal. Of particular note is the fact that during argument on defendant's posttrial motion, although plaintiff asserted that the trial court's decision to give the special interrogatory was error, plaintiff did not ask the trial court for a new trial. In fact, **886 *1014 plaintiff specifically argued that there should *not* be a new trial or, if one was ordered, that it should be limited to the question of damages only. In contrast, on appeal plaintiff now urges us to order a new trial if we find that the trial court erred in giving the special interrogatory to the jury. This is precisely the situation sought to be avoided by the posttrial motion requirement.

¶ 27 Moreover, plaintiff has deprived the trial court of the opportunity to review its own decision. Even in situations where a posttrial motion is not required, the supreme court has expressed a strong preference for ensuring that this policy objective is met. See *Mohn,* 184 Ill.2d at 547, 235 Ill.Dec. 465, 705 N.E.2d 78 ("We note that in this case, pursuant to plaintiff's petition for reconsideration, the trial court had an opportunity to reexamine its decision as to the entry of summary judgment in favor of [defendant] and partial summary judgment in favor of [codefendant]."). The mere fact that the trial court was adequately briefed on this subject does not render superfluous the other two policy considerations behind the posttrial motion requirement. On the contrary, the fact that only one of the three policy goals was met in this case indicates that accepting plaintiff's position would defeat the purpose of the posttrial motion requirement.

¶ 28 Second, plaintiff directs our attention to *Chand v. Schlimme,* 138 Ill.2d 469, 150 Ill.Dec. 554, 563 N.E.2d 441 (1990). In that case, the plaintiff won a jury verdict, but the trial court granted the defendant's posttrial motion for judgment notwithstanding the verdict, vacated the judgment in the plaintiff's favor, and entered judgment in the defendant's favor. See *id.* at 474, 150 Ill.Dec. 554, 563 N.E.2d 441. The plaintiff then simultaneously filed both a notice of appeal and a posttrial motion, which was later denied by the trial court. See *id.* Although the plaintiff later attempted to amend her notice of appeal, she never

filed a second notice of appeal after her posttrial motion was denied. See *id.* The issue on appeal to the supreme court was whether the appellate court ever obtained jurisdiction over the case. See *id.* at 476, 150 Ill.Dec. 554, 563 N.E.2d 441. The supreme court held that the appellate court lacked jurisdiction, reasoning that the plaintiff's first notice of appeal was ineffective because she filed it concurrently with her posttrial motion and that she failed to file a new notice of appeal after the trial court disposed of all pending posttrial motions. See *id.*

¶ 29 In support of his argument that a posttrial motion is unnecessary in this case, plaintiff points to a statement that the supreme court made in passing while discussing posttrial motions under section 2–1202(c), which authorized the plaintiff to file her own posttrial motion after the trial court entered judgment for the defendant notwithstanding the verdict in the plaintiff's favor. The supreme court noted, "The procedural rules provided plaintiff with an opportunity to attack the circuit court's order granting defendants' motion for judgment notwithstanding the verdict, and she did so. *While it was not essential that plaintiff file such a post-trial motion to preserve her appeal,* the Code of Civil Procedure and supreme court rules gave her that right and she exercised it." (Emphasis added.) *Chand,* 138 Ill.2d at 476–77, 150 Ill.Dec. 554, 563 N.E.2d 441. Plaintiff argues that the italicized clause in this statement indicates that although he had the right to file a posttrial motion in this case, he was not required to do so in order to preserve issues for appeal.

[6] [7] [8] ¶ 30 *Chand* is inapplicable to this case for two reasons. First, the statement that plaintiff points to in *Chand* is *obiter dictum* and is therefore of uncertain precedential ****887** ***1015** value. As the supreme court has explained, there are two types of *dicta* in judicial opinions:

> "The term 'dictum' is generally used as an abbreviation of *obiter dictum,* which means a remark or opinion uttered by the way. Such an expression or opinion as a general rule is not binding as authority or precedent within the *stare decisis* rule. [Citations.] On the other hand, an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum,* is a judicial *dictum.* [Citations.] And further, a judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous. [Citations.] Even *obiter dictum* of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court. [Citation.]" *Cates v. Cates,* 156 Ill.2d 76, 80, 189 Ill.Dec. 14, 619 N.E.2d 715 (1993).

See also *Lebron v. Gottlieb Memorial Hospital,* 237 Ill.2d 217, 341 Ill.Dec. 381, 930 N.E.2d 895 (2010). *Chand* dealt with the questions of jurisdiction and timely filing of notices of appeal, not the question of preserving error by filing a posttrial motion. The statement that plaintiff relies on was made in passing and does not appear to have been briefed by the parties in the case. Moreover, the statement is not accompanied by any citation to authority, so we are unable to determine the legal source and context of the statement. Consequently, it is unclear when read in the context of *Chand* whether the statement is binding precedent.

¶ 31 Even so, we need not take any position on whether the statement is *obiter* or judicial *dictum* or whether a posttrial motion is required to preserve error in a situation like *Chand* because that scenario is not before us. *Chand* is distinguishable from this case because its procedural posture is different. In *Chand,* the jury returned a general verdict in the plaintiff's favor, but the trial court vacated that verdict and entered judgment notwithstanding the verdict in the defendant's favor. Yet there was no special interrogatory in *Chand,* and unlike in *Chand* the trial court in this case did not enter judgment notwithstanding the verdict. Regardless of any precedential force that statement may have, it has no effect on this case because the trial court did not enter judgment notwithstanding the verdict. Indeed, because the trial court entered judgment in defendant's favor based on the special interrogatory answer, it explicitly did not reach defendant's alternative posttrial requests for judgment notwithstanding the verdict or a new trial.[3]

¶ 32 In light of the above discussion, we conclude that a posttrial motion is necessary in order to preserve error in this particular procedural situation. Unlike *Keen* and *Mohn,* the jury not only rendered a general verdict but also made a specific factual finding in response to the special interrogatory. Although the trial court vacated the judgment based on the general verdict, the trial court then entered judgment based on the jury's finding ****888** ***1016** in the special interrogatory. Because judgment was entered in defendant's favor on the jury's finding,

Illinois Supreme Court Rule 366 required plaintiff to file a posttrial motion in order to preserve issues for review. Plaintiff failed to do so, and he has therefore forfeited review of any alleged errors. *Cf. F.E. Holmes & Son Construction Co. v. Gualdoni Electric Service, Inc.*, 105 Ill.App.3d 1135, 1142–43, 61 Ill.Dec. 883, 435 N.E.2d 724 (1982) (in a case where the trial court entered judgment in the plaintiff's favor based on the jury's answer to a special interrogatory, finding that the defendant failed to preserve the issue for review because it "did not move to vacate the answer to the special interrogatory nor did it file a post-trial motion objecting to the answer").

[9] ¶ 33 Despite plaintiff's forfeiture, it is well settled that the forfeiture rule is "an admonition to the parties and does not impose a limitation on the reviewing court." *In re J.R.*, 342 Ill.App.3d 310, 317, 276 Ill.Dec. 519, 794 N.E.2d 414 (2003). We may overlook forfeiture "in the interest of developing a sound body of law [citation], and may review any issue so long as the record contains facts sufficient for its resolution [citation]". *Id.* at 317–18, 276 Ill.Dec. 519, 794 N.E.2d 414. The trial court's decision in this case relied on our reasoning and holding in *Hooper v. County of Cook*, 366 Ill.App.3d 1, 303 Ill.Dec. 476, 851 N.E.2d 663 (2006). In the interest of developing our precedent in order to provide guidance in similar cases, we choose to reach the merits of plaintiff's appeal.

¶ 34 B. Compatibility of the Special Interrogatory With the General Verdict

[10] ¶ 35 We first examine plaintiff's contention that the trial court erred by entering judgment in defendant's favor based on the jury's answer to the special interrogatory. Special interrogatories are governed by section 2–1108 of the Code of Civil Procedure (735 ILCS 5/2–1108 (2010)), which reads in full as follows:

> "Verdict—Special interrogatories. Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly."

We review *de novo* as a question of law a trial court's decision on whether to give a special interrogatory that has been requested by a party. See 735 ILCS 5/2–1108 (2010).

[11] [12] [13] [14] [15] ¶ 36 Special interrogatories are designed to be the "guardian of the integrity of a general verdict in a civil jury trial [citation]," and they "test[ ] the general verdict against the jury's determination as to one or more specific issues of ultimate fact." (Internal quotation marks omitted.) *Simmons v. Garces*, 198 Ill.2d 541, 555, 261 Ill.Dec. 471, 763 N.E.2d 720 (2002). As section 2–1108 explains, an answer to a special interrogatory controls the judgment when it is "inconsistent" with the general verdict. The special interrogatory only controls, however, when it is "clearly and absolutely irreconcilable with the general verdict. [Citation]." (Internal quotation marks omitted.) *Id.* As the supreme court has explained:

> ***1017 **889** "If a special interrogatory does not cover all the issues submitted to the jury and a 'reasonable hypothesis' exists that allows the special finding to be construed consistently with the general verdict, they are not 'absolutely irreconcilable' and the special finding will not control. [Citation.] In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict. [Citation.]" *Id.* at 556, 261 Ill.Dec. 471, 763 N.E.2d 720.

¶ 37 The dispute in this case is whether the special interrogatory covered all of the issues related to foreseeability of Roberto's injury and subsequent death. Plaintiff argues that the interrogatory was unacceptably narrow and did not cover all possible explanations for Roberto's fall from the window. Specifically, plaintiff contends that Roberto accidentally ejected himself from

the window because he was confused, blind, mentally ill, and often delusional. Plaintiff argues that sufficient evidence was adduced at trial in support of the theory that Roberto merely "eloped" from the nursing home, and he did not intend to either kill or harm himself in any way when he exited the window. Consequently, plaintiff argues, the jury's answer to the interrogatory could be consistent with the general verdict if the jury answered the interrogatory in the negative because it did not believe that Roberto intended to harm or kill himself, but also found that defendant should have reasonably foreseen that Roberto would attempt to leave the facility via the window.

¶ 38 In contrast, defendant argues that the interrogatory covers plaintiff's elopement theory. Defendant's position is that the term "self-destructive" has no mental state associated with it, meaning that it covers all instances of self-destructive behavior regardless of whether that behavior was intentional, negligent, or merely accidental. Under defendant's interpretation, the jury answered the interrogatory in the negative because it found that defendant could not reasonably foresee that Roberto would harm or kill himself, regardless of Roberto's subjective mental state or intentions when he ejected himself from the window.

¶ 39 The trial court in this case explicitly relied on our reasoning and holding in *Hooper v. County of Cook*, 366 Ill.App.3d 1, 7–8, 303 Ill.Dec. 476, 851 N.E.2d 663 (2006), in which this court was confronted with a nearly identical situation to this case. In *Hooper*, the plaintiff was admitted to the defendant hospital for medical treatment unrelated to the case. See *id.* at 3–4, 303 Ill.Dec. 476, 851 N.E.2d 663. While in the intensive care unit (ICU), the plaintiff "became paranoid, combative and uncontrollable," which are symptoms consistent with "a form of delirium known as ICU psychosis." *Id.* at 4, 303 Ill.Dec. 476, 851 N.E.2d 663. The attending psychiatrist treated plaintiff with an antipsychotic and transferred her to another ward, but did not order one-to-one nursing care for the plaintiff or personally talk to or examine her. See *id.* Early the next morning, the plaintiff was found hanged in her bathroom. See *id.*

¶ 40 At trial, there was conflicting expert testimony regarding whether the plaintiff's death by hanging was foreseeable, and the experts were also unable to identify why the plaintiff hung herself. See *id.* During the jury instruction conference, the defendant asked the court to present the jury with a special interrogatory that is identical to the one used in the instant case. See *id.* at 5, 303 Ill.Dec. 476, 851 N.E.2d 663. However, the court refused to give the tendered interrogatory. See *id.* On appeal, we reversed and held that it was error for the trial court to ****890 *1018** refuse to give the interrogatory, finding that "[a] negative answer would have been irreconcilable with the general verdict against defendants." *Id.* at 8, 303 Ill.Dec. 476, 851 N.E.2d 663.

¶ 41 In this case, defendant tendered an interrogatory that was identical to the one in *Hooper*, arguing to the trial court that it would be error for the trial court to refuse to give it because, in light of *Hooper*, a negative answer would be dispositive regarding defendant's liability in negligence for Roberto's death. Plaintiff attempts to distinguish *Hooper* by arguing that in *Hooper* "the only theory the special interrogatory in that case was intended to cover was the foreseeability that the decedent would commit suicide." In contrast, plaintiff argues, in this case the special interrogatory fails to cover the possibility that Roberto was merely attempting to elope from the facility through the window when he accidentally fell to his death.

¶ 42 The problem with plaintiff's position is that it fails to account for the fact that the special interrogatory in *Hooper*, as well as the special interrogatory in this case, explicitly asked the jury to determine whether it was reasonably foreseeable that the decedent would commit suicide *or* act in a self-destructive manner. See *id.* at 5, 303 Ill.Dec. 476, 851 N.E.2d 663. If plaintiff's position were correct, then the interrogatory would only have mentioned the foreseeability of the decedent's suicide. The fact that it also asked for the jury's views on whether a self-destructive act was foreseeable indicates that the foreseeability of suicide was not the only theory encompassed by the interrogatory. Indeed, offering the two alternative theories was necessary in *Hooper*, given that there was a factual dispute between experts regarding whether the decedent had even committed suicide. Whereas the plaintiff's expert opined that the decedent had accidentally killed herself while in a delirious state, the defendant's expert opined that the decedent had intentionally hung herself. Regardless of which opinion the jury ultimately accepted, the decedent's death was either a suicide or a self-destructive act, both of which are theories that are covered by the special interrogatory. See *id.* at 8, 10, 303 Ill.Dec. 476, 851 N.E.2d 663 (referring

to the decedent's death alternately as "suicide" and "self-destructive behavior").

[16] ¶ 43 Like *Hooper*, in this case the parties presented evidence that suggested either that Roberto had committed suicide or that he may have accidentally fallen to his death while attempting to leave the facility through the window. The medical examiner ruled Roberto's death a suicide, which by the medical examiner's definition is necessarily an intentional act, although the medical examiner also conceded on cross-examination that an "undetermined" ruling on the manner of death might have been warranted if Roberto had not been thinking reasonably when he ejected himself from the window. There was also ample testimony that Roberto had expressed interest both in opening the window and in leaving the facility in order to return home, and it was also clear from the record that Roberto was not always rational. This is indistinguishable from the situation in *Hooper*. In both cases, there was evidence that the decedents killed themselves either intentionally or accidentally. Plaintiff's theory that Roberto accidentally fell to his death while delirious is no different in its material aspects from the plaintiff's theory in *Hooper* that the decedent accidentally hung herself while delirious. Just as in *Hooper* the possibility that the plaintiff's death was accidental was covered under the "self-destructive act" portion of the special interrogatory, so too in this case is the possibility that Roberto fell to his death accidentally **891 *1019 while he deliriously attempted to leave the facility through the window in order to return home.

¶ 44 Plaintiff further argues that a self-destructive act necessarily requires the intent to harm oneself. Plaintiff's interpretation is inconsistent with our holding in *Hooper* and with the understanding of the phrase in our case law. As we have already noted, in *Hooper* there was evidence that the decedent killed herself unintentionally, but this lack of intent did not render the interrogatory impermissibly ambiguous. Indeed, the interrogatory required that the jury answer in the negative both the suicide and the self-destruction prongs in that case in order to make the special interrogatory irreconcilable with the general verdict. See *id.* at 8, 303 Ill.Dec. 476, 851 N.E.2d 663.

¶ 45 Additionally, in *Hooper* we referred to *Winger v. Franciscan Medical Center*, 299 Ill.App.3d 364, 374, 233 Ill.Dec. 748, 701 N.E.2d 813 (1998). Although *Winger* dealt with the duty that a physician owes a mentally ill patient rather than the foreseeability of an injury, it is nevertheless useful in construing the meaning of the term "self-destructive". *Winger* stated:

> "Where it is reasonably foreseeable that a patient by reason of his mental or emotional illness may attempt to injure himself, those in charge of his care owe a duty to safeguard him from his self-damaging potential. This duty contemplates the reasonably foreseeable occurrence of *self-inflicted injury regardless of whether it is the product of the patient's volitional or negligent act.*" (Internal citations omitted.) (Emphasis added.) *Winger*, 299 Ill.App.3d at 374, 233 Ill.Dec. 748, 701 N.E.2d 813.

As *Winger* makes clear, whether patients intend to harm themselves is irrelevant in this particular context. Regardless of whether Roberto's death was in fact the result of either a volitional or a negligent act on his part, it is covered by one of the prongs of the special interrogatory.

¶ 46 In sum, we cannot reconcile the jury's answer to the special interrogatory with the general verdict in plaintiff's favor. Although we are bound to exercise "all reasonable presumptions * * * in favor of the general verdict," (*Simmons*, 198 Ill.2d at 556, 261 Ill.Dec. 471, 763 N.E.2d 720), plaintiff's interpretation is not reasonable. Both our case law and the record at trial demonstrate that plaintiff's theory that Roberto's death was an unintentional accident is covered by the self-destructive act prong of the special interrogatory. The jury found that it was not foreseeable that Roberto would kill or harm himself, and without foreseeability there can be no negligence. See *Hooper*, 366 Ill.App.3d at 8, 303 Ill.Dec. 476, 851 N.E.2d 663. The general verdict was irreconcilable with the special interrogatory answer, and as a result the trial court properly vacated the judgment in plaintiff's favor and entered judgment for defendant based on that answer.

¶ 47 C. Form of the Special Interrogatory

¶ 48 Plaintiff also argues that he is entitled to a new trial because the trial court should never have given the interrogatory at all. Although plaintiff's argument on this point is in most respects the same as his argument on the issue of consistency with the general verdict, we address it separately because the analytical framework is different.

[17] [18] [19] ¶ 49 Section 2–1108 mandates requires the trial court to instruct the jury to answer a special interrogatory when a party requests it. See 735 ILCS 5/2–1108 (West 2010). However, the trial court's duty on this point only arises when the interrogatory is in the proper form. "[A] special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, **892 *1020 and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons,* 198 Ill.2d at 563, 261 Ill.Dec. 471, 763 N.E.2d 720. Additionally, the interrogatory "should be a single question, stated in terms that are simple, unambiguous, and understandable; it should not be repetitive, confusing, or misleading." *Simmons,* 198 Ill.2d at 563, 261 Ill.Dec. 471, 763 N.E.2d 720.

¶ 50 As we discussed in the previous section, the first two points have been satisfied because the interrogatory related to the foreseeability of Roberto's actions and a negative answer is dispositive on the question of defendant's liability in negligence. We will not repeat our analysis here. Moreover, we previously analyzed this same interrogatory in *Hooper* and explicitly found that it met those elements. See *Hooper,* 366 Ill.App.3d at 7–8, 303 Ill.Dec. 476, 851 N.E.2d 663.

[20] ¶ 51 Plaintiff additionally argues that the interrogatory required the jury to make four separate findings of fact, that is, whether (1) Roberto committed suicide, and (2) if so, was it foreseeable, or (3) whether Roberto committed a self-destructive act, and (4) if so, was it foreseeable? We disagree. The interrogatory was phrased as a single question about the foreseeability of two alternatives in the disjunctive, and an affirmative answer to either alternative would require an affirmative answer to the entire question. Such a construction is legitimate and does not make the interrogatory impermissibly compound. *Cf. Morton v. City of Chicago,* 286 Ill.App.3d 444, 450, 222 Ill.Dec. 21, 676 N.E.2d 985 (1997) (interrogatory with three alternatives in the disjunctive)

[21] ¶ 52 Finally, plaintiff argues that the interrogatory was confusing. In particular, plaintiff argues that the jury was not provided with a definition of either "suicide" or "act in a self-destructive manner". Plaintiff argues that this fact alone means that the jury must have misunderstood the meaning of the interrogatory and explains the discrepancy between the general verdict and interrogatory answer.

¶ 53 This is disingenuous. Not only was the jury provided with the definition of suicide through the testimony of the medical examiner, but during closing arguments plaintiff's attorney made the following statement to the jury while addressing the topic of the special interrogatory:

> "You'll be given what's called a special interrogatory. The special interrogatory will say prior to Roberto Garcia's death, was it reasonably foreseeable to [defendant] that he would commit suicide or act in a self-destructive manner on or before April 21, 2004? So what does that mean? No one knows for sure why Roberto Garcia went out the window. *Some have said it's suicide. Some have said it's elopement.* All have said no one knows for sure. * * * *Either way, it's self-destructive.* Either way, the harm was caused. So this question really asks both * * * was it foreseeable to them? Was it reasonably foreseeable?
>
> Again, the test isn't did they know for sure that this exact thing was going to happen on this day. The test is was it reasonably foreseeable? Should they have known enough that they should have taken precautions, simple precautions, to prevent Roberto Garcia from going out the window. For all the reasons we talked about, the answer to both of these questions should be yes." (Emphasis added.)

[22] ¶ 54 Plaintiff asserts that we should disregard this argument, pointing out that the arguments of counsel are not evidence. However, as plaintiff concedes in his own reply brief, the test for construing the meaning of a jury instruction "is not what meaning the ingenuity of counsel **893 *1021 can at leisure attribute to the instructions, but how and in what sense, under the *evidence before them and the circumstances of the trial,* ordinary men acting as jurors will understand the instructions." (Emphasis added.) *Reivitz v. Chicago Rapid Transit Co.,* 327 Ill. 207, 213, 158 N.E. 380 (1927), *quoted in Hulke v. International Manufacturing Co.,* 14 Ill.App.2d 5, 52, 142 N.E.2d 717 (1957). The mere fact that the jury did not receive specific definitions of all of the words in the interrogatory does not mean that it is automatically confusing. Moreover, plaintiff's own counsel argued to the jury at trial that the special interrogatory did in fact cover the very theory that plaintiff now claims on appeal

was not covered. Based on plaintiff's own explanation of the interrogatory at trial, any reasonable juror would understand plaintiff's argument to mean that a negative answer to the interrogatory would be fatal to plaintiff's case.

¶ 55 As we held in *Hooper* and reiterate here, the interrogatory is in proper form. See *Hooper*, 366 Ill.App.3d at 7–8, 303 Ill.Dec. 476, 851 N.E.2d 663. The trial court was correct to give it to the jury when defendant requested it.

¶ 56 III. CONCLUSION

¶ 57 The jury's special interrogatory answer that Roberto's death was not foreseeable is irreconcilable with a general verdict in plaintiff's favor, and the interrogatory is in the proper form. The trial court was therefore correct to give the interrogatory and to enter judgment in defendant's favor based on the jury's answer to it.

¶ 58 Affirmed.

Justices KARNEZIS and HARRIS concurred in the judgment and opinion.

All Citations

2011 IL App (1st) 103085, 956 N.E.2d 1005, 353 Ill.Dec. 877

Footnotes

1 Defendant initially raised the forfeiture issue in its response brief, and plaintiff addressed defendant's arguments in its reply. Due to the uniqueness of this issue in this particular procedural context and in order to have the benefit of full briefing by the parties, we ordered defendant to file a surreply addressing the cases raised in plaintiff's reply.

2 There is some authority indicating that an unrelated proposition in *Robbins* regarding the preclusive effect of the denial of a petition to file an interlocutory appeal may have been overruled *sub silentio* by *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 241, 97 Ill.Dec. 454, 492 N.E.2d 1327 (1986). See *Rosolowski v. Clark Refining & Marketing*, 383 Ill.App.3d 420, 428 n. 5, 322 Ill.Dec. 92, 890 N.E.2d 1011 (2008) (citing *Craigmiles v. Egan*, 248 Ill.App.3d 911, 918, 188 Ill.Dec. 672, 618 N.E.2d 1242 (1993)). The supreme court has never explicitly repudiated *Robbins*, however, and the case was cited with approval in *Mohn*, which was decided 12 years after *Kemner*. Even assuming that *Robbins* has been overruled in part, that particular point is not relevant to the question of how error is preserved.

3 Section 2–1202(f) mandates that the trial court "rule upon all relief sought in all post-trial motions." 735 ILCS 5/2–1202(f) (West 2010). The purpose of this rule is to ensure that, in the event that a reviewing court reverses on or vacates one form of relief, the trial court's decisions on the other forms of relief are available for review. See 735 ILCS 5/2–1202(f) (West 2010). The trial court in this case found that defendant's alternative requests for relief were moot due to its ruling on the main issue of the special interrogatory. Neither party assigns this action as error, however, so we do not address it further given our disposition of this case.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Hugh C. Griffin
Hall Prangle & Schoonveld, LLC
200 South Wacker Drive, Suite 3300
Chicago IL 60606

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

March 21, 2018

In re: Zachary Stanphill, Adm'r, etc., Appellee, v. Lori Ortberg, Indv., etc., et al., Appellants. Appeal, Appellate Court, Second District. 122974

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

April 11, 2018

Hugh C. Griffin
Hall Prangle & Schoonveld, LLC
200 South Wacker Drive, Suite 3300
Chicago, IL 60606

In re: Stanphill v. Ortberg
122974

Today the following order was entered in the captioned case:

Unopposed motion by Appellants for an extension of time for filing appellant's brief to and including May 25, 2018. Allowed.

Order entered by Justice Thomas.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Laura Georgann Postilion
Lori A Vanderlaan

APPEAL TO THE SECOND DISTRICT APPELLATE COURT OF ILLINOIS FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, WINNEBAGO COUNTY, ILLINOIS

ZACHARY STANPHILL, as Administrator of the Estate of Keith Stanphill, deceased,	)	Case No. 14 L 35
Plaintiff-Appellant,	)	
vs.	)	
LORI ORTBERG, individually, and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,	)	
Defendants-Appellees.	)	

FILED
Date: 12/21/16
Thomas A. Klein
Clerk of the Circuit Court
By EB Deputy
Winnebago County, IL

NOTICE OF APPEAL

NOW COMES Plaintiff-Appellant, ZACHARY STANPHILL, as Administrator of the Estate of Keith Stanphill, deceased, through his Attorneys, BEST, VANDERLAAN & HARRINGTON, pursuant to Supreme Court Rule 303, hereby appeals the following orders entered in this case:

1. Order granting Defendant's tender of special interrogatory, over objection of Plaintiff on 6/1/2016 and giving of special interrogatory to jury (no Order entered by trial court, but Report of Proceedings contains rulings in this regard by the Court);

2. Order denying Plaintiff's oral motion to enter judgment in favor of Plaintiff on the General Verdict – VERDICT FORM A on 6/2/2016 (no Order entered by trial court, but Report of Proceedings contains rulings in this regard by the Court);

3. Order entering judgment in favor of Defendants on the special interrogatory, dated 6/2/2016 (a copy is attached hereto as Exhibit "A"); and

4. Order denying Plaintiff's Post-Trial Motion to Reconsider Judgment on Special Interrogatory and Vacate Same and Enter Judgment on the General Verdict – VERDICT FORM A, or Alternatively for Judgment Notwithstanding the Verdict, dated 11/23/2016 (a copy is attached hereto as Exhibit "B").

On appeal, Plaintiff-Appellant, ZACHARY STANPHILL, as Administrator of the Estate of Keith Stanphill seeks that the aforementioned orders be vacated, and that the judgment in favor of Defendants-Appellees on the special interrogatory be reversed and vacated and judgment be entered in favor of Plaintiff -Appellant on the General Verdict – VERDICT FORM A or that this case be remanded to the Trial Court with instructions to enter judgment in favor of Plaintiff-Appellant on the General Verdict – VERDICT FORM A.

Respectfully submitted,

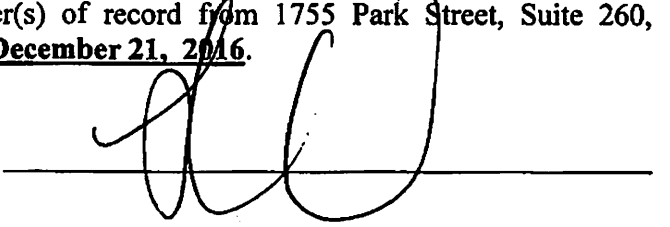
ZACHARY STANPHILL, as Administrator of the Estate of Keith Sylvester Stanphill, Deceased

By: _____
One of His Attorneys

James F. Best #201316
Lori A. Vanderlaan #6230432
Ashley M. Folk #6317133
Best, Vanderlaan & Harrington
25 E. Washington Street, Suite 800
Chicago, IL 60602
(630) 752-8000
(630) 752-8763 (Fax)

CERTIFICATE OF SERVICE

I, the undersigned, state that I caused copies of the foregoing to be served, with enclosures referred to thereon, if any, by **U.S. Mail, Fax and E-Mail** to the attorney(s) of record at the address(es) and/or facsimile number(s) of record from 1755 Park Street, Suite 260, Naperville, IL 60563, prior to 5:00 p.m. on **December 21, 2016**.



ATTORNEY SERVICE LIST

Counsel for Defendants Lori Ortberg and Rockford Memorial Health Systems, et al:
Laura G. Postilion
Quintairos, Prieto, Wood & Boyer, P.A.
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
Fax: (312) 566-0041
laura.postilion@qpwblaw.com

CC - 75

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

Stanphill

vs.

Ostberg

FILE STAMP
FILED
Date: 6/3/16
Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

Case No. 14L35

ORDER

This matter comes before the Court for jury trial. The jury having rendered its verdict.

It is hereby ordered that:

The Court, having reviewed the verdict ~~[illegible]~~ as well as the jury's response to the Special Interrogatory. Judgment is entered in favor of the Defendants.

EXHIBIT
A

Enter 6/2/16

Judge

CF 5.28.07

2-16-1086

LAV/AMF 5729 (5) CC-75

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

Zachary Stanphill

FILE STAMP

vs.

Lori Ortberg, Rockford Memorial Health System et al. Case No. 14 L 35

ORDER

This matter coming to be heard on Plaintiff's Post TRIAL Motion TO Reconsider Judgment on Special Interrogatory and Vacate Same and enter Judgment on the General Verdict or in the Alternative, for Judgment Notwithstanding the Verdict or Alternatively for NEW TRIAL Based On Error in Given Special Interrogatory, due Notice having been given, the Court having read briefs, considered Same & argument of Counsel & otherwise being fully advised in the premises;

It Is HEREBY ORDERED:

(1) for the reasons Stated in open Court, the Plaintiff's Post trial motion is denied in its entirety.

Enter 11/23/16

Judge

EXHIBIT B

CF 5.28.07

2-16-1086

CC - 75

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

Zachary Stanphill

FILE STAMP
FILED
Date: 11/23/16
Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

vs.

Lori Ortberg, Rockford Memorial Health Systems et al. Case No. 14 L 35

ORDER

This matter coming to be heard on Plaintiff's Post Trial Motion to Reconsider Judgment on Special Interrogatory and Vacate Same and enter Judgment on the General Verdict or in the Alternative, for Judgment Notwithstanding the Verdict or Alternatively for New Trial Based on Error in Given Special Interrogatory, due Notice having been given, the Court having read briefs, considered Same & arguments of Counsel & otherwise being fully advised in the premises;

It Is Hereby Ordered:

(1) For the reasons stated in open court, the Plaintiff's Post trial motion is denied in its entirety.

Enter 11/23/16

Judge

CF 5.28.07

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, Deceased,	)
Plaintiff,	)
-vs-	) No. 14 L 35
LORI ORTBERG, individually and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,	)
Defendants.	)

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause held at the Winnebago County Courthouse, Room 426, 400 West State Street, Rockford, Illinois, before the HONORABLE J. EDWARD PROCHASKA, Judge of said Court, on the 23rd day of November, 2016, at the hour of 10:30 a.m.

COUNSEL PRESENT:

BEST, VANDERLAAN & HARRINGTON, by:
MS. LORI A. VANDERLAAN and
MR. JAMES F. BEST
25 East Washington Street, Suite 800
Chicago, Illinois 60602
(312)819-1100
lvanderlaan@bestfirm.com,
appeared on behalf of the Plaintiff;

QUINTAIROS, PRIETO, WOOD & BOYER, PA, by:
MS. LAURA G. POSTILION
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
(312)566-0040
laura.postilion@qpwblaw.com,
appeared on behalf of the Defendants.

REPORTED BY:

CAROLYN J. HAWKES, C.S.R. No. 084-003296.

THE COURT: 2014 L 35, Stanphill versus Ortberg. Attorneys state your names for the record.

MS. VANDERLAAN: Lori Vanderlaan on behalf of plaintiff.

MR. BEST: Jim Best on behalf of the plaintiff.

MS. POSTILION: Laura Postilion for the defendants.

THE COURT: So this is set for a hearing on plaintiff's post-trial motion, which has been fully briefed. And I've read all -- everything. I will certainly allow you to supplement the record with argument, but I don't need you to take a half an hour because I spent hours reading your briefs, and so I'm really familiar with the issues. But if you want to supplement the record with argument, fire away.

MS. VANDERLAAN: Okay, Judge. With that said, I think a few key points I want to make definitely --

THE COURT: Okay. Go ahead.

MS. VANDERLAAN: -- is I think it's very important that the language of the special interrogatory is really what's controlling this decision. And that language being whether it was reasonably foreseeable to Lori Ortberg whether or not

Keith Stanphill would commit suicide.

You look at that in relation to all of the other instructions that the jury was given and what they found in the general verdict, that she was negligent in recognizing that Keith Stanphill was suicidal. If those two aren't exactly the same, you fail to recognize he was suicidal, the same as not foreseeing he would commit suicide. Completely consistent if you look at the instructions the jury was given and how they found in the general verdict, in addition to failing to evaluate him with a proper mental health, failing to diagnose him, refer him, et cetera.

So looking at the instructions, looking at the language of the special interrogatory supports our position in this case that the two, the answer of special finding and the instructions, are absolutely consistent. You couldn't find any other way by language of how the jury had to make their decisions to begin with and the decisions that they made.

I think the law is very well established on this issue. I think it's -- it's obvious that if you apply the law and you look at the special finding and the general verdict and what the jury had to

find, there's no question that you have to find consistency in this case. All reasonable presumptions in favor of the general verdict.

Inconsistency only exists when the special finding and the general verdict are clearly and absolutely irreconcilable. Clearly and absolutely irreconcilable. And they're only absolutely irreconcilable if no reasonable hypothesis as to consistency exists.

I would point, Your Honor -- I'm sure you've read it already, but to that Lancaster versus Jeffrey Galion case that I think defense cited. It's a Winnebago County case. It was a case where the special interrogatory was found not to be in the proper form because it didn't properly state the law to begin with on the issue of misuse as it relates to manufacture; in addition, the Court found that even if it was in the proper form, that it was not absolutely irreconcilable, that there was a hypothesis by which to find consistency, and in that case the Court found that -- or the Court -- the Appellate Court ordered that it be remanded for entry on the general verdict in favor of the plaintiff in a circumstance where the Court found it wasn't in

proper form and, alternatively, it would be consistent nonetheless.

I think that case is directly on point and requires a finding in favor of the plaintiff, a reconsideration of your -- of your prior order -- order entering judgment on the special interrogatory.

A couple other points I think that are important on the issue of consistency. This interrogatory was tendered by the defendant. The issue of whether it should have Lori Ortberg's name in the interrogatory, as to whether it would be foreseeable to Lori Ortberg, was established by the defendant. The defendant said at instruction conference it absolutely has to be that way. She insisted upon it.

The jury found by virtue of their general verdict that Lori Ortberg did not see/recognize Keith Stanphill as suicidal, she did not see/recognize -- diagnose him as depression, she did not see/properly evaluate him with a proper mental health assessment. All of those findings by the general verdict is absolutely consistent with the finding that Keith Stanphill's suicide was not foreseeable to Lori Ortberg. If she didn't recognize him as suicidal,

it's absolutely consistent that she wouldn't have foreseen his suicide. Absolutely consistent.

I think it's also important to realize that, again, looking at all of the other instructions that the jury had to look at to -- to do this analysis on consistency, all of the instructions ask the jury to determine if Lori Ortberg was negligent, if she failed to do those things that a reasonably careful social worker should have done.

They found that she failed on every -- they -- in her general verdict -- in their general verdict they found she failed, that she was negligent. So to find that she failed to foresee his suicide, again, completely consistent.

At a minimum, Judge, there's a reasonable hypothesis that would exclude and preclude you from finding that the special finding and the general verdict are absolutely irreconcilable.

I mean, Mr. Best proffered this reasonable hypothesis -- hypothesis at the hearing on the special interrogatory. He said that -- his point is it wasn't reasonably foreseeable because she didn't really believe he was going to commit suicide because she didn't think that. And the reason she didn't

believe that is because she didn't comply with the standard of care. So it doesn't really test the verdict because of that.

That's exactly the situation. Did you ever hear the saying you can't dream something that you've never seen before? How can you foresee a suicide that you didn't even identify as actually existing when the man was in your office. It would be impossible to foresee his suicide if she didn't recognize him as suicidal. That's why they are absolutely consistent.

How do we know -- and I think this is an important point too, Judge, that I want to make. How do we know that what I'm saying is true. Because Lori Ortberg testified at trial that if she recognized somebody as suicidal, that she would take emergent steps. She would call the police. She would refer them to the ER. Why would she take those emergent steps. Because she would foresee them being suicidal.

So if she failed to recognize him as being suicidal, the converse is true, she wouldn't take those emergent steps because she wouldn't foresee he was suicidal.

Her testimony of what she would do in the circumstance in which she recognized somebody is suicidal confirms that when she recognizes it, suicide is foreseeable, including to her. That's how, again, we know that this is absolutely -- the special finding and the general verdict are absolutely consistent.

Defendants claims in their brief that it requires you to speculate to come to this analysis or to this determination. There's absolutely no speculation required here. Number one, as I pointed out, Mr. Best predicted it before it would have ever happened. So that's certainly not speculation, when you're predicting it on the forefront, as opposed to asking you to retrospectively look at it.

The other thing is look at the -- again, at the Lancaster versus Galion case. That case tells you that you have to look at the findings the jury had to make in order to come to the conclusion that the manufacturer in that case was negligent.

And the findings that they had to make to come to that conclusion -- I just want to point it out here. The Court said to get to the point of a general verdict in favor of the plaintiff the jury

had to find that the roller was being used in a manner either intended or reasonably foreseeable to the defendants. Thus the findings the jury had to make in order to arrive at the general verdict implicitly required the jury to make findings consistent with their answers to the special interrogatory.

Exact same situation here. The findings the jury had to make to arrive at their general verdict that she didn't recognize, diagnose, do the evaluation was implicit in the findings that they had to make to arrive at their answer to the special interrogatory. Just like Lancaster. The Court held consistency and in proper form and remanded to enter a judgment in favor of the plaintiff on the general verdict.

Other issues to bring up -- and, again, I don't want to belabor it, Judge, but you can look at Bilderback, Simmons, Blue Environmental, which is a Supreme Court case, Jones versus DHR Cambridge, and the Beretta versus City of Chicago case.

It's clear that this interrogatory was not in proper form. The Supreme Court decision in City of Chicago versus Beretta makes it clear that when

you're testing foreseeability, you don't do it through the eyes of the negligent defendant, you do it through the eyes of a reasonable person.

In that case it was all about whether the retail sales -- sales establishments for selling guns should have foresaw that their sale of guns could cause a nuisance. And the whole -- one of the big issues discussed in -- by the Supreme Court in that case was how do you determine legal cause. Because the Appellate Court had done it wrong. And the Supreme Court said you determine legal cause by looking through the eyes of what a reasonable person in the business of that defendant would have foresaw. Not what the negligent defendant would have foresaw. Because, obviously, they're negligent and presumably wouldn't foresee it. So I think that that's important.

If you look at all of these issues, there's absolutely no way that special interrogatory should control this verdict, whether you find it to be an improper form, whether you find it consistent, whether you find there to be a reasonable hypothesis. There's no way that the special finding should control this verdict. In that regard, you should

reverse your prior decision and enter judgment on the general verdict.

A couple of other issues, Judge, that I want to bring up is if you disagree with me on that point, then we have also asked for a judgment notwithstanding the verdict on the special interrogatory. And here's why. Because there's absolutely no way a jury on the one hand could find that Lori Ortberg failed to recognize Keith Stanphill as suicidal and on the -- at the same time claim that she couldn't foresee it.

And here's why. Because if they -- if the jury found that she failed to recognize him as suicidal, that means the jury found that she failed to do what a reasonably careful social worker would have done. Meaning a reasonably careful social worker would have recognized him as suicidal. That's the implicit outcome of their determination.

And if they find that a reasonably careful social worker would have recognized him as suicidal, done the evaluation, diagnosis, et cetera, by her own testimony, in a situation like that she engages emergent instructions, calling the police, referring to the ER, all of those things.

By her own testimony and all of her experts' testimony you recognize as suicidal, you must immediately engage. And why? Because you have a duty to prevent an imminent risk of suicide. That's based on their own EAP statement of understanding as well.

So there's simply no way that a reasonable jury could find that Lori Ortberg failed to act as a reasonably careful social worker and that she should have recognized him as suicidal and in the same breath say it wasn't foreseeable to her if she was acting as a reasonably careful social worker. Those two decisions there's just no way a jury could find that way, and so you should enter judgment notwithstanding the verdict on the special interrogatory.

The last alternative relief we ask for, Judge, is a new trial. If you -- if you don't -- if you don't agree with the prior two arguments and enter judgment in favor of the plaintiff on the general verdict, we should have a new trial.

There's no question that Lori Ortberg's name should not have been in that special interrogatory. It should have been what a reasonable

person would foresee. It should have been what a reasonably careful social worker would foresee. It should not have been on what Lori Ortberg should have foreseen.

And the whole issue with the Garcia case -- and I know defense counsel's going to bring that up. And, obviously, Your Honor, we talked about that during jury instructions. It's simply not on point. It's not on point because it doesn't follow the Supreme Court's decision in the City of Chicago versus Beretta. It doesn't even follow the instruction approved by the First District in Hooper.

Beretta says you can't test foreseeability through the eyes of the negligent defendant. Hooper, the interr -- the interrogatory that the Appellate Court said should have been given phrased it was it reasonably foreseeable. Not to the defendant. It asked the jury to determine whether it was reasonably foreseeable. Not whether it was reasonably foreseeable to the defendant.

Why did they make a different decision in Garcia? I can only -- I can only suggest, Judge, that that case was very, very different. It wasn't dealing with a situation where the defendants in that

case failed to properly assess the decedent, where they failed to properly diagnose him. Everybody conceded in that case that he had various psychological issues, including schizophrenia, hallucinations, delusions. Everybody agreed that he was not at a risk for suicide. Nobody was even arguing any of that. The only issue in that case was should they have taken steps to make him safe, knowing all of this information they already had.

So they had this whole background of information. And the question was with all of that information, was it foreseeable to the defendant that he could have fallen out the window or what have you. That was the issue in Garcia.

That's not the situation here. And Mr. Best talked about that during the instruction conference. It's a different case. Here we're talking about somebody who should have had information, but flat out didn't, and the jury found she didn't have that information.

You can't apply the same test. You can't use the same language in the special interrogatory when we're dealing with somebody who didn't have information to test foreseeability versus somebody

who did have information to test foreseeability.

So our alternative is for a new trial. Our position is you should enter judgment in favor of the plaintiff, for all of the reasons I've said. We won this case. The jury found in favor of the plaintiff. The special interrogatory is completely consistent with the jury's general verdict.

We should not have to try this case again. We should not have to try the case again. Defense is the one who insisted on the special interrogatory, insisted on the language of the special interrogatory.

All of the case law that I've cited to you that found special interrogatories to be in improper form because it didn't comply with the law, including the Lancaster case, including the Blue versus Environmental case, which is a Supreme Court case, said improper form, we're setting it aside, we're finding in favor on the general verdict, remand and instructed the judge to do that or the Court did it -- the Appellate Courts did it themselves.

So our position is you should reverse your prior decision and enter judgment in favor of the plaintiff.

THE COURT: Thank you very much.

ms. Postilion, response?

MS. POSTILION: Thank you, Your Honor.

The law does not support the plaintiff's position. I know you've read all of the briefs, and I'll try to streamline my argument and counter some of the points that the plaintiff brought up.

The plaintiff's theory has been tried and tested with a similar argument in the Garcia case. The Appellate Court ruled. It said in no uncertain terms that the special interrogatory as worded was inconsistent with the general verdict for the plaintiff. That's the law in our state.

And I know that the plaintiffs have cited to numerous cases, the Beretta case, which has to do with public policy, and the Lancaster case and Blue, very -- Bilderback. None of those cases are on point because they don't deal with a special interrogatory that was given to a jury in a case involving suicide.

The only case in our whole state, any district of our state, that is right on point is the Garcia case. And that's why the Court ruled as it did and gave the interrogatory as worded, including the phrase to Lori Ortberg, meaning the

foreseeability had to be from Lori Ortberg's perspective. That's what the Garcia Court ruled was proper.

All roads in this issue lead to the Garcia decision. The Appellate Court in Garcia held it was proper to give the interrogatory and that it was in proper form.

Now, this was a de novo review, meaning that the Appellate Court was using the same standard of review as the trial Court did. And no matter how the plaintiff tries to dissect Garcia to create some kind of difference in the factual scenario, the bottom line is that the Appellate Court looked at this anew in a de novo review and determined that this was a proper interrogatory and that it was -- it would be inconsistent with the general verdict for the plaintiff.

And in determining that it was in proper form, which the Garcia Court did, the Garcia Court determined that the special interrogatory as worded was an accurate statement of the law. If it was not an accurate statement of the law, the Garcia decision would not have turned out the same way.

Plaintiff makes an argument that the

Garcia Court -- and this is in the briefs; it wasn't really mentioned today -- did not consider all reasonable presumptions in favor of the general verdict. I don't know how that presumption can be made because the Garcia Court actually stated in the decision that it did exercise all reasonable presumptions in favor of the general verdict and still found that the special interrogatory prevailed and trumped the general verdict.

Now, when we talk about reasonable presumptions, I believe that the Lapook case, L-a-p-o-o-k, is very helpful because it talks about reasonable presumptions. And it emphasizes the fact that the presumption has to be reasonable, obviously, but it's not really so obvious.

The plaintiff is presuming that her presumption is reasonable. However, when we look at what the evidence was that the plaintiff presented at trial, they never presented the presumption and the hypothetical that they're now presenting after the trial is over, after the verdict is entered, and after judgment was entered for the defendant.

So is it reasonable to presume that the jury would have interpreted the special interrogatory

the way they want the Court to rule? Absolutely not. They had an opportunity to extract evidence from their own expert, Dr. Bawden, on this very issue, as to whether the suicide was reasonably foreseeable to Lori Ortberg. I questioned him over and over and over again. Dr. Bawden would not give that opinion. He said this is not about foreseeability.

Well, it is. It is about foreseeability. The whole case is about foreseeability. Because that is what we need to show legal cause. So the plaintiff's hypothesis is not a reasonable presumption.

Whether or not Mr. Best predicted some outcome does not lead us to the conclusion that that is the thought process of the jury. In fact, we've been through this before in our motion to strike. The jury never had a question about the special interrogatory, during the trial, before they signed the verdict, before they signed -- they answered no to the special interrogatory. They never had a question about it.

So it's improper -- and this is under the Chalmers case. It's improper for the plaintiff to say look, we predicted it because this is what the

jury was thinking. That's really what their argument boils down to. And it's completely improper, under Chalmers and lots of other cases, to second guess -- including Lapook, to second guess or try to figure out after the verdict what the jury was actually thinking.

The plaintiff states that the special interrogatory should have included verbiage that states what a reasonable person would have foreseen or what a reasonably careful social worker would have foreseen. I want to make a couple of points on this issue.

The first and I think the most significant is the fact that the plaintiff is under an obligation to submit a proposed special interrogatory with the wording that the plaintiff wants in a special interrogatory. That was never done. The plaintiff never offered any other special interrogatory in this case. And under the law, that means the issue is waived. This is -- there are many cases on that subject. Plaintiff never tendered an alternate special interrogatory, and, therefore, the issue is waived.

In the Garcia case the plaintiff's

attorneys made a similar argument, stating that the special interrogatory, on which our special interrogatory was based, was confusing. And the Garcia Court actually held that the plaintiff's argument was disingenuous -- they used that term in the opinion -- because the terms in the interrogatory were defined by the witnesses and the plaintiff explained the terms in closing arguments.

So the Garcia Court went through the legal analysis that's required from a de novo review, looking at all aspects of the special interrogatory and whether it was proper, and they determined and held that it was proper and it was inconsistent with the general verdict for the plaintiff. And stare decisis requires that the judgment for the defendant be upheld.

The defendants believe that Judge Prochaska made the right call. He followed the law. And while this may not sit well with the Court, the Court did follow the law. And I think that's what's required at this stage of the litigation. This is the only case in Illinois that addresses this specific issue.

And if plaintiff believes that Hooper is

different from Garcia, well, the Hooper case said the special interrogatory was -- wasn't reasonable -- wasn't reasonably -- was the suicide reasonably foreseeable. In Garcia the interrogatory said was the suicide reasonably foreseeable to the defendant.

Either way you look at it, either one of those propositions is correct. Just because Garcia said to the defendant does not mean Hooper was wrong, and just because Hooper did not include to the defendant does not mean Garcia is wrong. The point is plaintiff never proffered a special interrogatory with the wording that they wanted.

And plaintiff's attorney said -- states that Hooper said -- Hooper's special interrogatory said that -- it phrased the suicide in terms of the suicide was reasonably foreseeable to a reasonable person. That's actually not what Hooper -- the special interrogatory said. It just said reasonably foreseeable, period. And my point in my -- so either way you look at it, either one of those would have been appropriate, reasonably foreseeable to the defendant or reasonably foreseeable, period.

We believe that Garcia is more on point because, number one, in Garcia the special

interrogatory is actually given to the jury in the form of was it reasonably foreseeable to the defendant. In Hooper they never even got to that point because in Hooper the trial judge did not give a special interrogatory at all, and so in the Appellate Court the Court found that the trial Court had committed reversible error in not giving a special interrogatory. So that's really what Hooper's all about was reversible error. Garcia goes a step further because the special interrogatory was actually given and the Court considered whether it was proper and held that it was.

So the plaintiff never tendered a special interrogatory stating was it reasonably foreseeable to a reasonable social worker. Well, that's not how a special interrogatory should be phrased. It's improper to combine elements of a cause of action. The whole point of a special interrogatory is to test an ultimate fact, not all of the facts. That's what the instructions are for. The special interrogatory tests one unique factor in the case.

And in Snyder versus Curran the reviewing Court held that folding all of the elements into a claim into one special interrogatory is improper

because it's more likely to confuse the jury. The Snyder Court also held that an ultimate question of fact does not require all of the elements necessary for a finding of guilty.

So the juries are charged with the reading of the special interrogatory in context with the other instructions, which clearly set forth the other elements they were to consider in rendering their verdict.

The form of the special interrogatory in our case was proper. How do we know? Because it's been tested. It's been approved. And the Court followed the law.

As for the plaintiff's request for relief, this case should not be tried again because the Court made the right call in the first instance by following the law in Garcia.

In terms of a judgment -- a ruling that the judgment was against the manifest weight of the evidence, as I briefly mentioned earlier, Dr. Bawden didn't even give the testimony that would support the hypothesis the plaintiff is now proffering to the Court. So if Dr. Bawden didn't say it, the jury didn't hear the evidence.

And I would submit, Your Honor, that the manifest weight of the evidence supports the jury's no answer to the special interrogatory. Because the only -- the only evidence they heard -- and this is from Lori Ortberg herself and from Dr. Hanus. The only evidence they heard was that the suicide was not foreseeable to Ms. Ortberg.

So I believe the only way -- if they were following the law that you gave them, Your Honor, the only way they could have answered this is no. The only mention of the plaintiff's theory on the case on the special interrogatory is a brief mention of it in the plaintiff's closing argument, where she told them to answer the special interrogatory yes.

There was no analysis at all of why that should be. The only time this case up is during argument that was not in front of the jury at all. And the first time that they say this is a reasonable hypothesis -- hypothesis that the jury probably was thinking was after they had rendered their verdict and answered the special interrogatory.

So to be against the manifest weight of the evidence the jury's finding be must be unreasonable, arbitrary, and not based on the

evidence. The jury's answer to the special interrogatory was completely reasonable because it was -- it was based on an abundance of evidence and the only evidence they heard on the issue, which was presented by the defendants.

So the plaintiff has presented a patchwork quilt of cases that do not deal with special interrogatories, that do not deal with suicides, that do not deal with foreseeability in an attempt to string together some type of argument that ignores the one case that is truly on point here. And that's the Garcia case. All roads lead to the Garcia decision.

So the law does not support the plaintiff's position. The special interrogatory answer controls the general verdict. And we request, Your Honor, that the Court deny the plaintiff's post-trial motion and allow the judgment for the defendants to remain intact.

THE COURT: Thank you.

MS. POSTILION: Thank you.

THE COURT: You're done?

MS. VANDERLAAN: Just a couple of points, Judge.

THE COURT: Go ahead.

MS. VANDERLAAN: First off, you don't look at Garcia in a vacuum. You have to look at the issues and the facts of this case and what was at issue in this case. Not in a vacuum.

The other thing is you look at the Hooper case, the Hooper case specifically says that legal cause is established if an injury was foreseeable as the type of harm that a reasonable person would expect to see as a re -- injury -- as a likely result of his or her conduct.

Hooper, the First District defined what is foreseeability or legal cause. The Garcia case didn't use it in that case, didn't follow their own prior law, and I would submit maybe because the facts are completely different. Again, we're dealing with a defendant who had all of the knowledge versus in this case a defendant who had, the jury found, none of the knowledge she should have had. So Hooper completely desecrates the contention that all roads in this case go through Garcia.

The other thing is I would -- I would indicate that there's -- defense counsel indicated that we didn't raise at trial or have an expert

testify as to what was or wasn't foreseeable. Foreseeability is a legal issue.

The issue we're dealing with right now is legal cause. Experts can't testify -- and we -- we maintained that issue throughout the trial. Experts don't testify as to legal cause. But it doesn't really matter. Because we already know what the jury decided in this case. She didn't recognize he was -- he was suicidal.

That's what you're looking at. You're look at the general verdict and a -- whether a reasonable hypothesis or consistency can be found between that and the special finding. It doesn't matter what anybody testified to in this case. When you're making that particular assessment, you're looking at what the jury decided.

They -- defense counsel indicated that you can't sit here and try to second guess the jury on what they were or were not thinking. That's completely contrary to Lancaster. Lancaster absolutely tells you that when you do this analysis, you have to go to look and see what the jury decisions had to be made to get to their general verdict and then compare it to this special finding

to see if they're consistent.

As to the plaintiff's counsel submitting a special interrogatory in its own form, that's not required. Again, go to the Lancaster case, Judge. The Lancaster Court says if you have a specific objection as to the substance of the interrogatory, that preserves your arguments not only on form, but on substance and form, as well as consistency.

So we absolutely didn't have to submit our own special interrogatory in that regard. We contended that one shouldn't be submitted period, but we also objected to the -- to the -- the substance of it. Very specifically, as I've already read.

Lastly, on the JNOV, the experts -- again, we know that the jury has decided she failed to recognize Mr. Stanphill as suicidal and all of the other issues in the general verdict. It doesn't matter what any expert says on foreseeability. Because every expert and Ms. Ortberg admits that had she recognized him as suicidal, she would have an immediate duty to act because that's -- that's because his suicide would be foreseeable. And no reasonable jury could have found otherwise. Thank you, Judge.

THE COURT: All right. Thank you. So I'm going to decide the case today. Because I've read your briefs and I've read your cases. And I appreciate your supplementing the record with your argument today, but it really is all contained within your briefs.

Court Reporter, what's your name?

THE COURT REPORTER: Carolyn Hawkes.

THE COURT: Carolyn. So Carolyn is the court reporter here today. She'll be the official record keeper of today's argument and decision.

So this is a case that's headed for the Appellate Court, so I'm going to make a record specifically for the Appellate Court.

First, I want to say that this was a hard-fought trial, that it lasted over a week, there were a lot of witnesses. I thought there were good and qualified experts on both sides of this case. It was a hard-fought battle.

And the reason I want to say that is I feel like the evidence was fairly balanced during the trial. I feel like this is a case that could have gone either way as far as the evidence goes. But basically, I think the credibility of the -- of the

defendant was paramount in this particular case and they were really -- the plaintiffs really attacked the credibility of the defendant, particularly because she relied a lot on what I would call custom and practice testimony, rather than things that were in the record, and that the plaintiff really attacked her credibility a lot, and I felt that was a key -- a key element of the trial.

And the Court -- the jury deliberated for a long time, and they reached a verdict for the plaintiff and awarded nearly 1.5 million, as I recall, and I felt that that verdict was absolutely justified by the evidence in this case.

And I would note that the defense in this case has not filed any kind of counter or cross appeal in any way attacking the jury's verdict in this particular case. And I don't think that would have gone anywhere anyway -- anywhere anyway because I feel like the evidence was fairly balanced. The defendant's credibility was clearly attacked, and -- and the jury rendered a verdict in favor of the plaintiff.

That verdict -- so the reason I'm saying all of this is because this entire case hinges on the

special interrogatory. The entire case hinges on the special interrogatory.

This is not a case where a new trial should be ordered, either by me or the Appellate Court. If this -- if this special interrogatory was appropriate, then what I did by entering a judgment in favor of the defendant on that special interrogatory shall be -- should be upheld.

If that special interrogatory was not appropriate under the law of the State of Illinois, then that special interrogatory should be thrown out and judgment should be entered in favor of the plaintiff on the verdict.

There's no reason to retry this case. This case stands or falls on that special interrogatory.

The reasons that I gave at the time of trial -- and we had to do it quickly because I think all of us were a little bit stunned by the verdict versus the special interrogatory. I had to rule very quickly on whether or not that special interrogatory was appropriate. Because Ms. Postilion immediately asked for judgment, as she should, to be entered on behalf of the defendant on the special interrogatory,

as it being inconsistent with the general verdict.

I said then that I was following the law in Garcia. I read that case. I read that case when Ms. Postilion tendered that special interrogatory to me. We -- you know, I took it under advisement. I read the case. I think I allowed the plaintiff an opportunity to respond. And I gave that special interrogatory because I felt like it was almost verbatim from the Garcia case, which was also a suicide case, which also involved foreseeability.

And the only thing that I did was I -- I limited it to suicide. Was it reasonably foreseeable to Lori Ortberg that Keith Stanphill would commit suicide on or before the date. I took out the language about -- whatever the other language was, risk of committing harm or something of that nature. So I limited it to suicide because that's what our case was.

But other than that, it was virtually cut and pasted from the Garcia Appellate Court opinion, which was a published opinion, it's the law in the State of Illinois, it's binding on any Circuit Court that finds that that Appellate Court decision is on point with what we've got going on here, and that's

the reason I gave that special interrogatory, and that's the reason I entered judgment on that special interrogatory, finding that it was inconsistent with the general verdict. I felt like my hands were tied to Garcia.

That being said, Ms. Postilion was right when she during her comments today said that that decision may not sit well with the Court. That's words right out of her mouth, and I couldn't say it better. That decision does not sit well with the Court. And I'll tell you why.

I think Garcia was wrongly decided. I think Garcia is an anomaly. I don't think Garcia sets forth what the law of the State of Illinois is or should be with respect to whether or not suicide is reasonably foreseeable. How in the world can a jury figure out how to answer that question? Because it says was it reasonably foreseeable to Lori Ortberg, the defendant.

How can that not be ambiguous? I can't imagine how that can't be ambiguous. Because Lori Ortberg was charged with several elements of negligence, one of which was that she didn't foresee the suicide. It was one of the things that the jury

had to consider in terms of whether she was negligent. It was the number one thing. The whole trial was about whether or not she should have foreseen the suicide. It's throughout the record.

And -- and so -- and the jury found in favor of the plaintiff. They found that she was negligent. And so we have to consider that special interrogatory as saying this: Was it reasonably foreseeable to a negligent Lori Ortberg that this suicide was -- that Keith Stanphill would commit suicide on or such a date.

Now, you can't say that, but honestly, for it to be consistent with the verdict, that -- that, you know, word -- for it to make sense with respect to the jury verdict that word should be in there. Because they already found she was negligent. Right? That's the verdict. They found she was negligent.

And so how can we issue a special interrogatory about Lori Ortberg before we know what the jury -- whether she was negligent or not negligent? How can that not be ambiguous? Because it seems to me it's perfectly understandable that the jury would find that she was negligent, award -- award damages to the plaintiff, and then say all

right, was it reasonably foreseeable to Lori Ortberg? No, it wasn't foreseeable to her, she was negligent. So no, it wasn't foreseeable to Lori Ortberg because she was negligent. She didn't foresee it was suicide, we already found that, so we're going to check that box no.

That makes perfect sense to me, and that's one of the arguments the plaintiffs have raised here, that it's consistent with the verdict. And yet the Garcia Court approved that special interrogatory.

I didn't like that special interrogatory. I didn't like it when it was tendered, I didn't like it when I was forced to enter judgment in favor of the defendant, but, you know, I've been a judge for 20 years, and one thing I've learned is that if there is an Appellate Court -- published Appellate or Supreme Court decision that is on point and there are no other contrary Appellate or Supreme Court cases out there for me to hang my hat on, that my duty and obligation is to follow the published Appellate Court decision. That's Garcia.

Garcia is the case that the Second Appellate District needs to take a good, strong, hard look at and decide whether or not it was properly

decided or wrongly decided.

I think it was wrongly decided. I think if we're going to give any kind of a special interrogatory in a suicide case where the defendant is allegedly negligent for not foreseeing the suicide, that the special interrogatory needs to not have the defendant's name in it. It needs to say was it foreseeable or was it reasonably foreseeable to a reasonably careful social worker that so and so would commit suicide on such and such a date.

That's what it should say if we're going to give special interrogatories at all in a case like this. It shouldn't have the defendant's name because it throws terrible ambiguity into the special interrogatory.

And if there's one thing Illinois case law is clear about, it's that you shouldn't give an ambiguous special interrogatory. It should be clear. This is anything but clear. It's -- it's muddy. It's -- I can see how a jury would be totally confused by that special interrogatory.

But that being said, I am once again going to follow Garcia and find that my hands are tied, that I believe that under Garcia, that, one, I had a

duty to give that special interrogatory, two, that it was in proper form under Garcia, three, that it's irreconcilable with a verdict in favor of the plaintiff, and, four, that special interrogatories trump general verdicts. I'm going to -- I'm going to maintain that position, only because I feel I have to under Illinois law.

I think the Second District should take a hard look at Garcia, and if they find that plaintiff's arguments are appropriate, which, quite frankly, I think they are, then it should not follow Garcia and it should reverse this case and enter judgment in favor of the plaintiffs.

It's a duty, an obligation of the Appellate Court to decide that issue, not the Circuit Court. For those reasons the plaintiff's post-trial motion is heard and denied.

MS. POSTILION: Thank you, Your Honor.

MS. VANDERLAAN: Your Honor, on the JNOV, do you have a decision?

THE COURT: Motion for JNOV is also denied. Good luck on your appeal.

MS. VANDERLAAN: Thanks, Judge.

MS. POSTILION: Thank you, Your Honor.

MR. BEST: Thanks for all of your hard work on this case. We appreciate it.

THE COURT: Thank you.

(WHEREUPON, which were all of the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, CAROLYN J. HAWKES, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete, and correct transcript of the proceedings of said hearing as appears from my stenographic notes, so taken and transcribed under my personal direction.

_____

Certified Shorthand Reporter

CAROLYN J. HAWKES, C.S.R., No. 084-003296

2-16-1086

CC - 75

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

Campbell

vs.

Ostberg

FILE STAMP
FILED
Date: 6/2/16
Thomas A. Klein
Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

Case No. 14L35

ORDER

This matter comes before the court for jury trial. The jury having rendered its verdict.

It is hereby ordered that:

The Court, having reviewed the verdict as well as the jury's response to the Special Interrogatory. Judgment is entered in favor of the Defendants.

Enter 6/2/16

Judge

CF 5.28.07

Stanphill v. Ortberg, et al.

14 L 35

Report of Proceeding

Taken on: June 02, 2016

JENSEN LITIGATION SOLUTIONS
190 North LaSalle Street
Suite 2600
Chicago, IL 60601
312.236.6936
877.653.6736
www.jensenlitigation.com

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

ZACHARY STANPHILL, as Administrator of the Estate of Keith Sylvester Stanphill, deceased,

Plaintiff,

vs.

LORI ORTBERG, individually, and as agent of ROCKFORD MEMORIAL HOSPITAL, d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants.

No. 14 L 35

PARTIAL TRANSCRIPT OF PROCEEDINGS at the trial of the above-entitled matter before the Honorable J. Edward Prochaska, Judge of said court, heard on June 2, 2016, Courtroom 426, Winnebago County Courthouse, 400 West State Street, Rockford, Illinois.

A P P E A R A N C E S

LORI VANDERLAAN, JAMES F. BEST, and ASHLEY M. FOLK, Attorneys at Law (Best, Vanderlaan & Harrington), 400 East Diehl Road, Suite 280, Naperville, Illinois, appearing for plaintiff.

LAURA POSTILION, Attorney at Law (Quintairos, Prieto, Wood & Boyer, P.A.), 233 S. Wacker Drive, 70th Floor, Chicago, Illinois, appearing for defendants.

(Whereupon, at 5:31 P.M., the jury returned to the courtroom with a verdict.)

THE COURT: Please be seated.

All right. Mr. Anderson, it looks like you're holding the paperwork? Does that mean you're the jury foreman?

MR. ANDERSON: Yes, sir.

THE COURT: Has the jury reached a verdict?

MR. ANDERSON: Yes, we have.

THE COURT: And would you hand the documents to Blanca, please?

MR. ANDERSON: (Tendering documents.)

THE COURT: Okay. The jury has signed Verdict Form A.

"We, the jury, find for the Estate for Keith Stanphill, deceased, and against the Defendants, Lori Ortberg and Rockford Memorial Hospital. We further find, first, that the total amount of damages suffered by the Estate of Keith Stanphill, deceased, is $1,495,151.00, itemized as follows:

Loss of wages: 895,151.

Loss of household family service: 100,000.

Loss of society: 500,000, for a total of one-million-four-ninety-five-one-fifty-one," signed by the 12 jurors.

And with respect to the special interrogatory,

"Was it reasonably foreseeable to Lori Ortberg on September 30 of 2005, that Keith Stanphill would commit suicide on or before October 9, 2005," the jury checked the box "No," and all 12 jurors signed that verdict form, that special interrogatory.

Any requests for polling of the jurors?

(No response.)

THE COURT: Seeing none.

Ladies and gentlemen, I want to thank you very, very much for your service that you have provided in this case. It has been a long trial, a difficult trial for everyone involved; yourselves, the attorneys, and I. We've worked hard, and I know you have also worked hard over the past two weeks. Your jury service is complete at this time. I'm going to discharge you with my thanks. I'm going to come back and thank you personally and answer any questions that you may have, and the attorneys may also want to talk to you out in the hall. It's up to you completely whether you want to talk to the attorneys or whether you want to just be on your way. But thank you very, very much for with your service. I'll be back in a minute to thank you, and you are discharged. Thank you very much.

(Whereupon, the jury left the courtroom.)

THE COURT: Okay. So we have a jury Verdict Form A in front of the -- in favor of the plaintiff, and we have a special

interrogatory, basically in favor of the defendants. How do you want to proceed?

MS. POSTILION: I'd like judgment entered in favor of the defendants.

MR. BEST: I would like judgment entered in favor of the plaintiff, and if that's not granted, we'd like to have a chance to file a written response if the Court is going to rule upon the special interrogatory.

MS. POSTILION: And just the special --

MR. BEST: Because I -- you know, we can argue it now. Because I don't think it was a proper interrogatory because it doesn't test the verdict and for other reasons I -- and I want to file, if we have the opportunity, if the Court will allow us, I should ask it that way, to file a written response.

THE COURT: A written response to what?

MR. BEST: Whether the special interrogatory trumps the Verdict Form A.

MS. POSTILION: I think the case law is clear that it does, and the special interrogatory in this instance controls, and judgment should be entered in favor of the defendants. If the plaintiffs want to -- wish to file a motion, a post-trial motion, I believe that's the appropriate vehicle.

THE COURT: Well, the case law that was submitted to me persuaded me that it was an appropriate special interrogatory to

give in a suicide case. I also indicated when I denied defendants' motion for summary judgment months ago, that I felt that the issue of the foreseeability of the suicide was an issue of fact to be determined by the jury. I had -- as the record will reflect, I had some concerns about this special interrogatory, because it seemed to me it only controlled the verdict going in one direction and not the other, which is, you know, contrary to most special interrogatories. And, yet, there was an appellate court decision that I felt -- submitted by Mrs. Postilion -- that I felt was directly on point, and as a circuit court, I feel -- I feel and felt, that I was bound to follow an appellate court decision that was on point. I don't have the ability, at this level, to disagree with an appellate court decision or to disregard an appellate court decision, even if it was questionable to me, and questionable because I didn't find that it controlled the verdict going in both directions. But this is an approved appellate court special interrogatory. I do believe that it controls the verdict, and that despite the fact that the plaintiffs have received a Verdict Form A, I believe that this special interrogatory trumps the Verdict Form A, and mandates that I enter a verdict in favor of the defendants, Lori Ortberg and Rockford Memorial Hospital.

MR. BEST: Judge, I appreciate that, the only thing -- and I'm not saying that we didn't have an opportunity to get it

heard, but this happened during the jury instruction conference, so -- a case was submitted, we looked it over overnight, we submitted some cases. We had argument, I'm not saying that we didn't get an opportunity to get heard, but just because of gravity of this, we're talking about --

THE COURT: It's pretty grave --

MR. BEST: Yes, it is.

THE COURT: -- no doubt about that.

MR. BEST: So before the judgment is entered, I'd like to at least be able to put, you know, our response and articulate it in writing more thoroughly before judgment is entered.

THE COURT: You know, I think that's fair. This was decided quickly. It was not decided with a lot of ability to brief the issue. It's a very, very important issue for both sides given that the, you know, the verdict is nearly 1.5 million dollars for the plaintiff, which I'm saying is completely trumped and disregarded in favor of this special interrogatory, you know, but I -- I don't know how you're going be able to overcome that case that she submitted to me -- the Garcia case was it?

MS. POSTILION: Garcia vs. Seneca Nursing Home. And it says if the jury answers no to that question, that it does trump the verdict. And I believe the proper vehicle here is to file a

post-trial motion and enter judgment for the defendants now based on the clearly, clearly stated case law, your Honor. This is the jury's verdict, and it doesn't matter how long it took them. This is the jury's verdict, and it was fully explored by the plaintiff's attorney. He actually even brought you case law, and you ruled. And so this is the jury's verdict. Judgment should be entered for the defendants, and then the plaintiff can file whatever post-trial motions it wants to, but, your Honor, the jury has spoken. They heard all the evidence, and that was their decision. I don't think it should be delayed.

MR. BEST: We'll, I'm just asking to file a brief to do my job.

MS. POSTILION: And I'm not objecting to the filing of a brief after judgment is entered.

THE COURT: I'm entering judgment today in favor of the defendants on the special interrogatory. That does not bar you from filing a post-trial motion or a motion to reconsider, fulling briefing the issue. That's my judgment today.

MR. BEST: Okay. Thank you, Judge.

THE COURT: I'll make you both -- can somebody make copies of this (indicating)? And you'll prepare an order, Ms. Postilion?

MS. POSTILION: Yes, Judge. Do you have any special

wording that you'd like? After a jury trial, judgment --

THE COURT: You can just say, After a jury trial, the verdict, and special interrogatory, the Court enters judgment in favor of the defendants.

MS. POSTILION: Thank you.

MR. BEST: Your Honor, in the order can we incorporate the verdicts to make sure that that's in the order?

THE COURT: I said after reviewing the verdict and the special interrogatory, judgment is entered in favor of the defendants.

MR. BEST: Okay. Thank you, Judge.

(End of proceedings.)

CERTIFICATE OF SHORTHAND REPORTER

STATE OF ILLINOIS)
)
COUNTY OF WINNEBAGO)

I, Margaret Ciembronowicz, Licensed Certified Shorthand reporter in the State of Illinois, Certified Shorthand Reporter No. 084-003833, do hereby certify that on June 2, 2016; I reported the proceedings had in the above-entitled matter before the Honorable J. Edward Prochaska, and that the same is a true, correct, and complete transcription of said proceedings held on said date.

Dated this 10th day of June 2016.

Margaret M. Ciembronowicz

MARGARET CIEMBRONOWICZ
Certified Shorthand Reporter
License No. 084-003833

SUBSCRIBED AND SWORN TO
before me this 13th day of
June, A.D., 2016.

Allison L. Sedakis

OFFICIAL SEAL
ALLISON L SEDAKIS
Notary Public - State of Illinois
My Commission Expires 3/14/2019

NOTARY PUBLIC

Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?

YES____ **NO ____**

Foreperson	Juror
Juror	Juror
Juror	Juror
Juror	Juror
Juror	Juror
Juror	Juror

Non-IPI Special Interrogatory, *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, 956 N.E.2d 1005, 353 Ill.Dec. 877 (1st Dist. 2011)

Defendant #21-Given as Modified, over objection

Stanphill vs Ortberg

14 L 35

Report of Proceeding

Taken on: June 01, 2016

JENSEN LITIGATION SOLUTIONS
180 North LaSalle Street
Suite 2600
Chicago, IL 60601
312.236.6936
877.683.6736
www.jensenlitigation.com

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, Deceased,

Plaintiff,

-vs-

LORI ORTBERG, individually and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants.

No. 14 L 35

EXCERPT

EXCERPT OF REPORT OF PROCEEDINGS at the hearing of the above-entitled cause held at the Winnebago County Courthouse, Room 426, 400 West State Street, Rockford, Illinois, before the HONORABLE J. EDWARD PROCHASKA, Judge of said Court, on the 1st day of June, 2016, at the hour of 9:00 a.m.

COUNSEL PRESENT:

BEST, VANDERLAAN & HARRINGTON, by:
MS. LORI A. VANDERLAAN,
MR. JAMES BEST, and
MS. ASHLEY FOLK
25 East Washington Street, Suite 800
Chicago, Illinois 60602
(312)819-1100
lvanderlaan@bestfirm.com,

appeared on behalf of the Plaintiff;

QUINTAIROS, PRIETO, WOOD & BOYER, PA, by:
MS. LAURA G. POSTILION
233 South Wacker Drive, 70th Floor
Chicago, Illinois 60606
(312)566-0040
laura.postilion@qpwblaw.com,

appeared on behalf of the Defendants.

REPORTED BY:

CAROLYN J. HAWKES, C.S.R. No. 084-003296.

(WHEREUPON, proceedings were had which are not herein transcribed.)
(WHEREUPON, the following proceedings were had in open court, outside the presence and hearing of the jury:)

MR. BEST: Then I think one issue has -- on the one instruction that you -- we have, we haven't ruled upon, was No. 7. It has to do with this issue that got brought up today about the idea that -- did the relationship --

THE COURT: Was this -- are you talking about a defense exhibit -- a defense instruction?

MR. BEST: Yes, sir.

THE COURT: 12.05?

MR. BEST: Yes.

MS. POSTILION: Yes.

THE COURT: So I already gave 12.04.

MR. BEST: Right.

THE COURT: So, Ms. Postilion, do you believe that I should also give 12.05?

MS. POSTILION: Yes, I do, Your Honor. They can be combined, but, I mean, I think that -- that

was the first question I asked of his opinions this afternoon. And Dr. Hanus testified specifically that something other than Ms. Ortberg's actions caused Mr. Stanphill's death and the damages claimed by the plaintiff.

And I asked -- I said what is that? There was an objection right away, there was a sidebar, and it was allowed. And it was -- his answer to that, the something was Mr. Stanphill's thoughts that his wife was having an affair. And so that is a something. Thoughts are a thing. And I think there's expert testimony in this case that that was the cause.

THE COURT: Okay. I'm not going to allow that. I think it all is encapsulated within 12.04. Because, you know, whatever he was thinking that caused his suicide, whether it be, you know, his wife's affair or these other causes or anything other than the negligence of -- alleged negligence of Lori Ortberg, whatever else it was that led him to commit the act of suicide I think is encapsulated within 12.04. Whether it be depression or whether it be his wife's affair or whatever you want to call it, it all leads to the

same place. And that's he committed suicide. And so the jury can consider I think that as possibly the sole proximate cause. But I don't think it should be two different instructions.

MS. POSTILION: I guess 12.04 is with regard to someone else.

THE COURT: And that would be him.

MS. POSTILION: Yes. And -- yes. And then 12.05 is something. And we've got two things. One is his thoughts that there was a marital issue, and then the other thing is the actual marital infidelity itself.

And there was testimony today on cross examination that plaintiff herself elicited on that. So thing and one, something and someone, are two different things, and there's evidence on both.

THE COURT: Right. The problem is that both of those things you talk about come back to him. They come back to him and what was the effect on him and did that lead to his suicide.

MS. POSTILION: And, Judge, I understand your ruling. I'm just making a record. Thank you.

MR. BEST: I don't know if I still have that clear. All right? So during the argument, can

they say his thought was the sole proximate cause or what he thought?

THE COURT: His suicide.

MR. BEST: His suicide.

THE COURT: His decision to commit suicide was the sole proximate -- the jury could believe that.

MR. BEST: Right. I understand that.

THE COURT: And everything that he was thinking that led to that act of -- that's in the record that led to that act of suicide. Other than negligence of Lori Ortberg. I mean, I think it's fair game for them to talk about everything that was going on in his life that they've all heard about numerous times that led to his suicide was the sole proximate cause.

MR. BEST: Right. I understand all that. But my question is they can't get up and argue and say well, the fact that the emails were sent to him, that was the cause.

THE COURT: I agree.

MR. BEST: Okay.

THE COURT: It has to, once again, go back to what he was thinking, what led him to that act.

MR. BEST: Okay.

THE COURT: I think I've tried to be consistent on it.

MR. BEST: Right. You have. You have been.

THE COURT: All right.

MS. POSTILION: Some of this can get really esoteric.

MR. BEST: Yes.

THE COURT: So what else?

MR. BEST: The special interrogatory.

THE COURT: Right.

MS. POSTILION: So I haven't been given copies any of case law. I was emailed it this morning. I haven't had a chance to read it.

THE COURT: Do you want to read it overnight? Because we can deal with that at 8:30. I mean, I'm either going to give it or not. And I'm going to -- you know, and I want you to be able to read everything you -- I read your stuff, but then he just give me a couple of cases.

MR. BEST: Right.

MS. POSTILION: Okay. So --

THE COURT: So it seems like her case is pretty much on point with giving it. It's been given in a couple of different contexts and in

suicide cases.

MR. BEST: Well, let me say this: Her case is, you know, the guy jumps out of the window or falls out of the window.

THE COURT: Right. Yeah.

MR. BEST: But the way it was worded in her case there were two possible causes.

THE COURT: Right.

MR. BEST: It could have been he committed suicide or he -- they had some -- what's the last part of the little statement?

THE COURT: Self-destructive behavior?

MR. BEST: Right. But there's no self-destructive behavior. The reason that was included into the special interrogatory, because it covered both possibilities, one, that he committed suicide, and the other one, that he just kind of was negligent --

THE COURT: What it really covered is the intentional act versus an unintentional act that resulted in death.

MS. POSTILION: Like a suicidal gesture gone awry, he changed his mind. That encompasses this because there's -- there has been testimony on both

of that. There is the coroner's report. There is Mr. Poe's testimony that he changed his mind. There is the photographs.

There's evidence in the case that it could have been either suicide or -- or he did act in a self-destructive manner that, unfortunately, resulted in his death.

THE COURT: So --

MS. POSTILION: And it's right on point with Garcia, I think.

MR. BEST: Well, that's certainly -- there's nothing that -- in the record to show that it's a suicide that went awry. You know, just because he's out of the car, that -- there's been no evidence of that. It's pure speculation to say that.

THE COURT: You know, I've said from the beginning you can call it whatever you want, the guy committed suicide.

MR. BEST: Right.

THE COURT: Whether, you know, we're going to speculate that at the last second he woke up and, you know, stumbled out of his car doesn't mean anything.

MR. BEST: Right.

THE COURT: It means -- it could just as well mean that he was disoriented and didn't know where he was and collapsed on the ground as it would be oh, my God, what am I doing, let me see if I can get out of this. I mean, we're entering into the realm of pure speculation as to how he got out of his car and ended up on the garage floor.

MR. BEST: Right.

MS. POSTILION: And that's why the special interrogatory covers that potential that the jury has heard about. So I think that this is going to test the general verdict.

THE COURT: Here's my main concern. And I did read those -- oh, go ahead.

MR. BEST: Let me finish up. But with that comment, and the way it's written here, you can't put in or act in a self-destructive manner. So --

THE COURT: So if I stuck that and just said suicide, you would be okay with it?

MR. BEST: Well, I'm still going to object, but it would be -- that would be in conformance with the Garcia case because we don't have this other element in this case that it

happened accidentally.

THE COURT: You probably wouldn't care, would you?

MS. POSTILION: I'm fine with that.

THE COURT: Okay. So here's my concern --

MR. BEST: I'm still going to object.

THE COURT: You're still going to object. Here's my concern. I feel like a special interrogatory should test the jury verdict and control the jury verdict no matter how the jury verdict comes in. So I can see why you're asking for the special interrogatory.

MS. POSTILION: Yes.

THE COURT: Because, for instance, if they check that it wasn't foreseeable and they return a verdict for the plaintiff, you would say the special interrogatory controls.

What if it's the other way around? What if they check the box that yes, it was foreseeable, but we find in favor of the defendant? Would the special interrogatory control then to mandate a JNOV and a plaintiff's verdict?

MS. POSTILION: Yes, it would.

THE COURT: Okay. It would.

MS. POSTILION: I believe so.
THE COURT: Okay.
MS. POSTILION: I mean, it's a risk. It's a risk to --
THE COURT: Well, it has to control it both ways.
MS. VANDERLAAN: Well, doesn't reasonably foreseeable go to duty?
MS. POSTILION: It goes to the law. That's the cause --
THE COURT: Well, the cases --
MR. BEST: I have --
MS. POSTILION: Legal cause as opposed to cause in fact.
MR. BEST: Here's a big point that I would say. In this case if they answered why wasn't it reasonably foreseeable, well, it's not reasonably foreseeable under our theory in the case to Lori Ortberg because she didn't do a full assessment, she didn't do the right diagnosis. So why is it not foreseeable for her? Because she didn't do the job. She didn't meet the standard of care.
THE COURT: No, but you're going to argue that it should have been foreseeable to her. That based

upon your -- your experts' testimony, the guy was a ticking time bomb, ready to explode, and that she just blew the diagnosis and blew the assessment and didn't make the proper referral and that it should have been reasonably foreseeable based on all of the evidence.

MR. BEST: But the question would be well, the reason it's not foreseeable to her --

THE COURT: Well, you're not going to make that argument.

MR. BEST: No, but they could -- they could --

THE COURT: It doesn't have to be to her. Was the -- was the suicide reasonably foreseeable -- well, reasonably foreseeable to Lori Ortberg, yeah.

MS. POSTILION: That's what it has to be.

MR. BEST: But, see, my point is they could think well, it wasn't reasonably foreseeable because she didn't really believe he was going to commit suicide because she didn't think that. So they believe that. And the reason she didn't believe that is because she didn't comply with the standard of care. So it doesn't really test the verdict because of that. There is an explanation. It's -- it's in there. And that's what my cases

are talking about. Because you have to find different things to answer the question.

So an explanation for why it wasn't foreseeable would be her breach of the standard of care, which is not a real test of the verdict.

MS. POSTILION: Mr. Best is mixing apples and oranges. Because it's not the standard of care that this is testing. It's the causation piece. So they have to prove, obviously, you know, three things. And this tests that part of it.

So if they don't find the bridge with foreseeability under the law, that's legal cause, if they can't find the legal cause, then the verdict should be for -- it must be for the defendant. This tests the -- that part of the plaintiff's case.

And it's not about the standard of care at all. They can argue that all they want to, but this just tests one element of the burden of proof. And under the Garcia case, it's completely proper.

MS. VANDERLAAN: So the fallacy in that argument is you asked counsel if they come back and say it was reasonably foreseeable, but get a verdict in favor of the defendant, she admitted

that we would get -- that we -- that that would trump it, but it's only testing proximate cause.

MS. POSTILION: If they --

MS. VANDERLAAN: It's not testing whether she breached the standard of care. So we win if we just prove proximate cause.

MS. POSTILION: Well, that's true. That's true. So my statement was wrong.

MS. VANDERLAAN: So that's the fallacy in it, and that's why it shouldn't be given.

THE COURT: And that's the -- that was what jumped out at me. How does it test the verdict in reverse?

MS. POSTILION: It just --

MR. BEST: Right. Exactly.

MS. POSTILION: I don't have to test the verdict in reverse. If they would -- if they want a special interrogatory was she -- did her deviations from the standard of care cause it, I think that would be allowed.

THE COURT: I think a special interrogatory should test and control the verdict no matter which way it goes.

MR. BEST: Exactly.

MS. POSTILION: Well, then how --

THE COURT: So, for instance, if I have a -- in an auto accident case do you find that they committed an act of negligence that proximately caused the plaintiff's injuries, yes or no. I mean, I've got the verdict covered in either direction with that.

You know, they can't say yes and return a no verdict and they can't say no and return a yes verdict.

MS. POSTILION: And here's why it doesn't have to be tested both ways. It's because the plaintiff has the burden of proof. We don't have to prove anything. And that's why it doesn't have to go both ways. Okay?

So they have to prove the three elements. If they agree and they write no, it was not reasonably foreseeable, that's it, end of story, they can't prove legal cause. And that's why it tests the verdict. And it's not our burden to disprove anything.

MS. VANDERLAAN: Proximate cause defines what the proximate cause is.

MR. BEST: Right. Foreseeable --

MS. POSTILION: Not in a suicide case.
MS. VANDERLAAN: It certainly does. It's -- proximate cause is proximate cause no matter what kind of case it is.
MR. BEST: Right.
MS. POSTILION: There's no specific IPI instruction on suicide cases, and that's why this special interrogatory has been held up on appeal and why it's used in every suicide case that I've heard about or seen. And I have discussed this with my defense colleagues who do suicide cases all the time.
MR. BEST: Not --
MS. POSTILION: And they said this because there's no IPI and that might be in the next version of the IPI textbook.
MR. BEST: But it gets back to my point, it doesn't test the verdict. And I gave the explanation on what's foreseeability. Foreseeability is not mentioned anyplace in the instructions at all.
MS. POSTILION: That's my point.
MR. BEST: And the point is foreseeability really is a legal question. You test

foreseeability in summary judgment. Was it foreseeable to create a legal duty. In the case -- this case that we have here the foreseeability could be explained by her negligence. So the jury would have to then indicate well, what does that really mean. Does it mean that Lori Ortberg had to think that Keith Stanphill was going to commit suicide? Well, that's not what this case is about.

MS. POSTILION: It's not a legal question. Both the plaintiff's causation expert and Dr. Hanus today have testified about foreseeability. Dr. Bawden could not say that Lori's actions -- Lori Ortberg's actions -- that the suicide was foreseeable to Lori Ortberg. My expert has said it was not reasonably foreseeable. So we have expert testimony on this issue.

If we have evidence in the case, it should come in through either a special interrogatory or if we had an IPI instruction. I wish we did, but there are no IPI instructions specific to this particular issue, which is cause in fact and legal cause. And that's why this is used all the time, and it was upheld in Garcia.

MR. BEST: This is covered completely by

proximate cause. It is all there. Evidence about that is proximate cause. It's already covered by the jury instructions.

And, again, in this case it still has not negated what I say about foreseeability and it doesn't test the verdict both ways.

MS. POSTILION: There is no --

MR. BEST: So that's -- that's why this is not proper for a special interrogatory.

THE COURT: Although it's exactly the special interrogatory that was used in the attached case.

MR. BEST: Right, which is --

THE COURT: And was also used in another case that's cited in this case.

MS. POSTILION: Yes.

MS. VANDERLAAN: Well, they have to have -- we can't have a psychiatrist giving an opinion on what is reasonably foreseeable.

MS. POSTILION: That's the --

MS. VANDERLAAN: It is a legal term, Judge.

MS. POSTILION: No. Reasonably careful, people give opinions about that all the time. I mean, your expert gave an opinion on foreseeability, my expert gave an expl -- an

opinion on foreseeability, and then we just don't let the jury know how that factors into the case? We've got to tell them -- we've got to give them something on foreseeability, and this is what our Appellate Courts have said is proper in a suicide case.

MS. VANDERLAAN: It gives them no legal definition of what that means.

THE COURT: Okay. So thank you for your argument on this point. I have a considered it and I've considered your arguments today. I'm going to give this special interrogatory as amended, and I'm going to strike the words or act in a self-destructive manner.

Because I think that this case is really all about suicide and no one really -- whether you call it suicide or a suicidal gesture, the bottom line is he committed suicide.

MS. POSTILION: Yes.

THE COURT: So I'm going to give this. And the reason I feel like I have to -- I don't really like it, because we haven't really talked too much about reasonable foreseeability, but there's two reasons I'm going to give it.

One is when I denied Ms. Postilion's motion for summary judgment before the trial was even on, one of the reasons I stated in my decision was that I think the issue as to the foreseeability of the suicide is a factual issue to be determined at trial. I think I actually said that.

And then secondly, and really even more on point, is I feel like I'm bound by these cases. These are suicide cases. They've approved this special interrogatory. It's been approved a couple of different times. And -- and from this Garcia case it says Section 2-1108 mandates -- Section 2-1101 mandates require the trial court to instruct the jury to answer a special interrogatory when a party requests it. And then it goes on to say this special interrogatory is approved in a suicide case.

Now, I realize these cases are slightly different, in that we don't really have the, you know, ambiguity between was this a suicide or, you know, an accident caused by self-destructive behavior that resulted in death, we don't have that dichotomy, but I think that's corrected by just taking out this phrase.

And I think that the plaintiffs can easily argue, based upon the evidence that they've heard in this case, that it was reasonably foreseeable to Lori Ortberg, just look at the self-assessment form and look at everything else and look at what our experts have said, she absolutely should have foreseen this.

And so I don't see that this is, you know, in a format that somehow favors the defense. So I'm going to give this with those -- with that change.

MS. POSTILION: Thank you, Your Honor. I'll make the changes.

MR. BEST: I want to make sure we get the wording. I understand that. So it would read --

MS. POSTILION: Right from the case.

THE COURT: Just like this. Just like this. This is right from the case with the change I made. I just struck a few words.

MS. POSTILION: And these are the words that plaintiff's counsel asked to be stricken.

MR. BEST: Okay. Are we okay with all of this?

MS. VANDERLAAN: Yeah. On or before

October 9.

THE COURT: That's when the body was found.

MS. POSTILION: It encapsulates your theory of October 6 or thereabouts.

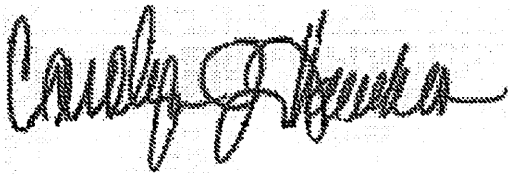
THE COURT: So over objection, that's granted, and do you want to make that change?

MS. POSTILION: Yes, I will.

(WHEREUPON, proceedings were had which are not herein transcribed.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, CAROLYN J. HAWKES, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete, and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.



Certified Shorthand Reporter
CAROLYN J. HAWKES, C.S.R., No. 084-003296

SUBSCRIBED AND SWORN TO
before me this 7th day
of June, 2016.

NOTARY PUBLIC

TABLE OF CONTENTS

RECORD ON APPEAL

TABLE OF CONTENTS

REPORT OF PROCEEDINGS

TABLE OF CONTENTS

March 13, 2017 Supplemental Report of Proceedings

TABLE OF CONTENTS

May 9, 2017 Supplemental Report of Proceedings

TABLE OF CONTENTS

SEALED EXHIBITS

No. 122974

In the Supreme Court of the State of Illinois

ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, deceased,

Plaintiff-Appellee,

v.

LORI ORTBERG, individually, and as an agent of ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS; and ROCKFORD MEMORIAL HOSPITAL d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
Second Judicial District, No. 2-16-1086
There Heard on Appeal from the Circuit Court of the Seventeenth Judicial Circuit,
Winnebago County, Illinois, No. 2014 L 35
The Honorable **J. Edward Prochaska**, Judge Presiding

NOTICE OF FILING and CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and states that on May 25, 2018 the Additional Brief of Defendants-Appellants and Separate Appendix of Defendants-Appellants were electronically filed and served upon the Clerk of the above court and that on the same day, a pdf of same were e-mailed to the following counsel of record:

James F. Best (Jbest@bestfirm.com)
Lori A. Vanderlaan (lvanderlaan@bestfirm.com)
Ashley M. Folk (afolk@bestfirm.com)
Best, Vanderlaan & Harrington
25 E. Washington Street, Suite 800
Chicago, Illinois 60602
Phone: (630) 752-8000
Attorneys for Zachary Stanphill, as Administrator of the Estate of Keith Sylvester Stanphill, Deceased

Michael Resis (mresis@salawus.com)
SmithAmundsen LLC
150 N. Michigan Ave., Suite 3300
Chicago, Illinois 60601
Phone: (312) 894-3200
Attorney for Illinois Association of Defense Trial Counsel

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

By: */s/ Hugh C. Griffin*
Hugh C. Griffin

Within five days of acceptance by the Court, the undersigned states that he will send to the above-mentioned court thirteen copies of the Additional Brief of Defendants-Appellants and Separate Appendix of Defendants-Appellants bearing the court's file-stamp.

By: */s/ Hugh C. Griffin*
Hugh C. Griffin