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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

I. Plaintiff's And The Second District's Misreading Of The Special Interrogatory As Stating A "Subjective" Standard Of Foreseeability Confirms That The Interrogatory Was Properly Worded And Inconsistent With The General Verdict.

A. Plaintiff Misreads the Special Interrogatory.

Plaintiff's Brief and all his appeal arguments are based on a fundamentally false premise. Plaintiff repeatedly claims that, as worded, the special interrogatory at issue imposed a "subjective" standard of foreseeability, asking the jury to determine whether Lori Ortberg "subjectively" foresaw Mr. Stanphill's suicide through her "own eyes." That is not the question the jury was asked to answer. No one claimed that Ms. Ortberg subjectively foresaw Mr. Stanphill's suicide. Yet, Plaintiff's Brief is based entirely on this misreading of the special interrogatory. Indeed, this assertion of a subjective standard is made in one form or another on at least 15 pages of Plaintiff's Brief. The following are just a few examples:

- Plaintiff argues that the general verdict "cannot be nullified by reliance on a special interrogatory that applied a completely subjective standard" (Pl. Br. 1);
- Plaintiff claims the special interrogatory tested "Ortberg's subjective knowledge" "through her eyes" (Pl. Br. 23);
- Plaintiff asserts "the special interrogatory was a purely subjective test" (Pl. Br. 40);
- Plaintiff includes a chart asserting that the interrogatory answer determined that "Ortberg fails to foresee suicide" (Pl. Br., p. 18);
- Plaintiff urges that the interrogatory asked the jury to determine "what was in the mind and knowledge of Defendant Ortberg" (Pl. Br. 48);

- Plaintiff's argument heading states: **"THE APPELLATE COURT PROPERLY HELD THAT THE SPECIAL INTERROGATORY . . . TESTED FORESEEABILITY FROM THE SUBJECTIVE VIEW OF THE DEFENDANT ORTBERG"** (Pl. Br. 34).

The same erroneous "subjective" standard is repeated at Plaintiff's Brief, pp. 22, 25, 32, 35, 38, 39, 41, 44, and 46. Plaintiff's Amicus (ITLA) makes the same unsupportable assertion, claiming that the special interrogatory asked the jury to determine "Ortberg's subjective knowledge" (ITLA Br. 4) and what Ortberg subjectively "foresaw" (ITLA Br. 3).

B. The Special Interrogatory Set Forth An Objective Standard of Foreseeability.

No matter how many times plaintiff or ITLA says it, plaintiff's assertion and the Second District's holding that the special interrogatory asked the jury to determine foreseeability on a subjective basis of what Lori Ortberg foresaw through her own "eyes" (Opinion, ¶ 36) (A.15) is erroneous and squarely at odds with the universally accepted meaning of the term "reasonable foreseeability." The special interrogatory provided:

> "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.106) (emphasis added).

As this Court held in *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 369 (1979) (Opening Br. 22), the concept of "'reasonable foreseeability' . . . is measured by an objective standard." Numerous cases concur. See, *e.g.*, *Kerns v. Engelke*, 76 Ill. 2d 154, 165 (1979) (what is "reasonably foreseeable" presents "a question of fact which is measured by an objective standard") (citations); *Arellano v. SGL Abrasives*, 246 Ill. App. 3d 1002, 1010 (1st Dist. 1993) (the concept of what is "reasonably foreseeable by the defendant

[is] based on an objective standard"); *Derrick v. Yoder Co.*, 88 Ill. App. 3d 864, 873 (1st Dist. 1980) ("reasonable foreseeability . . . is measured by an objective standard"). Indeed, in the law, the term "foreseeable" itself, whether analyzed in the context of duty or proximate cause, conveys the concept of objective reasonableness. "Foreseeability means that which it is Objectively reasonable to expect." (capital letter in original) (citation). *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466 (1976).

Even plaintiff's own psychiatry expert, Dr. Bawden, agreed that the term "reasonable foreseeability" is an objective, not a subjective, standard. He testified that Mr. Stanphill's suicide was "reasonably foreseeable" by which he meant, not that Lori Ortberg subjectively foresaw the suicide ("it wasn't that way to her"), but that she "should have foreseen" the suicide risk. (R. 1130-32). The defendants' psychiatry expert, Dr. Hanus, testified that Mr. Stanphill's suicide was not reasonably foreseeable to Lori Ortberg, given that Mr. Stanphill denied having any suicidal ideation or suicidal plan during their one hour EAP session and for all the other reasons (including no prior suicide attempts, still working, no family history of suicide, strong religious beliefs, love of his children, agreement to see another social worker specializing in marital issues) set forth in the Opening Brief (pp. 11-12). (R. 1398, 1425, 1440, 1449).[1] The trial court too recognized the objective standard presented in the special interrogatory, stating: "The

[1] Plaintiff's repeated reference to "doctored records" (Pl. Br. 5-8) has no bearing on any appeal issue. For undetermined reasons, there were different printouts of the EAP Progress Record (R. 7241, 7242, 7243). One copy of the Record had the capital letter "C" in quotes next to the October 4, 2005 entry confirming that Mr. Stanphill had made an appointment to see Mr. Dasenbrook; one copy did not have this entry at all; and one copy had a final entry: "client deceased. Obit in file." (R. 7241-43). There were no differences in any material entries in the Record. Each copy contained Ms. Ortberg's charted entry: "No homicidal/suicidal ideation or plan identified." *Id.*

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

Plaintiff states that "an objective standard as to foreseeability is imperative" and in accordance with the law. (Pl. Br. 42). ITLA concurs. (ITLA Br. 2). As set forth above, that was precisely the standard set forth in the given special interrogatory.

C. The Interrogatory Was Properly Worded.

Even ignoring plaintiff's failure to object below to the particular wording of the special interrogatory about which he now complains (Opening Br. 18-19),[2] there was no error in asking the jury whether Mr. Stanphill's suicide was "reasonably foreseeable to Lori Ortberg." Indeed, in a suicide case against a drug store (Walgreens) which filled a prescription for the suicide victim, the appellate court, in upholding judgment n.o.v. in favor of Walgreens, framed the proximate cause issue as "whether the suicide was foreseeable *to Walgreens*." *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 79 (1st Dist. 2007) (emphasis added). The *Crumpton* Court further noted that suicide cases fall within the general ambit of "intervening cause" cases, so that the issue of whether the chain of causation is broken is determined by whether the suicide is an intervening event "the *tortfeasor*" is expected to foresee. *Crumpton*, 375 Ill. App. 3d at 79. (citation) (emphasis added). This comports with the language of the special interrogatory here and with the

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[2] Plaintiff urges that plaintiff's failure to object to the specific wording of the interrogatory below was not raised in Ortberg/Rockford Memorial Hospital's Petition for Leave to Appeal. (Pl. Br. 30). Plaintiff overlooks that Ortberg/Rockford Memorial Hospital were Appellees in the Appellate Court and therefore they "may raise any argument properly presented by the record to sustain the judgment of the trial court, whether or not that argument was raised below or included in the petition for leave to appeal." *People v. Ramirez*, 214 Ill. 2d 176, 185, fn.2. Plaintiff also seems to be making some additional forfeiture argument on the consistency issue that Ortberg/Rockford Memorial cannot further discern. (Pl. Br. 18). In any event, the same non-forfeiture rule applies.

general doctrine of intervening causes recognized by this Court. See, *e.g.*, *Bentley v. Saunemin Township*, 83 Ill. 2d 10, 15 (1980), stating:

> "The negligence of a defendant will not constitute a proximate cause of a plaintiff's injuries if some intervening act supersedes the defendant's negligence, but if *the defendant* could *reasonably foresee* the intervening act, that act will not relieve the defendant of liability." (citations) (emphasis added).

Thus, the special interrogatory here was properly worded to decide the ultimate material issue in the case – was the intervening act (Mr. Stanphill's suicide) "reasonably foreseeable to Lori Ortberg."

In their Opening Brief (p. 24), Ortberg/Rockford Memorial set forth many cases where proximate cause was expressly measured by what was reasonably foreseeable *to the defendant*. There are many others. For example, in *Crumpton*, 375 Ill. App. 3d at 77, 79, 83, the court stated that "the question of proximate cause involves whether the suicide was foreseeable *to Walgreens*," and also considered evidence that the suicide "was not foreseeable *to* [plaintiff's] *psychiatrist.*" *Id.* at 83. In *Kempes v. Dunlop Tire and Rubber Corp.*, 192 Ill. App. 3d 209, 216 (1st Dist. 1989), the court held that the evidence did not establish "the reasonable, *i.e.*, objective, foreseeability of plaintiff's accident *by defendant*." In *Schmid v. Fairmont Hotel Co.-Chicago*, 345 Ill. App. 3d 475, 492 (1st Dist. 2003), the court determined that plaintiff's accident in the hotel was "not objectively reasonably foreseeable *to Fairmont*." (all emphasis added). Indeed, a recent Second District medical malpractice case, *Coleman v. Provena Hospitals*, 2018 IL App (2d) 170313, written by the author of the Second District Opinion in this case, held that a hospital could be liable to the estate of a psychiatric patient (Russell) who was killed by the police in the hospital because "it was reasonably foreseeable *to the defendant* that, if

it did not search Russell before he was admitted to the hospital, he might be harmed." *Id.* at ¶ 25 (emphasis added).

Despite the plethora of contrary authority, plaintiff insists the interrogatory should have been untethered to Lori Ortberg and worded in terms of whether Mr. Stanphill's suicide was foreseeable to a "reasonable person" (Pl. Br. 35-40). Although the Second District agreed (Opinion, ¶¶ 32-33, 36), that cannot be a correct proposition in this professional negligence case. As set forth in Ortberg/Rockford Memorial's Opening Brief (p. 20), many reasonable people failed to foresee Mr. Stanphill's suicide, including his wife and members of his family. (R. 734-36, 805-06, 843, 851-53). Even Mr. Stanphill's father-in-law, Pastor Wes Poe, who met with the Stanphills three times to counsel them regarding the marital problems they were having (R. 766-772; 796-805), and who had dinner with Mr. Stanphill the last night anyone saw him alive (R. 781), did not foresee the suicide. (R. 805-06). Thus, had the special interrogatory been worded in terms of a "reasonable person," plaintiff would have had a basis to argue that the interrogatory answer was not inconsistent with the general verdict because the jury could have considered Mr. Stanphill's family members as "reasonable people" who failed to foresee the suicide.

Alternatively, plaintiff argues, and the Second District held, that the interrogatory should have been worded in terms of a "reasonable licensed clinical social worker." (Opinion, ¶ 33). However, plaintiff (Pl. Br. 42) and ITLA (ITLA Br. 4-5) agree with Ortberg/Rockford Memorial (Opening Br. 20-22) that the special interrogatory must be read together with the other given instructions which include IPI 105.01. (R. C4781). Thus, asking whether Mr. Stanphill's suicide was "reasonably foreseeable to Lori

Ortberg," asked the jury, *in the context of the given instructions*, whether Lori Ortberg, as a "reasonably careful licensed clinical social worker" (IPI 105.01) (R. C4781), should have foreseen Mr. Stanphill's suicide at the time of their one hour EAP session.

Plaintiff cites *City of Chicago v. Beretta USA Corp.*, 213 Ill. 2d 351 (2004) (Pl. Br. 22, 35-36). *Beretta* was a nuisance action brought against firearms manufacturers, distributors, and dealers by the City of Chicago and Cook County in an effort to recover compensation for the costs of gun violence. Plaintiff quotes a section of the lengthy opinion wherein the Court discussed the appellate court's decision in terms of a "policy-based legal cause inquiry," *id.* at 396, and asserts that it stands for the proposition that legal cause should not be determined by what was reasonably foreseeable to the defendant. (Pl. Br. 35). However, in the actual *decision* portion of the *Beretta* opinion, this Court made clear that liability was to be determined by what the "dealer defendants . . . could reasonably foresee."

> "These excerpts from the treatise [Prosser & Keeton] 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. (Opening Br. 23-24).

Thus, contrary to plaintiff's argument, *Beretta* is one more in a long line of authorities standing for the proposition that reasonable foreseeability in a negligence case – whether analyzed under the concept of duty or legal cause – is determined by what was reasonably foreseeable *to the defendant*. The Appellate Court concluded that the duty cases such as *American National Bank & Trust Co. of Chicago v. National Advertising*

Advertising Co., 149 Ill. 2d 14, 27 (1992) – framing the issue as whether "National [defendant] should have foreseen the harm caused to decedent" – were irrelevant. (Opinion, ¶38). The Appellate Court cited *Colonial Inn Motor Lodge v. Gay*, 299 Ill. App. 3d 32 (2d Dist. 1997), but there the court expressly stated that "'reasonable foreseeability' is crucial to both duty and proximate cause." *Id.* at 41. Thus, as *Beretta* and *American National Bank* confirm, what is reasonably foreseeable to the defendant is an appropriate analysis in the context of both duty and proximate cause – particularly in a professional negligence case. (Opening Br. 24).

Plaintiff also cites *Williams v. University of Chicago Hospitals*, 179 Ill. 2d 80 (1997). (Pl. Br. 41). *Williams* did not involve any special interrogatories, but does contain language referring to what would be foreseeable to "an ordinarily prudent person." *Id.* at 87. However, the *Williams* Court had already made clear the medical defendants in that case had no knowledge that would affect the foreseeability issue, *i.e.*, they had no knowledge that plaintiff sought a sterilization as a means of avoiding the conception of a child with a particular defect. *Id.* at 87. On those facts, wholly dissimilar from the instant case, the *Williams* case is inapposite to the issues herein. Nothing in *Williams* changes the law in IPI 105.01 or in *Advincula v. United Blood Services*, 176 Ill. 2d 1, 23 (1996) (Opening Br. 20, 24), that "[p]rofessionals, 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." Nothing in *Williams* changes this professional standard of reasonableness or how it applies, not only to what professionals do and do not do, but also to what they should reasonably foresee. *Lopez v.*

Clifford Law Offices, P.C., 362 Ill. App. 3d 969, 982-83 (1st Dist. 2005) (Opening Br. 20-21).

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. C473). It was Lori Ortberg whom plaintiff's expert claimed "should have foreseen" the suicide risk. (R. 1132). It was Lori Ortberg who under the given instructions was held to foresee whatever a "reasonably careful licensed clinical social worker" should foresee. (IPI 105.01) (R. C4781).

Nor is there any merit to plaintiff's claim that the interrogatory was confusing or ambiguous. (Pl. Br. 46-47). It did not ask more than one question, and it did not need to define "foreseeability." Indeed, the *Garcia* Court soundly rejected these same arguments concluding: "The interrogatory is in proper form." *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 55. (Opening Br. *passim*) As in *Garcia*, the special interrogatory here was stated in terms that were simple, unambiguous and understandable, and the interrogatory was not repetitive, confusing or misleading. *Id.* at ¶¶ 49-50. Plaintiff cites *Smart v. City of Chicago*, 2013 IL App (1st) 120901 (Pl. Br. 33, fn.1), but there the court approved the wording of the *Garcia* interrogatory stating: "In *Garcia*, the interrogatory asked a single question regarding foreseeability." *Id.* at ¶ 37.

D. The Jury's Answer to the Special Interrogatory Was Irreconcilably Inconsistent with the General Verdict.

Like any other intervening cause case, if the intervening act of suicide is not reasonably foreseeable to the defendant charged with liability for the suicide, then the

causal chain is broken and the defendant is not liable. *Garcia*, ¶ 46; *Crumpton*, 375 Ill. App. 3d at 73, 83; *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 8 (1st Dist. 2006). Here the jury's negative answer to the special interrogatory determined that Mr. Stanphill's suicide was not reasonably foreseeable to Lori Ortberg. Plaintiff's Brief makes no claim that the jury's answer to the special interrogatory was unsupported by the evidence. The jury's answer broke the causal chain and is irreconcilable with the general verdict finding Lori Ortberg liable for the suicide on any and all of plaintiff's negligence theories. (R. C4783). As stated in *Garcia*: "[W]e cannot reconcile the jury's answer to the special interrogatory with the general verdict in plaintiff's favor"; "without foreseeability there can be no negligence," and a "negative answer [to the interrogatory] is dispositive on the question of defendant's liability in negligence." *Garcia*, ¶¶ 46, 50.

Plaintiff's consistency argument (Pl. Br. 20-25),[3] accepted by the Second District (Opinion, ¶ 29) is faulty on several levels: it improperly conflates and melds together the general verdict and the special interrogatory answer; it makes no legal sense; it would undermine the entire intent and purpose of a special interrogatory, and most importantly, it relies on the erroneous underpinning of Plaintiff's Brief, *i.e.*, that the special interrogatory tested foreseeability under a subjective standard. On this premise, plaintiff reasons that because she was negligent, Ms. Ortberg did not "subjectively" foresee Mr. Stanphill's suicide with her own "eyes." (Pl. Br. 20, 22, 23, 25). As conclusively demonstrated in Point I.B., *supra*, that premise is fundamentally false and was not the question the jury answered. Again, the given special interrogatory tested foreseeability

[3] Plaintiff chastises Ortberg/Rockford Memorial for not including plaintiff's lengthy consistency objection in its Opening Brief. (Pl. Br. 32). Ortberg/Rockford Memorial conceded that plaintiff's trial objection was sufficient to preserve the consistency issue. (Opening Br. 18).

under the objective standard of whether Mr. Stanphill's suicide was "reasonably foreseeable to Lori Ortberg." This objective standard was not altered or changed by the general verdict.

At best, plaintiff's and the Second District's circular reasoning is an acknowledgment that the general verdict and the special interrogatory are inconsistent because Ortberg/Rockford Memorial cannot be liable for Mr. Stanphill's suicide (general verdict) if the suicide was not "reasonably foreseeable" to Ms. Ortberg (special interrogatory answer). Under 735 ILCS 5/2-1108, the effect of such inconsistency is clear: "When the special finding of fact is inconsistent with the general verdict, the former controls." The jury's negative answer to the interrogatory – finding that Mr. Stanphill's suicide was not reasonably foreseeable to Lori Ortberg – is irreconcilably inconsistent with the general verdict. *Garcia*, ¶¶ 46, 50.

Plaintiff's cited cases – *Lancaster v. Jeffrey Gallon, Inc.*, 77 Ill. App. 3d 819 (2d Dist. 1979) (Pl. Br. 30), *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360 (Pl. Br. 26-28), *Blue v. Environmental Engineering, Inc.*, 351 App. 3d 455 (1st Dist. 2003) (Pl. Br. 27-28), *Bilderback v. Admiral Co., a Div. of Maytag Corp.*, 227 Ill. App. 3d 268 (3d Dist. 1992) (Pl. Br. 27-28), *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 272-74 (5th Dist. 2010), *rev'd*, 2011 IL 110096 (2011) (Pl. Br. 26-27) – do not support plaintiff. In each of those cases, the interrogatory at issue did not address an ultimate issue of material fact that controlled all theories of liability. Here, whether Mr. Stanphill's suicide was reasonably foreseeable to Lori Ortberg during their one-hour counseling session on September 30, 2005 was a determinative issue under each of plaintiff's negligence charges. (R. C4783). Ms. Ortberg could not be held liable for professional negligence

under any of plaintiff's negligence assertions if Mr. Stanphill's suicide was not reasonably foreseeable to her on September 30, 2005. *Garcia*, ¶ 46; *Crumpton*, 375 Ill. App. 3d at 79-80; *Hooper*, 366 Ill. App. 3d at 10; *Jinkins v. Evangelical Hospitals, Corp.*, 336 Ill. App. 3d 377, 384 (1st Dist. 2002).

In sum, this case demonstrates why special interrogatories are such an important aspect of our jurisprudence. This was an emotional case. The general verdict may well have been driven by the fact that two young children lost a father they loved. The special interrogatory then asked the jury to focus on a material issue of ultimate fact essential to a finding of liability. This is consistent with the special interrogatory's role to serve "as guardian of the integrity of a general verdict in a civil jury trial" and to "test[ ] 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). As in *Simmons*, 198 Ill. 2d at 555, the special interrogatory "relate[d] to an ultimate issue of fact upon which the rights of the parties depend[ed]," and as in *Garcia*, ¶ 46, "[t]he general verdict was irreconcilable with the special interrogatory answer, and as a result the trial court properly . . . entered judgment for defendant based on that answer."

CONCLUSION

For all the reasons set forth herein and in the Additional Brief of Defendants-Appellants, the special interrogatory was in proper form and the jury's general verdict against Ortberg/Rockford Memorial is wholly inconsistent and irreconcilable with the jury's negative answer to the special interrogatory. Accordingly, the circuit court's judgment entered on the special interrogatory answer in favor of Ortberg/Rockford Memorial should be affirmed, and the Appellate Court's contrary judgment reversed.

Respectfully submitted,

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Supreme Court Rule 341(c) Certificate of Compliance

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

Respectfully submitted,

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NOTICE OF FILING and CERTIFICATE OF SERVICE

TO: See attached Service List

You are hereby notified that on August 30, 2018, we electronically filed with the Clerk of the Supreme Court of Illinois, through eFileIL, Reply Brief of **Defendants-Appellants'** and **Notice of Filing and Certificate of Service,** true and correct copies of which are attached and hereby served upon you.

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CERTIFICATE OF SERVICE

I, the undersigned, a non-attorney, on oath state that on August 30, 2018, the **Reply Brief of Defendants-Appellants** and this **Notice of Filing and Certificate of Service** were electronically filed and served upon the Clerk of the above court and that on the same day, a pdf of same was e-mailed to the the following counsel of record:

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[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.