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,

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 RESPONSE BRIEF OF PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES

INTRODUCTION

The suicide of Keith Stanphill was not prevented because Lori Ortberg did not act as a reasonably careful social worker as required by Illinois law. Her professional negligence in failing to assess and recognize Keith Stanphill's suicidality and in misdiagnosing his condition did not allow her to foresee his suicide and prevent it. As a result, the jury found (pursuant to proper jury instructions), based on an objective standard (what a reasonably careful licensed social worker would or would not do), that she committed professional negligence and that the same proximately caused Keith Stanphill's suicide. This is confirmed by the general verdict.

As the Second District Appellate Court ruled, the general verdict, based on an objective standard, cannot be nullified by reliance on a special interrogatory that applied a completely subjective standard. The fact that the negligent Lori Ortberg did not foresee the suicide does not nullify the jury's verdict that a reasonably careful social worker would have foreseen the suicide and taken steps to prevent it.

The bottom line is the jury's finding that Lori Ortberg did nothing (general verdict) and consequently foresaw nothing (special interrogatory) are completely consistent thus, making her and RMH liable for the suicide of Keith Stanphill.

Thus, the Second District Appellate Court's decision must be affirmed and this case remanded to the trial court for entry of judgment in favor of the Plaintiff and against the Defendants on the general verdict.

ISSUES PRESENTED FOR REVIEW

In the Additional Brief of Defendants-Appellants, Defendants set forth two issues for review. Defendants state that the first issue for review is: "1. Did plaintiff preserve his

appeal objections to the form of the special interrogatory, and if so, was the interrogatory in proper form?" For the reasons discussed in Section II.A. of the Argument below, Plaintiff disputes that an issue of this appeal is whether Plaintiff preserved his appeal objections to the form of the special interrogatory. This "issue" was never raised in Defendants' Petition for Leave to Appeal and is therefore forfeited. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp,* 2011 L 111611 at ¶¶61-62, *citing Buenz v. Frontline Transportation Co.,* 227 Ill.2d 302, 320 (2008). Regardless and without waiver, Plaintiff has demonstrated below that he did not waive the objection.

In regard to Defendants' issue number 2, Plaintiff is unclear as to the issue of consistency as phrased by the Defendants' in their brief herein. In their Petition for Leave to Appeal, Defendants state that the issue is whether the Second District's decision on consistency undermines the recognized intent and purpose of a special interrogatory under the applicable statute. In the Additional Brief of Defendants-Appellants, Defendants state the issue is whether the jury's negative answer to the special interrogatory was inconsistent with the jury's general verdict. It is Plaintiff's position that the issue on this appeal as to consistency, if any, is whether the Second District Appellate Court properly found that the answer to the special interrogatory was not completely irreconcilable with the general verdict, or whether, at the very least, a reasonable hypothesis for consistency exists requiring judgment on the general verdict. Without waiving the foregoing, Plaintiff addresses both issues in full below.

STATUTES INVOLVED

The statute on Special Interrogatories is 735 ILCS 5/2-1108, which provides:

> §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 specifically

> 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.

STATEMENT OF FACTS

Plaintiff, Zachary Stanphill, was nine years old when his father, Keith Stanphill, committed suicide. (R. 1245). His sister, Kayla Stanphill, was two. (R 626). In the last month of his life, Keith Stanphill's physical and psychological condition deteriorated substantially. (R. 646, 651-53). He had concerns his wife was seeing another man and this was causing him significant psychological and physical distress. (R. 644-45). At the time of his suicide, they were not regularly sleeping in the same house. (R. 649-50). During the period of late August until September 30, 2005, he had lost nearly 15 pounds, walked around in a lethargic state, was pale and his eyes were sunken, he was slipping in his performance at work as a car salesperson and had effectively withdrawn his participation in the church of which he had been a lifelong member (R. 651-53, 875-76). His wife, Susan Stanphill, believed he needed help and arranged for him to see a counselor through the Employee Assistance Program at Defendant RMH, which was a benefit provided under her health insurance plan through the Rockford School District. (R. 655, 672).

Ortberg's Position and Duties

At all relevant times, Ortberg was a licensed clinical social worker and employed by RMH. (R. 448-49, 461). RMH provided a service called Crisis Behavioral Health Triage. (R. 449). Defendant Ortberg testified that this was a service for clients presenting

with mental health conditions, wherein "crisis" referred to a difficult or dangerous situation and triage referred to diagnosing the problem and determining the appropriate course of action. (R. 449-50).

In that regard, Ortberg's responsibilities to Keith included providing a thorough psychosocial evaluation, assessing primary areas of depression, anxiety and suicide. (R. 450-54, 458; C7261-7358, 7361-64: Pl. Ex. 22, 23). In fact, Defendants RMH/Ortberg and Keith Stanphill signed a "Statement of Understanding" which was maintained in the chart that RMH kept on Keith Stanphill's EAP counseling. (R. 457; C7260: P's Ex. 20). In the first paragraph of the Statement of Understanding, it provided that the EAP was required, among other things, to prevent imminent threats of suicide or potentially lethal violence. (R. 457-58). Defendant Ortberg conceded this was one of her responsibilities at the time she saw Keith Stanphill. (R. 458). Moreover, she agrees that as a licensed clinical social worker in the State of Illinois, she had a responsibility to determine if a patient is suicidal. (R. 458-59). Ortberg and her retained expert social worker, Terry Lee, testified that it was Ortberg's job to determine if Keith was suicidal and to document her efforts. (R. 458-59, 478, 1717). With regard to documenting the file relative to her evaluation, Ortberg admitted that she was trained that "if it is not written down, it did not happen." (R. 487).

RMH's/Ortberg's "Record" of Treatment

1. <u>Keith's self-assessment</u>

When Keith presented on September 30, 2005 to RMH, Ortberg provided him a written self-assessment to complete regarding his psychological condition. (R. 474). Keith answered the questions on the self-assessment, disclosing that he had: 1) feelings of harming himself or others most of the time, 2) feelings of being sad 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. (R. 474-86; C7259: Pl. Ex. 19). Ortberg noted that Keith was seeing a primary care physician for "mood". *Id.*

2. Ortberg's lack of recall concerning her exam

At trial, Defendant Ortberg admitted she had no specific recollection of Keith Stanphill. (R. 465-66). She had no recollection of what she said to him or what he said to her, other than what is reflected in her chart. (R. 466). This was also true at the time of her deposition in 2008. (R. 466). Defendant Ortberg also had no recollection as to how much time she spent evaluating Keith Stanphill. (R. 467). She has no recall of any follow-up she did to the answers given by Keith Stanphill in the self-assessment other than notes she made on the same and her chart note. (R. 476-86). She admits the standard of care required that she follow-up with additional questions beyond those reflected in her chart note. (R. 478-79).

Defendant Ortberg's defense, as to what she did or did not do to evaluate Keith Stanphill and his level of suicidality, was based exclusively on the chart she maintained and her custom and practice. (R. 487).

3. The "Doctored" Chart

The chart maintained by Defendant Ortberg and RMH, which they relied upon in support of the Defendant's positon of "custom and practice", was doctored. In that regard, RMH's chart on Keith Stanphill produced in response to a pre suit demand by the Stanphill attorneys for records concerning Keith Stanphill was manufactured. The entries on this

manufactured chart and the chart itself were made and printed on February 15, 2006, four months after Keith Stanphill's death and were individually signed off by Ortberg. (R. 462-463, 527, 529, 530-531; C7241: Pl. Ex. 10). This manufactured chart had different material entries than the chart RMH represented in the litigation to be the "official chart". (R. 462-66, 660-61, 1296, 2038). Evidence concerning the intentional alteration of the chart was presented to the jury. Trial Judge Prochaska, in ruling on the post-trial motions, stated that a significant issue concerning the outcome of this case came down to the lack of credibility as to Ortberg's defenses. (R.1981-82, 1985-86).

4. <u>The Lack of Records</u>

Ortberg's "official chart" note entry for September 30, 2005 of her session with Keith was made and printed on October 4, 2005. (R. C7242-C7243: Pl. Ex. 12). Ortberg testified that while her chart note reflected that she did not identify any suicidal ideations or a plan, his self-assessment reflected that he had thoughts of hurting himself or others most of the time, as well as feelings of anxiousness, losing control, sadness etc. (R. 471, 480-86). She also admitted that her chart note reflected that Keith had lost weight and was taking an anti-depressant. (R. 480-86). In addition to the fact that Ortberg could provide no specific information about Keith because she did not remember him or any conversation with him, she further testified that she could point to no record of any information provided by Keith which could reconcile the conflict between what Keith had disclosed in his Self-Assessment about having thoughts of suicide and her chart note which reflects that he had no suicidal ideation. (R. 515-16). In short, she conceded that she had no records to support that she complied with custom and practice as to specific questions asked and answers given in relation to a mental health assessment. (R. 486-87).

The standard of care required that Ortberg follow-up with additional questions beyond those reflected in her chart note. (R. 478-79). Ortberg admitted that she had no records to support that she complied with her custom and practice regarding specific questions asked and answers given in relation to a mental health assessment. (R. 486-87). Ortberg admitted that she had no evidence or recollection that 1) she conducted a suicide assessment or mental health evaluation of Keith and 2) the type of anti-depressant that Keith was on, how long he was on it, whether it was helping in light of his continuing complaints to her, or who his primary care physician was. (R. 508-509, 516-17). Also, Ortberg did not send a letter to Keith's primary care physician to advise them about Keith's visit, as required by the RMH EAP Manual. (R. 509-510; C7376: Pl. Ex. 46). Further, Ortberg had no evidence or recollection as to 1) how much weight Keith had lost and over what period of time; 2) what his eating or sleeping disturbances entailed; 3) any work trouble that he was having; or 4) how he physically appeared on September 30, 2005. (R. 469-470, 482-83, 490; C7243-53: Pl. Ex. 12; C7413-7442: Def. Ex. 1). Ortberg admits that issues involving sleep, appetite, work life, changes in mood, and changes in concentration or focus are all signs of depression that can lead to someone being suicidal. (R. 471-72).

Ortberg's Diagnosis and Treatment Plan

Ortberg diagnosed Keith with adjustment disorder with depressed mood. (R. 486, 89). But, Ortberg testified that the answers on the self-assessment were indicators of depression. (R. 486, 89). Ortberg agreed that major depression is much more serious than adjustment disorder with depressed mood and that there is a correlation between major depression and suicide. (R. 496-97). Dassenbrook, a social worker whom Ortberg had

referred Keith to, had no records from Ortberg or RMH regarding Keith. (R. 506-07, 1295-96). But, Ortberg actually testified that it was her custom and practice to send Dassenbrook her records. (R. 506-07, 1295-96). Additionally, Ortberg never called Dassenbrook to follow-up. (R. 507-08). Ortberg testified that an appointment made with Dassenbrook would be reassuring to her. (R. 659-60). However, it was Susan Stanphill ("Susan"), not Ortberg, who had insisted that Keith make an appointment with Dassenbrook after he failed for several days to do so. (R. 659-60). After persuading Keith to make the appointment, Susan called the EAP to advise that an appointment was made. (R. 660). The official chart note reflects that someone, other than the patient, had called the EAP to advise of the appointment. (R. 521). Ortberg, in the "doctored" records produced prior to litigation, changed the records to reflect that Keith, rather than someone other than the patient, had called the EAP. (R. 522-25).

Ortberg's Admissions on Standard of Care if She Recognized Keith Stanphill as Suicidal

Ortberg testified that if she had determined that Keith was suicidal, the standard of care required certain actions on her part. The standard of care would have required Ortberg to 1) not let the patient leave her office, 2) call a family member and have them pick up the patient and take him to the ER and explain the situation, or 3) if a family member could not be contacted, she would call 911 or the police and take whatever steps necessary to get him to the emergency room to be evaluated. (R. 510-11, 514). Ortberg admitted that she took none of these steps. (R. 519).

Expert Testimony

Licensed clinical social workers, Dan Potter, Plaintiff's expert, and Terri Lee, Defendants' expert, testified as to the standard of care for licensed clinical social workers

when it comes to evaluating a patient for suicidality. Both experts agreed that the standard of care required proper evaluation to determine Keith's suicidality. (R. 953, 1709).

Plaintiff's expert, Potter, testified that Keith was suicidal and that Ortberg breached the standard of care in failing to recognize the same. (R. 956). The standard of care required Ortberg do a proper mental health evaluation, lethality assessment, and mental status exam. (R. 936, 938-941; 953-54). Ortberg did none of these things. (R. 519). Potter testified that had she done a proper mental health assessment, it would have be revealed to Ortberg that Keith was suicidal and would have triggered her duty to take emergent action. (R. 959-60). Potter, including Ortberg and her defense experts, agreed that when someone is assessed as suicidal, emergent actions must be taken to keep them safe, including referral to an emergency room or calling 911. (R. 510-11, 958-59, 1463, 1710-11). Potter also testified that Defendant Ortberg had misdiagnosed Keith as having adjustment disorder when, in reality, Keith suffered from major depression. (R. 928). Potter explained the symptoms of major depression, which Stanphill exhibited, and the high correlation between major depression and suicide. (R. 928, 932-33). This misdiagnosis was another breach of the standard of care and why Lori Ortberg failed to recognize Keith as suicidal. (R. 933-34).

Plaintiff's expert psychiatrist, David Bawden, is a psychiatrist who has been practicing for 37 years and evaluates people 10-20 times per day for suicidal risk. (R. at 1044-45, 1048). As to involuntary admission, he testified as to the codified standard of care under the Illinois Mental Health Act for involuntary psychiatric admission and that ER's are highly regulated in their requirements in this regard. (R. at 1054-55, 58-65). Further, he works in psychiatric hospitals and has been called into ER's to evaluate patients

for suicidal risk and involuntary admission. (R. at 1046-48). He is well trained in what happens when there is a referral to an ER or psychiatrist/psychiatric facility and the evaluation the ER/psychiatrist must conduct for involuntary admission. (R. at 1048-49). He also testified that emergency rooms have a psychiatrist on call for consults in these situations. (R. at 1196-97). The ER attending does not have the authority to release the patient who is there based on a petition for the purpose of psychiatric evaluations. (R. at 1196). A qualified examiner would have to release the patient. *Id.*

Bawden testified as to the post admission preventative treatment provided to patients and the very rare event of suicide while hospitalized. (R. at 1066-69). It is Bawden's opinion that 100 percent of people who get to a hospital before they commit suicide are prevented from committing suicide. (R. at 1165). Furthermore, Bawden testified that Stanphill had a very severe illness, but an extremely treatable illness. (R. at 1135-36). The majority of people who get treated on an inpatient or outpatient basis for that level of depression and suicidal risk are successfully treated. (R. at 1135-36).

Bawden agreed with Potter's opinions concerning the failure to recognize Keith as suicidal, the misdiagnosis, and the failure to properly assess. (R.1092, 1095, 1097-98). Also, Dr. Bawden testified that each of those failures, individually, were the proximate cause of Keith's death. (R. 1094-95, 97-1100). Additionally, Dr. Bawden testified that Keith was suicidal or at a high risk for suicide on 9/30/05. (R. 1070-72). Bawden testified that the failure to give the correct diagnosis delayed treatment and caused a referral to providers that weren't qualified to handle the severity of his illness, both the necessary treatment and possible confinement for suicide risk. (R. at 1094-95). If Defendant Ortberg had properly diagnosed Stanphill, it is Bawden's opinion that she would have had an

obligation to refer him to an ER or psychiatrist and there would have been a different outcome. (R at 1179). He opined Stanphill had a very treatable condition with the proper referral to an ER or psychiatrist. (R. at 1135-36).

Bawden held the opinion that Stanphill was suicidal/at a high risk for suicide on September 30, 2005, and met the criteria for involuntary admission. (R. at 1093). Bawden opined that based on his experience and review of the file, Stanphill gave indications he would be agreeable to a voluntary admission, but Lori Ortberg never referred him for the same. (R. at 1057-58). She likewise never took the steps to refer him for involuntary admission and/or petition for the same under the Mental Health Act which she was qualified to do. (R. at 1057). Had Ortberg filled out the petition and if Stanphill was unwilling to go, she could have called the police to take him to the facility/ER. (R. at 1061). If he was taken to a psychiatric facility, such as Rosecrans which is in the Rockford area, he could be immediately evaluated by a psychiatrist for admission. (R. at 1061-62). The same is true at the ER. (R. at 1062-63). Dr. Bawden explained that the vast majority of persons who are suicidal and treated, whether on voluntary or involuntary admission, ultimately have their suicide risk level reduced and are released safely. (R. 1069, 1076-77).

Bawden also testified that if a patient was not imminently suicidal (in the next day or two days) and there was family support to watch them, then the other means to averting a suicide in a high risk patient is referral to a properly trained provider which in this case, given the severity of Stanphill's condition, would require a psychiatrist. (R. at 101-75). Psychiatrists are available to see people on an acute basis and in Rockford, there are mental health facilities like Rosecrance where psychiatrists are available to see acute patients

twenty-four hours a day. (R. at 1074). Defendant Ortberg did not refer Stanphill to a psychiatrist. (R. at 1075).

Bawden opined that based on the referral process, Stanphill's likely agreement for voluntary admission and/or the procedures for involuntary admission and the treatment available relative to preventing suicide post admission and through psychiatrists, it was his opinion that Stanphill's suicide would have been averted had he been referred to an ER for voluntary admission, involuntary admission or a psychiatrist. (R. at 1076-77). He believed the failure to refer was a contributing cause of his death. (R. at 1077).

Despite representations by Defendants made in the fact section of their brief, Dr. Bawden did not testify that Keith's suicide **was reasonably foreseeable to Ortberg**. He testified it **should have been foreseeable** to Ortberg, but that the suicide was not from her frame of reference. (R. 1130-32). The actual testimony in this regard was as follows:

> Q. You're here to talk about two main topics, as far as I can see. . . . One is that [you] think it was reasonably foreseeable to Ms. Ortberg that Mr. Stanphill would commit suicide about a week later?
>
> A. No, it wasn't that it was that way to her, but it should have been that way to her, based on the information she had. It wasn't that she thought that he was suicidal and she ignored that. She didn't believe he was. From her frame of reference.
>
> Q. So you think it should have been reasonably foreseeable?
>
> A. I think it was reasonably foreseeable.
>
> . . . . .
>
> Q. I'm asking. Is it your opinion that she should have foreseen the suicide?
>
> A. She should have foreseen that he was capable of suicide. That he was at risk for suicide. At high risk for suicide.

(R. at 1130-32).

PROCEDURAL HISTORY

Trial

In addition to the standard of care instruction on professional negligence, the jury received IPI 20.01 which charged that Ortberg was professionally negligent as follows:

a. Failed to recognize that Keith was suicidal.
b. Failed to properly diagnose Keith's depression.
c. Failed to evaluate Keith with the proper mental health assessment.
d. Failed to refer Keith to a psychiatrist.
e. Failed to refer Keith to a hospital emergency room.

(R. C4783).

The jury also received the burden instruction, IPI B21.02.01, wherein it was told that the jury should find in favor of Plaintiff if it finds that Defendant Ortberg acted or failed to act in one of the ways alleged by Plaintiff and that said actions or inactions by Defendant Ortberg was a proximate cause of injury to the Estate of Keith Stanphill. (C4785).

In addition to the general jury instructions, Defendants proffered a special interrogatory to be asked of the jury. Defendant relied upon the case of and argued that said case required the special interrogatory be given in the exact form as used in *Garcia.* Plaintiff objected to the special interrogatory and a recitation of said objections as well as Defendants' position is as follows:

> 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 to her? Because she didn't do the job. She didn't meet the standard of care.
> …
> 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.
(R. 1578-85).

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 why 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:… Because it's not the standard of care that this is testing. It's the causation piece… So if they don't find the bridge with foreseeability under the law, that's legal cause…
…

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

MS. POSTILION: I don't have to test the verdict in reverse...

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

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. … 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. VANDERLAAN: Well, they have to have - - we can't have a psychiatrist giving an opinion on what is reasonably foreseeable. … It is a legal term, Judge. … It gives them no legal definition of what that means.

(R. 1578 - 1585).

Over Plaintiff's objection, the court gave the special interrogatory just as worded in *Garcia*, other than substituting Ortberg's name and removing references to self-destructive conduct. (R. 1586 – 1588). The special 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?
>
> YES_____ NO_____

(C4768).

On June 2, 2016, the jury returned a General Verdict in favor of Plaintiff in the amount of $1,495,151.00. (R. 1941). Along with the General Verdict in favor of Plaintiff, the Jury answered the special interrogatory "No". (R.1941-42). Based upon the same and the arguments made in objecting to the special interrogatory, Plaintiff requested that judgment be entered on the General Verdict in favor of Plaintiff (R.1943-47). However, the Court entered judgment in Defendants' favor and advised Plaintiff to file a post-trial motion. (R. 1943-47; C4741). Plaintiff then filed a post-trial motion wherein he raised the same issues raised to the Appellate Court and herein. (C5038-5153; 5467-5493).

The trial court held, at the instruction hearing, that an answer of "no" to the special interrogatory would control over the general verdict. (R. 1577, 1580-81, 87-88). Over Plaintiff's objection, the court gave the Special interrogatory and advised the parties to thereafter argue the special interrogatory in a manner that was consistent with an answer in favor of their client based on the trial court's determination. (R. 1588).

Trial Court Ruling on Post-Trial Motions

In the trial court, while ruling on the Plaintiff's post-trial motion, Judge Prochaska agreed with Plaintiff's position. However, Judge Prochaska believed, as a trial court judge, that he was bound to follow *Garcia* because there was no contrary Second District Appellate Court opinion. But, Judge Prochaska believed that *Garcia* was wrongly decided. Specifically, Judge Prochaska stated as follows:

> "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. . . . 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. . . . 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 plaintiffs.

(R. 1985-89).

Appellate Court Ruling

While quoting Judge Prochaska's disagreement with *Garcia*, the Second District Appellate Court (hereafter "Second District") reversed the judgment in favor of the Defendants 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) (A7-9, 20). The Second District held that the special interrogatory answer was not inconsistent with the general verdict because the jury may have found that Keith's suicide was not reasonably foreseeable to Ortberg due to her negligence. (Opinion, ¶¶ 29-33) (A12, 14). Additionally, the Second District held that the form of the special interrogatory was improper because it asked the jury to determine whether the suicide was reasonably foreseeable to Ortberg when it should have asked whether the suicide was foreseeable to a reasonably careful social worker. (Opinion, ¶¶ 32-33, 36) (A13-15). Further, the Second District stated that "the trial court's difficulty in deciphering the special interrogatory is compelling evidence that the jury likely would have experienced similar confusion." (Opinion, ¶ 39) (A17).

ARGUMENT

The Second District, in its opinion, granted Plaintiff's appeal and reversed judgment entered by the trial court for two reasons. First, because there was consistency between the general verdict and the answer to the special interrogatory. (Opinion, ¶ 29)

(A12). Second, because the form of the special interrogatory was improper relative to the test on foreseeability and was confusing. (Opinion, ¶ 33) (A14). Affirmation of one or both reasons by this Court requires upholding the Second District's ruling that the judgement of the trial court be reversed and judgment be entered on the general verdict in favor of Plaintiff.

I. THE SECOND DISTRICT CORRECTLY HELD THAT THE GENERAL VERDICT AND ANSWER TO THE SPECIAL INTERROGATORY ARE CONSISTENT AND THUS THIS COURT MUST AFFIRM

As set forth above relative to the issues in this appeal, there is a question as to whether Defendants-Appellants preserved for appeal the issue of whether there was or was not consistency between the general verdict and the special finding. They only raised as an issue in their Petition for Leave to Appeal the analysis the Second District utilized to reach such a conclusion. Without waiving its position on the forfeiture of this issue by Defendants, Plaintiff sets forth the argument below as to consistency.

The Second District correctly held that the special interrogatory answer was consistent with the general verdict. (Opinion, ¶ 29) (A12). Making all reasonable presumptions in favor of the general verdict per *Simmons v. Garces*, 198 Ill.2d 541, 555-56 (2002), the general verdict and special finding are not absolutely irreconcilable because:

General Verdict		**Special Finding**
Negligence in failing to recognize suicide	**=**	**Ortberg fails to foresee suicide**

A. The Second District properly found consistency

Illinois statutory law provides that where several grounds for recovery are plead in support of a claim, a general verdict shall stand if one or more of the grounds is sufficient

to sustain the verdict even if one or more of any other grounds is insufficient to sustain the verdict. 735 ILCS 5/2-1201. With regard to special interrogatories, Illinois statutory law provides that a **special finding will only control over the general verdict if the special finding is inconsistent with the general verdict.** 735 ILCS 5/2-1108. [Emphasis provided]. In making the determination of whether a special finding is consistent or inconsistent with the general verdict, this Court has held that all reasonable presumptions must be exercised in favor of the general verdict. *Simmons v. Garces*, 198 Ill.2d 541, 555-56 (2002). For a special finding to be inconsistent with the general verdict, the special finding and the general verdict must be absolutely irreconcilable. *Simmons*, 198 Ill.2d at 555-56; *Blue v. Environmental Engineering Inc.*, 215 Ill.2d 78, 112 (2005). In order to be absolutely irreconcilable, the special interrogatory must exclude every reasonable hypothesis consistent with the general verdict. *Blue vs. Environmental Engineering Inc.*, 345 Ill.App.3d 455, 469 (1st Dist. 2003), *aff'd Blue*, 215 Ill.2d at 112. As noted by this Court in *Simmons* and as quoted by the Second District in the instant action:

> "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. . . ." 198 Ill.2d at 556; (Opinion, ¶25) (A10-11).

For example, in *Blue*, this Court held that even had the interrogatory been in proper form, a reasonable hypothesis nonetheless existed to construe the special interrogatory and the verdict consistently. 215 Ill.2d at 113.

Clearly, 5/2-1108 and this Court's rulings in *Simmons* and *Blue*, required that the Second District examine the special finding in comparison to the general verdict and the charges of negligence which the jury was to consider in order to arrive at the same. The

purpose and intent of a special interrogatory is not to usurp a jury's verdict without consideration of the interplay between the two. As this Court noted, there must be a finding of absolute irreconcilability, with all reasonable presumptions going in favor of the general verdict.

As to the individual acts of professional negligence submitted for the jury's consideration, the jury was instructed that the Plaintiff claims that Defendant Ortberg was professionally negligent in one or more of the following respects:

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.

e. Failed to refer Keith Stanphill to a hospital emergency room.

(C4783: IPI 20.01).

Additionally, the jury was further instructed on the definition of professional negligence wherein it was told to determine whether Defendant Ortberg was professionally negligent based on what a reasonably careful licensed clinical social worker would do or not do under circumstances similar to those shown by the evidence. (C4781: IPI 105.01). The jury found she was not a reasonably careful social worker and entered a general verdict against her.

In considering the Plaintiff's position on consistency, it should be noted that the special interrogatory, unlike the test for professional negligence set forth in the jury instructions, asked the jury to determine whether Keith Stanphill's suicide was **subjectively reasonably foreseeable to Defendant Ortberg.** Given the jury's finding that Defendant Ortberg was professionally negligent, the jury had already decided that

Defendant Ortberg had failed to act as a reasonably careful social worker in one or more of the ways as alleged by the Plaintiff. The jury found, by virtue of its general verdict, that Defendant Ortberg failed to recognize that Keith Stanphill was suicidal, failed to properly diagnose his depression, failed to evaluate him with a proper mental health evaluation and/or failed to refer him. In other words, because of her negligence, she did not know he was suicidal and that was a proximate cause of his death. The findings the jury had to reach to arrive at its general verdict are consistent with the jury's answer to the special interrogatory - that the suicide at issue was not reasonably foreseeable to a negligent Defendant Ortberg. Indeed, the trial judge agreed when he stated in his post-trial ruling: "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." (R. 1985-89). The Second District likewise agreed. (Opinion, ¶29) (A12)

Indeed, under any of Defendant Ortberg's acts of professional negligence submitted to the jury for consideration, Defendant Ortberg's failure to act as a reasonably careful social worker would have resulted in her failure to appreciate the gravity and seriousness of Mr. Stanphill's risk for committing suicide and thus impacted her ability to reasonably foresee the same. This is buttressed by Defendant Ortberg's own testimony. She testified that if she assessed a patient as suicidal, then she would have to take emergent actions. (R. 510-11). That emergent actions are necessary means the suicide is foreseeable. In contrast, she would take no action if the suicide was not foreseeable to her. Defendant Ortberg took no emergent actions further proving to the jury that she did not foresee his suicide, not

because it was unforeseeable had she done her job, but because she was negligent. (R. 519).

The reality is that the special interrogatory, as submitted, and as Plaintiff's counsel argued at the instruction hearing, did not in fact test foreseeability as defined by this Court in *City of Chicago v. Berettta*, 213 Ill.2d 351 (2004) and the First District Appellate Court's decision in *Hooper v. County of Cook,* 366 Ill.App.3d 1 (1st Dist. 2006), discussed *infra,* but instead, confirmed Defendant Ortberg's negligence. Indeed, this was specifically argued by Plaintiff's counsel during his objection wherein counsel argued that the special interrogatory does not test the verdict because a jury's finding that Keith Stanphill's suicide was not reasonably foreseeable to Defendant Ortberg is consistent with the theories of professional negligence – that she did not do her job in one or more of the ways stated in the instructions. (R. 1578-85). Nonetheless, Defense counsel insisted that the test of foreseeability sent to the jury should be through the eyes of a negligent Defendant Ortberg. (R. 1578-85). According to defense counsel, "That's what it has to be" - testing it through the subjective eyes of Lori Ortberg. (R.1578-85). For obvious reasons, if the Defendants were trying to test the verdict based on foreseeability, it should never have been through the eyes of Defendant Ortberg, the person who was accused of not doing what she needed to do to ascertain whether Keith Stanphill was suicidal. However, that is the way Defendants wanted their proffered interrogatory. Now the Defendants have to live with the realities of their position in this regard.

Taking the above into account and following the above law, the Second District Appellate Court found that the general verdict and the special interrogatory are not necessarily inconsistent. The Court stated that: "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 her." (Opinion, ¶29) (A12). Thus, "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 Plaintiff." *Id.*

Defendants and *Amicus Curiae*, Illinois Association of Defense Trial Counsel (IDC), essentially ask this Court to ignore that the special interrogatory required the jury to decide if the person they just found negligent in failing to recognize Keith Stanphill was suicidal was able to foresee his suicide. However, there is nothing in IPI 105.01 or any of the other jury instructions which informed the jury that when answering the question in the special interrogatory, that it should disregard the express language of the special interrogatory and ignore Ortberg's subjective knowledge or lack thereof. There is no way of getting around the fact that foreseeability was being tested through her eyes and the jury was answering that question, based on everything the jury had already determined about her negligent conduct and lack of knowledge resulting from the same.

In an attempt to circumvent this obvious conclusion, Defendants and IDC contend that the Second District's decision on consistency undermines the recognized intent and purpose of a special interrogatory. Defendants contend the Second District accepted the general verdict in its entirety and then "conflated the verdict and the special interrogatory answer together in an attempt to find consistency." (Additional Brief of Defendants-Appellants at. p. 27). However, despite their claim, the Second District did the analysis required by this Court's opinions as set forth above and followed throughout the state. In

that regard, the Second District analyzed whether the general verdict and special interrogatory were inconsistent – i.e. were they absolutely irreconcilable such that the special interrogatory excluded every reasonable hypothesis consistent with the general verdict. *Blue*, 345 Ill.App.3d at 469, *aff'd Blue*, 215 Ill.2d at 112. In making the determination of consistency, the Second District determined that a 'reasonable hypothesis' existed that allowed the special finding to be construed consistently with the general verdict, such that the two were not "absolutely irreconcilable" and the special finding would not control. *Simmons*, 198 Ill.2d at 556; (Opinion, ¶25) (A10-11). Notwithstanding Defendants' assertions, an analysis had to be done considering the various basis for the general verdict compared to the special finding. The court found that a reasonable juror could conclude that the suicide was not reasonably foreseeable to Ortberg because she was negligent in counseling him and thus failed to recognize he was suicidal, along with the various other charges of negligence.

Furthermore, it should be noted that in both Defendants' and IDC's briefs, they not only completely ignore the actual charges of negligence for which the jury found Defendant Ortberg guilty, but seem to suggest that regardless of what the basis was for the general verdict, if the answer to the special interrogatory was "no" on the question of foreseeability, it thereby trumps the general verdict. However, if that were true, then this Court would not require a determination of complete irreconcilability. It would not have instructed courts to ascertain whether there are reasonable hypothesis of consistency. If that were true, then this Court would not have previously ruled that presumptions are always in favor of the general verdict and that if "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." *Simmons,* 198 Ill.2d at 556.

Defendants try to compare this case to *LaPook v. City of Chicago,* 211 Ill.App.3d 856 (1st Dist. 1991). In *LaPoo*k, unlike here, the plaintiff was trying to argue an interrogatory was consistent with the general verdict because the interrogatory used the "plural" version of the word "paramedics" on the question of willful and wanton conduct instead of a singular version. 211 Ill.App.3d at 865-66. The Court gleaned that a technicality given the other instructions. *Id.* However, here, there was no instruction that told the jury they should disregard the express language of the special interrogatory, ignore Ortberg's subjective knowledge, and instead answer the question based on whether it was foreseeable to a reasonable person or a reasonably careful licensed clinical social worker that Keith would be injured and commit suicide. Moreover, *LaPook* applied the same rules of analysis as conducted by the Second District in this case. Similarly, Defendants reliance on *Snyder v. Curran Township,* 281 Ill.App.3d 56, 63 (4th Dist. 1996) is misplaced because the issue in that case was charged error in failing to give a special interrogatory, not consistency.

The law set forth in 5/2-1108 and by this Court in *Simmons* and *Blue* was followed by the Second District. The decision of the Second District Appellate Court must be affirmed and this case remanded to the trial court for entry of judgment on the general verdict.

B. At the very least, a reasonable hypothesis exists as to consistency such that the special finding is not absolutely irreconcilable with the general verdict thus requiring that the Second District's decision be affirmed

In *Abruzzo vs. City of Park Ridge*, the complaint arose from the City's response to a request for emergency services (9–1–1 call) by the decedent's father and the jury was provided an instruction as to the plaintiff's claim of willful and wanton conduct against the City. 2013 IL App (1st) 122360, ¶68. In that regard, the jury was instructed that the plaintiff claimed the City was willful and wanton in at least one of two respects: 1) the defendant failed to assess or evaluate decedent Joseph Furio on October 31, 2004 at 1:06 a.m., or 2) The defendant failed to transport decedent Joseph Furio to the hospital on October 31, 2004 at 1:06 a.m. *Id.* The jury was further instructed that one or more of the foregoing was a proximate cause of the decedent's death. *Id.* The defendant, City, tendered a special interrogatory on willful and wanton conduct which was refused by the trial court. *Id.* ¶65. On appeal, after a verdict for the plaintiff, the City argued that the trial court erred in not giving the interrogatory. *Id.* The proffered special interrogatory read:

> "Was the City of Park Ridge willful and wanton showing utter indifference to or conscious disregard for Joseph Furio in its response to the 1:06 a.m. 9–1–1 call?" *Id.*

The *Abruzzo* Court affirmed the trial court's decision refusing to give the interrogatory. *Id.* ¶72. In that regard, the court, in quoting *Jablonksi v. Ford Motor Co.*, 398 Ill.App.3d 222, 273-74 (5th Dist. 2010) stated that: "Particular attention must be given to the wording of a special interrogatory seeking to test a general verdict on the issue of negligence when the plaintiff has alleged multiple theories of negligence." *Id.* ¶71, quoting *Jablonski,* 398 Ill.App.3d at 273-74. "If a special interrogatory covers only one of the plaintiff's two theories of negligence, it is not in proper form since an answer contrary to a general verdict would not be inconsistent with the remaining theory of negligence. . .." *Id.* The *Abruzzo* court found that the special interrogatory could apply to less than all theories

of willful and wanton conduct asserted by the plaintiff. *Id.* ¶70. Therefore, the court held that the "interrogatory was not in proper form and appropriately was not given." *Id.* In so holding, the court stated that "We do not believe, in the context of all of the instructions that the jury would have believed that "response" in the special interrogatory referred to defendant's response *time. Id.* Nonetheless, the jury could have answered defendant's proposed special interrogatory "no" on the question of whether defendant was willful and wanton in failing to, for example, assess or evaluate Joseph, even though it had found that defendant was willful and wanton in failing to transport Joseph to the hospital." *Id.* Accordingly, the court found a reasonable hypothesis exists that the answer to the interrogatory would not be inconsistent with the general verdict. *Id.* ¶72. Thus, the Appellate Court found that the trial court was correct in refusing the same. *Id.* Similar findings were made by the courts in *Blue*, 345 Ill.App.3d at 460-61, *aff'd. Blue*, 215 Ill.2d at 112 (finding that a reasonable hypothesis existed to construe the jury's finding that the danger relative to the subject product was open and obvious as consistent with its finding of contributory negligence in the general verdict*); Bilderback v. Admiral Co.*, 227 Ill.App.3d 268, 270 (3d Dist. 1992) (finding that the special interrogatory did not eliminate retaliatory motive as one of the causes of the plaintiff's termination)..

Here, as discussed above, the general verdict was based on several theories of negligence against Defendants. Given the multiple theories of negligence against Defendants, the special interrogatory must be inconsistent with each theory of negligence. Otherwise, just as in *Abruzzo*, and the other cases cited above, if the 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.

As discussed in Part I.A. above, the special finding is not inconsistent with the General Verdict. At the very least, for the same reasons articulated in Part I.A. above, a reasonable hypothesis exists as to consistency between the General Verdict and special finding on all assertions of negligence. However, in order to affirm the Second District, this Court need only find that there is a reasonable hypothesis of consistency between the special finding and one of the five theories of negligence articulated by Plaintiff. In this regard, for example, given the evidence and the findings of the general verdict, a reasonable hypothesis exists that Defendant Ortberg's negligence in failing to recognize Keith Stanphill as suicidal is consistent with her inability to foresee the suicide. By the jury finding Defendant Ortberg was negligent in not recognizing Keith Stanphill as suicidal by virtue of the General Verdict, the jury consistently found, in the special finding, that she did not foresee his suicide. The same can be said on her failure to diagnose and her failure to evaluate him with a proper mental health examination. There can be no doubt that these are reasonable hypotheses as to how the general verdict and special finding are not absolutely irreconcilable. The same is true on all other allegations of negligence. However, it is enough for this court to merely find that one allegation of negligence upon which the general verdict was based is consistent with the special finding. Just as in *Abruzzo*, *Blue* and *Bilderback*, in such a situation, the general verdict shall control.

For the above reasons, the decision of the Second District Appellate Court must be affirmed and this case remanded to the trial court for entry of judgment on the general verdict.

II. THE ISSUE OF WAVIER IS NOT PROPERLY BEFORE THIS COURT AND IN ANY EVENT, PLAINTIFF DID NOT "FORFEIT" HIS OBJECTIONS TO THE FORM OF THE SPECIAL INTERROGATORY

A. The Defendants' Petition for Leave to Appeal is silent as to an argument of waiver and therefore said issue is not properly raised in the additional brief and should be disregarded

Supreme Court Rule 315(c)(3) states that petitions for leave to appeal shall contain "a statement of the points relied upon in asking the Supreme Court to review the judgment of the Appellate Court." Ill. S.Ct. R. 315(c)(3) (eff. Feb. 26, 2010). The petition must also contain "a short argument (including appropriate authorities) stating why review by the Supreme Court is warranted and why the decision of the Appellate Court should be reversed or modified." Ill. S.Ct. R. 315(c)(5). As this Court held in *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp,* "A party's failure to raise an issue in its petition for leave to appeal may be deemed a forfeiture of that issue." 2011 L 111611 at ¶¶61-62, *citing Buenz v. Frontline Transportation Co.*, 227 Ill.2d 302, 320 (2008). This Court went on to state that later raising the issue in its brief does not cure the forfeiture. *Id.*

In *Crossroads*, the plaintiff only raised issues of subject matter jurisdiction in its petition. *Id.* ¶2. It did not raise in the petition any issues as to other basis for dismissal at the lower court. *Id.* The defendant argued forfeiture of those issues before this Court. *Id.* ¶61. The Court agreed holding that: "While this court does not require a fully developed argument in a petition for leave to appeal, a party must raise an argument with sufficient grounds to show there is an issue. *Id.* ¶62.

Here, in their Petition for Leave to Appeal, Defendants identified three reasons upon which they claimed this Court should allow leave to appeal this case. (Defendants-Petitioners' Petition for Leave to Appeal at pp. 3-4). Nowhere in their Petition do

Defendants assert that Plaintiff's purported failure to object to form of the special interrogatory is an issue that requires this Court's review under the standard permitted for appeal in this case. In fact, Defendants specifically stated that the interrogatory was given over Plaintiff's objection. (*Id.* at p. 12).

Given the above, Defendants have forfeited the issue regarding preservation of the form objection.

B. Even if issue one is not forfeited by Defendants, the Second District correctly held that Plaintiff sufficiently objected to the form of the special interrogatory

Defendants contend that Plaintiff forfeited objections to the form of the special interrogatory because 1) there was no objection made to the inclusion of "Lori Ortberg" in the interrogatory and 2) there was no argument made that her name should be replaced by reference to a "reasonable person" or a "reasonable licensed clinical social worker." (R. 1574-89) (Opinion, ¶¶ 32-33) (A13-14) (Additional Brief of Defendants-Appellants at pp. 18-19). For the following reasons, the Defendants' position is baseless.

In *Blue*, the Supreme Court held that, *in order to be in proper form*, a special interrogatory must relate to an ultimate issue of fact upon which the rights of the parties depend and an answer responsive thereto must be inconsistent with the general verdict. 215 Ill.2d at 112 (2005). There is no dispute that objections as to form in this regard were made by Plaintiff. Thus, the form objections were preserved.

Further, in *Lancaster vs. Jeffrey Galion, Inc.*, 77 Ill.App.3d 819, 822 (2d Dist. 1979), the plaintiff had objected to the special interrogatory on the basis that it did not go to an ultimate fact and was improper because it was not in conformance with the applicable law on misuse. The appellate court noted that the trial court was fully

informed of the basis of the plaintiff's objection because it joined in the colloquy. *Id.* Additionally, the court in *Lancaster* was influenced by that fact that the plaintiff had made a specific substantive objection. *Id.* The appellate court also found that a defect in form can cause a special interrogatory to fail to control an ultimate issue of fact. *Id.* Thus, the court had serious doubts to preclude consideration of the question of form if it was necessary for the resolution of the case. *Id.*

Here the Second District found that plaintiff sufficiently objected to the form of the special interrogatory. (Opinion, ¶23) (A9-10). Indeed, Defendants' contention is completely disputed by the record and the Second District's finding is firmly supported. First, Defendants make repeated reference in their briefs that Plaintiff's only objection to the special interrogatory was inclusion of "or act in a self-destructive manner" from the *Garcia* interrogatory This is a flat out misstatement, as shown by what actually was said as follows:

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

MS. POSTILION: Yes, I will.

(R. 1576-1577, 1589)

Second, that Plaintiff sufficiently objected is well document. While the complete discussion is set forth in the facts, the below gives a very clear view that Plaintiff was unmistakably objecting to the form of the interrogatory – including its subjective test:

> 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 to her? Because she didn't do the job. She didn't meet the standard of care.
> …
> 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.
> (R. 1578-85).
>
> 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 why 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.
> (R. 1578-85).

The foregoing objection speaks volumes as to the breadth and sufficiency of the objection as does the intentional omission of that discussion by Defendants in their brief. The futility of their argument is exemplified by the fact that they clearly omitted this discussion in their argument to this Court. The whole point of the Plaintiff's objection

was that the jury would answer the question "no" because Lori Ortberg was negligent. Thus, the special interrogatory did not test the verdict and thus, was not in proper form. It is also abundantly clear that the issue being argued was whether it should include Lori Ortberg by name resulting in the comment from defense counsel. "That's what it has to be." (R.1578-85).

In summary, the full colloquy with the trial court as set forth above and in the Facts section herein, shows the Plaintiff objected that 1) the interrogatory was improper as it was testing foreseeability through the eyes of Lori Ortberg, 2) the interrogatory did not test the verdict, 3) the interrogatory did not conform to the law, 4) foreseeability was being tested through eyes of Lori Ortberg, 5) foreseeability was not being defined, 5) the interrogatory required the jury to answer too many questions, and 6) foreseeability is a legal issue to be determined at summary judgment, not by a jury deciding factual issues. (R.1578-1585). During this argument, Plaintiff tendered various cases on point to support his objection.[1] The trial court engaged in the colloquy as to this argument, which is also evidenced in the record and clearly shows that the trial court was put on notice of the various form objections raised. (R.1578-1585).

Based on the above, there was clearly no waiver of the form objection.

C. Objections are not required as to consistency regarding the special interrogatory and general verdict

In addition to the above, the issue of whether a reasonable hypothesis exists to support consistency between the general verdict and the special interrogatory, as the

[1] The Plaintiff submitted *Blue v. Environmental Engineering, Inc.*, 345 III.App.3d 455(2003); *Smart v. City of Chica*go, 2013 IL App (1st) 120901; and *Northern Trust Co. v. University of Chicago Hospitals and Clinic*s, 355 ILL.App.3d 230 (2004). (See R.1578-1585 and Group Exhibit C of Plaintiff's Post Trial Motion, C. at 5071-5116).

Appellate Court found, is never waived by a failure to object, even though in this case, Plaintiff's counsel's objections also addressed consistency issues. *LaPook vs. City of* Chicago, 211 Ill.App.3d 856 (1st Dist. 1991). Thus, even if there is waiver on form, which is denied, the Plaintiff must still prevail on this appeal based on a reasonable hypothesis of consistency between the general verdict and answer to the special interrogatory.

For all the above reasons, the issue of Plaintiff's failure to object was forfeited by Defendants-Appellants, but even if considered by this Court, objections to form of the special interrogatory were clearly raised and moreover, the argument of consistency is never waived by a failure to "object". Thus Defendants-Appellants' appeal on this basis must be denied.

III. THE APPELLATE COURT PROPERLY HELD THAT THE SPECIAL INTERROGATORY WAS NOT IN PROPER FORM WHERE IT TESTED FORESEEABILITY FROM THE SUBJECTIVE VIEW OF THE DEFENDANT ORTBERG

In *Simmons v. Garces,* this Court stated that a special interrogatory is in proper form if: "(1) it relates to an ultimate issue of fact upon which the rights of the parties depends and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." 198 Ill.2d at 555-56. The *Simmons* Court also articulated that a special interrogatory "should be a single question, stated in terms that are simple, unambiguous and understandable" and "and not be repetitive, confusing or misleading". *Id.* at 563. Additionally, *Simmons* holds that in determining whether a special interrogatory meets the criteria of being in the proper form, the court should consider the language of the special interrogatory within the context of all of the jury instructions to determine how it was understood and whether the jury was confused." *Id.*

A special interrogatory that is repetitive, misleading, confusing, or ambiguous is not in proper form. *Jones vs. DHR Cambridge Homes Inc.*, 381 Ill.App.3d 18, 39 (1st Dist. 2008). In that regard, significant terms in the interrogatory must be defined if not otherwise covered by the general instructions. *Struthers v. Jack Baulos, Inc.*, 52 III.App.3d 823, 827 (2d Dist. 1977) (court entered judgment on general verdict rather than the special finding, stating "no reference was made in any instruction to 'due care and caution' as referred to in the special interrogatory and we may not then consider that the defective form of the interrogatory was cured and possible jury confusion obviated by the instructions").

As to ambiguities in special interrogatories, the *Bilderback* court found another basis to enter judgment on the jury's general verdict. 227 Ill.App.3d at 271. In that regard, the court found that the special interrogatories were ambiguous. *Id.* They did not ask the question that should have been asked of the jury to test the general verdict. *Id.* As the *Bilderback* court found, "[t]he defendant proffered the interrogatories and is responsible for the ambiguity resulting." *Id*.

A. The Second District correctly followed this Court's *Beretta* decision in finding the special interrogatory was improper in form because it contained an improper statement of the law when it tested foreseeability by a subjective, rather than an objective standard

1. The Second District followed the law set by this Court in *Berretta*

In *City of Chicago vs. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 406-08 (2004), a nuisance case brought by the City of Chicago against those who specialize in the firearm industry, this Court specifically and unequivocally addressed the test for legal cause/foreseeability. In that regard, this Court held that the inquiry as to foreseeability/legal cause **looks at what a reasonable person would foresee as the result of his conduct, not at what this specific defendant knew or should have known.** *Id.* [emphasis provided].

More specifically, the court found that ***legal cause will be found if a reasonable person in the retail business of selling firearm***s would have seen the creation of the nuisance in the City of Chicago as the likely result of their conduct. *Id.* at 408. [Emphasis provided].

As to the case herein, the Second District actually cited to this Court and its holdings in *Beretta* and *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 455 (1992), when rejecting Defendants' contention that a defendant cannot be found negligent if the harm that befell the plaintiff was not foreseeable to the individual defendant. In so ruling, the Second District held: "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." (Opinion, ¶37) (A16) (Citations Omitted).

The Second District followed the law set by this Court and followed by other district courts. Its decision must be affirmed.

2. <u>The objective foreseeability standard applies to professional negligence cases as well and the Second District properly found in this regard</u>

Obviously, the law in *Beretta* establishes the reasonable foreseeability test in Illinois and there certainly is not a less stringent standard for professionals than for non-professionals as Defendants seem to suggest in its Amicus Brief. In fact, there are case decisions involving professionals and the courts have likewise held that the objective foreseeability standard applies. In fact, in *Williams vs. University of Chicago Hospitals*, 179 Ill.2d, 80, (1997), this Court applied the objective reasonable person rule to a medical negligence case. The case involved an interlocutory appeal in a medical malpractice action by parents seeking compensation for expenses they were likely to incur in raising a child who was born following a failed sterilization operation (wrongful pregnancy action). *Id.*

At 81. One of the issues was the foreseeability of the damages arising from a failed sterilization procedure. *Id*. at 86. This Court found the allegations of the complaint insufficient to establish proximate cause, and particularly, legal cause. *Id.* at 87. In that regard, *citing* to *Neering v. Illinois Central R.R. Co.*, 383 Ill.366, 380 (1943*),* this Court held that "if the result is one that an ordinarily prudent person would have foreseen as likely to occur, then the party will be held responsible even if the precise injury which resulted is not foreseen." *Id.* Applying said rule, this Court held that the plaintiffs could not establish the medical defendants conduct was a proximate cause of their injury, for under the allegations of that case, the plaintiff's injury could not be said to be "of such a character that an ordinary prudent person should have foreseen it as a likely consequence of the alleged negligence." *Id.* at 87-88.

Likewise, one of the very cases that Defendants relied upon to support the issuance of a special interrogatory in this case, *Hooper*, was a medical negligence suicide case and the Second District's holding specifically referenced the same. 366 Ill.App.3d at 5-6. The *Hooper* Court ruled that an objective standard of foreseeability applies in medical negligence cases and that an objective special interrogatory should have been given. The same finding regarding objective foreseeability in professional negligence cases was also reached in *Kunz vs. Little Company of Mary Hospital*, 373 Ill.App.3d 615, 611 (1st Dist. 2007), wherein the court held that: "The proper inquiry regarding legal cause involves an assessment of foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as the likely result of his conduct." Moreover, even in their own brief herein, Defendants admit that this Court has held that foreseeability is tested by an objective standard (Additional Brief of Defendants-Appellants at p. 22). Indeed, both

Defendants and IDC argue, albeit without basis, that the special interrogatory should be construed to have required the jury to apply a reasonable person standard, which is further indicative of the futility of the Defendants' argument that foreseeability be tested through the eyes of the negligent professional.

Nonetheless, Defendants contend that the Second District created a new "reasonable person" standard in professional negligence cases that conflicts with the long established standard of foreseeability in those cases. Yet, as stated above, the Second District followed *Beretta* and *Hooper*. Curiously, Defendants' brief is silent as to why the very case they relied on to support the special interrogatory is no longer applicable to their discussions when contesting the Second District's holding regarding application of the objective standard in this case. Moreover, the *Williams* case is but another example of a decision by this Court, that the rules for legal cause apply the same in professional negligence cases as they do in ordinary negligence cases. The bottom line is that the Second District did not set a new standard as to "reasonableness" in professional negligence cases. Rather, consistent with the above law, it confirmed that special interrogatories on foreseeability must use an objective standard even in professional negligence cases.

Consistent with the foregoing law, the Second District herein held the special interrogatory was flawed because it did not ask the jury to test foreseeability through the eyes of a reasonable person, but rather, was subjective. In that regard, it asked the jury to determine whether Keith's suicide was foreseeable to a negligent Ortberg who hadn't done her job well enough to recognize he was suicidal in the first place. (Opinion, ¶33) (A14).

The Second District followed the law set by this Court and followed by other district courts. Its decision must be affirmed.

3. The Second District did not hold that foreseeability of a professional should be tested through the eyes of an "ordinary" reasonable person

Defendants' next claim that the Second District improperly held that an "ordinary reasonable person" standard should be used to test foreseeability in professional negligence cases. First, while such an argument is not even accurate, nonetheless, even if true, it would have no impact on the Appellate Court's decision as to this case because it cannot be disputed that the special interrogatory judged foreseeability from a subjective and not an objectively reasonable standard, regardless of whether a professional or non-professional is characterized as the "reasonable person".

First, the Second District never held that the special interrogatory should test foreseeability based on whether Keith's suicide was foreseeable to an **ordinary** "reasonable person". Rather, after citing to *Beretta*, in making its ruling, the Second District also cited to *Hooper*, a professional negligence case, and held that "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 defendant's conduct." (Opinion, ¶32) (A13-14). The Second District clearly did not say that the foreseeability test should be based on what could be foreseen by an "ordinary person", but rather keyed it to the defendant/profession of the defendant. (Opinion, ¶33) (A14). In fact, the Second District went on to state that the interrogatory was not in 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 social worker) would expect to see as the likely result of her [Ortberg's] conduct. *Id.* This is consistent, not conflicted, with the above stated law.

Second, even if the Second District's ruling could be construed to suggest that foreseeability in a professional negligence case should be judged by what a reasonable ordinary person would foresee, which is denied, it is clear that in this case, the special interrogatory was a purely subjective test. It specifically asked the jury if the suicide of Keith Stanphill was foreseeable to Lori Ortberg, who the jury found to be negligent. It did not ask if it was foreseeable to an ordinary reasonably person or a reasonably careful social worker and nowhere in the instructions was the jury advised that it should disregard the express language of the special interrogatory. Thus, regardless of how the Second District's decision is construed, the special interrogatory still fails under the law promulgated by this Court.

The Second District followed the law set by this Court and followed by other district courts. Its decision must be affirmed.

4. If professionals' foreseeability were tested on a subjective standard, then the law would incent diminished care, indifference and incompetence

Defendants seem to suggest that a special rule of foreseeability should apply to professionals and that unlike non-professionals, when testing foreseeability as to a professional, the test should be done through the eyes of the actual defendant. In other words, Defendants suggest that ordinary people's liability should extend to limits consistent with what reasonably careful ordinary people would foresee to be the consequences of the defendant's actions. However, as to professionals, defendants contend their liability should only extend to limits consistent with what they individually can foresee, even if there foresight is muted by their own negligence.

This suggestion lacks all logic. First, the *Beretta* decision rejects such a claim where it likewise dealt with persons having specialized knowledge and keyed the test of foreseeability to a reasonable person in the defendant's business of selling fire arms. The same type of test applies to healthcare or any other professional, as supported by *Williams, Hooper* and *Kuntz.*

The second fallacy in the Defendants' argument is that if their position were true – that foreseeability in a professional negligence case can be tested subjectively - then when would a professional ever be liable for their own negligence? Never. Their own negligence would give them the very excuse for their inability to foresee the consequences to the plaintiff of said professional's negligent acts and omissions. For example, a radiologist who violates the standard of care by failing to properly read a mammogram result which shows positive for breast cancer could not reasonably foresee the patient plaintiff would die from breast cancer because he never even knew she had it in the first place given his own negligence. And likewise, as is the case here, a mental health care professional would be able to escape liability by simply being negligent in failing to gather the information to assess and make a diagnosis of suicidal risk since her own lack of knowledge due to her negligent conduct would preclude her from being able to foresee the suicide.

Such a rule, as proffered by Defendants would be incenting professionals to do less and know less because their liability would never be measured by what reasonably careful professionals in their business would have foreseen, but only what they failed to know and thus failed to foresee because of their own negligence and/or incompetence.

That surely cannot be the standard of foreseeability, much less the level of mental healthcare we strive for in Illinois.

Accordingly, an objective standard as to foreseeability is imperative. The Second District followed the law set by this Court and followed by other district courts. Its decision must be affirmed.

5. Consideration of the other instructions reinforces there is no conflict

Defendants' next contend that the Second District "ignored the word 'reasonably' altogether" as contained in the special interrogatory. (Additional Brief of Defendants-Appellants at p. 17). Defendants argue, while now conceding foreseeability must be tested using an objective standard, that when read with the other instructions, the word "reasonably" as used in the special interrogatory, resulted in an objective test of foreseeability.

For Defendants to argue that the Second District ignored the word "reasonable", when assessing the form of the instruction, is but another misconstruction by Defendants of the Second District's determination. The Second District cited and referred to the exact wording of the special interrogatory at numerous points in its opinion. (Opinion, ¶¶16, 29, & 33) (A6-7, 12, 14). Moreover, citing to *Hooper*, the Second District held that: "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 defendant's conduct." (Opinion, ¶32) (A13-14) [Citations omitted].

Additionally, the Second District did consider the other instructions relative to the wording of the special interrogatory. Taking those instructions into account and the verdict

that found Ortberg negligent under the standard of care enunciated and the various charges of negligence, the Second District concluded that a jury could find, because Ortberg was negligent, that it was "not reasonably foreseeable to her" that Keith would commit suicide. (Opinion, ¶ 29) (A12). The Court also found that 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. (Opinion, ¶ 33) (A14). As the Court held, "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." *Id.*

Additionally, Defendants contention that the duty instruction implied that the jury should have treated the special interrogatory as asking an objective question as to foreseeability by a reasonably careful licensed social worker is fatally flawed. To begin, Defendants ignore the placement of the word "reasonably" in the special interrogatory and the real problem with this interrogatory. The problem with the interrogatory was the "person" through whose eyes foreseeability should be tested. In this case, and contrary to *Beretta* and *Hooper,* the placement of the word "reasonable" was not even referring to Lori Ortberg. It was referring to the degree of "foreseeability". Thus, despite defendants' contentions, reading a standard of care instruction would not have implied to the jury that it was to answer the interrogatory assuming the Lori Ortberg referred to therein was a "reasonable" Lori Ortberg acting as a reasonably careful licensed clinical social worker, as opposed to the negligent Lori Ortberg the jury had found guilty just prior to answering the interrogatory.

Additionally, the special interrogatory, on its face, required the jury to use a subjective test. There was not one instruction which instructed the jury to ignore Ortberg's subjective knowledge, or lack thereof, and answer the interrogatory such that the jury would be determining if someone other than Ortberg – i.e. a reasonably careful licensed social worker, would have foreseen the suicide. Unlike the instruction for determining professional negligence based on an objective standard, and because of Defense Counsel's insistence, the special interrogatory did a one eighty and asked the jury to decide whether Stanphill's suicide was subjectively foreseeable to Ortberg. Given the determination on negligence, the facially subject interrogatory and the lack of any instruction which told the jury to disregard the subjective question asked by the interrogatory, the jury had no option but to answer "no" to the special interrogatory.

The reality is that this interrogatory misstated the applicable law and when considered with the other instructions, was confusing and ambiguous. The weakness in the Defendants argument is that Defendants are suggesting that a jury who just found Ortberg guilty of not being a reasonably careful social worker should be able to imply a meaning to a special interrogatory that 1) Plaintiff's counsel predicted, at the instruction conference, would be confusing but Defendants insisted that foreseeability be subjectively tested – "that's what it has to be"; 2) that a very experienced trial judge has opined was very ambiguous and muddy; and which 3) an experienced panel of Appellate Court judges found misstated the applicable law and was confusing and ambiguous. (Opinion, ¶¶16, 29, & 33) (A6-7, 12, 14). If trained legal professionals with more than 100 years of combined experience find the special interrogatory, as worded, confusing and ambiguous, it stands to reason so too would a jury.

The interrogatory was confusing and the Second District properly applied the law in making said finding. Its decision must be affirmed.

6. The cases cited by defendants do not establish a conflict in the Second District's decision and professional negligence law

Defendants reliance upon the case of *Lopez vs. Clifford Law Offices*, 362 Ill.App.3d 969 (1st Dist. 2005) is also misplaced. In *Lopez*, the First District, in reversing a motion to dismiss for the law firm, confirmed the First District was following this Court's ruling in *Beretta* and applied it to a professional negligence case. *Id.* at 982. In that regard, it held that "The pertinent inquiry . . . is . . . whether the injuries **were of the type that a reasonable attorney would see as a likely result of his or her conduct ("legal cause" component)"**. [Emphasis provided]. *Id.*

Further, Defendants attempt to distinguish the Second District's reliance on *Lancaster* and this Court's decision in *Beretta* because they are not professional negligence cases are unconvincing. *See Williams supra.* First, the Second District relied upon *Lancaster* in analyzing the consistency issue. The analysis of consistency with regard to special interrogatories does not change based on the type case. Further, as discussed above, even though *Beretta* was not a medical negligence case, it dealt with defendants with specialize skill, knowledge and training and this promulgated the standard with this in mind. Moreover, the decision in *Williams* simply destroys any argument by Defendants in this regard.

Further, the case of *Jinkins vs. Evangelical Hospitals Corp.*, 336 Ill.App.3d 377, 382 (1st Dist. 2002), actually confirms the Second District applied the proper law and did not set a new standard as to professional negligence. In *Jinkins*, a medical negligence case dealing with a suicide, the First District agreed with Plaintiff's position herein and held

that "Legal cause "'is essentially a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of the type which a reasonable man would see as a likely result of his conduct.'" *Id.* However, *Jinkins*, unlike this case, dealt with an intervening act breaking the chain of causation. *Id.*

Defendants also cite case law from outside Illinois as to certain jury instructions given to juries. Those cases obviously are not binding on this court. Moreover, they are also distinguishable. With regard to *Delozier vs. Smith*, 522 P.2d 555 (Ariz. Ct. App. 1974), there is just a recitation of jury instructions given. There is no reference to a special interrogatory. *Id.* In *Cook vs. Sheriff of Monroe County, FL*, this was a prison suicide case against a non-medical professional with specific rules under the federal civil rights law, §1983, that requires subjective knowledge on the part of the defendant of risk of serious harm to establish foreseeability. 402 F.3d 1092, 1115-116 (11th Cir. 2005). Lastly, in *Haynes vs. Wayne County*, the court held: "Rather, it is whether Defendant had any objective reason to foresee that Mr. Haynes might commit suicide following his release from custody" and not whether they subjectively foresaw his suicide." 2017 WL 1421220 at *8 (Tenn. Ct. App. Apr. 19, 2017).

For all the reasons stated above, the Appellate Court properly found that the special interrogatory was improper in form. Accordingly, its decision should be affirmed and this case should be remanded to the trial court for entry of judgment on the general verdict.

B. The special interrogatory was ambiguous and confusing and thus not in proper form

In addition to the special interrogatory being in improper form based on it misstatement of the law and subjective standard, here, just as in *Bilderback* and *DHR Cambridge*, the special interrogatory is ambiguous and confusing. The trial court made

specific reference to the interrogatory's ambiguity in its rulings on the post-trial motion. In that regard, the trial court stated:

> 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. . . . How can that not be ambiguous? (R. at 1985-86).

Indeed, the trial court's analysis was spot on in this regard and the Second District agreed. On the one hand, the jury was being asked to judge Defendant Ortberg and determine whether she was professionally negligent based on the standard of what a reasonably careful licensed social worker would do or not do and thus otherwise know under similar circumstances. They did so and they found she did not meet the standard on the various allegations of negligence. However, when it came to the special interrogatory, they were asked to predict foreseeability not through the eyes of a reasonably careful licensed social worker, but through the negligent eyes of Defendant Ortberg. This made the special interrogatory question ambiguous because they were being told to use two different standards. There is simply no way the jury could find that Defendant Ortberg failed to recognize Keith Stanphill as suicidal, or fail to assess or diagnose him and then at the same time say his suicidal was foreseeable to Defendant Ortberg who didn't even know he was suicidal because of her professional negligence.

Accordingly the Appellate Court decision must be affirmed.

C. The special interrogatory asked more than one question and did not define foreseeability and was thus not in proper form

A proper interrogatory consists of a single direct question that, standing on its own, is dispositive of an issue in the case such that it would independently, control the verdict with respect thereto. *Northern Trust vs. University of Chicago Hospitals and Clinics,* 355 Ill.App.3d 230, 251 (1st Dist. 2004). Further, the terms used in the interrogatory must be the same language contained in the other instructions and must be defined. *Struthers v. Jack Baulos, Inc.,* 52 III.App.3d 823, 827 (2d Dist. 1977).

Here, the special interrogatory did not require the jury to answer a single question. Instead, assuming the jury even knew what foreseeability means, which is another flaw in the instruction, the jury would have had to go through all of the criteria to ascertain what Defendant Ortberg knew or did not know about Keith Stanphill – i.e. whether she recognized he was suicidal and/or properly diagnosed and/or properly evaluated and/or properly referred. They obviously had to answer the questions as to what was in the mind and knowledge of Defendant Ortberg before they could determine whether the suicide was foreseeable to her. Then and only then, could the jury determine if Keith Stanphill's suicide was foreseeable ***to Defendant Ortberg.*** Because the interrogatory was not a single direct question, it was in an improper form.

In addition, over Defendant's objection, nowhere in the instructions was the term "foreseeability" defined. (R 1585). The inclusion of this undefined legal term in the special interrogatory, as well as standards inconsistent with the other instructions, likely created inconsistency and ambiguity rendering the special interrogatory confusing and misleading.

Thus, for all of the reasons set forth above, judgment must be entered on the General Verdict and the trial court reversed.

CONCLUSION

For the reasons stated above, the Second District applied the applicable law required by the decisions of this Court and consistent with the decisions of other Circuits relative to analyzing inconsistency under 735 ILCS 5/2-1108 and holding the special interrogatory was improper in form and should not have been given. The Appellate Court's opinion must be affirmed and this case must be remanded to the trial court for entry of judgment on the general verdict.

Respectfully submitted:

Zachary Stanphill as the Administrator of the Estate of Keith Stanphill

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07/30/18
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Certificate of Compliance

Pursuant to Supreme Court Rule 341(c), I certify that this Brief of Plaintiff-Appellee conforms to the requirements of Rules 341(a) and 341(b). The Length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341 (h)(1) points and authorities and the Rule 341(c) certificate of compliance and the certificate of service is 49 pages.

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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,

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

PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on July 30, 2018, the Plaintiff-Appellee's Additional Response Brief was 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 following counsel of record:

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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/ Lori a. Vanderlaan

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Within five days of acceptance by the Court, the undersigned states that he will send to the above-mentioned court thirteen copies of the Reply Brief of Plaintiff-Appellees bearing the court's file stamp.

By: /s/ Lori a. Vanderlaan

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