No. 127837

IN THE SUPREME COURT OF ILLINOIS

JOHN W. GIVENS, LELAND DUDLEY, and THERESA DANIEL as Special Administrator of the Estate of DAVID STRONG, deceased,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
First Judicial District, Nos. 1-19-2434 & 1-19-2457 cons.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2016 L 10768
The Honorable Bridget J. Hughes, Judge Presiding

BRIEF OF THE PLAINTIFFS-APPELLEES, JOHN W. GIVENS AND THERESA DANIEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DAVID STRONG, DECEASED

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ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court correctly determined that the claims of plaintiffs, Leland Dudley and John Givens, were not barred by collateral estoppel.

2. Whether the appellate court correctly determined that the special interrogatories did not control the general verdict.

STATEMENT OF FACTS

I. THE TRIAL TESTIMONY SUPPORTED THE JURY VERDICT.

A. Plaintiffs' theory of the case.

Plaintiffs contended that the police were willful and wanton when they fired 76 bullets into the minivan at the unarmed plaintiffs, as there was no legal justification for the shooting. (R809/16-R812/9.) Plaintiffs presented evidence to the jury in support of their theory of the case. Plaintiffs adduced testimony that Dudley, Givens, and Strong were merely trying to leave the scene when they decided to reverse out of the garage, and did not know police were on the other side. (Statement of Facts ("SOF") I. C, herein, *infra*.) Testimony also revealed that the police had advance warning that the Town & Country minivan was going to bust through the garage door, and had ample time to get out of the way as required by police regulations. (SOF I. D, herein, *infra*.) Trial evidence also showed that police did not actually believe that Officer Papin was struck and injured by the reversing van. (SOF I. E & F, herein, *infra*.) Testimony also showed that the advancing minivan could not have been a legitimate basis for the shooting because (1) the minivan never accelerated towards them, (2) driver Dudley was unconscious prior to rear-ending the second vehicle and could not have and did not move the gear shift into drive, (3) the majority of the shots were fired as the minivan was reversing, and (4) the minivan, had it

and its driver not been disabled, could have driven away from the scene without injuring police. (SOF I. G & H, herein, *infra*.) Plaintiffs also presented evidence that no one was in command at the scene, and that the police engaged in contagion fire, which even the defense agreed is never justified. (SOF I. I, herein, *infra*.)

B. Defense theory of the case.

Defense policing expert, Roy Taylor, testified that the police were reasonably justified in shooting the plaintiffs 76 times for three reasons: (1) because the plaintiffs knew that police were on the other side of the garage door when they reversed out of the garage (R2094/19-21, R2095/19-21, R2103/1-5, R2105/4-9); (2) because police reasonably believed that the minivan had struck and injured Officer Papin (R2119/23-R2120/12); and (3) because, after the reversing minivan no longer posed a threat, the van posed a new threat when Dudley put the vehicle in drive and accelerated towards the police. (R2103/6-24, R2121/1-9, R2224/24-R2225/9.)

C. There was trial testimony that the police shot at the Town & Country as it exited the garage.

Strong, Givens and Dudley were engaged in stealing stereo equipment from Mike's Electronics on the night of April 30, 2012. (R1861/16-18.) All three were unarmed, and no other people were present inside of the store or garage. (R1861/19-24.) Seeing "someone walk past" the window of the store, the plaintiffs decided it was time to leave. (R1806/20-22, R1807/1-7, 19-22, R1831/4-6, R1849/1-3, R1850/6-10.) They loaded the stolen goods into a silver Chrysler Town & Country minivan parked in the garage adjacent to the store, and got into the vehicle. (R1840/21-R1841/1.) David Strong sat in the back seat, while John Givens was the front seat passenger. Leland Dudley, the driver, testified that he determined that the garage door was locked, and that their only means of departure

was to reverse the minivan through the door. (R1805/3-9.) Their goal was to break the garage door with as little force as possible, and, thereafter, to drive away as quietly and slowly as possible. (R1805/15-23, R1812/13-20, R1814.)

The plaintiffs were unaware that police were assembled in the sidewalk area on the other side of the garage door. (R1804/7-14, R1805/1-3, R1831/1-3, R1851/6-22, R1865/23-R1866/2.) Dudley specifically denied hearing the police trying to open the garage door, and denied seeing a police flashlight shining into the garage. (R1852/11-18, R1854/17-21, R1857/3-6.) Dudley also testified that, had he known police were there, he and his co-plaintiffs would have surrendered to police. (R1859/14-R1860/1.) However, several police officers were standing outside of the garage door. (R1851/23-R1852/2.) Of these, three officers were positioned on the driver's side of the vehicle (referred to by some witnesses as the left side) as the Town & Country exited. One of these officers, Officer Papin, jumped back and ran away as the minivan reversed through the garage door. (R796/1-5, SUP E 17: Camera 5 at timestamp 2:45:48-2:45:50.) A second officer on the driver's side of the Town & Country, Officer Curry, aimed his weapon and began firing at the reversing minivan. (R1821/3-7, R1823/4-10, R796/1-R797/13.)

As the Town & Country moved backwards through the garage door, over the sidewalk area and towards the street, it struck a red minivan which was parked perpendicularly on the street, blocking the egress from the garage. (SUP E 17: Camera 5 at timestamp 2:45:49-2:45:50.) As he reversed out of the garage door, and even before the Town & Country rear-ended the red minivan, Dudley was shot in the back of the head, the side of the head, and the back by Officer Curry. (R1805/9-11, R1808/13-R1809/7, R1813/20-24, R1818/22-R1819/5, R1820/2-5, R1823/4-19, R1830/1-4; SUP E 17: Camera

5 at timestamp 2:45:49-2:45:52.) This rendered him unconscious before he even reached the street, and prior to rear-ending the red minivan. (R1810/2-5, R1821/22-24, R1823/13-19, R1824/4.) Defense expert, Brady Held, agreed that it looked like the driver's side window was shot out prior to striking the red minivan. (R2060/19-23.)

After colliding with the red minivan, the minivan continued moving backwards into the street, whereupon it rear-ended a second parked car, and then ricocheted forward "a very, very small distance," before coming to a complete stop. (R798/6-16, R938/21-R939/2, R1127/12-24, R1358/9-11, R1913/2-5.) By the time the Town & Country came to a complete stop, eight police officers had unloaded 76 bullets into it. (R1730/3-13.) David Strong was hit by nine of these bullets, and died. (R1649-67, R1672/1-6.) John Givens was shot six times. (R1728/24-R1729/1.) Leland Dudley was shot six times in his back and head. (R1728/19-23, R1813/20-24, R1821/3-7.) Investigators found 25-29 bullet holes in the windshield, and the tires were shot out. (R1728/12-15, R1824/1-2.)

D. There was trial testimony that the police did have advance warning that the van would be "busting through the garage door."

Officer Lorenz testified that, once he realized that the plaintiffs were inside of the garage and planning to reverse through the garage door, he immediately sent a radio message to Dispatcher Guadalupe Lopez at OEMC. (R995/23-996/10.) Lorenz's warning, repeated by Dispatcher G. Lopez to the radio of every officer on the scene, warned the officers to, "keep clear. They might be busting out of the garage door." (R613/13-R614/1-4.) The transmission was broadcast to every officer in District 10 and 11, and Dispatcher G. Lopez expected that all of the officers on the scene had their radios turned on and heard the transmissions. (R613/13-R614/4, R627/16-R628/3.) Officer Michel testified he heard Lorenz radio in the warning, and that the warning was repeated by Dispatcher G. Lopez

for everyone to hear. (R652/16-R655/18.) Officer Daniel Lopez and Officer Ohlson heard the radio warning that the plaintiffs were inside the building. (R1221/10-12, R1750/18-R1751/16.) Defense expert, Taylor, admitted that Officer Papin and all the other officers should have heard the warning. (R2155/20-24, R2156/1-2, R2158/2-5, R2160/3-13.) Plaintiff's expert, Dr. Alpert testified that every officer on the scene was warned ahead of time the plaintiffs were going to burst through the garage door. (R876/13-21.)

Dr. Alpert also testified that police radios are "a lifeline," and that police are trained to have it on their persons, to have it turned on, and to pay attention to it. (R753/2-11.) The importance of police radios was confirmed by Officer D. Lopez, Officer Pratscher, and Officer Mendez. (R1214/22-24, R1221/13-18, R1332/21-24, R1523/8-21.) Officer Papin and several other officers all agreed that they were wearing their radios at the time of the incident. (R639/21-R640/12, R674/19-22, R894/19-20, R1191/24-R1192/10, R1220/8-14, R1333/22-R1334/11, R1461/10-20, R1527/21-R1528/2, R1748/7-13.) The sound from the police radios was so loud that the building resident who called 911 to summon the police in the first place, Sergio Hernandez, testified that he could hear the police radios through the windows of his second-floor apartment. (R1070/9-19.)

As he stood outside of the garage door with the other police officers, Officer Valadez testified that he saw the taillights from the Town & Country emanating from inside the garage, and that he personally told Officer Papin to "watch out, they're coming out." (R683/23-R684/2.) Officer Valadez told investigators that he specifically told Officer Papin to "move out of the way." (R685/13-23, R689/6-15.) The surveillance video confirms Officer Valadez's testimony, and reveals that after warning Papin, Officer Valadez himself got out of the way. (R751/9-16, R752/10-17, R784/8-11.) Defense expert,

Taylor, agreed that Valadez warned Papin. (R2162/7-11.) Officer Gonzalez testified that he shouted a warning to fellow officers when he realized that the minivan was going to drive through the garage door. (R1706/7-16.) Officer Panek testified that she heard the vehicle starting up from inside the garage and saw the lights from the minivan before the Town & Country reversed through the garage door, and shouted a warning to fellow officers. (R1203/8-23, R1732/4-10.) Officer D. Lopez testified that he also screamed out a warning to other officers before the minivan reversed out of the garage. (R1232/4-23.) Officer Curry and Officer Vasquez both testified that they received advance warning of the vehicle exiting through the garage door. (R1116/2-6, R1480/10-22.) Officer Rosen also testified that he was warned verbally by another officer. (R931/16-19.)

Officer Papin testified that governing police regulations require that officers get out of the way of oncoming vehicles, and that, had he been warned of the exiting minivan and not gotten out of the way, his conduct would have violated these regulations and been "reckless." (R1620/2-19.) This was confirmed by plaintiffs' expert. (R784/21-R785/7.)

E. There was trial testimony that police on the scene knew in real time that Officer Papin had not been injured by the reversing minivan.

Officer Curry conceded that, if the Town & Country did not strike Officer Papin, then he had no legal justification for firing his weapon. (R1135/1-3.) Dr. Alpert, testified that the surveillance video clearly reveals that Officer Papin was not struck by the minivan. (R856/9-19, R857/8-14, R786/12-18, R795/22-R796/5.) Furthermore, Dr. Alpert testified that, even if Officer Papin had been tapped by the passing vehicle, he was obviously not injured, as he ran away from the van in full view of his fellow officers. (R795/22-R796/5.)

Although Officer Papin steadfastly maintained that he was struck by the Town & Country minivan, when watching the surveillance video at trial, he admitted that, at the

point of the video depicting the moment when he claimed to have been struck by the minivan, there is clearly space visible between his body and the minivan. (R1609-R1611.) In addition, he was facing the minivan when it allegedly struck him, but the bruising which he claimed was a result of the contact was on the back of his body. (R1615/19-22.)

It is undisputed that the shooting began after Papin had already run past the other officers and was safely out of harm's way. (R796/1-5, R797/10-13.) Officer Curry, who fired 18 shots at the reversing Town & Country, admitted that he waited for Officer Papin to clear Curry's line of fire before discharging his weapon. (R1121/2-4, R1122/3-5, R1125/11-R1126/9.) Some officers claimed that they believed Officer Papin had been struck by and dragged under the Town & Country as it reversed and did not know if he was safe. (Rosen: R936/10-15; Rey: R975/15-18; Vasquez: R1499/8-12; Mendez: R1564/1-11) However, at no time did any of the police officers run to see if Officer Papin was stuck under the vehicle after it came to a rest. (Curry: R1130/23-R1130/1; D. Lopez: R1237/15-18, R1238/14-16; Pratscher: R1369/10-13.) At no time did any officer radio in to dispatch that a police officer had been injured. (Rosen: R949/18-22; D. Lopez, R1238/17-20; Vasquez: R1497/11-17, R1498/5-15, R1502/18-24; Mendez: R1561/15-18; Papin: R1605/20-R1606/9; Taylor: 2207/5-7.) At no time did any officer request an ambulance for a fellow officer. (Rosen: R949/18-23; D. Lopez: 1238/14-16; Pratscher: R1369/16-18, R1373/2-8.) Officer Violet Rey testified at trial that she saw the Town & Country strike Officer Papin. (R975/15-18.) However, when interviewed by Detective Benigno shortly after the incident, she did not report seeing Officer Papin hit by the minivan. (R1731/1-24.) Dispatcher Lopez of OEMC testified that all of the officers were fine after the shooting, and that he received no report at any time of any injured police officer. (R617/17-23.)

F. Conflicting testimony as to whether it was even possible for Officers D. Lopez, Gonzalez and Pratscher to have seen Papin being struck.

At the time the Town & Country reversed through the garage door, Officer D. Lopez and Officer Gonzalez were both inside the building, attempting to punch a hole into the door leading from the interior hallway into the garage. The officers testified that as the van reversed out of the garage, they were both on all fours sticking their heads through the hole they created and watching the plaintiffs back out of the garage. (R1539/24-R1540/2.) Officer D. Lopez testified that he was also able to simultaneously stand up, pivot, turn, move to the exterior door, and crane his neck around the threshold in time to see the rear driver's side of the Town & Country strike Officer Papin, even though his view from that location, if any, would have been of the passenger side of the van. (R1233/11-18, R1251/3-21.) Officer Gonzalez admitted that he did not see the minivan strike Papin. (R1712/2-6.)

Officer Pratscher testified that he saw the reversing minivan strike Papin, even though Pratscher was standing on the passenger side, and Papin claimed to have been hit by the rear driver's side of the minivan. (R1353/15-1354/8.) There was also testimony that the scissor-gate would have blocked Pratscher's view of Papin. (R1435/21-1436/6.)

G. There was testimony that Leland Dudley never put the Town & Country in drive and never accelerated forward.

Defense expert, Taylor, testified that, after rear-ending a second vehicle while in reverse, Dudley put the Town & Country into drive and accelerated the vehicle forward towards police. (R2103/6-24.) According to Taylor, this gave a justification for the police firing their weapons at the Town & Country. (R2103/6-24.) Officer Pratscher also testified that he saw Dudley put the van in drive and accelerate forward. (R1409/23-1410/18.)

Leland Dudley testified that he was shot in the head before the reversing Town & Country even hit the red minivan blocking access to the street. (R1805/9-11, R1808/19-1809/7, R1813/20-24, R1818/22-R1819/5, R1820/2-5, R1823/4-19, SUP E 17: Camera 5 at timestamp 2:45:49-2:45:52.) Defense expert, Brady Held, confirmed that the Town & Country's driver's side window had been shot out prior to the collision with the red minivan, consistent with Dudley's testimony. (R2060/19-23.) Mr. Dudley testified that he never moved the gear shift into the drive position, and that he never "pounded" his foot on the gas pedal, and that could not have done either thing, as he was unconscious from receiving multiple gunshot wounds, including two to the head. (R1806/3-5, R1810/2-5, R1813/17-24, R1821/22-24, R1823/13-19, R1824/20-23, R1865/4-6.) Plaintiffs' expert corroborated Dudley's testimony and testified that the Town & Country never accelerated forward. (R798/7-16.) All the witnesses agreed that the Town & Country moved forward only a very small amount after rear-ending the second vehicle. (R798/6-16, R938/21-R939/2, R1127/12-24, R1358/9-11, R1913/2-5.) Officer Rosen and Officer Curry both testified that they never saw Dudley put the vehicle in drive. (R939/3-5, R1128/1-3.) Officer Curry also testified that the Town & Country did not accelerate. (R1127/22-24.)

Detective John Bengino, who was on the scene to investigate shortly after the shooting, personally witnessed police officers moving the gear shift of the Town & Country. (R1738/8-11.) There were also photographs taken at the scene after the incident which depicted the gear shift in different positions. (R1737/20-R1738/11, R1741/10-R1742/5, R2057/3-12.) Additionally, testimony adduced at trial revealed that most of the 76 shots were fired at the minivan while it was still reversing. (R938/13-15, R939/9-11,

R1127/9-11, R1714/10-12.) Officer Curry, who personally fired 18 rounds as the vehicle reversed, testified that he was in no danger while the vehicle was in reverse. (R1120/3-6.)

H. There was trial testimony that the Town & Country minivan could have safely exited the area after reversing out of the garage.

Defendant's expert opined that after rear-ending the second vehicle, the Town & Country had nowhere to go other than into the police. (R2224/12-R1225/9.) By contrast, Dr. Alpert, testified that, had Dudley and the Town & Country not been disabled by multiple gunshots, Dudley would have been able to successfully drive away without striking any police. (R839/12-22.) Officer Curry, Officer Vasquez, Officer Mendez and Officer Ohlson all agreed that there it may have been possible for the Town & Country to exit the area without striking the police. (R1165/8-10, R1561/2-8, R1763/2-13.)

I. There was trial testimony that the police engaged in contagion fire.

Dr. Alpert testified that the police on the scene engaged in contagion fire, meaning they fired their weapons because other officers were doing so, and not because they had any justification. (R807/14-R808/6, R810/17-24.) Plaintiff and defense experts agreed that contagion fire is never an "acceptable reason to fire a weapon." (R809/12-13, R2172/1-R2173/6.) Officer D. Lopez testified that he "was in complete shock" and did not know how many shots he fired. (R1236/5-10.) Officer Mendez testified that when he fired his weapon, he was "lost in his head" thinking about his family. (R1572/9-22.) Officer Gonzalez never thought that Papin had been struck by the minivan, and fired only because "he heard shots;" he admitted that this was contagion fire. (R1713/2-16; R1715/3-6.)

It is undisputed that there was no officer in command on the scene. (R642/13-14; R898/15-17; R1103/13-19; R1192/17-21; R1222/6-11; R1471/7-R1472/9; R1528/19-21;

R2161/2-24.) According to Dr. Alpert, having 19 officers on the scene with no one in command led to chaos and was a "free for all." (R773/17-R774/4.)

II. FACTS REGARDING COLLATERAL ESTOPPEL

A. The trial court granted summary judgment against Dudley and Givens under a theory of collateral estoppel.

Defendant moved for summary judgment against all plaintiffs. (C502.) The trial court granted the motion for summary judgment as to Givens and Dudley on the issue of collateral estoppel; summary judgment was denied as to Strong. (C1360.) The trial court's stated basis for applying collateral estoppel was that the criminal convictions constituted an identity of issues with their civil claims. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶62; Def. Br., p. 1.

B. The criminal cases only addressed the conduct of Dudley and Givens.

In the criminal cases of Dudley and Givens, the trial judge did not allow the jury to consider the question of whether the police's use of force was necessary. (C945/19-24, C946/1-6, C946/21-24.) The appellate courts upheld the criminal courts' decisions to exclude the CPD general orders, finding them irrelevant to Givens's and Dudley's guilt. (C1045-C1066, *People v. Givens*, 2018 IL App (1st) 152031-U, ¶¶32-35; *People v. Dudley*, 2018 IL App (1st) 152039-U, ¶¶25-28.)

C. The civil case only addressed the conduct of Chicago police.

The original complaint in this matter had three co-plaintiffs: Bernice Strong, Special Administrator for the Estate of David Strong (hereinafter "Strong"), John W. Givens and Leland Dudley. (C29-37.) Count I of the original complaint alleged that excessive force by the police proximately caused injuries to Dudley and Givens. Strong and Givens subsequently filed a first amended complaint. (C1363-9.) Count I of the first

amended complaint alleged that the willful and wanton conduct of police proximately caused injuries to Givens. (C1363-9.) Whether the police conduct was willful and wanton was not considered by the criminal juries.

III. FACTS REGARDING THE SPECIAL INTERROGATORIES

The trial court drafted special interrogatories purportedly to discern whether the defendant was reckless or intentional in the event that the jury found defendant's conduct willful and wanton for the sole purpose of reducing damages. (R1998/18-21, R2284/21-24, R2285/1-4, R2350/1-2, R2581/12-16, R2595/14-24.) The special interrogatories submitted to the jury and the answers given by the jury were as follows:

> **Special Interrogatory 1**: At the time deadly force was used, did the Chicago Police Officers who used deadly force engage in a course of action without legal justification, which showed an actual or deliberate intention to harm David Strong?
> **Answer**: No. (C1625.)
>
> **Special Interrogatory 2**: At the time deadly force was used, did the Chicago Police Officers who used deadly force engage in a course of action without legal justification, which showed an utter indifference or conscious disregard for the safety of others?
> **Answer**: No. (C1626.)
>
> **Special Interrogatory 3**: At the time deadly force was used against David Strong, did the Chicago Police Officers who used deadly force reasonably believe that such force was necessary to prevent imminent death or great bodily harm?
> Answer: No. (C1627.)

Plaintiffs' counsel objected to the form and substance of these interrogatories during the jury instructions conference, and in post-trial motions. (R1999/18-19, R2359/20-21, R2565/22-R2566/2, R2616/15-17; C1762, C2174V2, C2246V2.). The trial court did not let the plaintiff propose any alternative special interrogatories. (R2616/10-R2617/7.)

IV. VERDICT, POST-TRIAL MOTIONS AND ENTRY OF JUDGMENT

On May 30, 2019, the jury returned a verdict in favor of plaintiffs in the amount of $1,999,998. Using Verdict Form B, the jury found that "the percentage of fault attributable" to David Strong was 50% and reduced the award of damages to $999,999. (C1624.) Plaintiff filed a motion for entry of judgment in her favor consistent with the jury verdict. (C2246V2.) Thereafter, defendant filed a motion for entry of judgment on the special interrogatories, asking the trial court to enter judgment for the City, arguing that the answers to the special interrogatories were inconsistent with the verdict. (C1634.) The trial court agreed and entered judgment in favor of the City. (C1628.) The trial court denied plaintiffs' and defendant's post-trial motions. (C1762, C1807, C1983, C2257V2.)

Daniel and Givens filed a timely notice of appeal. (C2258V2.) Dudley filed a separate notice of appeal (C2275V2.) The appeals were consolidated.

V. APPELLATE OPINION

Plaintiffs raised several issues on appeal to the appellate court, two of which defendant has now brought before this court. First, plaintiff argued that the original award of $1,999,998 should not have been reduced by 50% to account for Strong's contributory willful and want conduct. Plaintiffs argued that, while Illinois law permitted the damages of willful and wanton defendants to be reduced by a plaintiff's contributory *negligence*, the law did not permit the damages award to be reduced by a plaintiff's contributory *willful and wanton* conduct. The appellate court disagreed, finding that liability could be shared where the contributory willful and wanton conduct was merely reckless rather than intentional. Ultimately, the appellate court held that "allowing a plaintiff's reckless willful and wanton conduct to reduce its damages against a reckless willful and wanton defendant"

is permissible. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶37. This issue was not raised on appeal to this court.

A second issue raised by plaintiffs on appeal was whether the trial court erred in granting summary judgment against Dudley and Givens under a theory of collateral estoppel. The appellate court agreed with plaintiffs that there was no requisite identity of issues. *Id*. at ¶¶63-70. The appellate court found that the criminal courts looked only at the conduct of Dudley and Leland, while the civil case rested upon the conduct of the police. *Id*. ¶¶63, 69-70. The appellate court also ruled that the criminal convictions did not constitute a finding that the willful and wanton conduct of Dudley and Givens was intentional versus merely reckless, thus permitting contribution. *Id*. at ¶¶66-68. The defendant has appealed this issue to this court.

Third, plaintiffs contended that the trial court was incorrect in overturning the jury verdict due to the special interrogatories. Specifically, plaintiffs argued that the special interrogatories were improperly formed, were vague and confusing, and were reconcilable with verdict. The appellate court agreed with all three arguments and reversed the trial court. *Id*. at ¶¶41-50. The defendant has appealed this issue to this court. The appellate court also ruled on various trial errors, which are not now at issue. *Id*. at ¶¶72-77.

ARGUMENT

I. STANDARD OF REVIEW

The standard for reviewing the trial court's granting of summary judgment against Dudley and Givens is *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co*., 165 Ill. 2d 107, 113 (1995). Likewise, the question of "whether the doctrine of collateral estoppel is applicable in a particular case is a question of law," and is reviewed *de novo*. *Pedersen v.*

Village of Hoffman Estates, 2014 IL App (1st) 123402, ¶ 42. The standard of review for a finding of inconsistency between the special interrogatories and the jury's verdict is *de novo*. *Rivera v. Garcia*, 401 Ill. App. 3d 602, 609–10 (1st Dist. 2010). Granting judgment *non obstante veredicto* ("j*nov*") on this basis is also reviewed *de novo*. *Brown v. City of Chicago*, 2019 IL App (1st) 181594, ¶42.

II. DEFENDANT'S IMPROPER, TENDENTIOUS STATEMENT OF FACTS REGARDING THE TRIAL EVIDENCE SHOULD BE DISREGARDED.

The facts adduced at trial supported the jury's finding that the defendant's conduct was willful and wanton. (C1624.) However, someone reading defendant's brief would be hard-pressed to believe such evidence existed based upon the one-sided summary of the trial testimony contained therein. (Def. Br., pp. 6-9.) Ill. Sup. Ct. R. 341(h)(6) requires that the statement of facts in a brief must recite the relevant facts "fairly and accurately." However, defendant here selectively summarized only the trial evidence which supported defendant's theory of the case, and neglected to include the conflicting and sometimes unrefuted trial testimony which favored plaintiff, and which supported the jury's verdict.

The defendant's Statement of Facts here is "not the neutral recitation of relevant facts mandated by Supreme Court Rule 341(h)(6)." *Board of Managers of Eleventh St. Loftominium Ass'n v. Wabash Loftominium, LLC*, 376 Ill. App. 3d 185, 187 (1st Dist. 2007). Where a party violates the rule and fails to "fairly and accurately" state the facts, the offending portions of the Statement of Facts should be disregarded. *Merrifield v. Illinois State Police Merit Bd*., 294 Ill. App. 3d 520, 527 (4th Dist. 1998). Plaintiffs readily admit that many issues of fact were hotly contested at trial. However, there was ample trial

testimony on each of these points, and other questions of fact as well, which supported plaintiffs' theory of the case and contradicted the defendant's version of events.

First, defendant's Statement of Facts suggests that it was undisputed that plaintiffs knew police were outside the garage, stating "surveillance footage shows Dudley, Givens and Strong reacting to officers' presence," and that the police announced their presence, shook and kicked the garage door. (Def. Br., pp. 4, 6.) However, this was *not* an undisputed fact, and defendant's Statement of Facts does not include plaintiffs' testimony on this point. When shown the portion of the video which purportedly showed the plaintiffs "reacting to officers' presence," Dudley categorically denied hearing the police, and stated his movements had nothing whatsoever to do with officers' presence. (R1852/11-R1857/6.) Indeed, there was ample trial evidence (not mentioned in the City's brief) that plaintiffs did *not* know police were there, thus depriving defendant of this basis for the shooting. (R1804/7-14, R1805/1-3, R1831/1-3, R1851/6-22, R1852/11-18, R1854/17-21, R1857/3-6, R1865/23-R1866/2.)

Next, the defendant states as uncontroverted fact that Officer Papin was struck by the reversing minivan, and that his fellow officers reasonably believed he was injured. (Def. Br., pp. 4, 7-8.) In fact, there was abundant evidence at trial that Papin was *not* struck by the reversing vehicle, and that the police *did not* and *could not* have believed that he was, and, therefore, this could not have been a reasonable justification for the shooting. (*See* SOF, I. E, herein, *supra*.) Indeed, upon being confronted with the surveillance video showing the moment he claimed to have been struck, Papin himself conceded that there was space between his body and the van, allowing the jury to conclude that he may not have been struck at all. (R1609-R1611.) Additionally, one of the shooting officers, Officer

Curry, testified that he actually saw Papin run away from the reversing minivan, and waited for Papin to move to a place of safety before firing his weapon. (R1121/2-4, R1122/3-5, R1125/11-R1126/9.) Officer Gonzalez admitted that he did not see the minivan strike Papin, and there was testimony that D. Lopez could not possibly have seen the minivan strike Papin as he was inside the building on all fours with his head through a hole looking into the garage at the time Papin was allegedly hit. (R1233/11-18, R1251/3-21, R1539/24-R1540/2, R1712/2-6.) A jury could also have concluded that Officer Pratscher could not have possibly seen the rear driver's side of the minivan strike Papin, because his view may have been blocked by the scissor-gate, and because Pratscher was standing on the front passenger side, and presumably does not have x-ray vision. (R1353/15-R1354/8, R1435/21-R1436/6.) Furthermore, jurors may have found it hard to accept that officers actually believed Papin was injured because no one made a radio call to dispatch reporting an injured officer, no one called an ambulance for an injured officer, and no one ran to the stopped Town & Country to ascertain if Papin had been dragged under it and if he was all right. (R949/18-22, R1130/23-R1131/3, R1237/15-18, R1238/17-20, R1369/10-18, R1373/2-8, R1497/11-17, R1498/5-15, R1502/18-R1503/3, R1561/15-18, R1605/20-R1606/9, R2207/5-7.) Additionally, Officer Panek, who subsequently claimed she saw Officer Papin being struck by the minivan, did not report it when she was interviewed by Detective Benigno, who was investigating the shooting. (R975/15-18, R1731/1-24.)

The defense Statement of Facts also states as undisputed fact that the police "did not hear radio warnings before the van burst out of the garage," and that this unheralded danger justified the use of deadly force. (Def. Br. pp. 6.) However, it is undisputed that a radio warning was given, and that at least some officers admitted to hearing it. The

defendant's Statement of Facts omits mention of this advance warning which showed that police were not actually in danger. (Def. Br., p. 6.) This trial testimony, not mentioned in defendant's brief, allowed the jury to conclude that the officers, all of whom were equipped with working radios, (R876/13-21, R1592, R639/21-R640/12, R674/19-22, R894/19-20, R1191/24-R1192/10, R1220/8-14, R1333/22-R1334/11, R1461/10-20, R1527/21-R1528/2, R1748/7-13), did, in fact, hear the radio warnings from Officer Lorenz, and repeated by Dispatcher G. Lopez, to get out of the way of the garage door, especially since officers D. Lopez, Michel, and Ohlson all admitted hearing the radio warning. (R613/13-R614/1-4, R652/16-R655/18, R627/16-R628/3, R876/13-21, R995/23-R996/10, R1221/10-12, R1750/18-R1751/6.) Even defense expert, Taylor, admitted that the officers should have heard the radio warning. (R2155/20-24, R2156/1-2, R2158/2-5, R2160/3-13.) Indeed, Sergio Hernandez, a resident of the building, testified that the police radios were so loud he could hear them from the window of his second-story apartment. (R1070/9-19.)

The jury could also have concluded that Officer Papin heard the verbal warning from Officer Valadez, or one of the other officers who shouted verbal warnings, especially since officers Rosen, Curry, and Vasquez all admitted hearing verbal warnings to get out of the way of the garage door. (R683/23-R684/2, R685/13-23, R689/6-15, R931/16-19, R1116/2-6, R1480/10-22, R1203/8-23, R1232/4-23, R1706/7-16, R1732/4-10.) Even the defense expert agreed that the surveillance video showed Valadez warning Papin to get out of the way. (R2162/7-11.) As Dr. Alpert testified, and as Officer Papin himself conceded, if Papin was warned and did not get out of the way, then his conduct was "reckless" and violated police regulations. (R784/21-R785/7, R1620/2-19).

The defense also suggested that, even if Papin was not struck, Dudley's conduct in reversing into the red minivan was reason enough to justify the shooting. (R2095/5-6.) However, Dudley testified that he was shot in back and side of the head by Officer Curry *before* he struck the red minivan. (R1805/9-11, R1808/13-1809/7, R1813/20-24, R1818/22-R1819/5, R1820/2-5, R1823/4-19, R1830/1-4, SUP E 17: Camera 5 at timestamp 2:45:49-2:45:52.) Defense expert, Brady Held, agreed that the surveillance video confirmed this testimony, as it showed the driver side window shot out prior to rear-ending the red minivan. (R2060) Thus, rear-ending the minivan cannot have been a justification for the shooting, because the shooting *preceded* it.

Next, the defense Statement of Facts incorrectly stated as undisputed fact that, once the Town & Country minivan had finished reversing, Dudley, who was driving, shifted the van into drive and accelerated forward with nowhere to go but full speed into the police. (Def. Br., p. 8.) According to defense expert, Taylor, this justified the use of force by police. (R2103/6-24.) However, the jury heard multiple witnesses testify that, once the minivan had reversed past the police on the sidewalk, the minivan presented no danger to them, as Dudley was unconscious before the Town & Country had even cleared the sidewalk, never put the van in drive, and never accelerated forward. (R798/7-16, R939/3-5, R1127/22-24, R1128/1-3, R1806/3-5, R1810/2-5, R1813/17-24, R1821/22-24, R1823/13-19, R1824/4-23, R1865/4-6.) Furthermore, the jury heard that the minivan only moved forward a very small amount on deflated tires due to momentum from backing into the second vehicle, and not due to acceleration. (R798/6-16, R938/21-R939/2, R1127/12-24, R1358/9-11, R1913/2-5.) Likewise, the defense's Statement of Facts falsely stated as fact that, once the Town & Country accelerated forward, "the only way out was through" police. (Def. Br.,

pp. 7-8.) This too was disputed, with several witnesses admitting that the van could have exited the area without harming police, via either the alley or on the street towards Western Avenue. (R800/11-17, R839/12-22, R1165/8-10, R1521/2-8, R1561/28, R1763/2-13.)

Additionally, Officer Curry, who personally fired 18 rounds, testified that he was never in danger when he shot at the reversing Town & Country. (R1120/3-6.) Moreover, it is undisputed that most of the 76 bullets were fired while the Town & Country was still reversing. (R938/13-15, R939/9-11, R1127/9-11, R1714/4-12.) Thus, the minivan subsequently accelerating towards the police could not have been the basis for the shooting as the majority of shots were fired *before* the alleged acceleration. Also, the jury might have concluded that police themselves shifted the minivan's gear shift into the drive position after the shooting in order to support their story, as the gear shift was indisputably manipulated by the police after the fact, and was photographed in different positions. (R1737/20-R1738/11, R1741/10-R1742/5, R2057/3-12.)

Furthermore, the opinion of defense expert, Christopher Ferrone, that, once the van stopped reversing, "police would have had less than one second to react before the van reached them," was falsely presented as uncontested in defendant's brief, even though it was disputed at trial. (Def. Br., p. 8.) Indeed, his opinion was based upon a belief that the Town & Country moved forward 31 feet, which was thoroughly debunked at trial, with all of the trial witnesses confirming that the van did not advance forward 31 feet, and, in reality, moved forward only a very short distance on shot out tires. (R798/6-16, R938/21-R939/2, R1127/12-24, R1358/9-11, R1913/2-5.)

All of the foregoing trial testimony, not included in defendant's Statement of Facts, could have led a jury to reasonably conclude that the police had no justification whatsoever

for the shooting, and provided a basis for the jury verdict in favor of plaintiff. By omitting all of the above-described testimony, defendant's brief falsely suggests that its theory of the case was supported by uncontested facts. This is prejudicial to plaintiff, as the opening brief provides an incorrect first impression that the defendant was an aggrieved party against whom a jury rendered a verdict in the absence of any evidence. Nothing could be farther from the truth. The evidence of willful and wanton misconduct by the police here was overwhelming, and each of the pillars upon which defendant's theory of the case rested was painstakingly dismantled at trial, witness by witness. In this way, defendant's brief violates the law and the spirit of Ill. Sup. Ct. R. 341(h)(6), and therefore the portion of defendant's Statement of Fact which purports to summarize the trial evidence must be disregarded. *Szczesniak v. CJC Auto Parts, Inc*., 2014 IL App (2d) 130636, ¶8.

It should also be noted that in its "Nature of the Case" section, defendant inaccurately states that "the jury made special findings that the officers were neither intentionally nor recklessly willful and wanton." This is an incorrect characterization of the answers to the special interrogatories. Special Interrogatory 1 only asked jurors about the police's intentionality as to David Strong exclusively, and Special Interrogatory 2 only asked about police recklessness towards the safety of others. Thus, as discussed more fully herein at Argument IV. B, *infra*, both special interrogatories were nondeterminative.

III. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AGAINST PLAINTIFFS GIVENS AND DUDLEY.

A. Even if Givens and Dudley were found to have been *intentionally* willful and wanton in the criminal courts, their claims are still not barred by collateral estoppel.

As a threshold matter, the doctrine of collateral estoppel has no relevance here whatsoever. Even if, as defendant asserts and plaintiffs deny, the criminal convictions of

Dudley and Givens did conclusively establish intentional willful and wanton conduct by them, collateral estoppel would still not apply. The only impact of such a finding would be that the City would be barred from seeking contribution from Dudley and Givens should a jury ultimately award them damages for the City's willful and wanton conduct. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶37. No case cited by defendant collaterally estops a plaintiff from prosecuting a case against a defendant for that defendant's willful and wanton conduct merely because that plaintiff was also found to have been willful and wanton. This is not the purpose of collateral estoppel. Rather, the purpose of collateral estoppel is to promote "judicial economy" and prevent parties from relitigating matters already decided. *Du Page Forklift Serv., Inc. v. Material Handling Servs., Inc*., 195 Ill. 2d 71, 77 (2001). Here, the issue of *defendant's* willful and wanton conduct had never been previously decided, and therefore collateral estoppel is not implicated. *Givens*, at ¶¶69-70.

Defendant relies on *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41 (1995) and *Ziarko v. Soo Line R. Co*., 161 Ill. 2d 267 (1994), for the proposition that a party found to have been intentionally willful and wanton "cannot recover against other tortfeasors." (Def. Br., pp. 21-23.) However, these cases only deal with an intentionally willful and wanton tortfeasor's ability to *seek contribution* from another tortfeasor, and do not hold that such claims are collaterally estopped. *Poole*, 167 Ill. 2d at 48-49; *Ziarko*, 161 Ill. 2d at 279. Neither case even addressed collateral estoppel. Defendant provides no legal authority whatsoever for the idea that an inability to seek contribution also constitutes a complete bar to a claim based upon collateral estoppel. Thus, even if the criminal convictions did establish intentional willful and wanton conduct as defendant argues, this would only serve

as a possible limitation to the City in seeking contribution from Dudley and/or Givens, and would not serve as a basis for collateral estoppel to bar their claims altogether.

B. There can be no identity of issues here: criminal cases looked only at the conduct of Dudley and Givens, and the civil complaints looked only at the conduct of police.

For collateral estoppel to apply, three requirements must be met: (1) identity of issues, (2) final adjudication on the merits, and (3) identity of parties. *American Fam. Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000). Here, the only element in dispute is identity of issues. (*Givens v. City of Chicago*, 2021 IL App (1st) 192434, at ¶63; Def. Br., p. 18.) It is well-settled that "the party asserting estoppel bears a heavy burden of showing with certainty that the identical and precise issue sought to be precluded in the later adjudication was decided in the previous adjudication." *In re Estate of Ivy*, 2019 IL App (1st) 181691, at ¶39. Here, the defendant cannot meet the "heavy burden" that the identical issue was determined by the criminal court, because it was not. It is undisputed that the jury made no finding whatsoever about the police officers' willful and wanton conduct in the criminal cases of Dudley and Givens. *Givens*, at ¶¶69-70. "Unless it can be shown with 'clarity and certainty' that the identical question was decided in an earlier proceeding, collateral estoppel is improper." *People v. Pawlaczyk*, 189 Ill. 2d 177, 191 (2000); *see also*, *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶114.

The criminal cases looked only at the conduct of Dudley and Givens, and the conduct of the police was expressly prohibited from being considered. (C945/19-C946/24.) By contrast, the civil complaints alleged excessive force by the Chicago police. (C29-37, C1363-C1369.). The criminal juries made no determination whatsoever whether the misconduct of Dudley and Givens was *intentionally* willful or wanton versus *recklessly*

willful and wanton. *Givens,* at ¶67. Without such a finding, defendant's assertion that an affirmative defense of contribution would serve to bar civil claims is premature. Likewise, defendant's reliance on collateral estoppel on the same undecided grounds also fails.

In its brief, defendant argues that the criminal convictions of Dudley and Givens, in and of themselves, establish willful and wanton conduct sufficient to warrant collateral estoppel in our case, and, for this proposition, relies on *Savickas*. (Def. Br. pp. 22, 25.) However, the defendant's reliance on *Savickas* here is misplaced. As the court noted in *Allstate Ins. Co. v. Kovar*, 363 Ill. App. 3d 493, 501 (2nd Dist. 2006) "[i]n *Savickas*, the Illinois Supreme Court held that, under certain circumstances, a criminal conviction may be conclusive in a subsequent civil litigation as to the issue of the criminal defendant's state of mind." In *Savickas*, both the criminal and civil trials depended upon a determination of whether the conduct of Michael Savickas was intentional. *Savickas*, 193 Ill. 2d at 391. Here, however, collateral estoppel in our case was improper because the civil complaints of Givens and Dudley did *not* hinge upon their conduct, but rather upon the conduct of the police. *Allstate Indem. Co. v. Hieber*, 2014 IL App (1st) 132557, ¶¶20-21, is distinguishable for the same reason.

Defendant also cites *Estate of Ivy*, which, like *Savickas*, does not support its argument here. In *Estate of Ivy*, at ¶¶56-57, the court held that the beneficiary to an estate was not collaterally estopped from seeking death benefits where he had been found not guilty of murder by reason of insanity. Holding that the criminal proceeding did not consider the identical issue before the probate court, the court noted that the criminal court found only that the beneficiary intended great bodily harm, but did not find intent to cause death, as would be required for collaterally estoppel. *Id*. at ¶¶47-50. Likewise, in our case,

the issue is not the same as in the criminal trial, where Givens was found guilty, but the jury made no findings about the willful and wanton conduct of the police. Thus, collateral estoppel is improper here. *Pawlaczyk*, 189 Ill. 2d at 191; *see also Kovar*, 363 Ill. App. 3d at 502. As the appellate court put it, "the officers' alleged willful and wanton conduct was not litigated in [Dudley's and Givens's] criminal cases, making collateral estoppel inapplicable." *Givens*, at ¶63. For this reason, the appellate court ruling reversing collateral estoppel should be affirmed, and the inquiry into collateral estoppel need go no further.

The defendant attempts to sidestep the lack of identity of issues by arguing that the City's affirmative defenses of contributory willful and wanton conduct *might* bar recovery. First and foremost, under the law of the case, the City's affirmative defense of contribution might itself be barred if a future jury in Dudley's and or Givens's civil case should find the City to have been intentionally willful and wanton, thereby precluding any contribution by Dudley and/or Givens under the law of the case. *Givens*, at ¶37. Additionally, in a civil case based upon the conduct of the police, an affirmative defense addressing the conduct of the plaintiffs provides a potential basis only for contribution, and not for barring prosecution of the claims. (*See* Argument III. A, *supra*.) The City's argument here is premature and speculative. Collateral estoppel of Dudley's and Givens's complaints cannot apply just because an affirmative defense barring intentional willful and wanton tortfeasors from recovering *might* succeed. For collateral estoppel to apply, the civil complaints - and not the affirmative defenses thereto - must have identity of issues with the criminal cases.

Significantly, defendant does not cite a single case where the identity of issues element of collateral estoppel was predicated on the allegations in an affirmative defense rather than a complaint. This is because the law does not permit it. While not controlling,

the decision of the Northern District of Illinois on this exact issue in *Johnson v. Beckman*, 2013 WL 1181584, No. 1:09-cv-04240, *3-4 (N.D. Ill. Mar. 21, 2013) is instructive here. *Johnson* found that just because a potential affirmative defense of qualified immunity might potentially defeat plaintiff's complaint, that was not a legally cognizable basis for preemptively barring the complaint under a theory of collateral estoppel. There, as here, identity of issues was lacking because the same issue had not been previously litigated.

C. The criminal convictions of Givens and Dudley do not establish *intentional* willful and wanton conduct in a civil context.

1. Criminal convictions for aggravated battery are not tantamount to a finding of *intentional* willful and wanton conduct in a civil context.

Defendant incorrectly asserts that Dudley and Givens were convicted of aggravated battery of a peace officer pursuant to 720 ILCS 5/12-3.05(a)(3). (Def. Br., pp. 18.) This is incorrect. In fact, their convictions were actually pursuant to 720 ILCS 5/12-3.05(d)(3), for aggravated battery based upon a finding of simple battery committed upon a certain class of victim (here, a peace officer). *People v. Givens*, 2018 IL App (1st) 152031-U, ¶2; *People v. Dudley*, 2018 IL App (1st) 152039-U, ¶2.) This is significant, because defendant's entire argument that the convictions meant that Dudley and Givens "knowingly" caused great bodily harm, and are thereby guilty of intentional conduct, fails on its face because 3.05(d)(3), unlike 3.05(a)(3), does not include "knowingly" causing great bodily harm as an element of proof. (Def. Br., pp. 18-19.)

Additionally, defendant incorrectly asserts that the criminal convictions of Givens and Dudley establish conclusively that they were *intentionally* willful and wanton and not merely *recklessly* willful and wanton. (Def. Br., pp. 17-21.) This is also false. Defendant cites no legal authority to show that an aggravated battery conviction equals a finding of

intentional willful and wanton conduct in the tort context. In *Enadeghe v. Dahms*, 2017 IL App (1st) 162170 (2017), ¶15, the court specifically found that, while a conviction for aggravated battery showed willful and wanton conduct, such conduct could be *either* reckless or intentional. Similarly, here, the criminal courts "did not conclusively determine whether, under civil standards, Givens and Dudley were by degrees intentionally or recklessly willful and wanton." *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶67.

Moreover, even if the defendant could somehow conclusively show that the criminal convictions for aggravated battery did establish intentionality in the criminal context, that is not the same as finding intentional (as opposed to reckless) willful and wanton conduct in the context of civil tort law. In *Ko v. Eljer Indus*., 287 Ill. App. 3d 35, 40 (1st Dist. 1997), the court addressed a similar issue and rejected transplanting the standards in place in one judicial arena into another court as a basis for collateral estoppel. Furthermore, intentionality in the criminal context is not tantamount to intentional willful and wanton in the civil context, where reckless willful and wanton is also an option.

2. The criminal convictions of Dudley and Givens for felony murder do not constitute findings that they were *intentionally* willful and wanton in the context of a civil tort.

Defendant also contends that the convictions of Dudley and Givens for felony murder satisfy the identity of issues requirement for collateral estoppel. (Def. Br., pp. 19-20.) However, this argument is also untenable under Illinois law. As with the convictions for aggravated battery, findings of felony murder do not, in and of themselves, demonstrate intentionality. Indeed, in *People v. Belk*, 203 Ill. 2d 187, 197 (2003), a case relied on by the defendant, the Illinois Supreme Court, specifically held that intent is "irrelevant" for felony murder. As defendant correctly states, a finding of guilt for felony murder rests on

the "proximate cause theory of liability." The test for proximate cause for felony murder is: if the death of a person was a foreseeable consequence of the felony, then felony murder applies. It is well-settled in Illinois that intentionality need *not* be shown to satisfy the foreseeability requirement for felony murder, and that accidental conduct can be enough. *People v. Martinez*, 342 Ill. App. 3d 849, 854-55 (1st Dist. 2003). Indeed, *People v. Hudson*, 222 Ill. 2d 392, 403 (2006), *People v. Lowery*, 178 Ill. 2d 462, 468 (1997), and *People v. Hickman*, 59 Ill. 2d 89, 93 (1974), all cases relied upon by defendant, cited the comments to the felony murder statute itself, (720 ILCS Ann. 5/9-1, Committee Comments-1961, at 12-13 (Smith-Hurd 1993)), and recognized that intentionality is "immaterial" in determining whether felony murder applies. Thus, the defendant's cases do not even support its own argument, as felony murder can lie even without intentionality. (Def. Br., pp. 19-20.) Because the convictions of Dudley and Givens did not constitute a finding of *intentional* willful and wanton conduct, defendant's collateral estoppel argument fails.

3. Defendant cannot argue as a basis for collateral estoppel that the criminal convictions established Dudley and Givens were merely recklessly willful and wanton, without also supporting a reinstatement of the full verdict in favor of plaintiff, Daniel.

Additionally, the City is foreclosed from arguing here that merely *reckless* willful and wanton conduct should also bar a contribution affirmative defense without simultaneously reviving and supporting plaintiff's argument below that Strong's damages award should not have been reduced for contributory recklessly willful and wanton conduct. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶¶20-37. Ultimately, the appellate court rejected plaintiffs' argument below, and ruled that contribution between willful and wanton tortfeasors (with no merely negligent tortfeasors) is permissible, so long as the willful and wanton tortfeasors were all reckless and not intentional. *Id*. at ¶37. Should

the City now argue that merely reckless willful and wanton conduct also bars contribution, then the City would be running afoul of the law of the case, and espousing plaintiffs' view below that no contribution by even merely reckless willful and wanton tortfeasors is permitted. In advancing such an argument, the City would also have to support the reinstatement of the full verdict reduced below for contribution.

4. Should this court, *sua sponte*, reverse the appellate court ruling permitting contribution by recklessly willful and wanton tortfeasors, then the original verdict for plaintiff Daniel must be reinstated, and the claims of Givens and Dudley would still not be collaterally estopped.

On appeal to the appellate court, plaintiff sought reinstatement of the entire $1,999,998 verdict in favor of plaintiff Daniel, under the theory that damages assessed against a willful and wanton tortfeasor, the City, could only be reduced if Strong had been merely negligent, and that, because the defendant had alleged Strong to be willful and wanton (as opposed to merely negligent) the award could not be reduced by contribution. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶¶20-36. The appellate court disagreed, and found that Strong's contributory conduct could reduce the City's award where the City was merely reckless rather than intentional. *Id.*, at ¶37.

Although neither plaintiffs nor defendant has brought this issue before this court, plaintiffs wish to assert that, in the event this court should, *sua sponte*, reverse this particular ruling of the appellate court and adopt the argument plaintiffs advanced below, the claims of Givens and Dudley would still not be collaterally estopped because, even if this court accepted defendant's argument here that the criminal convictions established intentional willful and wanton conduct, this would not bar Givens and Dudley from seeking damages from the City for its willful and wanton misconduct, but rather would only serve

as a possible basis to bar the City from seeking to reduce its damages via contribution. *Id*.; *see also*, Argument, III. A, herein, *supra*.

This is because a finding that the conduct of Dudley and Givens was "a" cause in the criminal case is not a finding that they were the "sole" proximate cause in the civil case, and the jury could have found concurrent shared liability by police and plaintiffs, as they did with respect to David Strong. While a finding of willful and wanton misconduct by a plaintiff may serve to reduce the damages, it is not a bar to advancing a civil suit, and it is not a basis for collateral estoppel. As the appellate court noted here, "the police potentially could be liable for willful and wanton conduct whether it contributed wholly or partly to Givens and Dudley's injuries so long as it was *one* of the proximate causes of the injury." *Givens*, at ¶68, (emphasis in original); *see also Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 92-93, 100 (1995).

D. Barring Dudley and Givens from advancing their claims against the City, while allowing Strong to do so, is "manifestly unjust."

In its opinion, *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶71, the appellate court also found that the trial court's application of collateral estoppel against Dudley and Givens but not Strong was manifestly unjust, "where the only distinguishing factor is that Strong died from his injuries while Givens and Dudley lived." It is a hallmark of American jurisprudence that similarly situated parties should not be treated differently. Indeed, the equal protection guarantees of both the United States and the Illinois Constitutions require that similarly situated persons be treated the same. *Jacobson v. Department of Pub. Aid*, 171 Ill. 2d 314, 322 (1996). To bar the civil claims of Dudley and Givens merely because they survived the barrage of gunfire has no legal basis.

In its brief, defendant contends that the plaintiffs are not actually similarly situated because the conduct of Givens and Dudley was "actually litigated," and the conduct of Strong was not. (Def. Br., p. 27.) However, as discussed herein, *supra*, at Argument, III. A, the conduct of Strong, Dudley and Givens was not at issue in any of their civil claims against the City and therefore cannot provide a basis for collateral estoppel. The only conduct at issue in the civil complaints of Dudley and Givens is the conduct of the City towards them, which has never been litigated. *Givens*, at ¶¶69-70.

IV. SPECIAL INTERROGATORIES DID NOT WARRANT *JNOV* AS THEY WERE IMPROPERLY FORMULATED AND THE ANSWERS WERE RECONCILABLE WITH THE GENERAL VERDICT.

In its brief, defendant asserts that the trial court's aim in giving the special interrogatories was to determine the degree of willful and wanton conduct by the police. (Def. Br., p. 29.) However, as the appellate court here noted, "the aim fell demonstrably short." *Givens v. City of Chicago*, 2012 IL App (1st) 192343, ¶46. As previously noted, the the only purpose of the special interrogatories was to determine if the City's willful and wanton conduct was merely reckless (as opposed to intentional) which would then permit the reduction of any damages assessed. (R2351/8-18, R2352/3-24, C1629.) The defendant's contention that special interrogatories given to determine contribution could also impact the jury's general verdict of liability by the City is legally and factually incorrect. It is a great leap from allowing reduction of damages to actually overturning the jury verdict. Nevertheless, when the jury came back with a negative response to both Special Interrogatories 1 and 2, the defendant seized on the situation to argue that the combined answers foreclosed any finding of willful and wanton conduct at all. (C1634.)

The appellate court was correct in reinstating the general verdict as the answers to the special interrogatories did not control the general verdict here.

A. The special interrogatories here were not necessary and did not test the general verdict.

Special interrogatories which do not touch an issue of ultimate fact cannot control the general verdict, and therefore must be disregarded. *Douglas v. Arlington Park Racecourse*, LLC, 2018 IL App (1st) 162962, ¶¶70-71. Where, as here, the special interrogatories did not control the verdict, the original general verdict stands. *Blue v. Environmental Engineering, Inc*., 215 Ill. 2d 78, 112-113 (2005). Furthermore, it is well-settled that, "[a]ll reasonable presumptions must be exercised in favor of the general verdict." *Price v. City of Chicago*, 2018 IL App (1st) 161599, ¶24. Here, the special interrogatories were *not* given to test the jury's verdict. Rather, they would only be triggered if the jury found that the police had acted willfully and wantonly, and then and only then were to be answered for the exclusive purpose of determining "reduction of damages." (R2349/19-R2350/2, R2351/8-18, R2352/3-24, C1629.)

Defendant argues that, under *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41 (1995), special interrogatories are "necessary" any time a jury is faced with determining whether the willful and wanton misconduct of a defendant was intentional versus reckless and that, without special interrogatories on this point, the entire verdict must always be shelved. (Def. Br., p. 29.) However, this is not the rule set forth in *Poole* or any case cited by defendant. As the appellate court noted, the j*nov* movant in *Poole* was the plaintiff, who, unlike the City here, did not object to the liability finding of the jury. Rather, the *Poole* plaintiff objected to any reduction of a willful and wanton tortfeasor's damages, because the Illinois Supreme Court, at that time, had not yet set forth the rule permitting the

reduction of a reckless (as opposed to intentional) willful and wanton tortfeasor's damages due to the plaintiff's negligence. *Poole*, 167 Ill. 2d at 48. Therefore, in *Poole,* the limited question was whether there was sufficient evidence to let the verdict stand without having submitted a special interrogatory to determine whether the defendant's willful and wanton conduct was reckless or intentional. This was an exception to the rule against contribution for willful and wanton conduct which did yet not exist when *Poole* was tried. *Id*. at 48-49; *see also Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶¶52-54.

In our case, by contrast, the defendant was the movant, and was seeking to overturn the entire the jury verdict, not just the amount of the plaintiff's contribution. As the appellate court here noted, this distinction is significant because, unlike in *Poole*, the court, counsel, and jury in our case were all acutely aware of the significance of the distinction with respect to intentional versus reckless conduct as it pertained to contribution. *Givens*, ¶52. To that end, ample evidence was adduced at trial by both parties regarding whether the City's conduct was reckless versus intentional, it was debated in jury instruction conferences, and plaintiff's counsel even referenced it in opening statements and closing arguments. (Plaintiffs' opening statement: R586/6; Plaintiffs' expert, Dr. Alpert: R809/16-812/9; Officer Papin: R1620/2-19; Jury instruction conferences: R1944/3-14, R1946/1-R1951/12, R1959/3-8, R1964/22-1965/7, R1966/21-1967/2, R2238/13-22, R2254/5-24, R2256/4-12, R2262/11-20, R2271/1-23; Plaintiffs' closing argument: 2489/3-7.) Indeed, during one jury instruction conference on this exact issue, defense counsel conceded that there was an abundance of trial testimony regarding the police's recklessly willful and wanton conduct, saying: "the jury's already heard it six dozen times about [the police] should have gotten out from in front of the door and they are reckless and all that."

(R2261/16-20.) This was not the case in *Poole*, where court and counsel were totally unaware of the legal significance of the distinction. *Poole*, 167 Ill. 2d at 48 (pointing out that the trial court and appellate court in *Poole* ruled prior to *Ziarko v. Zoo Line*, 161 Ill. 2d 267, 279 (1997), and therefore incorrectly believed that "a plaintiff's contributory negligence could not be compared with a defendant's willful and wanton misconduct").

Additionally, the instructions read to the jury in our case made it very clear that the plaintiff's willful and wanton contribution up to 50% would still permit recovery. (C1598.) Ultimately, the jury found the City liable, and found Strong to be 50% at fault, demonstrating that the jury deemed the willful and wanton conduct to be reckless, which allows for contribution. (C1624.) Thus, unlike *Poole*, the special interrogatories were not necessary here because evidence of reckless versus intentional conduct *was* presented at trial, as was a relevant jury instruction, and because the litigants and the court were aware of the legal ramifications. *Givens*, ¶54-57.

Defendant further argues that the appellate court somehow usurped the function of the jury by evaluating the evidence and then making its own determination that the willful and wanton conduct of the police was merely reckless rather than intentional. (Def. Br., pp. 16, 32, 46.) This is false. The appellate court here was not weighing the evidence, as defendant suggests, but rather pointing out that trial testimony supported a finding that the special interrogatories were consistent with the general verdict. It is well-settled that in determining the consistency of a special interrogatory, the court must evaluate the record to determine if it was contrary to the "manifest weight of the evidence." *Blakey v. Gilbane Bldg. Corp.*, 303 Ill. App. 3d 872, 882 (4th Dist. 1999). Here, the appellate court properly performed its duty, which is to look at the evidence adduced at trial not to weigh those

facts, but to determine whether "*any* facts exist allowing the verdict to be harmonized with the jury's special findings." *Givens*, ¶54, *citing Brown v. City of Chicago*, 2019 IL App (1st) 181594, ¶58, (emphasis in original). Therefore, to characterize the appellate court's analysis here as unusual, anomalous, or improper is to ignore the purpose of appellate review.

B. The form of the special interrogatories was improper.

1. The questions were impermissibly compound.

The appellate court correctly determined that Special Interrogatories 1 and 2 were both "impermissibly compound," because each asked the jury two distinct questions: "whether the use of deadly force by police was unjustified *and* either intentional (interrogatory No. 1) or reckless (interrogatory No. 2)." *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶4 (emphasis in original). Compound special interrogatories cannot control a general verdict. *Simmons v. Garces*, 198 Ill. 2d 541, 563 (2002).

Defendant cannot and does not deny that the interrogatories were compound. Instead, defendant asserts that the compound nature of the special interrogatories here was permissible. (Def. Br., p. 37.) In this context, defendant relies first on *obiter dictum* from *McCallion v. Nemlich*, 2021 IL App (1st) 192499-U, ¶41. By citing unauthoritative comments from an unreported case, which has no precedential effect pursuant to Ill. Sup. Ct. R. 23(e)(1), the defendant demonstrates the shaky ground upon which its argument rests. Moreover, *McCallion* has no application here, as the court expressly declined to consider the issue of whether the special interrogatories there were impermissibly compound. *McCallion*, at ¶42. Defendant next relies upon *Dynek v. City of Chicago*, 2020 IL App (1st) 190209, ¶¶37, which is also inapposite. In *Dynek*, the court found that all but

one of the special interrogatories at issue *were* "impermissibly compound." *Id*. at ¶37. *Dynek* did approve one compound special interrogatory, but only because the component questions there were subdivided, and "because each subpart of that interrogatory was a single, straightforward question." *Id*. at ¶38. This is nothing like the special interrogatories in our case where the question of legal justification was inextricably intermixed with the questions regarding reckless or intentional conduct. (C1625, C1626.)

Next, the defendant argues that, by finding the interrogatories here to be impermissibly compound, the appellate court contradicted its own ruling in *Price v. City of Chicago*, 2018 IL App (1st) 161599. Defendant's reliance on *Price* fails for two reasons. First, defendant contends that *Price* requires the inclusion of the term "legal justification" in the special interrogatory, and therefore its inclusion of the term in the special interrogatories in our case must be permitted. (Def. Br., pp. 38-39.) However, *Price* did *not* hold that the words "legal justification" had to be included in a special interrogatory covering willful and wanton conduct. Rather, *Price* held that the jury's affirmative answer that the police did engage in willful and wanton conduct was not "solely determinative" of liability and was therefore reconcilable with the verdict, even without the words "legal justification," because that term had been defined in the instructions. *Price*, at ¶¶28-30. Likewise, in our case, the jury, having been instructed on both willful and wanton conduct and legal justification, found for plaintiff, and therefore the negative answers to Special Interrogatory 1 or 2 were consistent with the general verdict. (R2496-2500.)

Second, the reversal in *Price* was *not* predicated upon the absence of the "legal justification" language in the second special interrogatory there. Rather, *Price* overturned the trial court's decision to allow the special interrogatory to control the verdict because

the first special interrogatory at issue there only addressed whether the police reasonably believed there was an "imminent" danger, but did not also address whether the use of deadly force was "reasonably necessary." *Price* at ¶34. *Price* held that, without a finding that the shooting was reasonably necessary, the affirmative answer to the special interrogatory was not controlling because the special interrogatory was "nondeterminative." *Id*. at ¶43. This is the same fatal flaw found in the special interrogatories in our case: they were nondeterminative. Special Interrogatory 1 in our case only asked jurors about the police's intentionality as to David Strong exclusively, and Special Interrogatory 2 only asked about police recklessness towards the safety of others. Thus, as discussed more fully herein at Argument IV. C, *infra*, both special interrogatories were "nondeterminative."

Defendant also contends that the form of the special interrogatories here must be deemed proper because they "track the language" in IPI 14.01. (Def. Br., pp. 33-34.) This is incorrect because the special interrogatories here did *not* track the language of IPI 14.01. (R2496-R2497, IPI 14.01 as read to the jury.) For example, and as discussed more fully herein, at Argument IV. C. 1, *infra*, Special Interrogatory 1 departed from the prescribed language and improperly singled out David Strong. Thus, the cases relied upon by defendant here, *Douglas v Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶67, and *McCallion v. Nemlich*, 2021 IL App (1st) 192499-U, ¶46, are both distinguishable as the interrogatories in those cases did track the instructions verbatim.

2. The special interrogatories violated the rule against piggy-backing.

Defendant admits that the only way for the special interrogatories to control the general verdict here is if they are read "together." (Def. Br., p. 43.) However, two

interrogatories can *never* be read together as a basis for voiding the jury verdict. *In re Commitment of Haugen*, 2017 IL App (1st) 160649, ¶30. The negative answers to the special interrogatories here cannot control the verdict because co-dependent interrogatories are improper in form, as the "case law is clear that a proper special 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." *Id*. Said another way, "piggy-backing" of special interrogatories is not permitted. *Northern Trust Co. v. University of Chicago Hosp. & Clinics*, 355 Ill. App. 3d 230, 253 (1st Dist. 2004).

C. The special interrogatories did not ask straightforward questions, as required, but instead were vague, ambiguous, and confusing.

The appellate court agreed with plaintiffs that both Special Interrogatories 1 and 2 were "vague and confusing," because Special Interrogatory 1 was "impermissibly narrow," and because Special Interrogatory 2 was ambiguously broad enough to render the negative answer consistent with the general verdict. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, ¶¶48-49. "A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Blue v. Environmental Engineering, In*c., 215 Ill. 2d 78, 112 (2005). "To be in proper form, a special interrogatory should consist of a single, direct question, should not be repetitive, misleading, confusing, or ambiguous and should use the same language that the instructions contain." *Curatola v. Village of Niles*, 324 Ill. App. 3d 954, 960 (1st Dist. 2001). Here, Special Interrogatories 1 and 2 both fell short of these standards.

1. Special Interrogatory 1 was improperly narrow.

The glaring error with the wording of Special Interrogatory No. 1, was its requirement that the jury find that David Strong was the specific, intended target of the police officers' intentional willful and wanton conduct. This narrow wording departed from both the requirements of the law and also from the facts alleged. Plaintiff never alleged an intention by police to harm David Strong *per se,* but rather alleged that police intended to shoot the driver of the van. It was undisputed that "the person who got shot was not the person who they intended to shoot." (R2350/17-18.) In this way, Special Interrogatory No. 1 incorrectly limited the intentionality to a specific intention to harm David Strong.

Rather than singling out David Strong, Special Interrogatory No. 1 should have had as its scope the driver of the van, or even all of the occupants of the van. Based upon the improperly narrow wording of Special Interrogatory 1, the jury could have answered it in the negative, believing that the officers were intentionally willful and wanton to the driver, or even to all of the people in the van, named or unnamed, but not exclusively towards David Strong. This plausible interpretation of Special Interrogatory 1 would have rendered a "no" answer entirely consistent with the general verdict in favor of plaintiff. *See Blue v Environmental Engineering, Inc.,* 215 Ill. 2d 78, 112-3 (2005). Where the form of the special interrogatories is improper, they must be disregarded. *Stanphill v. Ortberg*, 2018 IL 122974, ¶36.

Defendant suggests that the appellate court found Special Interrogatory 1 "too narrow" because it only addressed intentionality and not recklessness. (Def. Br., p. 42-43.) This misstates the appellate court's rationale. According to the appellate court, the actual problem with Special Interrogatory 1 was that it focused "solely" only on David Strong.

Givens v. City of Chicago, 2021 IL App (1st) 192434, ¶48. Thus, Special Interrogatory 1 could never resolve an ultimate issue sufficient to control the general verdict, even on the single issue of intentionality. This is because it still permits the conclusion, reconcilable with the verdict, that police were not legally justified in intentionally harming persons other than David Strong.

On this point, defendant relies on a single case, *Brannen v Seifert*, 2013 IL App (1st) 122067. (Def. Br., p. 43.) However, *Brannen* actually supports plaintiffs here. *Brannen* held that, "where there are two alternate theories of negligence and the special interrogatory does not differentiate between the two, the special interrogatory is not in proper form." *Id*. at ¶86. Here, Special Interrogatory 1 improperly contained three separate theories of liability: (1) whether the conduct of police was legally justified, (2) whether it was intentional and (3) whether the intentional misconduct was directed at David Strong. This was improperly compound, without clear subparts which could be answered in turn. *See, e.g*., *Dynek v. City of Chicago*, 2020 IL App (1st) 190209, ¶38.

2. Special Interrogatory 2 was worded broadly enough to render a negative answer consistent with the general verdict.

In its brief, defendant takes issue with plaintiff's argument below that Special Interrogatory 2 was overly broad in its use of the words "safety of others," and criticizes the appellate court for rejecting Special Interrogatory 2 on this basis. (Def. Br. pp. 44-46.) According to the City, the words "safety of others" cannot disqualify the special interrogatory because it tracks the language of the instruction. (Def. Br. p. 44.) However, the opinion of the appellate court reveals that the appellate court did *not* rule that the phrase "safety of others" was always impermissibly broad. Rather, the appellate court ruled that the broadness of the phrase "safety of others" in Special Interrogatory 2 was ambiguous

based on the evidence *in this case* and rendered the negative answer reconcilable with the general verdict. *Givens vi City of Chicago*, 2021 IL App (`1st) 192434, at ¶58. The appellate court recognized that a reasonable jury could have concluded that Special Interrogatory 2 was asking whether the police officers were utterly indifferent to or consciously disregarding the safety of possible passersby or innocent bystanders, rather than just the occupants of the van. *Id*., *see also*, *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 449 (1st Dist. 1997). This is especially the case here, where the jury heard testimony from defendant's police expert, Taylor, that the driver, Dudley, was the only legitimate target for the police, yet he was not mentioned in either interrogatory. (R2187/7-10.) Given this specific testimony in our case, a reasonable jury could have believed that the police *did not* recklessly disregard the "safety of others," but *did* recklessly disregard the safety of the driver, Dudley, and the other occupants of the van, Givens and Strong. In this way, Special Interrogatory 2 is reconcilable with the general verdict. *See Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 112-113 (2005).

Defendant also argues that the phrase "safety of others" in Special Interrogatory 2 "plainly meant everyone but the [police] officers, which obviously included Strong." (Def. Br., p. 44.) Yet, the plain language of Special Interrogatory 1, which identified David Strong by name, undermines this argument. Because he was named in Special Interrogatories 1 and 3, and no one at all was named in Special Interrogatory 2, the jury would have been more likely to think Special Interrogatory 2 was intended to specifically *exclude* David Strong. Moreover, the defendant misses the appellate court's rationale by focusing on the question of whether the phrase "safety of others" was confusing. The appellate court did not rule that Special Interrogatory 2 should be disregarded merely

because the phrase "safety of others" was confusing. Rather, the appellate court held that the phrase "safety of others" was significant here because it rendered the negative answer consistent with the verdict. *Givens*, at ¶49. The appellate court properly considered these possible interpretations, as any rationale which renders the answers consistent with the general verdict must be presumed. *Brown v. City of Chicago*, 2019 IL App (1st) 181594, ¶58.

3. The wording of the special interrogatories was confusing to court and counsel alike.

A review of the jury instruction transcript reveals how complicated it was to draft the special interrogatories beyond the parameters of the IPIs. (R2364/7-8/10-13, R2365/10-15/21-24, R2366/1-16.) Indeed, while the court ultimately settled on the wording (over plaintiffs' objections), court and counsel were all confused about how best to proceed. In one of its continuing objections to the special interrogatories, plaintiffs' counsel even pointed out the illogic of the narrow wording of Special interrogatory No. 1, saying that it implied that "David Strong intentionally wanted to be shot by the police." (R2361/21-22.) This objection, along with plaintiffs' other objections to the special interrogatories, were summarily shot down by the trial court. Additionally, the transcripts reveal that the court focused more on the rush to finish than on the risks attendant to improper wording, and did not permit plaintiffs to propose their own special interrogatories. (R2363/22, R2364/4-5, R2366/15-16, R2616/10-R2617/7.)

If the court and counsel were this confused about the special interrogatories, it can hardly be a shock that the jury might have been stumped as well. Where, as here, the form is improper, the special interrogatories must be disregarded and the question of consistency with the general verdict should not even be triggered. *Stanphill v. Ortberg*, 2018 IL 122974,

¶42. However, even then, the jury verdict here must stand, because the answers were consistent with the general verdict. *Brown v. City of Chicago,* 2019 IL App (1st) 181594 at ¶58; *see also Abruzzo v. City of Park Ridge,* 2013 IL App (1st) 122360, ¶¶67, 70.

D. The answers to the special interrogatories were reconcilable with the general verdict.

"Special interrogatories require careful scrutiny to be certain that the jury could not interpret an interrogatory so that an answer would not be 'absolutely irreconcilable' with a contrary general verdict." *Abruzzo v. City of Park Ridge,* 2013 IL App (1st) 122360, ¶67. In answer to Special Interrogatory 3, not at issue on appeal, the jury found that, when the police shot David Strong to death, the police officers did *not* reasonably believe that deadly force was necessary to prevent imminent death or great bodily harm. (C1627.) Defendant concedes that the answer to Special Interrogatory 3 supports the general verdict here. (Def. Br., p. 40, fn. 5.) This answer demonstrates that the jury understood the elements of legal justification and found them lacking here, which supports the overall finding of the appellate court that the answers to Special Interrogatories 1 and 2 were both reconcilable with the general verdict. Thus, the jury verdict must be reinstated because the answers to the special interrogatories can be reconciled with the general verdict.

In *Brown v. City of Chicago*, 2019 IL App (1st) 181594, ¶41, as here, there are several reasons that the jury's verdict and its answer to the special interrogatories were reconcilable. *Id*. at ¶41. One of the reasons in *Brown* was the wording of the special interrogatory, which asked if "at the time the accident occurred... [was the officer]... en route to a domestic disturbance call?" *Id*. at ¶26. The trial court and the defendant City in *Brown* agreed that an affirmative answer meant that the police officer was therefore "executing and enforcing" the law, which would then trigger a necessary showing of willful

and wanton, in turn alleviating the City of liability. *Id*. at ¶1. The appellate court disagreed, finding that the term "*en* route" could have been interpreted by the jury as not triggering that willful and wanton requirement. *Id*. at ¶55. Similarly, in our case, the ambiguous wording of the special interrogatories permitted interpretations of the answers that are entirely consistent with the jury's general verdict. (*See* Argument IV. C, *supra*.) Therefore, *Brown* is exactly on point and must be followed by reinstating the jury's verdict here.

Defendant relies heavily on *Simmons v. Garces*, 198 Ill. 2d 541 (2002), in its arguments that the special interrogatories here should control the general verdict. However, *Simmons* reiterates the rule that all presumptions must be in favor of the jury's general verdict, and any interpretation which can render the verdict consistent with the interrogatory answers must be deemed true. *Id*. at 556. Contrary to defendant's assertions, the language of both special interrogatories could be answered in the negative, as they were here, while *still* supporting a finding that the defendant acted both intentionally towards Dudley, and recklessly towards the van passenger, David Strong. (*See* Argument, IV. C, herein, *supra*.)

In other words, the negative answers to Special Interrogatories 1 and 2 do not unequivocally demonstrate a finding of no willful and wanton conduct by defendant. They only reveal a lack of intentionality towards David Strong specifically (Special Interrogatory 1), and a lack of recklessness towards the safety of others (Special Interrogatory 2). This is not sufficient to overturn a jury verdict. *Blue v. Environmental Eng*ineering, 215 Ill. 2d 78, 112 (2005). Although a court can never know the precise basis for a jury's verdict, the general verdict and the special finding will be found to conflict only when no reasonable hypothesis exists under which they may be harmonized. *Brown* at ¶58.

The other cases defendant relies upon for this section of its argument are equally unavailing. (Def. Br., pp. 41-42.) In *Blakey v. Gilbane Building Corp*., 303 Ill. App. 3d 872, 883 (4th Dist. 1999), the court found that the special interrogatory was both inconsistent with the general verdict and improperly formed, and that the proper remedy was a new trial. This is distinguishable from the situation in our case, where the defendant denies that the special interrogatories were poorly formed, and seeks not a new trial, but affirmance of the improperly awarded j*nov*.

Another case cited by the defense, *Borries v. Z. Frank, Inc*., 37 Ill. 2d 263, 266 (1967), is likewise inapposite. In *Borries*, the Illinois Supreme Court let stand the trial court's j*nov* in favor of defendant where the answer to the special interrogatory actually barred liability, and where the answer to the special interrogatory was not against the manifest weight of the evidence. Unlike *Borries*, the answers to the special interrogatory here did not bar liability altogether, but rather determined the permissibility of contribution.[1] Additionally, unlike *Borries*, the appellate court here found that the special interrogatories were improperly formed, and, unlike *Borries*, also found that the manifest weight of the evidence supported the general verdict. *Givens v. City of Chicago*, 2021 IL App (1st) 192434, at ¶47.

E. The objections to the special interrogatories were not waived, nor are they waivable.

Defendant asserts that plaintiff "did not object to the interrogatories at the jury instruction conference." (Def. Br., p. 35.) This is incorrect. Plaintiff asserted her objections to the special interrogatories on multiple occasions. (R1999/18-19, R2359/20-21,

[1] In 1967, when *Borries* was decided, any finding of contributory negligence by a plaintiff barred recovery completely. Since then, Illinois has adopted the rule of comparative negligence, and therefore a plaintiff's contributory negligence of 50% or less reduces recovery, but does not bar it altogether.

R2565/22-R2566/2, R2616/10-R2617/7, C1762, C2174V2, C2246V2.) The trial court recognized that these objections had been preserved, but conceded that the trial court itself cut short plaintiffs' objections out of a concern for time, even while acknowledging that it could have made time for plaintiffs' objections, stating: "I guess [plaintiffs' objections are] not very clear in the record, and that was because we were rushing in the morning, which obviously it's my courtroom and I could have just told the jury to take a break in the morning and we could have started arguments or even waited a day." (R2616/18-23.) The trial court judge also conceded that she did not let plaintiffs "propose" their own special interrogatories, and that plaintiffs' objections to those actually given were "fair" because plaintiffs "never had the chance to actually write and draft one." (R2616/22-R2617/7.)

Defendant inaccurately avers that plaintiffs never made any objections, and cites a host of cases in support waiver based on this incorrect recitation of facts: *Price v. City of Chicago,* 2018 IL App (1st) 161599; *LaPook v. City of Chicago,* 211 Ill. App. 3d 856 (1st Dist. 1991); *Smiglis v. City of Chicago,* 97 Ill. App. 3d 1127 (1st Dist. 1981); and *Bachman v. General Motors, Corp.*, 332 Ill. App. 3d 760 (4th Dist. 2002). (Def. Br. pp. 35-37.) None of these cases support a finding of waiver here. In both *Price* and *Smiglis*, unlike the instant case, the plaintiff made *no* objection whatsoever to the special interrogatories. *Price* at ¶22, *Smiglis* at 1129. In *LaPook,* at 864, unlike here, the plaintiff actually drafted the submitted interrogatory. In *Bachman*, at 801, unlike here, the plaintiff actually withdrew its objections.

Moreover, in *Price*, *Smiglis*, *LaPook,* and *Bachman*, all cases where the courts found actual waiver, the courts nevertheless went on to consider the merits of plaintiff's objections to the special interrogatories. *Price*, at ¶¶23, 40-44; *Smiglis* at 1130; *Bachman*

at 801-802. Indeed, the court in *Smiglis* not only considered the merits on review despite waiver, but urged other courts to do so as well: "Although plaintiff's failure to object to the special interrogatory during the instruction conference foreclosed him from objecting to it in his post-trial motion, the trial court was not so precluded if such scrutiny was warranted in the interest of justice." *Smiglis*, at 1130.

Next, defendant contends that plaintiffs did not specifically object to the special interrogatories being compound until the post-trial motion, and therefore that particular objection was "forfeited." (Def. Br. pp. 35-36.) However, this is not the law. Plaintiffs did object to the special interrogatories (R1999/18-19, R2359/20-21, R2565/22-R2566/2, R2616/10-R2617/7, C1762, C2174V2, C2246V2), and in Illinois, plaintiffs are not limited to the narrowest scope of those objections, rather evolution of an objection is permitted. *Price*, at ¶¶49-51.

The cases relied upon by defendant on the issue of objections to form are also inapposite. The waived objections in *People v. Thomas*, 215 Ill. App. 3d 751, 760 (1st Dist. 1991) and *Palanti v. Dillon Enterprises, Ltd*., 303 Ill. App., 3d 58, 64 (1st Dist. 1999) related to jury instructions and did not even address special interrogatories. In *Conxall Corp. v. Iconn Sys., LLC*, 2016 IL App (1st) 140158, ¶24, the court found waiver because the objection to the special interrogatories was too general. In our case, however, plaintiffs' counsel made specific objections. For example, during one jury instruction conference, plaintiffs' counsel pointed out that the problematic wording of Special Interrogatory 1 implied that contribution would depend on whether "David Strong intentionally wanted to be shot by police." (R2361/21-22.) Likewise, *McCallion v. Nemlich*, 2021 IL App (1st) 192499-U, ¶44, which held that objections raised for the first time post trial are waived, is

also distinguishable as plaintiffs here *did* object during the jury instructions conferences. (R1999/18-19, R2359/20-21, R2616/10-R2617/7.)

Moreover, even if, *arguendo*, the defendant is correct, and the plaintiffs never properly objected to the form of the interrogatories, the special interrogatories here *still* would not control the general verdict, because the answers are consistent with that verdict. It is well-settled in Illinois that the issue of reconcilability of special interrogatories with the jury's verdict cannot be waived. *LaPook*, at 865, *quoting Silverman v. First Federal Saving & Loan Ass'n of Chicago*, 94 Ill. App. 3d 274, 280 (1st Dist. 1981); *see also Morton v. City of Chicago*, 286 Ill. App. 3d 444, 450 (1st Dist. 1997); *Givens v. City of Chicago*, 2021 IL App (1st) 192434, fn 5. Defendant recognizes this as the general rule in its brief, and does not dispute it. (Def. Br., p. 36.) Thus, even if plaintiffs' objections to form were forfeited, the dispositive issue of consistency was not and cannot ever be waived.

F. The amended statute regarding special interrogatories is instructive.

Overturning a jury verdict based on answers to special interrogatories is strongly disfavored, and all reasonable presumptions should be exercised in favor of the verdict. *Blue v. Environmental Engineering, Inc*., 215 Ill. 2d 78, 112 (2005); *Brown v. City of Chicago*, 2019 IL App (1st) 181594, ¶42. Reflecting this long-standing public policy favoring verdicts, 735 ILCS 5/2-1108 was amended after the trial, and the current iteration of the law would have prevented the injustice which occurred here. The newly written statute requires that where a trial court finds an inconsistency between the answers to the special interrogatories and the verdict, then the jury is asked to continue deliberating rather than having the trial court insert its own interpretation of how the verdict should be reconciled with the perceived inconsistency, as happened in our case. Also, the new version of the statute would have prevented j*nov*, and would have instead mandated a new trial if

the jury could not reconcile its verdict with the special interrogatories. While not binding here, the new statute reflects legislative intent regarding special interrogatories. *Home Star Bank and Fin. Servs. v. Emergency Care & Health Org., Ltd*., 2014 IL 115526, ¶24.

Although the appellate court was very clear that its decision was not based upon the amended statute, *Givens v. City of Chicago*, 2021 IL App (1st) 192434, at ¶¶58-59, defendant decries the appellate court for even referencing the amended statute and vociferously complains that it is not even persuasive and should not be mentioned at all. (Def. Br., pp. 47-48.) Ironically, the defendant's argument here is itself based upon language from an unreported case, *McCallion v. Nemlich*, 2021 IL App (1st) 192499-U. As this court well knows, unreported cases have no precedential effect, and, until recently, parties could not even cite them in briefs to the court. It is only due to a recent amendment to Ill. Sup. Ct. R. 23, on January 1, 2021, that defendant can even cite the case here. By relying on an unreported case, defendant undermines its own argument that noncontrolling authorities, such as unreported cases or subsequently enacted legislation, should not be considered.

CONCLUSION

Wherefore, the plaintiffs-appellants, John W. Givens, Leland Dudley, and Theresa Daniel, as Special Administrator of the Estate of David Strong, deceased, respectfully request that this court affirm the ruling of the appellate court, reinstate the verdict in favor of Theresa Daniel, as Special Administrator of the Estate of David Strong, deceased, in the amount of $999,999, and remand the cases of John W. Givens and Leland Dudley for further proceedings.

Respectfully submitted,
/s/ Lynn D. Dowd
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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney for the plaintiffs-appellees, hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under 342(a), is 50 pages.

Respectfully submitted,
/s/ Lynn D. Dowd
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IN THE SUPREME COURT OF ILLINOIS

JOHN W. GIVENS, LELAND DUDLEY, and THERESA DANIEL as Special Administrator of the Estate of DAVID STRONG, deceased,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 127837
CITY OF CHICAGO,	)	
Defendant-Appellant.	)	

NOTICE OF FILING AN D CERTIFICATE OF SERVICE

To: See Attached Service List

Please take notice that on August 23, 2022 before 4:30 p.m., the undersigned electronically filed electronically via the court's Odyssey EfileIL system with the Clerk of the Illinois Supreme Court, the APPELLEES' BRIEF.

The undersigned further certifies pursuant to ILCS 5/1-109 that on August 23, 2022 before 4:30 p.m., she served electronically, via the court's electronic Odyssey filing system and via email, a copy of the Notice of Filing and the APPELLEE'S BRIEF on the parties listed on the attached Service List. 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.

Respectfully submitted,

/s/ Lynn D. Dowd

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