

Docket No. 122974

IN THE SUPREME COURT OF ILLINOIS

<p>ZACHARY STANPHILL, as Administrator of the Estate of KEITH SYLVESTER STANPHILL, deceased,</p> <p>Plaintiff-Appellee,</p> <p>v.</p> <p>LORI ORTBERG, individually and as agent of ROCKFORD MEMORIAL HOSPITAL, d/b/a ROCKFORD MEMORIAL HOSPITAL, d/b/a ROCKFORD MEMORIAL HEALTH SYSTEMS,</p> <p>Defendants-Appellants.</p>	<p>On Appeal from the Illinois Appellate Court, Second Judicial District</p> <p>Docket No. 2-16-1086</p> <p>There Heard on Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois</p> <p>Court No. 14-L-035</p> <p>The Honorable J. Edward Prochaska, Judge Presiding</p>
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***AMICUS CURIAE* BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL
COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS**

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***AMICUS CURIAE* BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL
COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS**

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Illinois Association of Defense Trial Counsel (“IDC”) is a voluntary organization of independent lawyers whose experience includes substantial tort practice generally for the defense. The IDC is a not-for-profit organization with more than 800 members in Illinois. It and its many members believe that they have a constructive role to play in the development of the law. Members of the IDC regularly submit special interrogatories at trial and they have an interest in how this Court addresses the important issue surrounding the use of the special interrogatory in this case.

Mindful that it is a privilege and not a right to appear as an *amicus curiae* before the Court, the IDC is grateful to do so in this case. Based on the experience of its many members, the IDC respectfully submits that its views may be of some assistance to the Court in determining when special interrogatories are in a proper form for use in the trial of civil cases.

INTRODUCTION

This wrongful death action was brought by the plaintiff, Zachary Stanphill, as administrator of the estate of Keith Stanphill, deceased, against the defendants, Lori Ortberg, a licensed clinical social worker and her employer, Rockford Memorial Hospital, after Keith Stanphill committed suicide on or about October 9, 2005. The jury received an issues instruction, taken from Civil IPI 20.01, charging Ortberg with professional negligence (R.C4783) as a result of a one-time, one hour counseling session she had with Stanhphill on September 30, 2005 (R.P464; R.P467; R.P973; R.C7241).¹ Relatedly, the trial court gave the professional negligence instruction, taken from Civil IPI 105.01, as follows:

A licensed clinical social worker must possess and use the knowledge, skill, and care used by a reasonably careful licensed clinical social worker. The failure to do something that a reasonably careful licensed social worker would do, or the doing of something that a reasonably careful licensed clinical social worker would not do, under circumstances similar to those shown by the evidence, is ‘professional negligence.’

The phrase ‘deviation from the standard of care’ means the same thing as ‘professional negligence.’

¹ All citation to the common law record will be “R.C” whereas all citation to the reports of proceedings will be “R.P” to avoid confusion between the two.

The law does not say how a reasonably careful licensed professional social worker would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified witnesses or evidence of policies. You must not attempt to determine how a reasonably careful licensed social worker would act from any personal knowledge you may have.

(R.C4781). Finally, pursuant to section 2-1108 of the Code of Civil Procedure (735 ILCS 5/2-1108 (West 2016)), the defendants tendered the following special interrogatory:

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

(R.C4769; R.P1942). The trial court gave the defendants' special interrogatory over the plaintiff's objection (R.P1588). The jury returned a general verdict in the plaintiff's favor against the defendants and awarded \$1,495,151 in damages, but answered "no" to the special interrogatory (R.P1941-42). The trial court entered judgment for the defendants in accordance with the jury's answer to the special interrogatory (R.C4741), and later denied the plaintiff's motion for a new trial (R.C5798).

The Illinois Appellate Court, Second Judicial District, reversed and remanded with directions for the trial court to enter judgment for the plaintiff. *Stanphill v. Ortberg*, 2017 IL App (2d) 161086, 91 N.E.3d 928. The appellate panel held that the special interrogatory was improper in form because it asked the jury to determine whether the suicide was reasonably foreseeable to Ortberg, as opposed to "a reasonable person or a reasonably licensed clinical social worker." ¶¶ 32-33. The panel held that the special interrogatory was also not "necessarily inconsistent" with the general verdict on the reasoning that the jury could have found that the suicide was not reasonably foreseeable to Ortberg because of her negligence in failing to reasonably assess Keith Stanphill's suicide risk. ¶¶ 29, 33.

Thereafter, the defendants timely filed a petition for leave to appeal which this Court granted on March 21, 2018. The IDC now seeks leave to file this *amicus curiae* brief within the time for the defendants to file their supplemental brief pursuant to Supreme Court Rule 345(b). Ill. S. Ct. R.345(b) (eff. Sept. 20, 2010).

ARGUMENT

THE SPECIAL INTERROGATORY PROPERLY ASKED WHETHER THE SUICIDE WAS REASONABLY FORESEEABLE TO THE INDIVIDUAL DEFENDANT AND THE JURY’S “NO” ANSWER CONTROLLED THE GENERAL VERDICT

A. Introduction: The Special Interrogatory Is The “Guardian Of The Integrity” Of A General Verdict

The law governing the use of special interrogatories is found in section 2-1108 of the Code of Civil Procedure:

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

735 ILCS 5/2-1108 (West 2016). The special interrogatory procedure is a codification of the common law. *Albaugh v. Cooley*, 87 Ill. 2d 2421, 252, 429 N.E.2d 837 (1981) (citing *Walker v. New Mexico & Southern Pacific R.R. Co.*, 165 U.S. 593, 597-98 (1897) (“So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown at common law and has been recognized independently of any statute”)); Morgan, *A Brief History of Special*

Verdicts and Special Interrogatories, 32 Yale L.J. 575, 592 (1923). The antecedents to section 2-1108 predate the Illinois Civil Practice Act of 1933 and can be traced as far back as 1922. ILL. REV. STAT. 1921, ch. 110, sec. 79 (on party's request court "must" have jury make special finding on one or more questions of material fact).

Since then, reviewing courts have upheld special interrogatories in a wide variety of civil cases. *See, e.g., Albaugh*, 87 Ill. 2d 241 (special interrogatory asked whether pedestrian was guilty of contributory negligence in auto accident); *Lacey v. Perrin*, 2015 IL App (2d) 141114, 53 N.E.3d 90 (special interrogatory asked whether police officer was in the execution and enforcement of the law at time of auto accident); *Morton v. Chicago*, 286 Ill. App. 3d 444, 676 N.E.2d 985 (1st Dist. 1997) (special interrogatory asked whether conduct of detective and officer was both willful and wanton); *Green v. Bernstein*, 238 Ill. App. 3d 656, 606 N.E.2d 500 (1st Dist. 1992) (special interrogatory asked in medical malpractice case whether plaintiff knew that drain tube was left in her right knee); *Ciborowski v. Philip Dressler & Assocs.*, 110 Ill. App. 3d 981, 443 N.E.2d 618 (1st Dist. 1983) (special interrogatory asked whether general contractor was guilty of major fault on its third-party implied indemnity claim under Structural Work Act); *Bluestein v. Upjohn Co.*, 110 Ill. App. 3d 981, 430 N.E.2d 580 (1st Dist. 1981) (special interrogatory asked whether prescribed drug was proximate cause of injuries in product liability case); *Gordon v. J.L. Manta, Inc.*, 3 Ill. App. 3d 657, 279 N.E.2d 475 (1st Dist. 1972) (special interrogatory asked whether defendant's use of force was in self-defense in wrongful death case).

This Court noted the salutary purpose behind the special interrogatory procedure and its historic function in *Blue v. Environmental Engineering Co., Inc.*, 215 Ill. 2d 78, 112, 828 N.E.2d 1128 (2005), where, it observed:

A special interrogatory serves ‘as guardian of the integrity of a general verdict in a civil jury trial.’ *O’Connell v. City of Chicago*, 285 Ill. App. 3d 459, 460, 674 N.E.2d 105 (1st Dist. 1996). It tests the general verdict against the jury’s determination as to one or more specific issues of ultimate fact. *Noel v. Jones*, 177 Ill. App. 3d 773, 783, 532 N.E.2d 1050 (3d Dist. 1988); *Gasbarra v. St. James Hospital*, 85 Ill. App. 3d 32, 38, 406 N.E.2d 544 (1st Dist. 1979).

Blue, 215 Ill. 2d at 112 (quoting *Simmons v. Garces*, 198 Ill. 2d 541, 555-56, 763 N.E.2d (2002)). The reason underlying the rule that an inconsistent answer controls is that “a jury more clearly understands a particularized special interrogatory than a composite of all of the questions in a case, and therefore a special finding upon which a jury presumably has more intensively focused its attention should prevail over an inconsistent general verdict.” *Borries v. Z Frank, Inc.*, 37 Ill. 2d 263, 266, 226 N.E.2d 16 (1967). The appellate decision in this case marks an unwarranted departure from these principles and precedents.

B. The Special Interrogatory Was Proper In Form And The Appellate Court Erred By Not Following Settled Principles And The Presumption That The Jury Follows The Instructions Given

The special interrogatory in this case was in proper form and not confusing, misleading or vague. It asked a simple, straightforward question relating to an ultimate issue of fact upon which the rights of the parties depended—whether it was reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005? A “no” answer to the interrogatory—that his

suicide was not reasonably foreseeable to Ortberg—was irreconcilable with and controlled the general verdict.

The appellate panel held in this case that the interrogatory was not in proper form because it asked the jury to decide whether the suicide was reasonably foreseeable to Ortberg, as opposed to whether the suicide was foreseeable to “a reasonable person or a reasonable licensed clinical social worker.” ¶¶ 32-33. In so holding, the appellate court read the interrogatory in isolation from the jury instructions when the law requires the interrogatory to be construed together with the instructions. *Simmons*, 198 Ill. 2d at 563 (citing *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 451, 676 N.E.2d 985 (1st Dist. 1997); *LaPook v. City of Chicago*, 211 Ill. App. 3d 856, 866, 570 N.E.2d 708 (1st Dist. 1991)). Notably, the appellate court did not discuss the professional negligence instruction, Civil IPI 105.01, which required the jury to apply the standard of “a reasonable careful licensed clinical social worker” to Ortberg in the circumstances of the case (R.C4781). In view of the professional standard of care set forth in Civil IPI 105.01, there were no reasonable grounds for the appellate court to conclude that the jury would fail to follow this instruction when it answered the special interrogatory. Not only did the appellate court impermissibly read the special interrogatory without reference to the jury instructions, including Civil IPI 105.01, it did so contrary to the usual presumption that jurors follow the instructions that they are given. *Powers v. Illinois Central Gulf R.R. Co.*, 91 Ill. 2d 375, 385, 438 N.E.2d 152 (1982).

C. The Jury’s Answer To The Special Interrogatory Was Absolutely Inconsistent With The General Verdict

The Second District was unable to cite any case involving a similar special interrogatory in which a reviewing court had read the special interrogatory the same way

that the panel did here. The appellate court's reliance on *Lancaster v. Jeffrey Galion, Inc.*, 77 Ill. App. 3d 819, 396 N.E.2d 648 (2d Dist. 1979), was misplaced. There, in a strict liability case, the special interrogatory asked whether the plaintiff's misuse of the product proximately caused the injuries. *Id.* at 821. The appellate court held that the "yes" answer to the interrogatory was not inconsistent with the general verdict for the plaintiff because product misuse was not a defense unless it was "not reasonably foreseeable by the manufacturer." *Id.* at 823. A reasonable hypothesis existed for the general verdict and the jury's answer to the special interrogatory because the jury had not been instructed that product misuse was a defense only when the misuse was not reasonably foreseeable to the manufacturer. Accordingly, the special interrogatory was not inconsistent with the general verdict because it did not exclude every possible basis for the verdict.

The same cannot be said in this case. Here, unlike the jury's "yes" answer to the special interrogatory in *Lancaster*, the "no" answer—meaning that the suicide was not reasonably foreseeable to Ortberg—was on an ultimate issue of fact and irreconcilable with the general verdict. *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 8, 851 N.E.2d 663 (1st Dist. 2006) (observing that "[w]ithout foreseeability, legal cause cannot be established" where special interrogatory asked whether suicide was "reasonably foreseeable"). Unlike *Lancaster*, the jury here was fully instructed on the professional standard of care to which Ortberg was held. If the suicide was not reasonably foreseeable to Ortberg when she was held to the objective standard of care applicable to a "reasonably careful licensed clinical professional social worker" (R.C4781), the plaintiff did not satisfy legal causation, and without legal causation, the plaintiff could not recover a verdict.

The appellate court held otherwise on the reasoning that the jury could have found that the suicide was not reasonably foreseeable to Ortberg due to her negligence in failing to reasonably assess Keith Stanphill's suicide risk. ¶¶ 29, 33. The appellate court's hypothesis amounts to circular reasoning and fares no better than its other hypothesis for finding error. Both hypotheses fail to read the jury's answer to the special interrogatory in conjunction with the jury instructions. Here, the jury was instructed under Civil IPI 105.01 that Ortberg was to use the knowledge, skill, and care used by a reasonably careful licensed clinical social worker, and that the failure to do something that a reasonably careful licensed clinical social worker would do, or the doing of something that a reasonably careful licensed clinical social worker would not do, under the circumstances of the case, constituted professional negligence (R.C4781). If the suicide was not reasonably foreseeable to Ortberg, as the jury found by its answer to the special interrogatory, it was because the suicide was not foreseeable to a "reasonably careful licensed clinical social worker" (R.C4783). The jury's "no" answer was absolutely inconsistent with the general verdict because it meant that Ortberg's conduct was not a proximate cause of the suicide.

The general purpose of special interrogatories is well recognized and illustrated by this case. Special interrogatories "may aid in sifting the jury's reasons for their verdict; they may show how closely or otherwise the jury has followed the trial court's instructions; and they may, and often do, show the measure of sincerity with which the jury has considered the evidence on which the general verdict must rest if it is permitted to stand." 75B Am.Jur.2d *Trial*, §1590 at 383-84 (West 2007). In an emotionally-charged case such as this, the special interrogatory well served its salutary purpose and historic

function. It related to an ultimate issue of fact on which the rights of the parties depended, and the jury's answer was amply supported by the evidence. Because the interrogatory was proper in form, supported by the evidence and controlled the general verdict, the appellate court's judgment should be reversed and the trial court's judgment should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Illinois Association of Defense Trial Counsel respectfully requests this Court to reverse the opinion and judgment of the Illinois Appellate Court, Second Judicial District, and affirm the judgment of the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus curiae* brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 10 pages.

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