No. 127837

IN THE
SUPREME COURT OF ILLINOIS

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant,

v.

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

Plaintiffs-Appellees.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Dudley's and Givens's convictions of aggravated battery of a peace officer and first-degree felony murder conclusively established that their own intentionally tortious conduct proximately caused the City's police officers to fire upon their escape vehicle, resulting in their injuries. They may not relitigate those facts, which bar them from recovering against the City. The circuit court correctly granted the City summary judgment on their claims, and the appellate court's judgment should be reversed.

The circuit court also properly entered judgment for the City on Strong's claims based on the special interrogatories. The interrogatories were necessary and in proper form, and the jury's answers – indicating that the officers' actions were neither intentionally nor recklessly willful and wanton – were inconsistent with a verdict for Strong. Strong also saved his attack on the interrogatories for after trial, and his attempt to overturn the outcome by asserting waived objections should be rejected. The appellate court's decision reinstating the verdict for Strong should be reversed.

I. COLLATERAL ESTOPPEL BARS DUDLEY'S AND GIVENS'S CLAIMS.

Dudley's and Givens's criminal convictions conclusively established that their intentionally tortious conduct proximately caused their injuries. As the criminal jury found, they knew when they smashed through the garage door that they were practically certain to hit an officer. And that

violent escape attempt proximately caused the officers to fire upon them. Collateral estoppel prohibits them from relitigating those facts.

Because Dudley and Givens are precluded from relitigating these facts, this court should disregard any attempt by Dudley and Givens to rely on purported disputes about those facts. For example, Dudley and Givens highlight testimony from Strong's trial that they claim could have allowed the jury to conclude 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." Givens Br. 1; see also id. at 3 ("[P]laintiffs were unaware that police were assembled in the sidewalk area on the other side of the garage door."); id. at 16 ("[P]laintiffs did not know police were there."). They also point to evidence that – they argue – shows the van "may not have" struck a police officer. Id. at 16; see also id. at 7. But the criminal jury disagreed when it convicted Dudley and Givens. In short, they already litigated those issues and lost. And, as we explain, the facts settled by the convictions bar their civil claims.

A. Dudley's And Givens's Knowing Misconduct Proximately Caused Their Injuries.

Dudley's and Givens's aggravated battery convictions established that they knowingly engaged in felonious conduct, while their felony murder convictions established that that conduct proximately caused the officers to respond by shooting at the van. City Br. 18-21. Their attempts to evade these established facts should be flatly rejected.

First, Dudley and Givens argue that it is somehow significant that, in our opening brief, City Br. 18, we mistakenly cited section 12-3.05(a)(3) of the criminal code when describing their convictions for aggravated battery of a peace officer.[1] Givens Br. 26. They were, in fact, convicted under section 12-3.05(d)(4). See People v. Givens, 2018 IL App (1st) 152031-U, ¶ 2; People v. Dudley, 2018 IL App (1st) 152039-U, ¶ 2. Aggravated battery under that section is a class 2 felony. 720 ILCS 5/12-3(h). We regret the error, but the mis-citation does not change the battery convictions' collateral estoppel effect.

Any battery conviction requires an intentional *mens rea* because "knowingly" is an element of all battery offenses:

> A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

720 ILCS 5/12-3(a). See also Maksimovic v. Tsogalis, 177 Ill. 2d 511, 514 (1997) ("battery" is an "intentional tort"). Aggravated battery under section 12-3.05(d)(4) adds another layer of knowledge, requiring that the defendant knew the victim was a peace officer. 720 ILCS 5/12-3(d)(4).[2] Thus, Dudley's and Givens's battery convictions established both that they knowingly made

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[1] Dudley and Givens also cite the wrong section of the code. See id. (citing 720 ILCS 5/12-3.05(d)(3)).

[2] The offense is defined as follows: "A person commits aggravated battery when, in committing a battery, . . . he or she knows the individual battered to be any of the following: . . . (4) A peace officer . . . : (i) performing his or her official duties[.]" 720 ILCS 5/12-3.05(d)(4)).

physical contact with the victim *and* that they knew that the victim was a police officer. Our initial citation to the wrong sub-section for aggravated battery is, therefore, inconsequential.

Indeed, as the appellate court explained in its decision upholding the aggravated battery convictions, the verdict meant that the jury found Dudley and Givens were "aware it was practically certain [they] would hit a police officer in driving through the garage door." Givens, 2018 IL App (1st) 152031-U, ¶ 45; accord Dudley, 2018 IL App (1st) 152039-U, ¶ 33. The appellate court's determinations also have estoppel effect, e.g., Long v. Elborno, 397 Ill. App. 3d 982, 990-92 (1st Dist. 2010) (prior appellate court decision estopped plaintiff's argument), and Dudley and Givens do not even address the appellate court's decision.

Next, Dudley and Givens deny that their "criminal convictions" for aggravated battery "establish *intentional* willful and wanton conduct." Givens Br. 26. They suggest that their conduct could have been recklessly willful and wanton, which would not completely bar their tort recovery. Id. at 23 ("The criminal juries made no determination whatsoever whether the misconduct of Dudley and Givens was *intentionally* willful or wanton versus *recklessly* willful and wanton."); id. at 26 ("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").

That makes no sense. The specific determination by a criminal jury as to aggravated battery that Dudley's and Givens's *mens rea* was knowing absolutely precludes Dudley and Givens from claiming a different *mens rea* – recklessness – for the same conduct in this case. Knowledge is a stricter *mens rea* than recklessness, compare 720 Ill. Comp. Stat. Ann. 5/4-5 ("knowledge") with 720 Ill. Comp. Stat. Ann. 5/4-6 ("recklessness"), and the two mental states are "mutually inconsistent," People v. Fornear, 176 Ill. 2d 523, 531 (1997). As this court has explained,

> [A] finding that a defendant acted recklessly but unintentionally contradicts a finding that a defendant concomitantly acted intentionally or knowingly . . . [because] "[t]he mental states involved in each of these offenses are mutually inconsistent. Where a determination is made that one exists, the others, to be legally consistent, must be found not to exist."

People v. Spears, 112 Ill. 2d 396, 404 (1986) (quoting People v. Hoffer, 106 Ill. 2d 186, 195 (1985)); see also People v. Washington, 2019 IL App (1st) 161742, ¶¶ 34-35 (defendant charged "with a single course of conduct" "could not have acted both recklessly and knowingly" because those "mental states were mutually inconsistent").

Dudley and Givens, for their part, cite nothing to support their contention that although battery is an "intentional tort," Maksimovic, 177 Ill. 2d at 514, their battery convictions could permit a finding that they were merely "recklessly willful and wanton" for the same conduct, Givens Br. 26. They cite Enadeghe v. Dahms, 2017 IL App (1st) 162170, id. at 27, but it does not help them. In fact, they grossly misrepresent the case as stating that

"while a conviction for aggravated battery showed willful and wanton conduct, such conduct could be *either* reckless or intentional." Id. To the contrary, Enadeghe explains that an aggravated battery conviction requires that the defendant acted intentionally or knowingly: "'if the [criminal] jury found that defendant did not act intentionally or knowingly . . . the State would have failed to prove a requisite element of the offense of aggravated battery.'" 2017 IL App (1st) 162170, ¶ 15 n.3 (quoting People v. Dahms, 2015 IL App (1st) 133301-U, ¶ 59). The defendant's aggravated battery conviction therefore precluded him from contesting the "less stringent" *mens rea* required for him to be liable in tort for negligent or willful and wanton misconduct. Id. Thus, Enadeghe does not say that the intentional *mens rea* required for a battery conviction permits a finding that the same conduct is merely reckless; it says that the *mens rea* required for battery is more culpable than willful and wanton conduct. Id.

Dudley and Givens also argue that their felony murder convictions do not establish intentional misconduct. Givens Br. 27-28. That is irrelevant. We did not argue that the felony murder convictions established intent. Rather, the felony murder convictions established that Dudley's and Givens's conduct in battering a peace officer *proximately caused* the police response that injured them. See City Br. 19-21. In upholding those convictions, the appellate court held that "[t]he jury was entitled to determine that such actions would lead the police to shoot," Givens, 2018 IL App (1st) 152031-U,

¶ 52; Dudley, 2018 IL App (1st) 152039-U, ¶ 42, and "categorically reject[ed]" the argument that it was not foreseeable that the officers "would use deadly force in shooting at the van," Givens, 2018 IL App (1st) 152031-U, ¶ 29; Dudley, 2018 IL App (1st) 152039-U, ¶¶ 22-23. Dudley and Givens do not contest that the felony murder convictions conclusively established that their misconduct proximately caused the police reaction that caused their injuries.

B. Collateral Estoppel Bars Dudley's and Givens's Recovery.

As we explained, City Br. 21-23, intentional tortfeasors whose conduct proximately causes their own injuries cannot recover damages from another alleged tortfeasor. See Poole v. City of Rolling Meadows, 167 Ill. 2d 41, 48-49 (1995); Ziarko v. Soo Line R.R., 161 Ill. 2d 267, 271 (1994). Dudley and Givens, however, contend that "[e]ven if" the criminal jury found that their knowing misconduct caused the police to fire upon the van, that "would still not" bar their civil claims. Givens Br. 21. That is incorrect, as we now explain.

To begin, Dudley and Givens baselessly argue that "the doctrine of collateral estoppel has no relevance here whatsoever," Givens Br. 21, and criminal standards cannot be "transplanted" to collaterally estop a civil claim, id. at 27. To the extent they mean to suggest that a criminal conviction can never bar a civil claim, even when the plaintiff's injury stemmed from his own intentional misconduct, that is not only incorrect, but absurd. On that view, criminal defendants could relitigate facts essential to

their convictions, greatly multiplying civil litigation over the same issues and allowing those criminal defendants to benefit from the very crimes they committed. As we explain in our opening brief, this court has already recognized that is not the law. City Br. 25 (citing American Family Mutual Insurance v. Savickas, 193 Ill. 2d 378, 385, 388-89 (2000)).

The only case Dudley and Givens cite for this broad proposition is Ko v. Eljer Industries, 287 Ill. App. 3d 35 (1st Dist. 1997). But Ko did not say, as plaintiffs suggest, that factual findings made "in one judicial arena" may not serve in "another court as a basis for collateral estoppel." Givens Br. 27. Ko simply rejected collateral estoppel "where there was no final adjudication on the merits by the district court." 287 Ill. App. 3d at 40. Here, by contrast, there was undisputedly a final judgment in Dudley's and Givens's criminal case.

On a more fundamental level, Dudley's and Givens's reading of Ko makes no sense. Transplanting factual findings from one judicial arena into another is the very purpose of the doctrine of collateral estoppel. It is meant to alleviate "the burden of relitigating an identical issue" and "promot[e] judicial economy by preventing needless litigation," Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979), and applies "regardless of whether" lawsuits involve "the same cause of action," Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955). Moreover, "[i]t is well established that a prior criminal conviction may work an estoppel . . . in a subsequent

civil proceeding." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951) (citations omitted).

Ultimately, the relevant inquiry is whether the issue for which estoppel is sought was "distinctly put in issue and directly determined" in the criminal action. Emich Motors, 340 U.S. at 569. When the conviction was based on a jury verdict, "issues which were essential to the verdict must be regarded as having been determined by the judgment." Id. And those issues can include a mental state necessary to the conviction. E.g., Savickas, 193 Ill. 2d at 388-89. Indeed, in one of the very cases upon which plaintiffs rely, Enadeghe, Givens Br. 27, the appellate court held that an aggravated battery conviction established a *mens rea* for purposes of a subsequent civil suit. 2017 IL App (1st) 162170, ¶ 15. The party was "barred . . . from relitigating the matter." Id.

Dudley and Givens also argue that estoppel should not apply because their criminal cases did not adjudicate every issue relevant to their civil claims – particularly, the conduct of the City's officers. E.g., Givens Br. 22 ("Here, the issue of *defendant's* willful and wanton conduct had never been previously decided, and therefore collateral estoppel is not implicated."); see also id. at 24 ("[T]he civil complaints of Givens and Dudley did *not* hinge on their conduct, but rather upon the conduct of the police."). Thus, they argue, the "identity of issues" necessary for estoppel is absent. Id. at 23. They elsewhere argue that "the jury could have found shared liability by police and

plaintiffs." Id. at 30. But that is wrong. Collateral estoppel here is based not on whether the jury drew conclusions about the officers' *mens rea*, but on what the jury verdict necessarily says about Dudley's and Givens's *own* conduct, which cannot be relitigated in this case. It bars findings that their conduct was anything other than intentional and the proximate cause of their own injuries. Those matters were conclusively resolved against them in the criminal cases. And if a party's intentional misconduct caused his injury, he cannot escape responsibility for it when another tortfeasor's conduct contributed to the same injury. E.g., Ziarko, 161 Ill. 2d at 280 (disallowing contribution based on comparative fault where party's "willful and wanton acts amount to intentional behavior"). Regardless of whether, as plaintiffs argue, the police's conduct could have "contributed . . . to Givens and Dudley's injuries," Givens Br. 30, there is no point in letting the claim proceed. Collateral estoppel operates to avoid such unnecessary litigation. E.g., Parklane, 439 U.S. at 326.

Moreover, as we explained, City Br. 26-27, the criminal jury *did* consider whether the officers' actions severed the causal link between Dudley's and Givens's actions and Strong's death; and it rejected that argument. Dudley and Givens do not respond to our discussion of that aspect of the criminal trial, other than fallaciously asserting that the officers' actions

were "expressly prohibited from being considered." Givens Br. 23.[3]

Dudley and Givens posit several other theories about why their intentional misconduct does not bar their claim. First, they argue that their intentional misconduct would only affect the *City's* "ability to *seek contribution* from" them. Givens Br. 22; see also id. ("The only impact of such a finding would be that the City would be barred from seeking contribution from Dudley and Givens."); id. at 29-30 (arguing plaintiffs' intentional conduct "would only serve as a possible basis to bar the City from seeking to reduce its damages via contribution"). This badly misstates the law. Indeed, even the appellate court rejected the argument as "anomalous." A16, Givens v. City of Chicago, 2021 IL App (1st) 192434, ¶ 34; see also A10-19, 2021 IL App (1st) 192434, ¶¶ 23-39. Plaintiffs acknowledge that they have not "brought" the court's rejection of that argument "before this court." Givens Br. 29.

Dudley and Givens argue that because Poole and Ziarko address contribution, those cases should be disregarded. See Givens Br. 25 ("[A]n affirmative defense addressing the conduct of the plaintiffs provides a

[3] Their record citation for this point does not support it. See id. (citing C. 945-46). The criminal court excluded "[g]eneral orders of the police department" from "the jury instructions," because those "internal matters of the Chicago Police Department" were not relevant to the case. C. 945-46. It did *not* say that the officers' conduct could not be considered. It *permitted* Dudley and Givens to argue the officers used excessive force. C. 539 ("[T]he defense will be given total latitude to tell the jury that the police were wrong with everything they did and in the handling of this case. You can go at them and talk about excessive use of force and everything . . .").

possible basis only for contribution, and not for barring prosecution of the claims."). It is true that Poole and Ziarko involved defendants seeking contribution, and this court has yet to squarely address how the same principles apply to recovery by a plaintiff whose intentionally tortious conduct caused his injuries. But this court's rationale in those cases cannot be cabined to the contribution context. In Poole and Ziarko, this court established general principles about how fault is allocated among tortfeasors. Under those now-settled principles, intentional conduct cannot be compared with another tortfeasor's conduct; the intentional tortfeasor remains fully liable for damages it caused and may not shift fault to another party. See Poole, 167 Ill. 2d at 47-49; Ziarko, 161 Ill. 2d at 280-81. Indeed, distilling these principles, the appellate court below described these cases as applying "the common law rule . . . barring *recovery* or contribution for intentional willful and wanton tortfeasors." A18; Givens, 2021 IL App (1st) 192434, ¶ 37. It explained that the rule's upshot is that "a plaintiff's intentional willful and wanton conduct cannot be compared to a defendant's willful and wanton conduct (whether reckless or intentional), thus serving as a complete bar to the plaintiff's recovery." A15; 2021 IL App (1st) 192434, ¶ 33. That conclusion follows naturally from Poole and Ziarko and bars Dudley's and Givens's claims.

Dudley and Givens also observe that Poole and Ziarko did not "address[ ] collateral estoppel." Givens Br. 22-23, and criticize the City for

not identifying a case applying collateral estoppel in this exact context, id. at 22. But, of course, there is no reason why this procedural doctrine should not apply in this context as it does in any other. Moreover, Dudley and Givens have themselves identified a case applying collateral estoppel from a criminal conviction to a civil case. They cite Enadeghe, id. at 27, in which the appellate court affirmed the dismissal of a defendant's negligence counterclaim based on the estoppel effect of his battery conviction, 2017 IL App (1st) 162170, ¶¶ 9, 25. And Dudley and Givens, for their part, point to no case where a plaintiff convicted of an intentional felony was allowed to recover in tort for injuries caused by that felonious conduct. We have found none, either.

Grasping at another straw, Dudley and Givens argue, without citation, that they cannot be estopped because the City raised their intentional misconduct as an "affirmative defense" to liability. Givens Br. 25. But there is no "affirmative defense" exception to collateral estoppel. An affirmative defense that is conclusively established entitles the defendant to summary judgment. E.g., Medrano v. Production Engineering Co., 332 Ill. App. 3d 562, 570 (1st Dist. 2002). And when the elements of collateral estoppel are met, that doctrine applies with full force to establish an affirmative defense that bars a defendant's liability. See, e.g., Wolfson v. Baker, 623 F.2d 1074, 1081 (5th Cir. 1980) (where criminal conviction established plaintiff's knowing illegal conduct, "district court properly applied the *in pari delicto* defense to

bar [plaintiff's] claim"). Dudley and Givens cite only one case as purportedly supporting the idea that collateral estoppel does not apply to affirmative defenses; but they admit the case is "not controlling," id., and then seriously misrepresent its holding. In Johnson v. Beckman, No. 1:09-CV-04240, 2013 WL 1181584 (N.D. Ill. Mar. 21, 2013), the plaintiff argued that a prior finding that there was no probable cause for his arrest entitled him to judgment on his Fourth Amendment false arrest claim. Id. at *1. The district court declined to apply *offensive* collateral estoppel to prevent the defendant police officers from contesting the claim because their qualified immunity defense had not been litigated in the prior criminal action. Id. at **3-4. Nothing in Johnson even remotely suggests that collateral estoppel can never be invoked to establish an affirmative defense to a civil claim.

Finally, Dudley and Givens complain that it was unfair for the circuit court to hold their claims estopped while allowing Strong's claim to go to trial. Givens Br. 30-31. But they cannot escape the application of collateral estopped because one of the participants in their criminal activity *died* and could not be charged. As we explained, City Br. 27-29, a decision that meets all the other requirements for collateral estoppel is not unfair when the party to be estopped received the opportunity and incentive to litigate issues decided in the prior case, e.g., Savickas, 193 lll. 2d at 385-89. The cases upon which plaintiffs rely espouse that same rule. E.g., Enadeghe, 2017 IL App (1st) 162170, ¶ 16 ("Dahms testified at his trial, he was represented by

counsel, and had an incentive to defend."); Johnson, 2013 WL 1181584, at *4 (N.D. Ill. Mar. 21, 2013) ("defendant must receive full and fair opportunity to present his case before court may give prior ruling preclusive effect") (quotation omitted). Dudley and Givens had a full and fair opportunity to litigate the issues in their criminal cases, had every incentive to do so, and enjoyed the full array of criminal procedural protections. Strong had no such opportunity, since he died during – and because of – Dudley's and Givens's criminal conduct. Nothing about these circumstances comes anywhere close to the "compelling showing of unfairness" required to avoid estoppel. Talarico v. Dunlap, 177 Ill. 2d 185, 196 (1997). On the contrary, the only potential unfairness in this scenario would be to require the City to relitigate facts conclusively determined by a criminal jury, which would otherwise be barred under a straightforward application of collateral estoppel, merely because one participant in the crime was not – indeed, could not be – prosecuted. This argument should be rejected and summary judgment reinstated for the City on Dudley's and Givens's claims.[4]

II. THE CITY IS ENTITLED TO JUDGMENT ON STRONG'S CLAIMS.

As we explained, City Br. 29-32, Strong's choice to pursue claims that the officers' conduct was *both* intentionally and recklessly willful and wanton

[4] Plaintiffs also argue that the City cannot claim that reckless willful and wanton conduct bars a contribution defense. Givens Br. 28-29. That is not our argument.

made it necessary to have special interrogatories distinguishing intentional from reckless conduct. The trial court followed this court's decision in Poole and the Notes on Use in IPI 14.01 and gave the jury interrogatories to ensure that its findings were clear. The interrogatories were necessary under Poole, in proper form, and unambiguous. And the jury's answers to those interrogatories entitled the City to judgment on Strong's claims.

A. The Interrogatories Were Necessary Under Poole.

Because Strong alleged two types of willful and wanton conduct, and the City raised the defense of contributory willful and wanton conduct, multiple verdicts were possible. A43; C. 1629. Following Poole and the IPI, the circuit court gave the jury special interrogatories distinguishing between the two forms of willful and wanton conduct. A43; C. 1629.

Strong argues that the interrogatories were unnecessary "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 Br. 34. But none of that served the same function as the interrogatories, which was to make clear whether the jury found the defendant to have engaged in reckless conduct, intentional conduct, or neither. Strong insisted on bringing two different claims, one based on reckless conduct and the other based on intentional conduct, R. 1947 (68:4-6); R. 2353 (8:5-24); but each of those theories had different ramifications for defendant's liability and claims for contribution. Thus, even

if, as Strong asserts, "there was an abundance of trial testimony regarding the police's recklessly willful and wanton conduct," id. at 33, the trial court still needed to determine what the jury found. And the IPI states that interrogatories may be used to clarify the jury's findings in this situation. The circuit court's decision to give those interrogatories was sound. Strong suggested no viable alternative before trial and suggests none now.

B. Strong Waived Any Objection To The Form Of The Interrogatories, Which Were Proper Regardless.

Strong argues that the interrogatories were impermissible because they were in improper form, Givens Br. 35-38, but he waived any objection to the interrogatories' form by failing to object during the jury instruction conference. "It is beyond dispute that a failure to specifically object to a special interrogatory when proffered at the instruction conference will ordinarily waive any claim of error in the giving of that special interrogatory." Price v. City of Chicago, 2018 IL App (1st) 161599, ¶ 22 (quotation omitted). Furthermore, "[a] general objection to instructions, without specification, does not preserve the claimed error." People v. Thomas, 215 Ill. App. 3d 751, 760 (1st Dist. 1991). And objections made in a post-trial motion are not preserved for review. Palanti v. Dillon Enterprises, 303 Ill. App. 3d 58, 64 (1st Dist. 1999).

Strong concedes that "objections to form" can be "forfeited," Givens Br. 48, but denies having done so here. Strong insists his counsel "asserted her objections to the special interrogatories on multiple occasions." Givens Br.

45; id. at 12 ("Plaintiffs' counsel objected to the form and substance of these interrogatories during the jury instructions conference."); id. at 42 ("This objection, along with plaintiffs' other objections to the special interrogatories, were summarily shot down by the trial court."). In fact, none of the record citations Strong provides, Givens Br. 45-46 (R. 1999, R. 2359, R. 2565-66, R. 2616-17, C. 1762, C. 2174, C. 2246), shows he made any specific objection before the case was submitted to the jury to the interrogatories that were given. Instead, they show:

- R. 1999 (120:14-19) – Strong's counsel objected to an interrogatory, and the court acknowledged the objection. R. 2000 (121:4-5). That interrogatory was not given to the jury.
- R. 2359 – Strong's counsel said, "I think we are setting this verdict form up for failure." The court asked for a solution: "Well what do you want me to do? You guys are going over two different theories, and I'm trying to let you do it. I don't know what else to do." Strong offered no suggestion.
- R. 2361 – The parties discussed a jury instruction, not the special interrogatories.
- R. 2565 – The parties discussed the jury instructions, and the cited portion includes no statement by Strong's counsel.

The other objections were raised too late – after the jury had returned a verdict and answered the special interrogatories. See R. 2616 (in discussion *after* the verdict, Strong's counsel denies waiving an objection to the interrogatories but points to no specific objection made); C. 1762 (Strong's post-trial motion); C. 2174 (Strong's reply in support of post-trial motion); C. 2246 (Strong's post-trial motion). None of this demonstrates that the trial

court "shot down" other objections, as Strong claims.

Attempting to evade waiver, Strong argues that "evolution of an objection is permitted," citing Price as support. Givens Br. 47. Strong again badly misrepresents the case law. The cited paragraph addresses, not objections to special interrogatories, but whether the plaintiff "argued a different theory of the case on appeal than presented to the jury." 2018 IL App (1st) 161599, ¶ 49. When Price discusses *special interrogatories*, it rejects the argument Strong makes here that a general objection preserves a claim of error. See id. ¶ 22.

Finally, Strong asserts that "the court and counsel were . . . confused about the special interrogatories." Givens Br. 42. That only underscores counsel's responsibility to make specific objections at the appropriate time. If Strong's attorneys were confused, they should have researched the issue and offered a viable alternative to clarify any confusion *before* the interrogatories were given to the jury. This court should deem Strong's objections to the form of the interrogatories waived. His gamesmanship in making those objections only after losing at trial is unfair and exactly what the waiver doctrine is designed to prevent.

Waiver aside, the special interrogatories were in proper form, as we have explained. City Br. 32-34. They each related to an ultimate issue of fact, and a response to each interrogatory would be inconsistent with one of the three possible general verdicts the jury could have rendered. The

interrogatories used simple, unambiguous language based on the tendered jury instructions.

Strong asserts that the interrogatories were "impermissibly compound" because they asked whether the use of force was unjustified and either recklessly or intentionally willful and wanton; he contends that "[c]ompound special interrogatories cannot control a general verdict." Givens Br. 35 (citing Simmons v. Garces, 198 Ill. 2d 541, 563 (2002)). Simmons does not say that. It says an interrogatory "should be a single question," 198 Ill. 2d at 563, but espouses no blanket rule that every interrogatory that includes a conjunction must automatically be disregarded. And Strong concedes that interrogatories with multiple elements were given in Dynek v. City of Chicago, 2020 IL App (1st) 190209, and McCallion v. Nemlich, 2021 IL App (1st) 192499-U, Givens Br. 35, which indicates that no absolute rule forbids multiple concepts in a single question.[5] Furthermore, Simmons explains that "[a] special interrogatory is to be read in context with the court's other instructions to determine how it was understood and whether the jury was confused." 198 Ill. 2d at 563. Here, when the interrogatories are read together with the jury instructions and the parties' explanations to the jury, there is no reason to think the jury was confused.

Strong also argues that the "interrogatories violated the rule against

[5] Strong faults the city for citing McCallion, id. at 35, 49, but he acknowledges that Ill. Sup. Ct. Rule 23 allows its citation, id. at 49, and he does not challenge its reasoning.

piggy-backing" because "[d]efendant admits" they control the verdict only if "read 'together.'" Givens Br. 37 (citing City Br. 43). But Strong deliberately misquotes our brief. We did not say the interrogatories had to be "read together" to control a verdict. We explained that each interrogatory controlled *one* of the three possible verdicts the jury could have rendered. City Br. 33, 43. This was not "piggy backing." It was a situation necessitated by Strong's own refusal to narrow his claims to one type of willful and wanton conduct. A special interrogatory is proper if the jury's response "could serve to test some general verdict." Eaves v. Hyster Co., 244 Ill. App. 3d 260, 266 (1st Dist. 1993). Where the plaintiff has asserted multiple claims, multiple special interrogatories are permissible. Id. at 267.

In sum, special interrogatories #1 and #2 were in proper form, and Strong waived any argument otherwise.

C. The Interrogatories Were Irreconcilable With The General Verdict.

The court's role, in reviewing special interrogatories, is not to weigh the evidence, but to determine whether any "reasonable hypothesis exists that allows the special finding to be construed consistently with the general verdict," such that the two "are not absolutely irreconcilable." Simmons, 198 Ill. 2d at 556 (quotation omitted). That does not mean, as Strong suggests, that "any rationale" will do. Givens Br. 42. The word "reasonable" is key: the court has no license to concoct implausible interpretations in order to reconcile an interrogatory with the general verdict. Here, especially given

the parties' trial presentations, no *reasonable* hypothesis reconciles the special findings with the general verdict.

First, as we explained, City Br. 42-43, interrogatory #1 was a proper statement of intentional willful and wanton conduct. Strong insists that the interrogatory was too "narrow" because it referred to Strong, not the occupants of the van. Givens Br. 39-40. But the interrogatory appropriately tested whether the City's officers specifically intended to harm Strong, as required to hold them liable for intentional willful and wanton conduct.

At any rate, it is the jury's answer to interrogatory #2 that is inconsistent with the general verdict. It found that the officers were not recklessly willful and wanton. Strong argues that interrogatory #2 was "ambiguous" because "a reasonable jury could have concluded that" it referred to "the safety of possible passersby or innocent bystanders," not "the occupants of the van." Givens Br. 40-41. That is implausible. City Br. 44-46. Indeed, Strong's argument borders on bad faith. He claims that "the jury would have been more likely to think Special Interrogatory 2 was intended to specifically *exclude* David Strong." Givens Br. 41. But again, City Br. 45-46, the interrogatory must be viewed in the context of the parties' trial presentations, Simmons, 198 Ill. 2d at 563, and the record here is plain. Strong's counsel told the jury that they should answer "yes" to interrogatory #2 because "there was a conscious disregard for *Mr. Strong's safety* that caused his injury." R. 2390 (emphasis added). In light of his own statements

to the jury, Strong's attempt to construe the interrogatory as ambiguous after the fact is frivolous.

Finally, the appellate court improperly justified disregarding the jury's special findings by evaluating the evidence itself to conclude that both parties were recklessly willful and wanton. City Br. 46; A25; Givens, 2021 IL App (1st) 192434, ¶ 55. When presented with a motion for judgment on the jury's special findings, the court's task is *not* to weigh the evidence, but to determine whether the special findings are irreconcilable with the verdict. E.g., Simmons, 198 Ill. 2d at 556. For the court to review the evidence itself and conclude that it supported the general verdict defeats the purpose of special interrogatories. Strong admits that the appellate court "found that the manifest weight of the evidence supported the general verdict," Givens Br. 45, and argues that this was proper, id. at. 34. But the court was charged with evaluating consistency between the verdict and the interrogatories, *not* deciding whether the verdict was contrary to the manifest weight of the evidence. Even Blakey v. Gilbane Building Corp., 303 Ill. App. 3d 872 (4th Dist. 1999), which Strong cites, Givens Br. 34, distinguishes the question whether "a special interrogatory was not properly given," from whether the resulting verdict "was contrary to the manifest weight of the evidence," 303 Ill. App. 3d at 882.

The interrogatory answers were irreconcilable with, and control, the general verdict, entitling the City to judgment on Strong's claims.

D. The Appellate Court Erred By Relying On The Amended Special Interrogatory Statute.

The appellate court justified disregarding the special interrogatories by referencing "the new iteration of the statute on special interrogatories," which "applies to trials commencing on or after January 1, 2020." A27; Givens, 2021 IL App (1st) 192434, ¶ 58. Strong insists the amended statute "reflects legislative intent regarding special interrogatories." Givens Br. 49. But, as we explained, City Br. 47, the amendment reflects the legislature's intent to *change* the interrogatory procedure as of January 1, 2020, *after* Strong's trial. That reinforces that, at the time of the trial, if the jury's special findings conflicted with its general verdict, the special findings controlled. The amendment does not justify disregarding the special findings, which require judgment for the City on Strong's claims.

CONCLUSION

For the foregoing reasons, the appellate court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,976 words.

/s/Ellen W. McLaughlin
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CERTIFICATE OF FILING/SERVICE

I certify under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing brief was electronically filed with the office of the Clerk of the Court using the File and Serve Illinois system and served via email, to the persons named below at the email addresses listed, on October 12, 2022.

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