

MEDICAL DEFENSE AND HEALTH LAW

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This article discusses a recent Illinois Appellate Court decision regarding the form of special interrogatories as well as their potential impact in the event of an adverse verdict.

Special Interrogatories: Be Careful What You Ask For

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A medical malpractice trial is concluded by the jury's return to the court room with a general verdict in favor of either the defendant or the plaintiff. However, under Illinois law, any lawyer trying a medical malpractice case is entitled to ask that the jury also make specific findings on ultimate issues in the case, such as whether a given defendant was negligent or whether a given defendant was a proximate cause of the injury or death at issue through the use of special interrogatories.

The use of special interrogatories is one of the most effective tools to reverse an adverse result. There are at least four advantages to using special interrogatories: 1) they provide a method of checking the correctness of the general verdict; 2) they compel the jury to give detailed consideration to important issues; 3) they may show that some errors were not prejudicial and provide a basis for curing others; and 4) they may have a salutary effect on the morale of the jury. See Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296, 301 (1925). Testing the veracity of a jury's verdict, however, does not come easily and there are many pitfalls associated with their use. The Illinois Appellate Court, Second District, recently reminded us of this in *Stanphill v. Ortberg*.

Background

In *Stanphill v. Ortberg*, 2017 IL App (2d) 161086, Keith Stanphill suspected that his wife, Susan, was having an extramarital

affair. After finding romantic e-mails to his wife from one of her co-workers, he committed suicide. During the last month of his life, Keith lost nearly 15 pounds, walked around in a lethargic state, was pale, his eyes were sunken, his work performance slipped, and he had effectively withdrawn from participation in the church of which he had been a lifelong member. Susan believed Keith needed help and arranged for him to see a counselor.

Keith met Lori Ortberg, a licensed clinical social worker who was employed by Rockford Memorial Hospital. Ortberg's responsibilities included assessing whether her patients posed threats of imminent suicide or potentially lethal violence. Ortberg had Keith complete a questionnaire as to his psychological condition. On that questionnaire, Keith indicated that he had (1) feelings of harming himself or others most of the time; (2) feelings of sadness most of the time; (3) sleep changes most of the time; (4) appetite changes all of the time; (5) feelings of anxiety, nervousness, worry, and fear all of the time; (6) sudden unexpected panic attacks most of the time; and (7) feelings of being on the verge of losing control most of the time. Keith also indicated on the questionnaire that he was seeing a primary care physician for "mood." After meeting with Ortberg for a one hour assessment, she charted he was experiencing adjustment disorder and was not suicidal in spite of the fact that he told her he thought a lot about harming himself or others most of the time. Nine days later

he killed himself in his garage with carbon monoxide from his car. Plaintiff, Zachary Stanphill, Keith's son and the administrator of his estate, subsequently filed a wrongful death and survival action against Ortberg and Rockford Memorial Hospital.

At trial, plaintiff presented experts who testified Ortberg was negligent for not doing a more thorough assessment, that it was reasonably foreseeable at the time of her interview that the patient was at high risk of suicide, and that Ortberg misdiagnosed Keith with adjustment disorder rather than major depression.

In response, defendants presented Terri Lee, a licensed clinical social worker, who testified that Ortberg conducted a thorough assessment and complied with the standard of care for a reasonably careful licensed clinical social worker in her one-hour counseling session with Keith. Lee believed that Keith was not suicidal on the day he met with Ortberg because he scheduled a follow-up date with the counselor Ortberg recommended. Lee testified that someone who is planning to kill himself does not make an appointment for a future date.

Defendants also presented Dr. Steve Hanus, a psychiatrist, who said Keith's suicide was not reasonably foreseeable because (1) Ortberg specifically documented that Keith had no ideas of suicide; (2) he had not made a suicide attempt before; (3) there was no family history of suicide; (4) the EAP documentation demonstrated that Keith was working; (5) he was religious and

receiving pastoral care; (6) he was living with his in-laws, with whom he had a close relationship; (7) he was seeing his children every day; (8) he was keeping up with his hygiene; (9) at the end of the EAP session, he had agreed to outpatient therapy; and (10) he had actually scheduled a follow-up appointment.

At a jury instruction conference, the defendants asked the court to submit the following special interrogatory to the jury:

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

Stanphill, 2017 IL App (2d) 161086, ¶ 16. The defendants drew this wording from the First District's decision in *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085. The jury returned a verdict of almost \$1.5 million in plaintiff's favor together with a "No" answer to a special interrogatory.

The trial court subsequently entered judgment in favor of the defendants, based on the answer to the special interrogatory. After hearing the plaintiff's post trial motion, the trial court ruled it had to follow *Garcia*, a nursing home suicide case in which the first district in 2011 approved of the same language in a special interrogatory that produced a defense verdict. In the opinion, however, the trial court criticized the *Garcia* decision because it approved a special interrogatory that was confusing and

misleading to the jury. In doing so, the trial court suggested that

if we're going to give any kind of a special interrogatory in a suicide case where the defendant is allegedly negligent for not foreseeing the suicide, that the special interrogatory needs to not have the defendant's name in it. It needs to say was it foreseeable or was it reasonably foreseeable to a reasonably careful social worker that so and so would commit suicide on such and such a date.

Stanphill, 2017 IL App (2d) 161086, ¶ 19.

The plaintiff appealed, arguing that the jury's answer to the special interrogatory was not irreconcilable with the general verdict or, alternatively, that the special interrogatory should never have been given. The Second District agreed and reversed the trial court and remanded with directions to enter judgment for the plaintiff on the general verdict.

Appellate Court: The Special Interrogatory Was Not Inconsistent with the General Verdict

The appellate court began its analysis by reciting that special interrogatories are designed to be the "guardian of the integrity of a general verdict in a civil jury trial," and they "test the general verdict against the jury's determination as to one or more

specific issues of ultimate fact." In fact, an answer to a special interrogatory controls the judgment when it is "inconsistent" with the general verdict. In order to establish this, the special interrogatory must be "clearly and absolutely irreconcilable with the general verdict."

The appellate court found that this special interrogatory answer was not necessarily inconsistent with the general verdict because here the jury could conclude that because she was negligent in the performance of her duties when she counseled Keith on September 30, 2005, it was not reasonably foreseeable to *her* that Keith would commit suicide 9 days later. Consequently, the special interrogatory and the general verdict were not clearly and absolutely irreconcilable and the trial court should have entered judgment in favor of the plaintiff.

Appellate Court: The Special Interrogatory Was Not in the Proper Form

Even if the appellate court found that the special interrogatory was inconsistent with the general verdict, the appellate court would still hold that the answer should not prevail over the general verdict because the special interrogatory was not in the proper form. In reaching this conclusion, the appellate court recited that proximate cause has two requirements: cause in fact and legal cause. Legal cause, which was at issue in this case, is established if an injury was foreseeable as the type of harm that a *reasonable person* would expect to see as

a likely result of his conduct. Moreover, although the foreseeability of an injury will establish legal cause, the extent of the injury or the exact way in which it occurs need not be foreseeable.

The special interrogatory in this case, however, was not in the proper form, because it did not ask whether Keith's suicide was foreseeable as the type of harm that a reasonable person (or a reasonable licensed clinical social worker) would expect to see as a likely result of her conduct. Rather, the interrogatory asked whether Keith's suicide was foreseeable to Ortberg. By substituting "Lori Ortberg" for a "reasonable person" or a "reasonable licensed clinical social worker," the interrogatory distorted the law and became ambiguous and misleading to the jury. The appellate court reasoned that although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to the plaintiff's theory did not act reasonably) would have. As such, the appellate court concluded the interrogatory was confusing and should not have been given.

In so ruling, the appellate court further distinguished the *Garcia* special interrogatory because *Garcia* did not address whether a special interrogatory was proper when it asked if suicide was foreseeable through the eyes of a specific person. Since *Garcia* did not squarely address the argument raised here, the

appellate court did not need to consider it and could reverse the trial court's decision on this basis as well.

Conclusion

As illustrated by this decision, great care needs to be taken when drafting special interrogatories. Not only does the appropriate form have to be used, but the interrogatory must be worded in such a way that if answered, would be clearly and absolutely irreconcilable with the general verdict. If it is not, there is a significant likelihood of reversal on appeal.

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