

## Health Law

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# Recent Appellate Decision Emphasizes Need for Caution in Drafting Special Interrogatories

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Under appropriate circumstances, special interrogatories can be valuable tools to employ at trial. However, in drafting a special interrogatory, defense counsel must carefully choose the language of the interrogatory. In its recent decision in *Stanphill v. Ortberg*, 2017 IL App (2d) 161086, the Illinois Appellate Court Second District criticized a special interrogatory submitted by the defense, which ultimately resulted in a defense verdict being entered by the trial court. In overturning this result, the appellate court provides direction that defense counsel should consider before submitting special interrogatories in future cases.

## Background

Keith Stanphill suspected that his wife was having an extramarital affair. *Stanphill*, 2017 IL App (2d) 161086, ¶ 4. Ultimately, after finding romantic e-mails to his wife from one of her co-workers, he committed suicide. *Id.* ¶ 9.

During the last month of his life, Keith lost nearly 15 pounds, walked around in a lethargic state, was pale, had sunken eyes, his work performance slipped, and he had effectively withdrawn from participating in the church where he had been a lifelong member. Keith's wife believed he needed help and arranged for him to see a counselor. *Id.* ¶ 4.

Keith was seen by Lori Ortberg, a licensed clinical social worker. Part of Ortberg's responsibilities was to assess whether her patients posed threats of suicide or lethal violence. *Id.* ¶ 5. To do so, Ortberg had Keith complete a questionnaire regarding his psychological condition. In answering the questionnaire, Keith indicated that he had feelings of harming himself or others most of the time. *Id.* He also reported feelings of sadness, sleep changes, sudden unexpected panic attacks and feelings of being on the verge of losing control "most of the time" and appetite changes, feelings of anxiety, nervousness, worry, and fear "all of the time." *Id.* Keith also stated he was seeing a primary care physician for his mood. *Id.* After meeting with Ortberg for a one-hour assessment, she diagnosed Keith with "adjustment disorder with depressed mood" but did not note on his chart that he was suicidal, despite the fact that he told her he thought a lot about harming himself or others. *Id.* ¶ 6. Nine days later, Keith committed suicide. *Id.* ¶ 9.

Keith's son, Zachary Stanphill, subsequently filed a wrongful death and survival action against Ortberg and her employer. *Id.* ¶ 10. At trial, the plaintiff's expert social worker and psychiatrist testified Ortberg was negligent for not doing a more thorough assessment. *Id.* ¶ 11. The experts testified that it was reasonably foreseeable at the time of Ortberg's interview that Keith was suicidal and that Ortberg misdiagnosed Keith with adjustment disorder rather than major depression. *Id.* ¶¶ 11, 14.

The defendants presented a licensed clinical social worker, who testified that Ortberg conducted a thorough assessment and complied with the standard of care in her counseling session with Keith. She testified Keith was not suicidal on the day he met with Ortberg because he scheduled a follow-up appointment with another counselor Ortberg

recommended. She testified that someone who is planning to kill himself does not make a follow-up appointment. *Id.* ¶ 12.

The defendants' expert psychiatrist testified that Keith's suicide was not reasonably foreseeable because Ortberg specifically documented that Keith had no suicidal ideation, had never attempted suicide before, had no family history of suicide, was working, was religious and receiving pastoral care, was living with his in-laws with whom he maintained a close relationship, saw his children every day, was keeping up with his hygiene, had agreed to outpatient therapy, and had scheduled a follow-up appointment. *Id.* ¶ 15.

At trial, the defendants submitted a special interrogatory, which read:

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

*Id.* ¶ 16. The defendants relied upon *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085 in crafting the language of the special interrogatory. *Stanphill*, 2017 IL App (2d) 161086, ¶ 16. After deliberation, the jury returned a general verdict in favor of the plaintiff but answered "No" to the special interrogatory. *Id.* ¶ 18.

Because of the special interrogatory answer, the trial court entered judgment in favor of the defendants. *Id.* In denying the plaintiff's motion to reconsider, the trial court explained that it was bound by the decision in *Garcia*, a nursing home suicide case in which the appellate court approved of the same special interrogatory language. *Id.* ¶ 19. However, the trial court criticized the *Garcia* decision for approving a special interrogatory that was confusing and misleading to the jury, opining that:

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

*Id.* ¶ 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. *Id.* ¶ 22. Ultimately, the appellate court agreed with both contentions.

### Whether the Special Interrogatory was Inconsistent with the General Verdict

The appellate court began its analysis by recounting that special interrogatories are designed to be the "guardian of the integrity of a general verdict in a civil jury trial," and "test the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Id.* ¶ 25 (quoting *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002)). A special interrogatory answer controls the judgment when it is inconsistent with a general verdict. *Stanphill*, 2017 IL App (2d) 161086, ¶ 25 (citing 735 ILCS 5/2-1108). However, the special interrogatory must be "clearly and absolutely irreconcilable with the general verdict" to control. *Stanphill*, 2017 IL App (2d) 161086, ¶ 25 (quoting *Simmons*, 198 Ill. 2d at 556).

Here, the appellate court found the special interrogatory answer was “not necessarily inconsistent” with the general verdict. *Stanphill*, 2017 IL App (2d) 161086, ¶ 29. The jury could have concluded that because Ortberg was negligent when she counseled Keith, it was not reasonably foreseeable to *her* (rather than a reasonably careful social worker) that Keith would commit suicide nine days later. *Id.* Therefore, 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. *Id.*

### Whether the Special Interrogatory was in Proper Form

Going further, the appellate court also found the special interrogatory was not in proper form. *Id.* ¶ 30. In reaching this conclusion, the court pointed out that proximate cause has two requirements: cause in fact and legal cause. *Id.* ¶ 32. Legal cause, at issue in this case, is established if an injury was foreseeable to a *reasonable person* as a likely result of his conduct. However, “the extent of the injury or the exact way in which it occurs need not be foreseeable.” *Id.*

The Second District found the special interrogatory was not in proper form because it did not ask whether Keith’s suicide was foreseeable to a *reasonable person* or a *reasonable* licensed clinical social worker. *Id.* ¶ 33. Instead, the special interrogatory asked whether Keith’s suicide was foreseeable to Ortberg. *Id.* Because the special interrogatory substituted “Lori Ortberg” for a “reasonable person” or a “reasonable licensed clinical social worker,” it distorted the law and was ambiguous and misleading to the jury. *Id.* The court stated that although a reasonable person or a reasonable licensed clinical social worker might have foreseen Keith’s suicide, it does not mean Ortberg would have because the plaintiff’s theory was that Ortberg did not act reasonably. *Id.* Therefore, the court determined the special interrogatory was confusing and should not have been given. *Id.*

### Conclusion

The result reached in *Stanphill* is unfortunate because the defense attorneys relied upon published case law in crafting the special interrogatory. Nevertheless, defense counsel should carefully consider this decision when drafting special interrogatories. If the special interrogatory is not in proper form, or if an answer to a special interrogatory might be ambiguous, the special interrogatory may not be effective.

### About the Authors

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