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Medical Malpractice Update

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Special Interrogatories in Suicide Cases: Objective vs. Subjective Standard

Special interrogatories serve as "checks" on general verdicts. *Simmons v. Garces*, 198 Ill. 2d 541, 566 (2002). The jury is asked to "determine one or more specific issues of material fact" in a special interrogatory, and the jury's response is compared to the jury's general verdict to ensure both are consistent. *Simmons,* 198 Ill. 2d at 555. Often, the jury receives special interrogatories over the plaintiff's objection. *See*, *e.g.*, *id*. at 552-53, *Hooper v. Cty. of Cook*, 366 Ill. App. 3d 1, 5 (1st Dist. 2006). Section 2-1108 of the Code of Civil Procedure, which codifies the Illinois rule regarding special interrogatories, provides:

> 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 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.

Ultimately, the jury's answer to a special interrogatory must be reconcilable with the general verdict, or the verdict will be overturned. *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 46 (overruled on other grounds). The Illinois Supreme Court recently issued an opinion on the form of special interrogatories in suicide cases. *Stanphill v. Ortberg*, 2018 IL 122974.

Trial Evidence

In *Stanphill v. Ortberg*, the plaintiff brought a wrongful death action against a social worker who evaluated his father, Keith Stanphill, approximately six days before he committed suicide. *Stanphill*, 2018 IL 122974, 3 ¶. The decedent's wife testified at trial that that he had never shown any mental health concerns until April 2005, which coincided with her disclosure to the decedent that she was having a relationship with another man. *Id*. ¶ 4. In August 2005, the decedent learned of romantic emails exchanged between his wife and the other man, after which he lost weight and stopped sleeping. *Id*. ¶ 5. His wife testified that he "moped around" and became less productive at his sales job. *Id*.

In mid-September 2005, the decedent agreed to see a counselor through his wife's employee assistance program. *Id*. ¶ 7. He saw the defendant social worker on September 30, 2005, for the purposes of evaluation and referral. *Id*., f.n. 2.

The visit lasted one hour. *Id*. ¶ 3. The social worker did not have a specific recollection of this visit, and at trial her testimony relied upon her usual customs, practices, and the notes and records kept in her file. *Id*. ¶ 10. The social worker provided the decedent a questionnaire to complete, and he indicated through his answers that most of the time, he 1) felt like harming himself or others; 2) felt sad; 3) had "sleep changes"; 4) felt like he was on the "verge of losing control"; and 5) had sudden panic attacks. *Id*. ¶ 11. He further noted that *all* of the time, he had appetite changes and felt anxious, nervous, worried, and afraid. *Id*. (emphasis added).

The social worker testified that she reviewed the decedent's answers with him. *Id*. She noted that he had lost weight, but also that he had seen his physician who prescribed an antidepressant. *Id*. She testified that she discussed his questionnaire answer pertaining to self-harm because she noted in her file that the decedent "denied having a suicide plan or any suicidal or homicidal ideation." *Id*. ¶ 12. Consequently, she concluded that he was "not at imminent risk of harming himself." *Id*. She testified that if she believed he was at imminent risk of committing suicide, it would have been her duty to see that either the police or one of the decedent's family members escorted him to the emergency room. *See, id*. ¶ 13.

The social worker then referred the decedent to another social worker who specialized in marital issues. *Id*. ¶ 7. On October 4, 2005, the decedent scheduled an appointment with the marital social worker for October 11, 2005. *Id*. 12 ¶. However, on or around the evening of October 6, 2005, the decedent committed suicide. *Id*. ¶ 9.

Expert Testimony

The plaintiff produced two retained experts at trial: a psychiatrist and a licensed clinical social worker. *Id*. ¶ 16. The psychiatrist opined that the decedent was at "imminent risk of committing suicide" when the defendant social worker evaluated him. *Id*. The plaintiff's psychiatrist further testified that the defendant social worker incorrectly diagnosed the decedent with adjustment disorder and also neglected to appreciate the severity of his depression. *Id*. According to the plaintiff's psychiatrist, the defendant social worker's alleged failure to diagnose the decedent proximately caused his suicide. *Id*. The plaintiff's psychiatrist further opined that had the defendant social worker recognized the decedent as suicidal, he would have received treatment at an emergency room or from a psychiatrist on September 30, 2005, which would have prevented his suicide on or about October 6, 2005. *Id*.

On cross-examination, defense counsel asked the plaintiff's psychiatry expert "Do you think it was reasonably foreseeable to [the defendant social worker] that Mr. Stanphill would commit suicide about a week later?" *Id*. ¶ 17. The psychiatrist responded, "No, it wasn't that way to her, but it should have been that way to her, based on the information she had." *Id*. In contrast, the defense produced a psychiatry expert who opined that the decedent was not suicidal on September 30, 2005. *Id*. ¶ 18. The defendant's expert further opined that if the defendant social worker had referred the decedent to a psychiatrist or emergency room on that date, whomever evaluated him would have reached the same conclusion and therefore the decedent's suicide on October 6, 2005 would not have been prevented. *Id*.

The Plaintiff's social worker expert testified that the defendant failed to appropriately assess the decedent on September 30, 2005 and as a result, failed to determine he was suicidal and refer him for further treatment. *Id*. ¶ 14. The defense proffered their own social worker expert, who testified that the defendant's assessment of the decedent was appropriate, as shown by the fact that he made a follow-up appointment for counseling as recommended. *Id*. ¶ 15. The defendant's social worker expert further testified that had the decedent been suicidal on September 30, 2005, he would not have made plans to see a counselor in the future. *Id*.

Jury Instructions and Verdict

At the close of evidence, the trial court instructed the jury via Illinois Pattern Jury Instruction No. 105.01, titled "Professional Negligence-Duty":

> A licensed clinical social worker must possess and use the knowledge, skill, and care ordinarily 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 evidence, is "professional negligence."
>
> The phrase "deviation from the standard of care" means the same thing as "professional negligence."
>
> The law does not say how a reasonably careful licensed 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.

Ill. Pattern Jury Instruction No. 105.01 (2011).

The jury also received a special interrogatory proffered by the defense, which read "Was it reasonably foreseeable to [the defendant social worker] on September 30, 2005, that [the decedent] would commit suicide on or before October 9, 2005?" *Id*. ¶ 20.

While the jury ultimately entered a general verdict in favor of the plaintiff, it answered the special interrogatory in the negative. *Id*. ¶ 22. The trial court concluded that the general verdict and special interrogatory answer were inconsistent, and overturned the general verdict in favor of the plaintiff. *Id*. ¶ 23. The appellate court reversed the trial court's decision and the appeal to the Illinois Supreme Court followed. Briefing before the supreme court centered on the appellate court's earlier decision in *Garcia v. Seneca Nursing Home,* 2011 IL App (1st) 103085. *Id*. ¶ 20, ¶ 29, ¶ 38.

Garcia v. Seneca Nursing Home and *Hooper v. County of Cook*

In *Garcia*, the plaintiff's decedent fell or jumped from a fifth-floor window of the nursing home in which he resided. *Garcia,* 2011 IL App (1st) 103085, ¶ 1. The decedent's diagnoses included paranoid schizophrenia and multiple conditions that caused him to be chronically restless and twitch involuntarily. *Id*. ¶ 4. The window to his room was covered with a screen and opened approximately eight inches. *Id*. ¶ 5. On several occasions and to at least two witnesses, he stated that he "wanted to 'go home'" and "get out of [the nursing home]." *Id*. ¶ 6. One staff member noted two instances where he "tried to climb the window." *Id*. ¶ 7. Approximately nine months after admission to the nursing home, staff members discovered the decedent's body on the ground below his window. *Id*. ¶ 1, ¶ 9. The window was open and the screen removed. *Id*. ¶ 9.

At trial, the jury received a special interrogatory that read, "Prior to [the decedent's] death, was it reasonably foreseeable to [the defendant nursing home] that he would commit suicide or act in a self-destructive manner on or before

[the date of his death]?" *Id*. ¶ 10. The jury answered no to the special interrogatory, but returned a general verdict in favor of the plaintiff. *Id*. ¶ 11. The trial court ultimately determined the general verdict could not be reconciled with the jury's answer to the special interrogatory and entered judgment in favor of the defendant, which the plaintiff appealed. *Id*. ¶ 13.

On appeal to the Illinois Appellate Court First District, the plaintiff argued that the special interrogatory did not allow the jury to consider whether the decedent's death was an accident, i.e., whether he was trying to escape the nursing home. *Id*. ¶ 37. The appellate court reasoned that the special interrogatory *did* allow the jury to consider whether the decedent's death resulted from a botched escape attempt because the interrogatory asked if it was foreseeable the decedent would "act in a self-destructive manner", in addition to asking whether it was foreseeable he would commit suicide. *Id*. ¶ 42. Therefore, the special interrogatory was appropriate and the jury's answer to it was irreconcilable to the general verdict. *Id*. ¶ 46. The First District affirmed the trial court's decision to enter judgment in favor of the defendant. *Id*.

In reaching its decision in *Garcia*, the appellate court noted that the special interrogatory given to the jury was identical to a jury instruction given in *Hooper v. Cty. of Cook*, 366 Ill. App. 3d 1 (1st Dist. 2006). *Id*. ¶ 46. *Hooper* was also a wrongful death suicide case where the decedent hanged herself while hospitalized. *Hooper*, 366 Ill. App. 3d at 4. The *Hooper* defendants, which included a hospital, psychiatrist, and a nurse, proffered a special interrogatory that asked, "Prior to the death of [decedent], was it reasonably foreseeable that she would commit suicide or act in a self-destructive manner on or before [her date of death]?" *Id*. at 3. The plaintiff argued that this interrogatory was improper because it did not account for the allegation that the defendants failed to prevent the decedent "from engaging in impulsive, unpredictable acts." *Id*. at 6.

The trial court refused to tender the instruction to the jury. *Id*. at 5. On appeal, the appellate court determined the interrogatory "was in the proper form" and should have been given to the jury, using similar reasoning to what was later employed by the *Garcia* court. *Id*. at 8. By framing the question "was it reasonably foreseeable that [the decedent] would commit suicide ***or*** act in a self-destructive manner", the special interrogatory encompassed all of the plaintiff's negligence allegations. *See id*. (emphasis added).

Garcia and *Hooper* Distinguished in *Stanphill*

In *Stanphill*, the special interrogatory used was nearly identical to the special interrogatory used in *Garcia*. *Stanphill,* 2018 IL 122974, ¶ 20. Specifically, the jury in *Stanphill* was asked whether it was "reasonably foreseeable to [defendant] on [the date the defendant evaluated him] that Keith Stanphill would commit suicide on or before [his date of death]?" *Id*. ¶ 21. The jury in *Garcia* was asked whether it was "reasonably foreseeable to [defendant] that [the patient] would commit suicide or act in a self-destructive manner on or before [the date of his death]?" *Garcia,* 2011 IL App (1st) 103085, ¶ 11.

While the appellate court had previously approved the special interrogatory used in *Garcia*, a new issue was raised in *Stanphill* that was not raised in either *Garcia* or *Hooper*. *See, Stanphill,* 2018 IL 122974, ¶ 36, ¶ 40, ¶ 41. In *Stanphill*, the special interrogatory that was previously affirmed by the *Garcia* decision employed a subjective standard, instead of an objective standard. *Id*. at ¶ 36, ¶ 40. The trial judge in *Stanphill* allowed the special interrogatory, finding that the court was bound by holding in *Garcia*. *Id*. ¶ 19. However, the trial court then advised counsel that the special interrogatory in a suicide case should not ask whether the defendant could reasonably foresee the ultimate harm that occurred, but whether a reasonable, similarly situated person would have foreseen that ultimate harm. *See, Stanphill v. Ortberg*, 2017 IL App (2d) 161086, ¶ 19. As the plaintiff's expert testified, there was no evidence to suggest that the defendant social worker

believed the decedent was suicidal on the day she assessed him, but the issue was whether a reasonable social worker *should have* determined he was suicidal on that date. *See, Stanphill,* 2018 IL 122974, ¶ 17 (emphasis added). The supreme court agreed, noting "a negligent defendant, by definition, does not foresee the likely result of her tortious conduct." *Id*. ¶ 36. If special interrogatories are phrased subjectively, then the answer to a special interrogatory will always be inconsistent with a general verdict where the jury finds in favor of the plaintiff. *See, id*.

The supreme court noted that the special interrogatory employed by *Garcia* was different to that given to the jury in *Hooper*. *Id*. at ¶ 41. While the *Garcia* special interrogatory was phrased in the subjective, the *Hooper* special interrogatory was phrased in the objective by asking "[p]rior to the death of [decedent], was it reasonably foreseeable that she would commit suicide or act in a self-destructive manner on or before [her date of death]?" *See, id*. The supreme court determined that to the extent *Garcia* was interpreted to hold that subjective special interrogatories are proper, it was overruled. *Id*.

In the dissent to the supreme court's opinion, Justice Garman agreed that special interrogatories should be phrased objectively, but pointed out that the particular interrogatory used in this case *was* objective. *Id*. ¶ 52 (emphasis added). Specifically, the interrogatory did not ask whether the defendant social worker foresaw the decedent's suicide, but rather asked if his suicide was *reasonably* foreseeable to her. *Id*. (emphasis added). Consequently, the dissent found that interrogatory did not misstate the law nor was it ambiguous. *Id*. ¶¶ 52, 55.

The Future of Special Interrogatories

From a defense standpoint, special interrogatories can be very helpful because they ensure that the jury understood the general instructions. To that end, a special interrogatory should be easy to understand, and not "repetitive, confusing, or misleading." *Jacobs v. Yellow Cab Affiliation, Inc*., 2017 IL App (1st) 151107, ¶ 124. Under the supreme court's decision in *Stanphill*, the interrogatory should also be objectively phrased. *Stanphill*, 2018 IL 122974, ¶ 41. For example, in a suicide case, the special interrogatory "Prior to the date of death, was it reasonably foreseeable that the decedent would commit suicide?" is more objective than if it is phrased "prior to the date of death, was it reasonably foreseeable to the defendant that the decedent would commit suicide?" *Id.* However, as pointed out by Justice Garman, a truly subjective special interrogatory would read "did the defendant foresee that the decedent would commit suicide?" *Id*. ¶ 52.

On February 7, 2019, the chair of the Illinois House of Representatives' Judiciary Committee (Civil) introduced a bill to repeal Section 2-1108 of the Code of Civil Procedure. H.B. 2233, 101st General Assembly, (Ill. 2019); Illinois General Assembly, http://www.ilga.gov (last visited March 26, 2019). If this bill is enacted as written, it will extinguish the use of statute-authorized special interrogatories in civil cases.

In the meantime, special interrogatories continue to serve an important check on the legitimacy of a jury's general verdict. When used in suicide cases against medical and mental health professionals, defense counsel's safest route is to submit an objectively-phrased special interrogatory to be read to the jury.

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