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Special interrogatories will be missed by both sides of the aisle

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When civil jury trials return in May, they will return largely without the use of special interrogatories. P.A. 101-184, which at the prompting of the plaintiffs’ bar effectively eliminated special interrogatories, but only applied to trials that commenced after Jan. 1, 2020. As there were few trials conducted before the March 17, 2020, trial shutdown, these forthcoming trials will be contended without a key tool for assisting the jury in getting to the truth and for the court to confirm the consistency of the jury’s verdict.

Courts and counsel will also not have the benefit of updated jury instructions to deal with these consequences of the amendment to 735 ILCS 5/2-1108 urged in this space on April 22, 2020.

Three recent decisions from the Illinois Appellate Court, *Mims v. Paintsil*, 2021 IL App (1st) 191285, *Kamin v. Country Casualty Insurance Company*, 2021 IL App (3d) 190275-U, and *Ghostanyans v. Goodwin*, 2021 IL App (1st) 192125, illustrate the utility of special interrogatories as well as a fundamental point of those who opposed the change to 735 ILCS 5/2-1108 urged: special interrogatories were available, and sometimes necessary, for both plaintiffs and defendants to prevail.

Mims concerned the alleged medical malpractice by a doctor caring for a patient, who suffered from a degenerative neurological condition that ultimately caused her death. 2021 IL App (1st) 191285, Para. 1-2. She had pressure sores resulting from the condition and an alleged lack of protective dressing that the plaintiff claimed was not reported by the defendant physician and that if the abuse and neglect was reported it would have been stopped by state regulators. *Id.* Para. 2, 46. The jury returned a complete defense verdict. *Id.* Para. 3. On appeal, the plaintiff contended only that the verdict on the survival count was error and that pain and suffering damages should have been awarded. *Id.* Para. 4-5.

However, the court held that in the absence of a special interrogatory offered by the plaintiff at trial, it would be impossible to tell if the jury decided for the defense on the basis that the death was caused by the underlying condition alone or if the jury found that the doctor simply did not violate the standard of care. The court stated “[b]ut since plaintiff failed to request a special interrogatory on this singular issue, we cannot set aside the jury’s general verdict based on that contention. ‘When there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the [plaintiff], having failed to request special interrogatories, cannot complain.’” *Id.* Para. 46.

In *Kamin*, an insurance coverage case arising out of a fire at a barn, the plaintiff received a verdict of \$198,837.45. 2021 IL App (3d) 190275-U, Para. 1. On post-trial motion the trial court reduced the verdict by \$28,850.70 to reflect that the insured used the barn for business, thereby excluding it from coverage, and because the jury had awarded more for business equipment than the policy allowed. *Id.* Para. 16. The defendant insurer appealed, arguing that a judgment notwithstanding the verdict should have been granted

because the plaintiff committed fraud by stating that he did not use the barn for business, the mortgage had been current since 2005, and his business did not include remodeling. Id. Para. 27.

In affirming the judgment, the court acknowledged that the plaintiff “admitted that he was ‘wrong’ when he told defendant that he did not use his barn for business and that he had not missed a mortgage payment on his home in the last five years.” Id. Para. 35. The court acknowledged that the plaintiff testified “that there was a difference between being ‘wrong’ and lying” and that “[t]he jury agreed, finding, in answering the special interrogatories, that plaintiff did not intentionally make material misrepresentations to defendant.” Id.

Ghostanyans is a prime example of one of the most fraught areas for jury instructions in Illinois and one in which special interrogatories would be particularly useful: sole proximate cause. This case concerned a severe brachial plexus injury caused by a shoulder dystocia. 2021 IL App (1st) 192125, Para. 5-7. The plaintiff sued both doctors involved in the delivery, but shortly before trial the plaintiff settled with the second doctor, who was ultimately able to deliver the child. Id. Para. 5.

At trial, the court instructed the jury on the long form of Illinois Pattern Instruction 12.04, but the short form of IPI 12.05 and issued a special interrogatory that “some person other” than the remaining defendant was the sole proximate cause of the plaintiff’s injury. Id. Para. 73, 81-84. The jury returned a defense verdict and answered the special interrogatory in the affirmative. Id. Para. 64. In this case, the special interrogatory was consistent with the finding of no liability of the remaining defendant doctor and served to properly check the veracity of the verdict. Had the jury answered the special interrogatory in the negative, the plaintiff might have had a very good basis challenge the verdict and get a new trial.

While the focus of the forthcoming trials will be on whether and how to conduct them in a safe fashion, the effective absence for the first time in over 150 years of special interrogatories as a tool in Illinois civil trials is also an issue for all civil litigators. Special interrogatories benefited both sides by assisting in ascertaining the truth and assured justice was done between the parties. These recent decisions demonstrate the fairness they imparted to plaintiffs and defendants, and civil justice in Illinois will suffer as a result.