[Cite as *Metter v. Konrad*, 2005-Ohio-4290.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85271

CHERYL METTER	:	
	:	
Plaintiff-appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
MICHAEL KONRAD, et al.	:	
	:	
Defendants-appellees	:	

DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 18, 2005
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga
	:	County Common Pleas Court
	:	Case Nos. 496593, 505557
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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KENNETH A. ROCCO, J.:

{¶ 1} Cheryl Metter, the plaintiff in these consolidated cases, appeals from a judgment entered on a jury verdict in her favor in the amount of $941.75 against defendant-appellees Michael Konrad and Richard Halleland. She argues that the court erred by failing to submit an interrogatory which required the jury to itemize the damages they awarded. She also asserts that the verdict contravenes the manifest weight of the evidence. We find no error in the proceedings below and affirm the judgment.

{¶ 2} In common pleas court case no. 496593, appellant alleged that she was injured on March 24, 2000, when the automobile she was operating was struck from the rear by an automobile operated by appellee Konrad. In case no. 505557, she alleged that she was injured again on June 4, 2000, when her vehicle was struck from the rear a second time, this time by a vehicle operated by appellee Halleland. The two cases were consolidated in the trial court and were tried together.

{¶ 3} Prior to trial, the court determined that appellant was not negligent in either collision. Both appellees admitted they

were negligent. The parties agreed that any injuries appellant suffered from the two collisions were indivisible and incapable of allocation. Therefore, the parties were prohibited from arguing that one appellee should be held liable for less than another; any liability would be joint and several.

{¶ 4} At trial, the jury heard the testimony of appellant herself as well as her treating physician, Dr. John Nichols. The defense presented the testimony of each appellee and expert witness Dr. Kim Stearns. A list of appellant's medical expenses was admitted into evidence without objection. This list indicated that plaintiff's total expenses were $43,213.59, as follows:

Provider	Dates of Treatment	Charges
Southwest General Health Center	03/25/00	$642.25
Emergency Professional Services, Inc.	03/25/00	$197.00
Drs. Hill & Thomas	03/25/00	$102.50
Northcoast Pain Mgmt & Rehabilitation Center, Inc.	04/03/00 - 04/29/02	$24,941.00
Regional Diagnostics	06/01/00, 06/06/00, 07/28/00	$2340.00
Cleveland Clinic – Dr. Saeed	02/21/01, 04/04/01	$284.00
Cleveland Clinic – Dr. Miller	02/28/01, 03/16/01 03/30/01, 04/17/01	$737.00
Cleveland Clinic – Physical Therapy	02/01/01 – 05/03/01	$2382.00
Jack Anstandig, M.D., Inc.	04/04/02 – 10/08/03	$2676.00
Southwest General Health Center	11/25/02	$ 46.50

Regional Diagnostics – Parma	03/10/03, 5/23/03	$2808.00
Kmart Pharmacy	04/11/00 – 9/17/03	$5453.00
RiteAid Pharmacy	06/06/00 – 07/03/02	$425.71
CVS Pharmacy	10/25/00 – 01/02/03	$178.63

{¶ 5} Appellant asked the court to submit the following interrogatory to the jury:

{¶ 6} "By a preponderance of the evidence as a direct and proximate result of the automobile collisions of 3/24/00 and 6/4/00, what amounts do you find that Plaintiff, Cheryl Metter, was damaged for:

"a. Past Medical Expenses $

"b. Past Lost Wages or Earnings $

"c. Past Pain and Suffering $

"d. Past Loss of Pleasure Due to His Inability to Perform His Usual Activities $

"e. Future Medical Expenses $

"f. Future Lost Wages or Earnings $

"g. Future Pain and Suffering (Permanency) $

"h. Future Loss of Pleasure Due to His Inability to Fully Perform His Usual Activities $_____"

{¶ 7} The court rejected this request. However, the court instructed the jury:

{¶ 8} "In deciding an amount for the Plaintiff then you will consider the nature and extent of the injury, the affect [sic] upon physical health, the pain and suffering that was experienced, the ability or inability to perform usual activities, and the reasonable cost of necessary medical and hospital expenses incurred. From these you will determine what sum will compensate the Plaintiff for the injury to the date of trial. That would be known as compensatory damages.

{¶ 9} "However, in this case, at the request of the attorneys, the damages are to be, if awarded to the Plaintiff, to be awarded in two respects: One is from the date of the accidents until the date of trial; but then there is a claim that the Plaintiff also has injuries which are permanent and that the Plaintiff will incur future expense, or that the Plaintiff will experience pain or disability in the future. Now, as to such claims, no damage may be found expecting [sic] that which is reasonably certain to exist as a proximate result of the injury.

{¶ 10} "* * * if you come to consider, in addition to damages from the date of the accidents until the date of today, the date of trial, and then consider damages beyond today that are claimed to be permanent, any amounts that you have determined will be awarded to the Plaintiff for any elements of damages shall not be considered again or added to any other element of damage. You shall be cautious in your consideration of damages not to overlap

or duplicate the amounts of your award which would result in double damages."

{¶ 11} The jury awarded plaintiff damages in the amount of $941.75.

{¶ 12} In her first assigned error, appellant argues that the court erred by refusing her request for a jury interrogatory specifying the amount awarded for each type of damages she sought. In *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St.3d 601, the Ohio Supreme Court held that a special interrogatory may be submitted to the jury asking the jury to state separately the damages awarded for "pain and suffering" on the one hand, and "loss of usual function" on the other, as well as other elements of damages. The court suggested that a separate interrogatory, taken together with Ohio's standard jury instructions regarding damages, "would help the jury understand exactly what claimed damages it is addressing. This adds more clarity and objectivity to this part of the jury's determination." Id. at 617. The court further noted that separate jury findings would enhance the appeal process. Id.

{¶ 13} However, as we have previously noted, *Fantozzi* does not *require* that the court give a special interrogatory. *Patton v. Cleveland* (1994), 95 Ohio App.3d 21, 26. "A judge does not have a mandatory duty to submit all written interrogatories to the jury, rather, he retains the discretion to reject proposed interrogatories that are ambiguous, redundant, or legally

objectionable." *Rich v. McDonald's Corp.*, 155 Ohio App.3d 1, 5-6, 2003-Ohio-5373, ¶14.

{¶ 14} In this case, although the trial judge's stated reason for rejecting the interrogatory was probably incorrect,[1] the court nevertheless correctly rejected the interrogatory because it asked the jury to assess plaintiff's damages for past and future lost wages, although there was no evidence of lost wages and the jury had not been instructed to award them. "A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96. Nor is it the trial court's role in an adversary system to correct the content of a proposed interrogatory submitted by counsel. Therefore, we overrule the first assignment of error.

{¶ 15} Second, appellant contends that the damages award contravenes the manifest weight of the evidence because the jury awarded her nothing for pain and suffering, although it awarded her damages for her injuries. Judgments supported by some competent credible evidence going to all the essential elements will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. The $941.75 damages award was equal to the expenses associated with appellant's emergency room visit after the first

[1]The trial judge considered the interrogatory to be a special verdict. Special verdicts have been abolished in Ohio. Civ.R. 49(C). However, *Fantozzi* does not construe the kind of interrogatory presented here as a special verdict.

accident. If the jury found no continuing injury from these accidents, it was within the jury's province to find no compensable pain and suffering. See *Baughman v. Krebs* (Dec. 10, 1998), Cuyahoga App. No. 73832. Therefore, we cannot say the damages award contravened the manifest weight of the evidence, and overrule the second assignment of error.

Affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
KENNETH A. ROCCO

and ANTHONY O. CALABRESE, JR., J. CONCUR

DIANE KARPINSKI, P.J. DISSENTS (SEE ATTACHED DISSENTING OPINION)

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 85271

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	:	
	:	
Plaintiff-appellant	:	
	:	DISSENTING
v.	:	
	:	OPINION
MICHAEL KONRAD, ET AL	:	
	:	
	:	
Defendants-appellees	:	

DATE: AUGUST 18, 2005

KARPINSKI, P.J., DISSENTING:

{¶ 16} I respectfully dissent on the first assignment of error because I disagree with the majority's application of Civil Rule 49(B).

{¶ 17} Civ.R. 49(B) explicitly mandates the submission of interrogatories: "The court *shall* submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument." (Emphasis added.)

{¶ 18} In *Werner v. McAbier*,(Jan. 13, 2000), Cuyahoga App. Nos. 75197 & 75233, 2000 Ohio App. LEXIS 73, this court reaffirmed the necessity of following Civ.R. 49(B) and the use of proper interrogatories whenever possible. Id. at *10. Encouraging the use of interrogatories serves important public policy goals. As the Supreme Court of Ohio previously explained, interrogatories assist in "facilitating appellate review of jury damage awards. With such separate findings by the jury being available, not only may counsel for the litigants more accurately determine the need for appeal, but the review process on appeal would be enhanced." *Fantozzi,* supra, at 617.

{¶ 19} In *Werner*, supra, this court held the trial court's failure to submit the proposed interrogatory was prejudicial. Without the damage allocation provided by the interrogatory, it was impossible to determine what damages the jury award included. Similarly, in the case at bar, there is no damage allocation; therefore, it is impossible to determine with certainty which damages the jury awarded. It is this very type of situation *Werner* sought to prevent. Discussing the purpose of interrogatories, this court explained: "Interrogatories test the correctness of the

jury's verdict by ascertaining the jury's assessment of the evidence presented at trial." *Werner*, supra at *9-10, citing *Srail v. RJF Int'l Corp*. (1998), 126 Ohio App.3d 689, 700.

{¶ 20} The majority, on the other hand, states that the court is not required to give a special interrogatory and cites *Fantozzi*, supra, in support of this claim. I do not agree that *Fantozzi* supports this conclusion. *Fantozzi* held it was not prejudicial error for the trial court to submit a special interrogatory for "loss of enjoyment of life" rather than the requested, more specific, interrogatory of "inability to perform usual activities." Id. at 617. For the court in *Fantozzi*, the issue was whether two *interrogatory* versions presented a distinction without a difference and therefore no prejudicial error occurred.

{¶ 21} In the case at bar, no interrogatory at all was submitted to the jury; only a jury *instruction* on the damage elements was given to the jury. *Fantozzi*, therefore, is not persuasive authority in this case.

{¶ 22} Additionally, the mere fact that the jury was instructed on damage elements does not replace the specific inquiry the proposed interrogatory would have achieved. In *York v. Mayfield*, (1999), 133 Ohio App.3d 777, the Twelfth District Court of Appeals held, "[s]imply, jury instructions are not a substitute for a validly proposed interrogatory." Id. at 785.

{¶ 23} Although *Fantozzi* did not address whether the trial court is required to submit a requested interrogatory, the Ohio Supreme

Court did rule on this issue in *Cincinnati Riverfront Coliseum v. McNulty Co.* (1986), 28 Ohio St.3d 333. The Court held: "The wording of Civ.R. 49(B), that the 'court shall submit written interrogatories upon request of any party,' *is mandatory in character and leaves no discretion in the trial court on the question of submission, upon request, of proper interrogatories to the jury*." (Emphasis sic.) Id. at 336, quoting *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 298.

{¶ 24} This court has previously provided a criterion for determining when interrogatories are "proper." In *Werner*, we explained: "Interrogatories are proper if they raise determinative issues." *Werner*, supra at *10 citing *Costa v. Hardee's Food Sys.*, 1998 Ohio App. LEXIS 137, Warren App. No. CA97-03-022. See *Ramage v. Central Ohio Emergency Serv., Inc.*(1992), 64 Ohio St.3d 97; *Cincinnati Riverfront Coliseum v. McNulty* (1986), 28 Ohio St.3d 333. This court concluded, "the proposed interrogatory involved a determinative issue - the amount of damages to be awarded – and was therefore a proper interrogatory." Id. at *12.

{¶ 25} The majority, however, believes that the trial court's rejection was nonetheless proper because appellant did not present any evidence of lost wages. I disagree with this analysis. *Werner* stands for the proposition that interrogatories should be given to the jury whenever they are proper, and this interrogatory could have easily been modified by striking the line dealing with lost wages.

{¶ 26} Civ.R. 49(B) grants the court the additional discretion to determine the form and substance of the interrogatories. *Riley v. Cincinnati*, 46 Ohio St.2d 287. Civ.R. 49(B) states, "the interrogatories shall be submitted to the jury in the form that the court approves." In *West v. Vajdi* (1987), 39 Ohio App.3d 60, for example, the court upheld the rejection of repetitive and confusing interrogatories. While the trial court has discretion on the form and substance of interrogatories, that discretion does not include ignoring simple revisions that would resolve anything objectionable. The difficulty of correction must be weighed against the need for a clear determination of the jury's award. In the case at bar, the court could have easily modified the requested interrogatory simply by striking the line dealing with lost wages, which was not an issue in the case. Submitting the special interrogatory to the jury in this redacted format would have fully satisfied the mandate of Civ.R. 49(B). *See Martin v. City of Cleveland* (1991), 66 Ohio App.3d 634, 645.

{¶ 27} Generally, the parties have the burden of submitting a proper interrogatory. In the case at bar, however, because the trial court mistakenly believed the interrogatory was a special verdict form, the appellant had no opportunity to resubmit the interrogatories in the proper form. The court stated: "That's a special verdict. Those have been outlawed in Ohio for a long time." Tr. at 183. The court then inquired about the form of the verdict, and rejected the proposed interrogatory, stating it was a

special verdict form. The court concluded no further arguments were needed. Tr. at 186.

{¶ 28} Civ.R. 49(C)states: "Special verdicts shall not be used." Civ.R. 49(A) provides: "A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used." The Supreme Court of Ohio in *Schellhouse Admx. v. Norfolk & Western Railway Co.*, et al., 61 Ohio St. 3d 520,stated the importance of adherence to Civ.R. 49(C): "In place of the old special verdict, the drafters provided, in Civ.R. 49(B), for the use of interrogatories in combination with the general verdict as a means of attaining the perceived advantages of the special verdict while avoiding its disadvantages." That is exactly what appellant in the case at bar requested: special jury interrogatories to be submitted with a general verdict form. The trial judge, however, erroneously believed the proposed interrogatory was a special verdict, which has been outlawed. The majority admits that the trial judge was probably mistaken in his characterization of the requested interrogatory.

{¶ 29} The problem is that the judge's definitive and erroneous ruling precluded any modification of the interrogatory. As a result, the court did not even consider submitting the proffered interrogatory in a redacted form; nor did the court give the appellant any opportunity to respond to the court's objection.

{¶ 30} For these reasons, I believe the majority mischaracterizes this argument when it says that this court "is not

authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." Majority Opinion, at 8. As *Riley*, supra, points out, it is mandatory that the jury receive interrogatories which, if they contain errors, should be corrected, not abandoned. The judgment in this case cannot be deemed "correct" when the jury never received any interrogatories. The majority has put the proverbial cart before the horse. The jury verdict cannot be deemed "correct" if we do not know how the jury allocated the damages. I would, therefore, reverse and remand for a new trial.