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Ohio Jury Interrogatories: Civil Rule 49(B)

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Ohio's Civ. R. 49(B) permits parties to submit interrogatories to the jury in order to test the jury's thinking in rendering a verdict. Unlike traditional jury interrogatories, the rule limits interrogatories to subject matter normally associated with the special verdict. For centuries the use of the special verdict has plagued the legal community with confusion. The practitioner, the jury and the trial judge have each had difficulty in a variety of ways when the special verdict is involved.

The practitioner experienced confusion on several fronts. Many practitioners misunderstood the basic nature and purpose of the special verdict. Second, when preparing the special verdict, there was nothing to guide the practitioner in determining its proper substance and form. Third, having received the jury's answer to the special verdict the practitioner had difficulty in determining how the special verdict affected the judgment and whether an appeal was warranted.

Most perplexing to the practitioner, however, was the question of when to use the special verdict. The legal literature on this subject offered little information. Deciding whether to submit a special verdict took on mystical qualities.

Jurors, too, were frequently confused. No matter how explicit and clear the jury instructions were thought to be, jurors often experienced confusion in their attempts to answer a special verdict. Not only were they uncertain as to what they were being asked to do, but they had little or no guidance in drafting an appropriate response, especially when a narrative answer was required.

The trial judge had many of the same difficulties that the practitioner experienced. However, the responsibility for supervising the use of the special verdict was uniquely the trial judge's, creating additional burdens in trial management and administration. The trial judge was required to ensure that the request for the special verdict was timely made and properly requested. In submitting the special verdict, instructions to assist the jury in its deliberations were required. Finally, the jury's answers to the special verdict always required the trial judge's interpretation and implementation. The trial judge's actions with regard to these various tasks became the subject of numerous appeals.

Civ. R. 49(B) was drafted in an attempt to minimize confusion and prac-
tice problems. Nonetheless, many of these problems still persist today.

**HISTORICAL BACKGROUND**

To understand the function of the Civ. R. 49(B) special interrogatory, the evolution of jury verdicts and jury interrogatories should be traced.

In England, jurors were summoned to serve the court and to render a verdict. Because the verdicts they rendered could be contrary to what the judge thought they should be and because the jurors were often chastised for finding as they did, jurors began to render special verdicts, refusing to generally find in favor of one party and against another. The practice developed whereby the jury would find specific facts. It would then give these factual findings to the judge, allowing the judge to enter the proper verdict according to the factual findings of the jury. This avoided the discomfort of rendering the wrong verdict.

This ancestor of the special verdict was brought to the United States along with the other elements of the common law practice of England. The common law *special verdict*, first known as such in American practice, was a narrative and factual recitation of findings made by the jury upon which the judge could enter judgment in the case. Provisions for special verdicts were codified in Ohio law as early as 1853.

1 **Ohio R. Civ. P. 49** provides:

- (A) *General verdict.* A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used.
- (B) *General verdict accompanied by answer to 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. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

The court shall give such explanation or instructions may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

(C) Special verdicts abolished. Special verdicts shall not be used.


3 *Id.*

4 *Id.*

5 As originally drafted, the Code of Civil Procedure of the State of Ohio (51 Laws of Ohio 57, 102) provided:

"Subdivision III.

"VERDICT.

"Section 275. The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence,
Prior to the enactment of the civil rules, the Ohio law permitted the submission of either special verdicts, or general verdicts, along with special interrogatories, or a combination of special interrogatories with a special verdict. It is noteworthy that the Revised Code, unlike its predecessor the General Code, reposed discretion in the trial court as to which type of verdict the jury would render. Previously, the discretion was left to the jury or the parties.

In 1955, the special verdict statute was amended to require specific findings on each determinative issue rather than a single narrative finding. At that same time, provision was made for the use of the special interrogatory. The

and not the evidence to prove them; and they must be so presented as that nothing remains to the court, but to draw from them conclusions of law.

"Section 276. In every action for the recovery of money only, or specific real property, the jury in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

"Section 277. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

"Section 278. When by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict, must assess the amount of recovery."

These provisions were incorporated into the Revised Statutes of Ohio and eventually the Ohio General Code. The 1910 Ohio General Code continued the special verdict practice, whereby the jury had discretion as to whether they would render a general or special verdict. The relevant portions of the General Code provided:

Sec. 11458 The verdict of a jury must be either general or special.
Sec. 11459 A general verdict is one by which the jury finds, generally, upon any or all of the issues submitted, in favor either of the plaintiff or defendant. (R.S. Sec. 5200)
Sec. 11460 A special verdict is one by which the jury finds facts only as established by the evidence; and it must so present such facts, but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law.
Sec. 11461 Unless otherwise directed by the court, a jury may render either a general or a special verdict, in all actions.
Sec. 11462 When requested by either party, the court shall direct the jury to give a special verdict in writing, upon any or all issues which the case presents.
Sec. 11463 When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk."

Former §§ 2315.12, 2315.13, 2315.14, 2315.15, 2315.16 and 2315.17 were in conflict with OHIO R. CIV. P. 49(A)(B)(C). See OHIO R. CIV. P. 49(A)(B)(C) for annotations construing these former sections.

6 OHIO REV. CODE 2315.14 Special verdict. A special verdict is one by which the jury finds facts only as established by the evidence; and it must so present such facts, but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law.

OHIO REV. CODE 2315.15 Court to direct a special verdict. When requested by either party, the court shall direct the jury to give a special verdict in writing, upon any issues which the case presents.

7 OHIO REV. CODE 2315.13 General verdict. A general verdict is one by which the jury finds, generally, upon any of the issues submitted, in favor either of the plaintiff or defendant.

8 OHIO REV. CODE 2315.16 Finding on questions of fact; journal entry. When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

9 OHIO REV. CODE 2315.14, as amended, provided in pertinent part: A special verdict is one by which the jury finds *** separately upon each determinative issue tried by the jury so that nothing remains for the court but to *** render judgment in accordance with such findings.
submission of special interrogatories was a procedure to test controverted facts against the determinative issue findings of the special verdict. However, the combined use of the special verdict with the special interrogatories created added confusion. In 1961, Revised Code Section 2315.15, the Ohio special verdict statute, was additionally amended to provide a time limitation for requesting a special verdict and provided that the special verdict should be rendered in writing.\textsuperscript{11} All of these changes resulted from dissatisfaction with the special verdict system.

The subsequent adoption of Civ. R. 49 was another attempt to eliminate confusion and to provide practitioners and judges with an objective method for testing the jury's verdict. The rule combined \textit{determinative issue} language from the \textit{special verdict} statute\textsuperscript{12} and \textit{controverted fact} language from the \textit{special interrogatory} statute.\textsuperscript{13}

Civ. R. 49 included four major changes. First, the special verdict was abolished.\textsuperscript{14} Second, the trial court's discretion in giving or not giving requested interrogatories was taken away.\textsuperscript{15} Third, special interrogatories could address mixed issues of law and fact rather than just factual issues.\textsuperscript{16} Fourth, all cases were to be decided by the use of a general verdict alone, or by the use of a general verdict in conjunction with jury interrogatories.\textsuperscript{17}

With these changes, the nature of interrogatories to the jury took on new meaning.\textsuperscript{18} In pre-rule practice, special verdicts were used to elicit the jury's findings on factual matters and such findings would determine who won or lost

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if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

\textsuperscript{11} OHIO REV. CODE 2315.15, as amended, provided: If requested by either party before the giving of any special charge and before argument to the jury, the court shall submit in writing each determinative issue to be tried by the jury and direct the jury to render a special verdict in writing.

\textsuperscript{12} OHIO REV. CODE 2315.14.

\textsuperscript{13} OHIO REV. CODE 2315.16.

\textsuperscript{14} OHIO R. CIV. P. 49(C); Riley v. Cincinnati 46 Ohio St.2d 287, 297, 348 N.E.2d 135, 142 (1976).

\textsuperscript{15} OHIO R. CIV. P. 49(B); Cincinnati Riverfront Coliseum v. McNulty, 28 Ohio St.3d 333, 337, 504 N.E.2d 415, 418 (1986) (holding that a refusal to submit interrogatories effectively foreclosed "any meaningful inquiry into the integrity of the fact-finding process and thus" vitiated "the right to determine whether the jury lost its way in returning the general verdicts."); Ragone v. Vitali & Belrami, 327 N.E.2d 645, 42 Ohio St.2d 161 (1975), paragraph one of the syllabus; Ware v. Richey, 14 Ohio App.3d 3, 469 N.E.2d 899 (1983).

\textsuperscript{16} OHIO R. CIV. P. 49(B). For background in this area, see Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66 (1877); Brier Hill Steel Co. v. Ianakis, 93 Ohio St. 300, 112 N.E.1013 (1915); Davison v. Flowers, 123 Ohio St. 89, 174 N.E. 137 (1930).

\textsuperscript{17} OHIO R. CIV. P. 49(A) and (B); and Riley, 46 Ohio St.2d at 297, 348 N.E.2d. at 142. \textit{But}, see, Viocx v. Stowe-Woodard Co. (Mar. 14, 1986), Erie App. No. E-84-27, unreported, appeal dismissed, 34 Ohio St. 3d 602 (1987) (holding that no reversible error occurs if the parties "embrace a procedure" which amounts to a special verdict).

\end{verbatim}
the litigation. 19 Now, the only method available to test the thinking of the jury is the special interrogatory procedure found in the Civ. R. 49(B).

At least one court has found Civ. R. 49(B) interrogatories to be similar to the former special verdict. 20 The general verdict is reconciled with the evidence when the answers to the special interrogatories and the general verdict are consistent. The general verdict embodies both fact and law and it is the function of the special interrogatory in Ohio to test the grounds upon which the jury's general verdict was predicated. Thus, answers to special interrogatories may also include mixed findings of fact and law.

FEDERAL AND STATE COUNTERPARTS TO OHIO CIVIL RULE 49

While all jurisdictions have rules or statutes governing verdicts, Civ. R. 49 is somewhat unique. Most jurisdictions have verdict provisions similar to the federal rule. 21 Both the Ohio and the federal rules contain provisions designed to alleviate the confusion historically associated with special verdicts and jury interrogatories. However, the two rules approach this problem in very different ways.

Under the federal rule, special verdicts still exist. 22 Civ. R. 49 specifically

20 Richlev, 44 Ohio App.2d 359, 338 N.E.2d 789.
21 FED. R. CIV. P. 49 provides:
Rule 49. Special Verdicts and Interrogatories
(a) Special Verdicts.
The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
(b) General Verdict Accompanied by Answer to Interrogatories.
The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

22 FED. R. CIV. P. 49(a).
abolishes the special verdict. It is noteworthy that the federal rule permits a trial court to make a finding upon any issue of fact "raised by the pleadings or by the evidence" which was omitted from the special verdict. Historically, if a jury returned a special verdict without ruling upon each essential element of the cause, the plaintiff would lose. Thus, poor drafting of a special verdict form could result in an unfair disposition of a claim or defense.

Similar to Civ. R. 49(B), the federal rule provides for general verdicts accompanied by answers to interrogatories. The federal rule permits interrogatories to address "one or more issues of fact the decision of which is necessary to a verdict." Civ. R. 49(B) allows interrogatories to be directed to "one or more determinative issues whether issues of fact or mixed issues of fact and law." While the federal rule does not explicitly permit jury interrogatories to address "mixed issues of fact and law," some federal courts permit such interrogatories when they are accompanied by appropriate jury instructions. Thus, the nature of jury interrogatories under the two rules is quite similar.

The primary distinction between Civ. R. 49(B) and its federal counterpart is that Federal Rule 49(b) reposes discretion in the trial court as to whether any interrogatories will be submitted to the jury. A trial court's decision in this regard will be reversed only upon a showing of an abuse of discretion. Although such a showing is possible, the necessary abuse of discretion is seldom found to exist.

In Ohio, jury interrogatories which are properly submitted to the trial court must be submitted to the jury. The trial court has no discretion in this regard and submission is mandatory under Civ. R. 49(B). A trial court does have discretion to control the form of jury interrogatories and may reject interrogatories which are not based upon the evidence, are ambiguous, or are otherwise objectionable. However, proper interrogatories must be submitted, even when a large number have been presented to the court.

23Ohio R. Civ. P. 49(c).
24Alton, Interrogatory Practice In Ohio, supra note 2, at 1614.
25See, e.g., Sperberg v. Goodyear Tire & Rubber Co., 519 F. 2d 708 (6th Cir. 1975), cert. denied 423 U.S. 987; Landy v. Federal Aviation Administration, 635 F. 2d 143 (2d Cir. 1980).
26See Reyes v. Wyeth Laboratories, 498 F. 2d 1264 (5th Cir. 1974).
28Compare Re: Air Crash Disaster at New Orleans, 795 F.2d 1230 (5th Cir. 1986) with Jamison Co., Inc. v. Westvaco Corp, 526 F. 2d 922 (5th Cir. 1976); Sadowski v. Bombardier, Ltd., 539 F. 2d 615 (7th Cir. 1976).
29Ragone, 42 Ohio St. 2d 161, 327 N.E.2d 645.
30Id. at 165-66.
31See Cincinnati Riverfront Coliseum, 28 Ohio St. 3d at 336, 504 N.E. 2d at 418, wherein the Ohio Supreme Court stated: "This court respects the time restraints under which trial courts must work; however, we can not approve the ignoring of the Civil Rules. We therefore agree with the decision of the court of appeals, and hold that the trial court erred when it failed to follow the mandate of Civ. R. 49(B)."
The Ohio rule is consistent with its federal counterpart regarding how a trial court should proceed when a jury returns answers to interrogatories which are consistent with its general verdict. Both rules provide that “the appropriate judgment upon the verdict and answers shall be entered pursuant to” Civ. R. 58 and Federal Rule 58. However, the similarity stops at this point.

When a jury returns one or more answers to interrogatories which are inconsistent with the general verdict, Federal Rule 49(b) makes a distinction between situations where the jury’s answers to the interrogatories are consistent with one another and where they are not. If the jury’s answers are consistent with one another and one or more is inconsistent with the general verdict, the trial court has three options. It may enter judgment in accordance with the answers, return the jury for further consideration of its answers and general verdict, or order a new trial. If the answers to the interrogatories are internally inconsistent and one or more is inconsistent with the general verdict, the trial court must either return the jury or order a new trial. In such circumstances, the trial court may not enter judgment under Federal Rule 49(b).

Ohio’s rule makes no distinction between answers to interrogatories which are internally inconsistent and those which are not. It merely provides that if one or more of the answers to the interrogatories is inconsistent with the general verdict, the trial court may enter judgment in accordance with the answers, return the jury, or order a new trial.

Most states have a rule which follows Federal Rule 49(b) reposing discretion in the trial court regarding submission of jury interrogatories. One notable exception is Illinois. In Illinois, submission is mandatory unless a proposed interrogatory is improperly formulated or does not address an ultimate question of fact.

In effect, a Civ. R. 49(B) jury interrogatory is a hybrid form of the traditional special verdict. Considering the need for a vehicle to test the general verdict and the problems historically encountered with special verdicts, Ohio’s adoption of such a rule is understandable. That is not to say that the practical application of the rule is easily understood. Confusion in the legal community as to the proper scope and form of jury interrogatories persists.

32 FED. R. CIV. P. 49(b); OHIO R. CIV. P. 49(B).

Verdict — Special interrogatories

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 ruling on 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.

34 See Ware, 14 Ohio App. 3d 3, 469 N.E.2d 899.
The purpose of the Civ. R. 49(B) is to provide counsel and the trial court, as well as reviewing courts, with information as to the jury’s thinking in order to test whether or not the general verdict is supportable under the jury’s specific findings. If the general verdict cannot be reconciled with the answers to the interrogatories, the answers prevail. Inconsistencies between the general verdict and the answers to interrogatories must be resolved in favor of the later. Thus, special interrogatories provide a method to objectively measure the justification of the jury’s general verdict.

The rule provides that interrogatories shall be given to the jury upon request. But what is an *interrogatory* under Ohio’s rule? If the requested submission is not a proper interrogatory within the meaning of the rule, the mandate does not apply.

The balance of this article will address the preparation and submission of Civ. R. 49(B) jury interrogatories. Factors affecting a trial court’s decision to submit or not submit proposed interrogatories and the eventual use of a jury’s answers to the interrogatories submitted will also be discussed. Jury verdicts, especially as to damage awards, are seldom disturbed on appeal. In addition, jury interrogatories are now required by statute in certain types of cases. Consequently, Ohio practitioners should familiarize themselves with the various stages of interrogatory practice.

**DRAFTING INTERROGATORIES**

The parties initially, and the trial court ultimately, have a responsibility to use language which is clear, concise, unambiguous, and which is not confusing. If the question propounded to the jury is unclear, not only will it be difficult for the jury to answer the question, but the effect of its answer will be similarly unclear. Proper drafting of jury interrogatories can eliminate such problems.

The dissent of Justice Brown in *Ragone v. Vitali & Beltrami* spoke to interrogatory form. He suggested that:

> "[a]ny narrative statements of law or fact should be prepared by lawyers, and if those statements are readily comprehensible by a layman, and the solicited response is an answer of ‘yes’ or ‘no’, then the statements may properly be posed to a jury. Otherwise, the so-called practice of testing the jury’s verdict serves only to exploit (1) a layman’s failure to properly articulate legal doctrine or (2) the jury’s failure to agree on a single set of words in drafting the narrative ***.”

Justice Brown suggested that questions which elicit a yes or no answer should

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35 See, e.g., OHIO REV. CODE §§ 2323.57 and 2315.19.
36 42 Ohio St. 2d 101, 327 N.E.2d 645 (1975).
be used and that interrogatories which require a narrative answer are improper. Submitting an interrogatory calling for a narrative response may result in unnecessary errors, appeals, or new trials. Further, such an interrogatory contravenes the intent of Civ. R. 49 to eliminate special verdicts. Nevertheless, a narrative interrogatory may be occasionally needed to test the jury's thinking.

Each interrogatory should be so framed as to call for a simple and categorical answer. Further, it should be limited to a single, direct and controverted issue and should be drafted in a manner which lends itself to a positive, direct and intelligible answer.

The question should be written so that it avoids being argumentative, and it should not attempt to cross examine the jurors. The simpler the question, the easier it is for the jury to answer: the more complex, the harder. The goal is to elicit an answer from the jury which indicates their deliberative process on the issue posed — a check against their general verdict.

Each interrogatory should be specifically tailored to the facts of the case being tried. Interrogatories obviously may address an issue which was raised in the pleadings, so long as supporting evidence was offered on the issue. They can address a fact which was contested throughout the trial. They can call for a calculation of a period of time or an amount of money. However, interrogatories must address something which was supported by the testimony of the witnesses and the exhibits offered into evidence. Interrogatories cannot encompass a question for which there was no evidence and which would require the jury to speculate rather than to determine an answer.

The scope of the interrogatory may be as broad as the evidence presented on the issue being resolved. Practitioners should, however, avoid including two issues in one interrogatory. This is confusing to the jury and it will be difficult to determine the effect of such an answer on the general verdict.

While the practitioner cannot eliminate the possible jury confusion which may result from the subject matter, he can avoid confusion which might arise from the form of the question. The question should be drafted in clear language so that it is easy to understand and, thus, easy to answer.

In drafting, the practitioner should look at the proposed interrogatory from the jury's viewpoint. Does the question call for a response which is available from the evidence presented? Further, will the response aid in testing the general verdict? If it was not covered by the evidence and it does not qualify as an aid, it should not be submitted for the jury's consideration.

The style of the interrogatory should be simple. Concise and direct language should be used so that only one meaning can be ascribed to what is being asked. The most efficient interrogatory is one which lends itself to a single answer.

37 76, AM. JUR. 2d, Trial, § 1182.
However if the response must be narrative, the drafting party should take special care to guard against asking too much. If the question is too broad, it may elicit a response which is either inconsistent or confusing. If the trial court and the attorneys cannot understand the answer, the answer cannot aid in testing the general verdict. Thus, the better practice is to draw narrow questions which elicit definite responses.

The subject of any given interrogatory is to be restricted to a determinative issue. It cannot include anything which has been admitted or stipulated, since the admission or stipulation takes it out of the province of the jury. Jury deliberations on an uncontested issue, likewise, are not proper. Unless the issue remains contested and the answer is necessary to support the general verdict, it is inappropriate for submission to the jury. The function of the jury is to answer disputed questions. Further, questions on peripheral issues which might be interesting, but not controlling, are likewise inappropriate for submission to the jury.

Practitioners frequently encounter difficulty in identifying which issues in the case are determinative. The staff notes to the Civ. R. 49 recognize that it is difficult to define what is and what is not a determinative issue. However, the staff notes indicate that a determinative issue may be defined as "an issue the deciding of which by the jury may in and of itself dispose of the entire case."

The Supreme Court in 1959, prior to the enactment of the civil rules, defined determinative issue. The court stated that determinative issues were "ultimate issues which when decided will definitely settle the entire controversy between or among the parties, so as to leave nothing for the court to do but to enter judgment for the party or parties in whose favor such determinative issues have

39 The staff notes to Ohio R. Civ. P. 49 provides in relevant part:

It should be noted under Rule 49(B) that the interrogatories are not tied to findings 'upon particular questions of fact' as was the case under Section 2315.16 R.C. (prior to 1955), and that the interrogatories are not tied to the 'material allegations contained in the pleadings controverted by an adverse party' as was the case under Section 2315.16, R.C. (after 1955). Under the rule the interrogatories should be directed to 'one or more determinative issues whether issues of fact or mixed issues of fact and law.' The term 'determinative issue' is difficult to define. One definition states: 'a determinative issue is an issue the deciding of which by the jury may in and of itself dispose of the entire case.' Hoffman, Amendments Relating to Special Verdicts, 16 Ohio St. L.J. 454 at 457 (1956). Such definition did not appear in the statute (Section 2315.16, R.C.). Another definition states that: 'Under the new statutes, a special verdict form should embrace only 'determinative issues,' and determinative issues are ultimate issues which when decided will definitely settle the entire controversy between or among the parties, so as to leave nothing for the court to do but to enter judgment for the party or parties in whose favor such determinative issues have been resolved by the jury.' Miller v. McAllister, 169 Ohio St. 487 at 494, [8 O.O. (2d) 485 at 489-490] (1959). But it should be noted that Rule 49(C) abolishes the special verdict, and that Rule 49(A) states that the general verdict 'shall be used.' The use of the term 'determinative issue' in Rule 49(B) does not contemplate the use of the special verdict. The use of the language in Rule 49(B) 'determinative issues whether issues of fact or mixed issues of fact and law' reflects on the phrasing of the interrogatory itself. The language seeks to eliminate the troublesome line between the 'factual' interrogatory and the interrogatory phrased in terms of mixed issues of fact and law, thus permitting the use of either form of interrogatory where appropriate.
been resolved by the jury." In 1975, an Ohio appellate court relied upon this definition of *determinative issues* and noted that: "in a negligence action *** the determinative issues include issues of negligence, proximate cause, contributory negligence, and damages ***." In *Ware v. Richey* (1983), 14 Ohio App. 3d 3, another appellate court considered what is meant by a determinative issue and the propriety of a particular interrogatory. There, the court found an interrogatory to be "confusing and potentially prejudicial." Consequently, the submission of the interrogatory was properly refused by the trial court.

An understanding of what is an *issue* is helpful in deciding whether or not an interrogatory is directed to a *determinative issue*. Issues are either questions of law or questions of fact. Issues consider factual or legal contentions of one party which are disputed by another party. Issues of law must be tried by the court and issues of fact may be tried by a jury or by a court without the jury. A jury may also be called upon to determine mixed issues of fact and law. However, it is improper to submit pure issues of law for the jury’s determination. Finally, a trial is a judicial examination of the issues.

Matters are first placed in issue by the pleadings. However, a matter asserted remains in issue only so long as it: (1) remains denied; (2) evidence is produced which both supports and controverts it; and (3) it aids in finally determining the action. While a cause of action may initially consist of several issues, only the issue or issues which remain contested and relevant may be properly submitted for adjudication by a judge or jury.

A *determinative issue* has at least four elements. It may be defined as an issue: (1) encompassed by or contemplated within the language of the pleadings; (2) contested by the parties; (3) unresolved by the evidence; and (4) the answer to which will directly affect the general verdict. A determinative issue also may be specifically addressed in the contemplated jury instructions. While this inclusion presents some indicia of the nature of the issue, it is not controlling.

Although a determinative issue must emanate from the pleadings, it need not be specifically set out. Any issue tried by the parties is implied a determinative issue. Additionally, precise findings as to time periods or proportion

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41 Richley, 44 Ohio App.2d at 363, 338 N.E.2d at 792.

42 Ware, 14 Ohio App. 3d at 6, 469 N.E.2d at 903.

43 Ohio REV. CODE 2311.02.

44 Id.

45 Ohio REV. CODE 2311.04.

46 MCCORMACK CIVIL RULES PRACTICE, Section 1220 (Supp. 1973) explains it this way. "Interrogatories may be directed to determinative issues only and are similar to the form special verdicts. The practice of asking evidentiary questions was intended to be eliminated by the Civil Rules as the jury, in all fairness, frequently cannot provide that type answer."

47 Id.
of negligence attributable to each party are matters which could be included within proposed jury interrogatories.\textsuperscript{48} It is sufficient if each item may be reasonably anticipated from the trial evidence.

Damages, for example, may include several separate items and a party may be entitled to the jury’s expression as to each of the several items, even though they were not separately pleaded. So, a pleading which recites a lump sum figure, rather than individual amounts for each damage item, may still entitle the requesting party to have interrogatories submitted on each item. Thus, an interrogatory request may cover each damage item separately, such as property damage, lost wages, past pain and suffering, future pain and suffering, future disability and medical expenses. However, a lump sum prayer in a complaint along with the absence of any evidence as to a particular item of damage, will not entitle a party to submission of a jury interrogatory as to that damage item. There must be some evidence on the item.

If the issue proposed to be submitted for the jury’s consideration is not contested, it is not a determinative issue. Obviously, any issue admitted or stipulated does not require the jury’s consideration and such agreement cancels the need for jury interrogatories. Thus, not only would a request be improper, but the giving of such an interrogatory would also be error.

If there is no evidence on an issue, a request for a submission of an interrogatory on that issue is likewise improper. While jurors are arbitors of the facts, their decision cannot be based upon mere speculation. Their decision must be reasonably inferrable from the evidence presented at trial. Although the evidence may be less than overwhelming, a requesting party is nevertheless entitled to an interrogatory if there is some evidence to support the issue.

Practitioners that submit properly drafted interrogatories should encounter little difficulty in getting a trial court’s approval. However, Civ. R. 49(B) does contain certain requirements as to the procedure for submitting interrogatories.

\textbf{PROCEDURE FOR REQUESTING JURY INTERROGATORIES IN OHIO}

The rule provides that \textit{either party} may request the submission of interrogatories to the jury. Does \textit{either party} mean \textit{any party}? Since the rule is to be strictly construed and a trial court is mandated to submit the interrogatories to the jury once requested to do so, it is evident that the language \textit{either party} must be interpreted to mean \textit{any party} to an action.

Although anyone named in an action may request that interrogatories be submitted to the jury, Civ. R. 49(B) is silent as to whether the trial judge may submit interrogatories, absent a request by a party to the action. At least one Ohio appellate court has held that it is improper for a trial judge to submit Civ. R. 49(B) interrogatories \textit{sua sponte}. In Dyche Fund v. Graves (1978), 55
Ohio App. 2d 153, the court held that interrogatory submission is solely within the prerogative of the parties. Under the federal rule, where the submission of interrogatories to the jury upon request is discretionary with the trial judge, the trial judge may submit interrogatories with or without the parties' consent.49

Under Civ. R. 49 (B), the request for written interrogatories must be made prior to the commencement of argument. In most jurisdictions the request to the trial court must be timely or it is waived.50 Ohio's rule is less definitive and presently there are no reported Ohio cases which have decided when a request for interrogatories was or was not timely. Although the request is required to be made before the commencement of closing arguments, there is no specific requirement that it be made in writing. However, since the request is directed to the court and must be submitted to opposing counsel as well, it is logical to assume that such a request must be written.

The rule does not provide any specific limitation on the number of interrogatories which may be submitted. The fact that there may be a significant number of interrogatories proposed by one party does not entitle the trial court to refuse to give additional interrogatories requested by another party.51 Hence, the number of interrogatories, alone, cannot justify a refusal to give any further interrogatories. The trial court's obligation, when a voluminous number of interrogatories are requested, is to review each interrogatory individually. The trial court must determine whether or not each interrogatory is or is not appropriate under the facts of the case being presented and eliminate those interrogatories which are redundant and inappropriate.

There is no specific form for jury interrogatories called for by Civ. R. 49(B). However, it is evident from the case law that it is preferable to provide each interrogatory on a separate sheet of paper. This, of course, allows the jury to answer each question individually, without having to agree with an answer to any other interrogatory which might have been submitted. Additionally, this helps avoid any confusion regarding whether the jury must be consistent with several answers, in order to answer a single interrogatory.

Once again, it should be noted that the form of an interrogatory should include language which is simple, clear, and concise. There should be no misunderstanding as to what is being asked. It would be best to construct the question for the jury's consideration in such a way so that the jury may provide either a yes or no answer; answer with a number of dollars; or otherwise be able to give a simple, direct answer. While narrative answers are acceptable in some situations and, in fact, are encouraged in others, it is the better practice to require the jury to provide a single, direct answer rather than to require

50 76 A. Jur.2d, Trial, §§ 1176 through 1186.
51 Cincinnati Riverfront Coliseum, 28 Ohio St. 3d 333, 504 N.E.2d 415.
the jury to attempt to agree on an entire passage.

Submission to the Jury

The trial court has six responsibilities under Civ. R. 49. First, the court must submit a general verdict to the jury, and if requested to do so, written interrogatories. Second, it must inform counsel of the action to be taken with respect to each of their requested interrogatories prior to their argument to the jury. Third, the trial court must approve the form of the interrogatories to be submitted to the jury. Fourth, the trial court must give the jury such explanation or instructions as are necessary to enable them to deliberate upon the general verdict and to answer the interrogatories. Fifth, the judge must direct the jury to render a general verdict and to answer the interrogatories in writing. Sixth, the trial court must enter a judgment as required by the general verdict and the answers to the interrogatories. Most of these six responsibilities appear to be mandatory and leave little or no discretion to the trial court.

In deciding whether to give or refuse to give requested interrogatories, the trial court's responsibility is twofold. First, the trial court must be satisfied that the interrogatory meets the rule by presenting a determinative issue. Second, the trial court must examine the precise content, form and scope of each proposed interrogatory to avoid excessive, redundant, or otherwise confusing language.

Although Civ. R. 49(B) places a mandatory duty on the trial court to submit proper interrogatories upon request, the Ohio Supreme Court has held that the rule does not require that the:

"trial judge *** act as a mere conduit who must submit all interrogatories counsel may propose. Authority is still vested in the judge to control the substance and form of the questions, and if the interrogatories are not based on the evidence, are incomplete, ambiguous or otherwise legally objectionable, the judge need not submit them to the jury." 53

As previously discussed, the threshold determination that the trial court must make is whether all of the proposed jury interrogatories address determinative issues. In this regard, opposing counsel may be of some assistance. If opposing counsel agrees that a proposed interrogatory addresses a determinative issue in the case, this will save valuable time. Ultimately, however, the trial court must decide which issues are determinative.

Having determined which of the proposed interrogatories address determinative issues, the trial court must then decide upon the proper form for the requested interrogatories. While trial counsel may certainly assist in this regard, the trial court must exercise judicial discretion as to form. Civ. R. 49(B) pro-

53 Ragone, 42 Ohio St.2d at 165, 166, 327 N.E.2d at 649, citing from the appellate court's decision. Also see Ware, 14 Ohio App. 3d at 9, 472 N.E.2d 899.
vides that "interrogatories shall be submitted to the jury in the form that the court approves." Thus, the rule has been construed to allow the trial court broad discretion in determining the linguistic content of jury interrogatories.54

A trial court may govern submission of interrogatories in several ways. First, it may alter language and remove language which is confusing, vague, or ambiguous. Second, it may limit the scope of each interrogatory which might otherwise require the jury to answer more than one question at a time. Third, it may eliminate interrogatories which are redundant. Fourth, it may eliminate interrogatories intended to cross-examine the jury.

Duplicity becomes especially problematic in situations where there are a number of parties in a single action making various claims and defenses. A trial court under these circumstances may find it advisable to require the several parties to each submit proposed interrogatories, reflecting their various claims and defenses. Ultimately, it is the trial court's responsibility to select the interrogatories which are proper and to approve the form of the submission.

It is conceivable that one interrogatory may be so framed that it accommodates the interests of several parties. Generally, however, where claims are adverse to or independent of one another, it is impossible to accommodate all parties in a single submission. Obviously, the trial court must approach this problem on a case by case basis. The interrogatories submitted to the jury must accommodate each requesting party and will usually require that the trial court consolidate various requests into a single set for submission.

Having established which interrogatories will be submitted, the trial court must then frame a jury instruction which explains the jury's responsibility as to the interrogatories submitted and provides whatever direction may be necessary. The trial judge must make it quite clear that the jury is to enter a general verdict and answer each of the several interrogatories.

After the trial court receives the general verdict and the jury's answers to the interrogatories, its final task is to determine whether the two are harmonious. Various options are available to the trial court if inconsistencies are found.

REVIEWING THE JURY'S ANSWERS

Having received a jury's general verdict and its answers to the submitted interrogatories, a trial court must determine whether the two are consistent. If they are, Civ. R. 49(B) mandates that the trial court enter judgment pursuant to Civ. R. 58. However, if a jury's answers to submitted interrogatories are not consistent with the general verdict the trial court may not enter judgment according to the general verdict.

54Ragone, 42 Ohio St.2d 161, 327 N.E.2d 645.
In such circumstances, Civ. R. 49(B) provides the trial court with three options: (1) the trial court may enter judgment according to the jury’s answers to the interrogatories and essentially ignore the general verdict; (2) the trial court may resubmit the matter to the jury in order for the jurors to resolve the inconsistencies; or (3) the trial court may order a new trial. The decision regarding which of these options to pursue lies within the sound discretion of the trial court.55

While the trial court must ultimately decide whether any inconsistencies exist, a party may initiate such an inquiry. It is incumbent upon a party challenging a general verdict to establish that the general verdict is “inconsistent and irreconcilable” with the jury’s answer to at least one of the interrogatories.56 It should be noted that if any theory or hypothesis is available which reconciles the jury’s answers to interrogatories with the general verdict, the general verdict will stand.57 It is not necessary that the theory ultimately relied upon is the only theory available to explain the jury’s actions.

Ohio case law is sparse as to when a trial court should employ any of the specified options available under Civ. R. 49(B). It appears that such decisions must be examined on a case by case basis.

Regarding the first option, Civ. R. 49(B) significantly differs from the rule’s federal counterpart. Under Federal Rule 49(b), a trial court is not provided with the option of entering judgment based upon the jury’s answers to interrogatories when the answers are, themselves, inconsistent with one another and one or more of the answers is inconsistent with the general verdict. The federal rule only permits a trial court to enter judgment pursuant to the jury’s answers when the answers are both internally consistent and one or more of them is inconsistent with the general verdict. Civ. R. 49(B) makes no such distinction.

Consequently, Civ. R. 49(B) appears to permit a trial court to enter judgment pursuant to a jury’s answers to interrogatories when the answers are inconsistent with one another and one or more of them conflicts with the general verdict. However, trial courts are well advised to be extremely cautious when confronted with such a dilemma. As previously discussed, Civ. R. 49(B) jury interrogatories are similar to former special verdicts.58 In construing former Revised Code Section 2323.17, various Ohio courts held that where answers to a special verdict “demonstrate confusion and are in irreconcilable conflict, no judgment can be rendered and the trial court should order a new trial.”59

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57 See Becker, 17 Ohio St. 3d 158, 478 N.E.2d 776.
58 Richley, 44 Ohio App.2d 359, 338 N.E.2d 789.
Although no reported cases have so held, such reasoning appears to be applicable to situations where Civ. R. 49(B) interrogatories are both internally inconsistent and in conflict with the general verdict. In such circumstances, a trial court should not enter a judgment based upon a jury’s obviously confused findings regarding the determinative issues of the case. A better practice would be to resubmit the entire matter to the jury. The jurors are in the best position to resolve any conflicts. Should the jury be unable to do so upon resubmission, then a new trial may be the appropriate alternative.

It is proper for a trial court to enter judgment pursuant to the jury’s answers to interrogatories when the answers are consistent with one another and one or more of them is inconsistent with the general verdict. If the jury’s answers clearly indicate that the general verdict is incorrect, the answers prevail. Consequently, the trial court may properly enter a judgment which is contrary to the general verdict, without interfering with the jury’s role as a factfinder.

By definition, all determinative issues must be decided in favor of the plaintiff to entitle the plaintiff to a judgment in an action. Consequently, it is conceivable that if a jury fails to answer a submitted interrogatory, a trial court may commit reversible error by refusing the request of a party to resubmit the issue to the jury.

Since resubmission to the jury is preferable in many situations, the staff note to Civ. R. 49 indicates that a trial court should not dismiss a jury until the court has had an opportunity to review the jury’s answers. Presumably, a trial court should also offer trial counsel an opportunity to conduct such a review prior to dismissing the jury. Otherwise, the jury may not be available to resolve conflicts within the interrogatories and a new trial may be necessary.

APPELLATE REVIEW OF JURY INTERROGATORY PRACTICE IN OHIO

Civ. R. 49(B) is important in the appellate process in two respects. First, jury interrogatories may be employed by practitioners to show that a jury’s verdict was founded upon erroneous reasoning by the jury and the verdict is, therefore, contrary to law. Second, a trial court’s error in handling requested jury interrogatories may, itself, constitute reversible error. Consequently, appellate counsel who has a jury’s answers to interrogatories or at least a request for such, as part of the record, frequently will experience more success in showing error than appellate counsel that does not.

A reviewing court may reverse and remand a matter for a new trial if it is found that a trial court improperly submitted or rejected proposed jury interrogatories. As noted earlier, a trial court is under a mandatory duty to sub-


mit proper jury interrogatories when so requested by a party. In determining whether proposed interrogatories should or should not have been submitted, a reviewing court will employ the same standard as that used by the trial court. Proper jury interrogatories must address determinative issues, must be based on trial evidence, and may not be "ambiguous or otherwise legally objectionable."

If a party challenges a trial court's rejection of a proposed jury interrogatory, that party must show that the interrogatory was proper under the circumstances of the case. A party need not show that all of the proposed interrogatories were proper. If any of the proposed interrogatories were proper and were rejected by the trial court, a reviewing court will order a new trial based upon those interrogatories. If a party challenges the trial court's submission of proposed interrogatories, the challenging party must show that the interrogatories were not only improper, but that their submission resulted in prejudice.

A party may also challenge the form in which interrogatories were submitted to the jury. However, the form and substance of jury interrogatories are matters exclusively within the sound discretion of the trial court. Absent a showing of an abuse of that discretion, a reviewing court will not disturb a trial court's decision as to the proper form.

In terms of appellate review, one of the most important reasons for submitting jury interrogatories is to determine the validity of the jury's general verdict. In the absence of answers to interrogatories which indicate otherwise, it is presumed on appeal "that the jury's verdict was founded upon the issue tried free from alleged error." Further, the burden is upon the party challenging a general verdict to show that the jury's answers to interrogatories are inconsistent with and do not support the general verdict.

Civ. R. 49(B) interrogatories are especially important in avoiding application of the two issue rule on appeal. The two issue rule mandates that "a general verdict which is supportable on one or more alternate grounds properly submitted to the jury is invulnerable to attack." Thus, a brief review of this rule and its application is in order.

The two issue rule is a rule of public policy employed by a reviewing court to uphold a jury's general verdict when it is untested by interrogatories. When

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62 Ragone, 42 Ohio St. 2d 161, 327 N.E.2d 645.
63 Id. at 165-66, 327 N.E.2d at 649.
64 See, e.g., Ware, 14 Ohio App. 3d 3, 469 N.E.2d 899.
65 Ragone, 42 Ohio St. 2d 161, 327 N.E. 2d 645.
66 See Riley, 46 Ohio St. 2d 287, 348 N.E. 2d 135.
67 Berisford v. Sells, 43 Ohio St. 2d 205, 208, 331 N.E.2d 408, 409 (1975).
68 Becker, 17 Ohio St. 3d 158, 478 N.E.2d 776.
there are two or more independent issues and one is error free, or when the primary issue is error free, although the secondary issue has error, the application of the rule avoids a retrial. For instance, when there are two or more theories of recovery and the jury renders its verdict for the plaintiff, if error appears as to one of the recovery issues, the error will not affect the verdict if the error-free theory of recovery would singularly support the verdict. Likewise, when there are two or more issues upon which the defendant provides a defense, when a defendant's verdict is rendered and error appears as to one of the defenses, the error will not affect the verdict if the error-free defense would singularly support the verdict. So long as there is a harmless error basis upon which to uphold the general verdict, it will not be disturbed on appeal.

The two issue rule appeared in Ohio initially in the case of Sites v. Haverstick (1873) 23, Ohio St. 626. Since the jury found for the defendant on both issues, an inquiry as to possible jury instruction error on one issue was not prejudicial. The court reasoned that a finding on either issue would be a finding for the defendant. Originally, the two issue rule was limited in its application to instances where the error alleged appeared in the instructions to the jury. However, the rule's application has now been broadened to include the admission or exclusion of evidence. The rule is most easily applied in cases which involve more than one theory of recovery and the verdict is for the plaintiff, or more than one theory of defense and the verdict is for the defendant. In such a case, any theory of recovery or defense may singularly support the general verdict. If one error-free theory would be determinative for the party in whose favor the general verdict was rendered, the rule's application will avoid the necessity of a new trial.

Independent issues of recovery include combinations of recovery, such as negligence and strict liability. A finding for the plaintiff on either of these would result in a plaintiff's verdict. Independent issues of defense include a combination of defense theories, such as waiver and absence of duty. A finding for the defendant on either the theory of waiver or the theory of the absence of any duty to the plaintiff, would result in a defense verdict.

The primary-secondary issue distinction provides that liability is a primary issue while either contributory negligence or damages is a secondary issue. As to secondary issues, the jury is not called upon to address them unless it first finds for the plaintiff on the primary issue of liability. Since liability is the primary issue, if the trial is error-free as to liability, error in the secondary issues of contributory negligence or damages will not warrant a reversal. However, where error occurs in the primary issue and such error is prejudicial,
an error-free secondary issue will not save the judgment.\textsuperscript{73}

Similarly, liability may be characterized as the primary issue with damages being the secondary issue. The jury need not reach the question of damages unless it first finds for the plaintiff on the question of liability. If the jury finds for the defendant and error occurs only in the damage issue, without error in the liability issue, the plaintiff has not been prejudiced. Where it is "evident from the verdict of the jury that it found no negligence or no cause of action, any error in admitting or rejecting evidence respecting the subject of damages is harmless unless it palpably prejudiced the jury on the main issue."\textsuperscript{74}

The two issue rule is applied by reviewing courts to allow every reasonable presumption in favor of the validity of a general verdict. The Supreme Court has termed it "a rule of public policy created in the interest of judicial economy."\textsuperscript{75} The rule's application has resulted from an elementary proposition of law that in order to warrant a reversal of a jury verdict, not only must error be shown to exist but such error must be prejudicial.

The two issue rule is thus founded upon the doctrine of harmless error. When there are two or more ways in which the jury could have arrived at its judgment, the verdict has not been tested by interrogatories, and it does not affirmatively appear from the record that the jury's verdict was based on the one in which error occurred, the reviewing court will presume that the jury rendered its verdict on the error-free theory. Thus, the unsuccessful party was not prejudiced by error occurring in the other.

Should the reviewing court find that the whole case was tainted by prejudice, the two-issue rule will not save the case from a retrial. When testimony was erroneously admitted which tended to engender racial prejudice which might have influenced the verdict, such error has been held not to be harmless and the two issue rule does not apply.\textsuperscript{76}

When the jury returns a general verdict, untested by interrogatories or absent other indicia indicating that the jury based its decision on prejudicial grounds, the two issue rule will avoid the need for a retrial. The defendant who faces two or more theories of recovery, and the plaintiff who faces two or more theories of defense, each would be wise in submitting interrogatories to the jury so that if error should be found as to one theory upon which the jury relied, retrial would be avoided by application of the two issue rule. Conversely, to avoid application of the rule, the answers to interrogatories submitted to the jury may affirmatively indicate that the jury verdict is in fact based

\textsuperscript{73} Pulley v. Malek, 25 Ohio St. 3d 95, 495 N.E.2d 402 (1986); Gallagher v. Cooper, 14 Ohio St. 3d 41, 471 N.E. 2d 468 (1984).

\textsuperscript{74} Sherer v. Smith, 155 Ohio St. 567, 571, 99 N.E.2d 763, 766 (1951); Suchy v. Moore, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972).

\textsuperscript{75} Gallagher v. Cooper, 14 Ohio St. 3d 41, 471 N.E.2d 468.

\textsuperscript{76} Acrey v. Bauman, 134 Ohio St. 449, 452, 17 N.E. 2d 755, 756 (1938).
upon the issue which had error. In such a case, a reversal and new trial would be proper and cannot be avoided.

Finally, a party may use the responses to jury interrogatories upon review to challenge a trial court’s actions after a trial court has found that a jury’s answers are inconsistent with its general verdict. Civ. R. 49(B) provides three potential courses of action in such a situation. However, the decision of which course to pursue lies within the discretion of the trial court and absent a showing of an abuse of discretion the trial court’s decision will not be disturbed.77

There exist no reported Ohio cases which have found that a trial court abused its discretion in pursuing one of the Civ. R. 49(B) options, to the exclusion of the other two options. It is arguable that a trial court may abuse the exercise of its discretion when it enters judgment based upon internally inconsistent answers to interrogatories, where one or more of the answers is in conflict with the general verdict.78

If any controversy over the submission, rejection, or any other area of jury interrogatory practice arises at trial, trial counsel must be careful to preserve the issue for the purposes of appeal. Failure to do so may result in the error being waived.79 It is doubtful that a party will succeed in urging plain error in most aspects of interrogatory practice.

In order to preserve for review a trial court’s rejection of proposed interrogatories, a challenging party must do at least three things. First, the record should clearly indicate that the proposed interrogatories were submitted in a timely fashion. Second, trial counsel should indicate, on the record, why the proposed interrogatories address determinative issues and are otherwise proper for submission to the jury. Third, the proposed interrogatories must, themselves, be preserved in the record either by their inclusion as exhibits or by their being read into the record.

Unlike requested jury instructions under Civ. R. 51, Civ. R. 49 contains no requirement that a party specifically object to a trial court’s refusal to submit proposed jury interrogatories. At least one appellate court has held that no such objection is necessary where the issue has been adequately preserved in another fashion and “a subsequent objection would be a vain act and serve no purpose.”80 An objection by a party proposing interrogatories could be deemed necessary, depending upon the facts of the case under review.

If a party opposes the submission of proposed interrogatories, that party is well advised to place an objection on the record and specifically state the

77 See Wagner, 11 Ohio App. 3d 199, 463 N.E.2d 1295.
78 Denna, 1 Ohio App. 2d 582, 206 N.E.2d 221.
80 See West v. Vajdi (May 13, 1987), Summit App. No. 12735, unreported.
basis of the objection. Otherwise, the party will be deemed to have waived the issue.\textsuperscript{81} Likewise, a party objecting to a trial court’s decision regarding which course of action to pursue, when the jury’s answers to interrogatories are in conflict with its general verdict, is well advised to specifically state its objection on the record. At least one court has held that such an objection must be raised prior to the jury being dismissed.\textsuperscript{82}

Having properly preserved the issue for appeal, a party challenging any aspect of a trial court’s decision concerning jury interrogatories must then transmit a sufficient record to support the error alleged. In some circumstances, a complete transcript of proceedings may be necessary.\textsuperscript{83}

**CONCLUSION**

Special verdicts and jury interrogatories have been confusing to practitioners, judges, and juries since their inception at the common law. However, jury interrogatories under Civ. R. 49(B) are the best means that a practitioner has for testing a jury’s thought process and the jury’s answers may prove invaluable at the appellate level. Since submission of proper jury interrogatories is mandatory in Ohio, practitioners should not hesitate to employ this valuable tool whenever complex issues arise or the jury appears to be confused. While many of the historic difficulties concerning jury interrogatories persist, carefully drafted jury interrogatories are helpful to juries in their deliberation, judges reviewing a jury’s verdict, and practitioners seeking to support or refute a jury’s verdict.

While the practitioner should be mindful of the substance of the interrogatory, it is the trial judge’s responsibility to be concerned with the form of its submission. With the suggestions included in this article, it is the hope of the authors that both practitioners and judges will be somewhat aided in their jury interrogatory practice.

\textsuperscript{82} Haehnlein, (Sept. 2, 1987), Summit App. No. 13026, unreported.

\textsuperscript{83} See Bertsch v. The Ohio Sav. Assn. (Nov. 30, 1983), Summit App. No. 11158, unreported.