[Cite as *Dailey v. Masonbrink*, 2015-Ohio-2207.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

DAVID DAILEY,

PLAINTIFF-APPELLEE,

v. **CASE NO. 2-15-02**

DAVE A. MASONBRINK, ET AL.,

DEFENDANTS-APPELLEES,
-and-

O P I N I O N

AUGLAIZE COUNTY BOARD OF COMMISSIONERS,

DEFENDANT-APPELLANT.

Appeal from Auglaize County Common Pleas Court
Trial Court No. 2012CV0211

Judgment Affirmed

Date of Decision: June 8, 2015

APPEARANCES:

William P. Lang and Marit Warren **for Appellant**

Benjamin D. Felton **for Appellee**

ROGERS, P.J.

{¶1} Defendant-Appellant, Auglaize County Board of Commissioners ("the County"), appeals the judgment of the Court of Common Pleas of Auglaize County granting Plaintiff-Appellee, David Dailey, a new trial on the issue of pain and suffering damages. On appeal, the County argues that the trial court erred by (1) granting Dailey's motion for a new trial on damages; (2) failing to offset the damages award pursuant to R.C. 2744.05(B)(1); and (3) questioning the jury foreman after the jury had reached its original verdict. Based on the following, we affirm the judgment of the trial court.

{¶2} On July 23, 2012, Dailey filed a complaint in the Court of Common Pleas of Auglaize County. (Docket No. 1, p. 1). In the complaint, Dailey alleged that Dave Masonbrink[1] was negligent in the operation of a motor vehicle in the course of his employment with the County and that Masonbrink's negligence was the proximate cause of damages to Dailey. (*Id.* at p. 2). The County was also named as a defendant.

{¶3} The matter proceeded to trial on September 25, 2013.[2] Dailey was the only witness to testify about damages. Dailey testified that he was riding his motorcycle northbound on State Route 501 just outside of Wapakoneta on May 9, 2011. He stated that he was wearing "steel-toed boots, blue jeans, a shirt, a long

[1] Masonbrink was dismissed from the case on February 2, 2015, after this court dismissed the original appeal for lack of a final appealable order. *Dailey v. Masonbrink, et al.*, 3d Dist. Auglaize No. 2012 CV 0211 (Jan. 26, 2015).

[2] Since this appeal deals solely with the issue of damages, testimony regarding liability has been omitted.

sleeved windbreaker and sunglasses." Trial Tr. p. 32. Dailey was not wearing a helmet. Dailey testified that the speed limit on State Route 501 is 55 miles per hour. He stated that he began to pass a truck, driven by Masonbrink, when the truck moved into the left lane. In an attempt to avoid a collision, Dailey explained that he slammed on his brakes. This caused the motorcycle to fly out from underneath him, which separated Dailey from the motorcycle.

{¶4} After he was separated from the motorcycle, Dailey explained that "I must've put my hands down to protect my head. I flipped several times. I remember my face barely brushing the driveway as I was entering into the ditch and I flipped several times in the ditch until I came to a stop." *Id.* at p. 42. As a result, Dailey stated that he "had severe road rash to the palms of [his] hands, the backs of [his] hands, forearms, elbows, stomach, back, shoulder, a light abrasion to the side of [his] face, knees, legs, and a sore neck and back." *Id.* at p. 50.

{¶5} Dailey testified that he was transported via ambulance to St. Rita's Medical Center. Dailey stated that the staff at St. Rita's cleaned his abrasions and performed x-rays and MRIs on his head, neck, shoulder, and back. Surprisingly, Dailey did not suffer any broken bones or head trauma. The hospital gave Dailey pain medication and ointment for his road rash and discharged him that day. Dailey was told to follow up with Dr. Olt, which he did. At this appointment, Dailey testified that she checked his wounds and rewrapped them. He never saw Dr. Olt again. Dailey stated that he also saw Dr. Kantner, a chiropractor, for lower

back and neck pain. Dailey explained that he saw Dr. Kantner twice. Both parties stipulated that these medical expenses totaled $7,002.04 and were reasonable and necessary.

{¶6} Dailey identified several exhibits, which were later admitted into evidence, as photographs of his injuries sometime after the accident.[3] In addition to the photographs, Dailey's medical records were also later admitted into evidence. The records indicated that he received two separate doses of morphine for pain the day of the accident. Dailey testified that until his injuries healed he was unable to care for himself. He explained that he needed help going to the bathroom; getting in and out of bed; getting in and out of a car; and nearly everything else that he used to be able to do by himself.

{¶7} On cross-examination, Dailey walked over to the jury and showed them his arms and the backs of his hands. Dailey admitted that when he visited Dr. Kantner on June 16, 2011, he reported no pain. He also admitted that he declined to get blood tests done as ordered by Dr. Olt.

{¶8} After both sides rested, the trial court read the jury instructions aloud. In regard to damages, the trial court instructed,

> If you find the Defendant's negligence proximately caused injuries to Plaintiff, Mr. Dailey, you will assign by a preponderance of the evidence an amount of money that will reasonably compensate him for his actual injuries and damages. In deciding the amount, you

[3] Dailey was unable to remember exactly when the pictures were taken. Additionally, Dailey was unable to state which body part each picture depicted. For example, one of the pictures was identified as one of Dailey's legs, but Dailey was unable to state whether it was his right or left leg.

> will consider the reasonable costs of necessary medical and hospital expenses incurred as a proximate result of the negligence, the pain and suffering experienced, the nature and extent of the injuries, the effect upon physical health, and the ability or inability to perform usual activities. Any amounts that you will have determined will be awarded to the Plaintiff for any element of damage shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages, not to overlap or duplicate the amounts of the awards. They will be separately set out for you like medical damages and pain and suffering, so you will separately determine that if you believe it appropriate.
>
> * * *
>
> Now if you find for the Plaintiff you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the Plaintiff for the actual injury that was caused, proximately and directly caused by the negligence of the Defendant. In deciding this amount you will consider the Plaintiff's economic loss and non-economic loss, if any, proximately or directly caused by Plaintiff's actual injuries. Economic loss means any of the following types of financial harm; all wages and salaries lost as a result of his injury, all expenditures for medical care or treatment, rehabilitation services or other care, or other things like drugs necessary to treat the Defendant for his injury, all expenses incurred by the Plaintiff or another person on behalf of the Plaintiff to repair or replace his property, any other expenditure incurred as a result of Plaintiff's injury such as pain and suffering.
>
> In determining the reasonable value of medical, hospital, or other related care treatment and services, you should consider all the evidence submitted. And I think that has been apparently stipulated as the reasonable costs. Non-economic loss means harm other than the economic loss that results from Plaintiff's injury including but not limited to pain and suffering, disfigurement, mental anguish and other intangible loss.

Id. at p. 225-226, 228-229.

{¶9} In addition to the jury verdict form, the court also submitted several interrogatories for the jury to fill out. The court instructed the jury,

> If you find that there was [sic] damages in this case you are to distinguish between the amount of damages in the categories. *State the following without regard to the percentage of negligence attributed to the Plaintiff.*
>
> * * *
>
> Additionally, again in determining damages, should you find that there is negligence and proximate cause and that the Plaintiff was injured, you should state these answers and write in the amount, separately the amount of the compensatory damages, if any, that represent the Plaintiff's pain and suffering, suffered some period of time after the accident, you should assign a value to it in dollars. The amount of the compensatory damages that represents the reasonable value of medical expenses that were proximately caused by the accident, the total amount of the compensatory damages sustained by the Plaintiff by simply adding them together, both pain and suffering and medical damages * * *

(Emphasis added.) Trial Tr. p. 233, 235-236.

{¶10} After a two day trial, the jury returned a verdict in favor of Dailey. The jury awarded $3,571.40 in damages. Before the judge read the verdict aloud, a discussion was held at the bench, where the following conversation took place.[4]

{¶11} The trial court stated that it appeared the jury had reduced Dailey's medical expenses damages in accordance with his comparative negligence. (Docket No. 92, p. 3). Dailey argued that this was improper since the interrogatories clearly forbade the jury from reducing any damages award

[4] A portion of this conversation was not recorded. Dailey, pursuant to App.R. 9(C), filed a Statement of the Proceedings stating his counsel's recollection of the conversation. (Docket No. 92, p.1). The County did not object or propose any amendments.

accounting for Dailey's comparative negligence. (*Id.*). The court indicated to counsel its intention to question the jury foreman about the verdict, which the County objected to since the court was invading the province of the jury. At this time, Dailey also objected to the jury's award of zero dollars for pain and suffering, arguing that since the jury awarded medical expenses damages it must also award some pain and suffering damages. (Docket No. 92, p. 4). The court stated that Dailey would have to address this issue in a post-trial motion.

{¶12} After the discussion concluded, the court addressed the jury foreman. The court stated, "There are no damages for pain and suffering. You are free to do that." Trial Tr. p. 244. The trial court also stated that the jury found Masonbrink to be 51 percent negligent and Dailey 49 percent negligent in causing the damages. The court explained that it seemed as if the damages award of $3,571.40 was exactly 51 percent of the stipulated medical expenses claimed. When asked whether the jury considered the percentage of fault attributable to Dailey when determining a damages award, the jury foreman answered in the affirmative. The court explained that this was against the specific jury instruction as it, not the jury, would reduce the award in accordance to percentage of fault. The court sent the jury back to the jury room to fix the mistake.[5]

[5] The jury returned shortly after, but due to another mistake in one of the forms was sent back to correct the new mistake.

{¶13} The jury returned and awarded $7,002.04 in damages, all of which were categorized as medical expenses. Again, the jury awarded zero dollars for pain and suffering.

{¶14} On October 2, 2013, the County filed a motion to reduce the damages award pursuant to R.C. 2744.05(B)(1). On October 10, 2013, Dailey filed his response, arguing that R.C. 2744.05(B)(1) was preempted by the Employee Retirement Income Security Act ("ERISA"). The County filed its reply on October 17, 2013. On October 15, 2013, Dailey filed a motion for a new trial on the sole issue of damages pursuant to Civ.R. 59. The County filed its reply on October 25, 2013.

{¶15} On December 11, 2013, the trial court denied the County's motion for a reduction of damages. The trial court did not give specific reasons, but cited both *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed. 356 (1990), and *Buchman v. Wayne Trace Local School District Bd. of Edn.*, 763 F.Supp. 1405 (N.D.Ohio 1991).

{¶16} The court also granted Dailey's motion for a new trial on December 11, 2013, finding that the jury's verdict was against the manifest weight of the evidence. Specifically, the court found that Dailey complained of road rash to the medical personnel that arrived at the scene of the accident. The records indicated that Dailey was given two separate doses of morphine to reduce his pain level

from a ten out of ten to five out of ten. Dailey was also prescribed Vicodin and a triple antibiotic ointment that was to be applied every four to six hours.

{¶17} The County filed this timely appeal, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED WHEN IT GRANTED THE PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

Assignment of Error No. II

THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S REQUEST FOR A SETOFF, PURUSANT TO R.C. 2744.05(B).

Assignment of Error No. III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AFTER A VERDICT WAS REACHED.

Assignment of Error No. I

{¶18} In its first assignment of error, the County argues that the trial court abused its discretion by granting Dailey's motion for a new trial on damages. Specifically, the County argues that there was no legal basis for disturbing the jury's award and that a new trial solely on damages was inappropriate because liability was at issue. We disagree.

{¶19} "Where a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial

may be reversed only upon a showing of abuse of discretion by the trial court." *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraph one of the syllabus; *see also Hacker v. Roddy*, 3d Dist. Hancock No. 5-13-13, 2013-Ohio-5085, ¶ 27. "An abuse of discretion 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Hacker* at ¶ 27, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶20} "The generally accepted rule is that a reviewing court should view the evidence favorably to the trial court's action rather than to the jury's verdict." *Rieman v. Congemi*, 8th Dist. Cuyahoga No. 83187, 2004-Ohio-1269, ¶ 6. "The predicate for the rule springs, in part, from the principle that the discretion of the trial judge in granting a new trial may be supported by his having determined from the surrounding circumstances and atmosphere of the trial that the jury's verdict resulted in manifest injustice." *Id.*, citing *Jenkins v. Krieger*, 67 Ohio St.2d 314 (1981).

{¶21} "There is a split among Ohio courts whether damage awards for medical bills for injuries, without any award for pain and suffering, are against the manifest weight of the evidence." *Uhlir v. State Farm Ins. Co.*, 164 Ohio App.3d 71, 2005-Ohio-5545, ¶ 19 (8th Dist.). This court, along with others, has typically found that such awards are automatically against the manifest weight of the evidence. *Krauss v. Daniels*, 6th Dist. Wood No. WD-98-076, 1999 WL 435114, *3 (June 30, 1999); *Boldt v. Kramer*, 1st Dist. Hamilton No. C-980235, 1999 WL

299888, *4 (May 14, 1999); *Guckes v. Feusner*, 3d Dist. Hancock No. 5-95-39, 1996 WL 165542, *2 (Mar. 22, 1996); *Miller v. Irvin*, 49 Ohio App.3d 96, 98 (3d Dist.1988); *Vanbuskirk v. Pendleton*, 3d Dist. Crawford No. 3-79-14, 1980 WL 351984, *5 (Jan. 18, 1980). Other courts have held that when pain and suffering damages are in controversy, then an award for medical expenses alone is not against the manifest weight of the evidence. *See Weber v. Kinnen*, 1st Dist. Hamilton No. C-100801, 2011-Ohio-6718, ¶ 24; *Mensch v. Fisher*, 11th Dist. Portage No. 2002-P-0055, 2003-Ohio-5701, ¶ 53; *Haller v. Daily*, 2d Dist. Montgomery No. 19420, 2003-Ohio-1941, ¶ 20.

{¶22} In *Krauss*, the jury did not award the plaintiff any damages for pain and suffering, but awarded $2,500 in medical expenses as a result of a car accident involving plaintiff and defendant. *Krauss* at *1. In support of its decision to award a new trial, the trial court explained, "the Plaintiff did provide ample evidence indicating that she was injured to at least a very limited degree and that she suffered some pain and suffering." *Id.* at *2. The Sixth District affirmed, finding that "[w]hile the expert testimony submitted in the trial below raised questions regarding the extent of that injury, nothing in the record supports the conclusion that Krauss suffered no pain as a result of that injury." *Id.*

{¶23} In *Boldt*, the jury returned a verdict in favor of the plaintiff and awarded her medical expenses of $4,139.15, but did not award damages for pain

and suffering, stemming from a car accident. *Boldt* at *1. In reversing the trial court's decision to deny a motion for a new trial, the First District found that

> [t]he jury clearly found that [Plaintiff's] emergency-room medical expenses were directly and proximately caused by the collision with [Defendant.] * * * [Plaintiff] must have experienced some pain and suffering. We hold * * * where the jury awarded the amount of the emergency-room medical expenses as damages, it was required to award [Plaintiff] an amount for pain and suffering for the time immediately following the accident, including the time spent in the emergency room.

Id. at *4.

{¶24} In *Guckes*, a jury awarded plaintiff $4,466 in damages resulting from a car accident. *Guckes*, 1996 WL 165542 at *1. In affirming the trial court's decision to grant a new trial, this court relied, in part, on *Vanbuskirk*, which found that an award for medical expenses without pain and suffering was against the manifest weight of the evidence. *Id.* at *2. The *Vanbuskirk* court stated, " 'While the jury could have by virtue of issues of credibility and conflicting testimony eliminated many other bases for damage it is impossible to eliminate the necessity of a finding of *some* even though minimal amount of pain as a predicate for this medical treatment.' " [Emphasis sic.] *Id.*, quoting *Vanbuskirk*, 1980 WL 351984 at *4. This court, in *Guckes*, concluded by finding that

> once a jury awards a personal injury plaintiff the special damages of medical expenses, some award for pain and suffering should be rendered, even if nominal, as it is only reasonable to conclude that if there are legitimate medical expenses there must have been some pain and suffering for a plaintiff to seek medical treatment in the first instance.

Guckes at *2.

{¶25} In the case sub judice, the jury awarded Dailey the full amount of the stipulated medical expenses, but awarded zero dollars in pain and suffering. Once again, it only seems logical that necessary medical treatment is either accompanied or preceded by some sort of pain or suffering. Although there was a question of the extent of Dailey's injuries, the fact that Dailey was injured as a proximate result from the accident is not disputed. *See Krauss*, 1999 WL 435114 at *3. Even a plaintiff, such as Dailey, that suffers minimal pain and suffering as a proximate result of a defendant's actions is entitled to some, even if minimal, amount of pain and suffering damages.

{¶26} The County also argues that any error in the jury's original verdict was invited by Dailey when he failed to object to the jury instructions. However, the record does not support this argument. After the jury returned its initial verdict, Dailey voiced his objection with the jury award of zero dollars in pain and suffering. Unbeknownst to Dailey, part of the conversation at the bench that was not recorded included his objection. However, Dailey filed a statement, absent any objection by the County, where he explained that he voiced an objection to the award, but the trial court instructed him that it would not consider any motion made at this time and that Dailey would have to raise his objection in a post-trial motion. (Docket No. 92, p. 4). Relying on this statement, Dailey filed his motion

for a new trial based on the sole issue of damages. Thus, the County's argument lacks merit.

{¶27} Unfortunately, the trial judge also addressed the award for pain and suffering, stating "[t]here are no damages for pain and suffering. You are free to do that." Trial Tr. p. 244. This instruction may have contributed to the jury's continued award of zero dollars for pain and suffering, whereas a more accurate instruction might well have corrected that error.

{¶28} Finally, the County argues that because liability was contested, a new trial on the issue of damages was inappropriate. In Ohio, it is well established that a trial court may grant a new trial based solely on the issue of damages. *See Mast v. Doctor's Hosp. N.*, 46 Ohio St.2d 539, 541-542 (1976). "App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes a Court of Appeals to order the retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error, and to allow issues tried free from error to stand." *Id.* at 541.

{¶29} In support of its argument, the County relies on *Iames v. Murphy*, 106 Ohio App.3d 627 (1st Dist.1995), for the proposition that "[a] new trial on damages alone is usually granted only when liability is not contested." *Id.* at 633. In *Iames*, the First District found that because the general verdict called into doubt the jury's damages award and each party's comparative negligence, a new trial on damages alone was inappropriate. *Id.* Importantly, the court suggested that if interrogatories had been used, then any confusion could have been erased. *Id.*

Here, the trial court did submit interrogatories to the jury, including one addressing the issue of comparative negligence. Therefore, this case is distinguishable from *Iames* as there was no error or confusion over the issue of comparative negligence.

{¶30} Since the jury awarded Dailey medical expenses damages, but nothing for his pain and suffering in spite of the obvious injuries, the verdict was against the manifest weight of the evidence. Therefore, the trial court's decision to grant Dailey's motion for a new trial was not an abuse of discretion. Additionally, because damages were the only issue in dispute, a new trial on the sole issue of damages was appropriate.

{¶31} Accordingly, the County's first assignment of error is overruled.

Assignment of Error No. II

{¶32} In its second assignment of error, the County argues that the trial court erred by failing to reduce the damages award pursuant to R.C. 2744.05(B)(1). We disagree.

{¶33} "An appellate court's review of the interpretation and application of a statute is de novo." *Fisher v. Hasenjager*, 168 Ohio App.3d 321, 2006-Ohio-4190, ¶ 19 (3d Dist.), *reversed on other grounds in* 116 Ohio St.3d 53, 2007-Ohio-5589, citing *City of Akron v. Frazier*, 142 Ohio App.3d 718, 721 (9th Dist.2001), and *State v. Sufronko*, 105 Ohio App.3d 504, 506 (4th Dist.1995). "In order to

determine the legislative intent, a court must first look to the statute's language." *Id.*, citing *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 218 (1991).

{¶34} "In construing statutes, we must read words and phrases in context and construe them in accordance with rules of grammar and common usage." *Kimber v. Davis*, 10th Dist. Franklin No. 12AP–888, 2013-Ohio-1872, ¶ 12, citing *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶ 11. Further, it is the duty of this court "to give effect to the words used in a statute, not to insert words not used." *State v. S.R.*, 63 Ohio St.3d 590, 595 (1992), citing *Cleveland Elec. Illum. Co. v. City of Cleveland*, 37 Ohio St.3d 50 (1988), paragraph three of the syllabus. If a statute's language is clear and unambiguous, the court must apply the statute as written. *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 9.

{¶35} "R.C. 2744.05(B) provides for setoff in an action against a political subdivision to recover damages for injury caused by an act in connection with a governmental function." *Jontony v. Colegrove*, 8th Dist. Cuyahoga No. 98295, 2012-Ohio-5846, ¶ 43. In its entirety, R.C. 2744.05(B)(1) reads:

> If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits.

> The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section.

{¶36} In addition to R.C. 2744.05(B)(1), there are three subsections of ERISA that are relevant to the analysis: the "preemption clause," 29 U.S.C. 1144(a); the "savings clause," 29 U.S.C. 1144(b)(2)(A); and the "deemer clause," 29 U.S.C. 1144(b)(2)(B).

The Preemption Clause

Under 29 U.S.C. 1144(A):

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

{¶37} "A law 'relates to' an employee welfare benefit plan if it has 'a connection with or reference to such a plan.' " *Donlan v. Greater Cleveland Regional Transit Auth.*, N.D.Ohio No. 1:99 CV 98, 2000 WL 485268, *6 (Mar. 31, 2000), quoting *FMC Corp.*, 498 U.S. at 58, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). R.C. 2744.05(B)(1) clearly references benefit plans governed by ERISA. Specifically, it states "if a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy *

* * of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by the claimant." *Id.* Therefore, because R.C. 2744.05(B)(1) "relates" to an employee welfare plan, it is preempted by ERISA unless it is "saved" by the savings clause.

The Savings Clause

{¶38} Under the savings clause, 29 U.S.C. 1144(b)(2)(A), "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

{¶39} The United States Supreme Court has found that if the state law in question regulates insurance, then it is saved from ERISA unless the deemer clause applies. *FMC Corp.* at 60. Relevant to this case, R.C. 2744.05(B)(1) authorizes a trial court to reduce an award against a political subdivision by any insurance benefits received by the plaintiff. *See also Donlan* at *6. Additionally, R.C. 2744.05(B)(1) regulates insurance by invalidating subrogation provisions contained in insurance contracts as they pertain towards actions against political subdivisions. *See also id.* Because R.C. 2744.05(B)(1) regulates insurance, it is saved from ERISA unless the deemer clause applies.

The Deemer Clause

Under the deemer clause, 29 U.S.C. 1144(b)(2)(B),

> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title * * * nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

{¶40} The United States Supreme Court has "read the deemer clause to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of the savings clause." *Donlan*, 2000 WL 485268 at *7, citing *FMC Corp*., 498 U.S. at 61.

> By forbidding States to deem employee benefit plans 'to be an insurance company or other insurer * * * or to be engaged in the business of insurance,' the deemer clause relieves plans from state laws 'purporting to regulate insurance.' As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans * * *. State laws that directly regulate insurance are 'saved' but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws.

FMC Corp. at 61. Thus, if Dailey's benefits plan is self-funded, then ERISA preempts R.C. 2744.05(B)(1). Otherwise, the County is entitled to the setoff provided by R.C. 2744.05(B)(1).

{¶41} It is undisputed that Dailey was insured through a self-funded ERISA plan. (Docket No. 68, p. 5-7). Therefore, it cannot be considered an insurance policy or "other source" under R.C. 2744.05(B)(1). Since Dailey's plan is self-funded, ERISA preempts R.C. 2744.05(B)(1) in this particular case.

{¶42} The County urges this court to recognize a distinction between the setoff and subrogation provisions of R.C. 2744.05(B)(1) in regard to ERISA preemption. However, this difference, if any, is irrelevant. Rather, as the Court found in *FMC Corp.*, the true distinction lies with whether the plan is self-funded or not. A self-funded plan, under ERISA, is not to be considered an insurance company or any other type of insurer. 29 U.S.C. 1144(b)(2)(B).

{¶43} Other courts have found that the dispositive issue involving ERISA preemption is whether the plan is self-funded. *See Buchman v. Wayne Trace Local School Dist. Bd. of Edn.*, 763 F.Supp. 1405, 1409 (N.D.Ohio 1991); *Donlan*, 2000 WL 485268 at *7. In *Buchman*, the court found that the source of benefits was a *self-funded* employee benefit plan, which is " 'saved' from the savings clause because of the operation of the 'deemer clause.' " (Emphasis added.) *Id.* Therefore, because the deemer clause applied, ERISA preempted R.C. 2744.05(B). In *Donlan*, the court found that the employee benefit plan was insured and not protected by ERISA. 2000 WL 485268 at *7. "Therefore, it is not exempt from application of Ohio Revised Code § 2744.05, which is a law that regulates insurance within the meaning of the saving clause." *Id.*, citing *Blue Cross & Blue Shield of Alabama v. Fondren*, 966 F.Supp. 1093, 1097 (M.D.Ala.1997).

{¶44} Dailey's insurance plan is self-funded, and therefore, R.C. 2744.05(B)(1) is preempted by ERISA. Thus, the County is not entitled to a setoff under the statute.

{¶45} Accordingly, the County's second assignment of error is overruled.

Assignment of Error No. III

{¶46} In its third assignment of error, the County argues that the trial court erred by questioning the jury's award. Specifically, the County argues that the trial court substituted its own judgment for that of the jury. We disagree.

> When one or more of the interrogatory answers is inconsistent with the general verdict, Civ.R. 49(B) provides for three options available to the court. The court may (1) enter judgment in accordance with the answers, (2) return the jury for further consideration of its answers, or (3) order a new trial. The decision to exercise any one of these options is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Tasin v. SIFCO Industries, Inc.*, 50 Ohio St.3d 102 (1990), paragraph one of the syllabus.

First Fed. Bank of Ohio v. Angelini, 3d Dist. Crawford No. 03-09-03, 2010-Ohio-2300, ¶ 36.

{¶47} A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.). When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Blakemore*, 5 Ohio St.3d at 219.

{¶48} "Additionally, we note that a trial court's decision in exercising these three options should reflect the degree of confidence that the court has in the jury's ability to resolve the inconsistency 'without compromising the fairness of the process or the integrity of the result.' " *Angelini* at ¶ 36, quoting *Phillips v. Dayton Power & Light Co.*, 111 Ohio App.3d 433, 448 (2d Dist.1996).

{¶49} In the case sub judice, the answers to the interrogatories were clearly inconsistent with the general verdict. The jury was instructed, in Interrogatory E, to "state the percentage of all the conduct that proximately caused Plaintiff's injury attributable to that particular Defendant." (Docket No. 59, p. 7). The jury found that Masonbrink was 51 percent negligent, while Dailey was 49 percent negligent. In Interrogatory F, the jury was instructed to calculate the total amount of damages it was awarding to Dailey. On the top of the page, it reads, "STATE THE FOLLOWING WITHOUT REGARD TO THE PERCENTAGE OF NEGLIGENCE ATTRIBUTED TO THE PLAINTIFF." (Emphasis sic.) (*Id.* at p. 8). Initially, the jury awarded Dailey a total of $3,571.40 in damages. This amount was exactly 51 percent of $7,002.74, the stipulated amount of reasonable and necessary medical expenses.

{¶50} Before reading the verdict aloud, the trial court indicated that it appeared from the face of the verdict form and interrogatories that the jury had not followed its instructions and had instead calculated damages while taking into account the percentage of negligence attributable to Dailey. Then, the court

conducted a brief exchange with the foreman, who indicated that it was not the jury's intent to award $3,571.40 before reduction, but rather that it had misunderstood the instructions.

{¶51} " 'Where a verdict is defective in form, but the jury's intent is clear and obvious to the court, pursuant to Civil Rule 48, the court acts within its power in briefly questioning the impaneled jury to confirm this intent and to secure their assent to a correction of such verdict so as to express their true intention as a matter of law.' " *Wilms v. Lo-Mar Ents., Inc.*, 7th Dist. Columbiana No. 83-C-39, 1985 WL 10417, *3 (Apr. 11, 1985), quoting *Barnes v. Prince*, 41 Ohio App.2d 244, 247 (8th Dist.1974). Since a defect existed on the face of the jury verdict, the trial court possessed the discretion to briefly question the jury foreman regarding the verdict. The inquiry was brief and only covered whether or not the jury had impermissibly taken into account the percentage of fault when calculating damages. After it became clear that the jury had misunderstood the instructions, the trial court properly instructed the jury to reconvene pursuant to Civ.R. 49(B)(2).

{¶52} Accordingly, the County's third assignment of error is overruled.

{¶53} Having found no error prejudicial to the County in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.
/jlr