[Cite as *7471 Tyler Blvd., L.L.C. v. Titan Asphalt & Paving, Inc.*, 2020-Ohio-5304.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

7471 TYLER BLVD., LLC,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2019-L-098**
- vs -	:	
TITAN ASPHALT AND PAVING, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2017 CV 001881.

Judgment: Affirmed.

Jeffrey W. Ruple, Cardenas Ruple & Kurt LLC, 4770 Beidler Road, Willoughby, Ohio 44094 (For Plaintiff-Appellant).

Michael C. Lucas, Wiles Richards, 37265 Euclid Avenue, Willoughby, Ohio 44094 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, 7471 Tyler Blvd., LLC ("7471 Tyler"), appeals the judgments of the Lake County Court of Common Pleas denying its (1) request to submit proposed interrogatories to the jury, (2) motion for judgment notwithstanding the verdict ("JNOV"), (3) motion for summary judgment, and (4) motion for a new trial, following a civil jury trial involving a contract in which 7471 Tyler agreed to pay appellee, Titan Asphalt and Paving, Inc. ("Titan"), for the performance of certain asphalt and concrete services at 7471 Tyler's commercial property in Mentor, Ohio.

{¶2} 7471 Tyler argues as follows:

{¶3} (1) The trial court had a mandatory duty to submit 7471 Tyler's proposed interrogatories to the jury pursuant to Civ.R. 49(B) based on precedent from the Supreme Court of Ohio.

{¶4} (2) The trial court erred in denying 7471 Tyler's pretrial motion for summary judgment on its breach of contract claims pursuant to Civ.R. 56(C) because there were no issues of material fact for trial.

{¶5} (3) The trial court erred in denying 7471 Tyler's motion for JNOV pursuant to Civ.R. 50(B) because it presented overwhelming evidence demonstrating Titan's breach of contract.

{¶6} (4) The trial court erred in denying 7471 Tyler's motion for a new trial pursuant to Civ.R. 59(A)(6) because the evidence was substantially one-sided in its favor.

{¶7} After a careful review of the record and pertinent law we find as follows:

{¶8} (1) The trial court did not abuse its discretion in rejecting 7471 Tyler's proposed breach of contract interrogatories because they did not test the jury's verdict and implied an incorrect statement of the law.

{¶9} (2) Based on the jury's general verdict finding in favor of 7471 Tyler on its breach of contract claim, we presume the jury found that 7471 Tyler had proven, by the preponderance of the evidence, each of the asserted breaches and awarded some amount of damages for each breach.

{¶10} (3) Even if we construed the jury's verdict as finding in favor of Titan, we find as follows:

{¶11} (a) Any error on the part of the trial court in denying 7471 Tyler's motion for summary judgment is moot or harmless in light of the full and complete development of the facts at trial.

{¶12} (b) The trial court did not err in denying 7471 Tyler's motion for JNOV pursuant to Civ.R. 50(B) because, construing the evidence in a light most favorable to Titan, a reasonable trier of fact could conclude that Titan's failure to install four inches of #304 limestone was not a material breach.

{¶13} (c) The trial court did not abuse its discretion is denying 7471 Tyler's motion for a new trial pursuant to Civ.R. 59(A)(6) because the evidence presented at trial provided the jury with competent, credible evidence from which to conclude that Titan's failure to install four inches of new #304 limestone did not constitute a material breach, and the assessment of damages is within the province of the jury.

{¶14} Therefore, we affirm the judgments of the Lake County Court of Common Pleas.

Substantive and Procedural History

{¶15} 7471 Tyler owns a multi-tenant commercial building located at 7471 Tyler Blvd. in Mentor, Ohio. Scott Andrews ("Mr. Andrews") is 7471 Tyler's managing member, and he has been a real estate developer for over forty years. He purchased the Tyler Blvd. property in December 2016, at which time its parking lot was in very poor condition.

{¶16} Titan is a residential and commercial asphalt and concrete paving company located in Mentor, Ohio. Peter Phillips ("Mr. Phillips") is the sole shareholder of Titan, and he started the company in 1999. Although some of Titan's service proposals have

listed the term “engineer” after Mr. Phillips’ name, he is not an engineer, and his formal education consists of a high school diploma.

{¶17} The parties had an existing business relationship in which Titan previously performed paving and asphalt services for 7471 Tyler and for USA Management, which is 7471 Tyler’s property manager.

The Parties’ Contract

{¶18} In April 2017, Mr. Andrews and Mr. Phillips met at the site to discuss potential asphalt and concrete services. During the meeting, Mr. Phillips took notes on the scope of work that the parties discussed. Mr. Andrews did not provide Mr. Phillips with any blueprints, site plans, or geotechnical drawings relating to the property. Mr. Phillips measured the square footage for the proposed asphalt replacement using a measuring wheel.

{¶19} Following the meeting, Titan’s office manager, Katherine Hawkins (“Ms. Hawkins”), prepared a service proposal based on Mr. Phillips’ notes, which she emailed to USA Management. 7471 Tyler converted the proposal into a purchase order and sent it to Titan. The parties signed the purchase order on April 11, 2017, and it is the governing contract in this case.

{¶20} The purchase order required Titan to perform several services, including the following: (1) removal of four existing drains and replacement with four 2-2B catch basins for the price of $6,064; (2) asphalt replacement of the parking lot located on the east side of the building for the price of $78,348, including excavation and grading, installation of approximately four inches of #304 limestone sub-grade, and installation of four inches of hot asphalt; (3) replacement of a concrete sidewalk located in the front of

the building for the price of $1,582, (4) replacement of concrete pads located in the front and on the east side of the building for the respective prices of $810 and $4,818, (5) replacement of a concrete apron located on the east side of the building for the price of $3,896, and (6) excavation of the sidewalk on the east side of the building and installment of concrete curbing for the respective prices of $1,718 and $8,350. After applying a discount of $4,586, the total contract price was $101,000.

{¶21} The parties subsequently agreed on Titan's performance of additional curbing services for the price of $3,500, increasing the total contract price to $104,500.

Disputes Regarding Performance and Payment

{¶22} Titan performed work under the contract from May 4, 2017 through June 20, 2017, and on July 28, 2017. During the performance of the work, Titan paid its employees, subcontractors, and vendors. Consistent with past practice, Ms. Hawkins emailed invoices to USA Management for payment following completion of work items.

{¶23} By June 2, Titan had completed the sidewalk, the concrete pads, and the curbing. Accordingly, Ms. Hawkins sent an invoice to USA Management in the amount of $25,000.

{¶24} According to Mr. Andrews, this work did not comply with the contract. He contended that the curbing was supposed to be installed in between the concrete doorway pads, resulting in the concrete pads being undersized and that some of the water boxes that Titan replaced, which control the water to the building's individual units, were installed in the curbing. Mr. Andrews and Mr. Phillips communicated regarding these issues, but they were not resolved.

{¶25} By June 7, Titan had completed the catch basins. Ms. Hawkins sent an invoice to USA Management in the amount of $5,000 for this work.

{¶26} On Saturday, June 17, Titan began "milling" the parking lot, which involved the removal of the old asphalt. Mr. Andrews was present on the work site that day and noticed that Titan was only milling four inches deep. Mr. Andrews approached the foreman and informed him that Titan was required to install a limestone base. The foreman told Mr. Andrews to contact Mr. Phillips. Mr. Andrews contends that he did not receive a response to his attempts to contact Mr. Phillips, which Mr. Phillips disputes.

{¶27} The following Monday, Mr. Phillips began paving the parking lot. According to Mr. Andrews, he motioned for Mr. Phillips to stop paving and discuss the limestone base issue with him. When Mr. Phillips did not stop, he stepped onto the paving machine and told Mr. Phillips that the job required stone base. Mr. Phillips told him to get off of the machine and continued paving. According to Mr. Phillips, he told Mr. Andrews that there was sufficient base.

{¶28} On June 20, Ms. Hawkins emailed an invoice to USA Management in the amount of $71,700 relating to Titan's completion of the parking lot work, bringing the total amount billed on the project to $101,700. According to Titan, the only work item remaining to be performed and invoiced at this time was the replacement of the concrete apron.

{¶29} On June 30, Titan received two payments from USA Management in the amounts of $38,000 and $23,342, respectively, for a total amount of $61,342, leaving an outstanding balance of $40,358.

{¶30} In July, Mr. Andrews notified Titan that one of the catch basins had settled and was cracked. He also asked when Titan would replace the concrete apron and

requested a meeting with Mr. Phillips. Mr. Phillips responded that he would meet after Mr. Andrews paid his bill. He also alleged that the company Mr. Andrews hired to install a fence at the property had parked trucks and equipment on the catch basin in question, causing it to crack.

{¶31} Titan last performed work on the project on July 28 when it cleaned up debris in the parking lot. Mr. Phillips informed his crew not to return to the site to replace the concrete apron as a result of 7471 Tyler's nonpayment.

{¶32} In August, Mr. Andrews sent a letter to Titan outlining his issues regarding its work performance under the contract and requesting credits. In addition to reiterating the above issues, Mr. Andrews contended that the amount of pavement installed was 2,000 square feet less than specified in the purchase order; the asphalt was not installed to the property line; and one of the catch basins is crowned and higher than the pavement around it, causing the water to bypass it. Mr. Andrews informed Titan that no further payment would be made until the parties had a meeting and resolved the issues.

{¶33} Titan sent a response letter to Mr. Andrews, stating that: there was adequate base when the asphalt was removed, so there was no need to remove and replace it; Titan would remeasure the completed asphalt and adjust accordingly; the concrete apron will be installed when the completed work has been paid for; the purchase order does not require paving to the property line; the concrete pads were the same size as the original sidewalk; the water boxes must be addressed by Aqua Ohio; the catch basin will be replaced for an additional charge, as it was damaged by the fence company's trucks; and it does not matter which catch basin water goes into as long as it is not holding

water and puddling, and there is no puddling. Mr. Phillips requested a meeting and receipt of payment at that meeting.

{¶34} Mr. Andrews and Mr. Phillips subsequently met at the site and discussed possible resolutions but did not reach agreement. Following the meeting, Mr. Phillips notified Mr. Andrews that, in light of the limestone base issue, he would reduce the outstanding balance by $12,000, leaving a total outstanding balance of $28,358. Otherwise, he would file a mechanic's lien. Mr. Andrews did not accept this proposed resolution and did not make payment. As a result, Titan retained an attorney and recorded an affidavit for mechanic's lien in the amount of $28,358 with the Lake County Recorder.

The Lawsuit

{¶35} 7471 Tyler filed a complaint against Titan in the Lake County Court of Common Pleas, asserting claims for breach of contract, slander of title, breach of the duty to perform in a workmanlike manner, and unjust enrichment and seeking damages in excess of $150,000.

{¶36} Titan filed an answer generally denying 7471 Tyler's claims and asserted a counterclaim for breach of contract, unjust enrichment, fraud, and foreclosure of its mechanic's lien. For purposes of its foreclosure claim, Titan named the Lake County Recorder and 7471 Tyler's mortgage lender as new party defendants.

{¶37} 7471 Tyler filed an answer generally denying Titan's counterclaims and filed a bond to discharge Titan's mechanic's lien.

{¶38} 7471 Tyler subsequently filed a motion for summary judgment in its favor on its breach of contract claims, on its claim for Titan's alleged breach of the duty to

perform in a workmanlike manner, and on Titan's counterclaims, which was opposed by Titan.

{¶39} Titan voluntarily dismissed its fraud counterclaim without prejudice.

{¶40} The trial court issued a journal entry granting summary judgment to 7471 Tyler on Titan's counterclaim for unjust enrichment. The trial court denied summary judgment on all other claims and counterclaims, finding that "significant material issues of fact exist as to whether the contract at issue was breached, to what extent, and whether the work that Titan performed pursuant to the contract was performed in a workmanlike manner."

The Jury Trial

{¶41} The case proceeded to a three-day jury trial on 7471 Tyler's breach of contract claim against Titan (which encompassed several alleged breaches and its claim for Titan's alleged failure to perform in a workmanlike manner); 7471 Tyler's slander of title claim against Titan; and Titan's breach of contract counterclaim against 7471 Tyler.

{¶42} The parties agreed to certain stipulations, including that they executed a contract on April 11, 2017, i.e., the purchase order, and that Titan never installed the concrete apron identified in the contract.

7471 Tyler's Breach of Contract Claim

{¶43} In support of its breach of contract claim, 7471 Tyler presented testimony from five witnesses, including Mr. Andrews.

{¶44} Leong Tan ("Mr. Tan"), the vice president of construction at JTO, Inc. testified regarding proposed remediation services totaling $159,450, which consisted of the removal and replacement of the asphalt ($128,500), replacement of the concrete

apron ($10,950), and removal and replacement of the four catch basins ($20,000). In providing his quote, Mr. Tan did not perform an evaluation of Titan's prior work or of the necessity of the requested services.

{¶45} Anthony Barresi of Henry Fence Company refuted the claim that his company parked semi-trucks on the property.

{¶46} Two expert witnesses, Dustin Keeney ("Mr. Keeney"), a professional engineer with Polaris Engineering & Surveying, and Alison Frye ("Ms. Frye"), a professional engineer at SME, also testified.

{¶47} Mr. Keeney presented the findings of a survey and evaluation of the property that his company conducted in August 2018. He noted deficiencies regarding the asphalt, catch basins, piping connected to the catch basins, and concrete pads.

{¶48} Ms. Frye testified regarding her analysis of pavement coring samples that SME obtained at five locations on the property in July 2018 and noted deficiencies regarding the installed asphalt and the limestone base.

{¶49} With respect to the limestone base, Ms. Frye's testified that four inches of new #304 limestone base was not installed and that the existing #304 limestone base was contaminated with clay, giving it poor drainage characteristics, and making it frost susceptible.

{¶50} She opined that correcting the existing deficiencies would require complete reconstruction and that the cracking observed in the parking lot during her site visits would not have been present if the parking lot had been properly designed and installed.

{¶51} On cross-examination, Ms. Frye testified that a preconstruction geotechnical report, a site plan, and a survey would be of assistance to a contractor

installing asphalt and concrete; maintenance is required for asphalt parking lots, including crack sealing, seal coating, patching, and surface repair; she did not observe evidence of maintenance during her site visits in July 2018 and May 2019; and if a contractor performed a proof roll (i.e., passing across the planned pavement area with a heavy tandem axle dump truck) and did not observe rutting, the contractor would be warranted in proceeding to paving.[1]

Titan's Defense and Breach of Contract Counterclaim

{¶52} In defense of 7471 Tyler's claims and in support of its breach of contract counterclaim, Titan presented testimony from three witnesses, including Daniel Samnik ("Mr. Samnik"), a former Titan employee who served as a junior foreman on the project, who testified regarding Titan's performance of each work item under the contract.

{¶53} With respect to the limestone base, Mr. Samnik testified that when Titan excavated the parking lot using a heavy milling machine and dump trucks, he did not observe rutting, which indicated the existence of a sufficient base; he observed an existing limestone base that was at least four inches; he was not aware of any clay being present in the existing limestone base; and Titan installed #304 limestone in certain areas throughout the parking lot and around the catch basins.

{¶54} With respect to the limestone base, Mr. Phillips testified that Titan did not remove all of the existing limestone and install new #304 limestone; if the existing base of a parking lot is sufficient, Titan does not disrupt it; he observed an average of six to eight inches of existing limestone base when Titan excavated a trench to install the curbing and about eight to ten inches when Titan dug holes to install the catch basins; he

1. 7471 Tyler also presented evidence in support of its slander of title claim. Since 7471 Tyler's assignments of error relate only to its breach of contract claim, we will not address this claim.

did not observe the presence of clay in the existing limestone; Titan installed #304 limestone around the catch basins and in four or five other locations in the parking lot; and he considered Titan's use of heavy machinery and equipment all over the job site to constitute a proof roll.

{¶55} Mr. Phillips testified that cracking in pavement could occur for a number of reasons, including a vehicle dropping a transmission or leaking fluid or driving on it with heavy materials shortly after installation.

{¶56} Mr. Phillips also testified regarding the appropriate maintenance for asphalt parking lots after the first year of installation, including crack filling and seal coating.

Proposed Jury Interrogatories

{¶57} Prior to closing arguments, 7471 Tyler submitted ten proposed jury interrogatories.

{¶58} The first through seventh (contained on separate pages) addressed 7471 Tyler's breach of contract claim; the eighth and ninth (contained on one page) addressed its slander of title claim; and the tenth addressed total combined damages for both claims.

{¶59} The trial court stated that it had reviewed 7471 Tyler's proposed interrogatories and found that the jury instructions and general verdict forms were "more appropriate" and that the jury instructions "adequately cover" the areas set forth in the interrogatories. The trial court noted 7471 Tyler's objection, and 7471 Tyler filed its proposed jury interrogatories in the record.

Jury Instructions

{¶60} The issues for the jury to decide regarding 7471 Tyler's breach of contract claim included: (1) whether Titan materially breached the contract or failed to perform in

a workmanlike manner by any or a combination of nine alleged failures in performance;[2] (2) whether 7471 Tyler was not in material breach of the contract and had substantially performed at the time of Titan's breach; and (3) the existence and amount of Titan's damages.

{¶61} The issues for the jury to decide regarding Titan's breach of contract counterclaim included (1) whether 7471 Tyler breached the contract by failing to properly compensate and timely pay Titan for the work it provided under the contract; (2) whether Titan was not in material breach of the contract and substantially performed its duties under the contract at the time of 7471 Tyler's breach; and (3) the existence and amount of Titan's damages.

The Verdict

{¶62} Following deliberations, the jury reached a unanimous verdict, as follows: (1) on 7471 Tyler's breach of contract claim, it found in favor of 7471 Tyler and awarded damages of $8,896; (2) on 7471 Tyler's slander of title claim, it found in favor of Titan; and (3) on Titan's breach of contract counterclaim, it found in favor of Titan and awarded damages of $40,358.

{¶63} The trial court utilized a single jury verdict form for 7471 Tyler's breach of contract claim, and the verdict form did not ask the jury to make individual findings or award damages with respect to each alleged breach.

{¶64} The trial court subsequently issued a judgment entry granting judgment to the respective parties in accordance with the jury's verdict.

2. Prior to closing arguments and jury instructions, Tyler withdrew its claim that Titan failed to install the sidewalk to the contracted for size.

Post-Trial Proceedings

{¶65} 7471 Tyler filed a posttrial motion for JNOV pursuant to Civ.R. 50(B) and/or, in the alternative, a motion for a new trial pursuant to Civ.R. 59(A)(1), (A)(6), (A)(7), and (A)(9).

{¶66} 7471 Tyler argued that there was no question that Titan failed to install approximately four inches of #304 limestone base, as the contract requires, and Titan's breach would require damages greatly exceeding the award of $8,896. 7471 Tyler contended that the jury's verdict could not be reconciled with the evidence, which entitled it to judgment notwithstanding the verdict pursuant to Civ.R. 50(B), or that the judgment was not sustained by the weight of the evidence, which entitled it to a new trial pursuant to Civ.R. 59(A)(6).[3]

{¶67} Titan filed a brief in opposition, arguing that that the contract did not require Titan to excavate the existing limestone base but instead to ensure a four-inch base level. Mr. Samnik and Mr. Phillips both testified that they observed at least four inches of existing limestone.

{¶68} The trial court issued an opinion and judgment entry denying 7471 Tyler's motion.

{¶69} With respect to 7471 Tyler's motion for JNOV, the trial court determined it could not conclude that there was no substantial evidence to support Titan's side of the case.

3. 7471 Tyler has not challenged the trial court's denial of its motion for a new trial pursuant to Civ.R. 59(A)(1), (A)(7), and (A)(9) in relation to its proposed jury interrogatories, so we will not summarize those arguments.

{¶70} With respect to 7471 Tyler's motion for a new trial pursuant to Civ.R. 59(A)(6), the trial court found that the jury concluded the contract was ambiguous regarding the requirement to install the limestone base. 7471 Tyler interpreted it to require the excavation of the existing base and the installation of a new #304 limestone base. Titan interpreted it to require the installation of limestone where it was insufficient or missing in the existing base. Based on the ambiguity, the contract term should be interpreted against 7471 Tyler as the drafter. The trial court determined that it could not conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.

{¶71} 7471 Tyler filed a timely notice of appeal and sets forth the following four assignments of error for our review:

{¶72} "[1.] The Trial Court Committed An Error Of Law by Failing to Submit 7471 Tyler's Proposed Jury Interrogatories to the Jury.

{¶73} "[2.] The Trial Court erred in Failing to Grant 7471 Tyler's Motion for Judgment Notwithstanding the Verdict as the Evidence at Trial Dictated that 7471 Tyler be Awarded Judgment in its Favor as to its Breach of Contract Claims.

{¶74} "[3.] The Trial Court erred in Failing to Grant 7471 Tyler's Motion for Summary Judgment that Titan is Liable for Breach of Contract.

{¶75} "[4.] The Court Erred in Failing to Grant a New Trial Based on the Weight of the Evidence."

Jury Interrogatories

{¶76} In its first assignment, 7471 Tyler contends that the trial court erred by failing to submit 7471 Tyler's proposed interrogatories to the jury.

Standard of Review

{¶77} 7471 Tyler states the trial court committed an error of law, which requires us to apply a de novo standard of review. However, the Supreme Court of Ohio has held that the applicable standard of review for a trial court's decision whether to submit a proposed interrogatory is abuse of discretion. *See Freeman v. Norfolk & W. Ry. Co*., 69 Ohio St.3d 611, 614 (1994), citing *Ragone v. Vitali & Beltrami, Jr., Inc*., 42 Ohio St.2d 161 (1975), paragraph one of the syllabus.

{¶78} An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.Rev.2004). When an appellate court is reviewing a pure issue of law, the mere fact that the reviewing court would decide the issue differently is enough to find error (although harmless errors and errors not preserved for appellate review are not reversible). *Id*. at ¶67, fn. 2. By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error. *Id*. at ¶67.

Legal Standards

{¶79} To properly address 7471 Tyler's first assignment of error, we first explain the separate but closely related concepts of general verdicts, jury interrogatories, and jury instructions.

General Verdicts

{¶80} The function of the jury, as trier of fact, is to make findings of fact determinative of any claim for relief or defense to it. *Robb v. Lincoln Publishing (Ohio), Inc.*, 114 Ohio App.3d 595, 623 (12th Dist.1996).

{¶81} Civ.R. 49(A) requires trial courts in civil jury trial to use "[a] general verdict, by which the jury finds generally in favor of the prevailing party." The Supreme Court of Ohio has held that "[c]ompliance with Civ.R. 49(A) is mandatory. A trial judge *must* require the jury to return a general verdict in a civil action for damages." (Emphasis added.) *Schellhouse v. Norfolk & W. Ry. Co.*, 61 Ohio St.3d 520 (1991), syllabus.

{¶82} Courts have held that Civ.R. 49 does not prohibit a trial court's issuance of multiple general verdict forms. *See, e.g., Williams v. Oeder*, 103 Ohio App.3d 333, 342 (12th Dist.1995); *Pravitskyy v. Halczysak*, 8th Dist. Cuyahoga No. 82295, 2003-Ohio-7057, ¶36.

{¶83} Civ.R. 49(C) mandates that "[s]pecial verdicts shall not be used." A "special verdict is "a statement by the jury of the facts it has found—in essence, the jury's answers to questions submitted to it; the court determines which party, based on those answers, is to have judgment." *Phillips v. Garfield Hts.*, 85 Ohio App.3d 413, 418 (8th Dist.1992), citing *Black's Law Dictionary* 1560 (6th Ed.1990). This prohibition was written into the civil rules in response to the many difficulties encountered with special verdicts in pre-rule civil practice. *Schellhouse* at 524, citing 1970 Staff Note to Civ.R. 49.

Interrogatories

{¶84} In place of the special verdict, the drafters provided, in Civ.R. 49(B), for the use of interrogatories in combination with the general verdict as a means of attaining the

perceived advantages of the special verdict while avoiding its disadvantages. *Id*. According to its drafters, Civ.R. 49(B) was "designed * * * to broaden the function of the interrogatory to the jury." 1970 Staff Note to Civ.R. 49.

{¶85} The Supreme Court of Ohio has held that "[t]he purpose of an interrogatory is to 'test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict.'" *Freeman* at 613, quoting *Riley v. Cincinnati*, 46 Ohio St.2d 287, 298 (1976). Stated differently, the "essential purpose to be served by interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co*., 28 Ohio St.3d 333, 336-37 (1986); *see also Colvin v. Abbey's Restaurant, Inc.*, 85 Ohio St.3d 535, 538 (1999) ("The purpose of using interrogatories is to test the general verdict. * * * The overall goal is to have the jury return a general verdict and interrogatory answers that complement that general verdict").

Review of Proposed Interrogatories

{¶86} The first three sentences of Civ.R. 49(B) provide that "[t]he 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."

{¶87} Accordingly, Civ.R. 49(B) vests the trial court with the discretionary power to review all interrogatories prior to submission to the jury. *Raymond-Cass, Inc. v. Sabetta*, 11th Dist. Lake No. 13-042, 1989 WL 81538, *2 (July 21, 1989). Further, the requirement that the trial court "inform counsel of its proposed action" means it may not summarily deny a party's request to submit written interrogatories without any consideration. *Id.*

{¶88} The Supreme Court of Ohio has held that Civ.R. 49(B) "does not render the trial judge 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 * * *." *Ragone* at 165-66.

{¶89} According to the court, "[f]ollowing a timely request by a party, a mandatory duty arises to submit written interrogatories to the jury, provided they are in the form the court approves." *Cincinnati Riverfront* at 336. "The wording of Civ.R. 49(B), that the 'court shall submit written interrogatories * * * upon the request of any party,' is *mandatory in character and leaves no discretion in the trial court on the question of submission, upon request, of proper interrogatories to the jury*. The rule, however, reposes discretion in the court to pass upon the *content* of requested interrogatories." (Emphasis sic.) *Id*., quoting *Riley* at 298; *see Freeman* at 613 ("While it is mandatory that the court submit to the jury properly drafted interrogatories, the trial court retains discretion to reject interrogatories that are inappropriate in form or content"); 1970 Staff Note to Civ.R. 49 ("The court has the right to approve the form of the interrogatories in order that the occasion for possible error may be reduced").

{¶90} Thus, the court has held that a trial court may reject proposed interrogatories where they are "not based on the evidence," "incomplete," "ambiguous," "confusing," "redundant," "merely cumulative," "potentially prejudicial," or "otherwise legally objectionable" or that "incorrectly state the law." *Ragone* at 165-66; *Ziegler v. Wendel Poultry Servs., Inc.*, 67 Ohio St.3d 10, 15 (1993), *overruled on other grounds*, *Fidelholtz v. Peller*, 81 Ohio St.3d 197 (1998); *Riley* at 299; *Freeman* at 614.

{¶91} The fourth sentence of Civ.R. 49(B) states that "[t]he interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law."

{¶92} The Supreme Court of Ohio has defined "determinative issues" as "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." *Ziegler* at 25, quoting *Miller v. McAllister*, 169 Ohio St. 487, 494 (1959); *see also* 1970 Staff Note to Civ.R. 49 ("A 'determinative issue' is an issue the deciding of which by the jury may in and of itself dispose of the entire case").

{¶93} The court has held that "proper interrogatories" are "those that will lead to findings of such a character as will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether such verdict shall stand." *Freeman* at 613-14, quoting *Bradley v. Mansfield Rapid Transit, Inc*., 154 Ohio St. 154, 160 (1950). "Proper jury interrogatories must address determinative issues and must be based upon the evidence presented." *Ziegler* at 15, citing *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992), paragraph three of the syllabus.

"Although interrogatories may be addressed to issues of mixed law and fact or issues of fact only, the issues must be ultimate and determinative in character." *Freeman* at 613; *see also* 1970 Staff Note to Civ.R. 49 ("[I]f an interrogatory is requested, the interrogatory ought to be phrased so as to lead to or be directed to the jury's answering a question involving a determinative issue").

{¶94} Thus, the Supreme Court of Ohio has held that a trial court may reject proposed interrogatories that are "merely probative or evidentiary in nature," that do not "touch on an ultimate issue," or that are "likely to evoke specific, nondeterminative findings." *Id.* at 614, 615.

Relationship to Instructions and General Verdict

{¶95} Civ.R. 51(A) provides that "[t]he court * * * shall give the jury complete instructions after the arguments are completed" and "also may give some or all of its instructions to the jury prior to counsel's arguments."

{¶96} The purpose of jury instructions is to properly guide the jury in performing its task by delineating the issues and by providing the law of the case and necessary procedural instructions. *Robb* at 623; *Sweet v. Clare-Mar Camp, Inc*., 38 Ohio App.3d 6, 11 (8th Dist.1987).

{¶97} The second paragraph of Civ.R. 49(B) provides that "[t]he 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."

{¶98} The Supreme Court of Ohio has found this provision to mean that the trial court "should be careful to see that the interrogatories, as phrased, are consistent with

and responsive to the general instructions to the jury." *Ragone* at 166, quoting 1970 Staff Note to Civ.R. 49.

{¶99} The drafters of Civ.R. 49 recognized that instructions and interrogatories serve different functions, writing that "inasmuch as a jury with proper instructions by the court decides determinative or ultimate issues (Issues which dispose of the case) in its general verdict, an interrogatory to the jury is designed to test the jury's thinking in resolving a determinative or ultimate issue in the case * * *". 1970 Staff Note to Civ.R. 49.

{¶100} The third and final paragraph of Civ.R. 49(B) details the actions a trial court must take when entering judgment on a jury verdict that is accompanied by interrogatories. *Colvin, supra,* at 538. It provides:

{¶101} "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."

{¶102} The fact that answers to interrogatories may control suggests that the answering of interrogatories is even more important than the general verdict. *See Aetna Cas. & Sur. Co. v. Niemiec*, 172 Ohio St. 53, 55 (1961) (construing former R.C. 2315.17).

Rejection of Proposed Interrogatories

{¶103} Finally, the Supreme Court of Ohio has determined that Civ.R. 49(B) imposes limited requirements on a trial court when it is faced with an improper interrogatory.

{¶104} According to the court, "[t]he structure of Civ.R. 49, and of our adversary system in general, places the burden on the parties themselves to propose proper interrogatories." *Freeman* at 614. "If the trial court rejects a proposed interrogatory, a party may resubmit the interrogatory in an amended form." *Id*. "Although the interests of justice and efficiency may make it a wise course of action, Civ.R. 49 does not obligate a trial court actively to assist a party in reformulating improper interrogatories." *Id*. "The court's duty is merely to submit proper interrogatories, and to reject them only for a proper reason." *Id*.

{¶105} The Fifth District has held that once the trial court explains the inappropriate nature of proposed interrogatories, "it is incumbent upon * * * counsel to inquire and remedy the same." *Lodestar v. Zeigler*, 5th Dist. Richland Nos. CA-2630 & CA-2645, 1989 WL 132536, *4 (Oct. 18, 1989). Otherwise, the party waives any error on appeal regarding the proposed interrogatories. *Id*.; *see also Mercer v. Bok*, 2d Dist. Montgomery No. CA 9383 ,1986 WL 4016, *2 (Mar. 27, 1986) ("[W]e conclude any possible error was waived by counsel's not pursuing the possibility of providing less confusing interrogatories").

{¶106} With the above concepts in mind, we reach the merits of 7471 Tyler's arguments regarding the trial court's rejection of its proposed jury interrogatories.

Mandatory Duty

{¶107} 7471 Tyler contends that the Supreme Court of Ohio's "binding authority" in *Cincinnati Riverfront* "holds that Civ.R. 49(B) is mandatory, and a court has no discretion on the question of submission of proper interrogatories to the jury."

{¶108} In *Cincinnati Riverfront*, however, the court explained that the trial court's "mandatory duty" to submit written interrogatories following a timely request arises "provided they are in the form the court approves." *Id*. at 336. The rule "reposes discretion in the court to pass upon the *content* of requested interrogatories." (Emphasis sic.) *Id*.

{¶109} More recently, the court has held that *"[w]hen both the content and the form of a proposed interrogatory are proper*, Civ.R. 49 imposes a mandatory duty upon the trial court to submit the interrogatory to the jury. (Emphasis added.) *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, paragraph two of the syllabus.

{¶110} Accordingly, the trial court was not automatically required to submit 7471 Tyler's proposed interrogatories to the jury.

The Trial Court's Reasons

{¶111} 7471 Tyler further contends that the trial court's reasons for denying its request to submit the jury interrogatories were the same as those by rejected by the Supreme Court of Ohio in *Cincinnati Riverfront* and by the Eighth District in *Rich v. McDonald's Corp*., 155 Ohio App.3d 1 (8th Dist.2003). We disagree.

{¶112} In *Cincinnati Riverfront*, the trial court denied the party's request because it was "impossible for the Court to take up additional interrogatories at this time." *Id*. at 336. The Supreme Court of Ohio found error because the "trial court did not refuse to submit

the interrogatories to the jury following an examination of the form and content," but denied the party's "timely request without any consideration." *Id*.

{¶113} Similarly, in *Rich*, the trial court failed to examine the party's interrogatories, stating that it did not favor using interrogatories in "a case like this." *Id*. at ¶16. The Eighth District found that the trial court's refusal to submit the interrogatories was arbitrary pursuant to *Cincinnati Riverfront*. *Id*. at ¶13, 15-16.

{¶114} Here, the trial court expressly stated that it had reviewed 7471 Tyler's proposed jury interrogatories and found that the jury instructions and general verdict forms were "more appropriate" and that the jury instructions "adequately cover" the areas set forth in the interrogatories. Unlike in *Cincinnati Riverfront* and in *Rich*, the trial court's findings reflect its consideration of the form and content of the proposed interrogatories.

Form and Content

{¶115} We next determine whether the trial court properly rejected 7471 Tyler's proposed interrogatories based on their form and content.

Proposed Breach of Contract Interrogatories

{¶116} 7417 Tyler's arguments on appeal only relate to the proposed interrogatories for its breach of contract claim, i.e., the first through seventh proposed interrogatories. Therefore, we limit our analysis accordingly.

{¶117} Respectively, 7471 Tyler's proposed breach of contract interrogatories requested that the jury answer "Yes" or "No" to the following questions:

{¶118} "[1.] Do you find that Titan Asphalt failed to excavate/grade the property?

{¶119} "[2.] Do you find that Titan failed to install 4 inches of #304 limestone base?

{¶120} "[3.] Do you find that the Catch Basins installed by Titan were of the wrong type and/or the wrong materials used[?]"

{¶121} "[4.] Do you find that it was proper for 7471 Tyler to install a new catch basin because the existing system installed by Titan was inadequate?"

{¶122} "[5.] Do you find that Titan failed to install the concrete apron?

{¶123} "[6.] Do you find that Titan failed to install 27,023 square feet of asphalt and instead installed 25,581 (difference of 1441 square feet)\of asphalt.? [sic]"

{¶124} "[7.] Do you find that Titan failed to install the concrete pads to the correct size?"

{¶125} Below each of these interrogatories is the following question:

{¶126} "If the answer is yes, what is the amount of damages you award the Plaintiff?"

Duplicative to Jury Instructions

{¶127} The trial court found that the jury instructions and general verdict forms were "more appropriate" and that the jury instructions "adequately cover" the areas set forth in the proposed interrogatories. In its opinion and judgment entry denying 7471 Tyler's motion for a new trial, the trial court expounded on these findings, stating that 7471 Tyler's proposed breach of contract interrogatories were "duplicative" because "[t]he jury instruction on plaintiff's claim for breach of contract specifically addressed each of the claims by plaintiff."

{¶128} Although a proposed interrogatory must be consistent with the jury instructions, this court and others have held that an interrogatory is not properly rejected because it overlaps with the jury instructions.

{¶129} In *Raymond-Cass*, *supra*, an issue for the jury was whether the injuries the plaintiff suffered in an automobile accident occurred within the scope of her employment. *Id*. at *1. The plaintiff proposed the following interrogatory: "Do you find that plaintiff, Linda Sabetta, was proceeding to her home to pick up posters to return to Raymond-Cass, Inc., dba Joe's Depot?" *Id*. at *3. The trial court refused to submit it to the jury, determining that it was similar in nature to the verdict that was going to be presented. *Id*.

{¶130} This court held that "simply because a given legal issue in a jury trial is the subject of coverage by the trial court in its general charge, and is subsumed in the general verdict, is not determinative of whether or not a written interrogatory is to be required under Civ.R. 49(B). *Id.* at *3.

{¶131} Similarly, the Twelfth District has held as follows:

{¶132} "[A] properly proposed interrogatory cannot be rejected because it is redundant to a jury instruction. The Supreme Court of Ohio has never created this exception and we decline to do so today. Indeed, a validly proposed interrogatory, consistent with a jury instruction, must be given to the jury. Simply, jury instructions are not a substitute for a validly proposed interrogatory. The trial court always provides jury instructions on how to apply the law to the facts of the case. The point of Civ.R. 49(B) is to allow a general verdict to be tested beyond a bare ruling for the defendant or plaintiff with responses to determinative legal issues." *York v. Mayfield Neurological Inst., Inc.* 133 Ohio App.3d 777, 785 (12th Dist.1999).

{¶133} Therefore, the trial court's finding that 7471 Tyler's proposed breach of contract interrogatories were "duplicative" to the jury instructions was not a proper reason for rejecting them.

{¶134} However, this court determined that the trial court's rejection of a proposed interrogatory does not constitute an abuse of discretion if it is supported by "another cogent rationale." *Raymond-Cass* at *3. As demonstrated below, at least two other "cogent rationales" support the trial court's rejection of 7471 Tyler's proposed breach of contract interrogatories.

Testing the Verdict

{¶135} 7417 Tyler contends that its proposed breach of contract interrogatories involved a determinative issue and would have tested the correctness of the jury's verdict. Had its proposed interrogatories been submitted, the jury's decision on each breach of contract claim would have been clear.

{¶136} We find that 7471 Tyler's proposed interrogatories for its breach of contract claim are incomplete, and thus, fail to test the jury's thinking.

{¶137} For instance, the Supreme Court of Ohio has stated that a properly drafted interrogatory on the issue of negligence will elicit a statement of facts from which a conclusion of negligence or no negligence may be drawn. *Freeman* at 613. When the plaintiff's allegations include more than one act of negligence, it is proper to ask the jury to specify of what the negligence consisted. *Id*.

{¶138} Therefore, the court has approved interrogatories that requested the jury to state "in what respects the defendant was negligent" and that requested the jury to apportion percentages of negligence among the named defendants and "others involved." *Ragone* at paragraph two of the syllabus; *Cincinnati Riverfront* at 339.

{¶139} By contrast, the court has rejected interrogatories that asked whether there was "actual notice" when the plaintiff could prove "actual or constructive notice."

{¶140} In *Raymond-Cass*, this court found that the proposed interrogatory at issue in that case was properly rejected because it failed to test the jury's thinking on the issue of whether the accident causing the plaintiff-employee's injury occurred in the scope of her employment. *Id*. at *3. This court reasoned as follows:

{¶141} "Either answer, 'yes or no,' is consistent with a general verdict that would conclude that appellant was entitled to participate in the fund and thus that the accident causing her injury occurred in the scope of her employment. On the other hand, either response would be equally consonant with a general verdict which declared that she was not entitled to participate in the fund – hence, that the accident did not occur in the scope of her employment. Here a 'no' response is wholly consistent with the verdict, as is the 'yes' reply. That is, the jury could respond to the interrogatory in the affirmative, or negative, but it still could conclude appellant was not acting within the scope of her employment." *Id*.

{¶142} Here, the jury instructions for 7471 Tyler's breach of contract claim informed the jury that it must find "by the greater weight of the evidence" that Titan breached the contract or failed to perform in a workmanlike manner "by any of the following or combination of the following:

{¶143} "1. Failing to properly excavate the property;

{¶144} "2. Failing to properly grade the property;

{¶145} "3. Failing to install the contracted for #304 limestone base to approximately 4" height;

{¶146} "4. Failing to install the 4 inches of asphalt uniformly;

{¶147} "5. Failing to install the concrete pads in the contracted for size;

{¶148} "6. Failing to install the water boxes in the correct location;

{¶149} "7. Failing to use the proper materials and install the catch basins to the proper grade and failing to install them properly in a manner consistent with industry standards;

{¶150} "8. Failing to install the concrete apron;

{¶151} "9. Failing to install the asphalt to the agreed upon square footage and/or to the property line."

{¶152} In addition, the jury instructions informed the jury that "[a] contract is breached when one party fails to perform its duties under the contract." The instructions defined "material breach" as "a breach that violates a term essential for the purpose of the contract. Mere nominal, trifling, slight, or technical departures from the contract terms are not material breaches as long as they occur in good faith." The instructions defined "good faith" as "honesty in fact in the conduct or transaction."

{¶153} Further, the instructions defined "workmanlike manner" as "the way work is customarily done by other contractors in the community. This implied duty requires construction professionals to act reasonably and to exercise a degree of care which a member of the construction trade in good standing in that community would exercise under the same or similar circumstances."

{¶154} A "yes" response to any or all of the proposed breach of contract interrogatories is consistent with a verdict finding in favor of 7471 Tyler because the jury could have concluded that Titan's failures in performance constituted material breaches of the parties' contract and/or were unworkmanlike. A "yes" response to any or all of the interrogatories is also consistent with a verdict finding in favor of Titan because the jury

could find that Titan failed to perform but conclude that such failure was not a material breach of the contract and was not unworkmanlike.

{¶155} In addition, a "no" response to any or all of the proposed breach of contract interrogatories is consistent with a general verdict that Titan did not breach the parties' contract. A "no" response to any or all of the interrogatories is also consistent with a verdict finding in favor of 7471 Tyler because the proposed breach of contract interrogatories do not address Titan's alleged failures to install the 4 inches of asphalt uniformly or to install the water boxes in the correct location. Therefore, the jury could find that Titan performed each of the activities specified in 7471 Tyler's proposed breach of contract interrogatories but that Titan failed to install the 4 inches of asphalt uniformly and/or failed to install the water boxes in the correct location. The jury could conclude that one or both of these failures was a material breach of the contract and/or was unworkmanlike.

{¶156} By contrast, if 7471 Tyler's proposed breach of contract interrogatories asked the jury to further find whether Titan's failures to perform were a "material breach" or "unworkmanlike" (or posed individual questions with respect to each element of a "material breach" or "workmanlike manner"), and the jury had answered "yes" with respect to at least one material breach or unworkmanlike performance, then such response would be expressly inconsistent with a general verdict in favor of Titan. Similarly, an answer of "no" with respect to each alleged failure to perform would be expressly inconsistent with a general verdict in favor of 7471 Tyler. And if the jury had answered "yes" with respect to at least one material breach or unworkmanlike performance and found in favor of 7471 Tyler, then it would be clear which breach(es) comprised the jury's general verdict.

{¶157} Accordingly, 7471 Tyler's proposed breach of contract interrogatories fail to test the verdict and were properly rejected.

Confusing/Incorrect Statement of Law

{¶158} We also find that 7471 Tyler's proposed interrogatories for its breach of contract claim are confusing and may be construed as an incorrect statement of law.

{¶159} Jury instructions must be a correct statement of the law as applied to the particular facts of any case. *Laderer v. St. Rita's Med. Ctr*., 122 Ohio App.3d 587, 599 (3d Dist.1997). Though instructions should be tailored to meet the facts in a case, such tailoring must be done so as not to alter the law which prompted the instruction in the first place. *Id.; see Little Miami RR. Co. v. Wetmore*, 19 Ohio St. 110, 135 (1869) ("The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury, in the application of the law to the facts as they may find them").

{¶160} 7471 Tyler's proposed breach of contract interrogatories only ask the jury whether Titan failed to perform. If the jury answered any of the interrogatories in the affirmative, it was further asked the amount of damages that it awarded. Thus, 7471 Tyler's proposed breach of contract interrogatories imply that 7471 Tyler is entitled to an award of damages if the jury finds merely a failure in Titan's performance, which is not the applicable law. *See Hostetler v. Cent. Farm & Garden, Inc*., 5th Dist. Tuscarawas No. 2010 AP 12 0046, 2012-Ohio-507, ¶160 (finding that trial court properly rejected proposed interrogatories in a breach of contract action where "they may likely have confused the jury as to the burden of proof required").

Failure to Inquire/Resubmit

{¶161} In the underlying case, the submission of proper jury interrogatories would have been helpful in understanding the jury's breach of contract verdict. Further, it would have been in everyone's best interest for the trial court to assist in the reformulation of the proposed breach of contract interrogatories. However, proper reasons support the trial court's rejection, and 7471 Tyler did not inquire and attempt to remedy them.

{¶162} Based on the foregoing, the trial court did not abuse its discretion in rejecting 7471 Tyler's proposed breach of contract jury interrogatories.

Timeliness and Formatting

{¶163} Finally, 7471 Tyler challenges the trial court's findings that its proposed jury interrogatories were untimely and not properly formatted.

{¶164} The record does not reflect that the trial court denied 7471 Tyler's proposed interrogatories for these reasons during the trial proceedings. Rather, these reasons are contained in the trial court's opinion and judgment entry denying 7471 Tyler's motion for a new trial pursuant to Civ.R. 59(A)(1), (A)(7), and (A)(9).

{¶165} Specifically, the trial court found that 7471 Tyler failed to submit its proposed interrogatories 14 days before trial, as required in the court's civil pretrial order. The trial court also found that 7471 Tyler's proposed interrogatories were not submitted "in a proper format" because "[t]hey did not provide signature lines for the jurors answering the interrogatories not instructions on which jurors are to sign the following interrogatories or amount of damages."

{¶166} 7471 Tyler has not assigned as error that portion of the trial court's order denying its motion for a new trial pursuant to Civ.R. 59(A)(1), (A)(7), and (A)(9). It has

only challenged that portion of the trial court's order denying its motion for a new trial pursuant to Civ.R. 59(A)(6), which we address below.

{¶167} Even if these issues before properly before us, however, any error on the part of the trial court regarding timeliness or formatting would be harmless based on the preceding discussion. *See* Civ.R. 61; R.C. 2309.59.

{¶168} 7471 Tyler's first assignment of error is without merit.

Inferences from the General Verdict

{¶169} 7471 Tyler's remaining assignments of error implicate the jury's verdict on its breach of contract claim. Therefore, we set forth the proper inferences to be drawn from the jury's verdict under these circumstances.

{¶170} As indicated, the jury returned a general verdict in favor of 7471 Tyler on its breach of contract claim but awarded it only $8,896 in damages. 7471 Tyler's breach of contract claim encompassed several alleged breaches. While 7471 Tyler submitted proposed jury interrogatories, the trial court properly exercised judicial discretion in rejecting them, because, as demonstrated above, they were inappropriate. Consequently, we cannot determine what evidence the jury ultimately rejected or accepted in reaching its verdict. Thus, we do not know upon which alleged breach(es) the jury returned its verdict on 7471 Tyler's breach of contract claim.

{¶171} According to the Supreme Court of Ohio, where there is only a general verdict with no interrogatories, a reviewing court is authorized to infer that the jury found on all issues in favor of the successful party and against the unsuccessful party. *See Bowman v. Davis*, 48 Ohio St.2d 41, 45 (1976), fn. 2; *Berisford v. Sells*, 43 Ohio St.2d 205, 208 (1975). *Accord Mid-Ohio Mechanical v. Eisenmann Corp.*, 5th Dist. Guernsey

No. 07 CA 000035, 2009-Ohio-5804, ¶80; *Nott v. Homan*, 84 Ohio App.3d 372, 378 (3d Dist.1992); *Stephenson v. Upper Valley Family Care, Inc*., 2d Dist. Miami No. 2009 CA 38, 2010-Ohio-4390, ¶50. The appellate court will not speculate as to the particular damages compensated by the jury award. *Mid-Ohio Mechanical* at ¶80; *Nott* at 378; *Stephenson* at ¶50.

{¶172} Accordingly, we presume that the jury's general verdict in favor of 7471 Tyler on its breach of contract claim is a finding that 7471 Tyler had proven, by the preponderance of the evidence, each of the asserted breaches. *See Stephenson* at ¶51. Further, because the jury was not asked to specify what award amount was meant to compensate for which asserted breach, we presume that the jury awarded some amount for each breach. *See id*.

Summary Judgment

{¶173} We address 7471 Tyler's remaining assignments of error out of order for ease of discussion.

{¶174} In its third assignment of error, 7471 Tyler contends that the trial court erred by denying its pretrial motion for summary judgment on its breach of contract claims. We do not reach the merits of 7471 Tyler's arguments because we find that any such error is moot or harmless.

{¶175} As indicated, we infer from the jury's verdict on 7471 Tyler's breach of contract claim that it found in favor of 7471 Tyler on all issues. Therefore, any error on the part of the trial court in denying summary judgment in 7471 Tyler's favor is harmless.

{¶176} Even if we construed the jury's verdict as finding in favor of Titan on one or more of the alleged breaches, however, any trial court error in denying summary judgment remains harmless or is moot.

{¶177} According to the Supreme Court of Ohio, "the denial of a motion for summary judgment is not a point of consideration in an appeal from a final judgment entered following a trial on the merits." *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156 (1994). Any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made. *Id*. at syllabus. To allow a summary judgment decision based on less evidence to prevail over a verdict reached on more evidence would defeat the fundamental purpose of judicial inquiry. *Id*. at 157.

{¶178} However, if a trial court denies a motion for summary judgment on legal grounds, the alleged error in that ruling is not rendered moot or harmless by a subsequent trial on the merits. *Id*. at 158. An appellate court, therefore, may review a denial of a motion seeking summary judgment on a pure question of law regardless of the nonmoving party's success at trial. *Hurton v. Boyer*, 11th Dist. Trumbull No. 2019-T-0086, 2020-Ohio-2790, ¶30, citing *Capella III, LLC v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶14 (10th Dist.).

{¶179} 7471 Tyler's' breach of contract claim involved whether Titan materially breached the contract and/or failed to perform in a workmanlike manner. Courts have held that both issues are generally questions of fact. *See Alloush v. Physician Cardiovascular Venture, LLC*, 11th Dist. Trumbull No. 2011-T-0112, 2013-Ohio-2400,

¶32, quoting *O'Brien v. Ohio State Univ*., 10th Dist. Franklin No. 06AP-946, 2007-Ohio-4833, ¶11 ("The determination of whether a party's breach of a contract was a 'material breach' is generally a question of fact"); *Fugo v. White Oak Condominium Assn., Inc*., 8th Dist. Cuyahoga No. 63440, 1993 WL 317445, *2 (Aug. 19, 1993) (noting that a trier of fact "must assess fault and address issues of fact" in determining whether a party performed in a workmanlike manner).

{¶180} In its journal entry denying 7471 Tyler's motion for summary judgment, the trial court found that "significant material issues of fact exist as to whether the contract at issue was breached, to what extent, and whether the work that Titan performed pursuant to the contract was performed in a workmanlike manner." The facts of the case were subsequently developed over a three-day jury trial.

{¶181} Accordingly, any error on the trial court's part in denying summary judgment is moot or harmless.

{¶182} 7471 Tyler's third assignment of error is without merit.

Motion for JNOV

{¶183} In its second assignment of error, 7471 Tyler contends that the trial court erred in denying its motion for JNOV pursuant to Civ.R. 50(B), which provides, in relevant part, as follows:

{¶184} "(1) Whether or not a motion to direct a verdict has been made or overruled, a party may serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion. * * *

{¶185} * * *

{¶186} "(3) If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. * * *"

Standard of Review

{¶187} The Supreme Court of Ohio has explained the trial court's task in ruling on a motion for JNOV pursuant to Civ.R. 50(B) in *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271 (1976):

{¶188} "The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions." *Id*. at 275.

{¶189} We review de novo a trial court's ruling on a motion for JNOV, as it presents a question of law. *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd.*, 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875, ¶48.

Waiver and Harmless Error

{¶190} On appeal, 7471 Tyler argues that it was entitled to JNOV that Titan materially breached the contract by failing to install (1) the #304 limestone base; (2) the contracted for amount of asphalt; (3) the concrete apron; (4) the correct drains, and (5)

the concrete pads to the correct size. However, 7471 Tyler's motion for JNOV only addressed Titan's alleged breach of the limestone base provision.

{¶191} This court will not consider an error which the party could have raised, but did not, in the trial court at a time when such error could have been avoided or corrected by the trial court. *Blatnik v. Avery Dennison Corp.*, 148 Ohio App.3d 494, 2002-Ohio-1682, ¶96 (11th Dist.).

{¶192} Further, since we infer the jury found that Titan materially breached the limestone base provision, any trial court error is harmless.

{¶193} Even if we construed the jury's verdict as finding in Titan's favor regarding this alleged breach, however, there was substantial evidence to support such a finding.

Substantial Evidence

{¶194} The applicable contract provision states, relevant part, as follows:

{¶195} "ASPHALT REPLACEMENT:

{¶196} "EAST SIDE ONLY:

{¶197} "PAVE: (27,023 SF)

{¶198} "Excavate/Grade entire east side from street to back corner of building, remove and haul off site. Install approx. 4" of #304 Limestone sub-grade. Install approx. 4" of Hot Asphalt in 2-Lifts * * *."

{¶199} The relevant inquiry is whether there was substantial evidence to support Titan's position, upon which reasonable minds may reach different conclusions, that it did not materially breach the contract by failing to install approximately four inches of #304 limestone.

{¶200} We disagree with the trial court's conclusion that the jury found this contract term to be ambiguous. Contract language is ambiguous if it is susceptible to two or more reasonable interpretations. *Willoughby Supply Co., Inc. v. Villhauer*, 11th Dist. Lake No. 2017-L-110, 2018-Ohio-2077, ¶25. Whether a contract is ambiguous is a question of law. (Citation omitted.) *Schraff & King Co., L.P.A. v. Casey*, 11th Dist. Lake No. 2012-L-010, 2012-Ohio-5829, ¶25. Where a contract term is ambiguous, its meaning is a question of fact. (Citation omitted.) *Great Lakes Crushing, supra*, at ¶37.

{¶201} In this case, the trial court did not determine that this contract term was ambiguous and instruct the jury to resolve the ambiguity. However, construing the evidence in a light most favorable to Titan, a reasonable trier of fact could conclude that Titan's failure to install four inches of #304 limestone was not a *material* breach.

{¶202} A "material breach of contract" is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform. (Citation omitted.) *Alloush*, *supra*, at ¶57. Conversely, "[m]erely nominal, trifling, or technical departures are not sufficient to breach the contract." (Citation omitted.) *Id*.

{¶203} 7471 Tyler contends that Titan's "breach" of this requirement was "expressly admitted at trial." We disagree with 7471 Tyler's characterization of the evidence.

{¶204} Mr. Phillips testified that Titan did not remove all the existing base and install new #304 limestone. However, he stated that Titan does not disrupt existing base if it is sufficient.

{¶205} According to Mr. Phillips' testimony, Titan excavated a trench eighteen inches wide and eighteen inches deep, where he observed an average of six to eight

inches of existing limestone; Titan dug ten foot by ten foot holes approximately two and a half feet deep for purposes of installing the catch basins, where he observed an average of eight to ten inches of existing limestone; and he did not observe any clay in the existing limestone.

{¶206} In addition, both Mr. Phillips and Mr. Samnik testified that Titan purchased a supply of #304 limestone and installed it in the areas where it was necessary. While excavating the asphalt using heavy machinery and equipment, neither observed deficiencies in the existing stone base.

{¶207} Thus, while Mr. Phillips conceded that Titan did not install four inches of new #304 limestone base, he did not admit that Titan's failure to do so constituted a material breach of the contract.

{¶208} Mr. Phillips further testified regarding other possible causes of asphalt cracking and proper parking lot maintenance during its first year. Although Ms. Frye testified that she observed cracking in the pavement, her observations occurred approximately a year after Titan's installation. While she opined that the cracking was due to improper design and installation, she stated that she did not observe evidence of parking lot maintenance.

{¶209} Based on the foregoing, the trial court did not err in denying 7471 Tyler's motion for JNOV.

{¶210} 7471 Tyler's second assignment of error is without merit.

Motion for a New Trial

{¶211} In its fourth assignment of error, 7471 Tyler contends that the trial court erred by denying its motion for a new trial pursuant to Civ.R. 59(A)(6), which provides, in

relevant part, that "[a] new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: * * * [t]he judgment is not sustained by the weight of the evidence * * *."

Standard of Review

{¶212} According to the Supreme Court of Ohio, "weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics but depends on its *effect in inducing belief*.'" (Emphasis sic.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶213} In deciding a motion for a new trial based on the weight of the evidence, the trial court must weigh the evidence and pass upon the credibility of witnesses. (Citation omitted.) *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, ¶68 (11th Dist.). However, the trial court's weighing of the evidence differs from that of the jury in that it is restricted to determining whether manifest injustice has been done and whether the verdict is, therefore, manifestly against the weight of the evidence. (Citations omitted.) *Id*.

{¶214} We review a trial court's judgment on a Civ.R. 59 motion for a new trial for an abuse of discretion. *Id.* at ¶69. In civil cases, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be

reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279 (1978), syllabus. When considering the manifest weight of the evidence in a civil case, "[t]he [reviewing] court * * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Eastley* at ¶20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001).

{¶215} "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts." *Id.* at ¶21, quoting *Seasons Coal Co.* at 80, fn. 3. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id.*

{¶216} "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Wilson* at ¶24, quoting *Seasons Coal Co.* at 81.

Waiver and Harmless Error

{¶217} Like its motion for JNOV, 7471 Tyler's motion for a new trial under Civ.R. 59(A)(6) only addressed Titan's alleged breach of the limestone base provision. Thus, it has waived any error regarding the other alleged breaches.

{¶218} Further, since we infer the jury found that Titan materially breached the limestone base provision, any trial court error is harmless.

{¶219} Even if we construed the jury's verdict as finding in Titan's favor regarding this alleged breach, however, we find no manifest injustice.

Manifest Injustice

{¶220} To find in favor of Titan, the jury would have necessarily found the testimony of Mr. Phillips and Mr. Samnik to be more persuasive than that of Ms. Frye.

{¶221} 7471 Tyler's arguments seem to imply that Titan had to present an expert witness in order to dispute Ms. Frye's testimony. However, this court has long-held that the opinion of an expert is an item of evidence intended to assist the jury in reaching the correct result in consideration with the other evidence of the case and that the expert's opinion is not ordinarily conclusive upon the jury. *Mackey v. McCormick*, 11th Dist. Trumbull No. 96-T-5517, 1997 WL 531243, *3 (Aug. 29, 1997).

{¶222} Further, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). A jury may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill,* 176 Ohio St. 61, 67 (1964).

{¶223} The evidence presented at trial, as described in the preceding discussion, provided the jury with competent, credible evidence from which to conclude that Titan's

failure to install four inches of new #304 limestone did not constitute a material breach. Indulging every reasonable presumption in favor of the trial court's judgment in this case, we cannot conclude that the jury clearly lost its way and created a manifest miscarriage of justice.

{¶224} We also find no manifest injustice with respect to the jury's award of damages.

{¶225} According to the Supreme Court of Ohio, "[i]t has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive." *Moskovitz v. Mt. Sinai Med. Ctr.,* 69 Ohio St.3d 638, 655 (1994). Further, a trier of fact is free to reject any evidence of damages even if such evidence is uncontroverted, unimpeached, or unchallenged. *Mid-Ohio Mechanical*, *supra*, at ¶80.

{¶226} 7471 Tyler has not contended that the jury's award of damages was motivated by passion or prejudice.

{¶227} Accordingly, the trial court did not abuse its discretion in denying 7471 Tyler's motion for a new trial pursuant to Civ.R. 59(A)(6).

{¶228} 7471 Tyler's fourth assignment of error is without merit.

{¶229} For the foregoing reasons, the judgments of the Lake County Court of Common Pleas are affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,
THOMAS R. WRIGHT, J., concurs in judgment only.