[Cite as *Cook v. M-F Transport, Inc.*, 2024-Ohio-4678.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

KATHLEEN COOK, ET AL., :

Plaintiffs-Appellees, :

No. 113562

v. :

M-F TRANSPORT INC., ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 26, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-968238

Appearances:

Nurenberg, Paris, Heller & McCarthy Co., L.P.A., Kathleen J. St. John, Jordan D. Lebovitz, and Regan J. Sieperda, *for appellees*.

Reminger Co., L.P.A., Brian D. Sullivan, and Brianna M. Prislipsky, *for appellants*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendants-appellants, M-F Transport, Inc., et al. (together "appellants"), appeal from the jury verdict rendered in favor of plaintiffs-appellees, Kathleen Cook (individually "Cook") and her husband Marcus Cook (individually

"Marcus") (together "appellees"). Appellants raise the following assignments of error for review:

> 1. The trial court improperly permitted certain jurors to change the jury's original verdict after the jury had been discharged, one juror had left the courthouse, and the remaining jurors were told of the impact of their apportionment of fault.
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> 2. The trial court incorrectly entered judgment based upon a modified verdict form in which only 7 of the 8 jurors participated.
>
> 3. The trial court erred in denying defendants' motion for judgment notwithstanding the verdict.

{¶ 2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Procedural and Factual History

{¶ 3} On September 24, 2020, defendant, Gary Delgaudio ("Delgaudio"), was operating a commercial vehicle in the course and scope of his employment with defendants M-F Transport, Inc. ("MFT") and Multi-Flow Dispensers of Ohio, Inc. ("Multi-Flow"). While travelling eastbound on Interstate 90 in Cleveland, Ohio, the left side of Delgaudio's commercial vehicle was struck by a vehicle driven by Jerome Bryant ("Bryant"). The collision caused Delgaudio's commercial vehicle to collide with the vehicle travelling in the lane to his right, which was being operated by plaintiff Cook. The force of this impact pushed Cook's vehicle up and over an overpass wall, causing her vehicle to fall to the road below. Cook sustained numerous injuries, including abrasions to her neck and arms, lacerations on both arms, and a laceration to her right leg that required surgical treatment.

{¶ 4} On September 2, 2022, appellees filed a civil complaint against defendants, MFT, Multi-Flow, Delgaudio, Bryant, and James Vine ("Vine"),[1] setting forth causes of action for negligence, vicarious liability, and loss of consortium. Relevant to this appeal, the complaint alleged that Delgaudio, while acting within the course and scope of his employment with MFT and Multi-Flow, negligently, recklessly, and carelessly operated his motor vehicle, causing substantial injuries to Cook's person and property. The complaint further alleged Delgaudio's negligence proximately caused Marcus to "lose the affection, consortium and/or other services of his wife," and that MFT and Multi-Flow were vicariously liable under the doctrine of respondeat superior.

{¶ 5} On May 26, 2023, appellees dismissed their claims against Bryant and Vine without prejudice.

{¶ 6} On June 21, 2023, the matter proceeded to a jury trial against Delgaudio and his employers. On June 26, 2023, the jury returned a verdict in favor of appellees, finding Delgaudio was negligent and that his negligence was the proximate cause of Cook's injuries. The jury specified that Delgaudio was 30 percent at fault for Cook's injuries, while Bryant was 70 percent at fault. The jury awarded Cook compensatory damages in an amount totaling $260,400. Additionally, Marcus was awarded damages in an amount totaling $22,500.

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[1] The complaint alleged that defendant Bryant was operating a vehicle that was owned, leased maintained and/or under the control of Vine. Accordingly, appellees alleged that Vine "negligently entrusted the [vehicle] to [Bryant] knowing he was an incompetent, unsafe, and negligent driver and thereby proximately caused Plaintiff Kathleen Cook's injuries."

{¶ 7} After the interrogatories and verdict forms were read in open court, the trial court thanked and excused the jurors, stating:

> Ladies and gentleman, I appreciate your diligence here. That's for sure. You have a case that I think did have some measure of difficulty. There were decisions here to be made. You, obviously, took the time and the effort to make these things – make these decisions the way that you feel is appropriate, and as far as I am concerned, no one can question your judgment. You heard everything necessary to make these decisions, and you made them. That's all we ask of you. You did it with some conscientiousness, which goes a long way.
>
> You are welcome to depart.

(Tr. 14-15.)

{¶ 8} Shortly thereafter, the trial judge invited the jurors into his office to have an informal discussion and answer any questions they might have had about the proceedings. At some point during this conversation, the trial judge explained the principles of apportionment and estimated that Delgaudio would be liable for approximately $78,000 of Cook's damages because he had been found less than 50 percent liable. (Tr. 17.) At that time, the jurors "started to mumble or mutter" and expressed that they had already reduced the damages in the verdict forms to an amount that equaled "30 percent of what they thought [appellees'] total damages were." (Tr. 17-18.)

{¶ 9} Following this off-the-record conversation, the trial court went back on the record, outside the presence of the jury, to articulate the information it had gathered from the remaining jurors. The trial court then explained to the parties that it had determined it was necessary and appropriate to have the jurors "re-deliberate" and fill out new, "blank interrogatories and verdict forms" to accurately

reflect their intended award of total damages. (Tr. 18.) The trial court acknowledged that Juror 6 had already left the courthouse after being discharged, and therefore, was no longer available to sign the interrogatories and verdict forms. Nevertheless, the trial court noted that the remaining jurors believed they knew what "Juror [6] intended" based on the conversations that occurred during the initial deliberation process. (Tr. 18.) Following the trial court's disclosures on the record, neither party objected to the court's decision to reconvene the jury for further deliberations.

{¶ 10} Shortly thereafter, the jury returned with the revised verdict forms and jury interrogatories. Before the trial court read the judgment into the record, the court provided counsel for both sides with an additional opportunity to raise any concerns before the new verdict was issued, stating:

> While I am looking over these, ladies and gentleman, I summarized, I hope correctly, what happened when I was talking to you informally after dismissing you and before you left the building. I do want to give the lawyers, however, every opportunity to ask about what it is that we talked about so they can be sure that I gave them an accurate version of our conversation.
>
> While I am doing this, [plaintiff's counsel] if you have any questions of the foreperson about what was said in our conversation or what came up, obviously, you're welcome to inquire at the same time [defense counsel].

(Tr. 23-24.) Plaintiff's counsel and defense counsel each indicated that they had no additional concerns or questions for the court or jury.

{¶ 11} Thereafter, the trial court read the amended verdict into the record and entered judgment in favor of Cook in an amount totaling $868,000, and in favor of Marcus in an amount totaling $75,000. Again, the trial court provided the parties

with an opportunity to question the jury or to raise any issue in open court that might "limit or, if possible, eliminate any appellate mark on this case." (Tr. 26.) Although defense counsel sought clarity on the math used to calculate the total damages, neither counsel raised a formal objection to the final verdict.

{¶ 12} On June 27, 2023, the trial court issued a judgment entry, stating:

> On June 26, 2023, the jury returned answers to interrogatories finding that defendant Gary Delgaudio was negligent and that his negligence was a proximate cause of damages to the plaintiffs. The jury assessed Delgaudio's negligence at 30% and Jerome Bryant's negligence at 70%. At trial, the defendants stipulated that defendant Delgaudio was acting in the course and scope of his employment with defendants M-F Transport, Inc. and Multi-Flow Dispensers of Ohio, Inc. at the time of the accident.
>
> . . .
>
> Judgment is therefore entered as follows: Against defendants Gary Delgaudio, M-F Transport, Inc., and Multi-Flow Dispensers of Ohio, Inc., jointly and severally, and in favor of (1) Kathleen Cook in the amount of $260,400, and (2) Marcus Cook in the amount of $22,500, with interest at the statutory rare beginning June 26, 2023, the date of the jury's verdict.

{¶ 13} On July 24, 2023, appellants filed a notice of appearance on behalf of new counsel. On the same day, appellants filed a motion for judgment notwithstanding the verdict ("JNOV"), raising several defects in the trial court's judgment, including the court's decision to reconvene an incomplete set of jurors after the original verdict was entered and the jury discharged. Appellants summarized their position as follows:

> A court is not permitted to recall a jury and have it raise its verdict after it has been discharged. It is certainly not permitted to do so after the jury has been provided information that was not evidence at trial concerning the impact of the jury's apportionment of fault. Finally,

> these errors were compounded when a jury of less than eight were permitted to re-open their deliberations and revise their verdict without the consent of the parties. Consequently, the court should rescind its initial journalization verdict and enter judgment consistent with the first verdict and interrogatories.

{¶ 14} Appellees filed a brief in opposition on August 21, 2023, arguing that (1) appellants waived all but plain error by failing to raise a timely objection on the record, (2) the trial court was permitted to recall the jury to correct the verdict forms to conform to the jury's true intent, and (3) appellants acquiesced to the final verdict being returned without the eighth juror by failing to raise a timely objection.

{¶ 15} On December 18, 2023, the trial court summarily denied the motion for JNOV "because it is evident that the journalized verdicts accurately reflect the intention of the jury after a full and fair consideration of all the evidence and the law."

{¶ 16} Appellants now appeal from the trial court's judgment.

II. Law and Analysis

{¶ 17} Within the first, second, and third assignments of error, appellants challenge the trial court's judgment denying their motion for JNOV. Appellants argue the trial court erred as a matter of law when it reconvened an incomplete set of jurors and permitted them to enter a new, substantially higher award in favor of the appellants following an off-the-record discussion of the case. Appellants maintain that the trial court had no authority to revisit the verdict after the jury was discharged from its service, and therefore, "the second verdict was void and invalid

under Ohio law and should not have been entered." We address the assignments of error together for the ease of discussion.

A. Standard of Review

{¶ 18} A motion for judgment notwithstanding the verdict challenges the legal sufficiency of the evidence. *Austin v. Chukwuani*, 2017-Ohio-106, ¶ 19 (8th Dist.), citing *Brady v. Miller*, 2003-Ohio-4582, ¶ 12 (2d Dist.). In evaluating the denial of a Civ.R. 50(B) motion for JNOV, a reviewing court applies the same test as that applied in reviewing a motion for a directed verdict. *Shields v. Bur. of Workers' Comp.*, 2023-Ohio-1368, ¶ 34 (8th Dist.), citing *Kanjuka v. MetroHealth Med. Ctr.*, 2002-Ohio-6803, ¶ 14 (8th Dist.), citing *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90 (1987). Specifically, in reviewing a judgment on a motion for JNOV,

> [t]he 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.

Id., quoting *Posin v. ABC Motor Court Hotel*, 45 Ohio St.2d 271, 275 (1976). Because a motion for JNOV tests the legal sufficiency of the evidence, we review a trial court's ruling on these motions de novo. *Id.*, citing *Osler v. Lorain*, 28 Ohio St.3d 345, 347 (1986).

{¶ 19} As mentioned, appellants filed a motion for JNOV, asking the trial court to reinstate the jury's first verdict because (1) the trial court had no authority to reconvene the jury to alter or amend its verdict after the jury had been discharged,

(2) the revised verdict was considered by less than eight jurors without the consent of the parties, and (3) the trial court improperly influenced the jury to amend its original verdict.

{¶ 20} With respect to the arguments posed in the motion for JNOV, we find appellants failed to raise a timely objection to the trial court's course of action during the proceedings held on June 26, 2023. It is well settled that errors arising during the course of trial that are not brought to the attention of the court by objection or otherwise are waived and may not be raised on appeal. *State v. Williams*, 51 Ohio St.2d 112 (1977), paragraph one of the syllabus. The Ohio Supreme Court has repeatedly stressed that to preserve an issue for appeal, a party must "timely advise a trial court of possible error, by objection or otherwise[.]" *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). Thus, absent a timely objection, we review for plain error. *Franklin v. Berea*, 2010-Ohio-4350, ¶ 36 (8th Dist.).

{¶ 21} In this case, the record clearly establishes that once the trial court made the unilateral decision to reconvene the jury to correct the substantive mistake in the original verdict, appellants were provided ample time and opportunity to raise a timely objection to the court's course of action on the record. They failed to do so. Under the unique circumstances of this case, an objection, if any, should have been raised on the record before the jury was excused for the second time. *See C4 Polymers, Inc. v. Huntington Natl. Bank*, 2015-Ohio-3475, ¶ 47 (8th Dist.). ("[A] party waives and may not raise on appeal any error *that arises during the trial court proceedings* if that party fails to bring the error to the court's attention, by objection

or otherwise, at a time when the trial court could avoid or correct the error.") (emphasis added), citing *Goldfuss* 121-123. Accordingly, we find the delayed arguments raised in the motion for JNOV did not preserve an objection for the purposes of this appeal. Our review, therefore, is limited to a plain-error analysis.

{¶ 22} For the plain-error doctrine to apply, the party claiming error must establish (1) that "'an error, i.e., a deviation from a legal rule'" occurred; (2) that the error was "'an "obvious" defect in the trial proceedings'"; and (3) that this obvious error affected substantial rights. *State v. Rogers*, 2015-Ohio-2459, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21 (2002). "The elements of the plain-error doctrine are conjunctive: all three must apply to justify an appellate court's intervention." *State v. Bailey*, 2022-Ohio-4407, ¶ 9.

{¶ 23} To show that an error affected an appellant's substantial rights, he or she must show "a reasonable probability that the error resulted in prejudice — the same deferential standard for reviewing ineffective assistance of counsel claims." *Id.* Therefore, the appellant must show "that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004), quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209 (1982) ("A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings.").

{¶ 24} "Although in criminal cases 'plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court,' Crim.R. 52(B), no analogous provision exists in the Rules of Civil Procedure." (Emphasis deleted.) *Goldfuss* at 121. Thus, the plain-error doctrine is not readily invoked in civil cases. Instead, an appellate court "must proceed with the utmost caution" when applying the plain-error doctrine in civil cases. *Id.* The Ohio Supreme Court has set a "very high standard" for invoking the plain-error doctrine in a civil case. *Perez v. Falls Fin., Inc.*, 87 Ohio St.3d 371, 375 (2000). Thus, "the doctrine is sharply limited to the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss* at 122; *accord Jones v. Cleveland Clinic Found.*, 2020-Ohio-3780, ¶ 24; *Gable v. Gates Mills*, 2004-Ohio-5719, ¶ 43.

B. Reconvening of Remaining Jurors

{¶ 25} With the passage of R.C. 2307.22, the Ohio legislature established where more than one tortfeasor has proximately caused the same loss or injury to a person or property, any tortfeasor who has caused 50 percent or less of the tortious conduct is responsible for only his or her proportional share "of the compensatory damages that represent economic loss." R.C. 2307.22(A)(2). The proportionate share of a defendant "shall be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct

. . . that is attributable to that defendant." *Id.* "[T]he statute provides for the apportionment of fault to others, including persons or entities not present at the time of trial." *Fisher v. Beazer E., Inc.*, 2013-Ohio-5251, ¶ 36 (8th Dist.). This includes tortfeasors who have settled. *Id.*

{¶ 26} In this case, the parties do not dispute that the jury was properly charged during the initial instructions and that the first set of interrogatories and jury verdict forms required the jury to determine the appellees' "total damages." Thus, the issue before this court is whether the trial court was permitted to reconvene the remaining jurors after the original verdict was entered and the jury discharged for the purposes of entering a corrected verdict to reflect the true intentions of the jury. *See De Boer v. Toledo Soccer Partners, Inc.*, 65 Ohio App.3d 251 (6th Dist. 1989.).

{¶ 27} Appellants correctly state on appeal that Ohio courts have routinely recognized that "'once a jury has returned its verdict and been discharged, it cannot be reconvened to alter or amend its verdict.'" *Southworth v. N. Trust Secs.*, 2013-Ohio-2917, ¶ 31 (8th Dist.), quoting *Gugliotta v. Morano*, 2005-Ohio-2570, ¶ 13 (9th Dist.), citing *Sargent v. State*, 11 Ohio 472 (1842), syllabus ("After a jury have returned their verdict, have been discharged, and have separated, they cannot be recalled to alter or amend it."); *Am. Express Co. v. Catlin*, 1924 Ohio Misc. LEXIS 1503, * 2 (7th Dist. Oct. 2, 1924) ("When the jury was discharged after the reception of the first verdict, their connection with the case was entirely severed and that being the fact they could not thereafter be or act as jurors in that case or return a

subsequent verdict. Therefore, the court was in error in authorizing them to correct their mistake."); *Boyer v. Maloney*, 27 Ohio App. 52, 58 (9th Dist. 1927) ("The jury having been discharged from the case it was error for the court to reconvene the jury and permit it to return a second verdict and enter judgment thereon."). *See also Ekleberry v. Sanford*, 73 Ohio App. 571, 574 (3d Dist. 1943) ("[A]fter the jury has been permanently discharged from a case it cannot be reassembled to amend or correct the verdict in the matter of substance, and . . . when the jury has been discharged the court cannot recall it to correct a defect in form."); *City Constr. Co. v. Edward J. DeBartolo Corp.*, 1973 Ohio App. LEXIS 1934, 7 (7th Dist. June 13, 1973) (The trial court has no power to correct or alter the verdict of the jury without the assent of the jurors before their discharge.); *State v. Davis*, 2003-Ohio-4839, ¶ 61 (2d Dist.) (finding the trial court erred in letting the jury deliberate after discharge).

{¶ 28} The foregoing courts have reasoned that "'[i]t is a deprivation of the right to a jury trial for the court to alter the verdict in matters of substance, or to order a jury to reassemble after discharge to consider further its verdict.'" *Gugliotta* at ¶ 13, quoting *Myrtle v. Checker Taxi Co.*, 279 F.2d 930, 934 (7th Cir. 1960). *See also Sargent* at 474 ("[T]o recall a jury to alter or amend their verdict after it has been received and the jury discharged . . . would jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen.").

{¶ 29} In contrast, appellees ask this court to adopt the reasoning set forth by the Circuit Court of Cuyahoga County (Ohio) in *Cady-Ivison Shoe Co. v. Chicowicz*, 1905 Ohio Misc. LEXIS 390 (8th Cir. Nov. 24, 1905). In *Cady-Ivison*, a discharged jury was permitted to reconvene to alter the verdict to conform to their intention. The jury initially "returned a verdict evincing on its face a misunderstanding of the particular form of verdict returnable in such cases." *Id.* at 474. The trial court then excused the jury and told them to report to the jury room for duty on another case. Some of the jurors left the courtroom, while others "crowded about the court's desk, inquiring about the effect of their verdict and whether it imported a finding for plaintiff or defendant." *Id.* When the trial court explained that the verdict was a finding in favor of the plaintiff, the jury "protested that it was not their verdict." *Id.* The trial court then sent the jury back to deliberate once more, and they later returned a verdict in favor of the defendant.

{¶ 30} Following the verdict, plaintiff filed a motion for new trial, arguing that "the trial court was without power, having once discharged the jury," to reconvene them; and that the jury were without power having once returned a verdict and separated, to withdraw the same and render another. The Circuit Court found no merit to plaintiff's contention under the limited circumstances of the case, stating that there was "abundant justification for the action of the court and the jury" where the first verdict was "self-impeached." *Id.*

{¶ 31} Appellees contend that *Cady-Ivison* is consistent with the modern trend in federal courts, including the Sixth Circuit's decision in *McCullough v.*

Consol. Rail Corp., 937 F.2d 1167, 1172 (6th Cir. 1991). In *McCullough*, the jury in a personal injury lawsuit determined that the plaintiff was 50 percent at fault and the total damages were $235,000. After the verdict was returned and the jurors dismissed, the trial court spoke with the jury off the record. During this conversation, the trial court was questioned by members of the jury regarding the total amount of damages the plaintiff would receive. When the court advised the jurors that the total damages would be reduced by plaintiff's 50 percent contributory fault, the jurors stated that they had already deducted the award of total damages by 50 percent and intended $235,000 to be the net recovery. Based on this information, the trial court reconvened the jury over the objection of defense counsel. The jurors subsequently clarified their verdict in a new verdict form, stating, "Total award $470,000 minus 50 [percent] = $235,000 to be awarded to plaintiff."

{¶ 32} In affirming the trial court's judgment, the Sixth Circuit held that "the interests of justice [were] served in assuring that McCullough receive[d] the award that the jury intended." *Id.* at 1172. The Court further determined that the values protected by FRE 606(b)[2] were not violated because the trial court did not inquire

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[2] Ohio's equivalent rule, Evid.R. 606(B)(1), provides as follows:

> (1) Prohibited Testimony or other Evidence. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror's affidavit or evidence of any statement by the juror concerning a matter about

into the thought process of the jurors and the amendment of the award did not threaten the jury's freedom of deliberation. In support of its judgment, the Court noted that only minutes elapsed before the jurors' attempted to rectify their mistake, that the defendant promptly became aware of the jury's final verdict, and that the amendment of the verdict stemmed from the jurors' own volition and not from any overreaching by the parties or their counsel. *See also Attridge v. Cencorp Div. of Dover Tech. Internatl., Inc.*, 836 F.2d 113, 115-116 (2d Cir. 1987); *Sifers Corp. v. Arizona Bakery Sales Co.,* 133 F.R.D. 607, 608 (D. Kan. 1991).

{¶ 33} Finally, appellees direct this court's attention to the United States Supreme Court's decision in *Dietz v. Bouldin*, 579 U.S. 40 (2016). In *Dietz*, a jury reached a verdict; the trial court discharged the jury; and the jurors left the courtroom. "A few minutes later, the [trial] court ordered the [courtroom] clerk to bring the jurors back." *Id.* at 41. Outside the juror's presence, the trial court explained to the parties' counsel that the trial court had just realized that the verdict was legally impermissible. The jurors returned to the courtroom, and the trial court questioned them and confirmed that they had not discussed the case with anyone else. The trial court then re-instructed the jurors and ordered them to begin deliberating again. The jurors did so and reached a new verdict. The losing party appealed and contended that the trial court erred in recalling the jury.

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which the juror would be precluded from testifying will not be received by the court for these purposes.

{¶ 34} The Supreme Court disagreed, explaining that district courts have "a limited inherent power to rescind a discharge order and recall a jury in a civil case where the court discovers an error in the jury's verdict." *Id.* at 42. In recognizing this power, the Court forcefully rejected what it deemed the "'Humpty Dumpty' theory of the jury," under which "something about the jury is irrevocably broken once the jurors are told they are free to go," such that they "cannot be brought back together again as a 'jury.'" *Id.* at 53. Instead, the Court adopted a practical view of the district court's authority in this realm, stating that a court's power to rescind a discharge order and recall a jury stems from the long-recognized control necessarily exercised by courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 45, quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962).

{¶ 35} Relevant to the arguments posed in this appeal, the *Dietz* decision did not limit its holding to situations where the initial verdict form "contains an error or inconsistency." *See Emamian v. Rockefeller Univ.*, 971 F.3d 380, 392 (2d Cir. 2020). Rather, the U.S. Supreme Court recognized the carefully delineated power of a district court to rescind a discharge order after "identifying," "discover[ing]," or "recogniz[ing]" an error in a verdict. *Dietz* at 42 and 46.

{¶ 36} It is worth reiterating that the inherent power to rescind a discharge order is not unlimited. To the contrary, the *Dietz* Court emphasized that it must be exercised "with restraint" due to the "risk [of] undermining other vital interests related to the fair administration of justice." *Id.* at 48. To guard against "[a]ny

suggestion of prejudice," the *Dietz* majority directed courts to consider the following factors: (1) "the length of delay between discharge and recall"; (2) "whether the jurors have spoken to anyone about the case after discharge," including court staff; (3) "the reaction to the verdict," including whether jurors witnessed "[s]hock, gasps, crying, cheers, and yelling"; and (4) "other relevant factors," including "to what extent just-dismissed jurors accessed their smartphones or the internet." *Id*. at 49-51.

{¶ 37} The decision reached in *Dietz* has yet to be applied in a civil case in the state of Ohio. However, as recognized by the dissent in *Dietz*, which relied extensively on the holding of the Ohio Supreme Court in *Sargent v. State*, 11 Ohio 472, 473 (1842), the holding of *Dietz* greatly alters the alleged common-law tradition of imposing a categorical bar on re-empaneling a jury after it has been discharged. *See Dietz*, 579 U.S. at 55 (Thomas, J., dissenting) (Noting that "[a]t common law, once the judge discharged the jury and the jury could interact with the public, the judge could not recall the jury to amend the verdict."), citing *Sargent* at 473 (1842); *Mills v. Commonwealth*, 34 Va. 751, 752 (1836); *Little v. Larrabee*, 2 Me. 37, 40 (1822). Instead, the *Dietz* decision adopts a practical approach that pursues "the fair administration of justice." *Dietz* at 41 and 53 (rejecting the dissent's reliance on the common law, stating "the advent of modern federal trial practice limits the common law's relevance as to the specific question whether a judge can recall a just-discharged jury").

{¶ 38} Based on the record before us, and upon careful consideration of the persuasive discussion in *Dietz* and its assessment of the common law approach that is applied in the cases cited by appellants herein, we are unable to conclude that this is the rare case that requires us to invoke the plain-error doctrine. In this case, the trial court created a detailed record of its conversation with the remaining jurors just minutes after the issuance of the original verdict. Contrary to appellants' assertion on appeal, there is no basis to suggest that the trial court inquired into the jury's thought process in rendering the original verdict. Nor does the trial court's brief reference to the legal effect of the original verdict support appellants' contention that the trial court improperly shared evidence that was not previously disclosed during the trial. *See Lynch v. Greenwald*, 2012-Ohio-2479, ¶ 17 (9th Dist.) (finding the trial court did not err when it "explained the legal effect of the jury's answers to the jury so that the ultimate verdict could 'represent [the jurors'] true intentions.'"), quoting *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, 2009-Ohio-2460, ¶ 36 (9th Dist.). The record confirms that the jurors' self-identification of their mistake was not the product of undue influence or upon reconsideration of the facts and evidence. Rather, the jurors merely realized, within minutes of their discharge, that they had mistakenly filled out the "total damages" section of the verdict forms. Importantly, the trial court's decision to reconvene the jury occurred before the court issued a final judgment entry. Thus, the trial court retained subject-matter jurisdiction over the case and was free to modify or rescind its orders before final judgment. *See Dietz* at 53 ("There is no benefit to imposing a rule that says that as

soon as a jury is free to go a judge categorically cannot rescind that order to correct an easily identified and fixable mistake, even as the jurors are still in the courtroom[.]").

{¶ 39} Under these circumstances, we find the trial court did not commit an obvious error of law when it exercised its inherent authority to control its docket after discovering an error in the jury's verdict. In our view, the court's exercise of power was a "'reasonable response to the problems and needs' confronting the court's fair administration of justice." *Dietz* at 41. We further find that it would be inappropriate to second guess the trial court's determination that the substantial interests served by issuing an award that conformed to the jury's true intentions far outweighed any potential prejudice caused to the appellants. In this case, the jury's explanation of its mistake to the court was reasonable, and appellants did not take the opportunity, when provided by the court, to question the jury about their actions or conversations in the minutes following the verdict. (Tr. 22-23.) In the absence of further information to suggest otherwise, this court has no basis to conclude that the jury may have been tainted by external influences post-verdict. We recognize that the *Dietz* analysis requires consideration of whether the jurors have spoken to anyone about the case after discharge. However, applying the plain-error standard to the record developed in this case, we find no resulting prejudice or an indication that the trial court's conversation with the jury after the original discharge affected the outcome of trial. To the contrary, the result of this conversation was the promotion of justice by effectuating the intended outcome of the trial.

{¶ 40} Relatedly, we find no plain error in the trial court's decision to allow less than eight jurors to redeliberate after the mistake in the original verdict was brought to the court's attention. Civ.R. 38(B) provides that in most civil actions, "the jury shall be composed of eight members unless the demand specifies a lesser number[.]" In this case, there is no dispute that eight jurors were impaneled during the course of trial and that eight jurors filled out the original verdict forms awarding judgment in favor of appellees. It is equally clear that only seven of the eight jurors remained in the courthouse when the trial court was notified of the mistake in the verdict. Significantly, neither party objected to the trial court's decision to reconvene the remaining jurors to issue new interrogatories and verdict forms without the eighth juror's signature. Appellants, therefore, waived any claim of error associated with the court's adherence to Civ.R. 38(B). We further find no basis to conclude that appellants were prejudiced by the trial court's judgment. Here, the same six jurors found that Delgaudio was negligent and the proximate cause of Cook's injuries in both the original set of interrogatories and the corrected set of interrogatories. (Interrogatories 1 and 4.) The jury did not modify its apportionment of negligence and only changed the total amount of damages to correct its previous mistake in awarding total damages. All seven remaining jurors signed the interrogatories and verdict forms that reflected the change in total damages. (Interrogatories 6 and 7; Verdict Form 2.) Accordingly, the absence of the missing juror did not affect the outcome of the proceedings.

{¶ 41} Based on the foregoing, we are unable to conclude that this is the exceptional case where the trial court's judgment seriously affected the basic fairness, integrity, or public reputation of the judicial process. To the contrary, the trial court properly exercised its inherent authority to correct an oversight after discovering that the jury had awarded damages in an amount far less than they intended. Thus, the trial court did not err in denying the appellants' motion of JNOV.

{¶ 42} The first, second, and third assignments of error are overruled.

{¶ 43} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

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EILEEN T. GALLAGHER, JUDGE

LISA B. FORBES, P.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR