[Cite as *Connell v. Goodyear Tire & Rubber Co.*, 2010-Ohio-4344.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92833 and 92923

GARY CONNELL, EXECUTOR, ETC.

PLAINTIFF-APPELLANT

vs.

GOODYEAR TIRE & RUBBER CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED;
CROSS-APPEAL DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-609220

BEFORE: Jones, J., Dyke, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 12, 2010

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Gary Connell ("Appellant"), as Executor of the Estate of Robert Connell ("Connell"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE FACTS

{¶ 2} Connell was employed by Goodyear Aerospace Corporation ("GAC") in Akron, Ohio from 1964 until 1973. During these years, GAC was a wholly-owned subsidiary of Goodyear Tire & Rubber Company ("Goodyear"). Connell was employed in both the Vinyl Division and Wheel and Brake areas of Plant B of GAC. The company used asbestos in the making of its aircraft brake pads. Connell left GAC in 1973.

{¶ 3} From 1973 to 2005, Connell operated his own trucking business and performed his own vehicle maintenance during that time. He changed the brakes

and overhauled the engines on his business and personal vehicles, tasks that regularly exposed him to asbestos.

STATEMENT OF THE CASE

{¶ 4} This wrongful death lawsuit arises from Connell's alleged exposure to asbestos. On December 6, 2006, appellant filed a complaint against numerous defendants, including Goodyear Tire & Rubber Company ("Goodyear") and Lockheed Martin Corporation ("Lockheed Martin"). Appellant alleged that defendants caused Connell's death through exposure to asbestos-containing material.

{¶ 5} Appellant alleges that Goodyear and Lockheed Martin are responsible for the liabilities of Connell's former employer, GAC, for the duration of Connell's employment at GAC. On June 26, 2007, appellant filed a motion for partial summary judgment against Goodyear, seeking an order that Goodyear is the successor-in-interest for GAC's alleged liability. On June 28, 2007, appellant filed a motion for partial summary judgment against Lockheed Martin seeking an order that Lockheed Martin is the successor to GAC's alleged liability in this case.

{¶ 6} On October 2, 2007, Lockheed Martin filed its motion for summary judgment on the grounds that: (1) Lockheed Martin is not the successor-in-interest to GAC's alleged liabilities in this case; (2) appellant possesses no evidence that Lockheed Martin could be liable under an "employer intentional tort" theory; and (3) appellant otherwise possesses no evidence that decedent was exposed to any asbestos-containing product manufactured or supplied by Lockheed Martin. On

October 26, 2007, Goodyear filed its own motion for summary judgment, arguing that Goodyear is not the successor to GAC's alleged liabilities. Thereafter, the parties extensively briefed the issue of whether Goodyear or Lockheed Martin succeeded to GAC's alleged liabilities.

{¶ 7} On April 15, 2008, the trial judge heard oral argument on the parties' motions. On January 5, 2009, the case proceeded to a jury trial on appellant's remaining issue of supplier liability against Goodyear. The jury delivered a verdict in favor of Goodyear on appellant's supplier liability claim.

{¶ 8} On February 17, 2009, the trial judge entered an order and final judgment granting Lockheed Martin's motion for summary judgment and denying appellant's motion for partial summary judgment against Lockheed Martin. On February 26, 2009, the trial court entered an order and final judgment granting appellant's motion for partial summary judgment against Goodyear. Appellant filed separate appeals regarding the judgments in favor of Lockheed Martin and Goodyear.

{¶ 9} On February 18, 2009, appellant filed his notice of appeal of the judgment. On February 27, 2009, Goodyear filed a notice of cross-appeal challenging the trial court's order and final judgment granting plaintiff's motion for partial summary judgment against Goodyear. On March 6, 2009, appellant filed a notice of appeal of the trial court's judgment in Lockheed Martin's favor. On April 29, 2009, Lockheed Martin filed a motion to consolidate these appeals. The motion to consolidate was granted on June 2, 2009.

Assignments of Error

{¶ 10} Appellant assigns six assignments of error on appeal:

{¶ 11} "[1.] The trial court erred in denying plaintiff-appellant's motion for partial summary judgment against Lockheed Martin Corporation and in granting Lockheed Martin Corporation's motion on the same issue.

{¶ 12} "[2.] The trial court erred in granting defendant-appellee Goodyear Tire and Rubber Company's motion for summary judgment on plaintiff's intentional tort claim.

{¶ 13} "[3.] The trial court erred in granting summary judgment for defendant-appellee Goodyear Tire and Rubber Company on plaintiff-appellant's negligent undertaking claim.

{¶ 14} "[4.] The trial court erred during trial in allowing into evidence unverified interrogatory answers.

{¶ 15} "[5.] The trial court erred during trial in allowing defendant-appellee Goodyear to read self-serving interrogatory answers to the jury.

{¶ 16} "[6.] The trial court erred in granting defendant-appellee Goodyear a partial directive verdict and failing to state the basis for its decision in writing."

Cross-Appellant's Assignment of Error for Cross-Appeal

{¶ 17} "[1.] The trial court erred by granting plaintiff-cross-appellee Gary Connell's motion for partial summary judgment against defendant-cross-appellant Goodyear Tire & Rubber Company and by denying Goodyear's judgment against Connell. These decisions constitute reversible error because they had the effect

of holding Goodyear directly responsible to Connell for certain liabilities, if any, of Goodyear's former subsidiary, Goodyear Aerospace Corporation."

LEGAL ANALYSIS

Summary Judgment

{¶ 18} Appellate review of summary judgments is de novo. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equipment Co.* (1998), 124 Ohio App.3d 581, 706 N.E.2d 860. Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 19} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

{¶ 20} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Medina, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, " * * * the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." Id. at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 21} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *."

{¶ 22} It is with these standards established above that we now address appellant's first three assignments of error.

Appellant's Partial Motion for Summary Judgment Against Lockheed

{¶ 23} Appellant argues that the court erred in denying his motion for summary judgment and in granting summary judgment in Lockheed Martin's favor. However, we find no error on the part of the lower court.

{¶ 24} A review of the evidence demonstrates that Lockheed Martin is not the successor-in-interest to GAC's liabilities. Connell was employed by GAC at GAC's Summit County facility between 1964 and 1973. He retired from GAC approximately twenty-three years before Lockheed Martin's merger with Loral, and fourteen years before Loral's purchase of certain GAC assets. In 1987, Goodyear and GAC entered into an asset purchase agreement with Loral by which Loral purchased certain GAC assets, including GAC's Summit County facility.

{¶ 25} Section 2.2 of the Goodyear/Loral Agreement specifically provides that, while Loral agreed to assume *some* GAC liabilities under the Goodyear/Loral Agreement, "Loral shall *not assume* (i) any liabilities for which GAC and Goodyear have agreed to indemnify Loral under this Agreement..."[1] Section 6.19.1 of the Agreement sets forth the liabilities for which GAC and Goodyear independently agreed to indemnify Loral (i.e., those liabilities that "Loral shall not assume"), including:

{¶ 26} "GAC and Goodyear, jointly and severally, agree to indemnify and hold Loral and its subsidiaries...harmless, from and against (c) any claims, actions, suits, or proceedings for personal or bodily injury, death, or disability to individuals other than employees of GAC."[2]

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[1]See, Lockheed Martin's Motion for Summary Judgment, Exhibit 2A at Sec. 2.2.

[2]Id. at Sec. 16.19.1(c).

{¶ 27} Similarly, Section 6.19.1(e) provides that GAC and Goodyear would indemnify Loral from (i.e., Loral did not assume) liability for "any...death or bodily injury...howsoever and whensoever arising, resulting from, caused by...the products manufactured by GAC on or prior to the Closing Date."[3]

{¶ 28} Moreover, the Goodyear/Loral Agreement consistently distinguishes between the employees of GAC at the time of the Agreement's execution, who were to become Loral employees, and the former, or retired employees, of GAC with whom Loral never would have any relationship. Indeed, throughout the Goodyear/Loral Agreement a distinction is made between "employees" and "retired employees."

{¶ 29} In Section 6.18, the term "employees" is defined as follows: "As used in this Section 6.18, the term 'employees' includes all employees actually working for GAC on the Closing Date and those who are absent from employment due to...[a]n authorized leave of absence."[4] As to retired employees, Loral did not assume any GAC liabilities.

{¶ 30} Given the plain language of Section 2.2 and Section 16.19.1, the agreement, the agreement definitions, and the evidence presented at the lower court, we find no error on the part of the lower court.

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

Appellant's Intentional Tort and Negligent Undertaking Claims

[3]Id. at Sec. 6.19.1 (e).

{¶ 32} Appellant argues in his second assignment of error that the trial court erred in granting Goodyear's motion for summary judgment on his intentional tort claim. Appellant further argues in his third assignment of error that the trial court erred in granting Goodyear's motion for summary judgment on his negligent undertaking claim. Due to the interrelation between appellant's second and third assignments of error, we shall address them together.

{¶ 33} In 1991, the Ohio Supreme Court established a three-part test that a proponent must satisfy in order to show the element of intent in proving that an employer committed an intentional tort against his employee: "1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe,* supra, at paragraph one of the syllabus (superseded by R.C. 2745.01 for injuries occurring after April 7, 2005, as stated in *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶17, 885 N.E.2d 204, holding that the *Fyffe* standard still applies in accidents predating the enactment of R.C.

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[4]Id. At Sec. 6.18.

2745.01).[5] Moreover, a plaintiff must demonstrate all three parts of the test. *Flynn v. Herbert E. Orr Co.*, 3d Dist. No. 11-02-04, 2002-Ohio-6598.

{¶ 34} In order to satisfy the first prong of the *Fyffe* test, Connell must establish that GAC possessed the knowledge of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation. A dangerous condition, as defined in the employer intentional tort doctrine, must be something beyond the natural hazard of employment. *Youngbird v. Whirlpool Corp.* (1994), 99 Ohio App.3d 740, 747, 651 N.E.2d 1314.

{¶ 35} The mere existence of a dangerous condition alone, however, is not sufficient to satisfy the first prong. Nor is knowledge of the mere possibility of a dangerous condition sufficient. "The employee bears the burden of proving by a preponderance of the evidence that the employer had actual knowledge of the exact dangers which ultimately caused the injury." *Reed v. BFI Waste Systems* (Oct. 23, 1995), Warren App. No. CA95-06-062.

{¶ 36} GAC was aware that asbestos was present and being used in production at the GAC facility. We are not convinced that appellant has

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[5]This court notes that the issue of constitutionality of R.C. 2745.01 is currently before the Ohio Supreme Court. We further note that this court, and the Eleventh District Court of Appeals, have previously found R.C. 2745.01 to be unconstitutional. See, e.g., *Kaminski v. Metal & Wire Products*, 175 Ohio App.3d 227, 2008-Ohio-1521, which is currently pending before the Ohio Supreme Court; *Barry v. A.E. Steel Erectors, Inc.*, Cuyahoga App. No. 90436, 2008-Ohio-3676, at ¶21-27; and *Fleming v. AAS Serv., Inc*., 177 Ohio App.3d 778, 2008-Ohio-3908, 896 N.E.2d 175, at ¶40 (Eleventh District Court of Appeals). Since this court found R.C. 2745.01 unconstitutional, we analyze appellant's claims under the common-law test for intentional torts. See *Kaminski,* supra.

demonstrated by a preponderance of the evidence that GAC had actual knowledge of the exact dangers that would lead to Connell's mesothelioma. Even if we were to find that appellant met the first prong of the *Fyffe* test, we do not find there is a genuine issue of material fact regarding the second prong.

{¶ 37} The second prong requires that appellant establish that GAC possessed actual knowledge that if an employee is subjected by his employment to such a dangerous process or procedure, then harm to the employee would be substantially certain to occur. See *New Hampshire Insurance Group v. Frost* (1995), 110 Ohio App.3d 514, 674 N.E.2d 1189.

{¶ 38} The *Fyffe* court elaborated on what constitutes an intentional tort, declaring that:

{¶ 39} "To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure, or condition, and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere

knowledge and appreciation of a risk--something short of substantial certainty--is not intent." *Fyffe*, supra.

{¶ 40} The Ohio Supreme Court has "defined the breadth of employer intentional torts very narrowly out of a concern 'that an expansive interpretation could thwart the legislative bargain underlying workers' compensation by eroding the exclusivity of both the liability and the recovery provided by workers' compensation.'" Id., quoting *Kincer v. American Brick & Block, Inc*. (Jan. 24, 1997), Montgomery App. No. 16073.

{¶ 41} The trial court in the case sub judice found that there was no evidence that GAC knew the exposure limits were being violated. The trial court provided the following in its December 2008 order: "Here, there is no evidence that GAC knew that the exposure limits were being violated, that GAC required Connell to be exposed to the dangerous condition, and that the harm would be a substantial certainly. Therefore, plaintiff cannot prevail on an employer intentional tort claim."[6]

{¶ 42} We agree with the trial court's findings. We find that the record demonstrates that there is not sufficient evidence from which a jury could conclude that GAC possessed actual knowledge that Connell was being exposed to levels of asbestos fiber which GAC knew was substantially certain to result in

[6]See trial court's December 1, 2008 Order.

the development of an asbestos-related disease. Moreover, appellant failed to provide any evidence that GAC knew concentrations exceeded the limit.[7]

{¶ 43} Appellant argues in his third assignment of error that the trial court erred in granting Goodyear's motion for summary judgment on his negligent undertakings claim.

{¶ 44} To state a claim for negligent undertakings a plaintiff must allege that (1) the defendants undertook to render services to another that they should have known were necessary for plaintiff's protection; (2) the defendants failed to exercise reasonable care to perform the undertaking; and (3) either (a) the failure to exercise reasonable care increased plaintiff's risk of harm; or (b) the defendants undertook to perform a duty owed by another to plaintiff; or (c) plaintiff relied on the defendants' performance, causing him harm. *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36.

{¶ 45} Contrary to appellant's claims concerning his negligent undertakings claim, we find no error on the part of the lower court. To establish that Goodyear

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[7]The applicable Ohio regulation for asbestos from 1947 until OSHA became effective in 1972 was 5 million particles per cubic foot of air. [1947 Regulations] In 1972, the applicable regulations governing permissible asbestos concentrations in the air were tightened, lowering the permissible concentration six-fold. (Dr. Corn Dep. at 52.) Accordingly, evidence showing that conditions in Plant B might have failed post-1971 standards offers no guidance as to whether conditions in Plant B failed the relevant standards in 1971 and earlier. Appellant's claim that the most serious problem detected during the 1972 testing at Plant B was a reading "*five times* the permissible limit" is actually evidence that conditions in Plant B in 1971 compiled with, the then, applicable regulatory limit. (Emphasis added.) This is because the limit prior to 1972 was *six times* greater than the limits imposed in 1972. See Appellant's brief at p. 28.

owed a duty to GAC employees using the negligent undertaking theory, appellant must show both that Goodyear undertook a duty that GAC owed GAC employees and that Goodyear breached that duty. Appellant has done neither.

{¶ 46} Appellant offers no evidence that would permit a jury to conclude that Goodyear assumed responsibility for GAC's obligations to its employees.[8]

{¶ 47} Throughout Mr. Connell's employment, GAC was a separate corporation that was a wholly owned subsidiary of Goodyear. Both Goodyear and GAC maintained their own industrial hygiene ("IH") and safety departments. Although GAC's IH personnel occasionally asked Goodyear's IH personnel for advice, and retained Goodyear's IH personnel to perform limited air sampling, GAC would decide whether to follow that advice and whether to take action based on the air sampling results. Accordingly, GAC retained complete responsibility for the safety of its workers.

{¶ 48} We find no error on the part of the lower court. Appellant's second and third assignments of error are overruled.

Interrogatory Answers

{¶ 49} Due to the substantial interrelation between appellant's fourth and fifth assignments of error, and for the sake of brevity, we shall address them

[8]Appellant refers to four things in support of its negligent undertaking argument: (1) the out-of-context deposition testimony of a former GAC employee, (2) the "understanding" of an expert witness without personal knowledge, (3) the speculation of another former employee, and (4) a line in a reply brief. None of this approaches the kind of evidence appellant must offer to show that Goodyear took on responsibility for the safety of GAC's employees.

together. Appellant argues that the court erred in allowing unverified interrogatory answers during trial and erred in allowing self-serving interrogatory answers to the jury.

{¶ 50} It is settled law in Ohio that the trial court has broad discretion to admit or exclude evidence. *State v. Long* (1978), 53 Ohio St.2d 91. The discovery responses appellant claims are hearsay are admissible, in the form of sworn interrogatories, pursuant to Evid.R. 801(D). Evid. R. 801(D)(1)(b) provides in relevant part:

> "(D) Statements which are not hearsay. A statement is not hearsay if:
>
> "(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification."

{¶ 51} Appellant objects to the purported admission of answers to interrogatories of General Motors Corporation. Appellee did not offer into evidence, and the trial judge did not allow into evidence, any answers to interrogatories of General Motors Corporation. Although there was a discussion of this document for the purposes of apportionment, appellee never offered this document as evidence.

{¶ 52} Appellant also objects to the trial judge's admission of interrogatory answers of C.P. Hall, Defendant's Exhibit S. A review of the record demonstrates that the admission of this evidence does not constitute reversible error.

{¶ 53} Appellant's counsel stated on the record that he did not "have a problem with" using those documents when appellee offered to authenticate them through testimony of C.P. Hall's counsel or corporate representative.[9] Further, appellant made no objection when appellee published to the jury both the interrogatory answers and the document request responses that contained the same information.

{¶ 54} Appellant's statement and non-objection waived any error. The C.P. Hall answers to interrogatories were authenticated and properly admitted under Ohio Rule of Evidence 801(D)(2) and 804(B)(3).[10] Moreover, appellant acquiesced in appellee's use of the C.P. Hall interrogatories.[11]

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[9] Trial Tr., Vol 7 at 966.

[10] Evid.R. 801(D)(2), provides the following, "Admission by party-opponent. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy."

Evid.R. 804(B)(3), provides the following, "Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it

{¶ 55} Appellant has therefore waived any argument that the interrogatory answers were not authenticated. See Evid.R. 103(A)(1); *Klussv. Alccm Aluminum Corp.* (1995), 106 Ohio App.3d 528, (challenge to admission of expert testimony waived); *State v. Tibbetts* (2001), 92 Ohio St.3d 146, (trial objection to testimony based on privilege did not preserve argument on appeal that evidence should have been excluded under Evid.R. 404).

{¶ 56} Appellant argues in his fifth assignment of error that the trial court erred during trial in allowing Goodyear to read self-serving interrogatory answers to the jury. A review of the record demonstrates that appellant did not offer the disputed discovery responses as substantive evidence, nor did appellant offer them to support an argument that Goodyear's testimony at trial on these topics was not accurate.

{¶ 57} Rather, the discovery responses were offered to suggest to the jury that Goodyear had given, in discovery elsewhere in a different case and different context, information that appellant would then argue was inconsistent with other information Goodyear offered on these topics. The trial court then allowed Goodyear the opportunity to rebut the inference that appellant sought to create.

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to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness [FN1] of the statement." FN1, provides the following, "So in original, should this read 'trustworthiness'?

[11] See, Trial Tr., Vol. 7 at 1019-1027. Although appellant later objected to Defendant's Exhibit S, he did not object either when an issue about that exhibit's authentication arose, or when it was published to the jury.

{¶ 58} We find appellant's argument to be without merit. The discovery responses are not inadmissible hearsay. The discovery responses, in the form of sworn interrogatories, are admissible pursuant to Evid.R. 801(D)(1)(b), which provides that the statement is not hearsay if it is "consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive."

{¶ 59} Here, Goodyear was permitted to present its discovery responses to demonstrate that there was no inconsistency between Goodyear's discovery responses in this case and the testimony and evidence it was presenting at trial.

{¶ 60} Accordingly, appellant's fourth and fifth assignments of error are overruled.

Partial Directed Verdict

{¶ 61} Appellant argues in his sixth and final assignment of error that the court erred in granting Goodyear a partial directive [sic] verdict and in failing to state the basis for its decision in writing. More specifically, appellant argues that the lower court violated Civ.R. 50(E) because it did not state the basis for granting a partial directed verdict as to appellant's asbestos exposure after January 1966.

{¶ 62} A review of the record demonstrates that appellant failed to object to this claimed error at trial. However, assuming arguendo appellant had properly objected to this error, it still lacks merit. Civ.R. 50(E) provides the following:

"(E) Statement of basis of decision"

> "When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement *may* be dictated into the record or included in the entry of judgment." (Emphasis added.)

{¶ 63} The statements on the record in the case at bar are sufficient to satisfy the minimal requirements of Civ.R. 50(E). See, e.g., *Kiss v. Dodgem* (Dec. 31, 1998), Erie Co. No. E-98-027. In addition when considering the sufficiency of statements under Civ.R. 50(E), a reviewing court must consider the entire record, including any discussion between the trial court and counsel which reflects the trial court's reasoning for its determination. See *Wiant v. May Dept. Stores Co.* (Feb. 16, 1990), Mahoning Co. No. 89 CA 32 (Civ.R. 50(E) satisfied where the record indicated "considerable discussion between the court and counsel which re-elected the court's reasoning for its determination").

{¶ 64} Here, the record contains discussion regarding Goodyear's partial directed verdict whereby both parties' counsel presented arguments to the court and the court asked questions of counsel.[12] Appellant offered no testimony regarding the issue of alleged asbestos exposure to Connell for the time period after January 1966.[13] Appellant challenged Goodyear's directed verdict on the issue of asbestos exposure after January 1966 only upon the basis of a union card showing Connell assigned to a particular department. The trial court's reasons for granting the partial directed verdict, i.e., the absence of testimony by

[12]Trial Tr. Vol. 10 at 1575-1581.

appellant's sole eyewitness, is further reflected in this exchange.[14] We find that the trial court satisfied the requirements of Civ.R. 50(E).

{¶ 65} Accordingly, appellant's sixth assignment of error is overruled.

Cross-Appellant's Assignment of Error for Cross-Appeal

{¶ 66} Appellee-Cross-Appellant, Goodyear, argues in its cross-assignment of error that the lower court erred. Specifically, Goodyear argues that the trial court erred by granting Connell's motion for partial summary judgment against Goodyear and by denying Goodyear's judgment against Connell. Goodyear further argues that these decisions constitute reversible error because they had the effect of holding Goodyear directly responsible to Connell for certain liabilities of Goodyear's former subsidiary, Goodyear Aerospace Corporation.

{¶ 67} This court notes that a judgment deciding liability only, is not a final appealable order, even with Civ.P.R. 54(B) certification. *General Medicine v. Manolache* (Jan. 15, 2009), Cuyahoga App. No. 91146; *Fireman's Fund Ins. v. BPS Co.* (1982), 4 Ohio App.3d. 3, 446 N.E.2d 181; *State ex. rel. A & D Limited v. Keefe*, 77 Ohio St.3d 50, 671 N.E.2d 13.

{¶ 68} Civ.R. 54(B) provides: "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or

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[13]Id. at 1575.

more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

{¶ 69} Despite the Civ.R. 54(B) certification that "there is no just cause for delay," "[a]n order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02[15] in order to be final and appealable." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381, at syllabus. If an order is not final and

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[14]Trial Tr. 1579.

[15]R.C. 2505.02(B) provides: "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment; (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment; (3) An order that vacates or sets aside a judgment or grants a new trial; (4) An order that grants or denies a provisional remedy and to which both of the following apply: (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy. (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. (5) An order that determines that an action may or may not be maintained as a class action."

appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed. Id.

{¶ 70} In *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 546, 1997-Ohio-366, 684 N.E.2d 72, the Ohio Supreme Court stated that generally "orders determining liability in the plaintiffs' * * * favor and deferring the issue of damages are not final appealable orders under R.C. 2505.02 because they do not determine the action or prevent a judgment." Id.

{¶ 71} Goodyear's cross-appeal for the order granting plaintiff's partial summary judgment, on liability only, does not present a final appealable order. Accordingly, we hereby sua-sponte dismiss Goodyear's cross-assignment of error for lack of jurisdiction.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., CONCURS;

MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY