Evans v. Dayton Power and Light Co.

2004-ohio-2183 (2004) | Cited 0 times | Ohio Court of Appeals | April 28, 2004

DECISION AND JUDGMENT ENTRY

¶1. The Dayton Power and Light Company ("DP&L") appeals a judgment in the amount of $806,077.27 plus prejudgment interest in favor of Alan B. Evans on his negligence action. Evans' claim arises from injuries he received while working at a DP&L plant for a third-party independent contractor. DP&L argues that it cannot be liable for Evans' injuries because it did not "actively participate" in the work and, therefore, the trial court should have entered judgment in its favor at various stages of the litigation. Because the record contains sufficient evidence to allow a reasonable person to find that DP&L exercised control over a critical variable in the workplace that caused the injury, we disagree.

Additionally, even if the trial court erred in denying DP&L's motion for summary judgment, any error is harmless because genuine issues of material fact that support a verdict in Evans' favor were raised at trial. DP&L also argues that the trial court should have entered judgment in its favor because the jury's responses to the interrogatories are inconsistent with the general verdict. Because we must examine the jury's responses to the interrogatories in their entirety and, when viewed in this manner, the jury's responses are not inconsistent with the general verdict, we reject DP&L's contention and affirm the jury's verdict.

¶2. DP&L also argues that the trial court abused its discretion by awarding prejudgment interest to Evans. DP&L contends the trial court improperly applied the legal standard used in contract cases, which generally mandates the award of prejudgment interest, rather than the standard applicable in tortious conduct cases, which permits the court to award prejudgment interest only when the defendant failed to make a good faith effort to settle the case. Because we agree that the trial court applied the wrong legal standard in deciding whether to award Evans prejudgment interest, we find that the court abused its discretion. We reverse and remand the issue of prejudgment interest to the trial court for further consideration under the appropriate legal standard.

¶3. In March 1995, Evans suffered serious injuries when he fell from a catwalk while working at a power plant operated by DP&L. Evans, a pipefitter, worked for Enerfab Corporation, an independent contractor hired by DP&L to perform maintenance work at the plant. At the time of his fall, Evans was working with a crew of other pipefitters replacing twenty air preheater coils. Each rectangular coil weighed approximately 3,200 pounds and measured about twenty feet long, four feet wide, and one foot high. The coils were inserted into the building at an angle.

¶4. The crew removed all of the existing coils and then began installing new coils. Evans worked on the evening crew and a day crew performed the same tasks. Each crew would begin its shift where the other crew had finished. As they removed each old coil, the crew would temporarily secure the new coil because new gaskets were not yet available. Each coil was supposed to be secured with wire cables and shackles at the top and with "come-alongs" at the bottom. Apparently, securing the coils at only the top or the bottom was sufficient to hold the coil in place; however, in an abundance of caution, the crew secured the coils in both places.

¶5. The crew used two catwalks to perform its tasks. The upper catwalk was near the top of the coil installation area and the lower catwalk was near the bottom, approximately eighteen to twenty feet from the ground. Someone had removed the lower catwalk's handrail because it was impossible to install or remove the coils with the handrail in place.

¶6. While Evans was standing on the lower catwalk, a coil installed by the day shift slid out of position, bumped Evans, and caused him to fall off the catwalk. Evans landed on an uninstalled coil sitting on the ground. He broke his pelvis in two places and sustained significant injuries to his legs.

¶7. Following Evans' fall, his co-workers and supervisors examined the area where the dislodged coil had been secured. They found no broken come-alongs, cables or shackles. Rather, it appeared that someone had removed the devices that had secured the coil.

¶8. Evans filed suit against DP&L, alleging its negligence caused his injuries. Evans voluntarily dismissed this action but later refiled the suit. Shortly after the refiling, DP&L moved for summary judgment but the trial court denied this motion.

¶9. The case went to a jury trial. DP&L moved for a directed verdict both at the close of Evans' case and at the close of its own case. The court denied both motions. The jury returned a general verdict in Evans' favor, awarded damages totaling $1,104,215.44, and found that Evans was 27 percent at fault.

¶10. Following the announcement of the jury verdict, DP&L moved for the entry of a verdict in its favor under Civ.R. 49(B). DP&L argued that the jury's answers to the interrogatories were inconsistent with the general verdict and, therefore, the general verdict could not stand. The court overruled this motion and entered judgment in favor of Evans.

¶11. Following the jury's discharge, the jury returned to the courtroom and the foreman advised the court that the jury had already reduced the total amount of its verdict by 27%, the amount of negligence it attributed to Evans. The court had not instructed the jury to make this reduction. The court thanked the jury and requested that the jurors leave the courtroom. DP&L argued, and the court agreed, that the court was required to reduce the jury's verdict by 27% despite the jury's previous reduction because the court's failure to do so would be an improper impeachment of the jury verdict. Thus, the court reduced the jury's verdict by 27 percent and entered judgment in the

amount of $806,077.27 in Evans' favor.

¶12. Following the trial court's denial of DP&L's post-trial motions for judgment notwithstanding the verdict and for a new trial, DP&L appealed to this Court. We determined that this appeal was premature as the trial court had not yet ruled on Evans' motion for prejudgment interest. Thus, we dismissed the original appeal. The trial court later granted Evans' motion and awarded prejudgment interest.

¶13. DP&L timely appealed, assigning the following errors. "First Assignment of Error: The trial court erred when it denied DP&L's motion for summary judgment. Second Assignment of Error: The trial court erred when it denied DP&L's motion for directed verdict at the close of Plaintiff's case. Third Assignment of Error: The trial court erred when it denied DP&L's motion for directed verdict at the close of Defendant's case. Fourth Assignment of Error: The trial court erred when it denied DP&L's motion for a new trial. Fifth Assignment of Error: The trial court erred when it denied DP&L's Rule 50 motion for judgment notwithstanding the verdict and failed to enter judgment in DP&L's favor pursuant to the jury's answer to Interrogatories A(2) and A(4). Sixth Assignment of Error: The trial court erred when it granted Evans' motion for prejudgment interest."

I.

¶14. In its first assignment of error, DP&L argues that the trial court erred in denying its motion for summary judgment. In that motion, DP&L argued that it did not "actively participate" in Enerfab's work; absent such participation, DP&L owed no duty of care to Evans and could not be liable for his injuries.

¶15. A party may appeal the denial of a motion for summary judgment after a subsequent, adverse final judgment. Balson v. Dodds (1980), 62 Ohio St.2d 287, paragraph one of the syllabus, 405 N.E.2d 293. However, "[a]ny 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 the judgment in favor of the party against whom the motion was made." Continental Ins. Co. v. Whittington, 71 Ohio St.3d 150, 156, 1994-Ohio-362, 642 N.E.2d 615.

¶16. While the holdings in Balson and Whittington appear incongruous at first glance, the Ohio Supreme Court has rejected this notion. In Whittington, the Court noted that the summary judgment motion in Balson was predicated upon a pure question of law; therefore, the Court could not have deemed harmless the trial court's error in denying that motion. Whittington at 158. The Court also recognized that appellate courts have properly reversed denials of summary judgment motions where no intervening trial occurred on the merits of the case, i.e. where cross-motions for summary judgment were filed. Id., citing Emrick v. Wasson (1990), 62 Ohio App.3d 498, 576 N.E.2d 814, and Bean v. Metro. Property & Liability Ins. Co. (1990), 68 Ohio App.3d 732, 589 N.E.2d 480. Therefore,

while the Whittington decision limited the circumstances under which an appellate court can reverse a trial court's denial of a summary judgment motion, it did not completely eliminate this ability.

¶17. In deciding Whittington, the Court recognized the inherent injustice in denying judgment to a party whose motion for summary judgment was wrongfully denied, but concluded that it would also be unjust to reverse a judgment in favor of the "party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised." Whittington at 157, citing Home Indemn. Co. v. Reynolds & Co. (1962), 38 Ill.App.2d 358, 187 N.E.2d 274. The Court ultimately concluded that the greater injustice would be to the party deprived of the jury verdict because "[o]therwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence." Id.

¶18. The issue of DP&L's active participation in Enerfab's work was one of the key issues at trial and is the subject of DP&L's second through fifth assignments of error. In addressing those assigned errors, we conclude that Evans presented sufficient evidence at trial upon which a reasonable person could conclude that DP&L owed a duty of care to him because DP&L actively participated in Enerfab's work. See Section II(B), infra. Because genuine issues of material fact supporting a judgment in favor of Evans were presented at trial, we conclude that even if the trial court erred in denying the earlier motion for summary judgment, that error is harmless.

¶19. DP&L's first assignment of error is overruled.

II.

¶20. In assignments of error two through five, DP&L asserts that the trial court erred in denying its motions for a directed verdict, for a new trial, and for judgment notwithstanding the verdict. As support for each of these assigned errors, DP&L asserts that Evans failed to demonstrate that DP&L "actively participated" in Enerfab's work.

¶21. Because these four assignments of error require us to examine nearly identical issues, we address them together. However, we first delineate the applicable standards of review to use in analyzing each of them.

¶22. DP&L's second and third assignments of error allege that the trial court erred in denying its motions for directed verdicts at the close of Evans' case and at the close of its own case, respectively. Civ.R. 50(A)(4) provides: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the

motion and direct a verdict for the moving party as to that issue."

¶23. A motion for a directed verdict presents a question of law, not a question of fact, even though in deciding such a motion it is necessary to review and consider the evidence. Grau v. Kleinschmidt (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399. A motion for directed verdict tests the legal sufficiency of the evidence. Eldridge v. Firestone Tire & Rubber Co. (1985), 24 Ohio App.3d 94, 96, 493 N.E.2d 293. Accordingly, we make an independent review.

¶24. When considering a motion for a directed verdict, a court must construe the evidence most strongly in favor of the party against whom the motion is directed. Strother v. Hutchinson (1981), 67 Ohio St.2d 282, 284, 423 N.E.2d 467. A court considering a motion for a directed verdict must determine not whether one version of the facts presented is more persuasive than another; rather, the court must determine whether the trier of fact could reach only one result under the theories of law presented in the complaint. Id. Where there is competent evidence favoring the nonmoving party so that reasonable minds might reach different conclusions, the court must deny the motion. Ramage v. Cent. Ohio Emergency Serv., Inc., 64 Ohio St.3d 97, 109, 1992-Ohio-109, 592 N.E.2d 828. Where the movant renews the motion for a directed verdict at the conclusion of all the evidence, no waiver results from proceeding with evidence after making the initial motion. Helmick v. Republic-Franklin Ins. Co. (1988), 39 Ohio St.3d 71, paragraph one of the syllabus, 529 N.E.2d 464.

¶25. In its fourth assignment of error, DP&L argues that the trial court erred in denying its motion for a new trial under Civ.R. 59(A)(6). Under this rule, a trial court may grant a new trial if "[t]he judgment is not sustained by the weight of the evidence * * *." The trial court has broad discretion in deciding whether to grant a new trial under Civ.R. 59(A)(6), and a reviewing court will not reverse the trial court's decision absent an abuse of that discretion. Pena v. Northeast Ohio Emergency Affiliates, Inc. (1995), 108 Ohio App.3d 96, 103, 670 N.E.2d 268. A court does not abuse its discretion unless its action implies that the court's attitude is unreasonable, arbitrary or unconscionable. Id.; Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Under Civ.R. 59(A)(6), a movant is entitled to a new trial if the jury award is against the weight of the evidence. A reviewing court will not reverse a judgment as being against the manifest weight of the evidence when some competent, credible evidence supports the judgment. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, syllabus, 376 N.E.2d 578; Pena at 104.

¶26. In its fifth assignment of error, DP&L argues that the court erred in denying its motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence. Posin v. A.B.C. Motor Court Hotel, Inc. (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; McKenney v. Hillside Dairy Corp. (1996), 109 Ohio App.3d 164, 671 N.E.2d 1291. Thus, the standard of review for a ruling on a motion for judgment notwithstanding the verdict is the same as that used for a ruling on a motion for a directed verdict. Posin at 275. We look to see whether the record contains any competent evidence, when construed most strongly in favor of Evans, upon which reasonable minds could reach different

conclusions. Meyers v. Hot Bagels Factory, Inc. (1999), 131 Ohio App.3d 82, 92, 721 N.E.2d 1068. Thus, the issue presents a question of law, which we review de novo. Id., citing Tulloh v. Goodyear Atomic Corp. (1994), 93 Ohio App.3d 740, 639 N.E.2d 1203.

A. LEGAL CONTEXT

¶27. In order to establish a cause of action for negligence, a plaintiff must demonstrate that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the plaintiff suffered injury as a proximate result of the defendant's breach. Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

¶28. Evans concedes that he was engaged in inherently dangerous work at the time of his injury. In negligence actions involving inherently dangerous work, the owner of the premises generally does not owe a duty to the independent contractor or its employees. Wellman v. East Ohio Gas Co. (1953), 160 Ohio St. 103, 113 N.E.2d 629, paragraph two of the syllabus. In Wellman, the Ohio Supreme Court stated: "Where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor." Id. at paragraph one of the syllabus. The independent contractor remains primarily responsible for the protection of its employees. Eicher v. U.S. Steel Corp. (1987), 32 Ohio St.3d 248, 250, 512 N.E.2d 1165.

¶29. However, an exception to the general rule exists when the owner of the premises "actually participates" in the work being performed by the independent contractor. Hirschbach v. Cincinnati Gas & Elec. Co. (1983), 6 Ohio St.3d 206, syllabus, 452 N.E.2d 326. See, also, Michaels v. Ford Motor Co., 72 Ohio St.3d 475, 478, 1995-Ohio-142, 650 N.E.2d 1352; Bond v. Howard Corp., 72 Ohio St.3d 332, 335, 1995-Ohio-81, 650 N.E.2d 416; Cafferkey v. Turner Constr. Co. (1986), 21 Ohio St.3d 110, 112, 488 N.E.2d 189. The terms "actually participates" and "actively participates" are used interchangeably in the relevant case law. If an owner of the premises actually participates in the independent contractor's duties, the owner will be liable for failing to eliminate a hazard that could have been eliminated through the exercise of ordinary care. Hirschbach, supra.

¶30. In Hirschbach, supra, an independent contractor agreed to replace several conductors. It was customary in this type of job to have a winch tractor located several hundred feet away from the base of the electrical tower. Before the accident, the plaintiff and several of his linemen discussed repositioning the winch tractor, which would have required the removal of a chain link fence and the placement of the tractor on another property. The job site inspector refused to reposition the winch tractor, which ultimately contributed to the partial collapse of the tower and the plaintiff's fall to his death. The Court held that the company had "sole control over the safety features necessary to eliminate the hazard" and, by refusing to reposition the winch tractor, had "actually participated in

the job operation by dictating the manner and mode in which * * * the job was to be performed." Hirschbach, 6 Ohio St.3d at 207, 452 N.E.2d 326. The Court implied that deciding whether the possessor/owner had sole control over the safety features necessary to eliminate a hazard is a factual question to be determined by the jury. Hirschbach, 6 Ohio St.3d at 209, 452 N.E.2d 326.

¶31. In Cafferkey v. Turner Construction Co. (1986), 21 Ohio St.3d 100, 488 N.E.2d 189, the Supreme Court reaffirmed and refined the exception enunciated in Hirschbach. In finding a general contractor not liable for injuries to one of its subcontractor's employees, the Court held that "[a] general contractor who has not actively participated in the subcontractor's work does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of a subcontractor who are injured while engaged in inherently dangerous work." Id. at syllabus. Thus, the Court made clear that "actively participating" in an independent contractor's work means more than merely supervising or coordinating. Bell v. DPL, Inc. (Aug. 31, 1999), Adams App. No. 98CA663. In Bond v. Howard Corp., 72 Ohio St.3d 332, 1995-Ohio-81, 650 N.E.2d 416, syllabus, the Court explained that before the law will impose a duty of care, the party engaging the independent contractor must have "directed the activity that resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project." See, also, Michaels v. Ford Motor Co., 72 Ohio St.3d 475, 479, 1995-Ohio-142, 650 N.E.2d 1352 (holding that owner who directed independent contractor to perform task required by contract, but who did not control the means or manner by which the job was performed, was not liable for injuries to the subcontractor's employees).

¶32. In Sopkovich v. Ohio Edison Co., 81 Ohio St.3d 628, 1998-Ohio-341, 693 N.E.2d 233, Ohio Edison hired an independent contractor to paint an electric substation. Ohio Edison was unable to stop the electrical flow through the entire substation, but could stop the electrical flow to certain areas. Each day, an Ohio Edison representative told the independent contractor which conductors were energized and which were deactivated. An employee of the independent contractor was shocked while painting, but it was unclear whether this resulted from a mistake on Ohio Edison's part or a mistake on the part of the injured worker. Nonetheless, the Court determined that Ohio Edison had a duty arising from active participation, even though it did not participate in specific work activities, because Ohio Edison retained and exercised exclusive control over a critical variable in the work environment, i.e., the deactivation of conductors in the work area. The Court held that a duty of care to employees of an independent contractor exists "where the owner retains or exercises control over a critical variable in the workplace." Id. at 643. Thus, the Supreme Court reversed summary judgment in the defendants' favor and remanded the case for a determination of whether Ohio Edison breached its duty to de-electrify the specific conductors and to accurately communicate which ones they deactivated.

¶33. As we noted in Bell, the "active participation" doctrine imposes a duty of care upon a premises owner to employees of an independent contractor when a property owner: (1) directs the activity resulting in the injury; (2) gives or denies permission for the critical acts that led to the employee's

injury; or (3) retains or exercises control over a critical variable in the workplace that caused the injury. Citing Sopkovich at 641-643; Bond at 337. Absent "active participation," the general rule of Wellman applies and an owner cannot be liable in negligence due to the lack of a legal duty owed to the employee of an independent contractor. Bell, supra.

B. FACTUAL CONTEXT

¶34. Since the key issue at trial was whether DP&L "actively participated" in the coil installation project, the relevant testimony focused on two main topics: (1) DP&L's general involvement in the project, and (2) the fact that the gaskets necessary to complete the coil installation were not available to the pipefitters at the time of Evans' fall. That testimony is summarized in the Appendix.

C. ANALYSIS

¶35. Although the standards of review for each of the assigned errors vary slightly, in ruling on assignments of error two through five we must essentially determine whether reasonable minds could conclude that DP&L "actively participated" in the coil replacement job. In other words, we must look to see if the record at the corresponding stage of the proceeding contains some evidence to support Evans' claim of active participation on DP&L's part.

¶36. As discussed in section II(A), supra, there are three ways in which a property owner can "actively participate" in a job. First, the owner can direct the activity that results in the injury. Although Evans asserts that DP&L directed the coil replacement job, there is simply no evidence to support this claim.

¶37. The Enerfab employees testified that they took orders only from the Enerfab supervisors and never from DP&L employees. While the evidence demonstrates that DP&L was aware of the method Enerfab was using to replace the coils, mere knowledge is insufficient to show "active participation." Rather, Evans must prove that DP&L controlled the "means or manner" of Enerfab's performance. Bell, supra, citing Michaels at 479. Although James Farmer testified that a DP&L employee was involved in the discussions regarding the coil replacement job, Farmer did not testify that the DP&L employee issued instructions regarding how Enerfab must perform the job.

¶38. Further, although there is ample testimony that DP&L employees "walked the job" daily, the exercise of a general supervisory role is also insufficient to establish "active participation." The evidence Evans relies on to support this claim demonstrates only that DP&L took measures to ensure workplace safety and Enerfab's compliance with the job specifications. These measures are insufficient to demonstrate "active participation" on DP&L's part.

¶39. Second, "active participation" can be established by proving that DP&L gave or denied permission for the critical acts that led to Evans' injury. While DP&L employees apparently knew

that the pipefitters were using come-alongs to temporarily secure the coils, there is no evidence that DP&L authorized their use in this manner. Although Enerfab employees borrowed some of the come-alongs from DP&L, as well as from other independent contractors on site, this does not amount to DP&L's authorization to secure the coils in this manner.

¶40. Last, Evans attempts to show "active participation" through DP&L's exercise of control over a critical variable in the workplace that caused the injury. Evans argues that DP&L controlled the availability of the gaskets and their absence caused his injury. We conclude that there is sufficient evidence to allow reasonable minds to find that the gaskets were a critical variable in this job and that their absence caused Evans' injury.

¶41. Several of the witnesses testified that the only reason the workers were using the come-alongs and other devices to temporarily secure the coils was because the gaskets were unavailable and the workers could not permanently secure the coils until the gaskets were available. DP&L disputed this claim through the testimony of Danny Carroll who stated that they performed the job in this manner on his orders for financial reasons, not because of the absence of gaskets. DP&L also attempted to demonstrate that the workers could have temporarily secured coils using nuts and bolts rather than the come-alongs.

¶42. Despite the evidence introduced by DP&L, we conclude that there was sufficient evidence supporting Evans' position to allow a jury to decide the issue. If believed, this evidence establishes that the gaskets were a critical element in the coil installation process because their absence precluded the final installation of the coils. Further, this evidence demonstrates that DP&L was solely responsible for the provision of the gaskets. Consequently, we conclude that Evans produced enough competent, credible evidence to allow the jury to decide if DP&L "actively participated" in the coil installation job through the control over a critical variable - the gaskets.

¶43. DP&L contends that it cannot be held liable in tort for a mere breach of contract. As the Ohio Supreme Court noted in Cooper v. Roose (1949), 151 Ohio St. 316, 322, 85 N.E.2d 545, 549-549, to be liable in tort, "[t]here must be some breach of duty distinct from breach of contract." We agree with this statement of law but conclude that it is inapplicable here.

¶44. Evans sued DP&L for breaching its duty of care, not for breach of a contract. If the jury chose to believe Evans' evidence, it could reasonably find that DP&L actively participated in the work and thus assumed a duty to Evans. By failing to provide a safe work environment for Evans, DP&L breached a duty in tort separate and distinct from its contractual obligations to supply gaskets to Enerfab.

¶45. DP&L also relies on Mount v. Columbus & Southern Ohio Elec. Co. (1987), 39 Ohio App.3d 1, 528 N.E.2d 1262, where the Fifth District Court of Appeals concluded that the premises owner's obligation to provide materials was insufficient to demonstrate actual or active participation. Mount

was decided before Sopkovich and the Fifth District did not consider whether the material constituted a "critical variable." Interestingly, Mount was decided primarily on the plaintiff's failure to demonstrate proximate causation, an issue that is not before us. Moreover, we do not base our conclusion that Evans presented sufficient evidence of DP&L's active participation to allow the jury to decide this issue on the mere fact that DP&L agreed to supply the materials. Rather, it is DP&L's failure to do so that became the critical variable in this context.

¶46. For these reasons, we conclude that the trial court did not err in denying DP&L's various motions for judgment in its favor based on Evans' inability to prove that DP&L actively participated in the coil replacement job.

D.

¶47. In its fifth assignment of error, DP&L also argues that the trial court erred by failing to enter a verdict in its favor in light of the jury's answers to interrogatories A(2) and A(4). DP&L contends that the jury's answers to these interrogatories are inconsistent with the general verdict. Evans argues that these interrogatories should not have been submitted to the jury in the first instance, that DP&L failed to preserve its objection to interrogatory A(4), and that the jury's answers are actually consistent with the general verdict.

¶48. Civ.R. 49(B) provides that the trial court "shall" submit written interrogatories to the jury upon the request of any party. Nonetheless, the court may reject proposed interrogatories that do not address determinative issues, and the court retains limited discretion to reject proposed interrogatories that are ambiguous, redundant, confusing, or otherwise legally objectionable. Ramage v. Cent. Ohio Emergency Serv., Inc., 64 Ohio St.3d 97, paragraph three of the syllabus, 1992-Ohio-109, 592 N.E.2d 828, 836-836.

¶49. The purpose of using interrogatories is to "test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict." Riley v. Cincinnati (1976), 46 Ohio St.2d 287, 298, 348 N.E.2d 135, 142. The goal is to have the jury return a general verdict and interrogatory answers that complement the general verdict. Paragraph three of Civ.R. 49(B) details the course a trial court must follow when entering judgment on a jury verdict accompanied by interrogatories: "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."

¶50. Evans argues that the trial court should have refused to submit DP&L's interrogatories to the jury because they do not address determinative issues. We review a trial court's decision to submit a proposed interrogatory under the abuse of discretion standard. Freeman v. Norfolk & W. Ry. Co.

(1994), 69 Ohio St.3d 611, 614, 635 N.E.2d 310, 313, citing Ragone v. Vitali & Beltrami, Jr., Inc. (1975), 42 Ohio St.2d 161, at paragraph one of the syllabus, 327 N.E.2d 645. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 498, 506, 589 N.E.2d 24; Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co. (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622.

¶51. 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. Ragone, supra, at 169. Determinative issues are defined as "`ultimate issues which when decided will definitely settle the 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 v. Wendel Poultry Serv., Inc. (1993), 67 Ohio St.3d 10, 15, 615 N.E.2d 1022, 1028, quoting Miller v. McAllister (1959), 169 Ohio St. 487, 494, 160 N.E.2d 231, 237. For example, in Ragone, the Supreme Court specifically approved an interrogatory asking the jury to state "in what respects the defendant was negligent" where the plaintiff alleged more than one act of negligence. 42 Ohio St.2d at paragraph two of the syllabus.

¶52. DP&L's interrogatories and the jury's answers follow: "A-1, did DP&L actively participate in Mr. Evans' work? Answer: Yes. A-2, if your answer to A-1 is yes, how did DP&L actively participate in Mr. Evans' work? Answer: They walked job and knew how the job was being performed each day. A-3, did DP&L undertake a duty to Mr. Evans in connection with Mr. Evans' work? Answer: Yes. A-4, if your answer to A-3 is yes, what was the duty that DP&L undertook? Answer: It was their duty to provide the gaskets and material for the job. A-5, did DP&L breach that duty? Answer: Yes. A-6, if your answer to A-5 is yes, how did DP&L breach that duty? Answer: Not having the gaskets. A-7, did the breach of that duty by DP&L proximately cause Mr. Evans' injuries? Answer: Yes."

¶53. After reviewing the interrogatories, we conclude that the trial court did not abuse its discretion in submitting interrogatory A(2) to the jury. The issue of DP&L's active participation in Enerfab's work was pivotal to the question of liability. Interrogatory A(2) tested whether the jury relied upon legally sufficient evidence in finding that DP&L actively participated in Enerfab's work. Since Evans relied upon numerous acts by DP&L employees to support his contention of active participation, some of which were legally insufficient as discussed supra, interrogatory A(2) was determinative and the trial court did not abuse its discretion by submitting it to the jury.

¶54. The court's decision to submit interrogatory A(4) is a bit more troubling. In that interrogatory, DP&L asked the jury to identify the duty it undertook. Under the case law, DP&L could only be liable for breaching its duty of care to Evans. Therefore, the jury's affirmative response to interrogatory A(3), which asked whether DP&L owed a duty to Evans, was determinative of the issue. See Ramage, supra, at 108 (holding that when only one act of negligence is alleged against a defendant, an interrogatory asking the jury to specify the manner in which the defendant was negligent is

improper). However, DP&L argued at trial that it did not owe a duty of care to Evans and that the only duty it did owe was a contractual duty to Enerfab to provide the materials for the job. Given that each party argued that a different duty applied to the situation, we conclude that DP&L was entitled to an interrogatory questioning the jury's factual conclusions on this issue. Therefore, we conclude that the trial court did not abuse its discretion by submitting interrogatory A(4) to the jury. Moreover, because we conclude infra that the jury's responses to the interrogatories are consistent with the general verdict, even if the court committed error by submitting interrogatory A(4) to the jury, that error is harmless.

¶55. We also reject Evans' claim that DP&L did not adequately preserve its objection to interrogatory A(4). After voicing his specific objection to interrogatory A(2) and the basis for that objection, defense counsel stated that the jury's response to that interrogatory rendered "the remaining answers to the interrogatories [] legally infirmed [sic]." We believe defense counsel's statement was sufficient to preserve his objection to all interrogatories following interrogatory A(2).

¶56. DP&L argues that the jury's response to interrogatory A(2) is inconsistent with the general verdict because, under the active participation case law, merely walking the job and knowing how the job was being performed each day is insufficient to create a duty to the employee of an independent contractor. DP&L notes that the trial court specifically instructed the jury to list every reason for its finding of "active participation" and, therefore, it must be presumed that this is the sole basis for the jury's finding.

¶57. DP&L argues that the jury's response to interrogatory A(4) is also inconsistent with the general verdict because the jury found that DP&L owed a duty to Evans to provide the gaskets and material for the job when, in actuality, that duty was owed to Enerfab and not to Evans. DP&L contends that since the jury did not find that it owed a "duty of care," the jury's response to the interrogatory is inconsistent with its verdict in Evans' favor.

¶58. "[J]udgment should not be rendered on special findings of fact as against the general verdict unless such special findings * * * are inconsistent and irreconcilable with the general verdict." Becker v. BancOhio Natl. Bank (1985), 17 Ohio St.3d 158, 160, 478 N.E.2d 776, 778-779, quoting Prendergast v. Ginsburg (1928), 119 Ohio St. 360, 164 N.E. 345, paragraph one of the syllabus. A prevailing party is not required to prove consistency between the verdict and a special finding. Rather, it is incumbent upon a party challenging a general verdict to show that the special findings, when considered together, are inconsistent and irreconcilable with the general verdict. Becker at 162-163.

¶59. We agree with DP&L that, when viewed in isolation, the jury's responses to interrogatories A(2) and A(4) are inconsistent with the general verdict. Under current case law, merely "walking a job" and "knowing how a job is being performed" does not constitute active participation. Evans' contention that the jury's response to interrogatory A(2) can be broadly read to include numerous other actions on DP&L's part is mere speculation and is not consistent with the jury's actual

response. We also agree with DP&L's contention that it owed a contractual duty to Enerfab, not to Evans, to provide the gaskets and that the only duty to Evans it could be liable for breaching was its duty of care.

¶60. However, we are required to view the jury's interrogatory responses in their entirety. When considered in this manner, rather than individually, we conclude that the responses are consistent with the general verdict in Evans' favor. Regardless of any confusion in the individual responses, it is apparent to us that the jury found: (1) that DP&L actively participated in Enerfab's/Evans' work by controlling a critical variable, i.e. the failure to provide the gaskets; (2) that based on its active participation, DP&L owed a duty of care to Evans; (3) that DP&L breached its duty of care by failing to provide the gaskets when they were needed so that the Enerfab employees could safely complete the job; and (4) that DP&L's failure to provide the gaskets proximately caused Evans' injuries.

¶61. Since the jury's interrogatory responses are not inconsistent or irreconcilable with the general verdict when considered in their entirety, the trial court did not err in refusing to enter a verdict in DP&L's favor. Given that some of the jury's individual responses were troublesome, the better practice would have been for the trial court to instruct the jury to reconsider its answers. However, the trial court's failure to return the jury for further deliberations does not require reversal.

¶62. DP&L's second, third, fourth and fifth assignments of error are overruled.

III.

¶63. In its sixth assignment of error, DP&L asserts that the trial court erred in granting Evans' motion for prejudgment interest.

¶64. R.C. 1343.03(C) governs the award of prejudgment interest in the tort context and states: "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." This statute was enacted to promote settlement efforts, prevent parties who engage in tortious conduct from frivolously delaying the ultimate resolution of cases, and encourage good faith efforts to settle controversies outside a trial setting. Kalain v. Smith (1986), 25 Ohio St.3d 157, 159, 495 N.E.2d 572.

¶65. A party has not "failed to make a good faith effort to settle" under R.C. 1343.03(C) if it has (1) fully cooperated in discovery proceedings, (2) rationally evaluated its risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good

faith, objectively reasonable belief that it has no liability, it need not make a monetary settlement offer. Kalain, supra, at syllabus. A party may have "failed to make a good faith effort to settle" even when it has not acted in bad faith. Id. at 159, citing Mills v. Dayton (1985), 21 Ohio App.3d 208, 486 N.E.2d 1209.

¶66. The party seeking prejudgment interest bears the burden of proof. Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 658, 635 N.E.2d 331. The decision to award prejudgment interest rests within the trial court's sound discretion. Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse, 74 Ohio St.3d 474, 479, 1996-Ohio-365, 659 N.E.2d 1268. Absent a clear abuse of discretion, the trial court's finding on the issue will not be reversed. Kalain, supra, at 159.

¶67. DP&L argues that the trial court applied the wrong standard in determining whether to award prejudgment interest and, therefore, abused its discretion. Alternatively, DP&L contends that the evidence does not demonstrate that it failed to make a good faith effort to settle the case. Evans disputes DP&L's contention that the court applied the wrong standard and cites evidence demonstrating that DP&L did not make a good faith effort to settle the action.

¶68. In granting Evans' motion for prejudgment interest, the trial court correctly noted the applicability of R.C. 1343.03(C), which governs awards of prejudgment interest in civil actions based on tortious conduct. The court then found that, based on its consideration of the relevant factors, Evans made good faith efforts to settle the case but DP&L did not.

¶69. However, the court then found that it was "required to consider whether the injured party has been fully compensated." The court determined that Evans had not been fully compensated due to the jury's improper 27% reduction of the verdict during its deliberations. The court relied upon Shell Oil Co. v. Huttenbauer Land Co., Inc. (1997), 118 Ohio App.3d 714, 693 N.E.2d 1168, in making this finding.

¶70. The court also found that DP&L "treated this matter throughout as a non-liability issue and [DP&L's] good faith belief in this position is irrelevant in determining whether prejudgment interest should be paid under this section of law." The court cited Slack v. Cropper, 143 Ohio App.3d 74, 2001-Ohio-8894, 757 N.E.2d 404, in support of this conclusion.

¶71. The appellate courts in both Shell Oil and Slack reviewed motions for prejudgment interest on breach of contract claims governed by R.C. 1343.03(A). Unlike R.C. 1343.03(C), which grants the trial court discretion in deciding whether to award prejudgment interest in tortious conduct cases, R.C. 1343.03(A) mandates a prejudgment interest award unless the aggrieved party has already been fully compensated. The losing party's good faith belief in the validity of its position at trial is irrelevant. Slack at 85. Neither Shell Oil nor Slack was relevant in this case and the principles of law the court relied upon from each of these cases are inapplicable and should not have been considered. The purpose of awarding prejudgment interest in a tort case is not to make an aggrieved party whole.

Moreover, a losing party's good faith belief that it is has no liability is relevant when deciding a motion for prejudgment interest. The court should have only considered the four factors outlined in Kalain and case law applying R.C. 1343.03(C) when deciding whether to award prejudgment interest.

¶72. Because the trial court applied the wrong standard of law when deciding to award prejudgment interest, we conclude that the trial court abused its discretion. Although a trial court has discretion when making factual determinations and applying those facts to the rules of law, it does not have discretion to utilize an improper rule of law. "A litigant has the right to insist on the correct rule of law." Wands v. Maple Hts. City School Dist. Bd. Of Ed. (Aug. 24, 2000), Cuyahoga App. No. 76198. Therefore, when a trial court applies an incorrect rule of law, an appellate court retains the authority to correct those errors under any standard of review. Id. See, also, State v. DeLeon (1991), 76 Ohio App.3d 68, 78, 600 N.E.2d 1137, 1143 (holding that where a trial court relies upon an error of law in exercising its discretion, the trial court's decision is reversible error even if it might have reached the same result in exercising its discretion without the error).

¶73. DP&L argues that because the trial court found that it had a good faith belief that it was not liable for Evans' injuries, we should simply overturn the award of prejudgment interest and not remand this matter to the trial court for further proceedings. While the court did make this statement in its conclusions of law, at an earlier point the trial court found that DP&L did not make a good faith effort to settle the case. Given that the trial court made several findings of fact which question whether DP&L had an objectively reasonable belief that it had no liability, we find that the appropriate course of action is to remand this matter to the trial court for its reconsideration of Evans' motion for prejudgment interest under the appropriate legal standard.

¶74. DP&L's sixth assignment of error is sustained and the award of prejudgment interest is reversed and remanded to the trial court for further action consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED.

Kline, P.J., concurs in judgment and opinion.

Abele, J., concurs in judgment only.

APPENDIX

1.

¶75. Evans attempted to prove that DP&L exercised control over the coil replacement job in various ways. David Lovejoy, Enerfab's night shift general foreman, testified that he observed Ron Griffith and Gary Tindall, both employees of DP&L, around the coil installation area and even on the catwalk. Lovejoy also testified that the Enerfab employees were subject to DP&L's safety rules, including

having their lunch boxes checked when they entered the plant and random drug testing. On cross-examination, Lovejoy conceded that neither Griffith nor Tindall had any supervisory role over the pipefitters.

¶76. Mark McCann testified that he is a pipefitter as well as a job steward for the union. He stated that a DP&L "safety man" was at the plant. He would walk around, look over the jobs, and issue warnings to Enerfab employees when they violated the rules.

¶77. James Farmer testified that he was employed by Enerfab as a general foreman and that Dan Carroll was his supervisor. Farmer testified that nobody from DP&L gave him orders, although they tried.

¶78. Ronald Griffith testified that he was a planner at DP&L and that part of his job was to assist the subcontractors. Griffith acknowledged that he walked the job site three to four times per night and provided assistance to the subcontractors if they expressed a need.

¶79. Michael Arnett, a pipefitter, testified that, although DP&L people were there every day, he took orders only from his supervisor, who worked for Enerfab.

¶80. Gary Tindall testified that he was DP&L's representative and its coordinator for the air preheater coil replacement job. Tindall acknowledged that an alliance agreement existed between Enerfab and DP&L. The purpose of the agreement was to improve productivity and cut costs. Under the agreement, if the job came in below the estimated cost, Enerfab received a portion of the savings. Tindall acknowledged that it was important for him to know if there was a change in any portion of the job because the change could affect the time or labor costs involved.

2.

¶81. The parties agree that under the terms of their contract between Enerfab and DP&L, DP&L was to supply all the materials for the coil replacement project and Enerfab was to provide the necessary tools and manpower. Specifically, DP&L was to provide the coils themselves, as well as the gaskets - thin pieces of rubber which are inserted at each end of the coil to form a tight seal between the metal flange of the coil and the metal assembly of the structure holding the coil. At the time of the accident, the gaskets were not present at the job site. The trial testimony demonstrates that material from which Enerfab could have fabricated the gaskets was located in DP&L's warehouse. However, the pre-made gaskets, which DP&L apparently intended for Enerfab to use, were not in DP&L's possession.

¶82. Evans contends that DP&L's failure to provide the gaskets caused his injuries. He argues that the reason the pipefitters were only temporarily installing the new coils using come-alongs, shackles and wire rope, instead of permanently installing the coils with nuts and bolts, is because the

pipefitters were waiting for the gaskets. Had the gaskets been present, the workers would have installed them simultaneously while permanently bolting the new coils into place. Evans contends that, had Enerfab been able to use this process, he would not have been struck by the unsecured coil and fallen from the catwalk.

¶83. Lovejoy, the night shift general foreman, testified that, because there were no gaskets available at the time of the coil installation, the workers were temporarily rigging the coils into place until the gaskets were at hand. When Lovejoy worked on other coil replacement projects at DP&L, the gaskets were present. Lovejoy testified that the pipefitters did not have enough equipment to temporarily rig the coils in place and borrowed some come-alongs from other independent contractors and from DP&L. According to Lovejoy, it would have been safer to bolt each coil into place. Lovejoy testified that he asked his immediate supervisors, Jimmy Farmer (the day shift general foreman) and Dan Carroll (the day shift piping superintendent), if the gaskets had arrived yet nearly every evening. Farmer and Carroll always told Lovejoy that the gaskets had not yet arrived. According to Lovejoy, if the gaskets had been present, the coil that struck Evans would have been pulled up and bolted into place and there would have been no possibility of it sliding out of position.

¶84. On cross-examination, Lovejoy acknowledged that the chokers, shackles and wire ropes used to hold the coils were strong enough to hold them. He also conceded that the pipefitters could have temporarily bolted the coils in place with the nuts and bolts instead of using the come-alongs and that he was never told the job could not be done that way. Lovejoy testified that it was his idea to put come-alongs at the bottom of each coil because he wanted the coils secured at both ends. He acknowledged that if William Elrod, the foreman who reported to him, had followed his instructions, the coil probably would not have slipped.

¶85. Mark McCann testified that he was not working on the coil installation project but, in his capacity as union steward, he received complaints about the unavailability of the gaskets and the fact that the job was not being performed in the usual manner. According to McCann, the rigging would not have been necessary had the gaskets been present. If the pipefitters bolted the coils in place and later unbolted them to install the gaskets, they would have been doing the job twice.

¶86. On cross-examination, McCann acknowledged that the coils will not move if they are shackled and secured properly and would hold for a "good while." McCann also conceded that he does not know if the coils could have been temporarily secured with the bolts, but he guessed that the job could have been performed in that manner.

¶87. James Farmer, a general foreman, testified that at other jobs he worked on at DP&L, the gaskets were available but they weren't in this instance. On previous jobs, they installed the gasket and bolted the coil into place simultaneously. Farmer could not recall why they did not have the gaskets and did not know who made the decision to temporarily rig the coils instead of bolting them in place. According to Farmer, someone from DP&L was involved in discussions as to whether to go forward

with the coil replacement job without the gaskets.

¶88. Larry Henry, a pipefitter, testified that the gaskets should have been present and that the coils should have been bolted into place. According to Henry, the accident would not have occurred if the coils had been bolted.

¶89. Ronald Griffith, a DP&L employee, testified that the pipefitters themselves decided how to perform the coil replacement job.

¶90. Michael Arnett, a pipefitter, testified that if they had the gaskets in the first place, nobody would have been hurt and the job would have been done twice as quickly. Arnett opined that the coil installation job was not safe and that the coils should have been bolted into place. Before Evans' injury, Arnett stated out loud and in the presence of DP&L employees, that the job was unsafe. Arnett also expressed his concerns to the union steward.

¶91. Gary Tindall, a DP&L employee, testified that he created a job "run down sheet," which he provided to Enerfab management. According to the sheet, the front plates on the coils needed to be bolted down to keep the coils from sliding.

¶92. Tindall testified that, before the coil replacement job began, F.B. Wright Company came out to create a pattern for the gaskets. Tindall was responsible for ordering the gaskets when Enerfab indicated that they were needed. DP&L could have obtained the gaskets within twenty-four to forty-eight hours of a request. Tindall testified that he was waiting for Dan Carroll's direction to order the gaskets. After Evans fell, Carroll instructed Tindall to order the gaskets.

¶93. On cross-examination, Tindall testified that he asked Carroll when he would need the gaskets several times prior to the accident. Carroll always responded that they were good with what they were doing. One or two evenings before the accident, Carroll stated that it would be at least the following week before they needed the gaskets.

¶94. DP&L introduced Carroll's testimony in its case-in-chief. Carroll testified that the coil installation process is generally performed as follows: (1) a boilermaker removes the upper plate; (2) a pipefitter removes the piping and the coil itself and installs the new coil; and (3) the boilermaker puts the plate back on. Carroll testified that the pipefitters generally install several coils - six to ten -before the boilermaker puts the plates back on. The coils are held in place with come-alongs during this period. According to Carroll, it was his decision to perform the job in this manner and this is how he has done it previously. He uses this method because boilermakers can install plates in about thirty minutes but it takes pipefitters about an entire shift to replace one coil. Carroll did not want a boilermaker waiting for nine and one-half hours to put on a plate when a come-along or hoisting equipment could hold the coil in place. According to Carroll, this equipment could hold the coils in place indefinitely. Carroll testified that DP&L never said it did not want the job done in this manner,

but it was ultimately his and Enerfab's decision to perform the job this way. According to Carroll, it did not matter that the gaskets were unavailable and their absence would only have mattered if Enerfab had run out of time and DP&L wanted to fire the unit. That situation did not occur here.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED and that Appellant and Appellees split 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 Adams County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Kline, P.J.: Concurs in Judgment and Opinion.

Abele, J.: Concurs in Judgment Only.