[Cite as *Rowe v. Striker*, 2008-Ohio-4654.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

CASEY M. ROWE, et al.	C. A. No. 07CA009296
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRYON S. STRIKER, et al.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellees	CASE No. 06CV146962

DECISION AND JOURNAL ENTRY

Dated: September 15, 2008

CARR, Presiding Judge.

{¶1} Appellants, Casey and Tina Rowe, appeal the judgment of the Lorain County Court of Common Pleas, which granted summary judgment in favor of Appellees, Bryon Striker, Ronald Striker and the Academy of Model Aeronautics, Inc. (the "AMA"), and dismissed the Rowes' complaint. This Court reverses.

I.

{¶2} Casey Rowe is a model airplane enthusiast who had belonged to a recently disbanded model airplane flying club. Tina Rowe is his wife. Soon after the club disbanded because the members lost access to their flying field, some former members met for a picnic on the property of one of the former members. Many of the friends brought model airplanes to fly on the large, open property. As Bryon Striker was flying his giant model airplane, he lost control of the aircraft. He called out that he had lost control, which all parties agree is the appropriate measure to warn others of the situation. The airplane had an approximately 8-foot wingspan,

weighed close to 40 pounds, and was capable of flying at speeds between 60 and 80 m.p.h. After Bryon Striker lost control of the airplane, it banked over a lake, towards a tree line, and behind a pole barn on the property. The airplane reemerged from behind the barn, completing nearly a 360 degree course, and hit Casey Rowe from behind, nearly severing his right leg. The impact further hurled his body forward, causing him to fall on a tent stake in the ground, impaling his shoulder.

{¶3} On July 19, 2006, the Rowes refiled a complaint against the Strikers and the AMA, alleging their liability for the injuries Casey sustained. Casey alleged that the Strikers were negligent and reckless in their construction and operation of the airplane, and that the AMA was negligent and reckless for failing to promulgate and enforce safety rules and regulations which would have prevented this tragedy. Casey further alleged that the AMA breached the terms of its membership agreement with him by failing to promulgate safety regulations and ensure their enforcement. Tina alleged a claim for loss of consortium.

{¶4} The Strikers and the AMA answered, asserting, among other things, contributory negligence, assumption of the risk and the recreational user statute as affirmative defenses. The Strikers and the AMA filed separate motions for summary judgment. The Rowes filed oppositions to both, and the Strikers and the AMA replied. The Rowes filed a motion for leave to file a sur-reply, instanter, in regard to the AMA's reply. The trial court granted leave to the Rowes. On November 5, 2007, the trial court granted summary judgment in favor of the Strikers and the AMA against the Rowes, dismissing the case. The Rowes timely appealed, raising four assignments of error for review. This Court addresses the assignments of error out of order to facilitate review.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE CLAIM OF BREACH OF CONTRACT AGAINST THE ACADEMY OF MODEL AERONAUTICS, INC."

{¶5} The Rowes argue that the trial court erred by failing to consider their breach of contract claim. This Court disagrees.

{¶6} As a preliminary matter, the Rowes' third assignment of error raises the issue of this Court's jurisdiction to consider the appeal. Under some circumstances, a trial court's failure to dispose of all claims results in a judgment entry which is not a final, appealable order. See Civ.R. 54(B). Under those circumstances, this Court does not have the jurisdiction to consider the appeal. R.C. 2505.02 limits appellate jurisdiction to a review of orders. In *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 215, this Court explained that "the primary function of a final order or judgment is the termination of a case or controversy that the parties have submitted to the trial court for resolution." If the trial court indeed failed to dispose of all claims without further noting its determination that there is no just reason for delay, this Court would lack the jurisdiction to address the appeal. Id.; Civ.R. 54(B).

{¶7} This Court has held:

> "[T]he trial court need not enunciate any definitive statement concerning the court's rationale for granting a motion for summary judgment. *Rogoff v. King* (1993), 91 Ohio App.3d 438, 449. In fact, the trial court need not issue anything more than 'a clear and concise pronouncement of the judgment' in its ruling on a motion for summary judgment. Id. However, it is axiomatic that the trial court may not grant summary judgment in regard to any claim, where a party has not moved for judgment in regard to that claim." *Urda v. Buckingham, Doolittle & Burroughs*, 9th Dist. No. 22547, 2005-Ohio-5949, at ¶13.

{¶8} In *Urda*, this Court dismissed the appeal for lack of a final, appealable order because the movants had failed to move for summary judgment in regard to one of many claims. Id. at ¶14. We stated that "[b]ecause appellees did not move for summary judgment in regard to

appellant's wrongful demotion claim, the trial court necessarily could not have granted summary judgment in regard to that claim." Id. In this case, however, the AMA moved for summary judgment on the breach of contract claim. In addition, in its statement of the case, the trial court noted the Rowes' allegations that Casey suffered injury as a result of the AMA's failure to promulgate and compel compliance with safety rules, allegations asserted in both the negligence and breach of contract claims against the AMA. Because the AMA moved for summary judgment on each claim, and because the trial court need not have specified its rationale for granting summary judgment on each claim, there is no reason to believe that the trial court failed to dispose of the breach of contract claim. The Rowes' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED WHEN IT CONSIDERED INADMISSIBLE STATEMENTS IN RENDERING ITS DECISION."

{¶9} The Rowes argue that the trial court erred in granting summary judgment in consideration of and reliance on inadmissible evidence. This Court agrees.

{¶10} In the final judgment entry, the trial court recited the following in its statement of the facts:

> "Rowe acknowledged hearing the warning and acknowledged, as well, observing Striker's plane as it flew, out of control, until it disappeared over some nearby trees. At this point according to Rowe, he assumed Striker's plane would crash into the trees *and he stopped paying attention to it*." (Emphasis added.)

In its conclusions of law, the trial court concluded:

> "6. After Striker shouted the appropriate warning, and after Rowe both heard the warning and observed Striker's plane, any negligence on the part of Striker was absolved, and thereafter, the duty fell upon Rowe to take cautionary measures for the protection of his own safety. *Thompson [v. McNeil* (1990), 53 Ohio St.3d 102,] at 104.
>
> "7. In failing to protect himself after being warned of the potential danger, Rowe's conduct was negligent and Rowe's negligence was the proximate cause of

> his own injuries, or, at the very least, Rowe's negligence as a cause of his injuries exceeded any negligence on the part of Striker in causing Rowe's injuries."

{¶11} It is clear that the trial court relied on evidence that Rowe stopped trying to ascertain the whereabouts of the out-of-control model airplane once it disappeared in the tree line for its conclusion that Rowe's negligence outweighed Striker's because Rowe's ignored an on-going danger. Such evidence was only presented by way of a "transcript" of Rowe's purported statements to an insurance adjuster regarding the incident. The following discussion purportedly transpired between the adjuster and Rowe:

> "Q. Okay were you watching as it went all along the trees here or did you assume?
>
> "R. I assumed it was crashing into the tree.
>
> "Q. Were you watching it?
>
> "R. Not actually.
>
> "Q. Or not really?
>
> "R. Not really watching, paying attention to the aircraft.
>
> "***
>
> "Q. And were you watching it attentively as it came across the barn and everything or was this the second time you said you notice it and it headed towards tree?
>
> "R. Well I did notice it coming over the barn. So I didn't, actually pay any attention to that. Because on a polish mind you think it's going to go down somewhere here over the lake. So when it didn't go into the water I didn't; nobody paid any attention actually where it was going to crash. ***
>
> "Q. Were you watching it at that point or just kind of aware it was there?
>
> "R. I was aware that it was there, but I wasn't really paying any attention.
>
> "***
>
> "Q. Okay so when did you really start locking in on this thing again? After you said you were casually aware of it going to the barn?

"R. When it made the turn over the pole barn I glanced up and saw it again."

{¶12} Rowe was deposed twice in relation to this case. During his October 17, 2005 deposition, he testified that he never stopped looking to see where the airplane had gone. He testified that he was "watching the plane at all times until [he] lost sight of it over the pole barn." He testified that he "was watching the plane and moving." Rowe testified that the whole incident from Striker's warnings until impact took 30-40 seconds. He never testified during his first deposition that he ignored or otherwise discounted the airplane once it disappeared from sight. During his December 8, 2006 deposition, Rowe testified that everyone thought the airplane had crashed in the trees, but he never testified that he ignored the possibility of the plane's return.

{¶13} The Strikers appended the "transcript" of Rowe's purported statement to the insurance adjuster in conjunction with an affidavit of the Strikers' co-counsel, Ryan Clark. Attorney Clark affirmed in his affidavit that he "has first hand knowledge of the matters contained herein[;]" that "Rowe's Recorded Statement was taken on November 9, 2004[;]" and that "a true and accurate copy of the transcript of the recorded statement" was attached. The "transcript" indicates only that Bill Matwijiw was interviewing Casey Rowe "by recorder." No other persons are identified as having been present, and the affiant does not affirm that he was present. There is no certification by the transcriptionist who purportedly transcribed the interview. There is nothing to indicate that Rowe was sworn to testify truthfully at the interview. There is nothing to indicate that Rowe or the adjuster reviewed the "transcript" for accuracy.

{¶14} The Rowes objected to the trial court's consideration of the transcript of the taped interview of Casey Rowe, conducted by an insurance adjuster, asserting that the purported evidence fails to comply with Civ.R. 56(E). Specifically, the Rowes argued that Attorney Clark

had no personal knowledge of the statements contained in the transcript of the interview and was, therefore, not a proper affiant. The Rowes argued that the trial court should disregard any statements contained in the transcript in considering the motion for summary judgment.

{¶15} Civ.R. 56(C) provides that the trial court in ruling on a motion for summary judgment may consider only certain evidence, specifically "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" The trial court may consider other document types not expressly listed in Civ.R. 56(C) only if the document is "accompanied by a personal certification that [it is] genuine or [is] incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Dunigan v. State Farm Mut. Automobile Ins. Co.*, 9th Dist. No. 03CA008283, 2003-Ohio-6454, at ¶10, quoting *Modon v. Cleveland* (Dec. 22, 1999), 9th Dist. No. 2945-M.

{¶16} Civ.R. 56(E) mandates that such affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." This Court has defined "personal knowledge" as "knowledge of factual truth which does not depend on outside information or hearsay." *Dunigan* at ¶10, quoting *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335. In addition, we have stated:

> "Where the nature of the facts contained in the affidavit, together with the identity of the affiant, creates a reasonable inference that the affiant has knowledge of the facts therein, an affiant must merely state that he had personal knowledge of the matter to satisfy Civ.R. 56(E)." *The Maple Street Living Trust v. Spada*, 9th Dist. No. 22119, 2004-Ohio-6747, at ¶17, citing *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, at ¶14.

{¶17} Civ.R. 56(E) mandates that "[s]worn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." This Court has stated that "[u]nauthenticated documents and affidavits not based on personal knowledge

have no evidentiary value and should not be considered by the court in deciding whether summary judgment is appropriate." (Internal quotations omitted.) *Cheriki v. Black River Industries, Inc.*, 9th Dist. No. 07CA009230, 2008-Ohio-2602, at ¶6.

{¶18} In this case, although counsel affirms that he has first hand knowledge, any such knowledge clearly depends on outside information because the affiant was not present at the interview. Further, although counsel affirms that the transcript is a true and accurate copy of Rowe's interview with the adjuster, that knowledge also clearly depends on outside information, as the "transcript" is neither certified by a transcriptionist nor sworn to by Rowe. Although Rowe purportedly "acknowledges" during the interview that the information he gave is "true and correct," there is no sworn statement to that effect. In addition, although Rowe testified during his October 17, 2005 deposition that he told the insurance adjuster the truth during their interview, he was not presented with a copy of the purported transcript to verify that it reflected his truthful statements during the interview.

{¶19} In *Dunigan*, this Court found that an unsigned, uncertified and unnotarized insurance policy attached to an opposition to a motion for summary judgment was not proper evidence pursuant to Civ.R. 56, notwithstanding counsel's affidavit averring personal knowledge. The attorney affirmed that the attached policy was sent to him upon request for a copy of the relevant effective policy. This Court held the affidavit to be insufficient based on the attorney's lack of knowledge that that policy was truly in effect at the relevant time. We stated that "the affidavit of Appellants' counsel does not serve as a sufficient affidavit in accordance with Civ.R. 56(E), since counsel did not likely possess any personal knowledge that this policy is the true and genuine policy in effect at the time of [the] accident." *Dunigan* at ¶18 (Carr, P.J.,

dissenting, asserting that the attorney in fact had personal knowledge that that was the policy sent to him by the insurance company upon his request).

{¶20} In this case, a copy of a transcript, "unaccompanied by a certification or notarization and supported solely by an affidavit of counsel showing no indicia of personal knowledge" as to its accuracy, does not comport with the evidentiary requirements of Civ.R. 56. See *Dunigan* at ¶19. Accordingly, the trial court erred by considering and relying on the "transcript" of Rowe's interview with the insurance adjuster in issuing its ruling on the motions for summary judgment. The Rowes' fourth assignment of error is sustained.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE WHETHER THE ACCIDENT WAS ORDINARY AND FORESEEABLE IS AN ISSUE OF FACT FOR THE JURY TO DECIDE."

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN RENDERING SUMMARY JUDGMENT BECAUSE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING THE CLAIM OF NEGLIGENCE."

{¶21} The Rowes argue that the trial court erred in granting summary judgment in favor of the Strikers and the AMA. Because this Court's decision regarding the Rowes' fourth assignment of error is dispositive, we decline to address the first and second assignments of error as they are rendered moot. See App.R. 12(A)(1)(c).

III.

{¶22} The Rowes' third assignment of error is overruled. The fourth assignment of error is sustained. This Court declines to address the first and second assignments of error. The judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for

further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

KIM R. MYERS, Attorney at Law, for Appellants.

KURT D. ANDERSON, Attorney at Law, for Appellee.

TERRANCE P. GRAVENS and RYAN N. CLARK, Attorneys at Law, for Appellees.