[Cite as *Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg. Inc.*, 2009-Ohio-3806.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ohio Casualty Insurance Co.

Appellee/Cross-Appellant

v.

D and J Distributing and Manufacturing, Inc., et al.

Appellant/Cross-Appellee

Court of Appeals No. L-08-1104

Trial Court No. CI-06-4644

DECISION AND JUDGMENT

Decided: July 31, 2009

* * * * *

Joseph P. Dawson and Paul R. Bartolacci, for appellee.

Robert J. Bahret and Andrew J. Ayers, for appellant.

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HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a jury trial held on October 29, through October 31, 2007, awarded appellee/cross-appellant, Ohio Casualty Insurance Co. ("Ohio Casualty"), judgment against appellant/cross-appellee, D & J Distributing and

Manufacturing Inc. ("D & J"), in the amount of $1,555,708.18. This matter is also before the court on Ohio Casualty's appeal from the trial court's denial of its motion for prejudgment interest. For the reasons that follow, we affirm the decision of the trial court with respect to the judgment against D & J, but reverse the decision of the trial court with respect to its denial of Ohio Casualty's motion for prejudgment interest due to the trial court's failure to conduct a hearing.

{¶ 2} D & J[1] rented space in a building located on Angola Road that was owned by Virginia Biniker and Biniker Builders and Developers (collectively referred to as "Biniker"), who had insurance with Ohio Casualty. In addition to D & J, the building had several tenants, including New Direction Autoworks, LLC ("New Direction"), and Maumee Valley Glass. D & J manufactured fragrance items for use in homes and automobiles. The fragrance, which was a flammable liquid, was mixed with ethyl alcohol, also highly flammable, and then infused into the product being scented.

{¶ 3} On January 20, 2006, D & J was manufacturing a line of incense sticks at its Angola Road location. A fire started near the incense stick manufacturing area and spread through other areas of the building, causing the building to be a total loss. On July 20, 2006, New Direction filed a complaint against D & J, alleging negligence and

[1]D & J did business under the name Exotica Fresheners and was owned by Adnan Ellasir, and Oussama "John" Ellasir. Two other companies, Rite Investments and Real Invest, LLC, were also associated with D & J at the building owned by Biniker. However, at trial, the parties agreed that D & J was the sole defendant. As such, no further reference will be made to the other companies associated with D & J's manufacturing business.

seeking damages associated with the fire. Cincinnati Insurance, Biniker,[2] Maumee Valley Glass, and Grange Mutual Casualty Company also became plaintiffs in the lawsuit, each seeking damages from D & J. Prior to trial, all claims were settled and/or dismissed except for Ohio Casualty's claims against D & J, seeking subrogation for damages caused by the fire.[3] At trial, the jury found that D & J was negligent, violated fire and safety codes, acted with gross negligence, and willful and wanton misconduct, and proximately caused the fire. The jury also determined that D & J breached its lease with Biniker.

{¶ 4} On appeal, D & J raises the following assignments of error:

{¶ 5} 1. "The trial court erred in admitting evidence of an OSHA citation having no relevance to the claimed misconduct of D & J."

{¶ 6} 2. "The trial court erred in not finding that Ohio Casualty was collaterally estopped from claiming a different value than that established by the triennial reevaluation and accepted by Ohio Casualty's insured."

{¶ 7} 3. "The trial court erred in denying D & J's motion for summary judgment and motion for directed verdict on the issue of the waiver of subrogation."

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[2]On July 25, 2006, Biniker filed a separate action seeking damages associated with the fire. The case, however, was consolidated with New Direction's lawsuit.

[3]At the commencement of trial on October 29, 2007, the case caption was amended to reflect Ohio Casualty as the real party in interest and D & J as the sole defendant.

{¶ 8} 4. "The jury's special interrogatory finding[s] that [D & J was] guilty of gross negligence, wanton and willful misconduct are not supported by the manifest weight of the evidence."

{¶ 9} Ohio Casualty raises on cross-appeal the following assignment of error:

{¶ 10} "The trial court erred in denying [Ohio Casualty's] motion for prejudgment interest without conducting a hearing which would have allowed [Ohio Casualty] to present evidence in support of its motion."

{¶ 11} In its first assignment of error, D & J argues that, even though the exhibit was not admitted, the trial court erred by allowing testimony from Adnan and John Ellasir, D & J's owners, regarding a 1994 citation issued by the Occupational Safety and Health Administration ("OSHA"). D & J argues that the citation was not "logically intertwined" with the fire in this case, failed to demonstrate a pattern of misconduct by D & J, and was improperly introduced as evidence of prior bad acts. Specifically, D & J argues that there was no evidence presented to establish that the prior citation was related to the operation of the incense drying machine, which was the origin of the fire, and, therefore, the trial court erroneously allowed the jury to consider D & J's prior behavior, rather than focusing on D & J's actions on the day in question. Although not specific to the citation testimony, D & J also argues that by videotaping the Ellasirs' testimony for presentation at trial, Ohio Casualty ensured that the jury would know that the Ellasirs were natives of the country of Lebanon. D & J argued that, combined with the highly prejudicial evidence of a prior OSHA citation, Ohio Casualty's introduction of the

videotaped depositions "was obviously intended to appeal to any prejudice in the juror's minds against Arabic speaking persons whose businesses suffered fires."

{¶ 12} Initially, we note that the Ellasirs were unavailable for trial and D & J never objected to the videotaped presentation of the Ellasirs' testimony. There is no indication in the record that Ohio Casualty sought to emphasize the Ellasirs' heritage in an effort to stimulate bias within the jury. Moreover, we find that D & J's argument in this regard has nothing to do with its first assignment of error, is entirely unfounded, and, therefore, the trial court did not err in allowing the videotaped presentations.

{¶ 13} On April 12, 1994, the Occupational Safety and Health Review Commission released a decision regarding citations issued against D & J. The decision stated that D & J had received citations on August 5, 1992, alleging violations of Section 1910.1200(e)(1),[4] Title 29, C.F.R., requiring a written "hazard communication program," Section 1910.1200(g)(1),[5] Title 29, C.F.R., requiring a "material safety data sheet"

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[4]Pursuant to 29 C.F.R. 1910.1200(e)(1), D & J was required to develop, implement and maintain a written "hazard communication program," which was to include descriptions of the hazardous materials used, warnings, material safety data sheets, and the manner and method of employee information and training.

[5]Pursuant to 29 C.F.R. 1910.1200(g)(1), D & J was required to obtain or develop a "material safety data sheet" for each hazardous chemical they produced or imported and make such MSDS available in the workplace. Each MSDS must have contained, in part, the following information: the identity of the chemical and its common name(s); the physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point); the physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity; the health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical; the primary route(s) of entry; the permissible exposure limit; whether the hazardous chemical is considered to be a potential carcinogen; any generally applicable precautions for safe handling and use

("MSDS") for each hazardous chemical, and Section 1910.1200(h),[6] Title 29, C.F.R., requiring information dissemination and training for employees.[7] Following a February 12, 1993 inspection, D & J was cited for repeat violations of each of these sections. The commission reviewed the alleged repeat violations and held that the evidence established each violation as alleged, and fined D & J a total of $6,160.

{¶ 14} Adnan Ellasir testified that approximately ten years prior to the fire, he had provided safety training to the employees, but that D & J was not making incense at that time. Adnan testified that, in 2006, Wael El-Zeeb was responsible for safety training at D & J. When asked if OSHA ever issued a citation in the 1990's while Adnan was involved with the safety training, Adnan testified that D & J had received a citation. When

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which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks; any generally applicable control measures, such as appropriate engineering controls, work practices, or personal protective equipment; and emergency and first aid procedures.

[6]Pursuant to 29 C.F.R. 1910.1200(h), D & J was required to provide information and training to its employees regarding hazardous chemicals in their work area, including information regarding categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals, the location and availability of D & J's written hazard communication program, and training concerning methods and observations for detecting the presence or release of a hazardous chemical in the work area, the physical and health hazards of the chemicals in the work area, the measures employees can take to protect themselves from these hazards, such as use of appropriate work practices, emergency procedures, and personal protective equipment, and the details of the hazard communication program developed by D & J, including an explanation of the labeling system and the MSDS, and how employees can obtain and use the appropriate hazard information.

[7]D & J also allegedly violated Section 1910.20(g)(2), Title 29, C.F.R.; however, no section 1910.20 exists and, based upon the written allegation, this court is unable to determine whether D & J was alleged to have violated Section 1910.1200(g)(2) or Section 1910.1020(g)(2).

questioned concerning the nature of the violation, Adnan responded that "it was triggered by an employee who was calling OSHA on us and he was working for us and the violation[s] were, were something like a, a fan that did not have a grid on it, it had a grid but not the grid they wanted; a chair that's not what it's supposed to be, something very minor." On cross-examination, in reference to the 1994 OSHA document, Ohio Casualty asked Adnan if he recalled being cited for failure to develop, implement and maintain a written hazards communication program for D & J's employees, have an MSDS for each hazardous chemical on site, and/or provide information and training on hazardous chemicals. Adnan testified that he did not recall those citations; however, with respect to the safety program, Adnan stated that one existed, but that office personnel failed to show the program to OSHA officials when they visited the site.

{¶ 15} John Ellasir was also asked whether D & J had ever been cited by OSHA prior to the fire. John testified that D & J had been cited approximately ten years before. Counsel for Ohio Casualty asked if D & J had been cited for not providing proper training to its employees with regard to flammable vapors. John responded that a manager who had personal difficulties with Adnan "set up" D & J and called OSHA. John never confirmed or denied whether D & J had been cited for lack of personnel training. John was also asked whether he was aware that a former employee, JB Groins, had informed OSHA that he was not aware of any type of written hazard communication program. John testified that he did not recall the employee and did not know if the employee had made such a statement to OSHA.

{¶ 16} When Ohio Casualty sought to introduce the OSHA document into evidence, D & J argued that the document was inadmissible hearsay, had no probative value because it was 14 years old, did not demonstrate that the 1994 citation concerned any chemicals or processes being used by D & J at the time of the fire, and that an example of one citation in 14 years did not demonstrate a pattern of ignoring OSHA regulations. In refusing to admit the document, the trial court held that it was "highly prejudicial" and "questionable."

{¶ 17} As set forth by the Ohio Supreme Court, "[t]he scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge." *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163. "[I]t is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse of discretion." Id. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 18} In this case, the trial court allowed the testimony upon cross-examination regarding the nature of the 1994 OSHA citation issued against D & J, but did not permit admission of the document itself. We find no abuse of discretion in this regard. Adnan and John Ellasir each testified that D & J was cited by OSHA for matters unrelated to the use of hazardous chemicals. Given the discrepancies between the witnesses' testimony and the 1994 OSHA citation, we find that it was not an abuse of discretion for the trial

court to allow Ohio Casualty to explore the witnesses' knowledge concerning the nature and extent of the 1994 citation. We additionally find that the trial court's rulings to permit the testimony during cross-examination, but deny admission of the unauthenticated document, were not inconsistent under the circumstances.

{¶ 19} Furthermore, we find that Ohio Casualty's questions during cross-examination did not violate Evid.R. 404(B). Although evidence of other wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith, it is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B). Ohio Casualty's introduction of the 1994 citation allowed it to establish whether the Ellasirs knew, prior to the fire, that OSHA required D & J to have a written hazard communication program, a MSDS for each hazardous chemical used, and provide safety training for employees.

{¶ 20} Based on the foregoing, we find D & J's first assignment of error not well-taken.

{¶ 21} D & J argues in its second assignment of error that the trial court erred in not finding that Ohio Casualty was collaterally estopped from claiming a different value for the building than that established by the Lucas County Auditor in 2000, 2003 and 2006. Specifically, D & J asserts that the auditor valued the building at $857,200 for purposes of assessing property taxes. Because Biniker could have challenged the auditor's determination of the value of the building, D & J argues that Ohio Casualty is

collaterally estopped, pursuant to the doctrine of res judicata, from arguing that the value of the building was more than $857,200 at the time of the fire.

{¶ 22} D & J is correct that the county auditor is charged with determining a property's "true value" in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. R.C. 5713.03. For tax purposes, the "true value" of real property is considered to be the amount for which that property would sell on the open market by a willing seller to a willing buyer. *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, ¶ 10. However, "[t]he general rule is that the assessed valuation of property is not evidence of its value for other than tax purposes." *Bana v. Pittsburgh Plate Glass Co.* (1947), 76 N.E.2d 625, 628, 48 Ohio Law Abs. 594.

{¶ 23} Moreover, we find that collateral estoppel does not bar Ohio Casualty from litigating the issue of the property's fair market value in this case. As set forth by the Ohio Supreme Court, "'[c]ollateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.'" *State ex rel. Davis v. Public Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 28, quoting *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183. "[A]n absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined,

and essential to the judgment in the prior action." *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 201. "When an issue is not actually litigated and decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in the subsequent proceeding." *Davis*, ¶ 30, citing *Thompson* at 185. To further explain the "actual-litigation requirement" of collateral estoppel, the Ohio Supreme Court in *Davis*, ¶¶ 31-32, quoted the following from 1 Restatement of the Law 2d, Judgments (1982) 256-257, Section 27, Comment e:

{¶ 24} "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. * * * The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

{¶ 25} "It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly."

{¶ 26} Biniker never challenged the county auditor's tax assessment valuation of its Angola Road property. As such, the issue of the building's fair or true market value was never litigated or determined by a court of competent jurisdiction, or by any administrative entity in a quasi-judicial proceeding. Accordingly, even if Ohio Casualty was in privity with Biniker concerning the property's valuation for tax purposes, we nevertheless find that Ohio Casualty was not bound by the county auditor's assessment and was permitted to present independent evidence to assist the jury with determining the building's value and the amount of damages that should be awarded. Appellant's second assignment of error is therefore found not well-taken.

{¶ 27} D & J argues in its third assignment of error that the trial court erred in denying D & J's motion for summary judgment and motion for directed verdict concerning the issue of waiver of subrogation. Specifically, D & J argues that a lease entered into on January 10, 1994, between Biniker and D & J, contains a waiver of subrogation clause which precludes Ohio Casualty from recovering damages from D & J. D & J argues that the terms of the waiver are clearly expressed and that Biniker did not restrict the waiver of subrogation to any particular form of conduct. Therefore, D & J argues that "the waiver was broad enough to encompass any conduct by D & J that caused 'any loss of damage caused by fire,'" and that it is immaterial whether D & J complied with applicable fire codes in operating its business. By denying its motions, D & J argues that the trial court interfered with its right to contract with Biniker.

{¶ 28} The parties dispute whether the terms of the lease agreement were in effect at the time of the fire, through renewal of the lease agreement, and, if so, whether the terms of the lease applied to all areas occupied by D & J, as its business had expanded to other areas in the building beyond the original 11,245 square feet specified in the lease agreement. Upon consideration, we find that, regardless of whether the terms of the lease agreement were in effect at the time of the fire, the trial court was correct in denying D & J's motions.

{¶ 29} The standards of review for summary judgment and a motion for directed verdict are similar. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). In determining a motion for directed verdict, after construing the evidence most strongly in favor of the party against whom the motion is directed, the trial court must find 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. Civ.R. 50(A)(4). In construing the evidence most strongly in favor of the party against whom the motion is directed, the trial court "must neither consider the weight of the evidence nor the credibility of the witnesses." *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. Additionally, where reasonable minds might reach different conclusions regarding the evidence presented and where there is substantial, competent evidence to support the claim of the party against whom the

motion is made, the motion for directed verdict must be denied. *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 31, 2001-Ohio-59.

{¶ 30} In this case, D & J leased property from Biniker for years, originally at a facility on South Avenue, and then, in the 1980's, D & J moved to the property on Angola Road. In evidence is a copy of a lease agreement between Biniker and D & J, entered into on January 10, 1994, to commence February 1, 1994 and terminate January 31, 1995. The leased premises was described as "office and warehouse unit consisting of approximately 11,245 sq. ft." located at 4754 Angola Rd., Toledo, Ohio 43615. Pertinent to D & J's argument, the lease contained the following exculpatory clause:

{¶ 31} "WAIVER OF SUBROGATION: Lessor agrees to cause each insurance policy carried by Lessor insuring the demised premises against loss by fire or other causes covered by the standard extended coverage endorsement, to be written in a manner so as to provide that the insurance company waives all right of recovery by way of subrogation against Lessee for any loss or damage covered by any such policy. Lessee shall not be liable to the Lessor or any other party for any loss or damage caused by fire or any of the risks enumerated in the standard extended coverage endorsement. Lessee agrees to cause each insurance policy carried by Lessee insuring Lessee's property against loss by fire or causes covered by the standard extended coverage endorsement, to be written in a manner so as to provide that the insurance company waives all right of recovery by way of subrogation against Lessor for any loss or damage covered by such policy. Lessor shall not be liable to the Lessee or any other party for any loss or damage

cause by fire or any of the risks enumerated in the standard extended coverage endorsement."

{¶ 32} Generally, exculpatory clauses are valid in leases and specific exculpatory provisions regarding fire damage will prevail over more general provisions, such as those requiring the lessee to repair all damage to the premises caused by its negligence and surrender the premises in as good a condition as provided. *Nationwide Mut. Fire Ins. Co. v. T & J Transportation & Warehouse* (Jan. 25, 1991), 6th Dist. No. L-90-097. The lease in this case, however, specifically required D & J to comply with all fire and safety codes and regulations:

{¶ 33} "*Lessee shall not do or permit anything to be done in said premises*, or bring or keep anything therein which will in any way increase the rate of fire insurance on said building; or obstruct or interfere with the rights of other tenants, or *which conflict with the laws relating to fires, or with the regulations of the Fire Department* or with any insurance policy upon said building or any part thereof, or *conflict with any of the rules and ordinances of the Board of Health or Building Inspection Department*, or which would in any other way be considered illegal. [Emphasis added.]"

{¶ 34} Moreover, the lease in this case set forth the remedies available to Biniker if D & J defaulted on the terms of the lease agreement. In particular, the lease stated that, in the event that D & J "shall fail to keep and perform and observe any of the conditions of this lease, * * * it shall be lawful for Lessor to enter into the premises the same as if this lease had not been made, and thereupon *this lease, and everything herein contained*

on the part of said Lessor to be performed, shall cease and be void without prejudice * * *. [Emphasis added.]" Accordingly, in the event that D & J violated the terms of the lease by allowing fire and safety code violations, the terms of the lease, including the "waiver of subrogation" clause, would be rendered void.

{¶ 35} In Ohio Casualty's response to D & J's motion for summary judgment, and at trial, ample evidence was presented to create a genuine issue of material fact concerning whether D & J violated fire and safety code violations. As such, based upon the terms of the lease agreement, we find that the trial court correctly denied D & J's motions for summary judgment and directed verdict.

{¶ 36} Additionally, we note that, although an exculpatory clause to limit one's liability due to negligence may be valid and enforceable, Ohio law finds that such a clause is ineffective where the party seeking protection failed to exercise any care whatsoever, where there was willful or wanton misconduct, or where the clause is against important public policy concerns, unconscionable, or vague and ambiguous. See *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 158; *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, ¶ 27; *Sanfillipo v. Rarden* (May 29, 1985), 1st Dist. No. C-840484; and *Cain v. Cleveland Parachute Training Ctr.* (1983), 9 Ohio App.3d 27, 28. Again, we find that a genuine issue of material fact existed concerning whether D & J violated fire and safety codes and whether such behavior constituted gross negligence, or willful and wanton misconduct. On this basis also, we

find that the trial court correctly denied D & J's motions for summary judgment and directed verdict.

{¶ 37} Accordingly, we find that the trial court did not err in denying D & J's motions. If the lease agreement was in effect between the parties, then genuine issues of material fact precluded the granting of summary judgment. If no lease agreement was in effect, then Ohio Casualty was permitted to seek subrogation from D & J for the damages proximately caused by its negligence, gross negligence, and/or willful and wanton misconduct. Appellant's third assignment of error is therefore found not well-taken.

{¶ 38} D & J argues in its fourth assignment of error that the jury's special interrogatory findings, that D & J was guilty of gross negligence, and wanton and willful misconduct, are not supported by the manifest weight of the evidence. Specifically, D & J argues that there was no evidence demonstrating that it was aware that a fire would result from its manufacturing operations. Rather, D & J asserts that the reason the fire started was due to employee, Juan Molina, who "deviated from the procedures" by carrying an open bucket of alcohol right up to the drying machine as he was starting it, rather than keeping the alcohol container covered. D & J further asserts that the fire spread because Molina spilled the alcohol on the floor and himself, causing his clothing to catch fire and the fire to spread from the immediate area of the dryer to other flammable materials in the warehouse.

{¶ 39} Ohio Casualty, however, argues that the jury could properly find that D & J knew, or should have known, that a fire could and would occur due to D & J's knowledge

of the hazards associated with its manufacturing process and use of flammable liquids, its numerous code violations, and its attempt to cover up its failure to provide Molina with safety training. As such, presuming that the findings of fact of the jury are correct, Ohio Casualty asserts that there was sufficient evidence to support the jury's finding that D & J was grossly negligent and/or acted with wanton and willful misconduct.

{¶ 40} On appeal, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. An appellate court must give great deference to the decision of the trial court, must not substitute its own judgment for that of a trial court, and must be guided by a presumption that the findings of the trier-of-fact were indeed correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. This deference "rests with the knowledge that the [jury] is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id.

{¶ 41} Upon a thorough review of the record, we find that there was some competent, credible evidence upon which the jury could have relied in determining that D & J's gross negligence and wanton and willful behavior proximately caused the fire in this case. As the trial court instructed the jury, gross negligence is "the failure to exercise any or very slight care." *Thompson Elec., Inc. v. Bank One, Akron, N.A.* (1988), 37 Ohio St.3d 259, 265, citing *Johnson v. State* (1902), 66 Ohio St. 59, 67. Although there is no

generally accepted meaning of gross negligence, it is signified as "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." *Pieper v. Williams*, 6th Dist. No. L-05-1065, 2006-Ohio-1866, ¶ 52, citing Keeton, Prosser and Keeton on Torts (5ed 1984), 211-212.

{¶ 42} "Willful misconduct" has been defined by the Ohio Supreme Court as "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527. See also *Hancock v. Ashenhurst*, 10th Dist. No. 03AP-1163, 2004-Ohio-3319, ¶ 11. The "intent" needed for willful misconduct "relates to the misconduct, not to the result, and, therefore, an intent to injure need not be shown." *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515. Willful misconduct involves "something more than negligence and it involves a more positive mental state prompting the injurious act than does wanton misconduct." Id. In accordance with these descriptions of "willful misconduct," the trial court instructed the jury as follows:

{¶ 43} "Willful misconduct is intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. It is a general rule that every person may be presumed to intend the natural and probable consequences of his acts. Willful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct, a purpose not to

discharge such duty, or the performance of wrongful acts with knowledge of the likelihood of resulting injury. Knowledge of surrounding circumstances and existing conditions is essential; actual ill will or an intent to injure need not be present."

{¶ 44} "Wanton misconduct" is "the failure to exercise any care whatsoever." *Hancock*, ¶ 11, citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356. To establish "wanton misconduct," the evidence must show a "disposition to perversity on the part of the tortfeasor," such that, "the actor must be conscious that his conduct will, in all likelihood, result in an injury." Id. The trial court defined "wanton misconduct" for the jury as follows:

{¶ 45} "Wanton misconduct must be under such surrounding circumstance and existing conditions that the party doing the act or failing to act must be aware, from his knowledge of such circumstances and conditions, that his conduct will probably result in injury. Wanton misconduct implies a failure to use any care for the plaintiff and an indifference to the consequences, when the probability that harm would result from such failure is great, and such probability is known, or ought to have been know, to the defendant."

{¶ 46} In this case, Juan Molina testified that his job was to infuse charcoal sticks with fragrance to make incense. Molina testified regarding each step in the process. He mixed fragrance oil with ethyl alcohol in a Rubbermaid plastic container with a 10-gallon capacity. Molina retrieved both the fragrance and alcohol from 55-gallon drums located throughout the premises. Molina would transport the liquid in an open 5-gallon bucket.

The mixture required at least one full bucket of alcohol. Molina testified that as he was transporting the alcohol to the mixing container, the alcohol would splash on the floor and on Molina's clothing. After mixing the liquids, Molina would take several bundles of sticks and place them in a metal crate that had holes on the sides and bottom. He would dunk the sticks in the fragrance/alcohol mixture and then place the crate in a cardboard box to drain briefly. He would then place a felt paper onto a conveyor belt of a drying oven, unbundle the sticks and lay them out on the paper to be fed through the dryer. After the sticks were fed through the dryer, Molina would box them up. Molina testified that he manufactured the incense sticks as he had been instructed by another D & J employee.

{¶ 47} Molina testified that the felt paper was reused repeatedly and would be saturated with the fragrance/alcohol mixture and was only discarded when it would fall apart. The cardboard box used to drain the sticks also would be reused until it fell to pieces; thereafter, it would be tossed on the garbage heap that was approximately five feet from the dryer. Molina stated that the garbage pile was large and higher than his waist. Only the garbage in canisters was removed on a weekly basis, the garbage pile was never cleared away. Molina testified that he never received any safety training regarding the chemicals used in the manufacturing process or any fire safety procedures. He also testified that the ventilation system was used only sporadically and could only be turned on by a couple of the employees. The electric dryer itself was designed for drying silk-screened t-shirts, a product that D & J no longer made.

{¶ 48} Molina testified that on the day of the fire, he was making incense sticks all morning. When lunchtime was announced at 1:00 p.m., he turned off the dryer at the power switch located on the wall next to the machine, as he had been instructed to do, not at the machine itself. When he left for lunch, there were incense sticks still on the conveyor belt. Molina testified that, after lunch, the ventilation system was not turned on, but this was not unusual during breaks. Molina was standing at the dryer holding a bucket full of alcohol when he turned on the dryer's power switch. An ignition occurred inside the dryer and Molina's mustache, eyebrows and eyelashes were singed. The alcohol he was holding caught fire, as did his shirt and pants. He dropped the bucket and alcohol spilled across the floor into the adjacent pile of garbage and cardboard boxes. Molina saw another worker attempt to use a fire extinguisher on the fire, but it did not work. Molina's supervisors attempted to extinguish the fire with other fire extinguishers, but to no avail. Molina suffered second-degree burns on his left leg. Two days after the fire, when he went to get his check, he was asked to sign a paper indicating that he had received safety training. Since he had never received any, Molina refused to sign the paper.

{¶ 49} Gary Milhalek and Daniel Kovacic investigated the fire to determine its cause and origin. Because of the extent of the fire damage, both had to rely on Molina's account of the source of the fire. Milhalek, who was hired on behalf of D & J, testified that the cause of the fire was related to the actions or inactions of D & J's employees, a manufacturing process employed by D & J, equipment owned and operated by D & J,

and materials, such as the alcohol mixture, used by D & J in its manufacturing processes. Noting that the ethyl alcohol has a flash point of 60-degrees Fahrenheit, Milhalek opined that it would not be a safe process "to utilize alcohol with a 60-degree flash point in conjunction with a heating oven."

{¶ 50} Kovacic, who was hired by Ohio Casualty on behalf of Biniker, testified that D & J's manufacturing process was highly hazardous and that many safety measures should have been taken when using flammable liquids in a closed compartment; however, D & J used none. Kovacic testified that D & J should have sought permits to run a process in a closed environment using flammable liquids and that the process should have been approved by fire prevention specialists and certified. Kovacic also testified that explosion proof electrical connections should have been used, all the machines should have been grounded to avoid static electricity, the dryer should have been on the concrete floor, not a wooden pallet, and the 55-gallon drums should have been bonded and grounded. Kovacic further testified that the flammable liquid was not properly transported in an open plastic bucket, "housekeeping" was a serious issue that led to the rapid spread of the fire from its origin site, and the ventilation system was insufficient to exhaust the flammable vapors from the closed area. Kovacic opined that "the potential to ignite those vapors was there from the day that they started that process."

{¶ 51} Jeffrey Moore, a professional engineer with Hughes Associates, a fire protection engineering and fire code consulting firm, testified that he was hired by Ohio Casualty to investigate the fire in this case. Moore testified that he evaluated the hazard

of the alcohol and found it to be a Class 1A flammable liquid by the Ohio Fire Code, meaning that it has a flash point of less than 73 degrees Fahrenheit. Moore explained that a flash point "is a temperature at which a * * * flammable liquid or combustible liquid will generate sufficient vapors at the surface, so if you introduce some type of outside ignition source, those vapors can be ignited." Class 1A signifies the most volatile or most flammable liquid characteristic in the fire code.

{¶ 52} In reviewing the manufacturing processes and investigating the physical layout of the building after the fire, Moore concluded that D & J violated a number of Ohio Fire Code rules and regulations with respect to its use of a Class 1A flammable or combustible liquid, including the following: (1) D & J had no permit to use flammable liquids in its manufacturing processes; (2) carrying flammable liquids in open plastic buckets was not an approved method of transportation; (3) under D & J's "open system" for using and storing flammable liquids, D & J was only permitted a maximum volume of ten gallons of flammable liquid in a single control area (D & J had several 55-gallon drums in the manufacturing area); (4) the silk-screen t-shirt dryer was not an approved processing system for use with a Class 1A combustible; (5) none of the equipment was bonded or grounded to avoid static electricity, which could cause a spark; (6) dryer should have been sitting on cement floor, not wooden pallet; (7) Rubbermaid container used for dipping was not an approved container, in part, because it was not constructed of noncombustible material and was not self-closing; (8) the mechanical ventilation system was inadequate for the elimination of combustible vapors because it needed to control

fumes at the point of generation, needed to keep the concentration of alcohol in the air between 1.3 and 3 percent, and there needed to be ventilation to eliminate fumes that accumulated on the floor; (9) equipment should have been connected with ventilation system so that no equipment could run unless the ventilation system was also running; (10) no method for containing spills was in place; (11) portable fire extinguisher near the dryer was not operable (possibly due to an earlier fire at a nearby machine); (12) incense processing area was not maintained in a controlled area, surrounded by fire walls, in order to contain any potential fires; (13) employees involved with flammable liquid processing not provided safety training; and (14) combustible rubbish was not stored in approved containers and amount exceeded acceptable limits.

{¶ 53} Based upon the evidence presented at trial, we find that the jury's determination that D & J's actions amounted to gross negligence and was wanton and willful was supported by some competent, credible evidence. Although the Ellasirs admittedly knew that they were using highly flammable liquids in their manufacturing process, that the fire code required, at a minimum, bonding and grounding, and that their employees should have received safety training, they nevertheless failed to implement any apparent safety precautions. D & J violated numerous fire code regulations, created a highly combustible atmosphere, which was entirely uncontained, and which led to the destruction of the entire building. D & J's complete disregard for abiding by Class 1A flammable liquid regulations and its numerous fire code regulations could be viewed by the jury as more than ordinary inadvertence or inattention, an intentional deviation from a

definite rule of conduct, and the failure to exercise any care whatsoever. Also, given the combination and extent of fire code violations, we find that there was competent, credible evidence upon which the jury could have relied in finding that D & J knew or should have known that there was a great probability that its actions and inactions would cause injury. Accordingly, we find that the jury's verdict was not against the manifest weight of the evidence. D & J's fourth assignment of error is therefore found not well-taken.

{¶ 54} In its cross-appeal, Ohio Casualty argues that the trial court erred in denying its motion for prejudgment interest without conducting a hearing. On November 7, 2007, Ohio Casualty filed a motion for prejudgment interest, arguing that D & J, through its insurer, Auto Owners Insurance Company, failed to evaluate rationally its risks and failed to make a good faith effort to settle the case. D & J responded that it had a good faith, objectively reasonable belief that he has no liability, due to the "waiver of subrogation" clause in the lease agreement, and that it was not required to make a monetary settlement offer.

{¶ 55} R.C. 1343.03(C) states that, in a civil action based on tortious conduct, prejudgment interest shall be computed against the party ordered to pay money by judgment, decree, or order if, following a hearing held subsequent to the verdict or decision, the trial court determines 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." "The purpose of R.C. 1343.03(C) is to encourage litigants to make a good faith effort to settle their case,

thereby conserving legal resources and promoting judicial economy." *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167.

{¶ 56} As set forth by the Ohio Supreme Court, "A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his 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 he has no liability, he need not make a monetary settlement offer." *Kalain v. Smith* (1986), 25 Ohio St.3d 157, syllabus. The last sentence of *Kalain*'s syllabus, however, must be "strictly construed so as to carry out the purposes of R.C. 1343.03(C)." *Moskovitz v. Mount Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 659.

{¶ 57} In *Moskovitz*, the Ohio Supreme Court held that, pursuant to R.C. 1343.03(C), "the trial court must hold a hearing on the motion" for prejudgment interest. Id. at 658. "The focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the *pretrial* settlement efforts made between the plaintiffs and defendants and/or their insurers. [Emphasis in original.]" Id. at 661. "[A]ny determination regarding the defendant's efforts to settle the case that resulted in such judgment *necessarily* requires a review of the settlement efforts of those who acted on the defendant's behalf. [Emphasis in original.]" *Peyko* at 166.

{¶ 58} In this case, D & J argued that Ohio Casualty was not permitted to seek subrogation from D & J based upon the terms of a lease agreement entered into between D & J and Biniker. D & J's motion for partial summary judgment regarding this issue, however, was denied on August 7, 2007. Thereafter, although a settlement conference was held with the trial court on September 21, 2007, D & J allegedly refused to engage in further settlement discussions or make any settlement offer prior to trial. Nevertheless, on March 24, 2008, the trial court denied Ohio Casualty's motion for prejudgment interest, without a hearing, on the basis that D & J possessed a good faith objectively reasonable belief that it had no liability.

{¶ 59} We find that the trial court was required to hold a hearing to determine whether D & J failed to make a good faith effort to settle the case. See *Moskovitz* at 658. Although D & J disputed its liability in this matter, the trial court ruled that the waiver of subrogation clause did not shield D & J from liability. Thus, even if D & J previously possessed a good faith objectively reasonable belief that it had no liability, based upon the trial court's denial of summary judgment, D & J needed to evaluate rationally its risks and potential liability at that point in time. See *Moskovitz* at 664 ("If [defendant] ever had a good faith, objectively reasonable belief that he had no liability, the fact that the 'arbitration' panel unanimously found against [defendant] should have apprised him that a finding of liability at trial was possible, if not probable.") Accordingly, we find that the trial court erred in denying Ohio Casualty's motion for prejudgment interest without a

hearing. Ohio Casualty's assignment of error in its cross-appeal is therefore found well-taken.

{¶ 60} On consideration whereof, with respect to D & J's appeal, this court finds that substantial justice has been done. The judgment of the Lucas County Court of Common Pleas, in the amount of $1,555.708.18, against D & J is therefore affirmed. We additionally find that substantial justice was not done with respect to Ohio Casualty's motion for prejudgment interest. Accordingly, we reverse the decision of the Lucas County Court of Common Pleas that denied Ohio Casualty's motion and remand the matter to the trial court for further proceedings consistent with this decision. D & J is ordered to pay the costs of this appeal pursuant to App.R. 24.

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

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE