[Cite as *Brondes Ford, Inc. v. Habitec Sec.*, 2015-Ohio-2441.]

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

Brondes Ford, Inc., et al	Court of Appeals No. L-12-1358
Appellees/Cross-Appellants	Trial Court Nos. CI0200403303 CI0200801281
v.	
Habitec Security, et al.	**DECISION AND JUDGMENT**
Appellant/Cross-Appellee	Decided: June 19, 2015

* * * * *

Peter C. Munger, Thomas G. Mackin and Randy L. Meyer,
for appellees/cross-appellants.

John T. McLandrich and Frank H. Scialdone, for appellant/
cross-appellee.

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OSOWIK, J.

{¶ 1} This is an appeal filed by appellant/cross-appellee, Habitec Security ("Habitec"), from summary judgment rulings issued by the Lucas County Court of Common Pleas on January 4, 2007, and a jury verdict issued on September 22, 2011, and a cross-appeal filed by appellees/cross-appellants, Brondes Ford, Inc. ("Brondes"), Phil

Brondes, Sr. and Universal Underwriters, from the trial court's post-verdict rulings issued on November 20, 2012. The relevant, undisputed facts are as follows.

{¶ 2} On September 14, 1993, appellee/cross-appellant, Phil Brondes, Sr. ("Brondes, Sr."), the owner, vice president and majority shareholder of Brondes, a 60-year-old Ford dealership located at 5715 Secor Road in Toledo, Ohio, entered into a "Commercial Lease Agreement" ("Agreement") with Habitec. Pursuant to the Agreement, Habitec was to provide a fire detection system and monitoring services for Brondes which, at the time, housed a showroom, offices and a large bay area ("quick lube") that was used to service vehicles.

{¶ 3} The Agreement stated that Habitec would supply and install the following equipment at Brondes' location: one Silent Knight 4724 master control panel with rechargeable battery back-up, one 24-hour digital communicator, one zone annunciator, five smoke detectors, 56 heat detectors, and five strobe horns. The Agreement further stated that Brondes agreed to pay Habitec $1,500 to install the equipment, followed by lease payments of $99 per month for five years. The fire detection system was installed by Habitec's employees.

{¶ 4} Over the next several years the system was periodically inspected by both Habitec and the city of Toledo. During that time, Brondes renovated several areas of the building, and some of the heat detectors were removed and then put back in place. In March 2002, another alarm service company, Simplex Grinnel Fire and Security ("Simplex"), was hired by Brondes to inspect the system. Simplex performed a virtual

check of some of the heat detectors. However, it did not physically check each one of the heat detectors to see if they were functioning properly, and did not check any of the detectors in the quick lube area.

{¶ 5} On May 27, 2002, Memorial Day weekend, at approximately 1:48 a.m., Habitec's alarm system reported a fire at Brondes' facility. The Toledo Fire Department arrived at the scene within eight minutes of the alarm sounding but, by then, the building was totally engulfed in flames. When the fire was completely extinguished, the building was determined to be a total loss. Although several theories were proposed as to the origin of the fire, the exact cause was never determined.

{¶ 6} On May 25, 2004, Brondes and its insurer, Universal Underwriters Insurance Company ("Universal"), filed a complaint in the Lucas County Court of Common Pleas against Habitec, Simplex, the city of Toledo fire inspection department, and other parties,[1] in which they set forth claims of negligent design, manufacture, installation and service of the alarm system by Habitec. The complaint further alleged that, as a result of Habitec's actions, Brondes and Universal suffered in excess of $5 million in combined damages. The amount of the damage claim was based, in part, on the cost of moving the location of the dealership to newly purchased property and greatly expanding the size of the building.

[1] As stated above, all defendants except Habitec were dismissed before trial and are not parties to this appeal.

{¶ 7} Habitec filed an answer on June 15, 2004, and Simplex filed its answer on July 6, 2004. On August 2, 2004, the trial court granted summary judgment to the city of Toledo and dismissed Universal's claim against the city. On August 12, 2004, Brondes filed a motion to designate the case as complex litigation, which the trial court granted on September 15, 2004.

{¶ 8} On August 22, 2006, Simplex and Habitec filed a joint motion for summary judgment in which they asked the trial court to limit Brondes' damages to the property's diminished value. In support, Simplex and Habitec argued that their liability, if any, should be based on the difference in fair market value of the dealership before and after the fire, not the difference between the value of the 10,000 square foot, 60-year-old dealership that burned and the new, 42,000 square-foot building that Brondes relocated and built to replace the original structure.

{¶ 9} Habitec and Simplex filed a joint motion for summary judgment on September 1, 2006, in which they argued that Brondes and Universal failed as a matter of law to allege facts that prove Habitec either caused the fire or contributed to their damages. On September 7, 2006, Habitec filed a separate motion for summary judgment and memorandum in support, in which Habitec asserted that it is either not liable to Brondes and Universal in damages, or the damages are limited by the terms of the Agreement. In support, Habitec argued that: (1) Pursuant to section 25 of the Agreement, any legal action arising out of the Agreement must be brought within one year, (2) Pursuant to section 19 of the Agreement, Brondes agreed to hold Habitec

harmless from any third party claims, including those of Underwriters, and (3) Section 21 of the Agreement limits Habitec's liability in damages, if any, to $250.

{¶ 10} Attached to Habitec's motion was the affidavit of its salesman, Robert Seymour, who stated that Phil Brondes, Sr. signed the Agreement, and a reduced-size copy of the original, legal-sized Agreement.

{¶ 11} On September 8, 2006, Habitec filed yet another motion for summary judgment, in which it argued that the record contains no evidence to show that Habitec negligently manufactured, designed, sold, installed, serviced, or inspected the alarm system that was installed at the Brondes dealership. In support, Habitec argued that Brondes and Universal did not meet their burden to show that either Habitec's alleged negligence or a product defect caused the fire.

{¶ 12} On September 18, 2006, Habitec filed four motions in limine. The first was a motion to exclude any evidence by lay and/or expert witnesses at trial concerning a causal connection between witnesses' reports that they smelled smoke, and the fire that was later reported at Brondes' dealership. Habitec also filed a motion in which it asked the trial court to prohibit Brondes and Universal from presenting evidence of property damage relating to the fire. In addition, Habitec filed motions to exclude both the expert testimony of Gary Wymer as to the actual cause of the fire, and any evidence related to "fire modeling, Fire Dynamics Simulator ("FDS") and/or Smokeview technology" which it characterized as "unfounded" and "speculative."

{¶ 13} On September 25, 2006, Brondes and Universal filed a combined memorandum in opposition to Habitec's and Simplex's motions for summary judgment, in which they argued that summary judgment is not appropriate in this case because: (1) negligence and proximate cause are issues to be resolved by the trier of fact, and (2) Habitec and Simplex are "negligent per se" for violating applicable statutes. On October6, 2006, Habitec filed a combined reply in support of all of its summary judgment motions, in which it argued that: (1) Brondes and Universal did not meet their burden to establish the actual cause of the fire, (2) the one-year limitation period established by the Agreement is enforceable and does not violate public policy, (3) the clause in the Agreement limiting Habitec's liability to $250 is not unconscionable on its face, and (4) damages claimed by Brondes to rebuild the dealership are outrageous and not related to the fair market value of the original dealership.

{¶ 14} On October 17, 2006, four years after the fire, Brondes and Universal filed a motion to amend their complaint "by interlineation" to add Phil Brondes, Jr., Phil Brondes, Sr., and Brondes Land Management, Ltd. ("BLM") as additional party-plaintiffs. In support of the motion, Brondes and Universal argued that, "but for" Habitec's actions, the original dealership would not have been a total loss, and asked the court to allow Phil Brondes, Jr. and/or Phil Brondes, Sr. and/or BLM, to be added as plaintiffs four years after the fire occurred because their respective connections to the Brondes dealership did not exist at the time that the original complaint was filed. On November 1, 2006, Habitec filed a memorandum in opposition, in which it argued that

"[n]one of [the] proposed parties relate back to the original pleading," and the motion to add them at this point in the proceedings is really "an attempt to extend the statute of limitations for this action."

{¶ 15} On November 9, 2006, a summary judgment hearing was held on all of Habitec's outstanding motions. On January 4, 2007, the trial court filed an opinion and judgment entry, in which it found that the issues of whether Brondes' damages should be limited to the $1,270,000 diminution in the value of the property, as well as "the reasonableness and necessity of rebuilding a more modern and updated dealership," are questions of fact for a jury to decide. The trial court further found that the one-year limitation clause and the limitation of Habitec's damages to $250, as stated in the Agreement, are unconscionable. Accordingly, Habitec's and Simplex's motions for summary judgment were denied. Habitec filed a motion for reconsideration on January 23, 2007, which the trial court denied on June 6, 2007.

{¶ 16} On November 16 and December 17, 2007, a hearing was held pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 1135 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("*Daubert* hearing"), to determine whether James Moore, Jason Floyd and Rick Spencer were qualified to testify as experts for Brondes on the issues of causation, fire modeling and amount of damages.

{¶ 17} James Moore,[2] a fire protection engineer who designs new fire protection systems and evaluates the effectiveness of existing systems, and who was hired by Universal to determine whether a delay in reporting the fire enhanced Brondes' damages, testified that he has never done fire modeling, and he was unable to state how much loss could have been avoided by proper placement of the heat detectors. However, J. Moore opined that a delay in detection of the fire contributed to "causing much more extensive damage than should otherwise have occurred if the fire detection system had been properly designed, installed, tested and serviced before the fire." At the close of J. Moore's testimony, Habitec stipulated to his qualifications as an expert, except as to the issues of delay and amount of damages. Thereafter, the trial court qualified him as an expert, stating that any challenges to his methodology would be subject to cross-examination at trial.

{¶ 18} Jason E. Floyd, a senior engineer for Hughes Associates, Inc. in Baltimore, Maryland, testified that he performs fire experiments for detection and regulatory testing for the Navy, as well as validating fire models for commercial and government purposes. Floyd said that he ran five different scenarios, with different delay times and temperatures. However, Floyd admitted that, in constructing his model, he was somewhat unclear as to the exact placement of the heat detectors, which would affect the

[2] Testimony in this case was presented by James Moore and Douglas Moore. For the sake of clarity, the parties will be referred to in this decision as J. Moore and D. Moore, respectively.

amount of delay in detecting the fire. On cross-examination, Floyd admitted that he is not an expert in determining the causes and origins of fires.

{¶ 19} Rick Spencer testified that he is an expert in the origin and causes of fires. He stated that the fire probably began in the quick lube area, approximately two feet above the floor, based on the burn patterns at the scene. Spencer testified that the time delay allowed the fire to do more damage, but he could not say when the fire started. He also testified that he took part of a heat detector from the scene and stored it in his barn, however, the device was lost when a tornado swept over his property in June 2006.

{¶ 20} Gary Wymer, an insurance loss adjuster hired by Universal, testified that only a flammable liquid scenario or an alarm delay could cause such a total loss. Wymer stated that Brondes insured the building for $1.1 million and Cousino Construction, the company hired to rebuild the dealership, estimated the building's replacement cost was $1,765,000, however, he believed its actual fair market value was $2.5 million. Wymer testified that it is a common economic decision for businesses to "not buy enough insurance." On cross-examination, Wymer testified that he was hired to determine the amount of damage to the dealership, and to negotiate the settlement between Brondes and Universal, and said he hired other experts because he is in "no way, shape or form" an expert on the cause and origin of fires. At the close of Wymer's testimony, the trial court ruled that, although Wymer could testify generally at trial, he was not qualified to offer an expert opinion.

{¶ 21} Next, the trial court entertained Brondes' motion to amend its complaint by interlineation. In support of the motion, Brondes' attorney argued that the new dealership was not built for two and one-half years after the fire; consequently, BLM could not have been listed as an original plaintiff because it was not in existence at that time. Counsel further argued that BLM is funded by Brondes and its sole shareholder, Phil Brondes, Jr., and Brondes, Sr. are named as insured parties on Brondes' insurance policy, and no prejudice would result by adding them as plaintiffs in this case, or by allowing their claims to relate back to the filing of the original complaint in October 2004.

{¶ 22} In response, counsel for Habitec and Simplex argued that allowing additional plaintiffs at this stage in the proceedings is prohibited by the applicable statute of limitations. Counsel further argued that Brondes was trying to add the extra plaintiffs to finance its decision to buy additional property and build a bigger and better dealership, despite the fact that the original dealership was underinsured. In addition, counsel argued that Brondes' losses were less than it claimed because it raised some of the money to finance the new dealership by selling other properties. Finally, counsel argued that Civ.R. 15, which governs the amendment of pleadings, does not cover an amendment by interlineation.

{¶ 23} At the close of the parties' arguments, the trial court stated: "what I'm going to allow is the amendment by interlineation because * * * I think justice requires it." The trial court also allowed the amendment to relate back to the original date the complaint was filed, because "the nature of who the plaintiff is does not necessarily

change the notice of some party who may have to pay for the potential damages." As to the timing of the request, the trial court found: "the time frame is reasonable under [Civ.R.] 17(A) to allow the amendment and the joining of the plaintiff or the movement for amendment by interlineation."

{¶ 24} On January 8, 2008, Habitec filed a renewed motion to exclude or limit Spencer's and Wymer's testimony at trial, due to spoliation of the evidence upon which their testimony was based. In support, Habitec argued that Spencer lost the one salvaged heat detector before it could be examined by the defense, and all other evidence from the scene of the fire was removed, leaving the case "to be tried upon speculation and inadmissible circumstantial evidence supplied by Plaintiffs with little or no ability of the Defendants to respond."

{¶ 25} On January 11, 2008, Brondes, BLM, Phil Brondes, Sr., Phil Brondes, Jr. and Universal filed a separate complaint in the trial court ("case No. CI0200801281"), in which they collectively asked for damages in excess of $8 million from Habitec and Simplex. On January 14, 2008, Brondes and Universal filed a motion to consolidate case No. CI0200801281 with case No. CI0200403303, which the trial court granted on January 15, 2008. On January 16, 2008, Habitec filed a "Motion for More Definite Statement and/or Amended Complaint by Plaintiffs" pursuant to Civ.R. 12(E). In support, Habitec argued that no specific claims were set forth against Habitec by BLM, or Phil Brondes, Sr. or Jr., ("other plaintiffs") since the complaint in CI0200403303 was

amended by interlineation and then consolidated with case No. CI0200801281, which Brondes and Universal opposed.

{¶ 26} On August 1, 2008, Simplex was voluntarily dismissed, leaving Habitec as the only defendant in the case. On November 13, 2008, the trial court granted Habitec's motion for a more definite statement and ordered Brondes, Universal and the other plaintiffs to file an amended complaint. The second amended complaint was filed on December 5, 2008, in which Brondes and BLM sought recovery in excess of $3 million each, Phil Brondes, Sr. and Jr. each sought recovery in excess of $1 million, and Universal sought recovery in excess of $3,900,000.

{¶ 27} On December 31, 2008, Habitec filed a "Motion for More Definite Statement and/or Amended Complaint by Plaintiffs and Motion for Sanctions" in which it stated that the second amended complaint "does nothing to clarify the issues and claims that were deficient in the originally filed Complaint," which the plaintiffs opposed on January 15, 2009. On March 12, 2009, the trial court granted Habitec's motion and ordered the plaintiffs to "file a responsive pleading to such motion * * *."

{¶ 28} The third amended complaint was filed on March 30, 2009, in which the plaintiffs collectively sought damages for negligence and/or breach of contract. Habitec filed a motion to dismiss the third amended complaint, and plaintiffs filed a revised third amended complaint on July 16, 2009, which set forth separate claims of negligence, negligence per se, and breach of oral and written contract. In addition, the revised third complaint contained allegations that portions of the Agreement limiting damages to $250

and limiting the time for bringing claims against Habitec to one year are unconscionable, and setting forth a subrogation claim on behalf of Universal.

{¶ 29} On August 6, 2009, Habitec filed a partial motion to dismiss, in which it asked the trial court to dismiss all except Brondes' claim for breach of written contract and Universal's subrogation claim "to the extent of money paid to [Brondes] only * * *." That same day, Habitec answered the third amended complaint, in which it asserted affirmative defenses of unclean hands, failure to join necessary parties, comparative/contributory negligence, statute of frauds, parole evidence rule, lack of proximate cause, spoliation of evidence, and "superseding, intervening causation," and asserted that Brondes' damages are limited by the terms of the Agreement. Brondes filed a memorandum in opposition to partial dismissal on August 27, 2009.

{¶ 30} On November 19, 2009, the trial court filed an opinion and judgment entry in which it dismissed Count 3 (breach of oral contract) as to all of the plaintiffs, and found that BLM cannot state a claim for either ordinary negligence or negligence per se, as stated in Count 4. However, the trial court said that the Agreement was not entirely unconscionable, and Brondes is not prohibited from subrogating its rights to Universal, to the extent that benefits were paid to Brondes under the terms of the policy. Accordingly, Habitec's motion to dismiss was granted in part and denied in part. On January 12, 2010, Brondes filed a motion for reconsideration, in which it asked the trial court to reconsider the dismissal of Count 3. Habitec filed a memorandum in opposition, to which Brondes filed a reply.

{¶ 31} On August 5, 2010, Habitec filed a motion in which it asked the trial court to order a set-off of $375,000, the amount paid in partial settlement of the Brondes' claim against Simplex because, until Simplex was dismissed as a defendant, Brondes claimed that Habitec and Simplex were joint tortfeasors, with joint liability for Brondes' losses due to the fire. On August 11, 2010, the trial court denied Brondes' motion for reconsideration and, on August 13, 2010, Brondes filed a motion in opposition to Habitec's request for set-off. The trial court filed an order on August 24, 2010, disposing of all pending motions. As part of that order, the trial court found no evidence that Simplex was liable, either wholly or in part, for Brondes' loss, and denied Habitec's motion for judicial set-off.

{¶ 32} A jury trial began on August 25, 2010. Before jury selection began, the parties and the trial court addressed Brondes' motion to prevent the Agreement from being introduced as evidence at trial. After discussing the size of the original document, and reviewing the trial court's earlier order to exclude paragraphs 21 and 25, the court ruled that the rest of the Agreement would not be excluded at trial. A jury was empaneled and sworn in on August 26, 2010. Testimony was presented on behalf of Brondes by Phil Brondes, Sr., Habitec salesman Robert Seymour, Toledo Firefighter Richard Syroka, former Toledo city building plan inspector Corky Hahn, city fire prevention worker William Caton, Habitec installer Jeffrey Long, Habitec employees Anthony Adams and Jesus Cordaro, electrical worker Duane Anthony Gibel, and former Brondes employee Benjamin Hazzard. Additional testimony was given by Michael

Peatee, Louise Schlatter, Michael Dean Bay and Kristin Bay, Curtis McDuffy, Frank Szocs, Rick Spencer, Toledo Fire Captain Kenneth Gehring, Thomas Moran, Dennis Jackson, Terrance Minsel, and Michael Cousino.

{¶ 33} Brondes, Sr. testified that in 2002, he was the vice-president and 52 percent owner of Brondes, and that he purchased the dealership when his brother, Don Brondes, died. However, Don's wife, Pat Brondes, inherited a one-half interest in the property on which the dealership was located, and he and Pat received monthly rent payments of $3,500 each until the day of the fire. Brondes, Sr. also stated that Pat had the option not to rebuild the dealership if it ever burned down, which forced him to purchase her interest in the property at a "big premium" after the fire.

{¶ 34} Brondes, Sr. further testified that, before the fire, the dealership had no mortgage whereas, after rebuilding, the business had to pay $48,000 per month in mortgage payments. He stated that, after the fire, he was forced to sell and build in another nearby location due to required setbacks for new construction, and because Ford Motor Company required the dealership to build a "Taj Mahal" to replace its old facility. He said that a vacant lot and a building formerly used by the dealership were sold to Monnette's market to help finance the project.

{¶ 35} Brondes, Sr. said he purchased the Habitec fire alarm system after a small fire happened at the dealership. He recalled telling Habitec to do "whatever has got to be done" to avoid a catastrophic fire. He never questioned the type of alarm system that was installed, and assumed the alarm system "immediately sent [a signal] to a station * * *

that's manned 24 hours a day" and is "a little over a mile away." Brondes, Sr. said the heat detectors were put "up in the ceiling" on trusses where available, and on the ceiling "in the open areas." He said the system was selected and installed by Habitec, and the dealership paid Habitec $100 per month to "maintain it" and provide 24/7 monitoring. Brondes, Sr. said the signature on the Agreement was probably his, since he handled "the fire detector thing," however, he did not know the Agreement was actually a lease. He also said: "I looked at the front side and read the cost and various things but I didn't spend much time reading it. I signed it. I figured it was a contract just to put in the system." He said he did not read the back of the Agreement, and would not have understood the terms written there even if he had read them.

{¶ 36} On cross-examination, Brondes, Sr. said he "half remembers" signing the Agreement, which states that the signer acknowledges they read the front and the back, and he would have turned the document over if he knew there were important disclaimers on the back. He did not know if Brondes applied for a variance to rebuild on the same location after the fire, however, Brondes already owned part of the property on which the new dealership was built. On redirect, Brondes, Sr. stated that he could read the larger print on the Agreement, but not the smaller type, and he did not have an attorney review the lease. He stated that his son, Phil Brondes, Jr., planned the rebuilt dealership.

{¶ 37} Robert Seymour, who sells commercial fire detection systems for Habitec, testified that he is aware of the National Fire Protection Association ("NFPA") guidelines for alarm systems, he is experienced in the area of security and fire detection systems,

and he tailors each system to meet the client's needs. He said that Brondes, Sr. asked for a "fire alarm system," which he provided after taking a tour of the facility. Seymour explained that commercial heat detectors often detect the "rate of rise" in temperature, which produces less false alarms than detectors that measure a set threshold temperature. Seymour said that he installed a Silent Knight control panel, five smoke detectors, and 56 heat detectors, which were designed to sound an alarm when a 135 degree rise in temperature is detected. He said the design drawings for the Brondes system were approved by the Toledo Building Inspector and the Toledo Fire Prevention Bureau, and the equipment charge for the system was $1,805.38, with a monthly monitoring charge of $99. Seymour testified that installers are instructed to mount the heat detectors "as high as they possibly can," and no revisions were made by Habitec after the initial installation. Seymour testified that the Agreement is "a commercial lease not a purchase," and the original document, which was 8.5 by 14 inches in size, with printing on both sides, was executed by "Phil Brondes," with no designation of "Sr." or "Jr."

{¶ 38} At the close of Seymour's testimony, the jury was excused and a discussion between the parties and the court was held as to paragraphs 21 and 25 of the Agreement, which the court previously excluded as unconscionable. The court noted that, although the copy of the Agreement used at trial was 8.5 by 11 inches, the original document was 8.5 by 14 inches, with correspondingly larger type. The jury was then brought back in and testimony resumed.

{¶ 39} Richard Syroka, of the Toledo Fire Department, testified that he responded to the alarm at Brondes on May 27, 2002. He said the fire was marked as "suspicious" because of its size, which required 58 firefighters and 15 rigs, and the origin of the fire remained "undetermined." He said that a check of the fire detection system on February 2, 2002, resulted in one violation in the quick lube area, and tests were performed by shorting electrical wires to make the heat detectors go off. On cross-examination, Syroka stated that the Fire Protection Bureau conducts yearly inspections on commercial properties, and it is the owner's responsibility to correct any violations. He said that the alarm recorded on May 27, 2002, at 1:49:58 a.m. was a "commercial fire alarm at Brondes coming from the quick lube area." He also said that a fire can grow quickly if fed the right fuel, i.e., oil, gas, or wood paneling. On further direct examination, Syroka said that when city inspections do occur, they only note that equipment is present, with no assurance that the system is in working order, since performance evaluations are performed by outside contractors.

{¶ 40} Corky Hahn, a construction plan examiner for the city of Toledo, testified that he played a role in the permit process. Hahn stated that the Toledo Municipal Code specifies what is required, and that an inspector checks later, after a system is installed. He said that his approval of a system drawing does not relieve the designer of the system from liability, and that the drawings submitted to him contained no information as to how high the heat detectors were to be mounted, or what structures they would be mounted on, but he did know that the roof of the old Brondes building was curved. Finally, Hahn

stated that the fire detection system was not required, therefore, it only needed a permit, as opposed to full compliance.

{¶ 41} William Caton, a former Toledo firefighter, testified that Brondes' fire system plan did not say where the heat detectors were placed, or list the height and shape of the ceilings. He said detectors are to be placed as high as possible in a room. Caton said he has never performed any fire system tests, which are commonly done with "smoke cans" and magnets. On cross-examination, Caton testified that the number of heat detectors in the Brondes facility was correct, based on the size of the building.

{¶ 42} After Caton's testimony, the trial deposition of William Bojarski, city fire inspector, was read for the jury. In his deposition, Bojarski testified that he uses NFPA form 72 when inspecting fire systems, however, the standards are not mandatory regulations, and are subordinate to municipal fire codes. Bojarski further testified that when he inspected Brondes' facility in 2000, no violations were found. He stated that, if a violation is found, the owner of the building is responsible for hiring a contractor to fix the problem.

{¶ 43} Jeffrey Long testified that he installed Brondes' fire detection system in 1993. Long said that the only change he made to the original plan was to relocate the control panel and add a heat detector at the new location to protect the panel. Long said he did not remember where he placed the heat detectors; however, the bottoms of the trusses in the quick lube area were six feet below the ceiling, and "there is no way I

would have mounted them six feet below" because, according to NFPA standards, heat detectors should be mounted as high as possible.

{¶ 44} Long stated that after the Brondes fire, wires were found on the top sides of the trusses, mounted with clamps. Long said that he could not testify as to the condition of the system after the fire because, by the time he got to the dealership, the quick lube area had been bulldozed and debris was piled where the panel had been. Long described the range of the Brondes sensors as "50ft coverage, 25ft radius, 25ft in any direction in a circle," and said the sensors would set off an alarm if the rate of temperature rise exceeded 15 degrees per minute. He also said that the Brondes detectors were installed by using a lift because of their height above the floor.

{¶ 45} On cross-examination Long testified that all of the clamps from the fire scene were lost, however, the clamps are usually "malleable" iron clamps that can be mounted horizontally or vertically, as long as they are near the ceiling. He recalled being told that Simplex could not inspect the heat detectors in March 2002 because they did not have a tall enough ladder or a lift. On redirect Long said that he walked through the building after the fire, but found none of the equipment he installed. He remembered telling ATF investigators that "he ran the lines along the angle of the bottom chord in order to obscure them from view from the floor," but he did not remember if the sensors were actually attached to the bottom or the top chord.

{¶ 46} Anthony Adams, a Habitec employee, testified that he added the "419" prefix to the Brondes fire system on October 11, 2001. At that time, he tested the power

supply, the battery backup, and the burglar alarm system and ran a test to see if a signal was being sent and received from the alarm. Jesus Cordaro testified that he serviced the system on December 2, 1999, when he replaced a heat detector, tested the power to the fire detection system, and checked the key pad. He did not remember the locations of the heat detectors, or the type of roof over the building.

{¶ 47} Duane Gibel, an electrician, testified that he added electrical plugs and conduits in the service area in 1999. He described the building as an "old airplane hangar" that is steel-ribbed, and has a 180 degree curved ceiling, with steel trusses on 20 to 25 foot centers. Gibel also stated that he installed outlets and a panel in the body shop and hung new lights in the service area on March 24, 2002. Gibel testified that he has previous experience with heat detector systems. He said the bottoms of the trusses in the quick lube area were about 13 feet above the floor, not at the height of the ceiling. Gibel said he did not see any heat detectors on the bottoms of the trusses in the quick lube area, and he never installed a heat detector on a bowed ceiling.

{¶ 48} Benjamin Hazzard, a former Brondes employee, testified that the quick lube area had an open, 10 to 12 foot high ceiling in the waiting area, a steel curved roof in the lube area, and the middle of the room was higher than the ends. Hazzard said that several containers of oil were kept in a hallway outside of the quick lube area. Hazzard remembered that, in an earlier deposition, he stated the room had a "normal flat panel" ceiling, however, at trial, he was certain the roof was curved and open and that the fire detectors were mounted on the bottoms of the girders.

{¶ 49} Michael Peatee, a Toledo Edison employee, testified that he lives several blocks from the original Brondes dealership, where he helped to install electrical service in the 1980s. Peatee said he was in bed the night of the fire, near an open window, when he smelled smoke, which reminded him of "tar and/or building material," but he did not see a fire. He heard about the fire the next morning and, two days later, he went to the fire scene to recover some equipment for his employer, where he gave a statement to an ATF agent. On cross-examination, Peatee said that there was electrical equipment on the wall of the quick lube area which he was asked to retrieve because there was suspicion that the fire was caused by an electrical failure.

{¶ 50} Louise Schlatter testified that she saw her husband walking around the house after 11 p.m. because he smelled smoke. She did not hear any sirens after 1:50 a.m., and did not hear about the fire until the next day.

{¶ 51} Michael Bay, a Brondes mechanic who lived one-half mile north of the dealership, said he was awakened by the smell of smoke around 12:15 a.m. on May 27, 2002. Bay, a volunteer fireman, said the smell reminded him of a burning building so he went outside, got into his car, and drove around looking for a fire; however, he did not drive toward the Brondes dealership. He went to Brondes the next day to get his tools, but they were destroyed by the collapsed ceiling. Bay testified that heat detectors were placed on "the bottom of the metal rails, the beams," in the quick lube area, and that the building had a "big dome roof and it had two opening sky lights. Kristin Bay, his wife,

testified that she went outside after her husband woke up. Although she could smell smoke, she did not see anything, and did not hear any sirens.

{¶ 52} Curtis McDuffy testified that he and his cousin, Terry Kachenmeister, were driving on Secor Road after midnight on May 27, 2002, when they saw an open garage door with flames inside the building and smoke coming out. They called 911 to report the fire. McDuffy said a "detective" came to his home the next day to ask him about what he saw. On cross-examination, McDuffy stated that he heard sirens before he made the 911 call.

{¶ 53} Former Universal account executive Frank Szocs testified that Brondes, Phil Brondes, Sr., Pat Brondes and several others were listed as insured parties on Brondes' policy, and that the business was insured for approximately $1,161,000. He explained that businesses can purchase a value protection endorsement that will pay if the owner is required to rebuild at more than the cost of the loss, but it does not cover a move to a new business location. Szocs said that Brondes was paid a total of $2,018,788.03 in insurance benefits.

{¶ 54} Rick Spencer, a licensed investigator for the Ohio Department of Public Safety, division of Homeland Security, testified that Wymer hired him to determine the cause and origin of the fire. He went to the burned dealership on May 29, 30, 31, June 17, and July 2 and 10, 2002, after which he generated two reports on April 5 and 9, 2006. Spencer said that when he first saw the quick lube area after the fire, the scene was "pretty much intact." He said that the trusses over the quick lube area, which were 12

feet above the floor and were 20 feet long, collapsed due to heat. Spencer also said that damage to the trusses showed that fire burned longer in that area, which he called "ground zero."

{¶ 55} Spencer stated that the heat detectors were programmed to respond if the rate of rise was more than 15 degrees per minute, or if the temperature of the room was between 135 and 190 degrees. He said his investigation included collecting remnants of burned trusses and what he thought were heat detectors, and he took one heat detector home and kept it in his barn; however, the barn was leveled by a tornado in 2006 and it was lost. Spencer said that the fire was not caused by an intentional human act and, in his opinion, placement of the heat detectors on the bottoms of the trusses contributed to the extent of the damage.

{¶ 56} On cross-examination, Spencer testified that he is not an expert in fire detection. While he did not believe that Habitec caused the fire, there was a two-hour delay before Habitec's system reported it. Spencer said the evidence shows the fire was caused by an unspecified electrical event and its temperature, based on Kachenmeister's and McDuffy's descriptions, was at least 425 degrees Fahrenheit.

{¶ 57} Spencer explained that a bowed roof has a pocket near the ceiling in which heat builds up, preventing the heat detectors from reading the temperature of the fire in a timely manner. He said that a fire can multiply by ten times every minute that it burns. However, he did not know what materials were present in the building, or how fast they would have burned. He also stated that vents in the ceiling may have caused a delay in

detection, although he did not analyze the effect of such vents in this scenario. Spencer testified that detection delay allowed the fire to "progress uninhibited and caused more damages than if it would have activated early on." He said that black smoke spotted by witnesses indicates the presence of petroleum distillate, and the open metal door may have been caused by an "electrical event." He also said that heat sufficient to twist metal trusses would have to be more than 2,000 degrees, and would have to build over some amount of time.

{¶ 58} Toledo Fire Captain Kenneth Gehring testified that the fire was "significant" by the time he arrived on the scene, and the first thing he saw was an open overhead door with flames licking out. Gehring said his focus was on keeping the fire from spreading and that the temperature of the quick lube area was probably a "couple 1000 degrees" by the time he got there.

{¶ 59} Toledo Fire Inspector Thomas Moran testified that he inspected Brondes in 2002 to see if earlier violations found by Simplex had been corrected. Moran said an inspection consists of a visual inspection, during which some of the detectors are "shorted" to make them go off. Moran recalled that Brondes' ceiling was flat.

{¶ 60} Brondes' general manager Dennis Jackson testified that he hired Simplex to inspect the fire system in 2002 and, at that time, heat detectors were mounted on the bottoms of trusses in the quick lube area. On cross-examination, Jackson said that he did not smell the fire, even though he lives only one mile from Brondes' original location. He also said that service and customer relations manager Robert ("Bobby D.")

DeSimpeleare and Bobby's brother, Richard, were in the building to clean floors the weekend before the fire.

{¶ 61} Simplex repair technician Terrance Minsel testified that he went to Brondes in March 2002, where he checked the phone line, disconnected the alarm bell, and tested the heat detectors, monitors, horns and smoke detectors. However, he was unable to reach the heat detectors on the trusses because he did not have a tall enough ladder or a lift. Minsel said the heat detectors were tested "by shorting across wires." He also said that some of the heat and smoke detectors in the conference room were not mounted. On cross-examination, Minsel said that zones four through seven were inaccessible to all but a visual inspection, and there would have been an extra charge to get high enough to actually touch them. Minsel expressed doubt as to whether he had the right equipment to test the heat detectors, and said that, in any event, activating a rate of rise heat detector to test it would destroy the mechanism.

{¶ 62} Michael Cousino testified that he was hired by Brondes to clean up and rebuild the dealership after the fire, which was a total loss. He stated that new set back requirements and zoning laws applied to the rebuilt structure, and that a "like kind, and equal" estimate to rebuild was $1,622,930.76. He said Brondes did not apply for a permit to rebuild on the original site, and did not attempt to find out if the set back and zoning issues could have been resolved.

{¶ 63} In addition to the above testimony, video depositions of Bobby D., deceased, and fire expert D. Moore were played for the jury, followed by additional

testimony by real estate appraiser Robert Domini, Toledo city building inspector James Gilmore, fire experts J. Moore and Jason Floyd, Universal underwriter James Redfern, Brondes' comptroller Linda Gaudaen, and real estate appraiser Michael Ducey. Brondes' final witness was Phil Brondes, Jr.

{¶ 64} Bobby D. testified that he and his brother attempted to clean floors at the dealership the day before the fire but the machine they rented did not work, so they closed the door that opened onto Coral Street and left. Bobby D. said the heat detectors were on the bottoms of beams in the quick lube area, and that there was a "dome-like" ceiling 10 to 12 feet above the trusses that had one big vent at the top, with flaps that could be opened with a crank. However, the vent was closed the last time he was in the building. Bobby D. stated that, before the fire, workers from Gibel Electric were in the building to move his desk and the vending machines, and put in some electrical outlets. He said that doors opening onto to Coral Street could only be opened from the inside. He also said that Simplex did not discuss getting a lift to inspect the heat detectors on the quick lube trusses.

{¶ 65} Testimony given in D. Moore's depositions was as follows. In his first deposition, given on September 19, 2007, D. Moore, an ATF employee and certified fire inspector, testified that he was trained to determine the cause and origin of fires, and was familiar with NFPA guidelines. D. Moore stated that he performed his own investigation of the Brondes fire, in addition to coordinating with other investigators on May 28 and 29, 2002. He said that the first indication of a fire was on May 26, 2002, at 10:30 p.m., when

a witness reported smelling smoke and, later, at 1:48 a.m., when another witness saw fire and called 911. At that same time, a sensor reported a fire in the quick lube area. The fire department was contacted at 1:50 a.m. By 2:03 a.m., there was a heavy fire in the southwest corner of the quick lube area.

{¶ 66} D. Moore said the original Brondes facility was a 60-year-old, 2-story commercial structure that encompassed 7,800 square feet. The roof was supported by steel, bowstring trusses that ran in a north-south direction, and two skylights 12 by 20 feet in size were centered in the east and west halves of the ceiling. Lights were suspended from the trusses, and heat detection sensors were located on the bottoms of the trusses in the quick lube area. D. Moore stated that the system was recently "upgraded to meet code specifications." He said the trouble signal sent to the fire department was probably due to system failure caused by the fire, which burned out the telephone line, and opined that the system responded when it was first capable of detecting the fire. However, he said the detectors would have activated sooner if they had been placed at the highest point of the ceiling, which would have allowed for less damage to the building.

{¶ 67} In his second deposition, given on December 11, 2007, D. Moore testified that the origin of the fire was narrowed to an area, not a specific point, and that the fire was accidental. D. Moore also said that he is not qualified as a fire determination expert, and has no training in assessment of damages or the nature and extent of damages beyond issuing a broad estimate, using the policy amounts as a guide. He said physical evidence and testimony placed the detectors on the bottoms of the trusses, and it is possible the

smoke detected by witnesses did not come from the Brondes fire. D. Moore also said that the fire was "slow-developing, smoldering, eventually it reached a point where it had enough energy where it broke out."

{¶ 68} Real estate appraiser Robert Domini testified that the value of Brondes' facility was $2.5 million before the fire, with an additional $2,172,000 after the fire. Toledo chief building inspector James Gilmore testified that Brondes would have needed a variance to rebuild at the same location. Gilmore also said that the building's owner could have asked for a variance from the setback regulations, and could have appealed a denial of such a request. He stated that it is normal to discuss rebuilding a facility with the same dimensions and location if 75 percent or less of the structure is destroyed.

{¶ 69} J. Moore, a fire protection and fire code research consultant for Hughes Associates, Inc. who also testified at the *Daubert* hearing, testified that NFPA develops fire codes and standards. He said that he visited Brondes on June 17 and July 17, 2002, after Spencer asked him to determine the type of alarm that was used and how it was installed. During those visits, he took photos inside and outside the building. J. Moore stated that NFPA requires heat detectors to be installed on the tops, not the bottoms, of trusses. He further stated that a rate of rise heat detector works when a diaphragm heats up along with the air temperature, putting pressure on a circuit and closing it, setting off an alarm, and a fixed temperature detector has a piece of solder in it that melts, releasing a small plunger that closes a switch and sets off an alarm. J. Moore said that heat detectors should be mounted no more than 12 inches below the ceiling, because the dome

shape traps rising heat, preventing low-mounted detectors from noticing it until the heat eventually builds up and travels back down.

{¶ 70} J. Moore testified that heat detectors come with mounting instructions, that the original plan for the Brondes system does not show the actual placement of the detectors, and no NFPA certificate of completion was issued. He concluded that: (1) the detectors at the facility did not comply with NFPA standards, (2) the installation was not performed correctly, (3) there was no evidence of proper testing, (4) the large number of alarms between the first signal and the fire department's arrival indicates either a rapidly growing fire or damage to the circuits, (5) there were no indications of smoke detection placement in relation to air ducts, (6) it cannot be determined how many detectors there were per zone or circuit, and (7) there was no indication of a primary, as opposed to a secondary power source, or a calculation of how much power is needed to feed the entire circuit. Based on these conclusions, J. Moore opined that the delay in detection of the fire resulted in a larger fire and more damage. Although he is not an expert in fire modeling, J. Moore calculated that even a relatively minor delay in detecting a fire could allow the fire to become two and one-half times bigger.

{¶ 71} On cross-examination, J. Moore testified that a pole can be used to test high-placed heat detectors, but none was used in this case. He said that Spencer lost the only surviving heat detector that could have been tested after the fire. He further said that Brondes did not complete the $1,400 of fixes that Simplex recommended for the system. J. Moore stated that the heat detectors probably failed because they were placed on the

bottoms of the trusses, and that a "flurry" of signals indicates an "attack of the fire alarm system by the fire" as opposed to a single signal from a functioning system.

{¶ 72} Jason Floyd, author of the fire dynamic simulator computer program which performed fire modeling in this case, defined the program as software that simulates "how a fire will grow and behave inside of a building or piece of equipment * * * determining the effect of that fire on either people, structures, equipment in terms of either * * * temperature, radiant heat, or toxicity * * *." Floyd said he was called in by J. Moore to evaluate the potential delay in activation of heat detectors, and he was given drawings and photos that showed the layout and size of the space, after which he ran five scenarios, based on varying possibilities, including assumptions of slower, rather than faster, fire acceleration, and different placement of the heat detectors.

{¶ 73} On cross-examination, Floyd testified that he could not "pinpoint" a dollar amount of damage due to later fire detection, and he did not know when the fire started or how fast the flames spread. Also, he did not know what materials were available to burn, and he did not include calculations based on the presence of oil. He said the only three known facts are the time smoke was first seen, the time the alarm went off and the time the roof collapsed.

{¶ 74} James Redfern, a retired Universal investigator, testified that he flew to Toledo on May 28, 2002, but ATF investigators would not let him see the site. Redfern said that Brondes' insurance policy had a value protection clause that would pay the increased cost to rebuild a facility of the same kind, quality, use and occupancy, even if it

was built at a different location. Redfern estimated the value of the fire-damaged property to be $2,172,000, and the real estate to be $2.5 million. He said that Universal paid Brondes approximately $4 million.

{¶ 75} Linda Gaudaen, Brondes' comptroller, testified that Ford, through its Blue Oval program, dictates how a dealership looks and, if a dealership participates in the program, it receives funds based on the level of sales. Gauden also said that Brondes paid $7,600 per month in rent to Brondes, Sr. and Pat Brondes, but had no mortgage to pay before the fire. However, the new dealership now has "quite a large mortgage" of $4,480,000, for which it made payments of $48,000 per month. She stated that the new facility is owned by BLM, not Brondes. Gauden further testified that property taxes on the new dealership were twice that of the old site, and Universal paid Brondes a total of $3,844,401 for its losses. She also said that BLM, not Brondes, paid Pat Brondes $1.175 million for her share of the original site.

{¶ 76} Real estate appraiser Michael Ducey estimated that, before the fire, the dealership was worth $2.5 million. He testified that Brondes owned seven parcels of land before selling a lot to Monnette's Market, and that Pat Brondes was paid $1.72 million for her interest in the original site of the dealership.

{¶ 77} Phil Brondes, Jr., president of Brondes, testified that BLM was created after the fire as "a financial planning thing actually for our family." He said that his father, Brondes, Sr. is the majority stockholder of BLM. Brondes, Jr. also said that the dealership "kind of went along" with Ford's suggestion to build a bigger facility,

however, the "bottom line" is to sell cars cheaper. He also said that, although the rent was set by Brondes in the past, the company now had no choice because $48,000 per month was needed to make the new mortgage payment. Brondes, Jr. stated that his father wanted a fire detection system because Pat Brondes, who owned part of the original dealership, had the right to influence the decision to rebuild in the event of a fire.

{¶ 78} On cross-examination, Brondes, Jr. testified that before the fire, the dealership sat on 5 acres of land, whereas the new facility was on 9.2 acres, and "[Brondes] could not rebuild the facility that we needed on the property that we have left that we had total control over, and had it not been for the fire we'd still be operating right there right now * * *." He said that the new dealership sits on one parcel of land, which is owned by BLM and Brondes, Sr. He also said that after the fire, Monnette's Market bought one parcel from BLM for $460,000, and several other lots were sold for a total of $1,070,000. He testified that BLM was set up to shield the Brondes family from taxes and liability, and it is "the sole owner and holder of whatever it is for Brondes Land Management LLC." Brondes, Jr. said that the $48,000 monthly rent paid to BLM by Brondes is a "business expense."

{¶ 79} At the close of Brondes, Jr.'s testimony, Brondes rested its case, and the jury was dismissed. Habitec made a motion for a directed verdict, which the trial court denied. In addition, Brondes, Jr. was removed as a plaintiff. Habitec then presented testimony by Simplex technician Dave Sibberson, after which the deposition of David

Gibel was played for the jury. Testimony was then given by William Tapper and fire investigator Timothy Wilhelm.

{¶ 80} Sibberson testified that he inspected the panel and tested the fire alarm system for Simplex before the fire by tripping alarms in different parts of the building. He said there were heat detectors "everywhere," but someone at Brondes turned down his request for a lift because it involved an additional cost. However, he did complete a "visual inspection." Sibberson testified that the ceiling in the lube area was "dome type" and was 15 to 20 feet above the floor. He opined that there "wasn't enough power in the control panel to run all the horns and everything else."

{¶ 81} On cross-examination, Sibberson stated that he disconnected the horns during the test and blew smoke in the smoke detectors, but he did not short out wires or use a heat gun to test the heat detectors in the quick lube area because he could not reach them. Sibberson said that he checked the current to the alarm panel and unsuccessfully attempted to convince Brondes to buy a new panel with an increased electrical capacity. Sibberson stated that one heat detector in the conference room should have been replaced because it had drywall on it due to recent remodeling, and he saw un-mounted smoke detectors in the furnace room.

{¶ 82} Tapper, a building light and safety technician at the University of Toledo, testified that he was a technical manager for Habitec in 2002, but he did not install the Brondes alarm system. Tapper said that the first alarm signal was sent at 1:48 a.m. by an alarm in the quick lube area. He said the telephone line was compromised at 1:53 a.m.,

and that, most likely, the trouble signals sent by the Habitec system were generated by telephone line failure caused by the fire. On cross-examination, Tapper said there should be a "working document" that shows the locations of the installed devices.

{¶ 83} Wilhelm, a firefighter and fire investigator from Erie, Pennsylvania, testified that "bowstring trusses have been known in the fire service to be dangerous and have potential for early collapse." Wilhelm also said that he visited the site on June 17, 2002, as part of Spencer's investigation, and he revisited the site three times more between June 17 and 19, 2001. Pursuant to "NFPA 921 protocol," he did not touch anything, however, the entire area was cleared out when he saw it, and 3,466-plus photos of the original condition of the site were all that was available for study. Wilhelm said that, in 18 dumpsters full of debris, no heat detectors were to be found. Consequently, no heat detectors were examined by anyone other than Spencer, and it was otherwise impossible to determine how the fire had progressed through the structure.

{¶ 84} Wilhelm opined that the ATF's investigators prematurely concluded the fire was accidental. He identified three possible causes: fireworks on the roof, a catastrophic failure of the ceiling-mounted gas heaters, and an unspecified electrical event. But, he also stated: "I don't believe anybody can state how this fire started with any degree of certainty." As to the structure of the building, Wilhelm stated that steel begins to weaken at 600 degrees Fahrenheit and loses 75 percent of its strength and sags at 1,200 degrees Fahrenheit, an opinion that differed from Spencer's assumption that steel begins to weaken at 2,000 degrees Fahrenheit. Wilhelm further stated that "Mr.

Spencer's theory of a fire multiplying in size ten times per minute is just plain wrong." Wilhelm testified that it would be helpful to know more about the building's ventilation, the point of origin of the fire, the ignition source, and the quantity of available fuel sources for the fire. He described fire growth as a "dynamic feature" and said that knowledge of possible fuel sources and surrounding environment is critical to an investigation, and opined that Bay may have smelled smoke from a source other than the Brondes fire. He did not agree with Spencer's conclusion that a prior issue with the system should have put Habitec on notice of a problem.

{¶ 85} On cross-examination, Wilhelm stated that he is not licensed as a fire investigator in Ohio, and he is not familiar with Ohio's Basic Building Code or Fire Code. He did, however, consider and apply NFPA standards. Wilhelm said that the fire scene was "cleaned out to some extent" when he first saw it, and he was not allowed to access the dumpsters. He said that a burning building does not have any particular smell, and he did not believe that either Peatee or Bay smelled smoke from the Brondes fire at 11:15 p.m. and 12:15 a.m., respectively.

{¶ 86} At the close of Wilhelm's testimony, the defense rested and the jury was excused. Habitec renewed its motion for a directed verdict as to Brondes' claims for negligent performance and negligence per se. The trial court granted the motion in part, dismissing Brondes' negligence per se claim as not supported by any specific law or regulation, and denied Habitec's request for a jury instruction as to superseding,

intervening cause. Thereafter, the trial court instructed the jury as to the remaining issues, and the jury retired to deliberate.

{¶ 87} On September 22, 2010, the jury returned its verdict, in which it answered seven separate interrogatories and calculated damages based on the answers to those interrogatories, as follows:

> Answer 1: The alarm system delayed reporting of the Brondes fire.
>
> Answer 2: There was a commercial lease agreement between Habitec and Brondes.
>
> Answer 3: There was a commercial lease agreement between Habitec and Phil Brondes, Sr.
>
> Answer 4: Habitec acted negligently and/or breached the terms of the commercial lease by selecting, installing, servicing, inspecting, and monitoring the system.
>
> Answer 5: Habitec's negligence and/or breach of the terms of the commercial lease caused the delayed reporting of the Brondes fire.
>
> Answer 6: Such delay caused additional damages to occur.
>
> Answer 7: Brondes suffered damages that would not have occurred but for the delayed reporting of the fire.

{¶ 88} Based on the above answers, the jury further found that Habitec was liable for a total of $4,080,284.80 in damages. That amount was further broken down into specific amounts, with the stated percentages of Habitec's liability for each amount:

{¶ 89} In favor of Universal:

Autos: $ 72,240.75 ($144,487.49 at 50 percent)

Buildings: $1,009,394 ($2,018,788.03 at 50 percent)

Equipment: $ 285,980.83 ($ 866,608.59 at 33 percent)

Stock: $ 151,498.12 ($ 302,966.21 at 50 percent)

Earnings: $ 211,363.44 ($ 528,408.60 at 40 percent)

Employee Tools:

$ 9,107.85 ($ 27,599.56 at 33 percent)

Extra Expenses:

$ 0.00 ($ 100,000 at 0 percent)

{¶ 90} In favor of Brondes:

Increased Rent:

$2,300,000.00 ($4,600,000 at 50 percent)

Property tax: $ 0.00 ($ 0.00 at 0 percent)

Unreimbursed Payroll:

$ 0.00 ($ 91,260.74 at 0 percent)

{¶ 91} In favor of Phil Brondes, Sr.:

Rent: $ 19,500.00 ($ 19,500.00 at 100 percent)

Unreimbursed Real Estate Loss:

$ 21,200.00 ($ 21,200.00 at 100 percent)

{¶ 92} On October 6, 2010, Brondes and Universal filed a "Motion for costs, prejudgment and post-judgment interest, and attorney fees, with [an] accompanying memorandum in support, and request for hearing," which Habitec opposed. On October 7, 2010, Habitec filed a motion for judgment notwithstanding the verdict ("JNOV") pursuant to Civ.R. 50(B), or for a new trial pursuant to Civ.R. 59(A) in which it argued that: (1) Brondes is barred from asserting a negligence claim against Habitec because the parties' obligations were established by contract through the Agreement, (2) there is no separate duty of care owed to Brondes because the trial court granted a directed verdict in favor of Habitec on the issue of negligence per se, (3) the plaintiffs' breach of contract claims are limited by the terms of the Agreement, (4) insufficient evidence was presented at trial to support a finding that Habitec's actions proximately caused Brondes' damages, (5) insufficient evidence was presented to support an award for increased rent which, in this case, was actually a mortgage payment, (6) the trial court should have instructed the jury as to superseding, intervening cause by Simplex, and (7) the jury should not have awarded damages to Phil Brondes, Sr. because his negligence claims are barred by the statute of limitations. That same day, Habitec filed a motion in which it renewed its pretrial motion for sanctions, and asked the court to set-off $375,000 from the judgment awarded to Brondes from Simplex, which Brondes and Universal opposed. On November 10, 2010, Brondes and Universal filed a reply in support of their motion for costs, interest and attorney fees. On February 17, 2011, the trial court granted

the parties' joint motion for a stay pending resolutions of all outstanding motions, after which the parties renewed their outstanding motions.

{¶ 93} On November 29, 2012, the trial court issued a judgment in which it vacated the jury award for increased rent, and denied the other issues raised in Habitec's motion for JNOV. The trial court also overruled Habitec's motions for a new trial and for sanctions and set off. As to Brondes' motion for costs, fees, interest and attorney fees, the trial court granted the motion as to a "portion of Plaintiffs' claimed costs" and post-judgment interest, and denied Brondes' requests for prejudgment interest and attorney fees.

{¶ 94} On December 20, 2012, Habitec filed a notice of appeal in this court, in which it set forth the following assignments of error:

> [First Assignment of Error]
>
> The trial court erred when it failed to enforce the terms of the Commercial Lease Agreement.
>
> [Second Assignment of Error]
>
> The trial court erred when it failed to enter judgment as a matter of law in favor of Habitec.
>
> [Third Assignment of Error]
>
> The trial court erred by refusing to instruct the jury on the defense of intervening superseding cause.

[Fourth Assignment of Error]

The trial court erred as a matter of law when it added Phil Brondes Sr., who was not a party to the contract, as a new-party plaintiff after the expiration of the statute of limitations and refused to grant judgment as matter of law dismissing him from this litigation.

{¶ 95} On December 21, 2002, Brondes, Phil Brondes, Sr., and Universal filed a notice of cross-appeal, in which they set forth the following cross-assignments of error:

First [Cross-] Assignment of Error

The trial court erred when it abandoned and ignored the jury's verdict awarding replacement rent overhead damages consistent with a month of testimony, two and a half days of focused deliberation, and strict compliance with the court's jury instruction, interrogatories and verdict forms[.]

Second [Cross-] Assignment of Error

The trial court abused its discretion when it subsequently ruled the jury verdict for Brondes was against the weight of the evidence[.]

Third [Cross-] Assignment of Error

The trial court erred in granting JNOV and vacating the replacement rent overhead award given Habitec repeatedly waived the issue[.]

Fourth [Cross-] Assignment of Error

The trial court erred in not awarding prejudgment interest on the jury's verdict which unquestionably found Habitec breached its contract[.]

Fifth [Cross-] Assignment of Error

The trial court erred in not awarding the proper amount of costs due [to] the prevailing parties[.]

{¶ 96} In its first assignment of error, Habitec asserts that the trial court erred when it denied Habitec's motion for summary judgment and failed to enforce the terms of the Agreement. Specifically, Habitec argues that the contract clause limiting damages to $250 was not unconscionable or against public policy, the one-year limitation on bringing an action against Habitec is enforceable and the Agreement bars enforcement of Universal's third-party claim against Habitec.

{¶ 97} We note at the outset that an appellate court reviews the trial court's granting or denying of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 573 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). 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). Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and

identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Id.* Similarly, "a determination as to whether a written contract is unconscionable is a matter of law" which courts review de novo. *Taylor Bldg. Corp. of Am. v. Benfield,* 117 Ohio St.3d 352, 2009-Ohio-938, 884 N.E.2d 12, ¶ 35. With these standards in mind, we will address Habitec's three arguments.

A. The Damages Limitation Clause

{¶ 98} The trial court summarily found that the clause limiting Habitec's liability under the Agreement to $250 was "against public policy," and denied Habitec's motion for summary judgment as to that issue. On appeal, Habitec argues that the clause is a limitation on damages, not a liquidated damages provision. Habitec further argues that the $250 limitation is not unconscionable and is not against public policy because the Agreement clearly states that Habitec is not an insurer, Brondes was required to obtain fire insurance to cover its losses, and the parties were free to limit Habitec's liability for damages because the Agreement was a "non-personal, commercial transaction between sophisticated businesses."

{¶ 99} In contrast, appellees make the argument that the damage limitation is unconscionable because the typeface used in the Agreement is "so small it requires a magnifying glass to read it." They also argue that Habitec tried to "fine print away" its responsibility to provide fire detection services through paragraphs 17 and 21 of the Agreement, in violation of R.C. 1302.93. We will now address each of these arguments.

{¶ 100} As to appellees' first argument, the record shows that, at one point, the trial court remarked that the typeface used in the Agreement was too small to be read without a magnifying glass. However, the trial court later corrected that impression, after being told that it was looking at a reduced-size copy of the original 8.5 by 14 inch document, which was in the trial court's record. Accordingly, appellees' attempt to generally characterize the Agreement as being written in "minute" type or "fine print" is misleading.

{¶ 101} Further, in their appellate brief, appellees quoted paragraph 17 of the Agreement as follows: "Company assumes no liability for delay . . . or for interruption of service due to . . . fires." However, paragraph 17 reads, in its entirety:

> **17. DELAY IN INSTALLATION AND INTERRUPTION OF SERVICE:** Company assumes no liability for delay in installation of the equipment or for the interruption of service due to strikes, riots, floods, storms, earthquakes, tornadoes, fires, power failures, insurrections, interruption of or unavailability of telephone services, act of God, or any other causes beyond the control of Company, and Company will not be required to give service to Subscriber while interruption of service due to any such cause shall continue.

{¶ 102} A plain reading of the language used in paragraph 17, in its entirety, shows that it addresses delays in installing or providing services due to a variety of forces that are outside of Habitec's control. It does not support appellees' argument that

Habitec is attempting to absolve itself of a duty to monitor the fire alarm equipment that it installed at the Brondes dealership, or at any other facility. Therefore, appellees' attempt to characterize paragraph 17 of the Agreement as an attempt to absolve Habitec of all such responsibility is also misleading.

{¶ 103} In addition, R.C. 1302.92(B), part of Ohio's version of the Uniform Commercial Code ("UCC"), allows for contracting parties to limit or alter damages, provided that such disclaimers are conspicuous. R.C. 1302.29 and *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.*, 67 Ohio St.2d 91, 423 N.E.2d 151 (1981). It also provides for at least a minimum adequate remedy for the victim of a breach. *Targetronix v. Flextronics Intern., USA, Inc.*, 8th Dist. Cuyahoga No. 82225, 2003-Ohio-3963, ¶ 15. However, in this case, R.C. 1302.92 and 1302.29 do not apply, since appellees' claims against Habitec revolve around alleged improper design, installation and monitoring, which predominantly involve the provision of services, not goods. *See Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc.*, 62 Ohio App.2d 144, 405 N.E.2d 307 (6th Dist.1977) (If the contract is for mixed goods and services, the UCC does not apply if its predominate factor and purpose "is the rendition of service, with goods incidentally involved * * *.").

{¶ 104} As for appellees' last argument, generally, in Ohio:

> [P]arties to a contract are free to insert provisions which apportion damages in the event of default. "The right to contract freely with the expectation that the contract shall endure according to its terms is as

fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation." *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 41 O.O.2d 250, 253, 231 N.E.2d 301, 305. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993).

{¶ 105} In spite of the foregoing, for public policy reasons, parties are not permitted to have "complete freedom of contract." *Id.* at 381. Limitations may be imposed in cases where a contract provision violates public policy or constitutes a penalty. In order to resolve such issues, courts are required to consider on a case-by-case basis "[whether] the provision was reasonable at the time of formation and [whether] it bears a reasonable (not necessarily exact) relation to actual damages * * *." *Id.* at 382.

{¶ 106} The following language is printed on the front side of the Agreement,[3] above the signature line:

> By signing this Agreement, Subscriber acknowledges that he has read the entire Agreement, both the front and the back pages; that he has an opportunity to have it reviewed by his attorney and/or insurance consultant, that he understands and agrees to all of the terms, conditions and provisions herein contained; and has in particular read paragraph 21 herein, wherein Subscriber understands that Company's liability is limited. THIS AGREEMENT BECOMES BINDING ON COMPANY ONLY WHEN

[3] All bold face and capitalized type used in this decision was in the original document.

SIGNED BY A MANAGEMENT REPRESENTATIVE OF COMPANY. NO REPRESENTATION MADE BY ANY SALESMAN OF COMPANY OR ANY OTHER PERSON SHALL SURVIVE THE SIGNING OF THIS AGREEMENT.

{¶ 107} Paragraph 21, which is printed on the reverse side of the Agreement, states:

> **21. COMPANY NOT AN INSURER AND LOSS FOR DAMAGES:** It is understood and agreed that: Company is **NOT AN INSURER;** insurance, if any, shall be obtained by Subscriber; the payments provided for herein are based solely on the value of service and are unrelated to the value of Subscriber's property or property of others located on Subscriber's premises; Company makes **NO GUARANTEE OR WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS,** that equipment or services supplied will avert or prevent occurrences or consequences therefrom which the System or service is designed to detect or avert. Subscriber acknowledges that it is impractical and extremely difficult to fix actual damages, if any, which may proximately result from a failure to perform any of the obligations herein, or failure of the System to properly operate with resulting loss to subscriber because of, among other things: (a) the uncertain amount or value of Subscriber's property or property of others

kept on the premises which may be lost, stolen, destroyed, damaged or otherwise affected by occurrences which the System or service is designed to detect or avert; (b) the uncertainty of response time of any police or fire department, should the police or fire department be dispatched as a result of a signal being received or an audible device sounding; (c) the inability to ascertain what portion, if any, of any loss would be proximately caused by Company's failure to perform or by a failure of its equipment to operate; (d) the nature of the service to be performed by Company.

Subscriber understands and agrees that if Company should be found liable for loss or damage due from a failure of Company to perform any of the obligations herein, including but not limited to installation, maintenance, monitoring or service or failure of the System or equipment in any respect whatsoever, Company's liability shall be limited to Two Hundred Fifty ($250.00) Dollars and this liability shall be exclusive; and that the provisions of this section shall apply if loss or damage irrespective of cause or origin, results directly or indirectly to persons or property, from performance or non-performance of the obligations imposed by this Agreement, or from negligence, active or otherwise, of Company, its agents, successors, assigns or employees.

In the event that Subscriber wishes Company to assume greater liability, Subscriber has the right to obtain from Company a higher liability

> by paying an additional amount per month for the increase in liability, and a rider shall be attached hereto setting forth such higher limit and cost, but such additional obligation shall in no way be interpreted to hold company as an insurer. This increased amount is up and above the additional payment for the extended limited warranty.

{¶ 108} Appellees argue on appeal that the test articulated by the Ohio Supreme Court in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), is controlling of the outcome of the case. In *Samson*, the predecessor of the Honeywell alarm company installed a burglar alarm in a pawn shop, which failed to transmit an alarm signal to local authorities. As a result, merchandise worth $68,303 was stolen from the shop. The contract for alarm services stated that the company's liability was unconditionally limited to $50 in "liquidated damages."

{¶ 109} In deciding whether the contract provision was enforceable, the Ohio Supreme Court stated:

> Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not

express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. Id. at the syllabus.

{¶ 110} The *Samson* court concluded that the provision at issue had "the nature and appearance of a penalty" which required the shop owner to pay $10,500 for services only to receive $50 in liquidated damages, and voided the liquidated damages provision. *Id.* at 394.

{¶ 111} In the wake of *Samson*, numerous Ohio courts have considered cases involving "liquidated damages and/or limitation of liability clauses in alarm systems contracts" without always distinguishing between the two types of cases. *Nahra v. Honeywell, Inc.*, 892 F.Supp. 962, 969 (N.D.Ohio 1995). (Citations omitted.) However, in contrast to liquidated damage clauses, which are subject to the full analysis under *Samson,* clauses that limit liability between commercial parties are generally enforceable unless the breaching party is found to be grossly negligent, or the contract is shown to be unconscionable. *Motorists Mut. Ins. Co. v. ADT Security Sys.*, 2d Dist. Montgomery Nos. 14799, 14803, 1995 WL 461316 (Aug. 4, 1995), citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.* (1978), 54 Ohio St.2d 147, 158, 375 N.E.2d 410 (1978). The distinction between the two is clear:

> While both types of clauses may under certain circumstances be found to be unconscionable or to violate public policy, the factual predicates for these findings, like the legal rationales allowing such clauses

> in the first instance, differ with the type of clause involved. * * *
>
> Liquidated damages clauses, properly employed, attempt to fix in advance "reasonable compensation for actual damages." However, a limitation of liability clause by definition restricts the amount of compensation available, regardless of the actual damages ultimately suffered. * * *. *Nahra, supra,* at 969, citing Restatement (First) of Contracts, Section 339, Comment g (1932).[4] *See also Whittle v. Davis*, 12th Dist. Butler No. CA2012-08-169, 2013-Ohio-1950, ¶ 14-15.

{¶ 112} In this case, paragraph 21 limits the amount of compensation to $250, without making an attempt to determine in advance what damages would result from a breach of the Agreement. Accordingly, the analyses in *Samson* and its progeny, while instructive, are not controlling in this instance. Nevertheless, the controversy still centers on whether the $250 damage limitation in paragraph 21 is unconscionable, or constitutes a penalty.

{¶ 113} In order to determine whether a commercial contract provision is unconscionable, "courts will examine, as in consumer transactions, the harshness of the terms of the contract and the relative bargaining positions and experience of the parties, although the commercial plaintiff is held to a higher standard than the ordinary

[4] Comment g states that a limitation of liability clause "is not an agreement to pay either liquidated damages or a penalty. * * * [Accordingly], the contracting parties can by agreement limit their liability in damages to a specified amount, either at the time of making their principal contract, or subsequently thereto."

consumer." *Motorists Mutual, supra,* citing *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 55, 537 N.E.2d 624 (1989). In commercial settings, courts rarely find unconscionability. *Id.*

{¶ 114} In *Motorists Mut. Ins. Co. v. ADT Security Sys.*, the Second District Court of Appeals found that a contract provision limiting the liability of a fire alarm company to "10 percent of the annual service charge or $1,000, whichever is greater" was not unconscionable, and granted summary judgment to ADT on that basis. In so doing, the appellate court determined that the contract clause at issue was a limitation of liability provision, not a liquidated damages provision. *Id.* The court reasoned that the provision did not constitute a penalty, because it was clearly articulated in the parties' contract, which had a warning displayed above the signature line on the front side of the document directing the signers' attention to the limiting conditions stated on the back. Also, clause E on the back of the document contained all-capitalized type that stated the limitations on ADT's liability, including the $1,000 cap on monetary damages "if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect * * *." *Id.*

{¶ 115} Appellees did not present evidence to show that Habitec was the only provider of fire alarm services in the Toledo area, or that no other alarm company could have provided similar services at a reasonable cost. In addition, it is undisputed that the plain, unambiguous terms of the Agreement allowed Brondes to procure damage limits above $250 for an addition premium, but Brondes did not purchase the additional

protection. Also, paragraph 21 states, in bold, capitalized letters, that Habitec "**IS NOT AN INSURER**," and that Brondes could purchase its own fire insurance coverage, which Brondes did obtain. Accordingly, under the circumstances of this case, we find that the damage limitation set forth in paragraph 21 of the Agreement does not violate public policy, and is not unconscionable or in the nature of a penalty due to the size of the typeface or lack of warning of its contents. Finally, Phil Brondes, Sr.'s claim that he did not read the reverse side of the Agreement and did not show the document to an attorney before signing it is not a valid defense to the enforcement of its terms. *Haller v. Borror Corp*., 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990).

{¶ 116} For the foregoing reasons, we find that the trial court erred when it found that the $250 damage limitation in paragraph 21 violated public policy and denied Habitec's motion for summary judgment as to that issue. Habitec's argument is, therefore, well-taken.

B. The One-Year Claim Limitation

{¶ 117} The trial court found that paragraph 25 of the Agreement, which limits the time for bringing any cause of action to one year, instead of the otherwise applicable two-year statutory period, is unconscionable because it "was not conspicuously marked and is therefore of no effect." The trial court relied on R.C. 2305.10 and 2305.06, as well as *Zurich-Am. Ins. Co. v. Citadel Alarm, Inc.*, 8th Dist. Cuyahoga No. 50499, 1986 WL 5291 (May 8, 1986).

{¶ 118} On appeal, Habitec argues that the time limitation was set off "in bold, capital letters at the end of the Agreement." Habitec also asserts that Phil Brondes, Sr. admitted that he was unaware of the limitation because he did not read the Agreement in spite of the warning above his signature, and the language of the limitation is "straightforward and not difficult to understand."

{¶ 119} In contrast, appellees argue that the trial court correctly concluded that the print used in paragraph 25 of the agreement is small enough to render its provision unconscionable. In addition, appellees cite *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 635 N.E.2d 317 (1994), in support of their argument that the one-year claim limitation is against public policy. We disagree, for the following reasons.

{¶ 120} Paragraph 25 of the Agreement states:

> **STATUTE OF LIMITATIONS:** any action by Subscriber under this Agreement in negligence, misrepresentation or fraud, or for any and all other actions, causes of action, claims or charges, must be commenced within one year from the date of occurrence or shall be forever barred.

{¶ 121} We have already determined that the typeface and bold, capitalized headings used on the reverse side of the Agreement, coupled with the advisement above the signature line and Phil Brondes, Sr.'s admission that he did not read the Agreement before he signed it, do not demonstrate that the Agreement was unconscionable on its face. We now turn to appellees' argument that paragraph 25 is void as against public policy, based on *Miller v. Progressive Cas. Ins. Co*.

{¶ 122} In *Miller*, the Ohio Supreme Court stated generally that in Ohio, the parties to a contract may validly limit the time for bringing an action to a period that is shorter than the one provided by statute, so long as the provision is reasonable. *Id.* at 625. However, *Miller* involved a contract to provide uninsured motorists' insurance which contained a provision limiting the time for filing a request to arbitrate claims to one year after the date of the accident. In finding that such a provision violated public policy, the Supreme Court held:

> [A] provision in a policy for uninsured or underinsured motorist coverage which precludes the insured from commencing any action or proceeding against the insurance carrier for payment of uninsured or underinsured motorist benefits, unless the insured has demanded arbitration and/or commenced suit within one year from the date of the accident, is void as against public policy. *Id*. at the syllabus.

{¶ 123} Unlike the circumstances in *Miller, supra*, the limitation in paragraph 25 of the Agreement applies only to Brondes' ability to seek damages from Habitec. The Agreement does not limit the time in which Brondes can bring an action to recover benefits under its insurance contract with Universal. Accordingly, we find that the policy considerations at issue in *Miller* do not apply in this instance and we are not persuaded by the holding of that case. In addition, as set forth above, the typeface used in the Agreement is not so minute as to make its provisions unconscionable on its face, and the

record contains no additional evidence to show that limiting the time for filing a claim to one year, rather than two years, is unreasonable.

{¶ 124} For the foregoing reasons, we find that the trial court erred when it found that the one-year limitation in paragraph 25 violated public policy and denied Habitec's summary judgment motion as to that issue. Habitec's argument is, therefore, well-taken.

C. Subrogation v. Indemnification

{¶ 125} After the jury verdict was entered, Habitec filed a motion for JNOV in which it argued that Universal's subrogation claim is barred by the language in paragraph 19. On November 29, 2012, the trial court filed an opinion and judgment entry in which it found that indemnification provisions require "'one who is primarily liable to reimburse another who had discharged a liability for which that other is only secondarily liable.' *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St.3d 75, 78, 609 N.E.2d 152 (1993)." In contrast, the trial court stated that the concept of subrogation allows Universal to "stand in the shoes" of appellees and directly seek to recover damages from Habitec. The trial court concluded that the indemnification provision of paragraph 19 "does not negate [Brondes'] separate agreement with Universal Underwriters for subrogation," and denied Habitec's motion on that basis.

{¶ 126} Similar to our review on summary judgment, our review of a trial court's order denying a motion for a directed verdict or a motion for JNOV is de novo. *Link v. FirstEnergy Corp*., 8th Dist. Cuyahoga No. 101286, 2014-Ohio-5432, ¶ 14, citing *Zappola v. Rock Capital Sound Corp.*, 8th Dist. Cuyahoga No. 100055, 2014-Ohio-2261,

¶ 63. Accordingly, we are required to construe the evidence in the light most favorable to the non-moving party. *Id.*; *Posin v. A.B.C. Motor Court Hotel, Inc*., 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976). "The motion should be denied if there is substantial evidence to support the non-moving party's side of the case and if reasonable minds could reach different conclusions." *Id.* "In deciding the motion, the trial court shall not weigh the evidence or the credibility of the witnesses." *Id.*

{¶ 127} In construing the language of a contract that provides for indemnification, a court must look at the plain and ordinary meaning of the words used. *Motorist Ins. Co. v. Shields*, 4th Dist. Athens No. 00CA26, 2001 WL 243285 (Jan. 29, 2001), citing *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 256, 513 N.E.2d 253 (1987). In this case, the indemnification provision set forth in paragraph 19 was part of an agreement between Habitec and Brondes. Paragraph 19 of the Agreement states:

> **THIRD PARTY INDEMNIFICATON:** Subscriber agrees to and shall indemnify, defend and hold harmless, Company, its employees and agents, for and against all claims, lawsuits and losses which claim and/or lawsuit is brought or loss sustained by parties or entitied [sic] other than parties to this Agreement (referred herein as third parties). This provision shall apply to all claims, lawsuits or damages caused by Company's negligent performance, active or passive, express or implied, contract or warranty, contribution or indemnification or strict or product liability of Company, its agents, successors, assigns or employees.

{¶ 128} A review of the language of paragraph 19 shows that it does nothing to limit Universal's rights as a subrogor, since the subrogation agreement was between Universal and Brondes, and not between Brondes and Habitec. *See Motorists Mut. Ins. Co. v. Hall*, 10th Dist. Franklin No. 02AP-1256, 2005-Ohio-3811, ¶ 15. Accordingly, as a matter of law, the trial court correctly denied Habitec's motion for JNOV on that particular issue.[5] However, Ohio courts have held that "[a] subrogated insurer stands in the shoes of the insured-subrogor and has no greater rights than those of its insured-subrogor. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 42, 537 N.E.2d 624 (1989)." *Nationwide Mut. Fire Ins. Co. v. Buckley*, 9th Dist. Medina No. 06CA0013-M, 2006-Ohio-5362, ¶ 14. Accordingly, as set forth above, Brondes' rights to collect damages from Habitec are limited by the terms of the Agreement.

{¶ 129} Upon consideration of the foregoing, we find that the trial court erred as a matter of law when it found that paragraphs 21 and 25 were unconscionable and/or violated public policy, and denied Habitec's motion for summary judgment on that basis. We further find that the trial court correctly concluded that the indemnification provision contained in paragraph 19 does not bar Universal from asserting a subrogation claim against Habitec, subject to the limitations expressed elsewhere in the Agreement.

{¶ 130} This court has reviewed the record as to the issues raised in Habitec's first assignment of error and, after reviewing all of the relevant, admissible evidence and

[5] The issue of whether Habitec is entitled to indemnification by Brondes is not before this court.

construing it most strongly in favor of appellees, finds that Habitec's first assignment of error is well-taken in part and not well-taken in part.

{¶ 131} In its second assignment of error, Habitec asserts that the trial court erred when it failed to enter judgment in Habitec's favor as a matter of law. In support, Habitec argues that the record contains insufficient competent, credible evidence to support the jury's finding that Habitec's actions were the proximate cause of Brondes' additional damages. Specifically, Habitec asserts that Rick Spencer could not testify as to the amount of damages due to a late reporting of the fire; J. Moore stated that he never actually calculated the amount of damage due to the fire; AFT Agent D. Moore stated that he did not know the requirements for fighting a fire but, "hopefully," earlier detection would have resulted in less damage; Dr. Jason Floyd could not state what effect earlier detection would have had on damages; and the testimony of various people who smelled smoke is not sufficient to prove that the smoke came from the Brondes fire. Also, Habitec asserts that the record contains no expert testimony on the issue of "additional damage."

{¶ 132} In its November 29, 2012 judgment entry, after reviewing the evidence presented by both parties at trial, the trial court found that appellees presented "sufficient credible evidence for the jury to consider" as to the issue of proximate cause. As set forth above, in reviewing the trial court's decision, we must conduct a de novo review, construing the evidence most favorably in light of the non-moving party. *Link v. FirstEnergy Corp*., 8th Dist. Cuyahoga No. 101286, 2014-Ohio-5432, *supra*, at ¶ 13.

{¶ 133} The Ohio Supreme Court has stated that:

> "[I]t is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability." One is thus liable for the natural and probable consequences of his negligent acts. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287, 423 N.E.2d 467 (1981), quoting *Foss-Schneider Brewing Co. v. Ulland*, 97 Ohio St. 210, 119 N.E. 454 (1918).
>
> [I]n determining what is direct or proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act. *Id*., quoting *Miller v. Baltimore & Ohio Southwestern Rd. Co.*, 78 Ohio St. 309, 325, 85 N.E.499 (1908).

{¶ 134} Ordinarily, proximate cause is a question of fact for the jury. *Strother*, *supra*, at 288, citing *Clinger v. Duncan*, 166 Ohio St. 216, 223, 141 N.E.2d 156 (1957). However, "where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury [to decide], and, as a matter of law, judgment must be given for the defendant."

Kemerer v. Antwerp Bd. of Edn., 105 Ohio App.3d 792, 796, 664 N.E.2d 1380 (3d Dist.1995); quoting *Case v. Miami Chevrolet Co.*, 38 Ohio App. 41, 45-46, 175 N.E.2d 224 (1st Dist.1930); *Vermett v. Fred Christen & Sons Co.*, 138 Ohio App.3d 586, 612, 741 N.E.2d 954 (6th Dist.2000).

{¶ 135} Expert testimony as to the elements of proximate cause is not required in every case to establish negligence. The need for expert testimony depends on the nature of the negligence claim and the circumstances. *Bernardini v. Fedor*, 9th Dist. Wayne No. 12CA0063, 2013-Ohio-4633, ¶ 6, citing *Yates v. Brown*, 185 Ohio App.3d 742, 2010-Ohio-35, 925 N.E.2d 669, ¶ 18 (9th Dist.). However, expert testimony is necessary whenever a factual issue is beyond the ordinary, common and general knowledge and experience of a layperson. *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 103, 592 N.E.2d 828 (1992), and *Darnell v. Eastman*, 23 Ohio St.2d 13, 261 N.E.2d 114 (1970), syllabus.

{¶ 136} An expert testifying on the issue of proximate cause must state an opinion with respect to the causative event in terms of probability. *Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994), paragraph one of the syllabus. Nonetheless, no "magic words" are required. Rather, the expert's testimony, when considered in its entirety, must be equivalent to an expression of probability. *Charlesgate Commons Condo. Assn. v. W. Reserve Group*, 6th Dist. Lucas No. 2014-Ohio-4342, ¶ 14; *Frye v. Weber & Sons Serv. Repair, Inc.*, 125 Ohio App.3d 507, 514-515, 708 N.E.2d 1066 (8th Dist.1998).

{¶ 137} As set forth above, testimony was presented at the *Daubert* hearing and at trial as to how and where Habitec placed the heat detectors in the Brondes facility. Specifically, although several witnesses did not know where the detectors were placed, Long testified that they were placed on the bottoms of trusses spanning the quick lube area, at least six feet below the ceiling. Rick Spencer testified that a two-hour delay in reporting the fire contributed to the damage, and that placing the detectors on the bottoms of the trusses added to the delay. In his deposition, D. Moore stated that the detectors would have activated sooner if they were placed closer to the ceiling. J. Moore said the installation did not comply with NFPA safety standards, and the delay in detecting the fire resulted in more damage. Other witnesses testified as to the amount of the actual damages.

{¶ 138} On consideration of the foregoing, we agree with the trial court's conclusion that the record contains sufficient competent, credible evidence to allow the jury to determine whether Habitec's actions proximately caused additional damages to the Brondes facility by delaying the detection of the fire. Accordingly, the trial court did not err by denying Habitec's motion for a directed verdict on that issue. Habitec's second assignment of error is not well-taken.

In its third assignment of error, Habitec asserts that the trial court erred when it refused to instruct the jury as to the defense of superseding, intervening cause. In support, Habitec argues that the requested instruction was a correct statement of the law, reasonable minds might have concluded that Simplex's actions were "new" and

"independent," and, if Simplex had performed its duties correctly, "the purported failure of the system would have been avoided." Habitec further argues that, because the trial court did not give the instruction, Habitec was precluded from obtaining a set-off of the $375,000 settlement paid by Simplex.

{¶ 139} Generally, a requested jury instruction should be given if it is "a correct statement of the law as applied to the facts in a given case." *Tabatha N.S. v. Zimmerman*, 6th Dist. Lucas No. L-06-1252, 2008-Ohio-1639, ¶ 44, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). In addition, this court has stated that:

> "[A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Further, a determination as to jury instructions is a matter left to the sound discretion of the trial court. *Id*. "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner*, 28 Ohio St.2d 54, 275 N.E.2d 340 (1971), at syllabus. *Id*.

{¶ 140} In *Berdyck v. Shinde*, 66 Ohio St.3d 573, 613 N.E.2d 1040 (1993), the Ohio Supreme Court set forth the following rule as to the defense of superseding, intervening cause:

> The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if that defendant's prior negligence and the negligence of the intervening agency co-operated in proximately causing the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate, concurring cause for which full liability may be imposed. * * *
>
> In order to relieve a party of liability, a break in the chain of causation must take place. A break will occur when there intervenes between an agency creating a hazard and an injury resulting therefrom another conscious and responsible agency which could or should have eliminated the hazard. * * * However, the intervening cause must be disconnected from the negligence of the first person and must be of itself an efficient, independent, and self-producing cause of the injury. Id. at 584-585.

{¶ 141} In Ohio, a break in the causal connection between the original negligent act "is broken and superseded by later negligence only if the latter act is both 'new' and 'independent.'" *Tabatha N.S., supra,* at ¶ 50. In this case, however, Habitec disputes appellees' claim that it was negligent in the first place. In addition, the evidence presented shows only that Simplex inspected a system that was installed by Habitec. Accordingly, while the requested instruction may be a correct statement of the law, the

record does not contain evidence to show that Simplex performed any "new" or "independent" acts that, in themselves, may have caused the alarm system to fail.

{¶ 142} On consideration of the foregoing, we find that the trial court's decision not to provide the requested instruction was not unreasonable, arbitrary or unconscionable and therefore did not constitute an abuse of discretion. Habitec's third assignment of error is not well-taken.

{¶ 143} In its fourth assignment of error, Habitec asserts that the trial court erred by: (1) allowing Phil Brondes, Sr. to be added as a new plaintiff after the expiration of the statute of limitations, and (2) later denying Habitec's motion for JNOV on that issue because "justice requires it." In support, Habitec argues that Brondes, Sr.'s negligence claim, which was brought four years after the fire, is barred by a two-year statute of limitation.

{¶ 144} The trial court's decision to grant or deny a motion to add a party will not be overturned on appeal absent a finding of abuse of discretion. *Landis v. Grange Mut. Ins. Co.*, 95 Ohio App.3d 422, 429, 642 N.E.2d 679 (6th Dist.1994), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973). An abuse of discretion connotes that the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 145} Pursuant to Civ.R. 15(A), a pleading may be amended either: (1) as a matter of course any time before a responsive pleading is filed, or (2) by leave of court

"when justice so requires." The process is further addressed in Civ.R. 15(C), which governs the relation back of amended pleadings as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be bought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. * * *

{¶ 146} A careful review of the language used in Civ.R. 15(C) shows that it governs three different sets of circumstances. The first two involve the addition of a "claim" or "defense." The third scenario involves the later addition of a defendant. In no case does the rule refer to the addition of a "plaintiff."

{¶ 147} The Ohio Supreme Court has held that "[t]he primary purpose of Civ.R. 15(C) is to preserve actions which, through mistaken identity or misnomer, have been filed against the wrong person." *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 101, 529 N.E.2d 449 (1988). Relation back is not generally allowed in

cases where "a new plaintiff brings a new cause of action." *Id.* Under both Federal and Ohio law, the "chief consideration of policy is that of the statute of limitations." *Shefkiu v. Worthington Industries, Inc.*, 6th Dist. Fulton No. F-13-014, 2014-Ohio-2970, ¶ 23. For that reason, in order for an amendment to relate back to the original date the complaint was filed pursuant to Civ.R. 15(C), it must be filed within the period for bringing such an action. Unless specifically prohibited by statute, such time period may be reasonably established by a contract between the parties. *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994). As set forth above, we have determined that the one-year limitation set forth in paragraph 25 of the Agreement is reasonable.

{¶ 148} In other cases involving the addition of a new party plaintiff, some courts have considered Civ.R. 17(A), which provides, in relevant part, that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶ 149} In *Shefkiu*, *supra*, this court addressed the application of Civ.R. 15(C) and 17(A) to the addition of a plaintiff after the statute of limitation had expired. In that case, we held that neither is available where, as in this case, the party commencing the litigation lacks standing. *Id.* at ¶ 27.

{¶ 150} Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting Black's Law Dictionary (8th Ed.2004). "The Ohio Supreme Court has recently explained that standing is required to invoke the jurisdiction of the trial court, and that, therefore, it is determined as of the filing of the complaint." *BK Builders, Ltd. v. The E. Ohio Gas Co.*, 5th Dist. Stark No. 2013CA00210, 2014-Ohio-3850, ¶ 28, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 3.

{¶ 151} In its decision, the trial court stated that Brondes, Sr.'s negligence claim should relate back to the original filing of the complaint because it "is based on the same event or transaction as stated in the original pleading." However, as set forth above, in support of their motion to add Brondes, Sr. as an additional plaintiff, appellees argued that the cause of action which formed the basis of Brondes, Sr.'s negligence claim did not exist at the time the original complaint was filed.

{¶ 152} On consideration we find that, at the time the original complaint was filed, Brondes, Sr. did not have standing to bring a negligence claim against Habitec. We further find that by the time Brondes, Sr. attempted to file his claim, the one-year limitation period under the Agreement had expired. Accordingly, the trial court erred as a matter of law, and therefore abused its discretion, when it granted appellees' motion to amend the original complaint and allow Brondes, Sr.'s claim to relate back to the original filing date pursuant to Civ.R. 15(C). Habitec's fourth assignment of error is well-taken.

Having disposed of Habitec's assignments of error, we will now address appellees' cross-assignments of error.

{¶ 153} In their first cross-assignment of error, appellees assert that the trial court erred when it granted Habitec's motion for JNOV and vacated the jury's award for "replacement" rent based on the increased costs of building a new, bigger dealership. In their second cross-assignment of error, appellees assert that the trial court erred when it substituted its own opinion for that of the jury and found that the arrangement between Brondes and BLM, which fixed the amount of rent for the new dealership, was not an arm's length transaction. In their third cross-assignment of error, appellees assert that the trial court erred by granting the motion for JNOV because Habitec failed to object to the issue before it was given to the jury. Since all three of these cross-assignments of error are related, they will be considered together.

{¶ 154} In support of its first three cross-assignments of error, appellees argue that the jury's award of damages for increased rent was consistent with: (1) the evidence and testimony presented at trial, and (2) Ohio law, which allows for recovery of increased rent as damages. Appellees further argue that the court's ruling was inconsistent with its own earlier decisions, which denied Habitec's prior attempts to have the issue of increased rent dismissed and fashioned specific interrogatories on that issue for the jury's consideration. Finally, appellees argue that the jury's answers to the interrogatories were internally consistent with the award, and Habitec's failure to prevent the issue from being presented to the jury amounts to a waiver of the issue on appeal.

{¶ 155} We note initially that, based on our determinations of Habitec's assignments of error, the issue of the amount of the jury award, to the extent that it exceeds $250, is moot. However, in the interest of clarity, we will consider the legal issue of whether the trial court erred in granting Habitec's motion for JNOV.

{¶ 156} On appeal, "[w]e review a trial court's ruling on a motion for judgment notwithstanding the verdict ("JNOV") de novo." *Seese v. Ohio Bur. of Workers' Comp.*, 11th Dist. Trumbull No. 2009-T-0018, 2009-Ohio-6521, ¶ 11.

> Where a party seeks JNOV, "[t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in [making its] ruling * * *." *Id.*, citing *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976).

{¶ 157} A motion for JNOV presents questions of law, not fact, "even though in deciding such a motion, it is necessary to review and consider the evidence." *Id.*, citing *Blatnik v. Dennison*, 148 Ohio App.3d 494, 504, 774 N.E.2d 282 (11th Dist.2002), quoting *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph three of the syllabus.

{¶ 158} In its decision on Habitec's post-verdict motions, issued on November 29, 2012, the trial court found, based on evidence presented at trial, that Brondes, Sr. and Brondes, Jr. were "the sole decision makers for Brondes Ford, and Brondes, Jr. is the sole shareholder in BLM * * *." The trial court further found that the new dealership was significantly superior to the old facility, and appellees' "own appraiser agreed that the lease is not an arm's length agreement." Accordingly, the trial court concluded that appellees failed to present sufficient evidence at trial to show that the $48,000 rent payment from Brondes to BLM was an arm's length transaction, and granted Habitec's motion for JNOV pursuant to this court's decision in *Ma Chere Hair Academy v. The Rolo Co.,* 6th Dist. Lucas No. L-85-287, 1986 WL 7111 (June 20, 1986). Upon reviewing the record we agree with the trial court's findings, and further find that evidence was presented to show that the amount of the "rent" paid to BLM by Brondes was set to correspond to the amount of the mortgage payments for the new dealership.

{¶ 159} As to whether the issue was waived on appeal, the record shows that Habitec filed pre-trial motions to remove the issue of increased rent from the jury's consideration, which the trial court denied. Habitec's decision to not challenge the form and content of the jury instructions and interrogatories did not preclude a later challenge to the jury's verdict. *See Bicudo v. Lexford Properties, Inc.*, 157 Ohio App.3d 509, 2004-Ohio-3202, 812 N.E.2d 315, ¶ 43-44 (7th Dist).

{¶ 160} On consideration of the foregoing, and after construing the evidence most strongly in favor of appellees we find, as a matter of law, that the lease between BLM

and Brondes was not an arm's length transaction and Habitec did not waive the issue for purposes of appeal. Appellees' first three cross-assignments of error are not well-taken.

{¶ 161} In their fourth cross-assignment of error, appellees assert that the trial court erred by denying their request for prejudgment interest. In support, appellees argue collectively that they are entitled to prejudgment interest pursuant to R.C. 1343.03(A), which states that prejudgment interest begins to accrue when a payor's obligation becomes "due and payable under the contract." Accordingly, they argue that: (1) Universal is entitled to $901,436.39 in statutory interest on the jury's award of $1,739,584.99, (2) Brondes is entitled to $840,854.79 in statutory interest on the jury's award of $2,300,000, from August 1, 2004 until March 25, 2011, and (3) Phil Brondes, Sr., is entitled to $23,360.68 in statutory interest on the jury's verdict of $40,700.00 from May 27, 2002, until March 25, 2011.

{¶ 162} As with appellees' first three cross-assignments of error, based on our determinations of Habitec's assignments of error, the issue of prejudgment interest on the jury award to appellees, to the extent that the judgment exceeds $250, is moot. However, in the interest of clarity, we will consider the legal issue of whether the trial court erred by not awarding prejudgment interest in this case.

{¶ 163} Generally, prejudgment interest "acts as compensation and serves ultimately to make the aggrieved party whole." *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 117, 652 N.E.2d 687 (1995). The purpose of prejudgment interest is to compensate the plaintiff "for the period of time between the accrual of the

claim and the judgment, regardless of whether the judgment is based upon a claim that was liquidated or unliquidated, and even if the amount due was not capable of ascertainment until determined by the court." *Gates v. Praul*, 10th Dist. Franklin No. 10AP-784, 2011-Ohio-6230, ¶ 60, citing *Royal Elec. Constr. Corp.* at syllabus.

{¶ 164} The Supreme Court of Ohio has "specifically and clearly declined to establish a bright-line rule regarding the accrual date of prejudgment interest but rather left such a determination to the trial courts on a case-by-case basis." *Gates* at ¶ 62, quoting *Miller v. Gunckle*, 96 Ohio St.3d 359, fn. 4, 775 N.E.2d 475 (2002). (Additional citations omitted.)

{¶ 165} On appeal, appellees argue that prejudgment interest should be paid for breach of contract pursuant to R.C. 1343.03(A). The statute provides, in relevant, part, that:

> [W]hen money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and

payable, in which case the creditor is entitled to interest at the rate provided in that contract. * * *

{¶ 166} Once judgment is rendered for the plaintiff on a contract claim, the only remaining issue to be resolved by the trial court "with respect to prejudgment interest under R.C. 1343.03(A) is how much interest is due." *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, ¶ 26. However, "[t]he trial court must make factual determinations as to when interest commences to run, based on when the claim became due and payable, and as to what legal rate of interest applies." *Id., citing Dwyer Elec., Inc. v. Confederated Bldrs., Inc.*, 3d Dist. No. 3-98-18, 1998 WL 767442 (Oct. 29, 1998). "[A]lthough the right to prejudgment interest on a contract claim is a matter of law, pursuant to R.C. 1343.03(A), the amount awarded is based on the trial court's factual determinations of the accrual date of the plaintiff's claim and the applicable interest rate." *Id.; Bell v. Teasley*, 10th Dist. Franklin No. 10AP-850, 2011-Ohio-2744, ¶ 28.

{¶ 167} On appeal, the trial court's decision will not be overturned absent a finding of an abuse of discretion. *Bell, supra*. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 276.

{¶ 168} In this case, the trial court found that the jury's award was based on "negligence and/or breach of contract, and [was] not specifically for breach of contract." In addition, the trial court found that appellees did not "provide * * * argument or

evidence of damages that might be read back to the contract as a contractual debt owed * * *." Accordingly, the trial court found that appellees were not entitled to any prejudgment interest pursuant to R.C. 1343.03(A).

{¶ 169} While the total amount of appellees' claims is limited by the terms of the Agreement as set forth above, the jury did find liability on the part of Habitec that was due, at least in part, to breach of contract. We further find that the trial court denied appellees' request for prejudgment interest without stating when appellees' claims began to accrue and therefore became "due and payable," as required by R.C. 1343.03(A) and applicable Ohio case law, and without stating the applicable legal rate of interest. Accordingly, on consideration, we find that the trial court abused its discretion in this instance, and appellees' fourth cross-assignment of error is well-taken.

{¶ 170} In their fifth cross-assignment of error, appellees assert that the trial court erred by awarding an insufficient amount of costs as reimbursement for their deposition and hearing transcript charges. In support, appellees argue that they are entitled to reimbursement on $1,644.50, the cost of preparing a transcript of the *Daubert* hearing, and $16,873.47 "in other expenses and fees for their five expert witnesses to prepare for, appear, testify, and travel to and from the two day hearing." Appellees further argue that those witnesses' testimony was necessary "to defeat Habitec's motions for summary judgment, motions to dismiss, motions in limine, and for directed verdict."

{¶ 171} Generally, the trial court's decision to deny or award expenses as costs will not be overturned on appeal absent an abuse of discretion. *Jackson v. Sunforest*

OB-GYN Assoc., Inc., 6th Dist. Lucas No. L-08-1133, 2008-Ohio-6170, ¶ 7. However where, as here, the issue is whether or not the expense in question is actually a "cost," the issue presented is a question of law, which we must review de novo. *Jackson*, *supra*. *Kmotorka v. Wylie*, 6th Dist. Wood Nos. WD-11-018, WD-11-026, 2013-Ohio-321, 2013 WL 425866, ¶ 51.

{¶ 172} Civ.R. 54(D) states that "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party[6] unless the court otherwise directs." The Ohio Supreme Court has held that the "costs" allowed by Civ.R. 54(D) "are limited to those allowed by statute." *Jackson*, *supra*, at ¶ 8, citing *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 691 N.E.2d 288 (1998), syllabus. Those "costs" are generally defined as "'the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action *and* which the statutes authorize to be taxed and included in the judgment.'" (Emphasis added.) *Williamson*, *supra*, at 290, quoting *Benda v. Fana*, 10 Ohio St.2d 259, 227 N.E.2d 197 (1967), paragraph one of the syllabus.

{¶ 173} In addition, pursuant to R.C. 2303.21:

> [w]hen it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding, or exemplification of a record, as evidence in such action or for any other purpose, the expense of procuring

[6] For purposes of deciding the issue presented herein, and based on our determinations as to Habitec's second and third assignments of error, we presume that appellees were the "prevailing parties" in the underlying litigation.

such transcript or exemplification shall be taxed in the bill of costs and recovered as in other cases.

{¶ 174} This court has held that transcripts that are filed and used for any purpose that was necessary can be awarded as costs. *Atkinson v. Toledo Area Reg. Transit Auth.*, 6th Dist. Lucas No. L-05-1106, 2006-Ohio-1638, ¶ 11, citing *Raab v. Wenrich,* 2d Dist. Montgomery No. 19066, 2001 WL 1782785 (Feb. 22, 2001). As noted by the trial court, Lucas County Court of Common Pleas Gen.R. 5.07(C) requires that a transcript of a deposition must be filed if it will be used as evidence at trial. In addition, in *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 2009-Ohio-2736, 913 N.E.2d 520 (2d Dist.), the Second District Court of Appeals, citing *Keaton v. Pike Comm. Hosp.*, 125 Ohio App.3d 153, 705 N.E.2d 734 (4th Dist.1997), held that deposition expenses may be recovered if they are used to support or oppose a motion for summary judgment, where no trial was held. *Id.* at ¶ 13. The "evidence" referred to in Civ.R. 56(C) includes "depositions," "affidavits," and "transcript of evidence," the "costs" of which may, pursuant to the trial court's discretion, be taxed to a non-prevailing party. *Id.* This court has interpreted *Boomershine* to mean that "the cost of depositions which are filed in an action and are 'necessary to the trial' may be taxed as 'costs' pursuant to Civ.R. 54(D)." *Kmotorka, supra,* at ¶ 53.

{¶ 175} "[I]n seeking costs under Civ.R. 54(D), the prevailing party has the burden of establishing that the expenses it seeks to have taxed as costs are authorized by

applicable law." *Naples v. Kinczel,* 8th Dist. Cuyahoga No. 89138, 2007-Ohio-4851, ¶ 6. Once this burden is established, the non-prevailing party has the burden to overcome this presumption. *Id.*

{¶ 176} In its decision, after considering the parties' motions and hearing evidence, the trial court identified eight transcripts that were actually filed by appellees pursuant to Lucas County Court of Common Pleas Gen.R. 5.07(C) and used in some capacity during the trial, and assessed costs of $1,917.40 for those items.[7] However, the trial court further found that appellees did not meet their burden to establish that the additional "costs" of paying expert witnesses to appear and testify at the *Daubert* hearing and preparing a transcript of that hearing were "necessary." Our review of the record and the arguments presented on appeal confirms the trial court's finding, particularly in light of our above determination that appellees' recovery is limited by the terms of the Agreement. Accordingly, we cannot say that the court abused its discretion by refusing to award those items to appellees as "costs" pursuant to Civ.R. 54(D) and R.C. 2303.21. Appellees' fifth cross-assignment of error is not well-taken.

[7] The depositions identified in the trial court's judgment entry dated November 29, 2012, were those of Dave Gibel (invoice 1125 for $90), Bobby D. (invoice 1264 for $285), Phil Brondes, Jr. (invoice 1264 for $290), Dennis Jackson (invoice 1357 for $120), Corky Hong (invoice 857 for $189), Michael Bay (invoice dated 07/06/06 for $56.40), D. Moore video (invoice 11973 for $507.50), and William Bojarski (invoice 61360 for $379.50).

{¶ 177} The judgment of the Lucas County Court of Common Pleas is hereby affirmed, in part, and reversed, in part. The case is remanded to the trial court for further proceedings consistent with this decision. Appellant and appellees are ordered to share the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE