[Cite as *Quill v. Albert M. Higley Co.*, 2014-Ohio-5821.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

HUGH QUILL, DIRECTOR, OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES, ET AL.,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
Plaintiffs-Appellants/ Cross-Appellees,	:	
-vs-	:	
THE ALBERT M. HIGLEY COMPANY,	:	Case No. 2014 AP 04 0015
Defendant	:	O P I N I O N
and	:	
BLUESCOPE BUILDINGS NORTH AMERICA, INC. f/d/b/a BUTLER MANUFACTURING COMPANY,	:	
Defendant-Appellee/ Cross-Appellant,	:	
-vs-	:	
NIMEN SHEET METAL, INC. ET. AL.,	:	
Third-Party Defendants,	:	

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2009 CV-02-0119
JUDGMENT:	Affirmed in part and Reversed and Remanded in part
DATE OF JUDGMENT:	December 26, 2014

APPEARANCES:

Plaintiffs-Appellants/
Cross-Appellees

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Baldwin, J.

{¶1} Plaintiffs-appellants/cross-appellees Hugh Quill, Director, Ohio Department of Administrative Services and Ohio Department of Transportation ("appellants") appeal from the March 13, 2014 Judgment Entry of the Tuscarawas County Court of Common Pleas. Defendant-appellee/cross-appellant Bluescope Buildings North America, Inc. f/d/b/a/ Butler Manufacturing Company ("appellee") has filed a cross-appeal.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about October 3, 1994, appellant Ohio Department of Administrative Services ("DAS") entered into a contract with The Albert H. Higley Company ("Higley") for the construction of appellant Ohio Department of Transportation's headquarters building in New Philadelphia, Ohio during 1994-1997. Higley, acting as the general trades contractor, hired Nimen Sheet Metal, Inc. as the roofing subcontractor. The roof for the building covered approximately 155,000 square feet and was primarily a standing metal roof system of panels. The panels were manufactured by appellee Butler Manufacturing Company, which later conducted business as Bluescope Building North America, Inc. Nimen Sheet Metal, Inc. purchased the roofing materials from The Knoch Company.

{¶3} Appellee issued appellant Ohio Department of Transportation ("ODOT") a Buildings Division Warranty with respect to the roof. On June 7, 2004, Travis Tipton, an ODOT employee, submitted a formal warranty claim on behalf of the State of Ohio to appellee with respect to the roof.

{¶4} On February 12, 2009, appellants DAS and ODOT filed a complaint for breach of contract and negligence against Higley. Appellants, in their complaint, alleged that, after construction, the roof panels began corroding and leaks developed

throughout the building. Appellants alleged that ODOT's headquarters had been damaged and the roof needed to be replaced. Higley filed an answer to the complaint on March 16, 2009 and, on March 20, 2009, filed a Third-Party Complaint against Nimen Sheet Metal, Inc. for contribution and/or indemnification. Nimen filed an answer on June 22, 2009.

{¶5} Subsequently, on January 4, 2010, appellants filed a Motion to Amend Complaint, seeking to add appellee Bluescope Buildings North American, Inc. formerly doing business as Butler Manufacturing Company, the manufacture of the roofing system, as a defendant. The motion was granted. The Amended Complaint added claims against appellee for common law breach of express warranty, common law breach of implied warranty, and common law negligence. The Amended Complaint alleged, in part, that some of the roof panels manufactured by appellee were significantly corroded when the roof system was delivered to the project site, that other panels became corroded and additional leaks developed at the areas of the corroded panels and that areas of the facility were severely damaged due to water leaks and damage to the building's insulation. The Amended Complaint stated that repair attempts had failed. Appellee filed an answer to the Amended Complaint on March 10, 2010.

{¶6} On January 10, 2011, Nimen Sheet Metal, Inc. filed a Third Party Complaint against The Knoch Corporation and appellee on January 11, 2011 filed a Third-Party Complaint against The Knoch Corporation for contribution and/or indemnification. The Knoch Corporation, on March 9, 2011, filed answers to both Third-Party Complaints.

{¶7} Appellee, on August 22, 2011, filed a Motion for Partial Summary Judgment. Appellee, in its motion, argued that appellants' strict liability implied warranty claim was barred by the economic-loss rule and that any claim for breach of implied

warranty was barred because appellee's warranty properly disclaimed any implied warranties. Appellee also argued that the damages for breach of any express warranty were limited to "repair, repainting or refurnishing or replacement materials" pursuant to the limitation set forth in appellee's warranty. Attached to appellee's motion were Exhibit A, a Buildings Division Warranty, and Exhibit B, an Addendum to the same dated November 20, 1996. The Addendum stated, in relevant part, as follows: "Weathertightness is a workmanship warranty. If the Roof should fail due to material failure, that would be covered by the Buildings Division Warranty, Section A. This addendum shall take precedence over all other documents."

{¶8} Appellants filed a memorandum in opposition to such motion on September 2, 2011 and appellee filed a reply on September 12, 2011. Pursuant to a Judgment Entry filed on November 15, 2011, the trial court denied appellee's Motion for Partial Summary Judgment. The trial court also overruled appellee's subsequent December 14, 2011 Motion for Reconsideration.

{¶9} On April 13, 2012, The Knoch Corporation filed a Motion for Summary Judgment as to the claims of Nimen Sheet Metal, Inc. and a Motion for Summary Judgment as to appellee's claims. Appellee filed a brief in opposition to the same on May 17, 2012. On June 27, 2012, Nimen Sheet Metal, Inc. filed a Notice of Voluntary Dismissal of its Third-Party Complaint against The Knoch Corporation.

{¶10} Subsequently, on or about October 4, 2012, a Settlement Agreement and Release was entered into between appellants, appellee and Nimen. Pursuant to the terms of the same, appellants released and discharged Higley and Nimen from any claims and Higley released and discharged Nimen from any claims. Higley and Nimen agreed to pay appellants $500,000.00. The Settlement Agreement and Release was filed on November 6, 2012.

{¶11} As memorialized in a Journal Entry that was not filed until December 19, 2012, appellants dismissed their claims against Higley, Higley dismissed its claims against Nimen Sheet Metal, Inc., Nimen dismissed its claims against The Knoch Corporation, and appellee dismissed its claims against The Knoch Corporation. Only appellants' claims against appellee remained for trial.

{¶12} Prior to the commencement of trial, appellants made a motion to amend the complaint to drop the allegations of breach of express warranty and negligence and sought to proceed on the strict liability implied warranty claim. The trial court granted the motion and appellants proceeded on the strict liability warranty claim only.

{¶13} The jury, on October 23, 2012, returned with a verdict in favor of appellants and against appellee in the amount of $2.14 million, which was the cost of replacing the defective roof panels with a similar roofing system. Immediately after the jury's verdict, appellee orally moved for a set-off to reduce the jury's verdict by the $500,00.00 that appellants had received from the other defendants. The trial court established a briefing schedule.

{¶14} Appellants, on November 7, 2012, filed a Motion for Prejudgment Interest and to Conduct Discovery. Appellee filed a memorandum in opposition to the same on November 30, 2012 and, on the same date, filed a Motion for Judgment Notwithstanding the Verdict.

{¶15} An oral hearing on the set-off issue was held on December 3, 2012. The trial court, via a Judgment Entry filed on December 19, 2012, granted the motion and ordered that the jury's verdict be reduced by $500,000.00. The trial court ordered that a modified judgment be entered in favor of appellants and against appellee in the amount of $1.64 million.

{¶16} As memorialized in a Judgment Entry filed on February 28, 2013, the trial court overruled appellee's Motion for Judgment Notwithstanding the Verdict after a hearing.

{¶17} Pursuant to a Judgment Entry filed on April 2, 2013, the trial court granted appellant's Motion to Conduct Discovery on their Motion for Prejudgment Interest. Subsequently, on November 12, 2013, appellant filed a Combined Motion for Leave to Amend First Amended Complaint, Motion for Sanctions, and Motion for Order Finding Defendant in Civil Contempt. Appellants in their motion, sought to amend their First Amended Complaint to add claims for breach of express warranty, spoliation of evidence, and punitive damages against appellee. Appellants alleged that their counsel had recently discovered that appellee had materially altered the express warranty that appellee had issued to appellants for the standing-seam metal roof system at issue and that appellee's "legal and settlement position have been based entirely on this forged document." Attached to their motion was an Addendum to Buildings Division Warranty that stated, in relevant part, as follows: "Weathertightness is a workmanship warranty. If the Roof should failed due to material failure, that would be covered by the Buildings Division Warranty, Section A, paragraph 2, with no limits of liability. This addendum shall take precedence over all other documents." (Emphasis added). Appellants noted that the above underlined language was not in the Addendum to the written warranty upon which appellee had relied throughout the case. Appellee filed a response to such motion on November 18, 2013.

{¶18} As memorialized in a Judgment Entry filed on December 12, 2013, the trial court overruled appellants' November 8, 2013 Motion for Discovery Order and November 12, 2013 Combined Motion for Leave to Amend First Amended Complaint, Motion for Sanctions, and Motion for Order Finding Defendant in Civil Contempt. The

trial court, in its Judgment Entry, concluded that "a better use of his discretion in this protracted litigation is that no further Discovery be allowed…" The trial court further found that "should Plaintiffs desire to pursue its (sic) express warranty, spoliation of evidence, and punitive damages issues, they have the ability to do so in a novel legal action."

{¶19} Thereafter, on January 17, 2014, an oral hearing was held on the Motion for Prejudgment Interest. After the hearing, the parties filed post-hearing briefs. The trial court, pursuant to a Judgment Entry filed on March 13, 2014, granted such motion. The trial court, however, failed to specify an amount of prejudgment interest.

{¶20} The trial court, via a Judgment Entry filed on April 28, 2014, found that appellants were entitled to prejudgment interest in the amount of $733,237.26, encompassing a period of time from January 10, 2012 through October 23, 2012. The trial court ordered that final judgment be awarded to appellants and against appellee in the amount of $2,373,237.26 ($1.64 million plus $733,237.26).

{¶21} Appellants now appeal from the March 13, 2014 Judgment Entry, raising the following assignments of error on appeal:

{¶22} I. THE TRIAL COURT INCORRECTLY DETERMINED THAT THE STATE OF OHIO'S IMPLIED WARRANTY CLAIM ACCRUED WHEN THE STATE SUBMITTED A FORMAL EXPRESS WARRANTY CLAIM IN 2004, RATHER THAT WHEN THE MASSIVE RUST AND CORROSION DEVELOPED ON THE CROSS-APPELLANT MANUFACTURER'S DEFECTIVE ROOF PANELS IN THE YEARS (1996-2000) FOLLOWING INSTALLATION.

{¶23} II. BECAUSE THE TRIAL COURT INCORRECTLY DETERMINED THAT THE STATE OF OHIO'S IMPLIED WARRANTY CLAIM ACCRUED IN 2004, THE TRIAL COURT APPLIED THE WRONG SETOFF STATUTE, CAUSING THE TRIAL

COURT TO ERR IN FINDING THAT THE SETTLING CONTRACTORS WERE JOINTLY "LIABLE IN TORT" FOR THE CROSS-APPELLANT MANUFACTURER'S STRICT LIABILITY? (SIC)

{¶24} III. THE TRIAL COURT ERRED WHEN IT HELD THAT THE CROSS-APPELLANT MANUFACTURER WAS ENTITLED TO A SETOFF OF THE AMOUNT THE STATE OF OHIO RECEIVED FROM THE SETTLING CONTRACTORS FOR FAULTY WORKMANSHIP BECAUSE THE SETTLEMENT WAS FOR "THE SAME INJURY OR LOSS" AS THE CROSS-APPELLANT MANUFACTURER'S STRICT LIABILITY FOR DEFECTIVE ROOF PANELS.

{¶25} Appellee has filed a cross-appeal, raising the following assignments of error on appeal:

{¶26} I. IT WAS ERROR TO ALLOW ODOT TO RECOVER ECONOMIC LOSSES RESULTING FROM DAMAGE TO AN ALLEGEDLY DEFECTIVE ROOF ON A TORT CLAIM FOR BREACH OF IMPLIED WARRANTIES.

{¶27} II. IT WAS ERROR TO EXCLUDE FROM EVIDENCE QUALITY-CONTROL BUSINESS RECORDS AND RELATED TEST SAMPLES THAT QUALIFIED WITNESSES WERE PREPARED TO AUTHENTICATE IN RESPONSE TO THE CLAIM THAT THE ROOF WAS IMPROPERLY GALVANIZED AND THAT MANUFACTURING DEFECTS HAD CAUSED THE RUST.

{¶28} III. IT WAS ERROR TO ALLOW PRE-JUDGMENT INTEREST BASED ON UNSUBSTANTIATED CONCLUSIONS THAT A WARRANTY ADDENDUM HAD BEEN ALTERED BY BUTLER AND THAT AN EXPERT WITNESS REPORT WAS ALTERED BY THE EXPERT AT THE REQUEST OF COUNSEL.

{¶29} For purposes of judicial economy, we shall address the cross-appeal first.

CROSS-APPEAL FIRST ASSIGNMENT OF ERROR

{¶30} Appellee, in its first assignment of error, argues that the trial court erred in allowing appellants to recover in tort (common law breach of implied warranty in tort) for the alleged defective roof. Appellee maintains that the economic- loss rule precludes appellants from recovery in tort for purely economic losses associated with a product defect. We disagree.

{¶31} Ohio's economic- loss rule generally prohibits recovery in tort of damages for purely economic loss. *Corporex Dev. & Constr. Mqt., Inc. v. Shook, Inc*., 106 Ohio St.3d 412, 414, 2005-Ohio-5409, 835 N.E.2d 701. However, in some instances, absent privity of contract, an action in tort for breach of express or implied warranty, or an action in strict liability, may be maintained for purely economic loss. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co*., 42 Ohio St.3d 40, 49, 537 N.E.2d 624 (1989).

{¶32} Subsequently, the Ohio Supreme Court addressed the economic- loss rule in *LaPuma v. Collinwood Concrete*, 75 Ohio St.3d 64, 1996-Ohio-305, 661 N.E.2d 714. In such case, a homeowner orally contracted with D & D Cement to replace the homeowner's driveway and D & D Cement recommended another company, Collinwood Shale, Brick & Supply Company (“Collinwood”), to supply the colored concrete for the project. Several months after the concrete was poured by Collinwood, the homeowners noticed problems with the driveway's coloration. They later sued Collinwood, alleging negligence and breach of an implied warranty of workmanlike quality. The trial court granted summary judgment in favor of Collinwood and an appellate court affirmed. The appellate court affirmed on the grounds that Ohio's product liability statutes, R.C. 2307.71 to 2307.79, preempted all common-law actions relating to defective products. The court held that since the plaintiffs had suffered only “economic loss” as defined in R.C. 2307.71(B), they did not suffer any “harm” as defined by R.C. 2307.71(G). Since

such harm is a prerequisite to recovering economic damages pursuant to R.C. 2307.79, the appellate court reasoned, the plaintiffs could not recover for their economic losses.

{¶33} In reversing the judgment of the appellate court, the Ohio Supreme Court, in *LaPuma,* noted that the Ohio product liability statutes then in effect did not provide a remedy for purely economic loss due to damage to the product itself and that since the plaintiffs' claim was based only on damage to the driveway itself, their claim was not a product liability claim. The Court also recognized that Ohio's statutory scheme recognized that claims like the plaintiffs' may arise, and that plaintiffs with such claims may have a common-law remedy. The Court held that the plaintiffs could pursue a common law strict product liability claim of breach of implied warranty against Collinwood.

{¶34} Shortly after *LaPuma*, in *Carrel v. Allied Products Corp.,* 78 Ohio St.3d 284, 1997-Ohio-12, 667 N.E.2d 795, the Ohio Supreme Court held that, "in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force." Id at 287. The Ohio Supreme Court determined that the language in Ohio Product Liability Act (OPLA)[1] was simply "not strong enough to completely eliminate unmentioned common-law theories." Id at 288.

{¶35} Thus, prior to 2005, three common law theories of recovery existed in Ohio product liability litigation: (1) breach of contract based on either express or implied warranty; (2) strict liability/implied warranty in tort; and (3) negligence. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 320, 364 N.E.2d 267 (1977).

{¶36} In response to *Carrel*, the Ohio General Assembly, in 2005, amended OPLA , which had been enacted in 1988, to include Section 2307.71(B), which states

[1] The Ohio Product Liability Act is codified at R.C. 2307.71 through 2307.80.

as follows: **"**Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action." Regarding R.C. 2307.71, the General Assembly stated that it is:

> Intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284 [677 N.E.2d 795], that the common-law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, and to abrogate all common law product liability causes of action.

{¶37} Cases decided after this amendment have limited the application of OPLA to common law causes of action that accrue after April 7, 2005 (the date R.C. 2307.71(B) went into effect). See *Doty v. Fellhauer Elec., Inc.,* 175 Ohio App.3d 681, 2008-Ohio-1294, 888 N.E.2d 1138 (6th Dist.) OPLA does not abrogate common law causes of action that accrued before April 7, 2005. Id.

{¶38} In the case sub judice, there is no dispute that appellants' implied warranty claim accrued before April 7, 2005, before the Ohio Assembly closed the loophole on product liability claims seeking economic loss for damages to the product itself. Because appellants were not in privity with appellee, appellants were not precluded in recovery under the economic-loss rule. Appellants can pursue a common-law strict liability claim against appellee.

{¶39} Appellee's first assignment of error on cross-appeal, is, therefore, overruled.

CROSS-APPEAL SECOND ASSIGNMENT OF ERROR

{¶40} Appellee, in its second assignment of error, argues that the trial court erred in excluding from evidence quality-control business records and related test samples in response to appellants' claim that the roof was improperly galvanized and that manufacturing defects had caused the rust. We disagree.

{¶41} A trial court possesses broad discretion with respect to the admission of evidence and an appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts,* 156 Ohio App.3d 352, 2004-Ohio- 962, 805 N.E.2d 594 (9th Dist.). An abuse of discretion is more than a mere error in judgment; it is a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748. When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

{¶42} In the case sub judice, appellee sought to introduce Exhibits J, R, S, U and V into evidence to show that the materials used in the steel roof were not defective. Raymond Heisey, appellee's employee, testified at trial that Exhibit J, which incorporated Exhibit S, consisted of reports from the various companies that handled the steel coils used in the roofing system and that such Exhibit indicated what the companies had done to the coils. Exhibit S was a summary prepared by appellee that identified which coils of steel were used to fabricate parts. In turn, Exhibit R was an e-mail received by Susan Atha, appellee's employee, to Wayne Rednour at appellee's fabricating plant requesting the coil identification information (Exhibit S). Exhibits U and V were samples of the steel coils retained and tested by appellee's lab. While appellee argued that the exhibits were standard business records under Evid.R. 803(6), appellants objected to their admission, arguing that the exhibits were based on

evidence received from others that was hearsay. The trial court sustained the objection and appellee proffered the Exhibits.

{¶43} Evid.R. 802 requires the exclusion of hearsay unless an exception applies. *John Soliday Fin. Grp., LLC v. Pittenger,* 190 Ohio App.3d 145, 2010–Ohio–4861, 940 N.E.2d 1035, ¶ 28 (5th Dist.). One such exception to the hearsay rule is the "records of regular conducted activity," more commonly known as the business records exception. Evid.R. 803(6). The rule states:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶44} The rationale behind Evid.R.803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to rely on that information as well. See staff note to Evid.R. 803(6).

> To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.' " *John Soliday Fin. Grp., LLC,* 2010–Ohio–4861, ¶ 31, quoting *State v. Davis,* 116 Ohio St.3d 404, 2008–Ohio–2, 880 N.E.2d 31, ¶ 171, quoting Weissenberger, Ohio Evidence Treatise (2007) 600, Section 803.73.

{¶45} In the *John Soliday Fin. Grp., LLC v. Pittenger* case, we reviewed the term "other qualified witness":

> The phrase "other qualified witness" should be broadly interpreted. See *State v. Patton* (Mar. 5, 1992), Allen App. No. 1–91–12, 1992 WL 42806, citing 1 Weissenberger's Ohio Evidence (1985) 75, Section 803.79.Further, it is not necessary that the witness have firsthand knowledge of the transaction giving rise to the record. *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189, paragraph two of the syllabus. "Rather, it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the

ordinary course of business consistent with the elements of Rule 803(6). *Patton*[2] at 2, quoting Weissenberger at 76.

{¶46} Id at paragraph 32.

{¶47} Generally, "there is no hearsay exception that allows a witness to testify to the contents of business records, in lieu of providing and authenticating the records in question." *Hayes v. Cleveland Pneumatic Co.* , 92 Ohio App.3d 36, 44, 634 N.E.2d 228 (8th Dist. 1993), citing *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.* , 8 Ohio App.3d 155, 456 N.E.2d 551 (10th Dist. 1982).

{¶48} Appellee, at trial, indicated it that was attempting to introduce technical documents that appellee had produced that summarized information received from other manufacturers. Appellee attempted to use Raymond Heisey, its employee, to lay the foundation for these documents. We concur with appellants that Heisey could not authenticate the documents and did not have working knowledge of the record keeping system of the other manufacturers. Nor is there evidence that he was familiar with their business operations or how the businesses created, maintained or retrieved technical data. We note that the trial court, in sustaining appellants' objection, informed appellee that "if you can get this document (Exhibit J) in through another witness you certainly will be entitled to that." Transcript at 433.

{¶49} Based on the foregoing, we find that the trial court did not abuse its discretion in excluding such Exhibits. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶50} Appellee's second assignment of error is overruled.

III

[2] The complete citation is *State v. Patten*, 3rd Dist. Allen No. 1-91-12, 1992 WL 42806 (March 5, 1992).

{¶51} Appellee, in its third assignment of error, argues that the trial court erred in awarding prejudgment interest to appellants. We disagree.

{¶52} Prejudgment interest is authorized pursuant to R.C. 1343.03(C)(1), which provides in pertinent part:

> (C)(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed …

{¶53} The Ohio Supreme Court held in *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572, 574 (1986) as follows:

> A party has not 'failed to make a good faith effort to settle' under [O.R.C. § 1343.03(C)] if he has (1) fully cooperated in discovery proceeding, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

{¶54} Decisions regarding an award of prejudgment interest are within the sound discretion of the trial court. *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). The *Huffman* Court stated in order to find "... an 'abuse' in reaching such

determination, the result must be palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* at 87, 482 N.E.2d 1248, citing *State v. Jenkins*, 15 Ohio St.3d.164, 222, 473 N.E.2d 264 (1984).

{¶55} The trial court, in its March 13, 2014 Judgment Entry granting prejudgment interest, found that appellee had failed to fully cooperate in discovery proceedings, failed to rationally evaluate its risks and potential liability, and failed to make a good faith monetary settlement offer. The trial court, in its Judgment Entry, stated, in relevant part, as follows:

> The Court …FINDs that the above-recited 'findings' are anchored in the inevitable conclusions reached upon the evidence and controlling legal authority that [appellee's] agent unilateral (sic), secretively, and materially altered a critically important document (Addendum to Buildings Division Warranty) upon which Plaintiff substantially relied in the negotiation/settlement process leading up to trial and that [appellee's] legal counsel and its 'Expert" Witness (Lewarchik) collaborated in the presentation to the Jury of an 'Expert' opinion that was not offered with good faith and integrity based on the facts and expert analysis, but was, instead, an expedient and feckless attempt to mislead the Jury on a critically important issue. Legal counsel for [appellee] may consider such conduct ''mild'… 'in a world of dastardly litigation tactics,' but the undersigned does not share that opinion.

{¶56} A hearing on the Motion for Prejudgment Interest was held on January 17, 2014. At the hearing, David Pastir, a employee of The Albert M. Higley Company who

was the Project Engineer in this case, testified that, as part of his duties, he handled all the close-out documents and turned them over to the State. He received the documents from the subcontractors. He testified that, on April 2, 1997, he wrote a letter to Tom Kovacs, who was with the State of Ohio, forwarding various documents from Higley to the State. Among these documents was a copy of the Addendum to appellee's Buildings Division Warranty. The Addendum contained the "with no limits of liability" language. A copy of the letter, and its attachments, was admitted as Plaintiff's Exhibit 1. Pastir further testified that Higley had received Plaintiff's Exhibit 2, which was the same unaltered warranty, via a FAX from Nimen Sheet Metal. Nimen Sheet Metal had, pursuant to a letter dated November 1, 1996 that was Faxed to it, received a copy of the unaltered Addendum from a Construction Manager at Higley (Defendant's Exhibit AA).

{¶57} Plaintiff's Exhibit 3 also was admitted at the hearing. Attached to Exhibit 3 was a letter dated August 30, 2004 from Susan Atha, appellee's Buildings Division Warranty Administrator, to Travis Tipton, a State employee who had worked for ODOT and who had submitted a claim. The Addendum included as an attachment to such letter does not contain the phrase "without limits of liability." At the hearing, Tipton testified that earlier in August of 2004, he had submitted a warranty claim to appellee by sending the unaltered version of the warranty that contained the phrase "no limits of liability." (Plaintiff's Exhibit 8).

{¶58} At the hearing, appellants also introduced Exhibit 12, which was a faxed transmission of the unaltered warranty from appellee and The Knoch Corporation. The following testimony was adduced at the hearing on the Motion for Prejudgment Interest when Dale Smith, who is the Senior Litigation Counsel for appellee, was questioned about Plaintiff's Exhibit 12:

{¶59} Q: In this particular case, this is now Exhibit 12, if we turn this upside down, I'm sure you've seen this version. I think it was probably part of your affidavit. But this particular version seems to be from Butler Manufacturing back in - - I think that's 1995 - - it's actually 1996, correct?

{¶60} A: Yes.

{¶61} Q: Okay. So as the senior litigation counsel weren't you concerned that somehow Butler had issued this version of the warranty and yet what has emerged in this litigation is this version where the no limits of liability have clearly been whited out.

{¶62} A: Yeah, it's concerning that there were two different warranties out there. That's for sure.

{¶63} Q: Yeah, and it's concerning to you as the senior litigation counsel at Butler that Butler didn't do this, right?

{¶64} A: It's concerning to me that Butler didn't do it? Is that –

{¶65} Q: Is it?

{¶66} A: Could you - - It's concerning to me that Butler didn't do it. It's concerning to me regardless.

{¶67} Q: Okay. You want to find out how did this happen.

{¶68} A: Yes. I mean it was - - it happened evidentially in 1996 before I was there.

{¶69} Q: You want to find out who did this.

{¶70} A: Yes.

{¶71} Q: You told Mr. Dowling that you went to Butler's file, and I guess this is something you did recently, looked in the file and could find no version of Plaintiff's Exhibit 12 that has a no limits of liability despite the fact that that clearly was something that Butler had because they actually faxed this version of the warranty, correct?

{¶72} A: Correct.

{¶73} Transcript from January 17, 2014 hearing at 161-162. He further admitted that Plaintiff's Exhibit 13, which was an unaltered copy of the warranty, was a "Butler production." Id. at 165.

{¶74} Based on the foregoing, we find that there was circumstantial evidence that appellee had altered the warranty. The trial court, as trier of fact, was in the best position to assess credibility of the witnesses who testified at the hearing and clearly believed, based upon such evidence, that the warranty had been altered by appellee. Appellee relied on the altered warranty throughout this case and introduced the same in discovery. Appellee attached the altered copy of the warranty in support of its August 22, 2011 Motion for Partial Summary Judgment. As noted by the trial court, appellee "substantially relied in its negotiation/settlement process leading up to trial" on such document. Based on the language of the altered warranty, appellants dismissed their express warranty and negligence claims prior to trial. Based on the foregoing, we concur with the trial court that appellee did not fully cooperate in discovery proceedings, rationally evaluate its risks and potential liability, or make a good faith monetary settlement offer.

{¶75} The trial court also based its award of prejudgment interest on its finding that appellee's legal counsel and its expert witness "collaborated in the presentation to the Jury of an 'Expert' opinion that was **not** offered with good faith and integrity based on the facts and expert analysis…"

{¶76} In the case sub judice, appellee hired Ron Lewarchik as an expert witness. In the initial draft of his report, Lewarchik had opined that the damage to the roof in this case was "irreversible." Testimony was adduced that Lewarchik had a conversation with William Dowling, appellee's trial counsel, on June 6, 2011 and that,

during such conversation, Dowling had instructed Lewarchik to remove "irreversible damage" from his report. At the hearing, Lewarchik's notes from June 6, 2011 were admitted as Plaintiff's Exhibit 16. Lewarchik, in his notes, stated that Dowling said to "remove irreversible damage." Dale Smith testified that he became aware of such conversation during his own deposition. As noted by appellants, appellee did not deny that its trial counsel directed appellee's expert witness to alter his report. We find that the trial court did not err in finding that appellee had failed to cooperate in discovery.

{¶77} Based on the foregoing, we find that the trial court did not abuse its discretion in awarding prejudgment interest. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶78} Appellee's third assignment of error is, therefore, overruled.

APPELLANTS' ASSIGNMENTS OF ERROR ON APPEAL

{¶79} Appellants, in their three assignments of error, argue that trial court erred in granting appellee's Motion for Setoff. We agree.

{¶80} In the case sub judice, appellants argue that the trial court erred in applying R.C. 2307.28 rather than R.C. 2307.33. R.C. 2307.28, which became effective April 9, 2003, provides as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same injury or loss to person or property or the same wrongful death, both of the following apply:
>
> (A) The release or covenant does not discharge any of the other tortfeasors from liability for the injury, loss, or wrongful death unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of the greater of any amount

> stipulated by the release or the covenant or the amount of the consideration paid for it, except that the reduction of the claim against the other tortfeasors shall not apply in any case in which the reduction results in the plaintiff recovering less than the total amount of the plaintiff's compensatory damages awarded by the trier of fact and except that in any case in which the reduction does not apply the plaintiff shall not recover more than the total amount of the plaintiff's compensatory damages awarded by the trier of fact.
>
> (B)The release or covenant discharges the person to whom it is given from all liability for contribution to any other tortfeasor.

{¶81} In turn, R.C. 2307.32 and later R.C. 2307.33, Ohio's setoff statutes, provided, in relevant part, as follows from 1996 through April 9, 2003:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons *liable in tort* for *the same injury or loss* to person * * *, the following apply:
>
> (1) The release or covenant does not discharge any of the other tortfeasors from liability for the injury * * * unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater;
>
> (2) The release or covenant discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. (Emphasis added).

{¶82} The issue thus becomes when appellants' implied warranty claim accrued. The trial court found that appellants' cause of action accrued on or about June 7, 2004 when Travis Tipton mailed his express warranty claim to appellee and that, therefore, R.C. 2307.28 applied. Appellants now argue, in their first assignment of error, that the trial court erred in applying R.C. 2307.28.

{¶83} A cause of action accrues in latent defect/property damage cases when:

> 1. The latent defect manifests itself into actual damages;
>
> 2. The injured party was aware or should have been aware that the damage was related to the acts of the manufacturer or seller; and
>
> 3. The damage put a reasonable person on notice of need for further inquiry as to the cause of the damage.

{¶84} *St. Paul Fire & Marine Ins. Co. v. R.V. World*, 62 Ohio App.3d 535, 543, 577 N.E.2d 72 (9th Dist. 1989).

{¶85} In the case sub judice, the August 20, 2012 videotaped deposition testimony of Thomas Joe Kovacs, who was employed at the State's Architect office from 1985 to 2007, was played for the jury[3]. Kovacs testified that he was the project manager in this case and that his office had designed the building. He testified that, after the building was completed in 1997, he went up on the roof for an annual inspection and saw rust on the roof each of the five years he went up (1997 through 2000 or 2001). In his August 20, 2012 deposition, which was played at trial, he testified that the rust continued to get worse. At trial, Robert Stevens, who was employed by

[3] The testimony was transcribed.

appellee as Senior Regional Sales Manager, testified that he saw rust over the entire roof surface in 1996.

{¶86} Based on the foregoing, we find that appellants' cause of action accrued prior to April 9, 2003. Due to the rust and corrosion that were visibly apparent, appellants either were aware or should have been aware that the rust resulted from a manufacturing defect. The damage put appellants on notice of need for further inquiry as to the cause of the damage. Because appellants' cause of action for the tort claim for breach of an implied warranty accrued prior to the effective date of R.C. 2307.28, the trial court erred in applying such statute.

{¶87} Appellants, in their second assignment of error, argue that appellee was not entitled to a setoff of the settlement amount received by The State of Ohio because the settling defendants were not "liable in tort" as required the statues then in effect.

{¶88} In *Fidelholtz v. Peller*, 81 Ohio St.3d 197, 1998 -Ohio- 462, 690 N.E.2d 502, the Ohio Supreme Court held as follows at 202-203:

> This definition ["liable in tort'] clearly implies that some finding of liability is required before a setoff is permitted. If the General Assembly had intended an automatic setoff, it would have used different wording. Instead of persons "liable in tort" it easily could have said "a named defendant" or words to that effect. Basic fairness and justice dictate that a tortfeasor should not benefit from a plaintiff's good fortune in reaching settlements with other potential defendants not determined to be liable. Granting a nonsettling tortfeasor an automatic setoff would subsidize tortious conduct.
>
> We agree with appellees that two policy objectives for these statutes were to encourage settlement and to prevent double

> recovery. However, we believe that the broader and more important goal was to ensure that where multiple tortfeasors were at fault in bringing about the injury to the innocent party, each tortfeasor would share the burden of making the injured party whole again. It seems only logical that a party found to have acted alone in causing the harm should not be entitled to a reduction in the damage award.
>
> Accordingly, we hold that former R.C. 2307.32(F) (now R.C. 2307.33[F]) entitles a defendant to set off from a judgment funds received by a plaintiff pursuant to a settlement agreement with a co-defendant where there is a determination that the settling co-defendant is a person "liable in tort." A person is "liable in tort" when he or she acted tortiously and thereby caused harm. The determination may be a jury finding, a judicial adjudication, stipulations of the parties, or the release language itself. To the extent that *Ziegler* is inconsistent with the rule of law announced today, it is overruled. " * * *
>
> We hold that payments made to appellants by defendants who were not determined to be persons "liable in tort" do not entitle appellees to a setoff.

{¶89} We concur with appellants that there was never a determination that the settling defendants were liable in tort. There was no jury finding, judicial adjudication, or stipulation of the parties. Moreover, the release itself does not contain language determining that the settling defendants were liable in tort.

{¶90} Appellants, in their final assignment of error, contend that the settlement proceeds were not "for the same injury or loss." We agree. The claims against the settling defendants were not product liability claims for defective metal roof panels, but rather were claims seeking damages for faulty workmanship that caused leaks and resulting water damage to interior finishes, furniture and fixtures. As noted by appellants, such claims were not related to appellee's defective roof panels.

{¶91} Based on the foregoing, appellants' three assignments of error are sustained. We find that the trial court erred in granting appellee's Motion for Setoff.

{¶92} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed in part and reversed and remanded in part.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.