[Cite as *Britton v. Gibbs Assoc.*, 2009-Ohio-3943.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

BONNIE BRITTON, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case No. 08CA9
	:	
vs.	:	**Released: July 29, 2009**
	:	
GIBBS ASSOCIATES, et al.,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendants-Appellants.	:	
	:	

APPEARANCES:

Bryan J. Mahoney, Freund, Freeze & Arnold, Dayton, Ohio, for Defendants-Appellants.

C. Todd Cook, Peelle Law Offices Co., LPA, Wilmington, Ohio, for Plaintiffs-Appellees.

McFarland, J.:

{¶1} Appellants, Gibbs Associates and James Gibb, appeal the judgment and decision of the Highland County Court of Common Pleas in favor of Appellees, Bonnie Britton, Debbie Goldie, Mike Nicholas and Cindy Nicholas. After a jury trial, Appellants were found liable to Appellees in the amount of $30,312. Appellants assert there was error in the proceedings below in that: 1) they were entitled to a directed verdict; 2) they

were entitled to judgment notwithstanding the verdict; 3) the trial abused its discretion by informing the jury that it had denied Appellants' motion for directed verdict; 4) the trial court abused its discretion by informing the jury that Appellants had moved for a mistrial; 5) the trial court allowed expert testimony which had not been disclosed before trial; 6) the trial court failed to declare a mistrial after reference was made to Appellants' liability insurance; 7) the cumulative effect of multiple errors denied Appellants their right to a fair trial; 8) the verdict was against the manifest weight of the evidence; and 9) the trial court denied Appellants' motion for a new trial. For the reasons stated in the following analysis, we find that none of Appellants' assignments of error are warranted. Accordingly, we overrule each assignment of error and affirm the decision of the court below.

I. Facts

{¶2} In June 2001, Appellees Bonnie Britton and Debbie Goldie purchased a used mobile home for their brother, Appellee Mike Nicholas, and his wife, Appellee Cindy Nicholas. Appellees planned to move the mobile home from Milford, Ohio, to a lot on the family farm outside of Lynchburg, Ohio. Britton contacted Appellants, Gibbs Associates and James Gibbs, insurance agents, to obtain insurance for the mobile home. As a result, Appellants arranged, through Progressive Insurance, a policy to cover the mobile home.

{¶3} Prior to moving the mobile home, Britton contacted Tom Rudisill, agent for Appellants, and asked if she needed additional insurance to cover the move. Rudisill advised Britton that no additional coverage was needed as long as she hired a "reputable mover." Britton subsequently hired a mover. The mover was to transport the mobile home from Milford to Lynchburg in two separate sections. The movers transported the first section of the mobile home to Lynchburg and left the scene. Because the foundation for the mobile home had not yet been completed, the first section was placed in a temporary spot on the lot and not in its final intended location. Approximately three days later, and before the second section of the mobile home had been moved, lightning struck the first section. The ensuing fire caused severe damage to the mobile home. At the time of the fire, the mobile home had still not been placed on its foundation and none its utilities had been connected.

{¶4} Immediately after the fire, Britton contacted Appellants and an insurance claim was submitted to Progressive. After investigating the incident, Progressive denied the claim, citing an "in transit" exclusion in Appellees' insurance policy. Under the terms of the policy, "in transit" is the time period during which all utilities are disconnected for the purpose of transporting. As a result on the denial of their claim, Appellees filed a

complaint against Progressive for breach of contract and against Appellants for negligent failure to procure insurance and negligent misrepresentation.

{¶5} In July 2006, the matter proceeded to trial. At the close of Appellees' case, the trial court dismissed Progressive as a defendant. The remaining claims went to the jury and it returned a verdict against Appellants in the amount of $30,312. Both parties filed appeals which we dismissed for lack of a final appealable order. After the trial court filed an agreed judgment entry dismissing Appellees' prayer for attorney fees, Appellants timely filed the current appeal.

II. Assignments of Error

I. APPELLANTS ARE ENTITLED TO A DIRECTED VERDICT. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANTS' MOTIONS FOR DIRECTED VERDICT.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. BASED ON THE RECORDS, APPELLANTS WERE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND PREJUDICED APPELLANTS WHEN IT ADVISED THE JURY THAT APPELLANTS HAD MOVED FOR A DIRECTED VERDICT AND THAT THE TRIAL COURT HAD DENIED SAID MOTION.

IV. THE TRIAL COURT FURTHER ABUSED ITS DISCRETION AND PREJUDICED APPELLANTS' [sic] WHEN IT DENIED APPELLANTS' MISTRIAL MOTION, ADVISED THE JURY THAT APPELLANTS HAD MOVED FOR A MISTRIAL AND

ADVISED THE JURY THAT THE COURT HAD DENIED SAID MOTION.

V. THE TRIAL COURT ERRED WHEN IT PERMITTED APPELLEES' EXPERT TO GIVE AN OPINION THAT HAD NOT BEEN DISCLOSED PRIOR TO TRIAL.

VI. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANTS' MISTRIAL MOTION AFTER BONNIE BRITTON REFERENCED APPELLANTS' LIABILITY INSURANCE DURING DIRECT TESTIMONY.

VII. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DENIED APPELLANTS THE RIGHT TO A FAIR TRIAL.

VIII. THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

IX. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

III. First and Second Assignments of Error

{¶6} In their first assignment of error, Appellants contend they were entitled to a directed verdict as a matter of law. In their second assignment of error they contend they were entitled to judgment notwithstanding the verdict. Because the standard of review for both assignments of error are the same and because Appellants use the same arguments to support them, we review them together.

{¶7} A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence. See *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d

164, 671 N.E.2d 1291. Thus, the standard of review when ruling on a motion for judgment notwithstanding the verdict is the same as that used when ruling on a directed verdict motion. See *Wagner v. Roche Laboratories (1996)*, 77 Ohio St.3d 116, 121, 671 N.E.2d 252, fn. 2, citing *Gladon v. Greater Cleveland Regional Transit Auth*. (1996), 75 Ohio St.3d 312, 318-319, 662 N.E.2d 287; *Posin* at 275. If the record contains any competent evidence, when construed most strongly in favor of the nonmoving party, upon which reasonable minds could reach different conclusions, the court must deny the motion. See *Meyers v. Hot Bagels Factory, Inc*. (1999), 131 Ohio App.3d 82, 92, 721 N.E.2d 1068. Like the directed verdict motion, a JNOV motion also presents a question of law, which we review de novo. Id., citing *Tulloh v. Goodyear Atomic Corp*. (1994), 93 Ohio App.3d 740, 639 N.E.2d 1203.

{¶8} Appellees asserted a claim against Appellants for negligent misrepresentation. Negligent misrepresentation occurs when " '[o]ne who, in the course of his business * * * or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the

information.' " *Delman v. Cleveland Hts*. (1989), 41 Ohio St.3d 1, 4, 534 N.E.2d 835, quoting 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1); see also *Laurent v. Flood Data Serv., Inc.* (2001), 146 Ohio App.3d 392, 400, 766 N.E.2d 221. Liability for negligent misrepresentation may be based on an actor's negligent failure to exercise reasonable care or competence in supplying correct information. *Marasco v. Hopewell*, 10th Dist. No. 03AP-1081, 2004-Ohio-6715, at ¶53, citing 4 Restatement of the Law 2d, Torts (1977), Section 552, Comment a.

{¶9} Appellants first argue that they can not be found liable under a theory of negligent misrepresentation because there is no evidence that they supplied false information to Appellees. To evaluate this argument, it is necessary to examine a specific conversation that took place between Appellee Bonnie Britton and Appellants' employee, Tom Rudisill.

{¶10} Britton originally dealt with another of Appellants' insurance agents in procuring a policy for the mobile home. Britton informed that agent that the mobile home was eventually going to be moved to a new location and the agent made a note of that fact in the file. When Rudisill took over Britton's file, he saw the note and instructed Britton to contact him before the move took place. The resulting conversation between Britain and Rudisill is at the core of these proceedings.

{¶11} The testimony of Britton and Rudisill established the following about their conversation: 1) Britton called Rudisill and asked if she needed any additional insurance before moving the mobile home; 2) Rudisill told Britton that the only other insurance available was “trip collision” and she would get that coverage if she used a “reputable mover”; 3) Britton understood this to mean that her insurance policy with Progressive would not cover the move itself; and 4) the movers Britton hired told her they had insurance.

{¶12} There is little doubt that if the mobile home had been damaged either while it was being physically moved to the new location or after it had been placed on its new foundation and had its utilities reconnected, this suit would never have arisen. Instead, it seems the mobile home was damaged during a gap in coverage between the protection provided by “trip collision” and the protection provided by Appellees’ policy with Progressive. During trial, Appellees’ produced an expert witness, Stephen Adkins, to testify concerning this gap.

{¶13} Contrary to Rudisill’s statement to Britton that no other insurance coverage was available for the move besides “trip collision,” Adkins testified that other types of insurance were available. Adkins' testimony indicated that such insurance would have provided coverage

during the time of the lightning strike, when "trip collision" no longer applied and before Progressive's coverage resumed. "* * * [T]his would have been trip transient floater along with either installation floater or location coverage that would have been generally available * * *." Further, Adkins testified that a competent insurance agent should have identified the gap in coverage.

{¶14} Because there was testimony from Appellees' expert witness that insurance could have been procured for the gap in coverage, yet Rudisill told Britton no other type of insurance was available besides "trip collision," the jury could have reasonably concluded that Appellants supplied false information to Appellees. Accordingly, there was some competent evidence to establish the "false information" element of negligent misrepresentation.

{¶15} We also find there was sufficient evidence to establish the remaining contested elements of negligent misrepresentation: failure to exercise reasonable care or competence in obtaining the information; and the loss being caused by justifiable reliance on the information. During his testimony as an expert witness, Adkins directly addressed Appellants' competence in procuring insurance for Appellees:

{¶16} "Based on my review of everything that has been provided to me on this case I would say, and including my background and experience I

would say that I have not seen the standard of care in the Gibbs Associates handling of this policy that I would expect of a competent independent insurance agency."

{¶17} Further, as to Appellees' loss being caused by justifiable reliance on the information provided by Appellants, Britton testified that she would have purchased additional insurance had she known it was needed to provide complete coverage:

Q: If [Rudisill] would have offered you some additional insurance which in his opinion you would need for that move would you have purchased it?

A: Yes, definitely, I would not have called him and asked him if I needed additional insurance if I wasn't planning on buying it if we needed it or not.

{¶18} From this testimony the jury could have reasonably concluded that, but for the false information Rudisill provided, that no other insurance besides "trip collision" was available, Britton would have sought additional coverage and the mobile home would have been protected against the loss caused by the lightning strike.

{¶19} Appellants argue that the evidence does not support a finding of justifiable reliance because Ohio law imposes a duty on the customer to examine the coverage provided by their insurance policy, and Appellees admit that they did not read the policy. However, an insured's failure to

read their policy is not an absolute bar to recovery. We recently stated that an insured's failure to read their policy is a matter of comparative negligence and is an issue to be decided by the trier of fact. *Robson v. Quentin E. Cadd Agency*, 4th Dist. No. 07CA26, 2008-Ohio-5909, at ¶28. Further, in the case sub judice, there are questions of fact as to whether the policy was sent to the proper parties and whether the policy was sent to the proper location.

{¶20} Accordingly, we find the record contains some competent evidence which, when construed most strongly in Appellees' favor, would allow reasonable minds to conclude that each element of negligent misrepresentation had been established. Because reasonable minds could have found Appellants liable under a theory of negligent misrepresentation, the trial court correctly denied Appellants' motions for directed verdict and judgment notwithstanding the verdict. As such, Appellants' first and second assignments of error are overruled.

IV. Third and Fourth Assignments of Error

{¶21} In their third assignment of error, Appellants state the trial court abused its discretion and created prejudice when it advised the jury that Appellants had moved for a directed verdict and the motion had been denied. In their fourth assignment of error, they argue the trial court further abused its discretion and created prejudice when it advised the jury that Appellants had moved for a mistrial and that motion had also been denied.

Because these two assignments of error are closely related we consider them together.

{¶22} Out of the presence of the jury, Appellants and Progressive both moved for a directed verdict at the close of Appellees' case. The trial court granted Progressive's motion, but denied that of Appellants. The trial court informed the jury as follows regarding its decisions on the motions:

{¶23} "Through legal arguments I have dismissed the case against Progressive Insurance Company, that is my legal decision, that was not a fact question, it was a legal decision. I did deny the motion that was filed by Gibbs and Associates and I still think they are Defendants in the case and anything that is done should be done by you, the jury, okay, not me. The argument that we had this morning was strictly legal in which I overruled the motions of [Appellants' counsel] and he did make his record for appellate purposes, and I did dismiss Mr. Rector's client, Progressive, over [Appellees' counsel's] objections. But again, this is the way the law is done, okay."

{¶24} Out of the hearing of the jury, Appellants immediately moved for a mistrial following the trial court's statement to the jury regarding the directed verdict motions. The trial court also denied that motion. Because

scheduling of the trial was becoming an issue, the trial court then addressed the jury regarding how much longer the trial would last:

{¶25} "Ladies and gentlemen, my hands are tied, the only day that I now have is Thursday okay. I had a second option and that is to mistry this, which I don't want to do, you have heard the evidence and, you know, another jury couldn't do as good as you have done, okay."

{¶26} Appellants also assert that this statement by the trial court was prejudicial.

{¶27} In determining whether a trial court's comments were prejudicial, a reviewing court must abide by the following rules: "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." *State v. Wade* (1978), 53 Ohio St.2d 182, 188, 373 N.E.2d 1244.

{¶28} In their brief, Appellants state that "* * * [t]he trial court in essence expressed its view that it believed Appellees had a case against Appellants * * *." We disagree with this characterization of the trial court's

comments. Regarding the motions for directed verdict, the court needed to inform the jury why Progressive would no longer be part of the case. Contrary to Appellants assertions, the trial court was simply informing the jury that, unlike Progressive, Appellants could not be dismissed as defendants as a matter of law. The court told the jury that Appellants would remain parties to the case, but in no way indicated or implied that the jury should find them liable. In such circumstances, we find Appellants fail to meet their burden of demonstrating that the trial court's comments were prejudicial.

{¶29} Appellants similarly fail to demonstrate prejudice regarding the trial court's comment on declaring a mistrial. Nothing in the statement implied that the trial court had an opinion as to Appellants' liability, rather the court was addressing scheduling issues, not liability. In fact, though the court stated it had the option to declare a mistrial, nowhere did the court specifically state that Appellants had moved for one. Accordingly, Appellants' third and fourth assignments of error are overruled.

V. Fifth Assignment of Error

{¶30} In their fifth assignment of error, Appellants argue that the trial court erred in permitting Appellees' expert witness, Stephen Adkins, to give an opinion that had not been disclosed prior to trial. Appellants contend that, despite written discovery requests and a discovery deposition

of Adkins, Appellees never indicated that Adkins would testify as to whether insurance coverage was available in 2001 that would have covered Appellees' loss.

{¶31} Our standard of review regarding the admission or exclusion of evidence is that such decisions are within the sound discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, at ¶20. An abuse of discretion connotes more than an error of law or judgment, rather it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, at ¶112, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When an appellate court applies this standard, it "may not substitute [its] judgment for that of the trial court." *Proctor v. Cydrus*, 4th Dist. No. 04CA2758, 2004-Ohio-5901, at ¶14, citing *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181.

{¶32} In the case sub judice, the specific testimony of Adkins that Appellants object to is the following:

Q: Do you have an opinion Mr. Adkins based upon your knowledge, your experience, your training as to whether or not in your opinion there would have been that same insurance coverage available that you found in 2006 available in 2001?

A: Certainly it would have been available in 2001.

{¶33} Appellants contend that, by allowing this testimony, the trial court erred in violation of Civ.R. 26. Under that rule, “[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows: (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify. (2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response. (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.” Civ.R. 26(E).

{¶34} Appellants state that, because Adkins did not give his opinion that other coverage would have been available in 2001 in his pretrial report or his deposition, Appellees had a duty to seasonably supplement his responses before trial began.

{¶35} As Appellants note, we have previously stated that “[c]ourts typically exclude a party's expert testimony when the subject matter is

revealed for the first time at trial and the opposing party have no reason to anticipate it." *Wright*, supra, at ¶66. However, in the case sub judice, we find the subject matter was not revealed for the first time during trial and, in any event, Appellants had ample reason to anticipate it. The subject matter in question was the availability of insurance which would have covered Appellees' loss. Appellants were well aware that Adkins would be testifying on that subject during trial.

{¶36} Appellants take particular issue with a response Adkins made during his deposition. During his investigation into the availability of the type of insurance which would have protected Appellees, Adkins had discussions with a particular insurance underwriter. This underwriter informed Adkins that, yes, that type of insurance was available from his company. During Adkins' deposition, Appellants asked him if such insurance would have been available in 2001. Adkins replied that he could not answer the question as to whether or not that particular underwriter's company would have been able to provide the same insurance in 2001. "We only talked current dates, so I -- I can't answer that question, whether it was available in 2001 or not." However, Appellants did not ask Adkins during his deposition whether, in his opinion, such insurance would have been generally available in 2001, as opposed to whether it was available from that

particular company. Thus, the trial court could have reasonably concluded that Atkins' opinion that such insurance was generally available in 2001 did not constitute unfair surprise.

{¶37} In the context of Civ.R. 26(E), "subject matter" has been defined as encompassing a broad range of information under a general topic, not as a detailed account of the entirety of an expert's possible testimony. *Wright* at ¶66. In the case sub judice, the subject matter was the availability of insurance which would have protected against Appellees' loss and Appellants were well aware that Adkins would be testifying regarding that general topic. Further, because the general availability of insurance in 2001 which would have covered Appellees' loss was central to Appellees' case, Appellants had reason to anticipate that Adkins would be offering his opinion on the subject. Accordingly, Appellants' fifth assignment of error is overruled.

VI. Sixth Assignment of Error

{¶38} Appellants next argue the trial court erred in overruling their motion for mistrial after Bonnie Britton referenced Appellants' liability insurance. During Bonnie Britton's direct examination, the following exchange took place:

Q: What about the loss, what did you do with that manufactured home after the loss, once you found out there was not going to be payment on your claim?

A: We tried to -- we put tarps on it, we tried to keep it covered so that maybe we could get it fixed or until we found out exactly what was going to happen because there they had denied it. But then I had talked to Mr. Gibbs about [the movers'] insurance and then I asked him about his errors and omissions insurance and he said that was a possibility but that would be our last resort.

{¶39} As a result of Britton's testimony, Appellants moved for a mistrial. In denying Appellants' motion, the trial court stated the following:

{¶40} "The question that [Appellees' counsel] asked was a very proper question, the response that the lady gave, okay, was voluntary, okay, it wasn't something that you were trying to draw from her as it deals with errors omissions insurance, it could have come out with something different, I don't know what you were looking for. Again, it wasn't planned the way I saw it. If it was planned like that, yes, but that's not the way I saw the question. So, as a result that's why I'm going to overruled the motion. He's made a record, that's fine, you're entitled to that, and I don't believe even then it would be such it would be subject to a mistrial."

{¶41} We agree with the trial court that Bonnie Britton's testimony, briefly touching upon Appellants' liability insurance, does not constitute grounds for a mistrial. The Supreme Court of Ohio has stated that "[g]iven the sophistication of our juries, the first sentence of Evid.R. 411 ('[e]vidence that a person was or was not insured against liability is not admissible upon the issue [of] whether he acted negligently or otherwise wrongfully') does

not merit the enhanced importance it has been given." *Ede v. Atrium S. OB-GYN, Inc.*, 71 Ohio St.3d 124, 127, 1994-Ohio-424, 642 N.E.2d 365. While testimony regarding a defendant's liability insurance may be grounds for reversal when the testimony is introduced solely to prejudice the jury[1], such was certainly not the case in this instance. As the trial court noted, Britton's few words regarding Appellants insurance was not intentionally elicited by trial counsel, nor was it given on the issue of whether Appellants acted negligently or otherwise wrongfully. Accordingly, Appellants' sixth assignment of error is overruled.

VII. Seventh Assignment of Error

{¶42} Appellants next argue that, even if a single error in the proceedings below, standing by itself, does not merit reversal, the cumulative effect of the trial court's multiple errors denied Appellants the right to a fair trial. According to Appellants, the cumulative errors consist of: 1) the trial court wrongly advised the jurors regarding its motions for directed verdict; 2) the trial court wrongly advised the jury that Appellants had moved for a mistrial; 3) the trial court wrongly allowed Adkins to give an opinion which was not disclosed prior to trial; and 4) the trial court wrongly overruled Appellants' motion for a mistrial after Bonnie Britton mentioned Appellants' liability insurance.

---

[1] See *Shipley v. Johnson* (Oct. 16, 1995), 5th Dist. No. 1995CA00100, at *1.

{¶43} We examine the totality of the evidence before the jury when reviewing a claim of cumulative error. *State v. Gondor*, 112 Ohio St.3d 377, 860 N.E.2d 77, 2006-Ohio-6679, at ¶72. In *Stouffer v. Reynolds* (C.A.10, 1999), 168 F.3d 1155, 1163-64, the court stated: "Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense." See, also, *Gondor* at ¶72. We have already individually addressed each of the errors that Appellants cite in this assignment of error. Having found no error or prejudice in the errors individually, we also reject Appellants' cumulative argument. Accordingly, Appellants' seventh assignment of error is overruled.

VIII. Eighth and Ninth Assignments of Error

{¶44} In their eighth assignment of error, Appellants assert that the jury's verdict was against the manifest weight of the evidence. In their ninth and final assignment of error, Appellants contend the trial court erred in denying Appellants' motion for a new trial. Because the basis of Appellants' motion for a new trial was that the jury's verdict was against the manifest weight of the evidence, we consider the arguments together.

{¶45} The judgment of a trial court should not be overturned as being against the manifest weight of the evidence if some competent and credible evidence supports that judgment. See, e.g., *C.E. Morris Co. v. Foley*

Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus.

{¶46} Further, in determining whether a judgment is against the manifest weight of the evidence, the credibility of witnesses and the weight given to the evidence are issues for the trier of fact. See, e.g., *Cole v. Complete Auto Transit, Inc*. (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289; *GTE Telephone Operations v. J & H Reinforcing & Structural Erectors, Inc.*, 4th Dist. No. 01CA2808, 2002-Ohio-2553, at ¶10; *Reed v. Smith* (Mar. 14, 2001), 4th Dist. No. 00CA650. The trier of fact is better suited than an appellate court to view the witnesses and observe their demeanor, gestures, and voice inflections and to use those observations in weighing credibility. Thus, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; *Stewart v. B.F. Goodrich Co*. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591; see, also, *State v. Nichols* (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; *State v. Harriston* (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144.

{¶47} Appellants' manifest weight argument consists of two parts: 1) that there is no competent credible evidence to establish proximate cause; and 2) that there is no competent and credible evidence to support the

amount of the jury's verdict, $30,312. We first address Appellants' proximate cause argument.

{¶48} For the same reasons we cited in our analysis of Appellants' first and second assignments of error, we find that there is some competent and credible evidence to establish that Appellees' loss was proximately caused by Appellants' negligence. Contrary to what Tom Rudisill told Bonnie Britton, the jury heard the testimony of Appellees' expert witness, Stephen Adkins, that other insurance was available which would have covered Appellees' loss. From this, the jury could have reasonably concluded that, but for Rudisill's statement, Appellees would have obtained coverage which would have protected against the loss which ultimately occurred.

{¶49} It is not this court's function to judge the credibility of Adkins' testimony. We must defer to the jury's discretion to believe all, part or none of the testimony which was before it. As such, the first part of Appellants' manifest weight argument is overruled. Further, because there was competent credible evidence to find Appellants liable for negligent misrepresentation, the trial court did not error is refusing to grant a new trial. Accordingly, we also overrule Appellant's ninth assignment of error. We now turn to the second part of Appellants' manifest weight argument, that

there was no competent credible evidence for the jury to compensate Appellees in the amount of $30,312.

{¶50} The trial court instructed the jury as follows regarding damages:

{¶51} "The general rule for measuring damages to personal property is the difference between the property's market value immediately before and after the injury. If the property is totally destroyed or irreparable, the measure of damages is the fair market value immediately before the injury. A fair market value is the price the property would bring if offered for sale in the open market by an owner who desired to sell it who was under no necessity or compulsion to do so and when purchased by a buyer who desires to buy it was under no necessity or compulsion to do so. Each having knowledge of the pertinent facts concerning that property."

{¶52} The parties agreed that Appellees purchased the mobile home for $15,000. Appellants argue that, because the mobile home was originally purchased for $23,875 in 1991, because mobile homes decrease in value over time, and because there was no other evidence regarding the value of the mobile home, any verdict in excess of $15,000 could only be the result of the jury clearly losing its way. However, Appellants are incorrect in

stating that no other evidence was presented regarding the value of the mobile home.

{¶53} The jury heard testimony that the mobile home was in excellent condition at the time it was sold to Appellees. In fact, Progressive's claims adjuster, who inspected the mobile home after the fire, noted that the mobile home appeared to be new. The jury also heard testimony that when Appellees initially looked for a mobile home to purchase, comparable mobile homes were priced between $30,000 and $60,000. Further, there was testimony that Appellants themselves initially estimated the replacement cost of the mobile home at $65,000, and that the eventual agreed-upon value of Appellees' policy with Progressive was $45,000. In light of such testimony, there was competent and credible evidence for the jury to determine that Appellants were liable to Appellees in the amount of $30,312. As such, the second part of Appellants' manifest weight argument also fails.

IX. Conclusion

{¶54} After a complete review of the record below, we overrule each of Appellants' nine assignments of error. Appellants' first and second assignments of error are without merit because the jury could have reasonably found, when the facts were construed most strongly in Appellees' favor, that there was some competent evidence to support a cause of action

for negligent misrepresentation. Appellants' third, fourth and sixth assignments of error fail because Appellants do not demonstrate that the trial court's comments, or Bonnie Britton's comments regarding Appellants' liability insurance, constituted prejudice requiring reversal. Because we conclude that Appellees' expert witness' testimony did not constitute undue surprise in violation of Civ.R. 26, Appellants' fifth assignment of error also fails. Because none of Appellants' individual assignments of error are warranted, their seventh assignment of error, regarding cumulative error, also has no merit. Finally, Appellants' eighth and ninth assignments of error fail because the jury's decision was not against the manifest weight of the evidence. Accordingly, we affirm the decision and judgment of the court below in full.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

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

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

Harsha, J.: Concurs in Judgment Only.
Abele, J.: Dissents.

For the Court,

BY: ____________________________
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.