2015 IL App (2d) 141032-U
No. 2-14-1032
Order filed September 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CINCINNATI INSURANCE COMPANY, a/s/o ODERMATH USA and VIP MORGAN, LLC,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs,	)	
v.	)	Nos. 11-L-1177 11-L-1279
A-SQUARE MANUFACTURING, INC.	)	
Defendant and Third-Party Petitioner in Discovery-Appellant	)	
(Sly, Inc., Third-Party Respondent in Discovery).	)	Honorable Patrick J. O'Shea, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant and third-party petitioner in discovery's motion to convert third-party respondent in discovery into a third-party defendant.

¶ 2 Defendant and third-party petitioner in discovery, A-Square Manufacturing, Inc. (A-Square), appeals the judgment of the circuit court of Du Page County, denying its motion to convert third-party respondent in discovery, Sly, Inc. (Sly), into a third-party defendant. A-Square argues that the trial court erred in denying its motion because there was probable cause to

believe that Sly was a cause of the injuries to the plaintiffs in this case, Cincinnati Insurance Co., as subrogee of Odermath USA Inc. (Odermath), and VIP Morgan, LLC (VIP). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 5, 2009, a fire occurred in an industrial building located in Naperville, Illinois. Odermath had rented the building from VIP. Odermath was in the business of making cored steel wire. (Cincinnati Insurance Co. is the nominal plaintiff, having stepped into Odermath's shoes as subrogee upon settling the insurance claim. We shall refer to this party as Odermath for ease of understanding of the relationship between the parties.) Beginning in 1988, Odermath had rented the industrial building in which to run its operations. Odermath was a subsidiary of a German corporation, and, beginning in 1996, Dirk Rolf Odermath (Rolf), a relation of the German company's founder, served as the managing director of Odermath in the Naperville facility. VIP eventually purchased the building and was the building owner at the time of the fire. Sly was in the business of manufacturing air pollution control equipment for industrial users. Since 1973 (and at times relevant here), Theodore Kurz (Kurz) has worked for Sly in a number of capacities, and at times relevant here, was the Chief Executive Officer of Sly.

¶ 5 Odermath manufactured cored wire from steel sheets rolled and formed around various particulate fillers, including iron, aluminum, calcium, magnesium, and other substances. At the time of the fire, Odermath had two distinct mills to manufacture its cored wire: the green mill and the blue mill. The particulate filler was mixed and kept in bins, which were then delivered to hoppers on the mills utilizing a forklift. The hoppers would deliver precise amounts of the powdered filler material to a conveyor which then transferred the filler and dropped it onto a steel sheet as it was being pulled through the mill. As the steel sheet was pulled through the mill, it traveled through a series of rollers that formed the steel sheet into the outer portion of the wire,

which surrounded the filler material in the center or core of the wire. The wire was then rolled onto a spool, which was the finished product. The cored wire was manufactured according to a customer's particular specifications.

¶ 6 During manufacture, dust from the particulate filler would be created. Much of the dust was dangerous in various fashions, such as being a danger to persons inhaling the dust, as well as being a fire hazard, as much of the dust was flammable as well as explosive if it remained floating in the air. Much of the dust ended up on the available surfaces in the plant, including on the mills, on the floor, and inside the surfaces of the ductwork in the building. Odermath had developed housekeeping procedures to deal with some of the hazards presented by the dust created during the manufacture of the cored wire. Odermath worked the entire day, leaving the dust in place. The following morning, before beginning production, the employees would use brooms, brushes, and a shop vacuum cleaner to clean up the dust that was on flat surfaces. The employees would not routinely clean the interior portion of the conveyors and the rolling machines in the two mills; they also would not clean the flat surfaces inside or the undersides of the mills. Rolf Odermath told the investigator from the Occupational Safety and Health Administration (OSHA) that, by lunch time, there would already be a significant accumulation of dust in the area around the green and the blue mills.

¶ 7 The manufacture of the cored wire also threw dust from the particulate filler into the air. From the beginning of its tenure in the subject building, Odermath had equipment installed that was intended to filter the particulate dust out of the air to comply with applicable air quality standards. This air filtering equipment was apparently in addition to the housekeeping procedures Odermath used to clean up the dust and to minimize the hazards posed by the dust.

¶ 8 Sly's involvement in this case stems from its provision of a dust collection system to

Odermath. A dust collection system consists of two gross components: a filter or dust collector, referred to as a "baghouse," and a system of ducts and tubes to deliver the dust-laden air into the filter. The ductwork begins at "collection points" near the equipment that is throwing dust into the air, and it delivers the dust-laden air to the dust collector or "baghouse," where the dust is removed. The baghouse is powered by a fan to provide suction to move the air from the collection points into the baghouse. Inside the baghouse is the filter media. In this case, the filter media consisted of a number of polyester bags designed to remove particulates in the air of half a micron or greater. The dust would eventually drop or be knocked off of the bags into a collection barrel underneath to allow for disposal of the dust. The dust so collected was not suitable for recycling and reuse, and Odermath disposed of it. Accordingly, we will refer to the baghouse, meaning the structure housing the filtering media, collection barrel, and suction fan, and we will refer to the dust collection system, meaning the baghouse and the ductwork system.

¶ 9 Kurz and Rolf Odermath both testified in their depositions that the dust collection system was implemented in order to remove the dust from the air inside the facility. Kurz further testified that the design of the dust collection system contemplated that it would remove 99.9% of the dust greater than half a micron in size from the air being delivered to the baghouse. Rolf Odermath appeared to share this view, testifying that the dust collection system was implemented in order to abate the dangers posed by airborne dust in the Odermath facility. Moreover, Kurz testified that that the effectiveness of the dust collection system also depended, in part, on the location of the collection points, from which it would draw the dust-laden air into the system.

¶ 10 In 1988, when Odermath occupied the Naperville facility, it installed a dust collection system. In 1999, Odermath determined that this original system was no longer sufficient for its

needs. As a result, Odermath contacted Sly about creating a larger or more powerful baghouse to power its dust collection system. Odermath was also looking to install the new baghouse externally to its work area.

¶ 11 Odermath provided Sly with requested information about the air volume (the amount of air to be pulled through the dust collection system per minute), the type of material to be filtered out of the air, the operating pressure, and other information so that Sly could design a dust collections system to meet Odermath's needs as well as environmental air quality requirements. Sly used this information and proposed a certain model baghouse to be installed at the Odermath facility. Based on the information provided, Sly also evaluated and incorporated the risk of explosion and whether the dust was inflammable.

¶ 12 In 1999, Sly fabricated a baghouse and had it delivered to Odermath. The baghouse was installed on the outside of the building by another company. Included in the delivery were installation and operation manuals. Sly maintains that Odermath's order did not include fabrication of collection points, ducts, or tubing, but only the baghouse itself. Kurz testified that Sly did not manufacture or do any work on any component of the dust collection system that resided inside of the Naperville facility. Kurz testified that the physical components of the collection points were made by someone other than Sly, and he did not believe that Sly had any input on placing the collection points. Rolf Odermath testified that he did not have a clear recollection about much of the 1999 commission and installation of the Sly baghouse, but he affirmatively testified that the collections points had been designated based on "advice" from Sly. He also testified that the collection points remained in the same places throughout Odermath's tenure in the building.

¶ 13 The baghouse provided by Sly also included a magnehilic gauge which measured the

pressure differential between the "dirty air" side of the baghouse and the "clean air" side in order to provide an indication of the amount of suction provided by the baghouse. If the suction decreased, it was an indication that the filters needed to be changed or the barrel emptied. The device was shipped loose for Odermath to install in a convenient location where it could be seen and monitored.

¶ 14 Between the delivery of the baghouse to Odermath in 1999 and the fire on November 5, 2009, Odermath performed the maintenance for the dust collection system, including cleaning or replacing the filter bags. From time to time, the ductwork of the dust collection system was also cleaned. Finally, the collection barrel was emptied as needed.

¶ 15 In June 2009, about five months before the fire, Odermath modified its milling equipment and replaced the ductwork and tubing of the dust collection system. Specifically, and at a minimum, the box housing the conveyor belt for the green mill was replaced. Along with the mill and tubing, all of the filter bags in the baghouse were replaced. Odermath also installed a new system to dry the air as it entered the baghouse. Rolf Odermath explained that the drying system was installed because the calcium dust could start a fire if it reacted with water, even the water in sufficiently humid air. The air drying apparatus was placed next to the filter system.

¶ 16 Rolf Odermath testified in his 2014 deposition that the dust collection system functioned well for all of the time after it had been installed. He also believed it was properly functioning on the date of the fire. Rolf Odermath testified, "The [dust collection] system worked perfectly and based on the amount of dust in the [collection] barrel we can say that the system functioned properly after the fact, now five years later."

¶ 17 On November 5, 2009, a fire damaged Odermath's equipment and the subject building. Odermath had contacted A-Square to install a light fixture over the green mill. On November 5,

A-Square sent Andy Komar and Andy Taranawski to perform the job. The production of cored wire had stopped for the facility's lunch break, and Komar and Taranawski began to install the light fixture near the green mill. First, they drilled a single hole and installed a lag bolt and nut to hold the fixture until all four holes could be drilled. The green mill had been running when they arrived and had stopped for the lunch break, but they did not follow lock out/tag out procedures for the machine. Power was not supplied to the light fixture while they were working on it. Komar told investigators he saw a flash out of the corner of his eye as he was working. He then saw fire coming out of the conveyor box on the green mill. Komar related that about 15 seconds elapsed between the ignition of the fire and the subsequent explosion. When the fire ignited, he and Taranawski attempted to extinguish it by beating at the flames with their jackets, but they were unsuccessful. After an explosion, they grabbed their tools and left the building.

¶ 18 A Naperville fire department investigator viewed the security video that captured views of the fire. In summarizing the video, the investigator related that "only the contractors, Mr. Komar and Mr. Taranawski, [were seen] in the area of the green machine before the start of the fire. The video showed what appeared to be sparks from the area of the light fixture install at the same time as the start of the fire." After the fire was extinguished, Rolf Odermath showed the investigator the area around the light fixture being installed. The investigator noted that the light fixture had been attached to the floor with a single lag bolt and nut, and the other holes had lag bolts but no nuts. The investigator wrote: "The bolt with the nut in the northeast corner of the steel support post appeared to have been cut by some tool. There was a small (1/4 inch) remaining piece of the lag bolt lying next to the cut bolt on the steel support post." The investigator noted that none of the other bolts appeared to have been cut.

¶ 19 Parul Christian, the lead operator of the blue mill, was interviewed by the Naperville fire

department investigator. She was not on the production floor when the fire started. She was alerted to the fire by someone yelling, "Fire." She walked into the production area where she saw fire on the conveyor belt of the green mill. She believed the fire was traveling along the machine from the east side of the mill to the west side of the mill.

¶ 20 OSHA also conducted an investigation of the fire. The OSHA investigator interviewed Komar and Taranawski, as well as Odermath personnel, and viewed the security camera footage and the damage at the scene. The investigator noted that the fire department had taken down portions of the ductwork because the removed portions were "smoldering and glowing." The OSHA investigator reported that, where the ductwork was still in place near the ceiling, there was an apparent build up of dust on the interior.

¶ 21 The OSHA investigator summarized the footage of a security camera that captured the fire:

> "The two employees from A-Square Manufacturing can be seen. [Taranawski] is crouching behind stacked bags on the ground. The view is not entirely clear but there appears to be some reflections in this area or bright light which could be sparks. Advancing the film frame-by-frame reveals a small flash where [Taranawski] was working. Less than 2 seconds later a larger flash can be seen behind him on the conveyor. What appears to be sparks can be seen coming from the area where the 1st flash was seen. Both employees can then be seen frantically trying to put the fire out with their jackets. 20 seconds after the second flash, a large explosion can be seen which appears to originate from the conveyor or hopper. At this point the employees can be seen backing away from the machine as the fire rages on the conveyor. The employees make one more attempt to approach the machine, but then the fire flashes again and a

tremendous amount of smoke emanates from the machine and engulfs the surrounding area. The employees are seen gathering their tools and running out."

¶ 22 The OSHA investigator also summarized footage from another security camera which "look[ed] out on the garage door which [led] to [a] parking lot on [the] North Side of [the] building":

"At the beginning of the video the material handler is seen moving material with a forklift. At 11:53:43, a flash can be seen coming from the machine area. The material handler re-enters the frame and is looking in the direction of the Green Mill. The material handler turns and runs toward the garage door. As he reaches the door, he grabs the fire extinguisher and turns around, again facing the machine. Less than 2 seconds later, at 11:53:59, a large flash of light is seen on camera. Smoke and debris rain down from the ceiling and the employee is seen falling to the floor onto his back and dropping the fire extinguisher. The employee gets back up and opens the garage door and runs out. The exhaust ventilation system junction is located directly above this area. The flash of light and falling debris suggest that dust in the ductwork may have ignited and resulted in a flash fire/explosion in this area. A final flash can be seen over a barrel by a work table and flames can be seen on the work table. At 11:54:50, [Taranawski] can be seen running out and then running back into the building. At 11:55:27, [Komar] can be seen running out of the building with a toolbox and ladder. He then re-enters and picks up the fire extinguisher dropped by the material handler. Other figures, not identifiable can be seen entering and exiting the building. At 11:58, the material handler is seen entering, then exiting the building, then just hanging around the door. At 12:00, Mr. Odermath and the material handler enter the building, look around, and then leave again. At 12:02,

firefighters are seen entering the building."

¶ 23 The fire department investigator and the OSHA investigator reached similar conclusions regarding the fire. The fire department investigator concluded:

> "The fire [at the Naperville facility] on November 5, 2009[,] was accidental in nature, but careless use of construction tools in the area of a hazardous material, Calcium Metal, caused a spark to ignite the dust that had accumulated in the production area. The resulting fire, explosion, and damage to the building are a consequence of this action."

¶ 24 The OSHA investigator made several determinations:

> "There were several hazards/regulatory deficiencies which were contributing factors to the incident or which were directly related to the performance of [Odermath's] emergency response to the fire. These include: the accumulation of combustible fugitive dust in areas in and around the rolling mill and the conveyor; the lack of emergency preparedness and training; the lack of communication and coordination of lockout/tagout programs between the employer and contractor; the lack of communication of the combustible dust hazard to the contractor; the lack of implementation of a hot work permit program in accordance with [certain regulations]; and failure to clean up the work area to remove the combustible dust prior to the performance of hot work in the area in accordance with [certain regulations]."

The OSHA investigator noted that Odermath's "informal procedure for housekeeping" did not abate the dust in "the interior portion of the conveyor and rolling machines or the flat surfaces on the underside of these machines." The "[e]mployees of A-Square Manufacturing were not informed of the presence of combustible dust and the associated hazards." The investigator reasoned that, had the Odermath employees been better informed about the fire and explosion

hazard posed by the metal dust, "it is also possible that the employees would have taken greater care to prevent the accumulation of dust on surfaces."

¶ 25 Based on these determinations, the OSHA investigator concluded:

> "It is the opinion of the [OSHA investigator] that the root cause of the accident was the performance of hot work (including cutting and/or grinding) and the use of unapproved power tools in the hazardous (classified) area. Employees of A-Square Manufacturing have stated that they were not informed that the Green Mill Area was a hazardous area due to the presence of combustible dust. They have stated that they were not required to complete a hot work permit and they were not prohibited from using unapproved power tools in the area. They have also stated that they were unaware that sparks could ignite the dust.
>
> The employer failed to control the ignition sources in the area by failing to require a hot work permit for any spark-producing operation including cutting and/or grinding and by prohibiting the use of unapproved electrical equipment, such as power tools, in this area.
>
> Furthermore, the employer failed to remove the primary hazard by thoroughly cleaning the area of combustible metals or powder prior to the commencement of hot work."

¶ 26 Following its investigation, OSHA fined Odermath for its violations. Additionally, A-Square was also fined for its part in the fire for failing to lock out the green mill before commencing work on the light fixture.

¶ 27 On October 13, 2011, Cincinnati Insurance, as subrogee of Odermath filed a complaint against A-Square alleging negligence in regard to the November 5, 2009, fire. On November 3,

2011, VIP filed a complaint against A-Square alleging negligence in regard to the fire. On April 2, 2012, the trial court consolidated the two cases.

¶ 28 On May 12, 2012, A-Square filed its third-party complaint against Odermath alleging negligence and seeking contribution. On May 14, 2012, A-Square filed its counterclaim for contribution against VIP. Nearly a year later, on May 9, 2013, A-Square filed an amended third-party complaint against Odermath and a third-party complaint against VIP[1] naming Sly as a third-party respondent in discovery in each. On February 7, 2014, A-Square filed amended third-party complaints against Odermath and VIP maintaining Sly as a third-party respondent in discovery.

¶ 29 On February 26, 2014, A-Square filed its motion to convert Sly from a third-party respondent in discovery into a third-party defendant, and on March 7, 2014, A-Square filed its amended motion to convert Sly. A-Square argued that probable cause existed to convert Sly into a third-party defendant based on the facts that Sly manufactured the baghouse and provided Odermath with advice about locations to place the collection points. A-Square also argued that, because there was an accumulation of dust in and around the green mill, Sly's dust collection system must have contributed to the fire because the production floor was not clear of dust. The amended pleading was identical to the original motion to convert, but it added as exhibits the proposed third-party complaints against Sly in each of the consolidated cases.

¶ 30 On May 13, 2014, after argument, the trial court delivered its judgment on A-Square's amended motion to convert:

[1] A-Square's initial filing against VIP was styled as a counterclaim. The pleading under discussion was styled as a third-party complaint.

"You know, I—for me to grant this motion, I have to find that the injury was somehow caus[ally] connected to the tortious conduct of Sly.

And this case has been going on, one of—both of them, for—since 2011.

I read the depositions, the material you gave me.

I specifically reread the deposition of Mr. Odermath, and he's not a person without technical background.

He was a Manager in Germany, according to his deposition. He's a Manager for the production of this cor[e]d wire there also.

He did state that there were many people that came onto the site after the fire or the catastrophic event, and that, to his knowledge, the system was working perfectly at that time, and that was based upon the amount of dust that was in the collection system, the barrel.

He also stated that there was some work done in June of 2011 [*sic*], a few months prior to the catastrophic event, where his people, meaning some people from Germany I think he stated, came here and changed some of the duct system and changed some of the bags and sacks and changed some—also changed part of the—I think the production system for the cor[e]d wire. And those were acts that occurred a few months prior to the fire and/or explosion.

With regard to the experts, the fire department, OSHA, they were all on the scene after the event.

So, what they find after the event, after a catastrophic event, sometimes is telling, sometimes not.

They're not fire origin experts, as we used to call them. They didn't issue a report

that said that—directly that Sly had done something wrong.

The system, incidentally, that's complained of was in—put in place, according to the deposition, in 1999. So, it functioned properly for ten years.

Then on the date in question, after some changes or modifications to the system by Odermath, may or may not have caused the situation, but it's complained now that the system was inadequate, improperly designed, or that somehow or another the system malfunctioned.

Well, I don't find any facts in the record to indicate that.

I find one situation where Odermath says that the collection points were determined by Sly.

Sly says, no, the collection points were determined by Odermath.

Sly also complains—or states that, in fact, through their witnesses that they didn't install the system.

Their system is on the outside of the building.

It has to do with basically clean air, has to do with the EPA, and the requirements that the EPA have for keeping the air clean.

OSHA basically controls the work site, which is probably in [*sic*] or about correct statement.

However, I—there is a cause here where it's complained that the electrician created some sparks, and the fire ensued after, that and it ensued because of the dust.

I also read the deposition of two other people, and they stated that this system does not guaranty that all the dust in the air are not—will, in fact, be removed.

They state—that is not what Sly said. Sly just put in the system that would

remove the dust and make it a safe environment. Now, safe is a word used and not by an expert.

But other than the collection points, the system's working ten years, and I understand Mr. Odermath may not be an expert as to whether or not it was working perfectly, but he certainly has experience in his own plant, knowing whether or not it was removing dust, which you don't have to be an expert to know.

So, I don't believe[,] in reviewing the record before me[,] that there is sufficient information to connect the injury, the damage, this catastrophic event, in fact, to the collection system.

I don't think there's probable cause here at all.

I'm going to deny the motion, and they're [Sly] going to be dismissed as respondents in discovery."

¶ 31 Following its ruling, the trial court set a 28-day deadline for the parties to file for a Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) finding in regard to the denial of the motion to convert Sly. Both parties timely filed motions for Rule 304(a) findings. On October 6, 2014, the trial court granted the motions. The trial court also noted that the specific issue for appeal should be "whether sufficient evidence exists to support the conversion of Sly, Inc. to a Third-Party Defendant." A-Square timely appeals.

¶ 32 II. ANALYSIS

¶ 33 On appeal, A-Square argues that the trial court erred in determining that no probable cause existed to convert Sly from a respondent in discovery into a party defendant. A-Square argues that, because the standard is relatively low, whether a person of ordinary caution and prudence would entertain a strong suspicion that the alleged actions of Sly caused the injuries

alleged by VIP and Odermath, the evidence was ample to support conversion of Sly from a respondent in discovery into a party defendant.

¶ 34 We begin by considering the standards applicable to converting a respondent in discovery into a party defendant. Respondents in discovery are governed by section 2-402 of the Code of Civil Procedure (Code) (735 ILCS 5/ 2-402 (West 2012)). Section 2-402 of the Code provides, pertinently:

> "The plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.
>
> Persons or entities so named as respondents in discovery shall be required to respond to discovery by the plaintiff in the same manner as are defendants and may, on motion of the plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such an action." 735 ILCS 5/2-402 (West 2012).

Probable cause under section 2-402 is established where a person of ordinary caution and prudence would entertain an honest and strong suspicion that the actions of the respondent in discovery were a proximate cause of the plaintiff's injury. *Jackson-Baker v. Immesoete*, 337 Ill. App. 3d 1090, 1093 (2003). This is a fairly low standard: the plaintiff need not present evidence demonstrating "a high degree of likelihood of success on the merits or the evidence necessary to defeat a motion for summary judgment in favor of the respondent[] in discovery, nor is the plaintiff required to establish a *prima facie* case against the respondent in discovery." *Id.*

¶ 35 The parties agree on the evidentiary standards regarding section 2-402 and summarized in *Jackson-Baker*, but they disagree on our standard of review. *Jackson-Baker* again offers a useful

summary: the trial court's ruling on a motion to convert a respondent in discovery into a party defendant is entitled to deference if the trial court heard testimony and made factual determinations regarding conflicting evidence. *Id.* The level of deference is not entirely clear; there are at least two lines of cases, one advancing an abuse-of-discretion standard (*Long v. Mathew*, 336 Ill. App. 3d 595, 600 (2003) ("[t]he standard of review on the denial of a section 2-402 motion to convert a respondent in discovery into a defendant is whether the trial court abused its discretion")), the other advancing a manifest-weight standard (*McGee v. Heimburger*, 287 Ill. App. 3d 242, 248 (1997) ("a reviewing court will not overturn the trial court's ruling [on a motion to convert a respondent in discovery into a party defendant] unless it is against the manifest weight of the evidence")). On the other hand, where (1) the facts are undisputed, (2) the credibility if the witnesses is not an issue, and (3) in-court testimony has not be presented, a question of law is presented to the reviewing court, which applies a *de novo* review. *Jackson-Baker*, 337 Ill. App. 3d at 1093; *McGee*, 287 Ill. App. 3d at 248.

¶ 36 Thus, we apparently have a choice of three standards of review. A-Square contends that *de novo* review is proper, because there was no in-court testimony, there are no issues of credibility, and the facts are undisputed. According to A-Square, these circumstances place the case squarely within the ambit of the *de novo* review regime in *Jackson-Baker* and *McGee*.

¶ 37 Sly suggests that a deferential standard should be applied because the trial court is to act as a gatekeeper, assessing whether it is fair to let a plaintiff proceed further against the respondent in discovery and to subject it to the fact-finding process, citing *McGee*, 287 Ill. App. 3d at 247-48. Sly ultimately opts for the manifest-weight standard, relying on this court's analysis in *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶¶ 46-48. Pertinently, in *Rock River*, we were reviewing the imposition of a civil penalty for a

Freedom of Information Act violation against the defendant based only on the written evidence presented by the parties. *Id.* ¶¶ 44, 47. The defendant cited *Jackson-Baker* for the proposition that, where the trial court's decision was based not on live testimony, but only written evidence, a *de novo* standard applies. *Id.* ¶ 46. We rejected *de novo* review in *Rock River Times* because, even though "the [trial] court considered only written evidence in making its decision, the facts were disputed." *Id.* ¶ 47. We held that, instead, the manifest-weight standard applied because the trial court resolved factual disputes, necessarily requiring both factual and credibility determinations. *Id.* ¶ 48. Sly argues that, similarly here, because the parties disputed the effect of the evidence presented, the trial court "necessarily made factual and credibility determinations," and our review should proceed under the manifest-weight-of-the-evidence standard.

¶ 38 We believe that *Rock River Times* is a bit far afield to provide controlling guidance, although it does appear to distinguish *Jackson-Baker*. While Sly's argument is not unreasonable, the context of *Rock River Times* renders that case inapposite. Instead, we follow *Jackson-Baker*, which is much more similar to the circumstances in this case.

¶ 39 *Jackson-Baker* held that, because "the trial court considered only documentary evidence *** a *de novo* review [was] appropriate." *Jackson-Baker*, 337 Ill. App. 3d at 1093. However, in order to reach a *de novo* review, the facts must be undisputed, there must not be issues of witness credibility, and there must be no in-court testimony. *Id.* Here, we believe, as Sly argues, that the parties disputed the effects of the facts. Specifically, there is testimonial conflict between Rolf Odermath and Kurz regarding Sly's involvement in the design and implementation of the dust collection system, including the placement of the collection points, and there is internal inconsistency in Rolf Odermath's deposition testimony evidenced by his repeated claims of poor

memory due to the fact that Sly's baghouse was installed 15 years before his deposition and his claims that Sly advised Odermath about the ductwork and collection points. Thus, even though the trial court proceeded solely on documentary evidence, there were disputed factual issues raised by the documentary evidence requiring the trial court to resolve them. Accordingly, we believe that the predicate for *de novo* review has not been established, and instead, we review whether the trial court's ruling on A-Square's amended motion to convert was against the manifest weight of the evidence. *Id.*; *McGee*, 287 Ill. App. 3d at 248. Such a standard of review also recognizes and accommodates the trial court's role as gatekeeper, adjudicating the fairness of subjecting the respondent in discovery to the full fact-finding process to which a party defendant is subjected. *Id.* at 247-48.[2]

¶ 40 A-Square emphasizes the relatively low hurdle of demonstrating probable cause pursuant to its motion to dismiss. A-Square argues that a "person of ordinary caution and prudence would entertain a strong suspicion that the alleged actions of Sly caused the injuries to VIP and Odermath." A-Square then points to five factual assertions it deems established by the evidence in order to demonstrate the existence of probable cause.

¶ 41 Before examining A-Square's factual assertions, we first note that its formulation of its burden is a bit lacking. Correctly stated, "[p]robable cause under section 2-402 will be established where a person of ordinary caution and prudence would entertain a strong suspicion that the purported negligence of [Sly] was a *proximate* cause of [A-Square's] injury." (Emphasis added.) *Jackson-Baker*, 337 Ill. App. 3d at 1093. In other words, the key to A-Square's

[2] We also note that, in any event, regardless of the standard of review chosen, abuse of discretion, manifest weight, or *de novo*, the result would be the same.

argument is the element of proximate causation. If A-Square cannot establish proximate causation, then there can be no probable cause to convert Sly into a third-party defendant.

¶ 42 "Proximate cause" embodies two distinct concepts: cause in fact and legal cause. *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶ 23. Cause in fact is embodied in the "but for" test and the "substantial factor" test: (1) a defendant's conduct is not the cause of an event if the event would have occurred without it (the "but for" test); and (2) a defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about (the "substantial factor" test). *Id.* By contrast, legal cause involves an assessment of the foreseeability, meaning that courts will ask whether the injury is the type of injury that a reasonable person would see as a likely result of the conduct, or whether the injury is so highly extraordinary that imposing liability is not justified. *Id.* ¶ 24.

¶ 43 Thus, the dispositive question in this matter is one of proximate causation: did Sly's conduct as alleged by A-Square constitute a proximate cause of the November 5, 2009, fire? We note that proximate cause is usually a question of fact; nevertheless, a court may determine the lack of proximate cause as a matter of law where the facts presented do not sufficiently establish both cause in fact and legal cause. *Rice v. White*, 374 Ill. App. 3d 870, 888 (2007).

¶ 44 A-Square makes the following factual assertions to support its contention that it had established probable cause to convert Sly into a party defendant:

> "1. Sly designed the Dust Collector, which was intended to remove dust from the Premises that created the risk of fire and explosion at the Premises (record citations).
>
> 2. Sly was involved in the design of the Dust Collection system at the Premises, which included the design of the ductwork that connected the Dust Collector to the interior of the Premises at dust collection points (record citation).

3. At the time of the Fire, there was a dangerous amount of dust present at the Premises (record citations).

4. The dust was the cause or a contributing cause of the Fire (record citations).

5. There was a buildup of dust in, and fire damage to, the ductwork portion of the dust collection system that Sly participated in designing (record citation)."

A-Square concludes that these factual assertions demonstrate that Sly was "a cause of the Fire that damaged the Premises." Again, this is not an entirely correct conclusion. We therefore deem A-Square's conclusion from its identified facts to be that Sly was a *proximate* cause of the fire that damaged the premises. We now turn to A-Square's factual assertions.

¶ 45 Regarding the first factual assertion, A-Square maintains that the dust collector, by which it appears to mean the baghouse, was "intended to remove the dust from the premises." A-Square implicitly assumes that Sly, by virtue of providing the baghouse (and, perhaps, advice), became a sort of "dust removal guarantor," but this assumption is contrary to the evidence in the record. The evidence demonstrates that Sly's baghouse or dust collector was designed to remove 99.9% of the airborne dust larger than half a micron in size, not that it was to remove all of the dust generated by Odermath's manufacturing process, or even all of the dust that made its way into the air and then into the baghouse. Both Rolf Odermath and Kurz testified that the purpose of the dust collection system was to remove the dust from the air. Kurz expressly testified that any dust collection system was not expected to remove all of the dust or other airborne pollutants from the air. Thus, to conform to the evidence, A-Square's first factual assertion should read that the baghouse was intended to remove dust from the air of the premises. We therefore reject A-Square's implied contention that Sly designed a system to remove from the premises all of the dust generated by Odermath's manufacturing process.

¶ 46 In its second factual assertion, A-Square maintains that Sly "was involved in the design of the Dust Collection system, which included the design of the ductwork." This assertion, too, seems not to be well supported by the evidence. Rolf Odermath testified that Odermath "received advice" about where to locate the collection points for the intake of the dust from the atmosphere. He was unable to remember anything else about the ductwork, such as the number of collection points, who put the ductwork in place, and the like, because it happened too long ago. Kurz, by contrast, testified that Sly provided the baghouse, but had no involvement regarding the installation of the baghouse or the ductwork, which is corroborated by the fact that Sly's baghouse was installed on the outside of Odermath's building. Rolf Odermath testified that the dust collection points had not changed significantly in 20 years within the premises. This testimony affirmatively rebuts A-Square's second factual assertion, because if the collection points had not changed for 20 years, meaning that the dust collection points originated around the time that Odermath occupied the subject property, then Sly's advice some 10 years later in 1999 did not change the collection points, so Sly could not actually have been involved in the "design of the ductwork that connected" the baghouse to the interior of the premises. Based on this record, we reject A-Square's second factual assertion.

¶ 47 A-Square's third factual assertion notes that, at the time of the fire, there was a dangerous amount of dust present at the premises. This assertion seems to be well supported by the record. Both the Naperville fire department and OSHA concluded that the ignition of dust was the primary cause of the fire. Additionally, the fact of the fire suggests that the amount of dust present in the premises was dangerous. A-Square's factual assertion, however, is artfully crafted to beg the actual question of where the dangerous dust was located: in the air or on the flat

surfaces in the premises. With that caveat, we can accept A-Square's formulation of its third factual assertion.

¶ 48 In its fourth factual assertion, A-Square states that the dust was a cause or a contributing cause of the fire. We note that this is actually more in the nature of a legal conclusion. As we discussed above, proximate cause is divided into cause in fact and legal causation. Cause in fact is further analyzed with the "but for" test (the dust was a cause) and the "substantial factor" test (the dust was a contributing cause). See *Turcios*, 2015 IL 117962, ¶ 23 (discussing the tests for cause in fact). A truly factual formulation would not include conclusions about causation in fact; rather, it would state that the dust constituted an ignition source for the fire. We further note that, under either A-Square's formulation or even a more neutral rearrangement of A-Square's formulation, the question of where the dust was located is again not addressed. OSHA and the Naperville fire department both concluded, based on interviews and review of the security footage, that the fire flashed up near Taranawski and on or about the conveyor box of the green mill while Taranawski was cutting or grinding metal. This suggests that the dust was on and in the conveyor box and that a spark or bit of molten metal caused by the cutting or grinding of the bolt landed on the dust in and on the conveyor belt apparatus and conveyor box and caused the initial ignition. For these reasons, then, we reject A-Square's formulation of point 4, because it is not factual, but represents a legal conclusion. We accept, however, the underlying factual predicate as we have modified it above.

¶ 49 In its fifth factual assertion, A-Square posits that "[t]here was a buildup of dust in, and fire damage to, the ductwork portion of the dust collection system," which is unexceptionable and supported by the evidence in the record. Specifically OSHA reported that the fire department had cut down damaged portions of the ductwork that were glowing and smoldering

after the fire. Dust was observed to be inside of some of the remaining portions. A-Square, however, moves beyond factual assertion and argues again that Sly "participated in designing" the ductwork. We have determined this assertion is not supported by the evidence. Rather, the evidence shows that, with Odermath's input and in reliance on Odermath's information, Sly designed the baghouse portion of the dust collection system, but did not participate in the installation of the baghouse, the cleaning and maintenance of the baghouse, or the installation, cleaning, and maintenance of the ductwork. Accordingly, we accept A-Square's assertion about dust being in the ductwork, but we continue to reject the assertion that Sly "designed" the dust collection system beyond the baghouse. The evidence simply does not support such a statement.

¶ 50 From its five factual assertions, A-Square concludes that it sufficiently demonstrated the existence of proximate cause to establish the necessary probable cause to convert Sly into a third-party defendant under section 2-402. We disagree.

¶ 51 In order to establish proximate cause, A-Square must demonstrate that Sly's conduct was a proximate cause of the fire that injured by Odermath and VIP. The legal causation, namely, the foreseeability, is not much in controversy. It appears eminently foreseeable that, in an environment that generates inflammable and explosive dust, a fire or explosion could result if Sly's contribution to the dust collection system were either inadequate or otherwise not eliminating the dust as designed. That leaves causation in fact for consideration.

¶ 52 Causation in fact may be established by either or both the "but for" test and the "substantial factor" test. *Turcios*, 2015 IL 117962, ¶ 23. The five factual assertions relied upon by A-Square do not demonstrate that Sly was involved in causing the fire under either of the tests. First, the evidence in the record does not support a conclusion that Sly's contribution to the layout of the ductwork was either the cause or a substantial factor in causing the fire. A-

Square's implicit argument is that, through faulty placement of the dust collection points, dangerous inflammable and explosive metal dust was allowed to accumulate culminating in the November 5, 2009, fire. The evidence on this issue showed that, according to Rolf Odermath, the layout of the ductwork, and specifically the dust collection points, had been consistent for the roughly 20 years that Odermath occupied the subject premises. Even if Sly advised Odermath about where to locate the dust collection points, the advice appears to have either been consistent with the preexisting layout of the ductwork system, or it was not taken and the preexisting layout of the ductwork system was maintained at and after the installation of the Sly baghouse. This suggests that the original design of the ductwork system and its dust collection points would be responsible. Because Sly did not participate in the original design of the layout of the ductwork and the dust collection points, it cannot be deemed responsible for the faulty location of the collection points. Thus, the trial court's conclusion that there was no causal link was not against the manifest weight of the evidence.

¶ 53 A-Square further appears to argue that, on the other hand, if Sly was hired by Odermath to design a dust collection system, meaning both baghouse and ductwork (including the layout), then by not relocating the dust collection points, Sly's omission could have been the cause or a substantial factor in causing the fire. This argument, too, is not borne out by the evidence. Rolf Odermath's testimony is, at best, equivocal. He was unable to remember important details, like whether Sly participated in the installation of the system, because it happened too far in the past, but was able to state that Sly provided "advice" on the placement of the dust collection points, but no other specifics, like from whom at Sly he received the advice. Kurz, by contrast, testified unequivocally that Sly had been commissioned to provide a baghouse to Odermath and nothing more. The trial court apparently accepted Kurz's testimony over Odermath's on this point, and

we cannot say it was against the manifest weight of the evidence. See *supra*, ¶ 39 (standard of review). Even if we were applying a *de novo* standard of review, Rolf Odermath's equivocation coupled with Sly's manifest dissociation from any continued involvement in dust removal at Odermath following the installation of the baghouse sufficiently undermines the omission argument. Similarly, therefore, Sly cannot be deemed responsible for its failure to place the dust collection points in (hypothetically) more effective locations because the evidence does not support that it was given this task. Accordingly, Sly's involvement with the layout of the ductwork cannot support a finding of causation in fact for the fire under either the "but for" or the "substantial factor" tests.

¶ 54 A-Square relatedly argues that the dust collection system was not properly performing its task, leading to a buildup of flammable and explosive metal dust, thereby increasing the hazard posed by the dust, leading to the occurrence of the fire. In support of this argument, A-Square points to the fact that dust was purportedly not being properly removed by the collection points because there was a buildup of the dust on flat surfaces each day, requiring the morning sweeping and vacuuming of the dust from the previous day's production. The record, however, does not support this contention. Both Rolf Odermath and Kurz testified that the purpose of the dust collection system was to remove particulate matter from the air, so, according to Kurz, the exhausted air from the premises complied with applicable environmental regulations. Further, both testified that the dust collection system was an air filtration system, and Kurz's testimony indicated it was not designed to remove all dust from every conceivable surface in the premises.

¶ 55 Additionally, and as noted by the trial court, Rolf Odermath testified that the dust collection system was working perfectly on the date of the fire. Moreover, the system had functioned for about 10 years without mishap before the fire, and the difference in the

environment at the Odermath facility on the date of the fire was the apparent cutting or grinding of metal lag bolts by Taranawski that occurred at the same time the fire was ignited.

¶ 56 We also note that the evidence in the record shows that Sly manufactured a baghouse for Odermath based on information provided by Odermath, about 10 years before the fire occurred. Sly was not involved in the installation of the baghouse or in its maintenance, such as the periodic cleaning and replacement of the filter bags, or the periodic emptying of the collection barrel. In addition, the evidence shows that Sly was not involved in the maintenance of the ductwork. Indeed, the evidence shows that, in June 2009, Odermath replaced all of the filter bags in the baghouse and stripped out old ductwork and installed new ductwork, all of which coincided with the modification of green mill. It is unclear from the evidence whether modification of the green mill might have required a recalibration of the dust collection system, such as an increase in the suction, a repositioning of the duct collection points, and the like. Likewise, while old ductwork was replaced, it is not clear that it was replaced by new ductwork of the same dimension, greater dimension, or lesser dimension, any and all of which may have had an influence on the functioning of the dust collection system. Moreover, what is clear in the evidence was that Sly was not involved in the work performed on the ductwork at that time (or at any time including after the installation of the baghouse). This undercuts A-Square's argument that a buildup of dust within the ductwork suggests that the system was not functioning properly, because the changes made by Odermath are an intervening event. Because in June 2009 Odermath overhauled the ductwork and modified the baghouse machinery by installing an air dehumidifier, we cannot say that any flaws in Sly's design of the dust collection system could have been the cause or a substantial factor in the fire.

¶ 57 A-Square can also point to the buildup of dust in the ductwork as evidence that the system was not and may have never been functioning properly so as to abate the risk posed by the dust in the premises. This contention fails for the same reasons. In June 2009, Odermath replaced at least some of the ductwork. It is unclear whether the ductwork (if any) that was not replaced had the buildup of dust noted by the investigators of the fire, or if it was limited to old or even new ductwork alone. The topic of overhauling the ductwork was one of the topics about which Rolf Odermath's memory was fuzzy because it was too long ago at the time of his deposition. In addition, A-Square's contention begs the question about Odermath's cleaning and maintenance of both the ductwork and the baghouse, and how frequently it should have occurred versus how frequently it actually occurred.

¶ 58 Finally, we note that Odermath provided the specifications for the volume of air to be moved through the baghouse per minute. This corresponds to the suction provided by the dust collection system. This also corresponds to the size of the particulate matter that will be drawn through the system. If a particle of dust is too heavy, then the current level of suction cannot draw it through the system, and the particle will settle on a surface. If Odermath were experiencing excessive dust buildup during the nearly 10 years the system functioned without mishap, then the suction level would have been too low, but the evidence showed unequivocally that Odermath provided the information as to its needs regarding the airborne dust filtration, and that it provided accurate information. The fact that the system functioned without mishap suggests that it was correctly calibrated. The only event in the evidence where the system appears to have been changed occurred in June 2009, shortly before the fire, when Odermath refurbished the ductwork and the filtering apparatus, and modified the baghouse by installing an apparatus to dry the air passing through (because some of the metal dust was flammable upon

exposure to water). Sly had the expertise to design the baghouse and the other apparatus required to draw dust-laden air through the system and to advise Odermath about the appropriate options based on its communicated needs. The fact that the system functioned without mishap for nearly 10 years strongly supports the inference that Sly's formulation of the baghouse was proper and worked in practice. Based on our review of this evidence, we reject A-Square's contention that the buildup of dust within the ductwork supports a conclusion that the dust collection system was not properly functioning.

¶ 59 A-Square argues that OSHA concluded that the fire may have been caused by the ignition of dust in the ductwork. The evidence in the record is contrary to this argument. OSHA appears to have concluded that the fire was ignited by sparks from cutting or grinding metal near the green mill. The fire ignited there, traveled onto the green mill and a flash from the conveyor box was seen. At that point, burning matter may have been drawn into the ductwork by the normal suction provided by the baghouse resulting in the fire damage seen to the ductwork. A-Square's argument ignores the evidence of the fires seen in the security camera footage and based on the interviews conducted by the OSHA and fire department investigators.

¶ 60 The trial court concluded that the evidence was insufficient to connect Sly causally to the fire. We agree. The evidence shows that Sly fabricated a baghouse, included the fan to drive the suction, but had little involvement in the installation of the baghouse on site. The evidence is conflicting as to Sly's involvement in designing the layout of the ductwork and the dust collection points. Rolf Odermath testified that Sly provided advice about the collection points, which the trial court and the parties seem content to interpret as advice about the location of the collection points, and not about how the collection points were fabricated. Kurz testified that Sly had no involvement with the ductwork or collection points, and this testimony was corroborated

by Rolf Odermath's testimony that the ductwork layout was consistent throughout Odermath's tenure in the premises. Thus, Rolf Odermath's testimony was inconsistent, and the trial court apparently discounted it in its analysis. We cannot say the trial court's judgment on causation, especially in light of Rolf Odermath's inconsistent testimony, including his inability to remember what had happened at the time Sly provided the baghouse to Odermath, was against the manifest weight of the evidence.

¶ 61 The evidence also demonstrated that Sly had no involvement in the maintenance of the dust collection system once it was installed and functioned without mishap for nearly 10 years. In June 2009, Odermath changed and upgraded at least the green mill, but there is no evidence as to how this affected operations, including the production and removal of the metal dust generated in the production of cored wire. The evidence shows that Sly had no involvement in the associated changes to the dust collection system, including the replacement of the filter bags, the replacement of the ductwork, or the installation of an apparatus to dry the air moving through the baghouse. The evidence is silent as to the effects of this work on the functioning of the dust collection system. In any event, Sly was not contacted for and did not provide any input for the changes made to the mills and the dust collection system in June 2009, which appear to be intervening events. In short, we cannot say that the trial court's conclusion, that Sly's conduct in providing the baghouse and any other services related to the dust collection system during its 1999-2000 installation was not causally related to the 2009 fire, was against the manifest weight of the evidence. (Even viewing the evidence and reviewing the trial court's judgment *de novo*, we cannot discern a cause-in-fact connection (under either the "but-for" or "substantial-factor" tests) between Sly's conduct and the fire.) Accordingly, we affirm the trial court's judgment

denying A-Square's motion to convert Sly into a third-party defendant. We now turn to A-Square's particular arguments.

¶ 62 A-Square challenges the trial court's conclusion, based on Rolf Odermath's testimony, that the system was working perfectly because the collection barrel had been filled with dust. According to A-Square, the trial court's conclusion is backward: whether the dust collection system was properly functioning at the time of the fire is not measured by the amount of dust in the barrel as representative of what it was removing from the premises, but rather, it should be measured by "the amount of dust that the [dust collection system] was NOT removing from the Premises." (Emphasis in original.) A-Square's argument is malformed in at least two respects.

¶ 63 First, the unstated assumption of the argument is that the dust collection system was meant to be more than an air filtration system, to the point that it was supposed to remove any and all dust generated by Odermath's manufacturing processes. This assumption is not based on the evidence, but only on the legal exigencies of A-Square's position. A-Square's reasoning reveals the unstated assumption:

> "[T]he significant accumulation of dust within the Premises, occurring on a daily basis, is evidence that, no matter how much dust the Dust Collect[ion system] was removing from the Premises on the date of the Fire, it was not removing enough dust to remove the danger of fire and explosion presented by the dust. The Dust Collector[3] was installed for the purpose of removing these very same dangers (citation)."

[3] We are unsure if A-Square means "baghouse" or "dust collection system." Either way, our analysis remains the same.

A-Square's citation in the above-quoted passage is to Rolf Odermath's deposition, in which he stated that the safety reason for the dust collection system was "[t]o collect the dust and so the dust wouldn't be in the air and produce any kind of dangers." Rolf Odermath's testimony expressly rebuts A-Square's unstated assumption that the dust collection system was supposed to remove any and all dust, not just the dust that was flung into the air as a result of the manufacturing process.

¶ 64 Second, the way to measure the functioning of an air filtration system is, in fact, by the amount of particulates it filters out of the air. One of the measures is to see if the filters trap the particulates, so the trial court's conclusion, that the dust collection system was functioning properly because the filters had been removing metal dust from the air, was correct.

¶ 65 Additionally, the formulation of A-Square's contention begs its actual question: was the dust collection system removing enough metal dust from the air inside the premises? The evidence suggests that it was. First, as the trial court noted, the collection barrel had been filled with metal dust, probably due to the percussive effect of the explosion knocking the dust off of the filter bags, which indicated that the system had been removing metal dust from the air as it was supposed to. More important, though, was the description of the security footage, which showed that the fire started at the same time and in the same location Taranawski was generating sparks. Taranawski and Komar tried to beat the fire out, but it spread into the green mill and there was a large flash from the green mill, apparently corresponding to the explosion observed by Rolf Odermath and the other employees, as related to the OSHA investigator. This suggests that the air in the premises was sufficiently free of airborne dust; otherwise, given its explosive nature, the explosion could have been much larger and much more catastrophic. Thus, we

conclude that the evidence in the record cuts directly against A-Square's contention, and we reject that contention.

¶ 66 A-Square argues that, if the collection barrel was completely full, and had been for an unknown amount of time, the trial court could not have correctly concluded the dust collection system was properly functioning. We disagree. There is direct testimony in the evidence that the system was functioning perfectly. The reason the collection barrel was full was reasonably explained. There is also negative evidence, namely, that the entire building was not leveled by the type of explosion that would have occurred had explosive metal dust saturated the air inside the premises. Moreover, the ignition of the fire and the explosion were not caused, according to OSHA, by airborne dust, but by the generation of sparks from cutting or grinding the metal lag bolts used to anchor the light fixture and by the spread of the fire into the green mill. Accordingly, we determine that A-Square's insinuation that the dust collection system may have been malfunctioning or been blocked by a full collection barrel, leading to a loss of suction, is not supported by the record; the trial court's conclusion that the full barrel indicated that the dust collection system was properly functioning was not against the manifest weight of the evidence.

¶ 67 We also note that A-Square's position on the full collection barrel overlooks any responsibility that Odermath had to maintain and clean the dust collection system by, say, emptying a full collection barrel. Kurz testified that the baghouse was shipped to Odermath, who employed a third party and its own employees to install it. There was no evidence suggesting that Sly was supposed to or required to assist with the installation of the baghouse. Kurz also testified that, included with the baghouse was a magnehilic gauge which was to be installed by Odermath to give Odermath an idea when the filter bags became clogged and needed to be cleaned because of the loss of suction. Thus, the evidence showed that a complete

baghouse system had been provided to Odermath and that Odermath installed it. There was also evidence that Sly performed some troubleshooting for Odermath once the baghouse had been installed, even if no Sly personnel actually worked on the baghouse and related systems. There was also evidence that Odermath undertook to perform the routine periodic maintenance and cleaning of the dust collection system and Sly was never involved with the routine maintenance and cleaning of the dust collection system. There is no evidence that Sly could influence Odermath's responsibility for routine maintenance and cleaning of the system, and Odermath's responsibility for the routine maintenance and cleaning of the system, including the emptying of the collection barrel, undercuts A-Square's arguments.

¶ 68 A-Square also argues that the collection barrel did not have an indicator to show when the collector barrel became filled, thereby potentially degrading the performance of the system without Odermath's knowledge. A-Square contends that this lack of indicator is a design flaw in Sly's baghouse and dust collection system. We disagree. Kurz testified that, included along with the baghouse was a magnehilic gauge, which provided an indication that the system was losing suction, whether by the filter bags becoming dirty or by the barrel becoming full. Thus, there was instrumentation provided to help Odermath determine when to empty the barrel, and this rebuts A-Square's argument.

¶ 69 A-Square also argues that the trial court erred in its pronouncement of judgment because it "read the deposition of two other people and they stated that [the dust collection] system does not guaranty that all the dust in the air *** will, in fact be removed." A-Square points out that the trial court had only the depositions of Rolf Odermath and Kurz before it, so it cannot have actually read the depositions of "two other people." We agree with A-Square's point, but we

note that, as A-Square does, the two people have to be Rolf Odermath and Kurz, and we ascribe the trial court's statement to a slip of the tongue while orally pronouncing judgment.

¶ 70 A-Square also notes that Rolf Odermath offered no testimony that a dust collection system does not guarantee the removal of all of the dust. We again agree. We have carefully reviewed the record and Rolf Odermath was not asked any questions regarding the percentage of dust a dust collection system may be expected to remove, and he offered no testimony on that topic. We do note, however, that Rolf Odermath's testimony established both that the purpose of the dust collection system was to remove metal dust generated by the manufacturing process from the air, and that the system was functioning perfectly on the date of the fire. Kurz testified that a dust collection system cannot be expected to remove 100% of the dust from the air, especially given that the filter bags are designed to remove only 99.9% of the particles above a specific size (in this case, half a micron), and that the dust collection system only removes dust from the air delivered to the baghouse. Based on Kurz's testimony about the dust collection system, we believe that Rolf Odermath's testimony is corroborative, because he testified that the system was to remove dust from the air and that it was functioning perfectly on the date of the fire. Accordingly, while the court may have misspoken about the depositions it relied on, its conclusion is supported by evidence in the record, and we cannot say that it was against the manifest weight of the evidence.

¶ 71 A-Square argues that Kurz's testimony regarding the amount of dust removed by the Sly dust collection system was inconsistent. We disagree. A-Square interprets Kurz's testimony to guarantee removal of all dust at the collection points, paraphrasing it: "if the dust collection points and ductwork are designed properly, then the dust around the collection points should be removed." This is not a fair interpretation of Kurz's testimony, as it overlooks Kurz's express

testimony that "[t]he dust collector is not required nor do we ever guarantee removing dust from a customer's facility. We remove dust from the air that is delivered to the dust collector." We also note that, in testifying about the design of the ductwork, Kurz was answering a hypothetical question because he expressly testified that Sly had no input into the design or layout of the ductwork (which was corroborated by Rolf Odermath's testimony that the collection points remained consistent throughout Odermath's tenure at the subject premises), and Kurz limited his answer to the "dust that's being generated inside the enclosure" and not all of the dust that may be generated within the facility. Thus, we believe that Kurz was not inconsistent in his testimony but was clear that Sly's baghouse did not purport to remove all of the dust from the premises, all of the dust in the air of the premises, or even all of the dust in the air traveling through the baghouse. The trial court's reliance on Kurz's testimony and Rolf Odermath's corroboration of it was not against the manifest weight of the evidence. Accordingly, we reject A-Square's particular arguments.

¶ 72 III. CONCLUSION

¶ 73 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 74 Affirmed.