

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

HEALTHSOUTH CORPORATION, :  
 :  
 Appellee, :  
 : Case No. 07-2281  
 v. :  
 : Appeal from BTA  
 WILLIAM W. WILKINS [RICHARD A. :  
 LEVIN], TAX COMMISSIONER OF OHIO, : Case No. 2005-A-1386  
 :  
 Appellant. :

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REPLY BRIEF OF APPELLEE

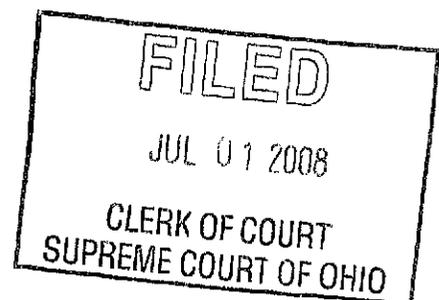
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NICHOLAS M. RAY (0068664)  
(Counsel of Record)  
Siegal Siegal Johnson & Jennings Co., LPA  
3001 Bethel Road, Suite 208  
Columbus, Ohio 43220  
Telephone: (614) 442-8885  
Facsimile: (614) 442-8880

ATTORNEYS FOR APPELLEE

NANCY H. ROGERS (0002375)  
Attorney General of Ohio  
BARTON A. HUBBARD (0023141) Assistant  
Attorney General  
(Counsel of Record)  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-5967  
Facsimile: (614) 466-8226  
[bhubbard@ag.state.oh.us](mailto:bhubbard@ag.state.oh.us)

ATTORNEYS FOR APPELLANT



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## APPELLEE'S REPLY BRIEF

### I. Introduction/Summary

The Tax Commissioner relies on two independent grounds for reversing the BTA and affirming the Commissioner's final assessment certificates denying HealthSouth's personal property tax refund claim for the 2002 tax year.

#### A. HealthSouth's accounting-fraud overcapitalization bars its refund claim.

HealthSouth brazenly predicates its refund claim on its assertion that, in filing its 2002 Ohio personal property tax return, it intentionally overstated the true values of its Ohio personal property using acquisition costs figures that it knew to be fraudulently overcapitalized. HealthSouth asserts that it did so in order that its fraudulent overstatement of its income and assets on its financial statements filed with the U.S. Securities and Exchange Commission (SEC) would not come to light. Made under penalties of perjury, these allegedly fraudulent misrepresentations in HealthSouth's 2002 tax return were reasonably relied on by the Commissioner, the school districts, and the other taxing district recipients of personal property tax revenues.

If HealthSouth were granted its tax refund claim, the tax-revenue recipients of HealthSouth's previously paid taxes would be substantially harmed for they would be required to finance the refunds out of current and future operating budgets. Under these undisputed facts, this Court's straight-forward application of estoppel principles properly bars HealthSouth's refund claim.

Indeed, in the history of Ohio taxation and, apparently, in the history of all other taxing jurisdictions as well, the BTA's decision below stands alone as the only known, published

decision granting a tax refund on the basis of a tax refund claimant's openly admitted, fraudulent overstatement of the tax. See the Commissioner's opening brief ("T.C.Br.") at 14.

In stark contrast, as we detailed in our opening brief, an array of Ohio tax law precedent provides compelling authority for the Court to reverse the BTA's one-of-a-kind, "outlier" decision on estoppel grounds. T.C.Br. 12-19. This case law authority includes a long-standing and continuous body of tax decisions on which this Court has applied estoppel principles against the Commissioner to bar his otherwise lawful assessment<sup>1</sup> or to grant a refund that otherwise would be lawfully denied<sup>2</sup>. Moreover, it includes a directly-on-point tax decision by the Clark County Court of Appeals applying estoppel to bar a taxpayer's challenge to a Commissioner-issued personal property tax assessment<sup>3</sup>.

Tellingly, HealthSouth's brief fails to address the very recent *HealthSouth* tax decisions from the Alabama Supreme Court and Connecticut Superior Court that we cited and relied on in our opening brief<sup>4</sup>. In both, the court denied HealthSouth's personal property tax refund claims for the very same 2002 tax year at issue here and regarding the very same kind of accounting-fraud overcapitalization.

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<sup>1</sup>*Ormet Corp. v. Lindley* (1982), 69 Ohio St.2d 263; *NLO, Inc. v. Limbach* (1993) 66 Ohio St.3d 389; and *Lyden Co. v. Tracy* (1996), 76 Ohio St.3d 66.

<sup>2</sup> *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St.3d 232;

<sup>3</sup> *The William Bayley Co. v. Lindley* (March 28, 1979), Clark Cty. App. No. 1308, unreported, 1979 Ohio App. LEXIS 9958, Appx. 1-4. In fact, as we discuss in Section III, *infra*, the instant case presents an even stronger factual basis for barring HealthSouth's tax claim on estoppel grounds than the Court of Appeals was presented with in *William Bayley*.

<sup>4</sup> *Ex Parte HealthSouth Corp. (In re: HealthSouth Corporation v. Jefferson County Tax Assessor, Dan Wietrib, and Jefferson County Tax Collector, J.T. Smallwood)* (2007, Ala. S.Ct.), \_\_\_ So. 2d \_\_\_, 2007 Ala. LEXIS 174, T.C.Br. Appx. 18-28; *Healthsouth Corp. v. City of Waterbury et al.* (March 13, 2008, Conn. Sup. Ct.), Case Nos. CV0540111048, CV054010916, CV05401807, CV054002794, and CV054006234, T.C.Br. Appx. 29-33;

As here, in the Alabama and Connecticut *HealthSouth* cases, HealthSouth claimed that that it had fraudulently listed on its 2002 personal property tax returns “AP SUMMARY” asset listings that were “fictitious” assets. As here, HealthSouth claimed that the “AP SUMMARY” asset values were included in its personal property tax returns so that the fraudulent overstatement of HealthSouth’s assets and income on its financial statements filed with the U.S. Securities and Exchange Commission (SEC) would not be discovered. The Alabama and Connecticut courts denied HealthSouth its refund claims because any overpayments of the tax were the result of HealthSouth’s intentional and fraudulent overstatement of its asset values. In other words, the basis on which HealthSouth sought and was denied its refund claims by the Alabama and Connecticut courts is the identical basis on which the BTA granted HealthSouth’s refund claim below.

Furthermore, the Ohio courts’ application of estoppel principles to tax cases represent just one of a myriad of contexts in which these principles have been held to apply. The Ohio School Board Association’s (OSBA’s) amicus brief provides a detailed and comprehensive discussion of these principles as applied in numerous tort, contract and administrative law decisions involving a wide spectrum of causes of actions and litigants<sup>5</sup>.

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<sup>5</sup> See OSBA Br. 12-22, citing and discussing a myriad of Ohio cases including: *The Hampshire County Trust Co. of North Hampton, Mass., Trustee and Executor, et al. v. Stevenson* (1926), 114 Ohio St. 1; *Goldberger v. Bexley Properties* (1983), 5 Ohio St. 3d 82; *Ohio State Bd. of Pharm. v. Frantz* (1990), 51 Ohio St.3d 143, 145; *Dayton Sec. Assocs. v. Avutu* (1995), 105 Ohio App.3d 559, 563; *LeCrone v. LeCrone* (2004), 2004 Ohio 6526 at ¶25 *First Federal Sav. & Loan Assoc. v. Perry's Landing, Inc.* (1983), 11 Ohio App. 3d 135, 145; *Egan v. National Distillers & Chemical Corp.* (1986), 25 Ohio St.3d 176, 179; *State ex rel. Ryan v. State Teachers Ret. Sys.* (1994), 71 Ohio St.3d 362, 368; *State ex rel. Richard v. Board of Trustees of Police and Firemen's Disability and Pension Fund* (1994), 69 Ohio. St.3d 409, 414; *Parr v. Jackson Twp. Board of Trustees* (Oct. 18, 2004), 2004 Ohio 5567, 2004 Ohio App. LEXIS 4987, at ¶ 19-20, Appx. 22-30; *Ohio Bank v. Beltz*, 2002 Ohio 4886 at ¶27, Appx. 14-20; *McCahan v. Whirlpool Corp.* (1986), 1986 Ohio App. LEXIS 8185 at \*\*5-6, Appx. 11-13; and *Flinn v. Hardin Quarry Co.* (1980), 1980 Ohio App. LEXIS 11123, Appx. 5-10.

In response, HealthSouth's answer brief filed with this Court is virtually silent on the substantive merits of this issue. Instead, HealthSouth asserts that the issue is not properly before this Court because it allegedly constitutes a "new" one. HS.Br. 10-12. As we detail in Section II, *infra*, the Commissioner specifically raised the estoppel issue in his notice of appeal to this Court and, therefore, complied fully with the requirements for invoking this Court's jurisdiction under R.C. 5717.04. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122; 2008 Ohio 511 at ¶14, f.n.3. Moreover, the Commissioner expressly raised this issue at the BTA. The Commissioner's counsel's closing argument at the BTA evidentiary hearing prominently featured accounting fraud estoppel as a complete bar to HealthSouth's tax refund. Tr.144-145, Supp.49-50. Thus, HealthSouth's jurisdictional challenge is easily refuted.

HealthSouth's brief devotes only a few paragraphs of its brief to addressing the legal merits of our estoppel grounds for reversing the BTA. See HS.Br. 13-14. HealthSouth fails to mention any of the cases relied on by the Commissioner and the OSBA, as amicus. Instead, HealthSouth selectively quotes from two inapposite decisions<sup>6</sup>.

As we detail in Section III, had HealthSouth set forth the facts and issues in those two cases, the inapplicability of these decisions instantly would have been revealed. Moreover, by failing to acknowledge any of the substantial body of case law relied on by the Commissioner and the OSBA, HealthSouth could not have more effectively conveyed its inability to rebut our reliance on this large body of established precedent or to provide the Court with any reasonable basis to depart from that precedent here.

HealthSouth devotes most of its answer brief to addressing a "strawman" argument of its own making. HealthSouth focuses its efforts on establishing the obvious point that

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<sup>6</sup> *In re Application of Country Collector v. Arizona Metro Corp.* (1977, Ill. App.), 53 Ill. App.3d 156, 368 N.E.2d 798; and *Asphalt Indus., Inc. v. Commissioner* (C.A. 3, 1967), 384 F.2d 229.

fictitious assets are not subject to taxation. This observation is simply not responsive to our estoppel claim. The Commissioner's basis for reversing the BTA's decision on estoppel grounds is that, to the extent that HealthSouth included such fictitious assets as taxable property in its 2002 personal property tax return, it did so fraudulently and intentionally. Thus, as a defense to our estoppel claim, the observation that "fictitious assets are not taxable" is no defense at all.

**B. Even if HealthSouth's role as the perpetrator of its own accounting fraud were not to bar its refund claim on estoppel grounds, HealthSouth failed to establish by probative and competent evidence the extent to which its asset values were fraudulently overstated and, thus, its refund claim fails factually.**

HealthSouth's observation that fictitious assets are not subject to taxation is likewise unresponsive to our second basis for reversal of the BTA: HealthSouth failed to establish by competent and probative evidence the extent, if any, to which the asset values that it reported as taxable on its 2002 tax return were, in fact, "fictitious" assets.

As we emphasized in our initial brief, HealthSouth did not provide the Commissioner or the BTA with any of the records of HealthSouth's actual, on-site physical inventory reviews that HealthSouth allegedly undertook to determine and identify the actual fixed asset properties located at its various facilities in Ohio and elsewhere. Nor did HealthSouth provide the Commissioner or the BTA with any of its accounting books and records showing the results of HealthSouth's on-site physical inventory reviews. That is, HealthSouth did not furnish any of its accounting records showing that, as a result of the on-site physical inventory reviews, the alleged "fictitious" assets, i.e., the "AP SUMMARY" entries, had been removed from its books and records and were no longer being listed as taxable assets on its Ohio facility-specific balance sheets and asset ledgers.

Instead, HealthSouth relied solely on uncorroborated, summary, multiple-level hearsay documentation and uncorroborated, multiple-level hearsay witness testimony asserting that the AP SUMMARY entries constituted fictitious assets. As such, the documentation and testimony presented by HealthSouth was pure, uncorroborated hearsay and failed to constitute probative or competent evidence. But this is not all.

Not only does HealthSouth's hearsay documentation fail to constitute probative or competent evidence to support its refund claim, it constitutes an admission against interest fatal to that claim. As we detail in Section IV, *infra*, an analysis of HealthSouth's only BTA exhibit purportedly reflecting any Ohio-facility specific data, BTA Ex. 4, Supp. 127-156, shows that, at the very least, HealthSouth's refund claim is vastly overstated, the full extent of which cannot be ascertained under this record. Thus, for this second and independent reason, the Court should reverse the BTA and affirm the Commissioner's denial of HealthSouth's refund claim.

**II. Because the Commissioner specified the issue in his notice of appeal to this Court as required under R.C. 5717.04, the Court has been conferred with jurisdiction to consider the estoppel issue.**

As its principal defense to reversal of the BTA on the basis of estoppel principles, HealthSouth contends that this issue is jurisdictionally not before the Court. See particularly, HS.Br. 10-12. Specifically, HealthSouth contends that because the Commissioner did not file a BTA brief, the Court has not been conferred with jurisdiction to consider this "new" issue. *Id.*

HealthSouth's answer brief, however, fails to acknowledge a crucial jurisdictional fact which is dispositive in favor of the Commissioner. As the Commissioner clearly stated in his opening brief and HealthSouth does not contest, the accounting fraud estoppel issue was specified in detail in numbered paragraph 7 of the Commissioner's Notice of Appeal to this

Court. T.C.Br. 1; T.C.Br. Appx. 4 (the relevant page of the Commissioner's Notice of Appeal to the Court). Thus, by specifying this error in his Notice of Appeal, the Commissioner has invoked this Court's jurisdiction under R.C. 5717.04.

This Court recently rejected a nearly identical jurisdictional argument to the one advanced by HealthSouth here. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122; 2008 Ohio 511 at ¶14, fn.3. In *Columbia Gas Transmission*, the appellee taxpayer asserted that the Commissioner was jurisdictionally barred from raising an issue in support of reversal of the BTA's decision because the Commissioner had not raised it in proceedings before the BTA. The Court rejected that jurisdictional argument as follows:

Columbia incorrectly claims that this issue was not preserved for appeal; the Tax Commissioner **raised this issue in his amended notice of appeal. See R.C. 5717.04.**

(Emphasis added.)

The jurisdictional ruling in *Columbia Gas* should have particular force because the Court resolved the case in favor of the Commissioner on the basis of the very issue that the appellee taxpayer had sought to jurisdictionally bar. The issue that the appellee taxpayer challenged jurisdictionally involved the applicability of the express "primary business" test set forth in R.C. 5727.02(A). After ruling that the Commissioner's specification of the error in his Notice of Appeal to the Court conferred the Court with jurisdiction to consider the R.C. 5727.02(A) issue, the Court then went on to unanimously reverse the BTA on the basis of that issue. Thus, *Columbia Gas Transmission* is controlling in favor of the Commissioner here.

Moreover, in favorable contrast to *Columbia Gas Transmission*, in the present case, not only did the Commissioner raise the estoppel issue in his Notice of Appeal to this Court, the Commissioner expressly raised the accounting fraud estoppel issue at the BTA. In his closing

argument at the BTA evidentiary hearing he emphasized and detailed that very issue as grounds for affirmance of the final assessment certificates, referring the BTA attorney-examiner to a Court of Appeals decision directly on point, *The William Bayley Co. v. Lindley* (March 28, 1979), Clark Cty. App. No. 1308, unreported. Tr.144-145, Supp. 49-50, Appx. 1-4. For this reason, the jurisdictional challenge brought by HealthSouth here presents the Court with an easier case for upholding the Court's jurisdiction to consider the accounting fraud estoppel issue than the Court was confronted with in *Columbia Gas Transmission*.

Finally, the cases that HealthSouth cites in support of its jurisdictional challenge strongly support the Commissioner. HealthSouth cites four Ohio Supreme Court decisions, all of which stand for the established jurisdictional principle that, in an appeal to the BTA pursuant to R.C. 5717.02, or from the BTA to this Court pursuant to R.C. 5717.04, the appellant's notice of appeal must specify the errors complained of in the decision appealed from<sup>7</sup>.

In stark contrast to the litigants' failures to specify error in their notices of appeal in foregoing cited cases, the Tax Commissioner has fully complied with the specification of error requirement of the relevant appeals statute, R.C. 5717.04. Thus, HealthSouth's jurisdictional challenge is erroneous and provides no basis for affirming the BTA's decision.

**III. As its substantive defense to the Commissioner's accounting fraud estoppel grounds for reversal of the BTA, HealthSouth exclusively relies for its legal authority on two cases that are wholly inapposite to resolving that issue.**

HealthSouth alternatively submits that the Commissioner's accounting-fraud estoppel grounds for denying HealthSouth's refund claim is substantively in error, but its answer brief is

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<sup>7</sup> See HS.Br. 12, f.n.24, citing to *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006 Ohio 2420; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Queen City Valves v. Peck* (1954), 161 Ohio St. 579; and *Osborne Bros. Welding Supply, Inc. v. Limbach* (1988), 40 Ohio St.3d 175.

devoid of pertinent authority or analysis. In response to the Commissioner's opening brief on this issue, HealthSouth ignores all of the cases that the Commissioner and the OSBA amicus cited and discussed. Instead, for its legal authority, HealthSouth exclusively relies on two decisions, *In re Application of Country Collector v. Arizona Metro Corp.* (1977, Ill. App.), 53 Ill. App.3d 156, 368 N.E.2d 798; and *Asphalt Indus., Inc. v. Commissioner* (C.A. 3, 1967), 384 F.2d 229. Neither of these decisions, however, involves a request for tax refund for taxes previously intentionally and fraudulently overstated by the taxpayer.

The Illinois lower appellate court decision in *Arizona Metro Corp.* is plainly inapposite as a defense to the Commissioner's estoppel grounds for reversal of the BTA's decision. There, a personal property taxpayer successfully challenged a tax assessment on the value of storage tanks that the Fulton, Illinois' tax assessor had estimated in the absence of a tax return filed by the taxpayer. 53 Ill. App.3d at 157-158. The tax assessor estimated the value of the storage tanks to include quantities of oil stored therein.

The tax assessor based his estimate on the immediately preceding personal property tax year's return filed by the taxpayer's predecessor in ownership, who had reported values for quantities of oil stored in the tanks. *Id.* at 157. In actuality, as of the applicable tax valuation date, the storage tanks were empty. When the tax went unpaid, the county collector sought to foreclose on the taxpayer's real property in order to satisfy the personal property tax assessment. *Id.* at 158. Under these facts, the Illinois appellate court held that the unpaid personal property tax assessment was erroneous and, therefore, dismissed the foreclosure action. *Id.* at 159.

Significantly, in *Arizona Metro Corp.* no taxpayer misrepresentations, fraudulent or otherwise, were involved. The present case is quite different. HealthSouth seeks a refund of personal property taxes based on its own asserted intentional and fraudulent misrepresentations

that were reasonably relied on by the Commissioner and the taxing district recipients of the personal property tax revenues. HealthSouth's refund claim is predicated on the assertion it intentionally and fraudulently overvalued its Ohio personal property in order to hide its fraudulent overcapitalization of assets and income on its SEC-filed financial statements.

Thus, in stark contrast to the present case, in *Arizona Metro Corp.*, the basic elements of a successful estoppel defense were not involved. There were no misrepresentations by the party against whom the estoppel bar would apply and there was no reasonable reliance on those misrepresentations by the party asserting the applicability of estoppel. For these reasons, that case is wholly inapposite to the issue presented here.

Nor is *Asphalt Indus.* at all helpful to HealthSouth. First, as in *Arizona Metro*, in *Asphalt Indus.* no refund of taxes was involved and, hence, no "detrimental reliance" was present akin to the detrimental reliance of Ohio's taxing districts here. Rather, the issue presented in *Asphalt Indus.* is far removed from the issue presented here. The *Asphalt Indus.* court rejected the IRS' attempt to impose additional taxes on a closely-held, private corporation on the basis of the corporation's failure over several years to report as income monies that were generated by the corporation's previous president and 50% shareholder (a Mr. Anderson), who had never disclosed the existence of the income but instead had embezzled those monies from the corporation. 384 F.2d at 235.

When the president died, the corporation's treasurer and co-50% shareholder (a Mr. Schwoebel, who became 100% owner of the corporation on Anderson's death) discovered the embezzlement and Anderson's failure to have disclosed as income the embezzled funds on the corporation's federal income tax returns. *Id.* at 230. He then promptly and voluntarily reported his discovery to the IRS. *Id.* Despite the corporation's failure to have recovered the embezzled

funds, which thereby entitled it for federal income tax purposes to a full business expense deduction for the embezzlement losses, the IRS attempted to impose tax assessments for the years in which the embezzled income had been received by the corporation, arguing that the deductions for the embezzlement loss could not be taken in the same years in which the income had been generated<sup>8</sup>.

In order to be able to impose the assessments, the IRS sought a ruling that the generally applicable three-year statute of limitations within which the IRS may issue assessments should not apply, asserting that the corporation's previous president's fraud provided lawful grounds for disregarding it. Under the unique circumstances of that case, the court declined to impute the ex-president's fraud to the corporation so as to "break the three-year limitation barrier." 384 F.2d at 232. The court emphasized that the ex-president, by embezzling the funds, was not acting for the corporation but against it. *Id.* at 233. Under these facts, the court reasoned that the "innocent" 100% shareholder, Schwoebel, who in no way benefited from, or was responsible for, the embezzlement, should not be subjected to tax assessment after the statute of limitations had run. *Id.* at 235.

In addition to the foregoing differences in the facts, issues, rationale and holding of *Asphalt Indus.* from those of the present case, the court found crucial to its rationale and holding a further factor for its decision highly significant here. Namely, the court emphasized the absence of any adversely affected, innocent third parties, as follows:

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<sup>8</sup> As explained by the court, in computing the corporation's income tax assessment liability, the IRS did not allow the embezzlement losses to be deducted in the years in which the embezzlements actually occurred, which would have negated the entire income tax assessments. Instead, the IRS argued that the embezzlement loss deductions could be taken by the corporation only in the year in which the corporation discovered the embezzlement loss. The court questioned the reasonableness and lawfulness of the IRS position, but found it unnecessary to expressly rule against the IRS on that ground, given that its ruling reached that result in any event. 384 F.2d at 232-233.

But there could be no conception of apparent authority to commit fraud against the corporation and against Schwoebel's interest in it in a case such as this, in which there is no room for the application of the doctrine that as between two innocent parties the loss should be borne by the one who made it possible.[ Footnote citations omitted.]

**Here there is no innocent third party who dealt with the corporation in reliance upon Anderson's authority and between whom and Schwoebel it might therefore be said that the greater innocence attends the one who had no part in entrusting to Anderson the power to commit the fraud.**

(Emphasis and underlining added.) 384 F.2d at 234.

In the present case, unlike in *Asphalt Indus.*, there are numerous “innocent third parties” who relied on the alleged intentional and fraudulent overcapitalization of assets in HealthSouth’s Ohio 2002 personal property tax return. The Ohio school districts and other taxing district recipients are obviously “innocent third parties,” who received and spent the tax payments reported by HealthSouth on its return in reliance on the valuations reported therein. To have to refund those previously spent taxes would adversely affect these taxing districts and their residents. Thus, by the *Asphalt Indus.* court’s own reasoning, any adverse effect on HealthSouth’s shareholders arising from denial of HealthSouth’s tax refund claim are subordinate to the adverse fiscal consequences arising to the innocent taxing district recipients of HealthSouth’s personal property taxes.

Moreover, the vast corporate accounting fraud perpetrated by HealthSouth as a publicly-held company clearly was perpetrated by the corporation. The fraud was a long-standing conspiracy led not only by the CEO and founder of HealthSouth, Richard Scurry, but by all five HealthSouth employees who had, at various times during the conspiracy served as HealthSouth’s chief financial officer. See T.C.Br. 3-4, citing HealthSouth’s SEC Form 8-K as of May 8, 2004, BTA. Ex. 1 at 6, Supp. 80.

Furthermore, unlike in *Asphalt Indus.*, in which Anderson's embezzlement unambiguously benefited only himself to the detriment of the closely-held corporation's only other shareholder, Schwoebel, the effect of HealthSouth's accounting fraud on its then-shareholders was very much a mixed result. For those shareholders who happened to sell all or a portion of their HealthSouth stock for artificially high prices prior to March 2003 when the SEC brought the fraud to light, the fraud may have been a great benefit. The artificially inflated income and asset figures reported on HealthSouth's SEC annual Forms 10-K over several years was reflected in the stock price throughout that time. Shareholders may have repurchased the stock after it plummeted following the SEC's investigation, so that they would be the recipients of the tax refund that HealthSouth seeks here.

Additionally, even in the context of the very narrow issue addressed and resolved in *Asphalt Indus.* its continuing vitality has been constrained by subsequent decisional law. In a more recent federal income tax case involving a closely-held business, the *Asphalt Indus.* holding was distinguished on the basis that the corporation and its shareholders may have benefited from the fraud perpetrated by one of its officers. See, e.g., *Alexander Shokai, Inc. v. Commissioner* (C.A. 9, 1994), 34 F.3d 1480, 1488.

Finally, the conclusion that *Asphalt Indus.* provides no help to HealthSouth on the estoppel issue is compelled not only by its far different issues, facts, holding and rationale from those of the present case, but by its lack of relevance in rebutting the cases on which the Commissioner relies. *Asphalt Indus.* provides no basis to question the holdings and rationales of any of the decisions we have cited, nor any of the cases set forth in the Ohio School Board Association's brief that we expressly endorsed in our opening brief. T.C.Br. 19, f.n.4. Specifically, the Ohio tax cases that we relied on in our opening brief and the general body of

case law cited and discussed by the Ohio School Board Association in its amicus brief apply estoppel principles to bar a wide spectrum of actions. See Section 1A of this reply brief, *supra*; and the Commissioner's opening brief at T.C.Br. 10-16.

In the present case, HealthSouth's answer brief asserts, with no pertinent legal authority to support it, that because HealthSouth's assertedly "innocent" shareholders would be injured by the application of estoppel in this case, its refund claim should not be barred here. But in virtually any estoppel case involving a corporation, such defense could be raised, allowing corporations to make fraudulent misrepresentations with impunity.

Moreover, in the tax decisions of this Court applying estoppel against the Commissioner, this Court barred the Commissioner from imposing otherwise valid tax assessments on the basis of the Commissioner's mistaken representations to taxpayers<sup>9</sup>. Consequently, Ohio's "innocent" citizens did not enjoy the benefit of the tax revenues from those assessments. Their innocence did not preclude the application of estoppel, just as the purported innocence of HealthSouth's shareholders should not preclude the application of estoppel here.

Instead, the Court should follow its own precedent, as well as the Clark County Court of Appeals in *William Bayley* applying estoppel against a personal property taxpayer, and the two *HealthSouth* personal property tax refund cases recently decided by courts in Ohio's sister states. In the *HealthSouth* cases, the Alabama Supreme Court and the Connecticut Superior Court barred personal property tax refund claims for the 2002 tax year because of HealthSouth's accounting fraud overcapitalization on the returns it filed with the taxing authorities in those jurisdictions. *Ex Parte HealthSouth Corp. (In re: HealthSouth Corporation v. Jefferson County Tax Assessor, Dan Wietrib, and Jefferson County Tax Collector, J.T. Smallwood)* (2007, Ala.

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<sup>9</sup> See note 1, *supra*.

S.Ct.), supra; and *Healthsouth Corp. v. City of Waterbury et al.* (March 13, 2008, Conn. Sup.), supra. Thus, the precedent for applying estoppel here is well established.

In sum, HealthSouth's brief provides no basis for the Court to depart from a vast body of established decisional law precedent. Accordingly, under application of these established estoppel principles, HealthSouth's refund claim is properly barred and, therefore, the BTA's truly unprecedented decision granting a refund claim to HealthSouth despite HealthSouth's openly admitted , fraudulent overstatement of the tax should be reversed.

**IV. HealthSouth's refund claim fails factually because it relies exclusively on hearsay documentation that, itself, demonstrates that the reductions sought are, at a minimum, substantially overstated, to the full extent to which cannot be ascertained on this record.**

HealthSouth's refund claim is predicated on the assertion that the "AP SUMMARY" and "AP Summary" entries set forth on the attachments to its 2002 Ohio personal property tax returns represent fictitious asset values. See the "Assessed Value Detail" attachments to HealthSouth's 2002 Ohio personal property tax return. S.T. 855-1581, Supp. 71-1387. As an attachment to its application for final assessment (i.e., its refund claim), HealthSouth included sheets specially prepared for that purpose captioned "HealthSouth Tax Year Amended Fixed Assets" S.T. 246-364, Supp. 1399-1517.

Notably, both the "Assessed Value Detail" sheets attached to the 2002 tax return and the "Amended Fixed Asset" sheets submitted with HealthSouth's refund application include many asset listings set forth as "AP Summary," rather than as "AP SUMMARY". Appx. 36. In its refund claim, HealthSouth seeks reductions for both its "AP SUMMARY" entries and its "AP Summary" entries. Attached to this brief, as "Attachment A," is a table setting forth the acquisition costs for each, by taxing district. As shown from the chart, the acquisition

costs attributable to the “AP Summary” entries comprise 16.59% of the total acquisition costs claimed as fictitious asset costs. Id.

In HealthSouth’s SEC Form 8-K as of May 28, 2004, at 17, BTA Ex. 1, Supp. 96, the following disclosure is made: “APSUMMARY is not to be confused with “AP Summary,” a description normally used during the initial processing of legitimate invoices in the Company’s accounts payable system and replaced with a specific asset description when a purchase was posted to the general ledger.” IN other words, “APSummary” assets signify actual asset values and, therefore, should not have been included as fictitious values here.

Furthermore, the Commissioner has undertaken an analysis of HealthSouth’s BTA Ex. 4, Supp. 127-156. See Attachment B and C, Appx. 37-39. These exhibits show that there are fundamental discrepancies between the acquisition costs reported for each facility location on the “Amended Fixed Asset” sheets vs. those set forth in the aggregate for each facility location in the BTA Exhibit 4. Specifically, as shown on Attachment B, Appx. 38, for those locations set forth in BTA Exhibit 4, the total acquisition costs for all locations is \$16,017,911. The corresponding acquisition cost total for those same locations as set forth in the “Amended Fixed Asset” sheets, after reduction for the “APSUMMARY” and “APSummary” entries is only \$11,863,200, for a difference of \$4,14,711. Id. Finally, as shown on Attachment C, Appx. 39, BTA Ex.4 omits over \$6 million of acquisition costs of taxable Ohio asset values that were reported as such in the Amended Fixed Asset” sheets.

In other words, BTA Exhibit 4 fundamentally conflicts with the Amended Fixed Asset schedule, and therefore HealthSouth’s claim should be denied on this basis as well. In fact, these discrepancies take on even further significance in light of the multiple-level

hearsay problems with HealthSouth's evidence we detailed in our initial brief, but which HealthSouth's answer brief ignores.

Fatally to HealthSouth's refund claim, HealthSouth failed to provide any "after" snapshots of its Ohio asset values, i.e., showing the asset values as adjusted to remove any allegedly fictitious assets or asset values. Despite being requested to do so by letter from the Commissioner's auditing agent, HealthSouth did not furnish the Commissioner or the BTA with any documentation showing an "after" snapshot of its Ohio asset values. That is, HealthSouth declined to provide any of the facility-specific balance sheets or general ledger/accounting journal entries showing that it removed any of these allegedly fictitious "APSUMMARY" assets or asset values following the discovery of HealthSouth's financial-statement accounting fraud by the SEC.

### CONCLUSION

For all these reasons, this Court should reverse the BTA's decision and affirm the Commissioner's denial of HealthSouth's refund claim.

Respectfully submitted,

NANCY H. ROGERS  
Attorney General of Ohio



BARTON A. HUBBARD (0023141)  
Assistant Attorneys General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-5967

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THE WILLIAM BAYLEY COMPANY 1200 WARDER STREET SPRINGFIELD, OHIO,  
Appellant v. EDGAR L. LINDLEY TAX COMMISSIONER OF OHIO STATE OF OHIO 30  
EAST BROAD STREET COLUMBUS, OHIO 43215, Appellee

Case No. 1308

Court of Appeals of Ohio, Second Appellate District, Clark County

1979 Ohio App. LEXIS 9958

March 28, 1979

*OPINION AND FINAL ENTRY*

McBRIDE, P.J.

This appeal is from an order of the Board of Tax Appeals affirming an assessment of the Tax Commissioner for personal property taxes for the years 1974 and 1975 on a demand note issued to the taxpayer for an amount of \$ 1,606,356.00. The note was not an account receivable from ordinary trade but was carried on the books as other assets. In 1976 the note was declared a bad debt and written off as worthless.

We will not report the lengthy history of this note which, while it represented a substantial amount of cash by others, was a paper transaction by the taxpayer, The William Bayley Company of Springfield, Ohio, a totally owned subsidiary of Aetna Industrial Corporation of New York. Briefly Aetna was in financial trouble, its only real asset being its owner-ship of the stock in Bayley. To protect its interests [\*2] a Chicago bank advanced \$ 1,500,000.00 to save Aetna and protect the bank's interests. It could not make a direct loan to Aetna. The Bayley Company was the only solvent and profitable holding by Aetna. The loan was channeled through Bayley to Aetna, which in turn issued the note to Bayley, which advanced some additional cash to Aetna. Since Aetna held the Bayley stock, the taxpayer's interest was to avoid any implication caused by the collapse of Aetna. The note to Bayley was pledged to the Chicago bank as security for the bank loan.

As one of the officers testified for the taxpayer the purpose of the note was (1) to consolidate Aetna's debts, (2) to leave Bayley's assets unincumbered so that it could continue to operate in the public contracting field with governmental units in which public performance bonds are required to continue in business and (3) to give the Chicago bank full control over Bayley and to enable the bank to take judgment and assume control of the taxpayer-corporation. The circuitous route taken by the loan and the note was provoked by the inability of the bank to make a loan to Aetna because of its financial collapse. Bayley carried the note on its books [\*3] as a non-current asset until 1976. The note represented the substantial outlay by the bank including some hundred thousand dollars in cash advanced to Aetna by Bayley. The benefit to Bayley was that by following the instructions of the bank and Aetna it avoided the takeover of its stock ownership by Aetna's creditors and it permitted Bayley to continue as a going business venture without interruption.

We are not concerned here with the intricacies of high finance or corporate management. What is involved is a note in which a corporation invested some cash, its credit and to some extent its reputation, and the time when it determined that

the asset it carried on its books and regularly reported in its public statements was in fact worthless, or an advance or distribution to its stockholder. <sup>HN1</sup> Having elected to treat the note as an asset the taxpayer has a burden of establishing the worthlessness of the note and in what year it decided that it was of no value. For this purpose resort must be made to the personal property tax laws of this state. R.C. 5711.01 to R.C. 5711.36.

As with any paper transaction the showing of the substantial loan by Bayley and the offsetting note from [\*4] Aetna on the balance sheet led to other complications. The receivable was shown under notes due after one year even though it was a demand obligation. R. p. 41. To maintain this false front the Bayley Company paid dividends and advanced cash to Aetna for the purpose of (1) servicing interest on the loan by Bayley to Aetna and (2) meeting other legal, accounting and administrative costs of Aetna. The bulk of Bayley's dividends were reimbursed by Aetna back to Bayley. R. p. 42. As a result of the transactions the Bayley corporation continued to operate at a profit without interruption, Aetna was able to report an income, and Bayley could show that interest payments were made above the prime rate on its note -- a note which it now insists was worthless despite deliberate efforts to make it appear otherwise on its books. R. p. 43; App. Ex. No. 4.

Appellant lists seven assignments of error; however appellant and appellee submitted and argued three propositions of law under categories A,B and C. The response of this court is according to the method of submission.

A.

Appellant's first proposition is that the decision of the Board of Tax Appeals is unreasonable and unlawful in holding [\*5] that the \$ 1,606,356.00 note should be listed for taxation of personal property for 1974 and 1975 at its face value without consideration of its actual value, if any.

Appellant concedes that it did not list this note in its 1974 and 1975 personal property tax returns and that it did not file a Form 902 or its equivalent with its returns for the purpose of challenging its actual value. The Tax Commissioner added the omitted note and assessed a tax for each year. Appellant argues that the Commissioner had a duty to value the note at its true value and that it was arbitrary to accept the value reported and reflected by the taxpayer on its books.

<sup>HN2</sup> Where a taxpayer fails to report an asset for the tax and the commissioner makes an assessment thereon the determination may be reviewed and corrected or he may affirm the assessment. R.C. 5711.31.

It appears to be true that the taxpayer could have filed a consolidated report with its parent, Aetna, however this was not done and that factor is not involved in this case.

The Commission heard the evidence which brought forth the omission to report the note, its inclusion as an asset on the books of the corporation, the receipt of substantial [\*6] interest payments on the note, the efforts of the taxpayer to convince others that the cash it advanced and the pyramid of paper reflected a real value and finally the failure to list the note on its return and promptly seek a reduction in its stated value, all of which constitute overwhelming evidence of the taxpayers plan and election to convince everyone of the stated value of the note. Under these circumstances we do not find that the conclusion of the Tax

Commissioner or the Board of Tax Appeals was either unlawful or arbitrary. Had he done otherwise the practices of the taxpayer would have continued and it would not have acted, as it did, to declare the note worthless in 1976 and the assessor would have become a party to the corporate misstatements.

The demand note was not an obligation within the ordinary trade of the taxpayer. It was not an asset subject to depreciation in the usual sense of the word. It was an extraordinary obligation, representing corporate cash and credit, to which the taxpayer assigned the book value and from which it received a substantial amount of interest. <sup>HN3</sup> ¶ The assignment of book value is prima facie evidence of true value. *Tube Co. vs. Kosydar*, [\*7] 44 Ohio St. 2d 96. The receipt of interest on the note is inconsistent with a conclusion that it was worthless from the start.

The issue in this case is not one of generally accepted accounting principles and practices. Whether the demand note was carried as a current or non-current account, or as a trade or non-trade item is not significant. What is significant is that in the judgment of the corporation it was a valuable item and reported as an asset at its stated value for the years in question for purposes of its own. This conclusion is supported by the cash advanced on the note and the interest received. The corporation did not elect to change its determination of the value of the note until 1976. <sup>HN4</sup> ¶ The valuation of this type of commercial paper is particularly within the knowledge and control of the taxpayer. Where a taxpayer lists such an asset at its stated value in its financial statements and makes no effort to reflect otherwise or to take timely steps to remove it from its books, its judgment may be accepted, especially where the record supports the receipt of a substantial amount of interest on the obligation.

The case of *Alcoa vs. Kosydar*, 54 Ohio St. 2d 477, involves [\*8] percentages for depreciation for equipment used in the manufacturing process and has no application to the valuation of a note, the value of which does not depreciate according to any normal method. The value of a note may disappear overnight. It may have value to the holder that others do not appreciate. The anomaly in this case is that the taxpayer denies its own judgment of true value as reported in its statements and seeks a retroactive conclusion by the tax assessor that, if accepted, would recognize a corporate fraud upon the public.

Attention is devoted in the briefs to procedural and jurisdictional questions; however, it appears that the final order is based upon a decision on the merits finding that the true value of the note was not other than that stated by the taxpayer.

The first proposition is denied.

B.

The second proposition argued is that the Board erred in excluding evidence offered by appellant in the taxpayer's subsequent 1976 personal property tax return that the note had no value in 1976.

In 1976 the corporation charged off the note, reflecting a major change in its financial statements. The 1976 election by the corporation represented a complete change [\*9] in the circumstances as to the note. The year of the write-off was 1976. That this was not done earlier was the taxpayer's judgment. <sup>HN5</sup> ¶ Not being an item of physical property subject to ordinary depreciation, the write-off and the time

when it was taken was indicative of prior true value and of the value of the note to the corporation on the tax listing day.

We find no error in excluding the information relative to the future value or future stated value of the note. The record presented by the 1976 return was a totally different ball game based upon different facts in a different tax period. In addition the record otherwise reflects appellant's position and if the denial of the evidence was erroneous, the ruling was not prejudicial.

This proposition is denied.

C.

The third proposition is error in holding that the taxpayer did not give timely written notice of the claim of deduction from book value of receivables in connection with the 1974 and 1975 returns.

Appellant concedes it did not file a Form 902 to claim such a deduction in either 1974 or 1975. However, as we have indicated this matter was brought to the taxpayer's attention and the issue fully heard on the merits. **[\*10]** The assessor did make a determination after a full hearing and it is our opinion that the determination was not unlawful nor unreasonable.

The third proposition is denied.

MACK L. FLINN, ET AL., PLAINTIFFS-APPELLANTS, v. HARDIN QUARRY COMPANY, ET AL., DEFENDANTS-APPELLEES

No. 6-80-1

Court of Appeals of Ohio, Third Appellate District, Hardin County

1980 Ohio App. LEXIS 11123

September 12, 1980

MEMORANDUM OPINION

COLE, J. This is an appeal from a judgment of the Common Pleas Court of Hardin County in an action, as here involved, for a mandatory injunction in which Mack L. Flinn and the Ohio Engineering Company, a corporation, sought to require the defendants, Lois P. Pees, the Secretary-Treasurer of the Hardin Quarry Company, a corporation, and its transfer officer, to transfer to them certain shares of stock in the said Hardin Quarry Company. There were other prayers and other issues but the trial below was directed solely to the issue of whether or not the injunction should be granted and certain defenses thereto. (Entry of Aug. 2, 1979.) After trial the trial court [\*2] dismissed the plaintiffs' complaint. The trial court further made a finding there was no just reason for delay under Civil Rule 54 and the plaintiffs' now appeal this judgment of dismissal. There had been filed, by the plaintiffs, prior to trial, a motion for summary judgment, and prior to final submission at trial, they had made a motion for judgment. They urge upon this court three assignments of error; i.e., that the trial court erred in:

1. Denying plaintiffs' motion for a summary judgment.
2. Denying plaintiffs' motion for a directed verdict.
3. Dismissing plaintiffs' complaint said judgment being against the manifest weight of the evidence.

All of these assignments of error involve similar issues and our discussion will be first directed to the third assignment of error as being the most comprehensive. The second essentially challenges legal sufficiency of the evidence and the first raises identical issues but predicated upon the narrower evidentiary base available at that earlier stage of the proceedings.

The factual situation forming appellants basic claim for relief is essentially simple. The Hardin Quarry Company is a small, closely held corporation [\*3] operating a quarry. The Ohio Engineering Company is a corporation engaged in road building activity and was one of two major customers of the quarry. At the time prior to the incidents involved in this proceeding, one Lois Pees owned 238 shares of the common stock of the Hardin Quarry Company and was both a director and Secretary-Treasurer of that corporation. David Pees owned 80 shares of stock and was a Director, President and General Manager. Richard Pees, son of Lois Pees, owned 2 shares. The Ohio Engineering Company had acquired 160 shares of the common stock. It was a wholly owned subsidiary of the S. E. Johnson Company, a corporation. John T. Kirkby was the president of S. E. Johnson Company and a member of the Board of Directors of the Hardin Quarry Company. Mack Flinn was a

Vice President of Ohio Engineering Company.

On September 20, 1978 David Pees executed a stock sale agreement to sell his 80 shares of stock to the Ohio Engineering Company pursuant to negotiations with John T. Kirkby. He delivered and endorsed his share certificate. For some reason not fully disclosed by the record, (but apparently to permit Flinn to qualify as a director) one share was endorsed [\*4] to Mack Flinn and the balance to the Ohio Engineering Company. Both requested transfer of their stock on the books of the Hardin Quarry Company. This request being refused resulted in this action for a mandatory injunction to require the corporation and its Secretary-Treasurer to make the transfer.

Several defenses were asserted by Lois Pees and the Hardin Quarry Company. The trial court explicitly, in its findings of fact and conclusions of law found "Plaintiffs have approached the Court with 'unclean hands'. Equity therefore must clearly favor Defendant Corporation" and that plaintiffs were not entitled to relief under the rules of equity. Although the trial court and the briefs herein filed devote much attention to the legal basis of the appellants' claim, if the determination by the trial court of the existence of the equitable defense is supported by the evidence, this alone is sufficient to support the judgment. Therefore, we shall first devote our analysis to this issue of clean hands. The trial court found:

"\* \* \* the weight of the evidence is conclusive that Plaintiffs, and their agent, John Kirkby, have violated conscience and good faith in their dealings with David [\*5] Pees; \* \* \*." (Findings - p. 10)

The appellees in their second defense had raised the claim that the appellants were barred by both equitable maxim that "he who seeks equity must do equity" and "he who comes into a court of equity must come with clean hands."

The trial court explicitly rests its judgment on both law and equity. If the evidence justifies this action as to the equitable defense that alone is sufficient without more to sustain the denial of equitable relief. In 29 Ohio Jur. 188, Injunction, par. 22, it is said:

<sup>HN1</sup> "Among the principles lying at the basis of equity jurisdiction is the one relating to the fairness or good conduct of the party invoking the court's aid, and which requires that relief be denied a suitor who is guilty of misconduct. The rule that one who asks the court to grant him relief upon equitable considerations must approach the court with 'clean hands' applies to one who seeks relief by injunction. Moreover, one seeking such relief must keep his hands clean after he has come into court. There must be no wilful misconduct on his part either in respect of the subject matter in litigation or with reference to his procedure in that behalf."

<sup>HN2</sup> "The equitable [\*6] maxim denoted the "clean hands" principle is set forth succinctly in Kinner v. Ry. Co., 69 Ohio St. 334 (p. 344):

"\* \* \* It denies all relief to a suitor, however well founded his claim to equitable relief may otherwise be if, in granting the relief which he seeks, the court would be required, by implication even, to affirm the validity of an unlawful agreement or give its approval to inequitable conduct on his part. \* \* \* the courts have consistently granted or refused relief by determining whether the reprehensible conduct of the plaintiff is related to the subject of the suit. \* \* \*"

See also 20 Ohio Jur. 148, Equity, par. 70 and the cases therein cited.

There are, therefore, two basic factors involved in the application of this principle. It must be based upon a finding of unconscionable conduct, and that conduct must be related to the subject matter of the suit and, at least in most cases must have prejudicially affected the defendant's rights. Are these elements present in the case now before us?

It must first be noted that the claimant here is the Ohio Engineering Company. The unconscionable conduct involved is that of John Kirkby and David Pees. Is the corporation [\*7] to be charged with this conduct? The trial court found (Findings - p. 2) that Kirkby was a director "by virtue of the ownership of one hundred sixty (160) shares of its common stock by the Ohio Engineering Company." It is clear from the evidence that all negotiations as to the stock sale were conducted by David Pees and Kirkby, that Kirkby acted on behalf of the Ohio Engineering Company at all pertinent times and was integrally related to it by being president of its parent corporation. It is further clear that the corporation is in this action relying upon an agreement negotiated and induced by Kirkby and that its claim for relief is based upon a sale resulting from this agreement. We conclude a logical inference is inherent in these facts that Kirkby was the agent of the corporation and that it is charged with knowledge of its agent in this matter. (See also Kirkby deposition used on summary judgment.)

The trial court finds (Findings - p. 10) that "\* \* \* Plaintiffs, and their agent, John Kirkby, have violated conscience and good faith in their dealings with David Pees;" thus restating this agency relationship as a basis for its equitable determination.

In 12 Ohio Jur. 3rd 137, [\*8] Business Relationships, par. 475, it is stated:

<sup>HN3</sup> "The general rule of the law of agency that the knowledge of an agent acquired within the scope of his employment and which is in reference to those matters to which his authority extends is imputed to the principal applies especially to corporations, since a corporation can act only through its officers and agents. \* \* \*"

Here the appellant corporation is relying upon the specific actions of Kirkby and must be deemed to approve and rectify all his acts as its agent and to be held accountable for the facts giving rise to the contract of sale upon which it relies.

Having thus established that the trial court found a nexus between the appellant and Kirkby's conduct and that there was sufficient evidence to sustain this finding we must turn to the problem of unconscionable conduct. Was there such conduct on the part of Kirkby that the court would be, in effect, by granting the relief requested approving unconscionable behavior inherent in the subject matter of the claim?

The trial court finds such unconscionable conduct, predicated upon the fiduciary relationship both David Pees and Kirkby had to the Hardin Quarry Company and its stockholders [\*9] by virtue of their position as directors of that corporation. <sup>HN4</sup> There is nothing, it must be said, inherently wrong when one stockholder sells stock to another stockholder or even generally where one director sells shares to another director. However, each director owes a fiduciary duty to the corporation. In 12 Ohio Jur. 3rd 72, Business Relationships, par. 421 it is stated:

"It is well established that a director's obligations are of a fiduciary nature as far as the corporation is concerned. But it is frequently declared that, in addition, the director occupies a fiduciary relation to the corporation's shareholders."

One area in which fiduciary duties are particularly involved is that in which a director takes personal advantage of what may be called a corporate opportunity. Although we speak here of personal advantage, in the present case Kirkby was an agent of the Ohio Engineering Company and the concept concerns not his personal benefit but the benefits accruing directly to his principal and by inference, ultimately to him as president of the parent company.

In 77 ALR 3rd 965, it is stated:

<sup>HNS</sup>✦ "The so-called doctrine of corporate opportunity is a species of the duty of a fiduciary [\*10] to act with undivided loyalty; it is one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relations with the corporation that he represents; in general, a corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain."

One of the tests used to determine whether a particular transaction involves a corporate opportunity is the "line of business" test. But other tests have been applied, (77 ALR 3rd 966 note 17) and because of the broad concept of fiduciary responsibility it would seem appropriate that any conduct taking advantage of a corporate situation to aid a second corporation at the expense of the first would involve a breach of fiduciary duty. Here there is involved no line of business opportunity in the sense that some new customer or source of stone was misused. What is involved here is a detriment to the corporation arising in two ways. It is asserted, and the evidence is sufficient to justify a finding, that the specific tax situation of the Hardin Quarry Company was such that the purchase by the company of outstanding stock would permit [\*11] the reduction of inordinate retained earnings. Today, because of the impact of tax laws, many "business opportunities" involve adjustments directed to tax reductions. A tax saved is in many cases more valuable than a penny earned. A penalty for unwarranted, undistributed profits could result in a substantial loss to the corporation and to its shareholders (Tr. 105-107) and this situation had been made known to the directors. The purchase of corporate stocks would directly reduce this accumulated profit figure and avoid a potential loss by the imposition of a tax penalty. Mr. Kirkby was aware of this problem as a director. (Tr. 105-106.) It would appear, therefore that there was sufficient evidence to support a finding that the negotiation for purchase of the David Pees stock by Kirkby, without revealing to the directors of the corporation that such stock was available for the corporate purpose of reducing the accumulated surplus violated his fiduciary duty to the corporation and to its shareholders. The trial court concluded:

"\* \* \* the facts in the record demonstrate a complete absence of 'good faith' on the part of the purchasers and David Pees. There is strong evidence [\*12] that the purchase of David's stock by the corporation would lessen taxes and penalties on account of Federal Profit Accumulations tax, and increase in equal shares, proportionately, the value of the stock owned by each one of the remaining shareholders." (Findings - p. 9.)

A review of the evidence sustains this conclusion that a very definite business opportunity to preserve corporate assets was ignored by *both* directors and a lack of

good faith demonstrated by their secret negotiations to the exclusion of the whole board of directors of the Hardin Quarry Company. Kirkby also was aware of the comparable breach of fiduciary duty by David Pees and chargeable with this knowledge in governing his own conduct.

A second consideration is pertinent to the issue of fiduciary duty. The peculiar situation here presented involves a potential deadlock in the board of directors and a possibility of dissolution based upon impossibility of action. Mrs. Pees and her son Richard owned 240 shares. Ohio Engineering owned 160 shares. If it acquired the 80 shares owned by David Pees a 240-240 split would occur, which in the light of past differences and antagonisms revealed by the evidence would [\*13] permit neither group to effectively make policy for the corporate entity. Had more shares been involved it could perhaps be said no injury to the corporation as such would occur; there would merely be a new guiding majority. But here the result is a potential for deadlock, and that potential for inaction was of basic corporate interest. The ability to function at all was potentially at stake in a very real sense. Because of this there is a corporate problem presented as distinguished from a simple shareholders dispute. With corporate existence and potential for action involved, we would conclude there was a sufficient basis for director interest and discussion. This required pertinent and timely information. But neither director supplied to the board information from which the situation and its dangers could be brought before the board for consideration. This concealment constitutes a basis for a finding of breach of fiduciary duty. (Tr. 87, 88.) Mr. Kirkby on cross-examination admitted to the following statement:

"I thought it was going to force a deadlock so that we could end some of those things that we had been complaining about."

The trial court found that (Findings [\*14] - p. 6):

"\* \* \* John Kirkby owned no shares of the Quarry Company, yet as a Director he did owe to it and to the other officers and shareholders good faith and fairness. He testified that he had planned for and hoped to create a deadlock. The conclusion is that he played upon David's pique to create a plan, of which his other corporations would be the ultimate beneficial recipient [sic], to place a highly solvent corporation into receivership and judicial dissolution without the knowledge of and at the expense of the other shareholders. \* \* \*."

There are reasonable inferences based upon the admissions of Kirkby and the totality of the other evidence contained in the record. He at no time made any effort to inform the other directors of the action being taken by him and by David Pees which, because of the peculiar stock split, could, and in all probability would, materially and adversely affect the corporate capacity for future action.

We would conclude there was sufficient evidence to justify the conclusion of the trial court that the Ohio Engineering Company, by virtue of the action of its agent, John Kirkby in the acquisition of the David Pees' stock, violated basic precepts [\*15] of fiduciary responsibility to the board of directors of the Hardin Quarry Company and hence that appellant, not having exercised good faith was not entitled to relief in equity.

This disposes of the second and third assignments of error, both being based upon the evidence at trial. Neither is well taken. The first assignment of error is based

upon the narrower evidentiary base presented by the motion for summary judgment. This motion was filed on May 3, 1979. On April 24, 1979 depositions of Lois P. Pees, John T. Kirkby, Richard W. Pees and Mack L. Flinn had been filed; on April 27, 1979 an affidavit of Stephen C. Betts, and on April 30, 1979 a deposition of David T. Pees. The trial court overruled the motion for summary judgment on July 19, 1979 based upon the pleadings, the affidavits and the depositions. Reviewing these depositions, we find in the deposition of John T. Kirkby sufficient testimony upon which to conclude a question of fact existed as to the breach of a fiduciary duty to the Hardin Quarry Company on his part in his capacity as director. This issue is predicated upon conflicting inferences which may be drawn from the admission that he knew the purchase would [\*16] create a deadlock in the board of directors. (Deposition p. 39-41, 53.) The second basis for finding a breach of fiduciary duty, as set forth above, was inherent in this testimony as well as in the numerical distribution of the stock.

There was also a direct conflict of testimony as to the original conversation between Kirkby and David Pees as to the availability of his stock for sale.

This being the case the first assignment of error is also not well taken. The judgment is therefore affirmed.

MICHAEL E. McCAHAN, PLAINTIFF-APPELLANT, v. WHIRLPOOL CORPORATION, ET AL., DEFENDANTS-APPELLEES

No. 5-85-11

Court of Appeals of Ohio, Third Appellate District, Hancock County

1986 Ohio App. LEXIS 8185

August 29, 1986, Decided

OPINION

GUERNSEY, P.J.

This is an appeal by plaintiff Michael E. McCann from a summary judgment of the Court of Common Pleas of Hancock County in a workers' compensation case, finding for the defendant Whirlpool Corporation and dismissing the matter with prejudice.

This case arose as a result of plaintiff's allegation that he injured his lower back on September 22, 1980 in the course of his employment with Whirlpool (Claim No. 784477-22). A hearing was held before a district hearing officer of the Industrial Commission on July 9, 1982. The hearing officer issued an order disallowing the claim, and finding that plaintiff's alleged injury did not arise out of the course of his employment with Whirlpool but rather as a result of a previous injury incurred in 1969 during the course of employment with a former employer (Claim No. 69-36681). On April [\*2] 25, 1983, the Toledo Regional Board of Review affirmed the disallowance of Claim No. 784477-22. Plaintiff's further appeal to the Industrial Commission of Ohio was denied and an order dated July 13, 1984 affirmed the disallowance. Plaintiff then filed suit in the Court of Common Pleas of Hancock County. Upon motion of Whirlpool, that court granted summary judgment for Whirlpool and dismissed the case with prejudice. Plaintiff now appeals that dismissal.

It should be noted and emphasized that prior to filing the most recent claim, plaintiff sought to re-activate the previous claim and requested temporary total compensation. Following a hearing a district hearing officer held that the 1980 injury was related to the previous claim and issued an order dated December 30, 1980 granting plaintiff's application for re-activation. Plaintiff was awarded and received temporary total compensation. No further proceedings relating to this order were taken.

Plaintiff's only assignment of error states that the common pleas court erred when it granted summary judgment to Whirlpool. Plaintiff alleges a genuine dispute of facts existed as to whether the 1980 injury was a new and distinct injury, or [\*3] a result of the previous 1969 injury, and, therefore, that the issue of fact should have been decided by a jury.

We disagree, and affirm the summary judgment.

*HN1* ¶ The trial court should grant summary judgment if the evidentiary material " \* \* \* show(s) that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ. R. 56(c). The moving party has the burden of proving the absence of any genuine issue of fact. *Hickman v. Ford*

*Motor Co.* (1977), 52 Ohio App. 2d 327, 329. All reasonable inferences should be resolved in favor of the party opposing the motion. *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 21 116, 120, certiorari denied (1981) 452 U.S. 962. However, the provision in Civil R. 56 that "summary judgment shall not be rendered unless reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion was made" (was) retained in the Ohio rules to avoid refusal to grant summary judgment if there is the 'slightest doubt' as to the facts." McCormack, *Civil Rules Practice* (1970), 14F, Section 6.33, quoting *Cunningham v. J. A. Myers Co.* (1968), 176 [\*4] Ohio St. 410.

The common pleas court determined that no genuine issue existed as to any material fact and that the moving party was entitled to judgment as a matter of law. The court held that where a worker, who has sustained an injury for which he has received compensation, thereafter asserts a re-activation of the claim because of a subsequent injury, he has elected to proceed on the original claim and cannot assert a claim under the subsequent injury. This conclusion did not involve any issue of fact, but did involve whether Whirlpool was entitled to judgment as a matter of law.

In reviewing the common pleas court holding, we must first determine whether principles of res judicata and estoppel may, as a matter of law, be the basis for the granting of a summary judgment motion, and if so, whether the undisputed facts in the present case support the judgment.

<sup>HN2</sup> Principles of res judicata and estoppel may properly be the basis for the granting of a summary judgment motion in a workers' compensation matter. Res judicata does apply to decisions of boards and commissions no less than to decisions of a court. Most obvious is the holding that prior decisions by a tribunal on earlier aspects [\*5] of the same case are binding on it. 3 Larson, *Law of Workmen's Compensation App. Brd.* (1986), 15-426.229 - 15-426.244, Section 79.72(B); *Dow Chemical Company v. Workmen Compensation App. Brd.* (1967), 67 Cal. 2d 483; *Ricci v. Hall*.

Although it may accurately be stated, then, that res judicata may form the basis for a summary judgment in a workers' compensation matter, it should be clarified that what is involved in the present case is actually estoppel by election of remedies. While closely related in principle, <sup>HN3</sup> estoppel by election of remedies is far less formalistic than res judicata, and acts as a bar to double recovery based on inconsistent positions. Where a party has an election to adopt one of two inconsistent courses and takes decisive action with knowledge of his rights and the facts, his election is determined and he is estopped. Some authorities classify this rule against inconsistent positions as quasi estoppel or election, rather than estoppel proper. *Hampshire County Trust Co. v. Stevens* (1926), 114 Ohio St. 1; *State v. Carter* (1903), 67 Ohio St. 422; See generally 42 Ohio Jurisprudence 3d 1986) 60, *Estoppel and Waiver*, Section 39. Just [\*6] as with res judicata, estoppel by election of remedies may be the basis for the granting of a summary judgment motion. *Scott v. East Cleveland* (1984), 16 Ohio App. 3d 429.

All that must yet be determined is whether this plaintiff made an election of remedies and was therefore properly estopped from asserting an inconsistent position. Plaintiff's most recent injury occurred on September 22, 1980. Approximately six weeks later, on November 4, 1980, plaintiff successfully re-activated the claim from 1969. Implicit within the reactivation and explicit within the findings of the district hearing officer of the commission was "that the lower back

injury was pre-existing since at least 1976". "When it is said that change in condition includes aggravation of the first injury, this must be understood to include aggravation only, under circumstances that would not amount to a new injury. \* \* \* On the other hand, when there is no causal relation between the first injury and the subsequent condition, re-opening is obviously not the appropriate remedy." 3 Larson, Law of Workmen's Compensation (1986) 15-544.19 15-554.22, Section 81.31(b).

Hence, by electing to re-open the previous claim [\*7] and by receiving compensation thereunder, plaintiff is deemed to have admitted that the lower back injury pre-existed the 1980 injury. Prior to re-opening the previous claim, plaintiff had two inconsistent theories available upon which to proceed to recovery. He could allege the 1980 injury was a new one and file a new claim, or he could allege the 1980 injury was related to the 1969 injury and file under the previous claim. Having chosen to proceed under and accept benefits from the previous claim, plaintiff cannot subsequently allege the injury was new and distinct. He is bound by his election. *Scott v. East Cleveland* (1984), 16 Ohio App. 3d 429.

Accordingly, having found no merit in plaintiff's assignment of error, we conclude that summary judgment was properly entered in favor of defendant Whirlpool Corporation. Such judgment as to Whirlpool also effectively terminated the action as to the other defendants.

THE OHIO BANK, NKA SKY BANK, OHIO BANK REGION, PLAINTIFF-APPELLANT v.  
MARTHA J. BELTZ, EXECUTOR, ET AL., DEFENDANTS-APPELLEES

CASE NUMBER 8-02-13

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

2002 Ohio 4886; 2002 Ohio App. LEXIS 4931

September 19, 2002, Date of Judgment Entry

**Walters, J.**

**[\*P1]** Plaintiff-appellant, The Ohio Bank, nka Sky Bank-Ohio Bank Region ("Bank"), appeals from an action based on its rights as the holder of a note. In that action, the Logan County Common Pleas Court granted summary judgment in favor of Defendant-Appellee, Martha J. Beltz, individually, and as the executrix of the estate of Stephen L. Beltz. Because material issues of fact remain as to (1) whether the terms of the underlying agreement and circumstances presented herein entitled the Beltzs to treat the agreement as though it had failed or were excused from performing thereunder, (2) whether the Beltzs' acceptance and retention of benefits from the transaction may operate to estop them from denying the obligations imposed **[\*\*2]** by the same contract or transaction, and (3) discrepancies between documents concerning the note upon which the Banks seeks to recover, we must reverse the entry of summary judgment.

**[\*P2]** Facts and procedural history relevant to issues raised on appeal are as follows: On October 18, 1999, Stephen Beltz signed a purchase order for a 1999 Ford Ranger from Statewide Ford Mercury ("Statewide") in Kenton, Ohio, for \$ 21,000. At that time, Mr. Beltz prepared an application for credit with and executed a note to the Bank in the amount of \$ 24,133.70, to finance the transaction. Of the loan proceeds, \$ 14,121.14, was to be applied to satisfy an existing loan Mr. Beltz had with Ford Motor Company, which was secured by a 1997 Ford Ranger that was traded-in for the new truck. The Bank rejected the application that same day. Statewide then advised the Beltzs that it would be necessary for Mrs. Beltz to sign the promissory note in order to obtain financing. On October 19, 1999, Mrs. Beltz came to Statewide and signed the note, the 1997 Ford Ranger was turned in to the dealership, and the Beltzs took possession of the 1999 Ford Ranger.

**[\*P3]** Eleven days later, on October 30, 1999, the **[\*\*3]** Beltzs received notice from the Bank indicating that their credit application had been denied. At about the same time, Statewide contacted the Beltzs and requested the immediate return of the 1999 Ford Ranger. Shortly thereafter, the Beltzs were again contacted by Statewide, who informed them that the Bank had made an error in reviewing the credit applications and had since decided to accept Mr. Beltz's individual application.

**[\*P4]** The Bank's amended complaint confirms that they had initially denied the loan because of excessive loan obligations in relation to Mr. Beltz's income. After the initial denial, Statewide indicated that the outstanding loan on the 1997 Ford truck would be paid off, which would reduce Mr. Beltz's outstanding loan obligations and permit approval of the loan. The Bank has indicated that on or about November 2, 1999, Statewide sent loan documents to the bank and requested payment for the financed vehicle. However, because the loan application and promissory note were in

the names of both Mr. and Mrs. Beltz and the Bank had approved the loan in just Mr. Beltz's name, the Bank returned the documents to Statewide for corrections and resubmission of the loan **[\*\*4]** application.

**[\*P5]** When Mr. Beltz refused Statewide's request to sign a new application and contract, the dealership sent a letter stating: "On October 18, 1999, you signed the enclosed contract to purchase a new Ford Ranger pick-up truck from Statewide's store in Kenton, Ohio. Enclosed is a copy of the purchase agreement and your signed promissory note.

**[\*P6]** "As you know[,] Statewide submitted your application for credit to The Ohio Bank, who initially denied it. The Bank indicated that they wanted your wife on the loan, too. Based upon that, you were asked to have your wife sign the purchase contract and loan application, which she did on October 19, 1999.

**[\*P7]** "Statewide was led to believe that credit would be issued to one or both of you, and as a result, Statewide permitted you to take possession of the 1999 Ranger truck. They also took your old truck in trade, and paid off the loan on it."

**[\*P8]** "The Ohio Bank then notified Statewide that your joint credit application was rejected. However, after reviewing your own application again, The Ohio Bank apparently realized it had made an error in reviewing just your credit, and they have since decided to **[\*\*5]** accept your individual application for credit.

**[\*P9]** "Statewide's salesman recently stopped by your residence to have you sign a new credit application, and contract to take care of this, but you refused to sign these documents.

**[\*P10]** "At this time you have Statewide's 1999 Ford Ranger, and you have not paid for it.

**[\*P11]** "As I see it, you have three choices. First, by the close of business on Monday, you will need to stop at Statewide to sign a new contract and loan application in your name only. Once you do this, the 1999 Ford Ranger will be paid for with your loan and title to it will be issued to you.

**[\*P12]** "Or, second, by the close of business on Monday, you can re-deem your old truck and re-institute your old loan with Ford Motor Company in the amount of \$ 14,121.00; and, return the 1999 Ford and pay Statewide \$ 49.95 per day since October 18, 1999, as and for rent for it; and, pay \$ .15 per mile for every mile in excess of 100 miles per day since you have had possession of it; and, pay for any damages you may have caused to this truck while it has been in your possession.

**[\*P13]** "Or third, and the least desirable choice for both parties, is for **[\*\*6]** you to do nothing. If that is your choice, then further legal action will be taken against you."

**[\*P14]** The Beltzs returned the 1999 Ford Ranger on November 9, 1999, but did not retrieve the 1997 Ford Ranger or reaffirm their indebtedness thereon.

**[\*P15]** On November 18, 1999, the Bank sent a check for the loan proceeds to Statewide. The Bank claims that Statewide did not notify it that the vehicle had been returned to the dealership before the Bank financed the purchase and had

represented at all times that the Beltzs had possession of the vehicle and were in agreement with the Note. On or about November 30, 1999, the Bank sent Mr. Beltz a past due notice on the purported loan. Statewide paid the first installment of the loan. Having received no further payments, the Bank repossessed the vehicle on March 7, 2000, subsequently sold it at auction for \$ 10,000, and applied the auction proceeds to the balance of the note, leaving a deficiency on the note of \$ 15,096.87.

**[\*P16]** On June 26, 2000, the Bank filed suit against Stephen and Martha Beltz, seeking to enforce the terms of the note. Martha Beltz, as executrix of the estate of Stephen Beltz, was subsequently substituted **[\*\*7]** for Stephen Beltz. The Appellees answered the complaint, including therewith various counterclaims against the Bank and a third-party complaint against Statewide. The Bank subsequently amended their complaint to include claims against Statewide. Competing summary judgment motions were submitted before the trial court. The trial court concluded that any purported agreement failed for lack of consideration, dismissed the Bank's claims with prejudice, found there was no just cause for delay, and continued the matter for proceedings involving the Appellees' counterclaims against the Bank. The instant appeal followed.

**[\*P17]** Because the arguments presented by the Bank in the following consolidated assignments of error are interrelated, we have elected to address them simultaneously:

**[\*P18]** "The trial court erred in sustaining Defendants-Appellees' (Beltz) motion for summary judgment against Plaintiff-Appellant (Sky Bank) by finding that:

**[\*P19]** "1. There was a failure of consideration to support the existence of a legal obligation from Beltz to Sky Bank to repay funds advanced by Sky Bank on behalf of Beltz.

**[\*P20]** "2. There was no genuine issue of material fact **[\*\*8]** raised by the evidence submitted concerning the failure of consideration between the parties.

**[\*P21]** "3. There was no genuine issue of material fact raised by the evidence submitted concerning whether Beltz properly rescinded the loan agreement with Sky Bank by returning the vehicle purchased without repayment of the funds advanced by Sky Bank on behalf of Beltz."

#### *Summary Judgment Standard*

**[\*P22]** <sup>HN1</sup> It is well-established under Ohio law that a court may not grant a motion for summary judgment unless the record demonstrates: (1) that no genuine issue of material fact remains to be litigated; (2) that the moving party is entitled to judgment as a matter of law; and (3) that, after construing the evidence most strongly in the nonmovant's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. <sup>1</sup> In ruling on a summary judgment motion, the trial court is not permitted to weigh evidence or choose among reasonable inferences; rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the nonmovant. <sup>2</sup> Even **[\*\*9]** the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the adverse party. <sup>3</sup> Appellate review of summary judgment

determinations is conducted on a de novo basis; <sup>4</sup> therefore, this Court considers the motion independently and without deference to the trial court's findings. <sup>5</sup>

#### FOOTNOTES

<sup>1</sup> Civ.R. 56(C); *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 686-687, 653 N.E.2d 1196.

<sup>2</sup> *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7, 663 N.E.2d 653.

<sup>3</sup> *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044.

<sup>4</sup> *Griner v. Minster Bd. of Edn.* (1998), 128 Ohio App.3d 425, 430, 715 N.E.2d 226.

<sup>5</sup> *J.A. Industries, Inc. v. All American Plastics, Inc.* (1999), 133 Ohio App.3d 76, 82, 726 N.E.2d 1066.

**[\*P23]** The Bank's action is predicated upon its rights as the holder **[\*\*10]** of the note executed by the Beltzs in conjunction with their original offers to purchase the 1999 Ford Ranger. However, because of the Bank's involvement in and knowledge of facts underlying the transaction, it is not a holder in due course and holds the note subject to all valid claims and defenses that would be available if it was attempting to enforce the right to payment under a simple contract. <sup>6</sup> In this instance, the Beltzs contend that their offer was rejected, thereby preventing the formation of a contract, and that the instrument was issued without consideration. <sup>7</sup> Therefore, as the trial court's determination indicates, the initial inquiry in this matter is whether there is an enforceable agreement upon which the Bank may pursue its claims.

#### FOOTNOTES

<sup>6</sup> R.C. 1303.31; 1303.23; 1303.35; 1303.36.

<sup>7</sup> R.C. 1303.33(B).

**[\*P24]** <sup>HN2</sup> "It is axiomatic that the formation of a contract is dependent upon both offer and acceptance." <sup>8</sup> To constitute a valid contract, **[\*\*11]** there must be an offer on the one side and an acceptance on the other, resulting in a meeting of the minds of the parties. <sup>9</sup> "When the [offeree] has once rejected the offer it can not afterwards be revived by the mere tender of an acceptance of it." <sup>10</sup> "It is elementary that a refusal to accept, or an acceptance upon terms varying from those offered, is

a rejection of the offer, and puts an end to the negotiations unless the party who made the original offer renews it, or assents to the modification suggested." <sup>11</sup> In addition, the contract must be supported by sufficient consideration. "Consideration may consist of either a detriment to the promisee or a benefit to the promisor. A benefit may consist of some right, interest or profit accruing to the promisor, while a detriment may consist of some forbearance, loss or responsibility given, suffered or undertaken by the promisee." <sup>12</sup>

#### FOOTNOTES

<sup>8</sup> *Univ. Hosps. of Cleveland, Inc.* (2002), 96 Ohio St.3d 118, 130, 220 Ohio 3748, 772 N.E.2d 105, at P 62, citing 1 Corbin on Contracts (Rev.Ed.1993), Sections 3.18 and 3.28.

<sup>9</sup> *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 2 Ohio B. 632, 442 N.E.2d 1302.

[\*\*12]

<sup>10</sup> *Id.* (citation omitted).

<sup>11</sup> *Brush Elec. Light Co. v. City of Cincinnati* (1892), 1892 Ohio Misc. LEXIS 167, 11 Ohio Dec. Reprint 581, 28 W.L.B. 29; 17A Am. Jur.2d Contracts § 68, Effect of Revocation or Rejection of Offer (2002).

<sup>12</sup> *Brads v. First Baptist Church* (1993), 89 Ohio App.3d 328, 336, 624 N.E.2d 737 (citations omitted); see, also, *Irwin v. Lombard Univ.* (1897), 56 Ohio St. 9, 46 N.E. 63.

[\*P25] The record herein supports that the Beltzs submitted an offer to purchase the vehicle to Statewide and that the dealership had accepted their offer, contingent upon the Beltzs being able to secure financing for the purchase. We do not, however, have before us a copy of the purchase agreement; therefore, we are unable to determine the nature of the contingency or whether the Beltzs were entitled to treat the agreement as though it had failed or were excused from performing thereunder upon the Bank's initial denial of the parties' credit application. The nature of the condition and its effect upon the agreement is a question [**\*\*13**] of intent, to be ascertained by considering the language of the provision, the entire agreement, and the subject matter of the agreement. <sup>13</sup>

#### FOOTNOTES

13 See, e.g., *Wrase v. Ardis* (Jan. 17, 1992), Lucas App. No. L 90-335, 1992 Ohio App. LEXIS 125; *Washington Cty. Agr. & Mechanical Ass'n v. T.H.E. Ins. Co.* (Dec. 22, 1992), Washington App. Nos. 92CA4, 92 CA13, 1992 Ohio App. LEXIS 6535.

**[\*P26]** Moreover, even if the Beltzs were entitled to treat the agreement as though it had failed or were excused from performing thereunder, the terms contained within the November 5, 1999 letter from Statewide could reasonably be construed as an offer for the sale of the 1999 truck under the original terms of the agreement. In response thereto, the Beltzs elected to return the 1999 truck, an initial expression of an intent to reject the offer. However, for reasons that are not apparent from the record, the Beltzs did not retrieve the 1997 truck and did not reaffirm their corresponding indebtedness. Contrary to the trial court's findings, the satisfaction of the existing loan **[\*\*14]** on the 1997 truck certainly provided partial consideration for the transaction between Statewide and the Beltzs. As a result, we are potentially confronted with a situation in which a party to a transaction has retained a benefit therefrom while attempting to refute or reject the contract.

**[\*P27]** <sup>HN3</sup> As a general principle, "a party cannot be permitted to retain the benefits of a contract and at the same time repudiate it or reject its burdens." <sup>14</sup> Courts have long recognized that "a party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by the same contract or transaction." <sup>15</sup> The principles of estoppel by acceptance of benefits, "quasi-estoppel," "estoppel in pais," or "equitable estoppel," have been recognized under varying circumstances. <sup>16</sup> The Ohio Supreme Court has noted that in the "acceptance of benefits" or "quasi-estoppel" situation, strict adherence to some of the elements of technical estoppel, such as knowledge and reliance, may not be required for the doctrine to be invoked, <sup>17</sup> describing the application of these principles as follows:

**[\*P28]** "Of course, <sup>HN4</sup> in technical estoppel, the party to be estopped **[\*\*15]** must knowingly have acted so as to mislead his adversary, and the adversary must have placed reliance on the action and acted as he would otherwise not have done. Some authorities, however, hold that what is tantamount to estoppel may arise without this reliance on the part of the adversary, and this is called ratification, or election by acceptance of benefits, which arises when a party, knowing that he is not bound by a defective proceeding, and is free to repudiate it if he will, upon knowledge, and while under no disability, chooses to adopt such defective proceeding as his own. Such conduct amounts to a ratification. Estoppel proceeds on the theory that the party's conduct has induced his adversary to take certain action on the faith of it, and that it would work injury to his adversary if the party were not compelled to be bound by such conduct. This element of knowledge and reliance upon the part of the adversary may not be present in ratification. Ratification means that one under no disability voluntarily adopts and gives sanction to some unauthorized act or defective proceeding, which without his sanction would not be binding on him. It is this voluntary choice, knowingly **[\*\*16]** made, which amounts to a ratification of what was thereafter unauthorized [or defective], and becomes the authorized act of the party so making the ratification." <sup>18</sup>

#### FOOTNOTES

<sup>14</sup> See, e.g., *Buydden v. Mitchell* (1951), 60 Ohio Law Abs. 493, 102 N.E.2d 21, citing *K-W Ignition Co. v. Unit Coil Co.* (1915), 93 Ohio St. 128, 112 N.E. 199, 13 Ohio L. Rep. 497; *In re Schubert's Estate* (1934), 32 Ohio N.P. 169, 1934 Ohio Misc. LEXIS 1447, 1934 WL 1928.

<sup>15</sup> *Dayton Securities Assoc. v. Avutu* (1995), 105 Ohio App.3d 559, 563, 664 N.E.2d 954 (citations omitted).

<sup>16</sup> *Hampshire Cty, Trust Co. of North Hampton, Mass. v. Stevenson* (1926), 114 Ohio St. 1, 14, 150 N.E. 726 (citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, at 14-15.

**[\*P29]** Accordingly, <sup>HNS</sup> "for an estoppel by acceptance of benefits to arise, [where a party has an election to adopt one of two inconsistent courses of action] the party accepting such benefits must do so with full knowledge of the facts and **[\*\*17]** of his rights." <sup>19</sup> As mentioned previously, the record herein evidences the Beltz's receipt and retention of the benefit of the satisfaction of their existing loan for the 1997 Ford Ranger, which constituted partial consideration for and resulted directly from the transaction between the parties. The record does not, however, contain sufficient information to determine whether the Beltz's retained this benefit with full knowledge of the facts and of their rights or whether they had the ability to "reaffirm" their loan with Ford Motor Company or could have obtained financing for the 1997 Ford Ranger for an amount which appears to significantly exceed its value.

#### FOOTNOTES

<sup>19</sup> *Dayton Securities Assoc.*, 105 Ohio App.3d 559, 563, 664 N.E.2d 954, citing *Brown v. Logan Clay Products Co.* (App.1929), 7 Ohio Law Abs. 515, and 42 Ohio Jurisprudence 3d (1983), Estoppel and Waiver, § 50. See also, *McCahan v. Whirlpool Corp.* (Aug. 29, 1996), Hancock App. No. 5-85-11, 1986 Ohio App. LEXIS 8185.

**[\*P30]** Finally, the Beltz's **[\*\*18]** attached to their summary judgment motion a

copy of the credit denial they received on October 30, 1999. The credit denial purports to correspond to application number 6000192118, applicant Stephen Beltz, dated October 18, 1999, for the amount of \$ 25,739.00. In comparison, the note attached to the Bank's complaint, upon which it seeks to recover, indicates that the note corresponds to application number 6000191438, applicants Stephen and Martha Beltz, also dated October 18, 1999, but for the amount of \$ 24,133.70. The Bank claims that reasonable minds could conclude that the Beltzs made two separate loan applications for credit, one of which was denied while the other was accepted. Although Martha Beltz provided an affidavit wherein she averred that she and her husband signed only a single note, i.e., the note attached to the Bank's complaint, and the Bank has indicated that after denying the original application it had approved the loan only in the name of Stephen Beltz, when the note attached to the complaint lists Stephen and Martha Beltz, the discrepancies in these documents present material issues to be addressed by the trial court upon remand.

**[\*P31]** Accordingly, because **[\*\*19]** the existence of material issues of fact outlined herein preclude an entry of summary judgment, the Bank's assignments of error are well taken.

**[\*P32]** Having found error prejudicial to the appellant herein, in the particulars assigned and argued, the judgment of the Logan County Common Pleas Court is hereby reversed and the cause is remanded for further proceedings in accordance with this opinion.

***Judgment reversed and cause remanded.***

**SHAW, P.J., and HADLEY, J., concur.**

PHILIP W. PAAR, Plaintiff-Appellee -vs- JACKSON TOWNSHIP BOARD OF TRUSTEES,  
Defendant-Appellant

Case No. 2003-CA-00334

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

2004 Ohio 5567; 2004 Ohio App. LEXIS 4987

October 18, 2004, Date of Judgment Entry

*Gwin, P.J.*

**[\*P1]** Defendant Jackson Township Board of Trustees appeals a judgment of the Court of Common Pleas of Stark County, Ohio, entered on a jury verdict in favor of plaintiff Philip W. Paar on his complaint for breach of contract and promissory estoppel. Appellant assigns six errors to the trial court:

**[\*P2]** "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT A DIRECTED VERDICT ON ALL COUNTS OF THE APPELLEE'S COMPLAINT, PARTICULARLY PROMISSORY ESTOPPEL AND BREACH OF CONTRACT.

**[\*P3]** "II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE CLAIMS OF PROMISSORY ESTOPPEL AND BREACH OF CONTRACT.

**[\*P4]** "III. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON IMMUNITY AND OTHER CONTRACT DEFENSES, AND BY PROHIBITING APPELLANTS FROM UTILIZING EVIDENCE CONCERNING **[\*\*2]** THE DAWSON SETTLEMENT.

**[\*P5]** "IV. THE TRIAL COURT FAILED TO GRANT A MISTRIAL AFTER THREE JURORS COMPLAINED ABOUT INFORMATION PROVIDED BY DEBORAH DAWSON DURING A RECESS, AND AFTER COUNSEL FOR BOTH PARTIES MOVED FOR A MISTRIAL.

**[\*P6]** "V. THE TRIAL COURT ERRED IN FAILING TO REMIT OR ENTER JUDGMENT ON THE VERDICT FOR PROMISSORY ESTOPPEL AFTER ADVISING COUNSEL BEFORE THE JURY WAS INSTRUCTED THAT THE COURT COULD MAKE AN ADJUSTMENT IF THE VERDICTS WERE RETURNED FOR BOTH BREACH OF CONTRACT AND PROMISSORY ESTOPPEL.

**[\*P7]** "VI. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE VERDICTS OF CONTRACT BREACH AND PROMISSORY ESTOPPEL."

**[\*P8]** At trial, the jury heard evidence appellee was a police officer for appellant Jackson Township for most of the past 24 years. Appellee was a patrol officer in 1977, and advanced through the ranks to the level of Chief in 1983. In 1997, the Board of Trustees demoted him to the position of Lieutenant, but 4 months later, a new Board of Trustees re-appointed appellee as Police Chief. Appellee was Chief of Police until he tendered his resignation on November 19, 2001. The circumstances surrounding **[\*\*3]** appellee's retirement and the subsequent events were the subject of this lawsuit.

**[\*P9]** Beginning in the spring of 2001, appellee approached the Board of Trustees about the possibility of implementing Community Oriented Government in Jackson Township. Community Oriented Government is a system which coordinates various township services in order to better serve the residents. The trustees gave appellee permission to investigate the idea, and to attend a conference on the subject. After attending the conference, appellee gave a full presentation on the concept of Community Oriented Government to the Board of Trustees. Two of the trustees supported the concept and were in favor of creating a position to implement the concept in Jackson Township.

**[\*P10]** Appellee was considering resigning from his position as Chief of Police to begin receiving retirement benefits. One of the township trustees suggested to appellee he would support appellee to fill the newly created position of Public Services Coordinator to implement the Community Oriented Government. The trustee asked appellee to draft a job description and an employment contract for the Public Services Coordinator position. **[\*\*4]** The Law Director for the township reviewed and approved the job description and employment contract. One of the provisions of the employment agreement provided the parties contemplated the position would have bargaining unit status, but this required approval from the State Employee Relations Board.

**[\*P11]** At a public hearing on November 19, 2001, the Board of Trustees approved the creation of the Public Services Coordinator position, and appellee presented the Board with his written resignation. The Board accepted the resignation, and offered appellee the position of Public Services Coordinator. Appellee accepted the position, which was to begin on December 3, 2001.

**[\*P12]** The resolution creating the position and appointing appellee invoked the statutory authority of R.C. Section 511.10. The resolution also accepted the negotiated agreement, containing the provision the position would become a union position if and when SERB gave its approval.

**[\*P13]** On November 30, 2001, a Jackson Township resident, Deborah Dawson, filed a lawsuit in Stark County Common Pleas Court alleging violations of Ohio's Sunshine Law in the creation of the Public Services Coordinator position. **[\*\*5]** On December 4, 2001, the trustees met with their attorney and the attorney for Ms. Dawson in Executive Session, and entered into a settlement of the pending lawsuit. The terms of the settlement included removal of appellee from the Public Services Coordinator position, and prevented appellee from returning to his former position as Chief of Police. However, the parties agreed appellee would be appointed to a Lieutenant's position with the township police department. The settlement agreement rescinded all resolutions regarding the creation of the Public Services Coordinator position, and specified the position would not be created or filled before May 1, 2002. After the parties entered into the settlement, the Police Sergeant's Union filed a grievance against the township based on the union agreement which provided any Lieutenant in the township had to be drawn from the Sergeant's pool. As a result, the Board did not give appellee the promised Lieutenant position.

**[\*P14]** After appellee left the township payroll, he was offered a temporary part-time position to perform various administrative functions in the township. The Board indicated it would create the position for appellee **[\*\*6]** so that his income would be the equivalent to what he would have received had he remained Chief of Police. The long-term goal of the Board was to create the Public Services Coordinator

position, and offer the position to the best candidate. The Board indicated appellee would be strongly considered. Appellee testified he did not believe the Board would fulfill these promises, perhaps because someone would file another action against him as it happened in the Dawson suit. Appellee declined to accept the part-time job and instead filed his lawsuit in February, 2002.

I

**[\*P15]** In its first assignment of error, appellant Board of Trustees argues the trial court should have granted a directed verdict in its favor on all counts of the appellee's complaint. <sup>HN1</sup> Pursuant to Civ. R. 50, a trial court must construe the evidence most strongly in favor of the party against whom the motion is directed, and if it finds that upon any determinative issue reasonable minds could come to but one conclusion on the evidence submitted, and this conclusion is adverse to the non-moving party, then the court shall sustain the motion and direct a verdict for the non-moving party as to this issue. The reasonable **[\*\*7]** minds test calls upon the court only to determine whether there exists any evidence of substantial probative value in support of the claims of the party against whom the motion is directed, Wagner v. Roche Laboratories (1996), 77 Ohio St. 3d 116, 1996 Ohio 85, 671 N.E. 2d 252. The motion for directed verdict raises a question of law because it examines the materiality of the evidence as opposed to the conclusions which may be drawn from the evidence, Ruta v. Breckenridge-Remy Company (1982), 69 Ohio St. 2d 66, 23 OO 3d 115, 430 N.E. 2d 935. Because a motion for directed verdict presents a question of law, our standard of reviewing a trial court's judgment on a directed verdict is de novo, Titanium Industries v. S.E.A, Inc. (1997), 118 Ohio App. 3d 39, 691 N.E.2d 1087.

**[\*P16]** First, <sup>HN2</sup> as to appellee's cause of action for promissory estoppel, in order to prove his claim, appellee must show: (1) a promise; (2) that the promisor should reasonably expect to induce action or inaction on the part of another; (3) which does induce the action or inaction; and (4) injustice will result if the promise is not enforced, see Ed Schory & Sons, Inc. v. Francis (1996), 75 Ohio St. 3d 433, 1996 Ohio 194, 662 N.E.2d 1074. **[\*\*8]**

**[\*P17]** First, appellant Board argues appellee could not have reasonably relied upon anything that was said or done outside the confines of a public meeting of the Board of Township Trustees, because the Board of Trustees can only function as a Board when it operates in open and public meetings.

**[\*P18]** Appellee responds he presented evidence the Board made statements to him both during Executive Session and in the open meeting following the Executive Session, which encouraged him to resign in order to accept the newly created position of Public Services Coordinator. Appellee did present evidence certain trustees made statements to him outside of meetings, but appellee argues there were statements and actions taken during the public meeting which in and of themselves permit reasonable reliance. We agree.

**[\*P19]** Next, appellant argues appellee must prove appellant deliberately misled him into resigning, or were fraudulent in offering him the position of Public Service Coordinator. As appellee points out, <sup>HN3</sup> there are two lines of cases in Ohio, one suggesting the promisor's conduct must be misleading, but another line of cases suggesting knowingly false representation or **[\*\*9]** fraud is not an element of estoppel, see, e.g., First Federal Saving & Loan Association of Toledo v. Perry's

Landing, Inc. (1983), 11 Ohio App. 3d 135, 11 Ohio B. 215, 463 N.E. 2d 636. In the Perry's Landing case, the Court of Appeals for Wood County conducted an extensive discussion of the doctrine of estoppel. The court cited Restatement of the Law 2d, Contracts 1981 and case law, for the proposition that proof of fraud is not always necessary for estoppel, and one may be held responsible for words or acts which he knows or should know will be acted upon by another. Estoppel is not actionable fraud, and must not be treated as actionable fraud. There is no need to prove intent to deceive, nor misrepresentation of fact to form the basis of an estoppel, Perry's Landing at 647, citations deleted. When a party induces another to take an action, estoppel prevents the party from later taking an inconsistent position which damages the other because of the induced action.

**[\*P20]** We find appellee was not required to prove appellant acted fraudulently, or intended to mislead him into resigning his position as Chief of Police. Appellee presented evidence tending to show appellant **[\*\*10]** Board of Trustees offered him the position of Public Services Coordinator, so he resigned his position as Chief of Police. Thereafter, appellant Board not only withdrew its offer to place appellee in the position of Public Services Coordinator, but also agreed in the Dawson settlement not to restore appellee to his former position as Chief of Police. We find this is sufficient to meet the elements of promissory estoppel.

**[\*P21]** With regards to the breach of contract claim, appellant Board argues it created the position of Public Services Coordinator under R.C. 511.10, <sup>HN4</sup> which provides for at-will employment of employees within a township. For this reason, the Board urges any appointment it made to the position of Public Services Coordinator was at the pleasure of the Board, and the position could be eliminated at any time.

**[\*P22]** Appellant responds while R.C. 511.10 is the general enabling statute which provides for the hiring of certain classifications of township trustees, the statute does not limit the authority of the trustees to enter into written employment agreements with its employees instead of maintaining an at-will employment status. Appellee cites us to Beasley v. City of East Cleveland (1984), 20 Ohio App. 3d 370, 20 Ohio B. 475, 486 N.E. 2d 859, **[\*\*11]** as authority for the proposition a city manager working under an employment contract can bring a breach of contract claim against the city.

**[\*P23]** We find appellee presented evidence tending to show the employment relationship between the Board and appellee Paar involved a written employment agreement, and was not an at-will relationship.

**[\*P24]** Next, the Board argues <sup>HN5</sup> R.C. 2744.07 provides political sub-divisions shall defend their employees who are sued in connection with their duties. If the political sub-division enters into a consent judgment or settlement, then no action or appeal of any kind may be brought by any person, including the employee or a taxpayer concerning the amount or circumstances of the consent judgment or settlement.

**[\*P25]** We find R.C. 2744.07 does not provide immunity under these circumstances. The settlement the Board entered into was not in defense of any employee sued in connection with his duties. Appellee was not involved in the negotiations, and was not a party to the Dawson litigation.

**[\*P26]** We find none of appellant's arguments against appellee's causes of action

are well taken, and accordingly we conclude the trial court correctly **[\*\*12]** overruled the motion for directed verdicts.

**[\*P27]** The first assignment of error is overruled.

II and III

**[\*P28]** Both of these assignments of error address jury instructions.

**[\*P29]** First, appellant argues the trial court erred in instructing the jury on promissory estoppel and breach of contract. In addition to the issues raised in I, supra, appellant argues the Doctrine of Estoppel is never applicable against a political subdivision while engaged in a governmental function. Appellant Board argues because R.C. 2744.07 permits it to enter into settlements, it was performing a governmental function when it entered into the Dawson settlement which effectively eliminated appellee's new position, and his old one. As stated in I, supra, we find the statute does not provide immunity to appellant as to an action by appellee.

**[\*P30]** In its third assignment of error, appellant urges the trial court erred in failing to instruct the jury on immunity and other contract defenses, and also by preventing appellant from utilizing any evidence concerning the Dawson settlement.

**[\*P31]** As stated supra, we find immunity was not an available defense here.

**[\*P32]** Appellant **[\*\*13]** attempted to cross-examine appellee regarding the Dawson lawsuit. The trial court instructed the jury the Dawson lawsuit did not involve appellee and did not affect the contractual relationship, if any, he may have had with the township. At the conclusion of the case, the trial court gave jury instructions informing the jury the Dawson lawsuit had no legal bearing on whether the Board of Trustees had the legal right to rescind the position of Public Services Coordinator. Instead, the court instructed the jury the Board of Trustees had the authority to rescind or terminate the position or employee at any time at the discretion of the Board of Trustees so long as this did not violate any legal agreement or contract.

**[\*P33]** The trial court found appellant had entered into the Dawson settlement voluntarily, and we agree. The record does not demonstrate appellant trustees could not have negotiated some other settlement or pursued other alternatives.

**[\*P34]** <sup>HN6</sup> A trial court properly instructs the jury where the instruction given correctly states the law which applies to the issues raised by the evidence in the case, see e.g., Pallini v. Dankowski (1969), 17 Ohio St. 2d 51, 245 N.E.2d 353. **[\*\*14]** A trial court has broad discretion in instructing the jury, Bostic v. Connor (1988), 37 Ohio St. 3d 144, 524 N.E.2d 881.

**[\*P35]** We find the trial court did not err in instructing the jury as it did. Accordingly, the second and third assignments of error are overruled.

IV

**[\*P36]** In its fourth assignment of error, appellant argues the court erred in not granting a mistrial after 3 jurors informed the court Deborah Dawson made open and

prejudicial comments in their presence during a recess.

**[\*P37]** The trial court conducted a voir dire of the jury after learning from the bailiff the jurors had reported Ms. Dawson's actions. Juror 19 stated while she was waiting to get some food at the counter, a woman behind the juror said in a loud voice, something about money being offered, and a salary and that she could not believe some things. The woman identified herself as Deborah Dawson. The court asked Juror 19 if she understood anything Deborah Dawson said has absolutely nothing to do with case. The juror agreed she understood this and could put the matter out of her mind. The juror indicated she was still comfortable sitting on the jury, and did not feel intimidated or pressured.

**[\*\*15] [\*P38]** Juror 37 informed the court two women between Juror 19 and Juror 37 were talking loudly while waiting for their food. One of the ladies stated she was a teacher for 31 years, and after she retired, she never expected to be able to get her job back. When Juror 37 heard the name Deborah Dawson, she turned around and left. The juror informed the court she felt able to continue to sit on the jury and be fair, and she had not repeated any of this to any of the other jurors.

**[\*P39]** Finally, Juror 49 told the court he had been in the snack bar when he heard someone say something about \$ 100,000 and a job being created for someone. The juror indicated he had a hearing problem, and stepped a few paces away so he would not be able to hear anything else. This juror also informed the court he was able to put it totally out of his mind, and do justice to both sides.

**[\*P40]** The trial court found there was no taint and every one of the jurors had indicated they could be fair. The trial court gave all counsel the opportunity to question the jurors.

**[\*P41]** Appellant argues the negative impact of the various comments in front of the jury could not be overstated. Appellant **[\*\*16]** states there is little doubt Dawson's intent was to influence the jury, but admits the actual impact of her statements is unclear. Appellant also asserts the jury had learned from these comments there was an offer made by appellant to appellee to resolve the claim.

**[\*P42]** We have reviewed the record, and we agree with the trial court the jurors appeared to be uninfluenced by Deborah Dawson's statements. From the jurors' reports, it is not at all clear the jurors understood there had been any settlement offer made.

**[\*P43]** <sup>HN7</sup>In determining whether a trial court properly exercised its discretion, reviewing courts must determine whether there was a manifest necessity or high degree of necessity for ordering a mistrial, or whether the ends of public justice will otherwise be defeated, *State v. Widner* (1981), 68 Ohio St. 2d 188, 429 N.E. 2d 1065. The Supreme Court has been reluctant to formulate standards outlining the circumstances under which a mistrial may arise, but has instructed us to defer to the trial court's discretion in light of all surrounding circumstances, *Id.*

**[\*P44]** We find the record supports the trial court's determination a mistrial was **[\*\*17]** not necessary. Accordingly, the fourth assignment of error is overruled.

V

**[\*P45]** In its fifth assignment of error, appellant argues the trial court should not have entered judgment both on promissory estoppel and breach of contract. Appellant argues the two claims are alternatives, *Kashif v. Central State University* (1999), 133 Ohio App. 3d 678, 729 N.E.2d 787. In fact, appellant states, the two claims are mutually exclusive, and it is plain error for the trial court to enter judgment on verdicts based on both. In *Castle Nursing Homes, Inc. v. Sullivan* (November 21, 1996), Holmes Appellate No. 95-CA-541, 1996 Ohio App. LEXIS 6071, this court reviewed a judgment entered on a jury verdict for both breach of contract and promissory estoppel. In that case, the trial court had instructed the jury Sullivan's recovery would be the same on either claim, and the jury returned identical verdicts on each claim.

**[\*P46]** The appellant in *Sullivan* argued to us the claims were separate and distinct, not alternative, because the breach of contract claim was based on the written employment agreement while the promissory estoppel claim was based on an alleged oral representation Sullivan could remain with **[\*\*18]** Castle Nursing Home until retirement. We found the jury verdicts were inconsistent because the written provisions of the contract provided for a limited term of employment, although it was renewable upon agreement of the parties.

**[\*P47]** Here, the appellant failed to object to the jury verdict, and did not raise any concern when the trial court asked if there were any other matters to be considered after the reading of the verdict. Appellant did not object to the jury instructions, or ask for an instruction that the claims were in the alternative. Here, the jury was instructed not to award damages for the same item twice, and appellant did not request any jury interrogatories to test the verdict. Appellant did not request the jury verdicts be clarified or re-submitted to the jury.

**[\*P48]** Appellee argues the breach of contract claim was presented from the time the breach of the contract occurred until the date of the trial, and the jury awarded him \$ 105,000, which was in accord with the evidence. The contract had no specific ending date. Appellee also testified he expected to remain working with the township until his retirement in approximately 12 years. The court instructed **[\*\*19]** the jury it could consider the amount of future expectancy damages. The verdicts awarded different amounts.

**[\*P49]** We find the damages on the breach of contract and promissory estoppel are not identical, and we find where appellant has failed to object, offer any jury instruction, or any jury interrogatory, the trial court did not err in entering judgment on both verdicts.

**[\*P50]** The fifth assignment of error is overruled.

VI

**[\*P51]** In its final assignment of error, appellant argues the trial court should have granted a new trial, or judgment notwithstanding the verdict.

**[\*P52]** <sup>HNS</sup> Pursuant to Civ. R. 50, a motion for judgment notwithstanding the verdict is similar to a motion for directed verdict in that the trial court must determine whether, as a matter of law, reasonable minds could come but to one conclusion upon the evidence submitted. Appellant re-submits its arguments in I, supra, for a directed verdict, in support of its argument it was entitled to a judgment

notwithstanding the verdict.

**[\*P53]** For the reasons we stated in I, supra, we reject these arguments.

**[\*P54]** Appellant also argues the trial court should have ordered a new trial pursuant **[\*\*20]** to Civ. R. 59. The grounds appellant gave for the granting of a new trial was that the evidence did not sustain the verdict, and the incident with Deborah Dawson constituted an irregularity of the proceedings which prevented appellant from having a fair trial.

**[\*P55]** <sup>HN9</sup>¶ In determining a motion for new trial, the trial court may weigh the evidence and determine the credibility of the witnesses to insure justice has been done, see Rohde v. Farmer (1970), 23 Ohio St. 2d 82, 262 N.E.2d 685.

**[\*P56]** We have reviewed the record, and we find there was sufficient, competent and credible evidence going to each element of the claims to support the jury's verdict. Accordingly, the court did not err in overruling the motion for new trial.

**[\*P57]** The sixth assignment of error is overruled.

**[\*P58]** "I. THE TRIAL COURT ERRED IN DENYING CROSS APPELLANT'S MOTION FOR PREJUDGMENT INTEREST."

**[\*P59]** Turning now to the cross-appellant's assignment of error, appellee/cross-appellant argues the trial court erred when it did not grant appellee's motion for prejudgment interest made pursuant to R.C. 1343.03. <sup>HN10</sup>¶ The statute provides when money becomes due and payable upon any bond, bill, **[\*\*21]** note, or other instrument of writing, book account, settlement, verbal contracts, or judgments and decrees, the creditor is entitled to interest at a rate of 10% per annum.

**[\*P60]** <sup>HN11</sup>¶ The Supreme Court has held pre-judgment interest is not available to a plaintiff in a breach of employment contract claim, because damages cannot be ascertained until a determination is made, and cannot be ascertained by a mere computation or reference to market values. Also appellant points out, if appellee had been placed in the position of Public Services Coordinator, he would have received wages over time, and not all at once when he assumed the position.

**[\*P61]** In addition, the damages for promissory estoppel are expectancy damages, for wages expected to be paid out in the future. Clearly, pre-judgment interest would not apply to wages not due and payable prior to trial.

**[\*P62]** We find the trial court did not err in overruling appellee/cross-appellant's motion for pre-judgment interest.

**[\*P63]** The cross-assignment of error is overruled.

**[\*P64]** For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, P.J., Farmer, **[\*\*22]** J., and Boggins, J., concur

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellant.

§ 5717.02. Appeals from final determinations; procedure; hearing

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 [5703.05.6] of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it

their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

**History:**

GC § 5611; 106 v 246(260), § 54; 118 v 344; 119 v 34(48); Bureau of Code Revision, 10-1-53; 135 v S 174 (Eff 12-4-73); 136 v H 920 (Eff 10-11-76); 137 v H 634 (Eff 8-15-77); 139 v H 351 (Eff 3-17-82); 140 v H 260 (Eff 9-27-83); 141 v S 124 (Eff 9-25-85); 141 v H 321 (Eff 10-17-85); 145 v S 19 (Eff 7-22-94); 148 v H 612 (Eff 9-29-2000); 148 v S 287 (Eff 12-21-2000); 149 v S 200. Eff 9-6-2002.

§ 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and

the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

**History:**

GC § 5611-2; 107 v 550; 116 v 104(123), § 2; 118 v 344(355); 119 v 34(49); Bureau of Code Revision, 10-1-53; 125 v 250 (Eff 10-2-53); 135 v S 174 (Eff 12-4-73); 137 v H 634 (Eff 8-15-77); 140 v H 260 (Eff 9-27-83); 142 v H 231. Eff 10-5-87.

§ 5727.02. Persons excepted

As used in this chapter, "public utility," "electric company," "natural gas company," "pipe-line company," "water-works company," "water transportation company" or "heating company" does not include any of the following:

(A) (1) Except as provided in division (A)(2) of this section, any person that is engaged in some other primary business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental. As used in division (A) of this section and in section 5727.031 [5727.03.1] of the Revised Code, "supplying of electricity" means generating, transmitting, or distributing electricity.

(2) For tax year 2009 and each tax year thereafter, a person that is engaged in some other primary business to which the supplying of electricity to others is incidental shall be treated as an "electric company" and a "public utility" for purposes of this chapter solely to the extent required by section 5727.031 [5727.03.1] of the Revised Code.

(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise;

(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products.

(D) Any person whose primary business in this state consists of producing or gathering natural gas rather than supplying or distributing natural gas to consumers.

**History:**

GC § 5416-1; 118 v 258; 123 v 452; 124 v 460; Bureau of Code Revision, 10-1-53; 143 v S 156 (Eff 12-31-89); 148 v S 3 (Eff 10-5-99); 149 v H 9, Eff 6-26-2001; 151 v H 66, § 101.01, eff. 6-30-05.

**ATTACHMENT A**

**"AP Summary" Amount Included by HealthSouth in the Computation of Total AP SUMMARY Amount**

|  | Ohio Facility Code | Total AP SUMMARY | "AP Summary" Amount Included in Total AP SUMMARY | RATIO ("AP Summary"/ AP SUMMARY) |
|--|--------------------|------------------|--|----------------------------------|
| 1  | 04-0166-00         | \$568,266        | \$350,103  | 61.61%                           |
| 2  | 04-0209-00         | \$299,820        | \$168,966  | 56.36%                           |
| 3  | 04-0227-00         | \$396,585        | \$282,571  | 71.25%                           |
| 4  | 04-0287-01         | \$227,927        | \$143,899  | 63.13%                           |
| 5  | 04-0314-00         | \$207,424        | \$114,706  | 55.30%                           |
| 6  | 04-0337-00         | \$190,550        | \$96,970   | 50.89%                           |
| 7  | 04-0338-00         | \$373,947        | \$172,086  | 46.02%                           |
| 8  | 04-0339-00         | \$180,954        | \$90,580   | 50.06%                           |
| 9  | 04-0559-00         | \$241,714        | \$150,504  | 62.27%                           |
| 10   | 04-1305-00         | \$210,040        | \$124,275  | 59.17%                           |
| 11   | 04-1337-00         | \$62,490         | \$27,890   | 44.63%                           |
| 12   | 04-1342-00         | \$95,604         | \$52,058   | 54.45%                           |
| 13   | 04-1522-00         | \$199,618        | \$152,462  | 76.38%                           |
| 14   | 04-1525-00         | \$217,755        | \$137,931  | 63.34%                           |
| 15   | 04-9822-00         | \$320,609        | \$203,280  | 63.40%                           |
| AP SUMMARY Grand Total Throughout Ohio                   |                    | \$13,669,188     |  |                                  |
| "AP Summary" Grand Total Throughout Ohio                 |                    |                  | \$2,268,281                                      |                                  |
| RATIO ("AP Summary" Grand Total/ AP SUMMARY Grand Total) |                    |                  |  | 16.59%                           |

\* Source: "Amended Fixed Asset Detail" attached to HealthSouth's Application for Final Assessment (Statutory Transcript pp.246-364)

## ATTACHMENT B

### Discrepancy of HealthSouth's Asset Cost in "Amended Fixed Asset Detail" and in Its Exhibit 4

Data from HealthSouth's Amended Fixed Asset Detail

| Ohio Facility Code | Statutory Transcript page | Acquisition Cost (a) | AP SUMMARY (b)   | Acquisition Cost - AP SUMMARY (c) |
|--------------------|---------------------------|----------------------|------------------|-----------------------------------|
| 04-0031-00         | 269                       | 471,507              | 0                | 471,507                           |
| 04-0031-01         | 270                       | 85,540               | 0                | 85,540                            |
| 04-0031-02         | 286                       | 86,340               | 0                | 86,340                            |
| 04-0031-04         | 271                       | 89,101               | 0                | 89,101                            |
| 04-0031-05         | 286                       | 96,183               | 0                | 96,183                            |
| 04-0031-06         | 330                       | 69,874               | 0                | 69,874                            |
| <b>Total</b>       |                           | <b>898,545</b>       | <b>0</b>         | <b>898,545</b>                    |
|                    |                           |                      |                  |                                   |
| 04-0144-00         | 300                       | 150,598              | 0                | 150,598                           |
|                    |                           |                      |                  |                                   |
| 04-0166-00         | 347                       | 2,110,083            | 1,853,333        | 256,750                           |
| 04-0166-04         | 349                       | 135,589              | 0                | 135,589                           |
| 04-0166-07         | 264                       | 44,611               | 0                | 44,611                            |
| 04-0166-08         | 351                       | 138,289              | 0                | 138,289                           |
| <b>Total</b>       |                           | <b>2,428,572</b>     | <b>1,853,333</b> | <b>575,239</b>                    |
|                    |                           |                      |                  |                                   |
| 04-0209-00         | 308                       | 1,085,774            | 978,915          | 106,859                           |
|                    |                           |                      |                  |                                   |
| 04-0227-00         | 283                       | 1,574,044            | 1,301,422        | 272,622                           |
| 04-0227-01         | 297                       | 132,721              | 0                | 132,721                           |
| 04-0227-02         | 304                       | 62,053               | 0                | 62,053                            |
| 04-0227-03         | 298                       | 120,158              | 0                | 120,158                           |
| 04-0227-05         | 352                       | 105,712              | 0                | 105,712                           |
| <b>Total</b>       | <b>1,534</b>              | <b>1,994,688</b>     | <b>1,301,422</b> | <b>693,266</b>                    |
|                    |                           |                      |                  |                                   |
| 04-0287-01         | 328                       | 712,290              | 705,060          | 7,230                             |
| 04-0287-02         | 248                       | 4,763                | 0                | 4,763                             |
| 04-0287-04         | 249                       | 75,892               | 0                | 75,892                            |
| <b>Total</b>       |                           | <b>792,945</b>       | <b>705,060</b>   | <b>87,885</b>                     |
|                    |                           |                      |                  |                                   |
| 04-0314-00         | 334                       | 911,453              | 801,141          | 110,312                           |
| 04-0314-01         | 278                       | 36,987               | 0                | 36,987                            |
| <b>Total</b>       |                           | <b>911,453</b>       | <b>801,141</b>   | <b>110,312</b>                    |

Data from HealthSouth's Exhibit 4 (2001)

| "Restated" Asset Cost (d) |
|---------------------------|
| 1,668,865                 |
| 152,518                   |
| 804,612                   |
| 184,787                   |
| 657,189                   |
| 86,319                    |
| 111,089                   |

Data Discrepancy

| Difference b/w (c) and (d) : (d) - (c) |
|--|
| 770,320                                |
| 1,920                                  |
| 229,373                                |
| 77,928                                 |
| 163,923                                |
| -1,566                                 |
| 777                                    |

Data from HealthSouth's Amended Fixed Asset Detail

| Ohio Facility Code | Statutory Transcript page | Acquisition Cost (a) | AP SUMMARY (b) | Acquisition Cost - AP SUMMARY (c) |
|--------------------|---------------------------|----------------------|----------------|-----------------------------------|
| 04-0337-00         | 312                       | 858,857              | 730,131        | 128,726                           |
| 04-0338-00         | 317                       | 1,995,908            | 1,791,437      | 204,471                           |
| 04-0339-00         | 320                       | 738,819              | 620,285        | 118,534                           |
| 04-0356-02         | 321                       | 61,794               | 25,360         | 36,434                            |
| 04-0357-00         | 321                       | 752                  | 0              | 752                               |
| 04-0357-02         | 322                       | 113,204              | 0              | 113,204                           |
| Total              |                           | 113,956              | 0              | 113,956                           |
| 04-0559-00         | 253                       | 1,033,007            | 854,814        | 178,193                           |
| 04-0559-01         | 254                       | 48,566               | 0              | 48,566                            |
| 04-0559-02         | 255                       | 47,896               | 0              | 47,896                            |
| Total              |                           | 1,129,469            | 854,814        | 274,655                           |
| 04-1305-00         | 290                       | 959,482              | 795,484        | 163,998                           |
| 04-1337-00         | 302                       | 342,936              | 317,765        | 25,171                            |
| 04-1342-00         | 285                       | 528,087              | 456,544        | 71,543                            |
| 04-1522-00         | 275                       | 859,181              | 696,735        | 162,446                           |
| 04-1525-00         | 326                       | 1,061,545            | 888,339        | 173,206                           |
| 04-9822-00         | 296                       | 1,260,539            | 840,321        | 420,218                           |
| 05-0016-00         | 257                       | 525,992              | 0              | 525,992                           |
| 05-0155-00         | 363                       | 2,899,538            | 0              | 2,899,538                         |
| 05-0259-00         | 258                       | 653,372              | 0              | 653,372                           |
| 05-0289-00         | 277                       | 489,036              | 0              | 489,036                           |
| 05-0296-00         | 263                       | 1,730,172            | 0              | 1,730,172                         |
| 06-0164-00         | 264                       | 1,049,028            | 0              | 1,049,028                         |
| Total              |                           | 25,529,489           | 9,657,000      | 15,872,489                        |

Data from HealthSouth's Exhibit 4 (2001)

| "Restated" Asset Cost (d) |
|---------------------------|
| 122,721                   |
| 206,678                   |
| 114,635                   |
| 36,438                    |
|                           |
| 113,948                   |
|                           |
| 226,993                   |
| 159,444                   |
| 20,424                    |
| 58,850                    |
| 172,711                   |
| 152,147                   |
| 657,529                   |
| 498,675                   |
| 4,772,913                 |
| 1,005,804                 |
| 500,926                   |
| 2,224,557                 |
| 1,107,139                 |
|                           |

Data Discrepancy

| Difference b/w (c) and (d) : (d) - (c) |
|--|
| -6,005                                 |
| 2,207                                  |
| -3,899                                 |
| 4                                      |
|  |
| -8                                     |
|  |
| -47,662                                |
| -4,554                                 |
| -4,747                                 |
| -12,693                                |
| 10,265                                 |
| -21,059                                |
| 237,311                                |
| -27,317                                |
| 1,873,375                              |
| 352,432                                |
| 11,890                                 |
| 494,385                                |
| 58,111                                 |
|  |

**ATTACHMENT C**

**HealthSouth's Asset Data Appearing in Its Amended Fixed Asset Detail But Omitted in Its Exhibit 4**

Data from HealthSouth's Amended Fixed Asset Detail

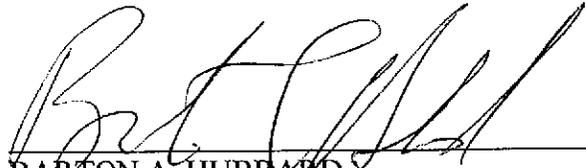
| Ohio Facility Code | Statutory Transcript page | Acquisition Cost | AP SUMMARY | Acquisition Cost - AP SUMMARY |
|--------------------|---------------------------|------------------|------------|-------------------------------|
| 05-0148-00         | 341                       | 2,313,991        | 0          | 2,313,991                     |
| 05-0165-00         | 357                       | 2,221,472        | 0          | 2,221,472                     |
| 06-0193-00         | 296                       | 509,462          | 0          | 509,462                       |

Data from HealthSouth's Exhibit 4  
(2001)

|                            |
|----------------------------|
| "Restated" Asset Cost      |
| <b><u>NOT PROVIDED</u></b> |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Reply Brief of Appellant was sent by regular U.S. mail to Nicholas M. Ray, Siegal, Siegal, Johnson & Jennings Co., LPA., 3001 Bethel Road, Suite 208, Columbus, Ohio 43220, counsel for appellee, on this 15<sup>th</sup> day of July, 2008.

  
\_\_\_\_\_  
BARTON A. HUBBARD  
Assistant Attorney General