

No. 2011-1588

IN THE SUPREME COURT OF OHIO

Discretionary Appeal from the Court of Appeals  
Ninth Appellate District  
Summit County, Ohio  
Case No. 25582, dated August 3, 2011

MICHAEL L. HAWSMAN, ET. AL.,

Plaintiffs-Appellees

v.

CITY OF CUYAHOGA FALLS, ET. AL.,

Defendants-Appellants

**DEFENDANTS/APPELLANTS, CITY OF CUYAHOGA FALLS'  
OPPOSITION TO PLAINTIFFS'/APPELLEES' MOTION TO STRIKE**

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**CITY OF CUYAHOGA FALLS' OPPOSITION  
TO PLAINTIFFS'/APPELLEES' MOTION TO STRIKE**

Appellants, City of Cuyahoga Falls, *et. al.* respond to Appellees' Motion to Strike and oppose the Motion on the grounds that the Appellants' Merit Brief complies with the requirements of S.Ct. Prac. R. 6.2.

Further, Appellees argue that the City's Merit Brief contains information that was not part of the record in the trial court or the court of Appeals. However, the City has not referenced any fact not a part of the record. If Appellees are arguing that the City's reliance on certain arguments of fact and law have to remain the same as in the Court below, then Appellees' "plurality" argument must be stricken as well, because it was not argued in the trial court. The City will make so such argument.

S.Ct. Prac. R. 6 governs briefs on the merits in appeals. S.Ct. Prac. R. 6.2(B) titled "Contents" states:

(4) An argument, headed by the proposition of law that the appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. If several propositions of law are presented, the argument shall be divided with each proposition as set for the as a subheading. *Id.*

The City's merit brief complies with the above rule.

Appellees argue that both the argument in the City's Proposition of Law II and pages 33-36 of the appendices were not argued in the court below or contained in the record below.

It is true that the City did not specifically argue that an exception to a rule cannot consume the rule entirely in either the trial court or the court of appeals.

This was not at issue in the trial court or the court of appeals. The Court of Appeals overruled controlling precedent. No one could have foreseen the court of appeals opinion in the case below. How can the City justly be charged with the duty to argue a point that was not at issue and, at least in the Ninth District, was settled law?

S. Ct. Prac. R. 6 does not command that propositions of law match those suggested in the jurisdictional memorandum. The City's first opportunity to make the argument contained in Proposition of Law II came in its Memorandum in Support of Jurisdiction filed in this Court on September 19, 2011. S.Ct. Prac. R. 3.1(B)(4) requires jurisdictional memorandum contain brief and concise arguments in support of each proposition of law. Since the City did make the argument in its jurisdictional memorandum it should be permitted to expand that argument in its merit brief.

The proceedings below did not present the opportunity for the City to make the argument that Appellees now would like stricken. For the waiver doctrine to apply, the party must have had an opportunity to argue it below. *See, Strip Del., LLC v. Landry's Rests., Inc.*, 5<sup>th</sup> Dist. No. Case No. 2010 CA 00316, 2011 Ohio 4075. Appellees would have this Court rule that each and every possible argument that can foreseeably or even, unforeseeably be made, *must* be made. That simply cannot be done. Certainly, that was not the ruling in *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St.3d 274, 279 (1993) in which this Court held that "[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, [the reviewing court] may consider and resolve that implicit issue. To put it another way, if [the reviewing court] must resolve a legal

issue that was not raised below in order to reach a legal issue that was raised, [it] will do so.” *Id.*

Further, appendices pages 33-36 are included in the City’s merit brief as required by S. Ct. Prac. R. 6.2(B)(5)(f). The Court is permitted to take judicial notice of 1999 H.B. 205 that is attached at appendices pages 33-36. *See, Lawyers Coop. Pub. Co. v. Muething*, 65 Ohio St3d 273 (1993). The City submits that a “hard” copy of the other statutes that it attached pursuant to the S. Ct. Prac. R. 6.2(B)(5)(f) were not in the court of appeals record below either. Statues are not evidence – they are relied upon to make cogent arguments. Appellees’ protests are misplaced.

The City’s Proposition of Law II and pages 33-36 of the appendices should be allowed to stand.

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court overrule Appellees' Motion to Strike in its entirety.

Respectfully submitted,



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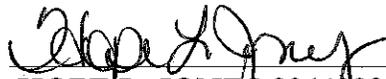
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Merit Brief has been sent by regular U.S. Mail, postage prepaid, March 23<sup>rd</sup>, 2012 to the following:

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