

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY LOU BURKHART,)
)
v.)
)
H.J. HEINZ CO., et al.)
)

Case No.: 13-0580

On Appeal from the Wood County
Court of Appeals, Sixth Appellate District

Court of Appeals Case No.: WD-12-0008

APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN
SUPPORT OF JURISDICTION

<p>Thomas W. Bevan, Esq. (0054063) David S. Bates, Esq. (0059344) Joshua P. Grunda, Esq. (0084266) 6555 Dean Memorial Pkwy Boston Heights, Ohio 44236 Phone: (330) 330-650-0088 Fax: (330) 467-4493 dbates@windstream.net jgrunda@bevanlaw.com</p> <p>Attorney for Plaintiff-Appellee Mary Lou Burkhart</p>	<p>Keith A. Savidge, Esq. (0014242) Andrew D. Bemer, Esq. (0015281) Eric D. Baker, Esq. (0070025) Seeley, Savidge, Ebert & Gourash Co., L.P.A. 26600 Detroit Road Cleveland, OH 44145-2397 Phone: (216) 566-8200 Fax: (216) 566-0213 kasavidge@sseg-law.com adbemer@sseg-law.com edbaker@sseg-law.com</p> <p>Attorney for Defendant-Appellant H.J. Heinz Company</p>
<p>Joshua Lanzinger, Esq. (0069260) Ohio Attorney General's Office One Government Center, #1340 Toledo, OH 43604 Phone: (419) 245-2550 Fax: (419) 245-2520 Joshua.lanzinger@ohioattorneygeneral.gov</p> <p>Attorney for Ohio Industrial Commission</p>	

FILED
MAY 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	3
ARGUMENT IN SUPPORT APPELLEE’S POSITION REGARDING APPELLANT’S PROPOSITION OF LAW No. 1.....	5
ARGUMENT IN SUPPORT APPELLEE’S POSITION REGARDING APPELLANT’S PROPOSITION OF LAW No. 2.....	7
CONCLUSION.....	9
PROOF OF SERVICE.....	10

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

On or about March 24, 2011, Plaintiff-Appellee re-filed her Complaint with the Court of Common Pleas of Wood County appealing the decision of the Ohio Industrial Commission denying her the right to participate in the workers' compensation fund as a result of her husband's death due to the occupational disease mesothelioma. This appeal was filed pursuant to ORC 4123.512.

Plaintiff-Appellant's deceased husband, Donald Burkhart, worked for the H.J. Heinz Company (hereafter "Heinz") from 1946-1986. According to deposition testimony offered as part of a separate products liability case he filed in Cuyahoga County, Mr. Burkhart worked at the Heinz's Bowling Green facility from 1946 through 1975 and transferred to the Fremont facility until his retirement in 1986. Mr. Burkhart further testified he was exposed to asbestos in the boiler room while performing his duties out of the maintenance department. Mr. Burkhart's gave his testimony in *Donald Burkhart vs. AW Chesterton, Inc. et al.*, Cuyahoga County Case Number 599652. Mr. Burkhart was later diagnosed with mesothelioma, an asbestos related cancer of the lining of his lungs, and he died from that disease on May 23, 2007.

At the trial court, Mr. Leland Bandeen, a co-worker of Mr. Burkhart, offered testimony regarding Mr. Burkhart's job duties and exposures. Mr. Bandeen testified that during his tenure at the Bowling Green Heinz facility in the 1950's and 1960's that he saw Donald Burkhart working in the boiler room around asbestos covered pipes. Mr. Bandeen further testified that the boiler house was a dirty and dusty place and that Mr. Burkhart never wore a mask or respirator while working in this environment.

Cathy Shell, the corporate representative of Heinz provided further testimony before the

trial court that asbestos existed at the Heinz Fremont plant until at least 1987 and that a person working in the boiler room at the Heinz Bowling Green plant could have been exposed to asbestos. At the close of discovery, Heinz moved the trial court for summary judgment on the basis that there was no genuine issue of material fact as to whether Donald Burkhart was exposed to asbestos during his employment.

In addition to the deposition testimony given in this case, Donald Burkhart's testimony in the products liability case, and the written discovery exchanged by the parties, Plaintiff also offered the expert affidavit of Mr. William Ewing who is a Certified Industrial Hygienist to establish a genuine issue of material fact relative to Donald Burkhart's occupational asbestos exposure. The expert report of Mr. William Ewing, relied upon the co-worker testimony, the testimony offered by Heinz's corporate representative, numerous documents obtained in discovery as well as medical records provided by Donald Burkhart's treating oncologist. Based upon all of this evidence, and his experience as a certified industrial hygienist, Mr. William Ewing opined that Donald Burkhart was injuriously exposed to asbestos during his forty (40) year tenure at Heinz.

The trial court, however, deemed the medical records, abatement records, and sales invoices evidencing asbestos sales to Heinz as inadmissible. Based upon these rulings, the trial court indicated that Plaintiff-Appellee's industrial hygiene expert's report had no foundation and thus could not create a genuine issue of material fact on the issue of asbestos exposure. Further, while the trial court did not strike the co-worker exposure testimony offered by Leland Bandeen, the court ignored its value, and granted Heinz's motion for summary judgment as the court found no genuine issue of material fact on the issue of occupational asbestos exposure.

On appeal, the Sixth District Court of Appeals held that the trial court had abused its

discretion regarding these evidentiary issues on all of Plaintiff-Appellant's assignments of error. In its well reasoned opinion, the Sixth District found that the trial court ignored basic principles of evidence in striking almost all of the evidence put forth by Plaintiff-Appellee at the trial court level. The Court of Appeals overturned these evidentiary issues, reversed the trial court's grant of summary judgment, and remanded the case. This appeal followed.

This appeal fails to raise any issues of public or great general interest. In fact, the issues presented by Appellant on appeal are all subject to long standing legal precedent which the Court of Appeals properly applied in this case. Further, many of the issues which Defendant-Appellant claim to be of public or great general interest are issues only recently manufactured by Appellant and ones which Defendant-Appellant failed to ever raise in its previous briefing. As such, this Honorable Court should deny jurisdiction in this case.

II. ARGUMENT IN SUPPORT OF APPELLEES' POSITION REGARDING APPELLANT'S PROPOSITION OF LAW

Proposition of Law No. 1

Pursuant to Evid. R. 804(B)(1) a deposition taken in an unrelated tort action against sellers of asbestos-containing materials is not admissible against a defendant employer in a subsequent workers' compensation action where the employer was not a party to the tort action and the alleged tortfeasors had no similar motives in cross-examining the decedent.

The Sixth District Court of Appeals properly applied long standing law in allowing the deposition of Mr. Burkhart to be used for evidentiary purposes against Defendant-Appellant Heinz. Plaintiff-Appellant contended that the other defendant's in the Cuyahoga County products liability case were "predecessors in interest" to Heinz as contemplated by Evid. R. 804(B)(1). In the Cuyahoga County case, no less than twenty five (25) defendants were present to cross examine Mr. Burkhart relative to his asbestos exposures. The Sixth District agreed, and laid out a long line of cases in support of this position, including a number of asbestos cases from

the Sixth Circuit. see *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983), *Dykes V. Raymark Ind., Inc.*, 801 F.2d 810 (6th Cir. 1986), and *Burke v. Johns-Manville*, S.D. Ohio No. C-1-81-289, 1983 WL 314571 (1983). Quite simply, the Sixth District followed long standing precedent in coming to its holding, and nothing about that holding raises issues of public and great general interest.

Further, while Defendant-Appellant's Proposition of Law No. 1 is couched in terms previously briefed before the trial court and the Court of Appeals, it is based on principles of law which Defendant-Appellant Heinz failed to argue previously. As this Honorable Court is well aware, a party can not present issues on appeal that were not properly preserved at the trial court level. *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319 (1988). "A party who fails to raise an argument in the court below waives his or her right to raise it here." *The State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). Here, for the first time, Heinz argues that the deposition of Mr. Burkhart should have been stricken under the evidentiary principles of Evid. R. 403(A). This is the first time at any level that Heinz has made this argument, though nothing has changed regarding the issue from when it was first argued at the trial court level. It is clear that Heinz has waived the right to make this argument at this late juncture in the proceedings. To allow Heinz to proceed under this argument would be highly prejudicial to Plaintiff-Appellee.

Finally, what Heinz fails to acknowledge before this Honorable Court, is that it was not Plaintiff-Appellant who first introduced Mr. Burkhart's video deposition in this case, but Heinz itself! Heinz, in its motion for summary judgment, in what it claims was a preemptive attempt to get a head of the issue, was the first party to bring Mr. Burkhart's deposition testimony before the trial court. Heinz not only referenced Mr. Burkhart's testimony in its motion for summary

judgment, but quoted and attached the order from the industrial commission, which explicitly relied on portions of Mr. Burkhart's testimony to deny his claim. By doing this, Heinz implicitly lead the trial court to believe that the testimony given by Mr. Burkhart was detrimental to his case, but at the same time argued that the trial court was not allowed to look at or consider that testimony as evidence.

This was highly prejudicial to Plaintiff-Appellee's case. To leave the testimonial evidence from Mr. Burkhart's video deposition to the selected quotations and references introduced by Defendant-Appellant Heinz would be patently unfair and a miscarriage of justice. It is only right that the full record be before the trial court, especially when it was the complaining party which created that record in the first instance.

Proposition of Law No. 2

Summary judgment opposition evidence under 56(C) must consist of evidence that is admissible at trial.

In this proposition of law, Defendant-Appellant Heinz is attempting to confuse summary judgment practice under rule 56(C) with the presentation of evidence at trial. In essence, Heinz argues in this proposition of law that the parties should partake in a full blown trial at the summary judgment phase, in which all evidence can only be presented as it would be presented at trial. This is clearly an erroneous proposition.

Evidence that may be considered in opposing a motion for summary judgment is delineated in Civ. R. 56 (C). The rule states:

(C) Motion and proceedings. The motion shall be served at least fourteen days before the time fixed for hearing. **The adverse party, prior to the day of hearing, may serve and file opposing affidavits.** Summary judgment shall be rendered forthwith if the **pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact,** if any, timely filed in the action, show 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. No evidence or stipulation may be considered except as stated in this rule. A

summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Civ. R. 56(C), *emphasis added*.

The form of the affidavit is set forth in Civ. R. 56(E). The rule states:

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Affidavits, by themselves, would not normally be admissible as evidence at trial. The evidence in the affidavit would have to be presented in some other form, such as through testimony of a witness or custodian of records, or by being offered as a statement against interest. However, at the summary judgment level, this is clearly not required.

There is nothing about this proposition of law which is of public or great general interest. As held by the Sixth District Court of Appeals, Plaintiff-Appellee's evidence clearly met the strictures of Civ. R. 56(C) and (E). Yet, this is simply not good enough for Heinz. Heinz is attempting to turn summary judgment into a full blown trial. However, all the supposed challenges that Heinz has dreamed up are best left for trial, and are not appropriate at summary judgment. As such, this Honorable Court should reject jurisdiction of this proposition of law.

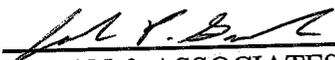
Further, like in the preceding proposition of law, Heinz once again presents issues on

appeal that it did not previously raise. As previously stated, a party can not present issues on appeal that were not properly preserved at the trial court level. *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319 (1988). "A party who fails to raise an argument in the court below waives his or her right to raise it here." *The State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). For the first time at any point in this litigation, Heinz claims that the evidence challenged under its proposition of law no. 2 should be excluded under the principles of Evid. R. 804(B)(1) and 403(A). Yet, Heinz never once challenged any of this evidence previously on these grounds. To allow Heinz to proceed under these new arguments would be highly prejudicial to Plaintiff-Appellee.

III. CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest. Appellees request that this Court deny jurisdiction and allow this case to proceed under the holding of the Court of Appeals.

Respectfully submitted,


BEVAN & ASSOCIATES LPA, INC.

Thomas W. Bevan (0054063)

David S. Bates (0059344)

Joshua P. Grunda (0084266)

6555 Dean Memorial Parkway

Boston Heights, Ohio 44236

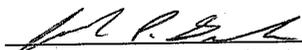
Phone: (330) 650-0088

Fax: (330) 467-4493

COUNSEL FOR PLAINTIFF-APPELLEE

PROOF OF SERVICE

I certify that a copy of this Memorandum in Response to Jurisdiction was sent to all parties of record by U.S. Mail, postage prepaid this 8th day of May, 2013:


Joshua P. Grunda (0084266)

COUNSEL FOR PLAINTIFF-APPELLEE

SERVICE LIST

Keith A. Savidge, Esq. (0014242)
Andrew D. Bemer, Esq. (0015281)
Eric D. Baker, Esq. (0070025)
Seeley, Savidge, Ebert & Gourash Co., L.P.A.
26600 Detroit Road
Cleveland, OH 44145-2397
Phone: (216) 566-8200
Fax: (216) 566-0213
kasavidge@sseg-law.com
adbemer@sseg-law.com
edbaker@sseg-law.com

Attorney for Defendant-Appellant H.J. Heinz Company

Joshua Lanzinger, Esq. (0069260)
Ohio Attorney General's Office
One Government Center, #1340
Toledo, OH 43604
Phone: (419) 245-2550
Fax: (419) 245-2520
Joshua.lanzinger@ohioattorneygeneral.gov

Attorney for Ohio Industrial Commission