

IN THE SUPREME COURT OF OHIO

MARY LOU BURKHART)
)
 Plaintiff-Appellee,)
)
 v.)
)
 H.J. HEINZ CO, et al,)
)
 Defendant-Appellant.)

On Appeal from the Wood County Court
 of Appeals,
 Sixth Appellate District
 Supreme Court Case No. 2013-0580

DEFENDANT-APPELLANT H.J. HEINZ CO.'S
 MERIT BRIEF

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APPELLANT'S MERIT BRIEF

I. STATEMENT OF THE CASE

The core issue before the lower courts concerned the standard for application of Ohio Rule of Evidence 804(B)(1), regarding the admissibility of the hearsay exception for former testimony. The key elements in determining admissibility focus on whether the predecessor in interest had both the opportunity and a similar motive to develop testimony to advance either the support or opposition to the interest of another party in a subsequent proceeding. Additionally, Evid.R. 403(A) requires the court to determine whether the danger of unfair prejudice outweighs the probative value of certain evidence in rendering decisions on admissibility. The Sixth District Court of Appeals clearly erred in determining that the Trial Court abused its discretion in the evidentiary ruling to strike a video deposition of Donald Burkhart, decedent.

In the instant matter, Appellee Mary Lou Burkhart is the spouse of Donald Burkhart, a deceased former employee of Appellant Heinz, who died purportedly following a diagnosis of mesothelioma. This case originated in the Industrial Commission of Ohio on the Widow-Claimant's death claim. The former testimony in question was a 2006 video deposition of Mr. Burkhart in an asbestos claim captioned *Burkhart v. AW Chesterton, Inc., et al*, Cuyahoga County Case No. CV-06-599652. Appellant H.J. Heinz Co. ("Heinz") submits that the Sixth District Court of Appeals clearly erred in finding that because "all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos," the motives of the parties participating in the 2006 litigation were such that the interests of Heinz would have been protected. The Lower Court failed to recognize that all of the defendants in the prior litigation cross-

examined Burkhart, merely for the purpose of establishing that Burkhart had no knowledge of the existence of each particular defendant's asbestos product at the Heinz workplace. No attorney for those defendants objected to leading questions to Burkhart from his attorney concerning his unfounded "beliefs" about the existence of asbestos at Heinz. Notwithstanding, the Appellate Court held that the Burkhart deposition testimony was admissible for evidentiary consideration of whether a genuine issue of material fact existed in these proceedings under Civil Rule 56.

II. PROCEDURAL HISTORY

The Supreme Court accepted jurisdiction of this matter by Order dated June 26, 2013. On March 1, 2013, the Sixth District Court of Appeals reversed the decision for summary judgment to Heinz, and determined that the Wood County Court of Common Pleas abused its discretion in striking the video deposition testimony of Donald Burkhart, interrogatory answers for a prior unrelated proceeding, as well as various medical and expert reports as hearsay without exception. The Trial Court had granted summary judgment to Heinz on Plaintiff-Appellee's *de novo* appeal of the Ohio Industrial Commissions' rejection of her death benefit claim regarding her deceased husband, Donald Burkhart, for his alleged exposure to asbestos while an employee of H.J. Heinz Co. ("Heinz").

On March 18, 2009, Burkhart filed a claim with the Ohio Bureau of Workers' Compensation seeking benefits for the death of her husband due to alleged asbestos exposure at Heinz, which Heinz has contested. Both the District Hearing Officer and a Staff Hearing Officer of the Industrial Commission denied the claim and on July 14,

2009, the Industrial Commission refused to hear Burkhart's further appeal. On July 28, 2009, Appellant appealed to the Trial Court pursuant to the provisions of R.C. §4123.512.

Unfortunately for Mrs. Burkhart, the deposition transcripts did little to support her claim, and, in fact, constituted the primary reason for its denial. As can be gleaned from the Industrial Commission's order of June 29, 2009, the Staff Hearing Officer noted in his ruling that:

The order of the District Hearing Officer, from 05/19/2009, is modified to the following extent. Therefore, the FROI-1, filed 03/18/2009, is denied.

The Staff Hearing Officer denies the Application for death claim benefits. The Staff Hearing Officer finds the evidence fails to establish the decedent's death resulted from an occupational disease that was developed in the course of or arising out of his employment.

The Staff Hearing Officer finds insufficient evidence to support any actual and specific exposure to friable asbestos with the Employer of record. **The Staff Hearing Officer finds the deposition testimony of the decedent, dated 10/06/2002, to be the best evidence on hand. Within the deposition, the decedent was unable to identify an asbestos exposure with the Employer.** No specific documentation of asbestos exposure with the Employer of record was present at the District Hearing. While there are asbestos notifications in evidence on file at this time with regard to the Fremont plant, the testimony from Ms. Shell, an asbestos abatement certified worker, at hearing, indicates that the removal was preventative and the asbestos was not friable in any of those locations. Without the asbestos being friable, the Injured Worker would not have breathed in the asbestos fibers.

As to the Bowling Green Plant in the early years of the Injured Worker's experience, there is insufficient evidence to establish an actual exposure to asbestos. The affidavits on file from the co-workers indicates [sic] that they think there was asbestos which is not sufficient evidence to establish a claim. In addition, there are no asbestos records on file and there is only the Injured Worker's testimony via the deposition of 12/14/06 indicating any

potential asbestos exposure. Even at that time, the Injured Worker was not convinced it was asbestos; he was simply told it was. Further, the Injured Worker has also worked as a mechanic in a garage where he was exposed to household asbestos and he also had a side business throughout the years of household maintenance where he would repair, service, and install asbestos boards and wall boards.

As a result, the Staff Hearing Officer finds insufficient evidence to establish specific exposure with this Employer that resulted in the Injured Worker's mesothelioma that caused his death.

Industrial Commission Order of June 29, 2009. (Shell Affidavit Exh. B.)

On October 20, 2011, Heinz filed a Motion for Summary Judgment on Burkhart's claim (R-39), which Burkhart opposed on November 11, 2011. In support of her opposition brief, Burkhart included various exhibits which Heinz moved to strike, and following reciprocal briefing, the trial court issued an Order on December 15, 2011 granting Heinz's motion to strike, and eliminated from the summary judgment record the following exhibits: the video deposition transcript of Donald Burkhart in his Cuyahoga County lawsuit¹; the Responses to Interrogatories of Owens-Corning in an unrelated case from 1994²; certain hearsay statements contained in medical records prepared by Dr. Bahu Shaikh; and the affidavits of Andrew Oh, William Ewing Stephen Demeter, M.D., Leland Bandeen and Wally Koons.

Thereafter, on January 6, 2012, following oral argument, the Trial Court entered an Order granting summary judgment in favor of Heinz on Burkhart's death benefit

¹ Other deposition transcripts of Donald Burkhart were not submitted in any summary judgment briefings and consequently, were not considered or reviewed by either the Trial or Appellate Courts.

² The Owens-Corning Responses were not filed with the Trial Court.

appeal. Burkhart's appeal to the Sixth District Court of Appeals resulted in the Judgment and Decision which is the subject of this review.

III. STATEMENT OF FACTS

On May 23, 2007, Plaintiff's Decedent, Donald Burkhart, a former H. J. Heinz employee of both the since closed Heinz Bowling Green plant and the existing Fremont facility passed away, allegedly from mesothelioma, that Mrs. Burkhart contends was contracted as a result of her husband's employment with Heinz.

Donald Burkhart was employed by Heinz from 1946 until 1986. He worked as a maintenance employee at the Heinz plant in Bowling Green until 1975 when that plant closed. Mr. Burkhart then transferred to the Fremont plant, where he worked as a maintenance employee until this retirement in 1986. Prior to working at Heinz, Mr. Burkhart worked as an automobile mechanic and was in the U.S. Marine Corps.

In addition to the case *sub judice*, Plaintiff asserted a product liability tort death claim against various entities which she believes manufactured or sold asbestos containing products that caused or contributed to her husband's death. That case was pending as one of thousands of asbestos cases filed in the Cuyahoga County Common Pleas Court where it is known as *Donald Burkhart vs. AW Chesterton, Inc. et al.*, Case Number CV-06-599652. The Cuyahoga County case was filed on August 28, 2006 before Mr. Burkhart's death. Both his discovery and videotape depositions were taken in that case. As Heinz was not a party to that proceeding, it was not able to attend and cross examine. In fact, Heinz did not know of the existence of the case until after the filing of the Workers' Compensation claim against it. Nonetheless, Mrs. Burkhart's attorneys filed copies of these depositions with the Industrial Commission in support of her claim.

The Ohio Rules of Evidence do not apply to Industrial Commission administrative hearings.³

IV. PROPOSITION OF LAW AND SUPPORTING ARGUMENT

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.

A. The Appellate Court Erred To The Prejudice Of Heinz By Reversing The Trial Court's Exclusion Of The Prior Video Deposition Testimony Of The Decedent Burkhart.

1. Standard of Review of Evidentiary Matters

a. Abuse of Discretion Standard

The Appellate Court properly identified the standard for admitting or excluding evidence, as being within the discretion of the court, but subject to review under an abuse of discretion standard. *Beard v. Meridia Huron Hospital*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323. However, a trial court is vested with broad discretion in determining the admissibility of evidence, as long as that discretion is exercised consistent with the Rules of Procedure and/or Evidence. *Rigby v. Lake County*, 58 Ohio St.3d 269, N.E.2d 1056 (1991); *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 1056 528.

³ Burkhart gave four depositions in the Cuyahoga County case, a discovery deposition taken over three days in 2006 (Vol. I, 10/6/06) (Vol. II 11/21/06) (Vol. III 12/14/06) and a video deposition also taken on December 14, 2006. It is undisputed Heinz did not participate in any of these depositions of Burkhart.

It has long been understood that an abuse of discretion is defined as more than an error of law or judgment; it applies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983); *Malone v. Courtyard by Marriot L.P.*, 74 Ohio St.3d 440, 659 N.E.2d 1242 (1996). An abuse of discretion means that the decision in question is "so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 662 N.E.2d 1 (1996).

b. Supreme Court Review of Lower Court's Evidentiary Findings

In its review of evidentiary considerations, the Supreme Court has consistently held that a trial court is in the best position to make evidentiary rulings, and that an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion. *Branch v. Cleveland Clinic Foundation*, 134 Ohio St.3d 114, 2012-Ohio-5345, N.E.2d 970 citing *Vogel v. Wells*, 57 Ohio St.3d 91, 566 N.E.2d 154 (1991). This High Court will review the trial court's evidentiary ruling, to determine whether the trial court reasonably exercised its discretion without making its evidentiary order in an unreasonable, arbitrary or unconscionable fashion. *Id.*, *Branch*, *Blakemore*, *supra*. Indeed, while it is incumbent on the trial court to examine the evidence, that is not the function of the appellate court; the appellate court's review is even more limited in its scope, in that it shall determine only if the trial court has abused its discretion. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993). Moreover, absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its

judgment for that of the trial court. *Id.* If the Supreme Court determines an appellate court substitutes its judgment for that of the trial court, the High Court will reverse the appellate court for its error. *Branch, Blakemore, supra.*

In applying the case precedent to the evidentiary determination of the Appellate Court regarding the admissibility of the Burkhart video deposition under Evid.R. 804(B)(1), it must be concluded that the Appellate bench clearly erred in finding abuse of discretion in the trial court's determination that such evidence was inadmissible. Under no interpretation of Rule 804(B)(1) should the Appellate Court have found the Trial Court's evidentiary decision to be premised upon passion or bias or to be arbitrary or so grossly violative of fact or logic. The Appellate bench improperly substituted its judgment for that of the Trial Court. This High Court must reverse the Appellate Court and reinstate the order of the Trial Court in this instance.

2. The Court of Appeals Failed to Recognize The Burkhart Deposition Transcript Reflected Different Party Motives, as Well as Unfair Prejudice.

The Sixth Appellate District erred and abused its discretion under Evid.R. 804(B)(1)⁴ by reversing the Trial Court's evidentiary decision to strike the 2006 deposition transcript of Donald Burkhart taken in *Burkhart v. AW Chesterton, Inc., et al*,

⁴ Ohio Rule of Evidence 804(B)(1) is as follows

(B) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

Cuyahoga County Case No. 599652. The Appellate Court failed to examine the issues and circumstances presented in that deposition transcript, and further failed to recognize that the motives of the parties participating in that deposition not only were different, but diametrically opposed to the interest of Heinz.

The Sixth District determined that: “all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos.” (Appellate Opinion, pg. 17, ¶41). However, even a cursory review of that transcript discloses that the attorneys examining Burkhart clearly encouraged him with leading questions suggesting that asbestos existed at the Heinz workplace, but that the asbestos was not manufactured by their particular client. The focus of the questioning presumed the existence of asbestos materials, with the intention to establish only that asbestos was not manufactured by their client. No inquiries were made of Burkhart which remotely attempted to refute the presence of asbestos materials at Heinz; No party protected or even objected to the suggestion that Heinz was culpable in allowing a hazardous material to exist at its workplace. Moreover, the District Court failed to apply Evid.R. 403(A)⁵, and made no determination of whether the prejudicial effect of the former deposition testimony outweighed its probative value.

3. Review of Federal Case Law on the Application of the “Predecessor-In-Interest” and “Similar Motive” Test.

The Sixth District primarily looked to case law from the federal courts in addressing the applications of the terms “predecessor in interest” and “had an opportunity

⁵ Ohio Rule of Evidence 403(A) is as follows:

Exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay

(A) Exclusion mandatory

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

and similar motive to develop the testimony by direct, cross or redirect examination,” in determining whether testimony from another matter would provide balanced and fair evidentiary value in the current matter. (Appellate Opinion pgs. 12-17). The Sixth District properly identified the seminal federal case of *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) in determining the application of the term “predecessor in interest”.⁶ *Lloyd* expressed that:

If it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party. Under these circumstances, the previous party having a like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party. 580 F.2d at 1187⁷

Then, in *Paducah Towing Co., Inc. v. Exxon Corp.*, 692 F.2d 412 (6th Cir. 1982), the Sixth Circuit expanded the focus of the predecessor in interest, in questioning whether the predecessor had a “meaningful opportunity” to fully examine the prior and now unavailable witness whose testimony is proposed to be admitted.⁸

⁶ The Appellate Court properly identified Rule 804(B)(1) as being identical under both the Federal and Ohio Evidentiary Rules.

⁷ The facts in *Lloyd* involved testimony from a prior Coast Guard proceeding that had investigated an incident wherein Lloyd was injured in an altercation with a fellow crewman, Alvarez. The *Lloyd* Court determined that the Coast Guard was acting to protect its interest and that of the public by insuring a safe merchant marine service, and the Coast Guard and Alvarez together were interested in determining Lloyd’s culpability. The *Lloyd* Court moved beyond the need for privity between the parties in allowing an analysis through parties sharing a “community of interest”.

⁸ In *Paducah*, the prior testimony of the unavailable witness was ruled inadmissible, as the testimony was that from a license revocation proceeding which was handled by a Coast Guard warrant officer and not an attorney. The license revocation proceeding was limited in scope by the Coast Guard judicial officer, and it was therefore determined that it could not be used to establish liability of an unrelated party involved in a river barge towing accident.

The Appellate Court also reviewed the Sixth Circuit asbestos decisions of *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983) and *Dykes v. Raymark Industries, Inc.*, 801 F.2d 810 (6th Cir. 1986), (Appellate Opinion pgs. 16-17). However, the Court failed to review the other Sixth Circuit asbestos case in this trilogy, *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985). The subject of all three decisions concerned the prior testimony of Dr. Kenneth Smith, the former medical director for Johns-Manville, who had died. Dr. Smith was considered to be in a unique position to relate the scope of knowledge available to the manufacturing of asbestos-containing products during his 20 year tenure at Johns-Manville, including what knowledge, if any, was known regarding the hazards of asbestos to the health of its employees. His testimony was initially presented in 1976 in the case of *DeRocco v. 40-8 Insulation, Inc.*, Case No. 2880, (PA. Ct. Com. Pleas 1974); *Murphy, supra* 779 F.2d at 343. In both *Clay* and *Dykes*, Dr. Smith's prior deposition was deemed admissible, but not so in *Murphy*.

In the first case of the trilogy, *Clay* determined that the defendants in the *DeRocco* case had a similar motive for confronting Dr. Smith's testimony compared with the defendants in *Clay*, in view of the appropriate objections and incisive cross-examination of that deposition, and held that Smith's deposition testimony was admissible under 804(b)(1).⁹ However, in the second case, the *Murphy* Court determined that Dr. Smith's prior testimony was more prejudicial than probative, and under the balance test of Evid. R. 403, determined that the trial court did not abuse its discretion in ruling its inadmissibility under 804(b)(1). The argument at issue before the *Murphy* Court was the

⁹ It cannot be overlooked that Dr. Smith's 20 year plus tenure with Johns-Manville as its medical director may have been accorded significant weight against Johns-Manville as a defendant in *Clay*.

fact proposition that the Defendant Owens-Illinois ceased to manufacture or sell asbestos-containing product in 1958, and Dr. Smith's "state of the art" testimony about industry responses **after 1958** to asbestos would not have been probative regarding the knowledge of general available in the industry **prior to 1958**.

In the third leg of the Sixth Circuit trilogy, the *Dykes* Court determined that Dr. Smith's testimony primarily related to historical facts, and therefore, there was not an abuse of discretion for the trial court to admit that deposition, in view of the limited ability to challenge the accuracy of his historical statements concerning industry knowledge. The *Dykes* Court, however, recognized the issue of potential prejudice could arise when the party against whom the deposition is introduced did not have an adequate opportunity to refute the substantive nature of that testimony. 801 F.2d at 817. The *Dykes* Court further found the need for the court to **consider the circumstances** under which the original deposition was taken so that a full understanding of the motives in the first case can be obtained. That Court also found:

What is more important, however, is the question of **potential prejudice** that can accrue to a defendant against whom a deposition is introduced which the defendant never had an opportunity to adequately refute". 801 F.2d at 816 (emphasis added).

4. Review of Limited Ohio Case Law on Application of Rule 804(B)(1) in Civil Proceedings.

The Appellate Court attempted to reconcile its Opinion on the admissibility of the Burkhart video deposition by citing to four other appellate decisions which reviewed Evid. R. 804(b)(1): *Whitaker v. Weinrich*, 12th Dist. Butler No. CA86-12-179, 1987 WL 28437 (Dec. 14, 1987); *Wheat v. Wright*, 2nd Dist. Montgomery No. 8614, 1985 WL 17381 Oct. 10, 1985); *Yates v. Black*, 9th Dist. Summit No. 13525, 1988 WL 133675

(Dec. 7, 1988); *Shepard v. Grand Truck W. RR., Inc.*, 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853¹⁰. However, these decisions (cited *infra*) contain minimal legal analysis it was determined that the issue of hearsay has been overcome when the testimony of the decedent from a prior guardianship proceeding was deemed highly relevant in a wills contest on the issues of undue influence and testamentary capacity. The attorney for the objecting parties had participated in the prior guardianship proceeding and had extensively cross-examined the decedent on the issue of mental competency which was found to be a similar motive to the issues of testamentary capacity. On the other hand, in *Wheat*, testimony in a prior hearing from a police officer was not admissible in a libel case against the speaker, as the motives of the officer and the speaker were clearly dissimilar, given the nature of the prior criminal proceeding versus the subsequent libel proceeding. A videotaped deposition of a decedent was deemed inadmissible in *Yates*, in that under both Evid. R. 804(B)(1) and Civ. R. 32(A), decedent's deposition transcript would not be admissible against the physicians in a medical malpractice case who were not parties to the two prior litigations in which the deposition was taken.

In an asbestos case, *Shepard*, the court ruled the deposition testimonies of physicians in other prior asbestos cases were admissible, as they were offered to prove the defendant's locomotives contained asbestos and that the railroad was aware of the asbestos and its harmful affects. It is significant to note that the prior physician testimonies were given in litigation involving the **same defendant**. Because the

¹⁰ Earlier decisions focused upon prior testimony of an unavailable witness before administrative boards and commissions, usually with similar parties See, *Indust. Comm. v. Bartholome*, 128 Ohio St. 13, 190 N.E. 193 (1934); *Cupps v. Toledo*, 118 Ohio App. 127, 193 N.E. 2d 543 (6th Dist. 1960); *Sudbury v. Arga Co.*, 12th Dist. Clermont No. CA85-03-015, 1985 WL 3970 (Dec. 2, 1985).

defendant was identical in both proceedings, the court determined that the probative values of the testimonies were not substantially outweighed by the dangers of unfair prejudice under Evid. R. 403(A).

This Supreme Court has only tangentially addressed the issue. In the case of *Green v. Toledo Hosp.*, 94 Ohio St.3d 480, N.E.2d 979 (2002), the Court addressed the prior trial testimony of a doctor **in a retrial of the same matter**, and considered it the same as deposition testimony under Civ.R. 32(A). The majority opinion of the Court, without addressing Evid.R. 804(B)(1), determined that the physician's prior testimony bore the indicia of reliability, as it was under oath and subject to cross-examination, and therefore admissible. In a concurring opinion, Justice Cook presented the argument that the proper evidentiary review should have been under Evid. R. 804(B)(1), but this inquiry was only limited to the application of "unavailability" under that rule.

B. Neither Similar Motives, Nor Similar Interests, Nor Similar Circumstances Existed In The Prior And Current Litigations To Support A "Predecessor-In-Interest" Finding.

1. The Burkhart Deposition is Replete With Objectionable and Prejudiced Testimony.

A review of the Burkhart video deposition transcript demonstrates the objectionable leading questions by Burkhart's counsel, as well as how dissimilar and even antithetical the motives were of the parties participating in that deposition compared with Heinz, who was not a party in the prior action:¹¹

¹¹ The relevant portions of the video deposition transcript of Donald Burkhart taken on December 14, 2006 are attached as Appendix B; transcript pages attached are 50, 51, 53, 54, 55, 56, 61, 67, 68, 87, 91, 92 and 126. The original transcript was filed at the Wood County Court of Common Pleas on November 10, 2011 in Case No. 2011 CV 0254 and filed with the Sixth District Court of Appeals as part of Docket No. 6 filed on February 28, 2012.

Q: Alright. Now in 1946, you said that you went into the boiler room, what all did you have to do in the boiler room, what was your job?

A: Yes. Or any place else.

Q: Now, when you say that this asbestos stuff-

A: Well, it was flaky, they called it asbestos, **I don't know what it was.**

Q: Who is they that called that asbestos?

A: Management.

Burkhart Tr. Pgs. 50-51...

Q: When you pick up this asbestos in the buckets to mix it up and put it on, was that a dusty process?

A: Oh, yes.

Q: Do you **believe** that you breathed in that dust?

A: Well, if it was dust, I got some of it.

Q: Why do you say that?

A: Well, because I got this disease.

Burkhart TR. Pg. 53...

Q: Do you **believe** that cheesecloth was an asbestos-containing product?

A: I have no idea.

Q: And your assignment in the boiler room, how long were you assigned in the boiler room?

A: Well I started in June, or July when I got out of the service, and I worked in there until well just before season, I would say August it wasn't too long because I went into the evaporators.

Burkhart Tr. Pgs. 54-55...

Q: OK. Do you believe these bricks were an asbestos-containing material.

A: I have no idea, they were a light brick, the guy on the outside dipped them in some kind of mud and I took them and handed them to the brick layers.

Q: All right. Were you there when they would be taking out the old brick?

A: No, I wasn't in there then.

Burkhart Tr. Pg. 56...

Q: OK. Do you recall the brand name, trade name or manufacturer of any of those evaporators.

A: Buffalo VAC.

Mr. Michalec: What was that?

Q: Buffalo VAX do you **believe** that any part of your work with the evaporators, as we sit here today, exposed you to any asbestos-containing materials?

A: No.

Burkhart Tr. Pg. 61...

Q: OK. Do you have a **belief** as to whether those Garlock gaskets contain any asbestos?

Mr. Hurley: Objection.

A: I have no idea.

A: And we would-I **feel** that with Garlock, it had to be asbestos, because we put it on the steam, on the flanges to hold the line together, so it must have asbestos in it.

Burkhart Tr. Pgs. 67-68...

Q: Alright. Do you **believe** that any part of your work on the continuous line would have exposed you to asbestos?

A: No.

Q: Do you know one way or the other?

A: I would say no.

Q: Have we talked about all the ways in which you **believe** you were exposed to asbestos while you worked at Heinz?

A: I **believe**.

Burkhart Tr. Pgs. 91-92 (emphasis added).

There is no doubt that the direct examination of Attorney Blevins, counsel for Plaintiff Burkhart in the prior matter¹², was motivated by showing that Employee Burkhart worked in an environment at Heinz where he “**believed**” asbestos materials existed. It is well known that speculation and belief is never admissible in any evidentiary form, whether deposition or affidavit. *Goldman v. Johns-Manville*, 33 Ohio St.3d 40, 514 N.E.2d 691 (1987). Notwithstanding, the leading questions were not challenged with objection by any other party. Ms. Blevins singular focus was to establish Burkhart’s exposure to asbestos, regardless of who controlled or manufactured the asbestos, if it did exist. Her questions were entirely void of objection, with the exceptions of attorney Michalec, on behalf of Gould Pump, and Attorney Hirley. Only Attorney Michalec provided any limited cross-examination in order to demonstrate that Burkhart had no personal knowledge whatsoever regarding the nature of, or whether any asbestos existed in the Gould pumps. (Burkhart Tr. pg. 126). This cross-examination is as follows:

Q: Do you have any personal knowledge that Gould’s manufactured or supplied any types of seals on their pumps such as packing and/or mechanical seals?

A: No.

¹² This law firm represented both Plaintiff-Burkhart and Employee-Burkhart in both the current and prior litigations. Had there been a pursuit of the occupational disease claim against Heinz during Donald Burkhart’s life, the issue at hand would very likely not have arisen.

Q: Do you have any personal knowledge that any of the packing or mechanical seals may have been used on any Gould's stainless steel pump contained asbestos?

A: No.

Q Did you ever utilize a Gould's service manual or parts list when doing any work on a Gould's pump.

A: No.

Q: And because you didn't utilize those, you of course would not have any knowledge that Gould's and any of those materials specified the use of any asbestos or asbestos-containing product in its pump, is that correct?

A: That's right.

Burkhart Tr. Pg. 126.

There was no predecessor in interest during the prior litigation to protect Heinz interests, or even advance questions regarding the essential issues about the existence or nature of asbestos anywhere in the Heinz workplace. No one inquired of Burkhart as to the extent of his personal knowledge, training, background, or other education in working with asbestos materials. No one objected in any of the leading questions by Attorney Blevins to her client regarding Burkhart's inadmissible responses to leading questions of his "beliefs" regarding whether dust contained asbestos. (Burkhart Tr. Pgs. 53-56, 61, 67-68, 87, 91). No one objected to the response that Heinz's "management" was the source of Burkhart's information regarding the boiler room pipes. No attorney asked Burkhart whether he was aware of any fellow workers who may have been diagnosed with any asbestos related diseases. No attorney even bothered to inquire about whether Burkhart was aware of potential exposure to asbestos: (a) during his time in the Marines; nor (b) when encountering materials in his father's repair shop; nor (c) whether he had

worked with any drywall or home remodeling materials throughout his career. (Burkhart Tr. Pgs. 27-44).

2. No Party in the *AW Chesterson* Litigation was Similarly Situated to Heinz in Either Motives, or in Interests to be Advanced or Defended.

Had Heinz been a party to the prior proceedings, its legal representative would have been able to provide succinct and meaningful cross-examination of Burkhart to fetter out salient facts which were not couched in mere speculation and belief. Indeed, the prior deposition transcript clearly represented Plaintiff Burkhart's interest in proposing the existence of asbestos at Heinz and the defendants, with the exception of Goulds, had no interest whatsoever in refuting that proposition. Those parties' only concern was assuring that their respective manufacturers were never identified in any of the materials to which Burkhart may have come in contact. To the contrary, Heinz's motive and interest in developing Burkhart's cross-examination would have been to show that he had no personal knowledge, training, education, or background for determining whether any asbestos-containing materials existed at Heinz.

It must be concluded that the Sixth District Court substituted its judgment for that of the Trial Court, and clearly erred in finding that the parties present at Burkhart's video deposition in the *AW Chesterson* case were predecessors in interest, as the facts and circumstances to be garnered from that deposition were antithetical to the facts and circumstances to which Heinz would have pursued. The prejudicial effect of the Burkhart deposition clearly outweighs any probative value as well. For these reasons, the deposition should have been stricken in its entirety pursuant to Evid.R. 804(B)(1) and Rule 403(A).

Indeed, it must be recognized that Evid.R. 804(B)(1), in conjunction with Rule 403(A), contain an overriding concern about fairness and due process. Prior testimony should be considered for evidentiary use in a subsequent proceeding only when: (1) The parties have a sufficiently close relationship; (2) there is identity of facts and issues;¹³ and (3) an identity of interests exists between the parties. Such a three-element standard should be applied in order to satisfy the predecessor- in-interest and similar motive test. See, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining A Predecessor-In-Interest*, 42 U. Miami Law Review 975 (1988). Inquiry must be made of whether the parties and counsel would have made the same or similar tactical decisions in both proceedings. There must be meaningful opportunity to access similar information. Circumstances must show a common overriding motive to ferret out similar facts which advancing the evidentiary objective of supporting a claim or defense. And finally, the probative value of the evidence in question must be tempered with the administration of justice in a fair and unprejudiced fashion. *Id.* These are the factors which must be reviewed under the *Clay-Murphy-Dykes* standard in applying the “predecessor-in-interest” and “similar motive” test.

¹³ Prior to the promulgation of Federal Evidence Rule 804(b)(1), common law required an identity of issues as a test for determining whether the examination of a witness whose testimony would be considered an exception to the hearsay rule and applied in a subsequent proceeding. 5 *Wigmore*, §1386, at 90. Upon the promulgation of Evidence Rule 804(B)(1), “opportunity and similar motive supplanted the identity of issues” requirement. J. Moore & H. Bendix, *Moore’s Federal Practice* §804.04 [3], Pg. VIII-266(2nd Ed. 1989). Notwithstanding, it continues to be recognized that whether a similar motive existed in developing testimony at the time of the prior proceeding, compared to the present proceeding, a court will search for some substantial identity of issues. *Id.*

V. CONCLUSION.

The Sixth District bench wrongfully substituted its judgment for that of the Trial Court in the evidentiary review of the matter at hand. The Trial Court's ruling of inadmissibility of the Burkhart deposition cannot be considered to be grossly violative of fact or logic, or otherwise so arbitrary and unreasonable to be tantamount to an abuse of discretion. Indeed, the Appellate Court was restrained to make only the judicial inquiries required of the abuse of discretion standard, and this failure is reversible error. The Appellate Bench made a cursory review of the Burkhart deposition transcript in concluding that "all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos." (Appellate Opinion Pg. 17, ¶41). While that blanket statement has a ring of truth, the Sixth District failed to review the Burkhart testimony to determine whether the facts and circumstances advanced in the *AW Chesterson* litigation provided a basis for the Trial Court to reasonably conclude whether under Rule 804(B)(1), those parties had a similar motive to Heinz to support a finding that they were predecessors-in-interest. The Trial Court's decision to strike the deposition from evidence should not have been disturbed.

Such a review of the transcript clearly reveals that the prior litigants were merely interested in assuring that Burkhart had no knowledge of the conditions of the Heinz workplace to connect their respective manufacturing client to any hazardous asbestos material. Every party in the prior litigation summarily accepted the proposition that hazardous asbestos did exist in the Heinz workplace. It was quite apparent by this deposition transcript that none of the parties were concerned or cared about pursuit of the foundational question of the existence of asbestos at Heinz; the concern was merely to

establish that their clients manufactured label was not readily apparent on any material “believed” to be asbestos by Burkhart.

The Appellate Court clearly erred in its determination that the prior litigation Burkhart deposition met the predecessor-in-interest and similar motive tests to allow its evidentiary use against Heinz in the instant matter. But to the contrary, there were no similar motives, nor similar interests, nor any similar circumstances between the prior and current litigations; none of the parties in the prior suit even attempted to cross-examine Burkhart during his deposition in order to elicit any testimony about that foundation of question of whether he had the personal knowledge, training, education or background to determine whether any asbestos containing materials even existed at Heinz. Indeed, the Burkhart deposition was replete with objectionable and prejudicial testimony, but to which no one entered an objection on the record.

It is therefore submitted that this High Court must provide clear guidance that the evidentiary use of prior testimony under Rule 804(B)(1), the Court must determine that the circumstances must demonstrate: the existence of a sufficiently close relationship between the parties and the prior and current litigation; that there is an identity of facts and issues; and that there is an identity of interest between the parties to be advanced or defended. When these three elements exist, a court can then find that the predecessor-in-interest and similar motive tests have been met, and prior testimony can be presented for evidentiary purposes and a subsequent proceeding. Notwithstanding, a court must also be cognizant of the prejudicial effect of the prior testimony according to Rule 403(A), and assure that the prejudicial effect does not outweigh the probative value of the evidence submitted under this hearsay exception.

The record reflects that the Appellate Court failed to apply any of these elements in its decision to reverse the Trial Court's exclusion of the Burkhart deposition testimony. The Appellate Court improperly substituted its judgment for that of the Trial Court. The Reviewing Court's evidentiary decision in this regard is grossly without support in fact or law, and must be considered clear error in that instance. It is respectfully submitted that the decision of the Sixth District Court of Appeals must be reversed, so that the *AW Chesterson* deposition of Donald Burkhart is stricken from any evidentiary consideration in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Defendant-Appellant H.J. Heinz Co's Memorandum in Support of Jurisdiction has been sent via overnight delivery to David S. Bates, Esq., Attorney for Plaintiff-Appellant, Bevan & Associates, LPA, Inc., 6555 Dean Memorial Parkway, Boston Hts., Ohio 44236; with a copy to Joshua Lanzinger, Esq., Assistant Attorney General, Attorney for Defendant Ohio Bureau of Workers' Compensation, Toledo Regional Office, One Government Centre, Suite 1340, Toledo, Ohio 43604-2261, on this 8th day of August, 2013.



Andrew D. Bemer, Esq. (#0015281)

APPENDIX

- A. **Decision of the Ohio Supreme Court accepting jurisdiction of the case dated June 26, 2013**
- B. **Decision and Judgment of The Sixth District Court of Appeals dated March 1, 2013**
- C. **Judgment Entry from the Wood County Court of Common Pleas dated January 6, 2012**
- D. **The relevant portions of the video deposition transcript of Donald Burkhart taken on December 14, 2006; transcript pages attached are 50, 51, 53, 54, 55, 56, 61, 67, 68, 87, 91, 92 and 126**

APPENDIX A

The Supreme Court of Ohio

FILED

JUN 26 2013

CLERK OF COURT
SUPREME COURT OF OHIO

Mary Lou Burkhart

v.

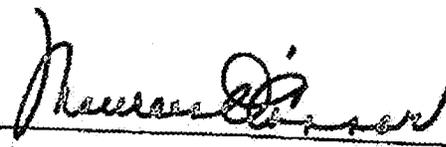
H.J. Heinz Co. et al.

Case No. 2013-0580

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal on Proposition of Law No. I. The clerk shall issue an order for the transmittal of the record from the Court of Appeals for Wood County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Wood County Court of Appeals; No. WD-12-008)



Maureen O'Connor
Chief Justice

APPENDIX B

[Cite as *Burkhart v. H.J. Heinz Co.*, 2013-Ohio-723.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Mary Lou Burkhart

Appellant

v.

H.J. Heinz Co., et al.

Appellee

Court of Appeals No. WD-12-008

Trial Court No. 2011 CV 254

DECISION AND JUDGMENT

Decided: March 1, 2013

David S. Bates and Joshua P. Grunda, for appellant.

Keith A. Savidge and Eric D. Baker, for appellee.

SINGER, P.J.

{¶ 1} Appellant appeals a summary judgment issued by the Wood County Court of Common Pleas in an R.C. 4123.512 appeal from a denial of workers' compensation death benefits. Because we conclude that the trial court abused its discretion in sustaining multiple motions to strike evidence and, with proper consideration of such evidence, questions of material fact preclude an award of summary judgment, we reverse,

{¶ 2} Appellant is Mary Lou Burkhart, widow of Donald Burkhart. Following his release from World War II service in the Marine Corps, in 1946 Donald Burkhart began working at the Bowling Green ketchup bottling plant operated by appellee, H.J. Heinz, Co. He worked there as a maintenance worker/electrician until the plant closed in 1975, at which point he transferred to appellee's Fremont plant where he worked until he retired in 1986. Subsequent to his retirement, Donald Burkhart developed mesothelioma, a pulmonary cancer due to exposure to asbestos.

{¶ 3} Believing that his disease was caused by exposure to asbestos in his work environment, Donald Burkhart initiated a products liability suit against certain asbestos manufacturers in the Cuyahoga County Common Pleas Court. As part of this suit, Burkhart was subject to a 2006 video deposition by attorneys for the asbestos manufacturers. In this deposition, Burkhart described the white insulation on the pipes at the Bowling Green Heinz plant. Burkhart testified that he was told by Heinz managers this insulation was asbestos. According to Burkhart, one of his duties was to repair frayed or missing insulation on the pipes. The disposition of that suit is not in the record before us. Donald Burkhart died in 2007.

{¶ 4} After her husband's death, appellant filed for death benefits with the Ohio Bureau of Workers' Compensation. When appellee contested the claim, the matter was heard before an Ohio Industrial Commission hearing officer who found that, based on the 2006 deposition, appellant failed to show workplace asbestos exposure. Subsequently, a staff hearing officer also found insufficient evidence of exposure and denied the claim.

{¶ 5} On March 24, 2011, appellant appealed the Industrial Commission's decision and, pursuant to R.C. 4123.512, re-filed her complaint in the trial court. Appellee again contested the claim and moved for summary judgment. Appellant filed a 389-page response to appellee's motion. This response included a transcript of Donald Burkhart's 2006 video deposition, medical records, affidavits of co-workers, invoices showing delivery of asbestos pipe insulation to the Bowling Green plant, an environmental report on asbestos pipe insulation in the Fremont plant, interrogatories from a Summit County asbestos litigation and the reports of experts opining that Burkhart's disease was caused by his exposure to asbestos at Heinz.

{¶ 6} Appellee responded with a motion to strike much of appellant's supporting material. Appellee argued it was not a party to the Cuyahoga County asbestos suit, therefore, the Donald Burkhart depositions from that suit should not be considered in this matter. The affidavit authenticating the invoices showing the sale of asbestos pipe insulation to the Bowling Green plant failed to allege personal knowledge. The portion of medical records that attributed Donald Burkhart's disease to asbestos at the Heinz plants was hearsay, not for purposes of medical diagnoses. Co-worker affidavits were conclusory or opinions. Asbestos abatement documents for the Fremont plant were not properly authenticated. Expert opinions were predicated on inadmissible evidence.

{¶ 7} The court struck the asbestos insulation invoices, the Donald Burkhart depositions, the interrogatories, co-worker affidavits, portions of medical records attributing Donald Burkhart's disease to asbestos exposure at Heinz and expert testimony

based on any of the stricken documents. The court then denied appellant's request for reconsideration of the evidentiary rulings and entered summary judgment in favor of appellee, concluding that, without the support of the stricken materials, appellant failed to present evidence of exposure to asbestos in the workplace. From this judgment, appellant now brings this appeal.

{¶ 8} Appellant sets forth the following six assignments of error:

Assignment of Error No. 1

The Trial Court Erred in striking certain invoices from Owens-Corning Fiberglas Corporation to the H.J. Heinz Bowling Green facility.

Assignment of Error No. 2

The Trial Court Erred in striking Owens-Corning Fiberglas Corporation's Supplemental Responses to Interrogatories.

Assignment of Error No. 3

The Trial Court Erred in striking certain statements from Donald Burkhart's medical records composed by Dr. Bahu S. Shaikh.

Assignment of Error No. 4

The Trial Court Erred in striking the Videotape Deposition of Donald Burkhart.

Assignment of Error No. 5

The Trial Court Erred in striking the expert reports of William Ewing and Dr. Stephen Demeter.

Assignment of Error No. 6

The Trial Court Erred in granting Defendant-Appellee H.J. Heinz Company's motion for summary judgment.

{¶ 9} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but

must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 11} Civ.R. 56(E) governs the types of material which may be used to support or defend against a motion for summary judgment:

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.

{¶ 12} Documents submitted in defense against a motion for summary judgment must be properly "sworn, certified or authenticated by affidavit" or they may not be considered in determining whether there is a triable issue of fact. *Green v. B.F. Goodrich Co.*, 85 Ohio App.3d 223, 228, 619 N.E.2d 497 (9th Dist.1993).

{¶ 13} Decisions concerning the admission or exclusion of evidence are within the discretion of the court and will not be reversed absent an abuse of that discretion. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 20. The term "abuse of discretion" connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

I. Insulation Invoices

{¶ 14} In her first assignment of error, appellant asserts that the trial court abused its discretion in striking invoices from Owens Corning Fiberglas Company for asbestos containing pipe insulation delivered to appellee's Bowling Green plant between 1957 and 1961.

{¶ 15} At issue is the affidavit of Andrew Oh, Director of Analysis Research Planning Company, who authenticated copies of invoices from Owens Corning to appellee for the sale and delivery to appellee's plant of an asbestos containing pipe insulation product trade named "Kaylo." Appellee moved to strike these documents as irrelevant and on the ground that affiant Oh had no personal knowledge of appellee's Bowling Green plant. The trial court struck the invoices, concluding that Oh did not have personal knowledge of the invoices. As a result, the invoices were hearsay for which there was no exception.

{¶ 16} The trial court's decision to strike these invoices was erroneous. Andrew Oh's affidavit states that he has personal knowledge of the matters to which he testifies

and states that he is "authorized and qualified to attest to matters involving the Kaylo sales invoices" contained in a database established for the Owens Corning Asbestos Personal Injury Trust. He then outlines how the database was established and avers that the documents attached are authentic invoices recorded at or near the time of the transactions by persons with knowledge of and a business duty to record such matters. The invoices were kept by Owens Corning in the course of a regularly conducted activity, according to Oh's affidavit.

{¶ 17} Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(A). Hearsay is not admissible into evidence unless an exception is provided by law or rule. Evid.R. 802. Evid.R. 803 provides exceptions to the hearsay rule for when the declarant is available as a witness. Evid.R. 803(6) makes admissible certain business records. The rule provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes

business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶ 18} There are four essential elements that must be shown for hearsay to be admitted under the rule as a business record:

(i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the "custodian" of the record or by some "other qualified witness." 1

Weissenberger, Ohio Evidence, Section 803.73, 124 (2012); State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 171.

{¶ 19} Andrew Oh testified that he was authorized to attest to matters concerning Kaylo sales and the attached invoices were authentic. They were records of business activity recorded contemporaneous to the transactions by persons with knowledge. The documents were kept in the normal course of business. Appellee made no attempt to impeach any of Oh's statements. Oh needed no personal knowledge of the transactions themselves under the rule. He need only aver that the documents are authentic and produced in qualifying circumstances. On its face, Andrew Oh's affidavit succeeds in that regard.

{¶ 20} Concerning appellee's relevance objection, any evidence that makes the existence of a fact of consequence more or less probable is relevant. Evid.R. 401. Since

the presence of asbestos at appellee's Bowling Green plant is a fact of consequence, appellee's relevance objection is misplaced.

{¶ 21} Since the insulation invoices were both relevant and authentic, the trial court's decision to strike the documents was unreasonable. Accordingly, appellant's first assignment of error is well-taken.

E. Videotape Deposition

{¶ 22} Because consideration of the testimony by Donald Burkhart in his videotape deposition in the Cuyahoga County proceedings is dispositive in other assignments of errors, we shall next consider appellant's fourth assignment of error.

{¶ 23} In its motion to strike the video deposition, appellee conceded that a deposition from another proceeding may be treated as an affidavit and considered for summary judgment purposes when the testimony is from personal knowledge and the witness is available to testify at trial. *See Hastings Mut. Ins. v. Halatek*, 174 Ohio App.3d 252, 2007-Ohio-6923, 881 N.E.2d 897, ¶ 25 (7th Dist.). Since Donald Burkhart is deceased, however, he is unavailable as a witness at trial and the court may not consider the deposition, appellee maintained.

{¶ 24} The only remaining way that the court may consider the deposition would be as a hearsay exception for former testimony found in Evid.R. 804(B)(1), but this path too is unavailable, appellee argued. The rule allows testimony from a different proceeding only if the party against whom it is now offered was a party to the prior proceeding or a predecessor in interest, with a similar motive to develop testimony and

had an opportunity to examine the witness. Appellee asserts it was not a party to the Cuyahoga County asbestos litigation and was not represented there by a predecessor in interest. As a result, appellee insisted, the video deposition should be stricken.

{¶ 25} The court found that there was no evidence that Heinz or a predecessor in interest was involved in prior litigation and struck the transcript of the video deposition. In her fourth assignment of error, appellant asserts that this determination was wrong. According to appellant, there were no less than 25 parties in the Cuyahoga County asbestos litigation, each with a motive to discredit Donald Burkhart's assertion of exposure to asbestos.

{¶ 26} Appellee responds that it undisputed that it was not a party in the Cuyahoga County asbestos litigation. It had no predecessor in interest in the litigation. Moreover, those parties involved did not represent appellee's interests and were not similarly motivated. Appellee points to a specific portion of testimony as an exemplar of these divergent motives. In an inquiry by counsel for Cuyahoga County defendant Standard Oil, there was the following exchange:

Q: All right. Now, in 1946, you said that you went into the boiler room, what did you have to do in the boiler room, what was your job?

A: Well, like I said, Heinz never throwed nothing away, and this asbestos stuff was knocked off the pipes, had to put it in a bucket and saved it and we would, in spare time, would beat it to pieces, make a paste out of it and put it back on the pipes.

Q: Okay. And would these be the pipes in the boiler room?

A: Yes, or anyplace else.

Q: Now, when you say this asbestos stuff --

A: Well, it was flaky, they called it asbestos, I don't know what it was.

Q: Who is they that called it asbestos?

A: Management.

{¶ 27} Appellee insists that if the defendants in the Cuyahoga County case had truly been of similar motive to it, they would have inquired as to the identity of the person or persons in management who characterized the substance as asbestos.

{¶ 28} Evid.R. 804(B)(1), in material part, provides:

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

***. (Emphasis added.)

{¶ 29} Evid.R. 804(B)(1) is patterned after the federal rule. Its language is identical to the original Fed.R.Evid. 804(b)(1). Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1942.¹

{¶ 30} At issue is whether the defendants in the Cuyahoga County asbestos suit are predecessors in interest to appellee. A survey of the Ohio cases in which Evid.R. 804(B)(1) was an issue reveals that the vast majority are either criminal proceedings or concern whether the prior deponent was indeed unavailable. The few cases that touch on the qualifications of a predecessor in interest under the rule simply conclude that the party in the prior proceeding akin to the party against whom the testimony is offered in the current suit must have had an opportunity and similar motive. *House of Wheat v. Wright*, 2d Dist. No. 8614, 1985 WL 17381 (Oct. 10, 1985), *Whitaker v. Weinrich*, 12th Dist. No. CA86-12-179, 1987 WL 28437 (Dec. 14, 1987), *Shepard v. Grand Trunk W. R.R., Inc.*, 8th Dist. No. 92711, 2010-Ohio-1853, ¶ 77. Compare *Yates v. Black*, 9th Dist. No. 13525, 1988 WL 133675 (Dec. 7, 1988). These cases seem in conformity with what appellant characterizes as the dominant federal interpretation of the rule as articulated in *Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.1978).

{¶ 31} Lloyd and Alvarez were seamen involved in a fight on a U.S. flagged merchant marine vessel in Japan. Subsequently, the Coast Guard convened an inquiry to determine whether Lloyd's merchant mariner's document should be suspended.

¹ The language of the rule was restyled in 2011. No change in the substance of the rule was intended. 2011 Advisory Committee Notes, Fed.R.Evid. 804.

Concurrently, Lloyd sued the ship's owner. The ship's owner joined Alvarez as a third-party defendant and Alvarez, in turn counterclaimed against the ship owner.

{¶ 32} Lloyd disappeared. The suit continued on Alvarez' counterclaim. *Id.* at 1181. During trial, the ship owner attempted to introduce portions of Lloyd's testimony before the Coast Guard inquiry, but the court denied admission. The jury returned a verdict in Alvarez' favor. On appeal, the ship owner assigned as error the trial court's refusal to admit Lloyd's prior testimony. *Id.* at 1182.

{¶ 33} The appeals court reversed, concluding that Lloyd's prior testimony should have been admitted pursuant to Fed.R.Evid. 804(b)(1). The court noted that clearly Lloyd was unavailable and that the Coast Guard hearing was conducted before a professional hearing examiner, under oath and that Lloyd was subject to direct and cross-examination. *Id.* at 1183.

{¶ 34} The issue, according to the appeals court, was whether Alvarez or a "predecessor in interest" had an opportunity and similar motive to develop testimony at the inquiry. The court noted that Congress did not define the term "predecessor in interest," but left to the courts the interpretation of the phrase. *Id.* at 1185. The court examined the legislative history of the provision and concluded a "predecessor in interest" is a party with a motive similar in interest to the party against whom the prior testimony would be offered. *Id.*

"[I]f it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was

accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party. *Id.* at 1186, quoting McCormick, Handbook of the Law of Evidence Section 256, at 619-621(2d Ed. 1972).

{¶ 35} On the facts before it, the court concluded that the Coast Guard and Alvarez shared a "sufficient community of interest" to satisfy the rule.

Alvarez sought to vindicate his individual interest in recovering for his injuries; the Coast Guard sought to vindicate the public interest in safe and unimpeded merchant marine service. Irrespective of whether the interests be considered from the individual or public viewpoints, however, the nucleus of operative facts was the same the conduct of Frank Lloyd and Roland Alvarez aboard the [ship]. *Id.* (Footnote omitted.)

{¶ 36} While acceptance of the *Lloyd* test for "predecessor of interest" has not been universal, *see* Lawrence, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining A Predecessor In Interest*, 42 U.Miami L.Rev. 975 (1988), its holding has been adopted by federal and state courts in several circuits, including our own Sixth Circuit. *Clay v. Johns-Marville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir.1983), *Dykes v. Raymark Ind., Inc.*, 801 F.2d 810, 816 (6th Cir.1986), *Burke v. Johns-Marville*, S.D.Ohio No. C-1-81-289, 1983 WL 314571 (Nov. 3, 1983), *New England*.

Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 651(10th Cir.1989), *In re Screws Antitrust Litigation*, 526 F.Supp. 1319 (D.C.Mass.1981), *Athridge v. Aetna Cas. and Sur. Co.*, 474 F.Supp.2d 102, 115-116 (D.D.C.2007), *Rich v. Kaiser Gypsum Co.*, 103 So.3d 903 (Fla.App.2012), *White Pine Ranches v. Osguthorpe*, 731 P.2d 1076, 1079 (Utah 1986).

{¶ 37} Both Sixth Circuit cases were asbestos cases and both involved the admission of prior deposition testimony from an expert witness in a proceeding unrelated to either party in the pending actions. Dr. Kenneth Smith had been a physician for asbestos manufacturer Johns-Manville for 22 years. He testified in a deposition in a Pennsylvania asbestos case concerning the manufacturer's prior knowledge about asbestos diseases. By the time of the *Clay* and *Dykes* cases, Smith had died.

{¶ 38} In *Clay*, the trial court refused to admit Smith's deposition because neither of the parties in *Clay* was in privity with any of the parties in the case in which the Smith deposition was taken. The appeals court reversed, concluding that the defendants in the Pennsylvania case had a similar motive to the *Clay* defendants in confronting Dr. Smith's testimony. Applying *Lloyd*, the court found that Fed.Evid.R. 804(b)(1) was satisfied. *Clay* at 1295.

{¶ 39} In *Dykes*, the district court admitted Dr. Smith's deposition. On appeal, the Sixth Circuit again applied *Lloyd* and affirmed the district court's ruling. *Dykes*, 801 F.2d at 817.

{¶ 40} *Lloyd* is well reasoned and in conformity with Ohio cases concerning the definition of "predecessor in interest" as used in Evid.R. 804(B)(1). There is also merit

in applying the rule in conformity with the federal courts of this circuit. Accordingly, we adopt the *Lloyd* holding.

{¶ 41} Applying this to the facts before us, we conclude that the defendants in the Cuyahoga County asbestos cases and appellee share the same position with respect to appellant: all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos. In that regard, the Cuyahoga County asbestos defendants had the same motive to develop testimony through direct and cross-examination as appellee. As to appellee's argument that the questioners at the Burkhart video deposition did not ask the exact same questions as appellee might have, this is not required. See *Whitaker*, 12th Dist. No. CA86-12-179, 1987 WL 28437.

{¶ 42} The Cuyahoga County asbestos defendants were predecessors in interest and shared the same motive to develop testimony as appellee. As a result, Donald Burkhart's video deposition testimony in the prior proceeding was admissible pursuant to Evid.R. 804(B)(1) and the trial court acted unreasonably in refusing to consider such testimony on summary judgment. Accordingly, appellant's fourth assignment of error is well-taken.

III. Expert Witness Reports

{¶ 43} In her fifth assignment of error, appellee complains that the trial court should not have stricken the affidavits of expert witnesses William Ewing and Dr. Steven Demeter.

{¶ 44} The court did not expressly strike the Ewing affidavit, but questioned it on the ground that it improperly relied on the Burkhart deposition and the Owens Corning Kaylo invoices. Moreover, the court also faulted the expert's reliance on co-worker affidavits in which the affiants averred that Burkhart worked in areas where they believed asbestos insulation was present. The court stated the same grounds for striking Dr. Demeter's affidavit.

{¶ 45} We have already held the Kaylo invoices and Burkhart's prior deposition testimony admissible. The same is true of the co-worker affidavits. The court parses the language of the affidavit of former Bowling Green Heinz personnel manager Leland Bandeen. Bandeen averred that he believed Donald Burkhart was exposed to asbestos wrapped steam pipes throughout the plant. In his deposition testimony, Bandeen testified that he saw Burkhart in the boiler room with pipes wrapped with what he recognized as asbestos. As to whether Bandeen had a proper basis for thinking the material was indeed asbestos, that goes to the issue of weight of the evidence, not admissibility. The same is true of the affidavit of Burkhart's co-worker, Wally Koons.

{¶ 46} Accordingly, it was unreasonable for the court to strike the affidavits of Dr. Demeter and Mr. Ewing. Appellant's fifth assignment of error is well-taken.

IV. Physician Letter

{¶ 47} Appellant complains in her third assignment of error that the trial court erred in striking a portion of a letter from Donald Burkhart's treating physician, Dr. Bahu S. Shaikh, to the referring physician from the Cleveland Clinic. The court struck

the portion of the document that stated Burkhart had "a history of asbestos exposure while working in the Heinz plant." The court found that, since Burkhart had already been diagnosed with mesothelioma, the stricken statement was not relevant to the treating physician's diagnosis or treatment and, therefore, not properly admissible hearsay through Evid.R. 803(4).

{¶ 48} Evid.R. 803 provides exceptions to the exclusion of hearsay when the availability of the declarant is immaterial. Evid.R. 803(4) exempts:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶ 49} The trial court's decision here is somewhat perplexing. The letter to the referring physician was, for the most part, a summary of the information transmitted with the referral and informing the referring physician of a planned course of treatment. Mesothelioma arises exclusively from asbestos exposure and the fact of such exposure is certainly relevant to diagnosis and treatment. Simply because a diagnosis has been made does not mean that the record must now be purged of relevant information obtained in the course of diagnosis.

{¶ 50} The medical treatment exception to the hearsay rule is premised on the presumption that a statement made for treatment and diagnosis "generally guarantees trustworthiness: the declarant has a motive to tell the truth because his treatment will

depend upon what he says." Weissenberger, *Ohio Evidence*, Section 803.45, 100 (2012). We fail to see how such a statement becomes less trustworthy after there is a diagnosis. Striking such a statement is unreasonable. Accordingly, appellant's third assignment of error is well-taken.

V. Supplemental Response to Interrogatories

{¶ 51} Appellant's exhibit No. 7 with her memorandum in opposition to summary judgment contains certain pages from a "Supplemental Response to Plaintiffs' Master Discovery Requests" by Owens Corning Fiberglas Corporation in a Summit County Common Pleas Court case, *In re: Northern Ohio Treworker Asbestos Litigation*, Summit C.P. No. 88-04-1087, et seq. (Sept. 23, 1994). Appellee moved to strike the exhibit on the ground that it had not been properly authenticated. The court struck the exhibit on the ground that it had not been filed in the present action. In her second assignment of error, appellant asserts this ruling was erroneous.

{¶ 52} The supplemental response itself is authenticated by the notarized signature of one who purports to be authorized to make such responses by Owens Corning. The authenticity of the copy of the document is attested in an affidavit by appellant's counsel. Absent contradictory evidence, these attestations are sufficient to establish the authenticity of this document.

{¶ 53} As to whether the "answers to interrogatories" which Civ.R. 56(C) expressly includes as a basis for consideration is limited to those in the present matter only, the rule provides that:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment * * *. No evidence or stipulation may be considered except as stated in this rule.

{¶ 54} It is interesting to note that, until a 1999 amendment, the rule read "transcripts of evidence in the pending case." The amendment removed the phrase "in the pending case" so that transcripts of evidence from another case could be filed and considered in deciding the motion. Civ.R. 56(C), Staff Note to 7-1-99 Amendment. Indeed, prior to the amendment, transcripts from different cases could not be considered. *See Frazier v. Sites*, 4th Dist. No. 1679, 1984 WL 5674 (Dec. 3, 1984).

{¶ 55} Clearly, the drafters of the rule were capable of using language restricting the material that may be considered to that in the pending case. Since "answers to interrogatories" was not so restricted, we may conclude that the interrogatories that may be considered are not limited to those in the pending case. Accordingly, the trial court erred in striking exhibit No. 7. Appellant's second assignment of error is well-taken.

VI. Summary Judgment

{¶ 56} An employee who becomes disabled or dies as the result of an occupational disease is entitled to compensation. R.C. 4123.68. Mesothelioma is an occupational disease caused by exposure to asbestos. *State ex rel. Pilkington N. Am. v. Indus. Comm.*,

118 Ohio St.3d 161, 2008-Ohio-1506, 887 N.E.2d 317, ¶ 3. To establish a claim for mesothelioma, the employee or the employee's dependent must show an injurious exposure to asbestos in the employee's workplace. An injurious exposure is that which proximately causes the disease or augments or aggravates a pre-existing condition. *State ex rel. Hall China Co. v. Indus. Comm.*, 120 Ohio App. 374, 377, 202 N.E.2d 628 (10th Dist.1962). Proof of exposure with the last employer is a sufficient basis for an award, even though other employment may have contributed to the occupational disease. *State ex rel. Burnett v. Indus. Comm. of Ohio*, 6 Ohio St.3d 266, 268, 452 N.E.2d 1341 (1983).

{¶ 57} Donald Burkhart testified that there was asbestos at the Bowling Green Heinz site, that he was exposed and, indeed, regularly worked with this material. The sales records from Owens Corning support a reasonable inference of the presence of asbestos in the Bowling Green Heinz plant. The affidavits of Wally Koons and Leland Bandeen support appellant's assertion that Burkhart was exposed to asbestos at least in the boiler room of the plant. The medical experts agree that Burkhart had mesothelioma and that the cause of this disease was his exposure to asbestos.

{¶ 58} Construing the evidence in favor of the non-moving party, we can only conclude that appellant presented evidence which, if believed, establishes that he was injuriously exposed to asbestos at the Heinz plant in Bowling Green and possibly Fremont. Whether Burkhart, or Koons, or Bandeen had the expertise to properly identify asbestos insulation is a question of fact. Whether the asbestos at either location was friable is a question of fact. When there are questions of material fact, summary

judgment is inappropriate. Accordingly, appellant's sixth assignment of error is well-taken.

{¶ 59} On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to said court for trial. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR

JUDGE

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

APPENDIX C

WOOD COUNTY
CLERK OF COURT
2012 JAN -6 A 9 55
CLERK OF COURT

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

**Mary Lou Burkhart,
Plaintiff,**

Case No: 11 CV 254

v.

JUDGE REEVE KELSEY

**H.J. Heinz Co., et al.,
Defendants.**

JUDGMENT ENTRY

This case was before the court on December 22, 2011, for a hearing on defendant H.J. Heinz Co.'s ("Heinz") motion for summary judgment. Present were David Bates, Esq., for plaintiff Mary Lou Burkhart, and Keith Savidge, Esq., for Heinz. The attorneys each presented their arguments, and the court took the matter under advisement.

Facts

Mrs. Burkhart's deceased husband, Donald Burkhart, was employed by Heinz from 1946 to 1986. During that time, he worked as an electrician at both the now-closed Heinz plant in Bowling Green, and the existing plant in Fremont. Mr. Burkhart was diagnosed with mesothelioma in 2005, and died of the disease in May 2007. Mrs. Burkhart filed a death claim with the Ohio Bureau of Workers' Compensation seeking compensation from Heinz for her

husband's death, allegedly due to mesothelioma caused by asbestos exposure at Heinz's plants. The claim was denied at all administrative levels, and this appeal followed.

Heinz claims that Mrs. Burkhart cannot present any evidence that Mr. Burkhart received any injurious exposure to asbestos while working at Heinz. Mrs. Burkhart contends that genuine issues of material fact remain. At the summary judgment hearing, Mrs. Burkhart also asked the court to reconsider two of its rulings striking portions of her evidentiary materials.

Reconsideration

On December 15, 2011, the court issued a decision striking portions of the evidentiary materials filed with Mrs. Burkhart's motion for summary judgment. Mr. Bates asked the court to reconsider two of those items. The first was the affidavit of Andrew Oh. Exhibit 6 to plaintiff's response to defendant's motion for summary judgment. The court struck the affidavit because it was not made on Mr. Oh's firsthand knowledge. Mr. Bates argued that Mr. Oh is the custodian of the Owens Corning records and that he is the only person from whom the plaintiff could obtain an affidavit regarding these records, as Owens Corning declared bankruptcy approximately 10 years ago. Paragraphs 4 and 5 of Mr. Oh's affidavit state, "Upon information from Owens Corning, * * *." These two paragraphs form the foundation of Mr. Oh's knowledge upon which he then bases his subsequent conclusions. Information

coming from Owens Corning is hearsay, and no exception to the hearsay rule is available.

Further, an affidavit must be made upon personal knowledge not knowledge. "Personal knowledge" is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said," *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶ 26, quoting Black's Law Dictionary (7th Ed.Rev. 1999) 875; and *Chase Bank, USA, v. Curren*, 191 Ohio App.3d 507, 2010-Ohio-6596, 946 N.E.2d 810, at ¶ 17 (4th Dist.), and "knowledge of factual truth which does not depend on outside information or hearsay." *Residential Funding Co., LLC v. Thome*, 6th Dist. No. L-09-1324, 2010-Ohio-4271, at ¶ 64, quoting *Modan v. Cleveland*, 9th Dist. No. 2945-M, 1999 WL 1260318, *2 (Dec. 22, 1999). It appears from Mr. Oh's affidavit that the database is owned by the Owens Corning Asbestos Personal Injury Trust. Mr. Oh states that he is employed by Analysis Research Planning Company. There is no indication why Mr. Oh as an employee of Analysis Research Planning Company would have any personal knowledge of the records maintained in the Owens Corning Asbestos Personal Injury Trust. Without more evidence that the affidavit was made on Mr. Oh's personal knowledge the court cannot conclude that the affidavit is properly admissible under Civ.R. 56(B). The court's December 15, 2011 decision to strike Exhibit 6 stands.

Mr. Bates also asked the court to reconsider striking a portion of a medical letter written by Dr. Bahu Shalkh, Mr. Burkhardt's oncologist. He argued

that the statement about asbestos exposure contained in Exhibit 12 was made for the purpose of medical diagnosis or treatment, and is an exception to the hearsay rule under Evid.R. 803(4). The hearsay exception in Evid.R. 803(4) states that, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof *insofar as reasonably pertinent to diagnosis or treatment,*" are not hearsay. Evid.R. 803(4) (emphasis added). The stricken statement in Dr. Shaikh's letter refers to a history of asbestos exposure while Mr. Burkhart was working for Heinz. While this statement is reasonably pertinent to a diagnosis of mesothelioma, Dr. Shaikh was not diagnosing Mr. Burkhart; Mr. Burkhart came to Dr. Shaikh with the mesothelioma diagnosis. Further, where Mr. Burkhart might have been exposed to asbestos is irrelevant to mesothelioma treatment. Because the statement in Dr. Shaikh's letter is not reasonably pertinent to Mr. Burkhart's diagnosis or treatment, the statement does not fall within the hearsay exception in Evid.R. 803(4). The court's December 15, 2011 decision to strike portions of Exhibit 12 stands.

Standard for Summary Judgment

In *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 375 N.E.2d 46 (1978), it was held that for summary judgment to be granted, it must appear "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law, and (3) 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, who is entitled to have the evidence strongly construed in his favor." *Hartess v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 84, 375 N.E.2d 46; and *Conley-Slowinski v. Superior Spinning & Stamping Co.*, 128 Ohio App.3d 360, 714 N.E.2d 991 (6th Dist. 1998). See, also, Civ.R. 56(C); and *Leibreich v. A.J. Refrigeration, Inc.*, 87 Ohio St.3d 268, 617 N.E.2d 1068 (1993).

In moving for summary judgment " * * " the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The moving party must specifically point to some evidence of the type contemplated by Civ.R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claim. Mere conclusory assertions are not sufficient.

Once the moving party has met its burden, the non-moving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The non-moving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. The allegations and denials in the pleadings are not sufficient for this purpose. Civ.R. 56(E).

Issue and Analysis

The issue before the court is whether Mrs. Burkhart has presented sufficient evidence of Mr. Burkhart's injurious exposure to asbestos at Heinz's facilities to survive Heinz's motion for summary judgment. After reviewing the parties' motions and considering the arguments presented at the hearing, the court finds that she cannot.

Injurious exposure to asbestos occurs means, " * * * an exposure in the claimant's last place of employment which proximately caused [mesothelioma], or an exposure in such last place of employment which augmented or aggravated a pre-existing [mesothelioma] caused by constant exposure to free [asbestos] during many years in prior places of employment." *State ex rel. China Hall Co. v. Indus. Comm. of Ohio*, 120 Ohio App. 374; 202 N.E.2d 828 (10th Dist.1962), at paragraph one of the syllabus; and R.C. 4123.68(AA).

After excluding the evidentiary materials stricken by the court's December 15 decision, the affidavit of William Ewing, and the results of the asbestos abatement study, the totality of Mrs. Burkhart's evidence fails to present any genuine issues of material fact in this matter. In the December 15 decision, the court noted that it would not strike the expert affidavit of William Ewing, but noted that Mrs. Burkhart would be required to present evidence of the foundations of Mr. Ewing's opinions. Other than arguing that the court should reconsider striking some of the documents Mr. Ewing relied on, Mrs. Burkhart did not present any evidence or arguments to show that Mr. Ewing had a proper

foundation for claiming Mr. Burkhart experienced "significant exposure" to asbestos at the Heinz facilities. Without some further evidence of a proper foundation, Mr. Ewing's opinion is not sufficient to create a genuine issue of material fact.

The only remaining evidence of Mr. Burkhart experiencing any exposure to asbestos at the Heinz plants is testimony from Leland Bandeen that Mr. Burkhart, while working at the Bowling Green plant, worked in a dusty boiler room containing pipes he thought might have been covered with asbestos insulation. July 22, 2011 deposition of Leland Bandeen, p. 63, 66-67; and Cathy Shell's testimony that it was "possible" someone working in the boiler house at the Bowling Green plant could have been exposed to asbestos and that asbestos existed in the Fremont plant at least until 1987. August 31, 2011 deposition of Cathy Shell, p. 31, 40-41. This information barely creates an issue of fact regarding any exposure, much less the injurious exposure required to support a Workers' Compensation death claim. Because Mrs. Burkhart has failed to demonstrate that a genuine issue of material fact remains regarding Mr. Burkhart's injurious exposure to asbestos at the Heinz facilities, the court will grant Heinz's motion for summary judgment.

The court has reviewed and considered all of the timely filed pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case. The court has construed the evidence most strongly in favor of the plaintiff, the party against whom the motion

for summary judgment is made. Upon conclusion the court finds that there remains no genuine issue of material fact and that reasonable minds could come to but one conclusion and that conclusion being that the motion for summary judgment of the defendant should be granted.

IT IS ORDERED that defendant H.J. Heinz Co.'s motion for summary judgment is granted.

IT IS ORDERED that the case is dismissed.

IT IS ORDERED that the settlement pretrial set for January 10, 2012, at 1:00 P.M., and the jury trial set for February 8, 2012, at 8:30 A.M. are vacated.

Costs to plaintiff.

1/6/12
Date


Judge Reeve Kelsey

Clerk to furnish copy to counsel of record and unrepresented parties

APPENDIX D

1 time?

2 A Yes.

3 Q Is that a fair statement?

4 A Yes.

5 Q All right. Now, in 1946, you said that
6 you went into the boiler room, what all did you have to do in
7 the boiler room, what was your job?

8 A Well, like I said, Heinz never threw
9 nothing away, and this asbestos stuff was knocked off the
10 pipes, had to put it in the bucket and saved it and we would,
11 in spare time, would beat it to pieces, make a paste out of
12 it and put it back on the pipes.

13 Q Okay. And would these be the pipes in
14 the boiler room?

15 A Yes, or anyplace else.

16 Q Now, when you say that this asbestos
17 stuff --

18 A Well, it was flaky, they called it
19 asbestos, I don't know what it was.

20 Q Who is they that called that asbestos?

21 A Management.

22 Q Okay. Management, all right. Now, you
23 said that it came from the pipes?

24 A Well, if it did, it laid on the floor and
25 it was thrown in this bucket and we just mixed it up with

1 new stuff and put it back on the pipe.

2 Q All right. Did you ever have to collect
3 any of that stuff or was it already in buckets for you?

4 A Well, it was in buckets, or wherever they
5 gathered it up.

6 Q Okay. When you were putting it on the
7 pipes, were these just the pipes in the boiler room?

8 A No, we put it on anyplace that was open.

9 Q Okay.

10 A They would schedule us where they wanted
11 us to do it.

12 Q All right. Did you have pipes running
13 all through this plant?

14 A Oh, yes.

15 Q Is there any part of the plant that you
16 didn't work in?

17 A I was in every building, every place that
18 they made.

19 Q That they --

20 A Even the vinegar village, I was in.

21 Q Okay.

22 A They had no steam out there.

23 Q All right. But when I'm talking about
24 putting this material back on the pipes, was that all over
25 the plant that you did that?

1 Q Okay. And what about the vinegar
2 building, was that another building?

3 A That was right outside the door, but they
4 -- they made vinegar.

5 Q Was it its own separate building?

6 A Yes.

7 Q When you would pick up this asbestos in
8 the buckets to mix it up and put it on, was that a dusty
9 process?

10 A Oh, yes.

11 Q Do you believe that you breathed in that
12 dust?

13 A Well, if it was dust, I got some of it.

14 Q Okay. And why do you say that?

15 A Well, because I got this disease.

16 Q Okay. Did they give you any breathing
17 protection when you were working with those buckets?

18 A Never, no instructions.

19 Q During the time that you were out at
20 Heinz, did you ever receive any warning about the dangers or
21 hazards of asbestos from anybody at Heinz?

22 A Not in Bowling Green.

23 Q Okay. Not in Bowling Green, and that was
24 until '76, right?

25 A (Witness nodding.)

1 Q Correct?

2 A Right.

3 Q Did you ever see any warnings about the
4 dangers or hazards of asbestos on any of the materials that
5 you used out at Heinz?

6 A No.

7 Q All right. Now, how long did you do this
8 work where you started in the boiler room and were mixing up
9 this material and putting it on the pipes?

10 A Well, they would tell us that there was
11 pipe over there that needed covered, so somebody didn't get
12 burnt, and we would put that stuff on there, wet, boy, the
13 steam just rolled off of it, then we cover it with, called
14 cheesecloth, so it wouldn't fall off, it would dry real
15 quick.

16 Q All right.

17 A And just go around and put it on all the
18 lines that we found that had it off.

19 Q Do you believe that cheesecloth was an
20 asbestos-containing product?

21 A I have no idea.

22 Q And your assignment in the boiler room,
23 how long were you assigned to the boiler room?

24 A Well, I started in June, or July when I
25 got out of the service, and I worked in there until, well,

1 just before season, I would say in August, it wasn't too
2 long, because I went in the evaporators.

3 Q Okay.

4 A And then they moved me back to the boiler
5 room afterwards.

6 Q All right. So, from my calculations, you
7 were in the boiler room about a month in 1946, then you go to
8 season, which is a three to four month deal?

9 A Yes.

10 Q Okay. And then you would have gone back
11 to the boiler room; is that correct?

12 A Yes.

13 Q Is that how your year went for the first
14 several years you were at Heinz?

15 A No.

16 Q Okay.

17 A That would be the first year.

18 Q Okay. That's the first year. When you
19 went back to the boiler room, did you do the same job that
20 you had done before, taking the asbestos out of the buckets,
21 mixing it up?

22 A If there was one knocked off that had to
23 be patched.

24 Q All right. If you weren't doing that
25 particular job, what else were you doing in the boiler room?

1 A Brick laying.

2 Q Okay. And where were you laying bricks?

3 A In the tubes.

4 Q What tubes?

5 A In the top of the boilers.

6 Q Okay. Do you believe these bricks were

7 an asbestos-containing material?

8 A I have no idea, they were a light brick,

9 the guy on the outside dipped them in some kind of mud and I

10 took them and handed them to the bricklayers.

11 Q All right. Were you there when they

12 would be taking out the old brick?

13 A No, I wasn't in there then.

14 Q Was that a dusty process, the placing of

15 the bricks?

16 A That was dusty no matter where.

17 Q Well, what do you mean no matter where?

18 A Inside of a boiler, you hit something and

19 dirt flies.

20 Q Okay. So no matter where you were in the

21 boiler, it was dusty?

22 A On top of the tubes, there is a layer of

23 dirt, that if you hit one, it will shake it off.

24 Q How big was this boiler that you worked

25 in at Heinz that first year?

1 in the tomato harvest?

2 A Yes.

3 Q Did you also repair them and refurbish
4 them after the season?

5 A Yes.

6 Q Okay. So you did work with evaporators
7 all year long, you just did different things with them?

8 A Yes, well, the evaporators didn't need
9 too much attention.

10 Q Okay.

11 A They were all stainless.

12 Q Okay. Do you recall the brand name,
13 trade name or manufacturer of any of those evaporators?

14 A Buffalo Vac.

15 MR. MILLICAN: What was that?

16 Q Buffalo Vac. Do you believe that any
17 part of your work with the evaporators, as we sit here today,
18 exposed you to any asbestos-containing materials?

19 A No.

20 Q Do you know one way or the other?

21 MR. MICHALEC: Objection.

22 Q You can answer.

23 A No.

24 Q Okay. Now, what is the function of the
25 evaporators in this process of making ketchup?

1 A That's on the pump.

2 Q Okay, on the pump, itself, all right.

3 Now, you've talked about bearings, gaskets, impellers, motors
4 and packing, and you've talked about several different brands
5 of pumps, all right, did you have to do these same things on
6 all those brands of pumps or did different pumps require
7 different things?

8 A Well, most generally all pumps, you had
9 the same packing for them.

10 Q Okay.

11 A Nothing was designated for this one or
12 that one.

13 Q Okay. And do you recall the brand name,
14 trade name or manufacturer of the packing that you used at
15 Heinz?

16 A No.

17 Q Okay. Do you recall the brand name,
18 trade name or manufacturer of the gaskets that you used out
19 at Heinz?

20 A Garlock.

21 Q Okay. And what did those Garlock gaskets
22 look like?

23 A We had to make them, they come in a
24 sheet.

25 Q Okay. Do you have a belief as to whether

1 those Garlock gaskets contained any asbestos?

2 MS. HURLEY: Objection.

3 A I have no idea.

4 Q You said that the Garlock came in a
5 sheet, how would you make your gaskets out of that sheet?

6 A Well, you went to the stockroom and told
7 them that you wanted this and they would pull that sheet out
8 and they would cut a chunk of it out and then you would put
9 your cutter in there and cut circles and things, and then
10 take the gasket and lay it on the flange and cut the holes,
11 take a ballpeen hammer about the same size as that and then
12 take another hammer and hit it, and that would make a hole in
13 there.

14 Q Okay.

15 A And we would -- I feel that with Garlock,
16 it had to be asbestos, because we put it on the steam, on the
17 flanges to hold the line together, so it must have asbestos
18 in it.

19 Q Okay. Now, when you would get these
20 sheets, how would you know that these were Garlock sheets?

21 A Had Garlock right on it.

22 Q All right.

23 A Right big name.

24 Q And when you would cut it out, what kind
25 of tools would you use, before you -- you said that you would

1 A Kettles.
2 Q Kettles, okay.
3 A Kettles.
4 Q And you had never worked on the kettles,
5 right?
6 A Oh, yeah.
7 Q Okay.
8 A I've even tin plated them.
9 Q That's when you were doing the tin
10 plating?
11 A Yeah.
12 Q Okay. What was your job once the
13 continuous line came in, what did you do?
14 A Keep it running, continuous, I could run
15 it eleven and a half hours out of my 12 and not shut it down.
16 Q All right. Do you believe that any part
17 of your work on the continuous line would have exposed you to
18 asbestos?
19 A No.
20 Q Okay. Did you ever have to replace
21 gaskets on any part of this continuous line?
22 A No.
23 Q Did you ever have to replace packing?
24 A Only in the pumps.
25 Q All right. Did the pumps continue to

1 A I didn't work on them, but I was in them.

2 Q What were you doing in the boilers?

3 A Pittsburgh engineer came out and he says,
4 Burkey, that boiler that we brought over, I want you to go
5 out there with me and look at it, and we went in through the
6 back, inside, into the throat of it, where the fire would go
7 through, he wanted me to take a chisel and cut a groove in
8 there and take these wires and lay them in there, so he could
9 put an instrument on the outside to tell where the hot spots
10 were.

11 Q Okay. How big was this boiler that you
12 went inside, was it bigger than this room?

13 A No, it was smaller than this room.

14 Q Okay.

15 A But you could walk in it and everything,
16 the tubes were all on the outside, like, they wasn't across
17 in front of you.

18 Q Okay. And do you know the brand name,
19 trade name or manufacturer of that boiler?

20 A No.

21 Q Okay. Do you believe any of the work
22 that you did in that boiler exposed you to asbestos?

23 A No.

24 Q Do you know one way or the other?

25 A I would say no.

1 Q Okay. All right. Then you retired from
2 Heinz in 1986; is that right?

3 A Yes.

4 Q Have we talked about all the ways in
5 which you believe you were exposed to asbestos while you
6 worked at Heinz?

7 A I believe.

8 Q Okay.

9 A Yes.

10 Q Now, before I leave that finally, do you
11 know the names of any of the suppliers of materials to Heinz,
12 anybody that supplied, say, any of the gaskets or the
13 packing?

14 A No, I don't.

15 Q Okay. Do you know the names of any
16 outside contractors who came and did any kind of work at
17 Heinz at all?

18 A No. Sebrowski's, which is electrical,
19 but that's the only name that I know.

20 Q Okay. And is that a company that you
21 began working with at Bowling Green?

22 A No, I didn't know them, they were outside
23 people, I think they were from Fremont, I'm not sure.

24 Q Okay. What kind of projects did
25 Sebrowski's do?

1 A No.

2 Q Do you have any personal knowledge that
3 Goulds manufactured or supplied any types of seals on their
4 pumps such as packing and/or mechanical seals?

5 A No.

6 Q Do you have any personal knowledge that
7 any of the packing or mechanical seals that may have been
8 used on any Goulds stainless steel pump contained asbestos?

9 A No.

10 Q Did you ever utilize a Goulds service
11 manual or parts list when doing any work on a Goulds pump?

12 A No.

13 Q And because you didn't utilize those, you
14 of course would not have any knowledge that Goulds in any of
15 those materials specified the use of any asbestos or
16 asbestos-containing product in its pump; is that correct?

17 A That's right.

18 Q And you have no knowledge or do you have
19 any recollection that any stainless steel Goulds pump was
20 covered with any insulation; is that correct?

21 A Not that I know of.

22 Q Is that a correct statement?

23 A Yes.

24 MR. MICHALEC: Okay. I want to thank you
25 very much and again, I wish you the best in your