

IN THE SUPREME COURT OF OHIO

MARY LOU BURKHART,)	Case No.: 2013-0580
)	
v.)	On Appeal from the Wood County
)	Court of Appeals, Sixth Appellate District
H.J. HEINZ CO., et al.)	
)	Court of Appeals Case No.: WD-12-0008

MERIT BRIEF OF PLAINTIFF-APPELLEE MARY LOU BURKHART

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APPELLEE'S MERIT BRIEF

I. STATEMENT OF FACTS

On or about March 24, 2011, Plaintiff-Appellee re-filed her Complaint with the Trial Court appealing the decision of the Ohio Industrial Commission denying her the right to participate in the workers' compensation fund as a result of her husband's death due to the occupational disease mesothelioma. This appeal was filed pursuant to ORC 4123.512. The Order by the Staff Hearing Officer denying Plaintiff- Appellee's right to participate in the workers' compensation fund, from which the appeal to the Trial Court originated, was partially based on the former deposition testimony of Donald Burkhart, which was introduced into evidence at the Industrial Commission hearing. Heinz continued to use the Order as evidence in briefing before the Trial Court.

Plaintiff- Appellee's deceased husband, Donald Burkhart, worked for the Defendant-Appellant H.J. Heinz Company (hereafter "Heinz") from 1946 until 1986. Mr. Burkhart worked at the Heinz's Bowling Green facility from 1946 through 1975 and transferred to the Fremont facility until his retirement in 1986. (*Exhibit 1 and Exhibit 2 to Plaintiff's Response to Heinz's Motion for Summary Judgment*) Further, Mr. Burkhart testified he was exposed to asbestos in the boiler room and other areas of the facility while performing his duties out of the maintenance department. (*December 14, 2006 Deposition of Donald Burkhart*). Mr. Burkhart's gave his testimony in *Donald Burkhart vs. AW Chesterton, Inc. et al.*, Cuyahoga County Case Number 599652¹. Mr. Burkhart was diagnosed with mesothelioma, an asbestos related cancer of the lining

¹ In footnote 12 of Heinz's Brief, Defendant-Appellant states that Burkhart was represented by the same law firm in both his products case and his worker's compensation case. This is not

of his lungs, and he died from that disease on May 23, 2007. (*Exhibit 14 to Plaintiff's Response to Heinz's Motion for Summary Judgment*)

Mr. Burkhart's testimony was confirmed by Mr. Leland Bandeen, a co-worker of Mr. Burkhart, who offered testimony regarding Mr. Burkhart's job duties and exposures. (*July 22, 2011 deposition of Leland Bandeen*). Mr. Bandeen testified that during his tenure at the Bowling Green Heinz facility in the 1950's and 1960's that he saw Donald Burkhart working in the boiler room around asbestos covered pipes. (*July 22, 2011 deposition of Leland Bandeen, pgs. 60-6*) Mr. Bandeen further testified that the boiler house was a dirty and dusty place and that Mr. Burkhart never wore a mask or respirator while working in this environment. (*July 22, 2011 deposition of Leland Bandenn, pgs. 63 & 80*)

Cathy Shell, the corporate representative of Heinz, provided further testimony that asbestos existed at the Heinz Fremont plant until at least 1987, and that a person working in the boiler room at the Heinz Bowling Green plant could have been exposed to asbestos. (*Deposition of Cathy Shell pg. 39-41*) At the close of discovery, Heinz moved the trial court for summary judgment on the basis that there was no genuine issue of material fact as to whether Donald Burkhart was exposed to asbestos during his employment.

In addition to the above enumerated evidence, Plaintiff-Appellee also offered numerous other pieces of evidence in support of her case. Defendant-Appellant Heinz moved to strike most of Plaintiff- Appellee's evidence based on various evidentiary grounds. (*Heinz's Motion to*

correct. During his deposition in his products case Mr. Burkhart was represented by a Donna Blevins from Barron & Budd. In this current litigation regarding workers compensation, Mrs. Burkhart is being represented by Bevan & Associates LPA, Inc. While Blevins is similar to Bevan, they are not the same.

Strike) The Trial Court deemed numerous aspects of Plaintiff-Appellee's evidence inadmissible and struck them from the record. (*Order on Motion to Strike*) Based upon these rulings, the Trial Court granted Heinz's motion for summary judgment under Civil Rule 56 as the court found no genuine issue of material fact on the issue of occupational asbestos exposure. (*Order on Motion for Summary Judgment*)

Plaintiff-Appellee Burkhart appealed the Trial Court's Order on the Motion for Summary Judgment and Order on the Motion to Strike on January 19, 2012. In its well reasoned opinion, the Sixth District Court of Appeals reversed the Trial Court on all of its evidentiary rulings regarding Defendant-Appellant's motion to strike and reversed the Trial Court's Order granting summary judgment. *Burkhart v. H.J. Heinz Co.*, 2013-Ohio-723 (6th Dist 2013). The Sixth District held that all of the evidence that the Trial Court had stricken was admissible under the Ohio Rules of Evidence and that a genuine issue of fact did exist regarding Plaintiff-Appellee's claim that she had a right to participate in the worker's compensation system. *Id.* Amongst the evidence that the Sixth District found admissible was the former videotaped deposition testimony of Donald Burkhart.

Defendant-Appellant Heinz appealed the Sixth District's Order to this Honorable Court on April 10, 2013. Heinz's appeal involved two propositions of law. This Honorable Court only accepted jurisdiction over the first. The second proposition of law, which generally involved challenges to the Sixth Districts Order regarding the admissibility of various pieces of evidence, was not accepted for review by this Honorable Court. Further, it should be noted, that nowhere in its brief does Defendant-Appellant Heinz move, or claim, that the Sixth District's Order reversing summary judgment should be overturned. Heinz only claims that the December 14, 2006 video deposition of Donald Burkhart should not be considered as evidence in this case.

II. LAW AND ARGUMENT

A. Standard of Review

The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St. 3d, 173. An appellate court may reverse a trial court only upon a finding of an abuse of that discretion (*i.e.*, determining the trial court's decision was unreasonable, arbitrary, or unconscionable not merely an error of law or judgment.) *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. This same abuse of discretion standard is used when a reviewing court is determining whether or not a motion to strike should have been granted. *Jewett v. Our Lady of Mercy Hosp. of Mariemont* 82 Ohio App.3d 428, (1992).

B. 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.

1. Donald Burkhart's former testimony is admissible for use against Heinz under the strictures of Evid.R. 804(B)(1).

Part of the evidence offered by Plaintiff-Appellee in response to Defendant-Appellant Heinz's motion for summary judgment was the December 14, 2006 video deposition of Donald Burkhart, which was given in his products liability case, *Donald Burkhart v. AW Chesterton, Inc., et al* in Cuyahoga County Common Pleas Case No: 599652. The trial court struck the deposition on motion from Defendant-Appellee Heinz. The trial court relied upon the fact that Heinz was not present at the deposition, nor had any involvement in the prior litigation, as the basis for striking the testimony.

In determining whether to strike the deposition of Donald Burkhart, the Trial Court only looked to see whether Heinz was present at the prior deposition. *December 21, 2011 Order on*

Defendant's motion to strike. While there is no disagreement with the fact that Heinz was not present at the deposition, the trial court's analysis of the issue should not have stopped there. The trial court must conduct an analysis as to whether any other party present at the deposition had an opportunity and similar motive to develop Donald Burkhart's testimony.

Evid.R. 804(B)(1) provides an exception to the hearsay rule when a declarant is unavailable. The rule states that the following testimony is not excluded by the hearsay rule and reads as follows:

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.

Here, Plaintiff-Appellee contends that the other defendants in the Cuyahoga County products liability case were "predecessors in interest" to Heinz as is contemplated by Evid. R. 804(B)(1). In the Cuyahoga County case, no less than twenty five (25) defendants were present to cross examine Mr. Burkhart relative to his asbestos exposures. These defendants clearly had the opportunity and similar motive to develop Mr. Burkhart's testimony.

The Sixth District Court of Appeals, in its well reasoned opinion, found that excluding Donald Burkhart's testimony was an abuse of discretion and contrary to Evid.R. 804(B)(1) and the applicable case law interpreting the Rule. The Sixth District found that the case law, starting with *Lloyd v. American Export Lines, Inc.* 580 F.2d 1179 (3rd Cir. 1978), clearly created an exception to the hearsay rule into which the former testimony of Mr. Burkhart fell.

In *Lloyd*, the Third Circuit Courts of Appeals addressed the issue of former testimony being admitted at trial where a party to the present litigation was not a party to the previous

litigation, in which the former testimony was developed, and therefore did not have the opportunity to cross-examine the declarant. In interpreting Federal Rule of Evidence 804(b)(1), which is identical to Ohio Rule of Evidence 804(B)(1), the court clarified the definition of predecessor in interest by stating, “[W]hile we do not endorse an extravagant interpretation of who or what constitutes a “predecessor in interest,” we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as ‘the practical and expedient view’ expresses the congressional intention: “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 like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.” *Lloyd*, at 1187. Thus, according to the Third Circuit, a predecessor in interest for purposes of 804(B)(1) is merely any party to the previous litigation having a like motive to cross-exam the declarant as the present party. *Id.* The present party need not have been a party to the previous action.

The Third Circuit’s holding in *Lloyd* regarding the definition of predecessor in interest has been followed by various courts, including Ohio courts. See *Burke*, 1983 U.S. Dist. Lexis 12033 (adopting the *Lloyd* test); *Dykes v. Raymark Inds. Inc.* (6th Cir.(Tenn.) 1986), 801 F. 2d 810 (deposition held admissible pursuant to *Lloyd* test); *Clay v. Johns-Manville Sale Corp.* (6th Cir.(Tenn.) 1983), 722 F.2d 1289 (deposition held admissible pursuant to *Lloyd* test); *Temple v. Raymark Inds. Inc.*, (Del. Super. Ct. 1988), 551 A. 2d 67 (deposition held admissible pursuant to *Lloyd* test.).

The Sixth Circuit cases, both asbestos cases, centered on the admission of prior deposition testimony of Dr. Kenneth Smith, as an expert witness, from an unrelated proceeding. Dr. Smith was the former medical director for Johns-Manville. He had testified in an earlier case regarding corporations' knowledge as to the hazards of asbestos. Smith had died before either of the *Clay* or *Dykes* cases had been filed.

The trial court in *Clay* refused to admit Dr. Smith's former testimony of privity grounds. The Sixth Circuit reversed. The Sixth Circuit applied *Lloyd* to the facts of the case and held that the defendants in the former case had a similar motive to the defendants in the *Clay* case. *Clay* at 1295. The Sixth Circuit came essentially to the same conclusion in the *Dykes* case under an analogous fact pattern. *Dykes*, 801 F.2d at 817.

The District Court for the Southern District of Ohio in *Burke v. Johns-Manville*, addressed this same issue. See *Burke v. Johns-Manville*, 1983 U.S. Dist Lexis 12033. The court adopted the predecessor in interest test developed in *Lloyd* and stated that:

the appropriate test for determining whether a party against whom prior testimony is being offered is a successor in interest is whether that party shares a sufficient community of interest with a party to the prior action. To determine whether there is a sufficient community of interest, the Court must be presented with enough facts to permit it to determine whether the party to the earlier litigation has an opportunity and similar motive to that of the party against whom the testimony is now being offered to develop the prior testimony by direct, cross, or redirect examination. *Id.*, at 9-10.

Further, the few courts in Ohio who have examined this issue have followed the interpretation of "opportunity and similar motive" as described in *Lloyd*. *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).

Defendant-Appellant Heinz attempts to counteract the vast majority of case law with the opinion from the *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985) is misplaced. While it is true that *Murphy* was a third case (second in order) in the trilogy of *Clay*, *Murphy*, and *Dykes* originating from the Sixth Circuit, the reason for it having been decided differently has absolutely no bearing on the current case. All three cases dealt with the former testimony of Dr. Kenneth Smith. Under the holding in *Lloyd*, the testimony was allowed to be used against these other defendants in both *Clay* and *Dykes*.

While the testimony was not allowed to be used in *Murphy*, it had more to do with the unique positioning of the parties, than it had to do with the test created in *Lloyd*. The defendant against whom the Plaintiff wished to use Dr. Smith's former testimony in *Murphy* was Owens-Illinois. *Id.* at 343-344. However, unlike the defendants found in the other cases, Owens-Illinois ceased to manufacture or sell asbestos-containing products *prior* to Dr. Smith joining Johns-Manville. *Id.* The defendants who took Dr. Smith's earlier deposition focused on what Dr. Smith knew from the time he started working at Johns-Manville in 1958, and not on the years prior to his joining the company. *Id.* Because of this, the defendants who took Dr. Smith's earlier deposition had a dissimilar motive than the attorneys for Owens-Illinois would have had in taking Dr. Smith's deposition. *Id.*

That is obviously not the case here. The focus for the majority of the defendants in Mr. Burkhart's case was on his exposure to asbestos-containing products during the time he worked at Heinz. The other defendants in this case, whose products were present at the Heinz's facility while Mr. Burkhart worked there, would have a similar motivation as that of Heinz in taking Mr. Burkhart's testimony. Mr. Burkhart's exposure to asbestos at Heinz could also mean exposure to one of their products. No exposure at Heinz would mean no exposure to their product.

However, once exposure at Heinz was established, it became a case of defendants trying to redirect that exposure to other defendants' products, or limiting potential liability. However, nothing could undo the fact that the exposure at Heinz had occurred.

In this case, the Sixth District, after examining the evidence, found that the twenty-five plus represented defendants in the *Donald Burkhart v. A.W. Chesterton, et al*, Cuyahoga County litigation have such a "community of interest" with Defendant-Appellant Heinz. As previously stated, the prior litigation was a product liability suit concerning asbestos containing products and Donald Burkhart's exposure, or lack thereof, to such products while employed by Heinz. Donald Burkhart gave a video deposition on December 14, 2006. (*Exhibit "12" to Plaintiff's Response to Heinz's Motion for Summary Judgment*) This was *after* he had already given discovery depositions on October 6, 2006, December 14, 2006 and November 21, 2006 under cross examination by the defendants in the case. (*see attachments to Exhibit "15" to Plaintiff's Response to Heinz's Motion for Summary Judgment*) These depositions were attended by twenty-five defense attorneys representing various defendants, who were manufacturers, supplies, distributors and/or installers of asbestos and/or asbestos-containing products. *Id.* Donald Burkhart was deposed, under lengthy cross-examination, for a total of approximately 8 hours regarding his employment history, his exposure to asbestos-containing products during his employment, and the particular types or forms of asbestos and/or asbestos-containing products he was exposed to during his employment. *Id.*

The defendants in the products liability case had, and took, an extensive opportunity to cross-examine Mr. Burkhart under the same or a similar motive as Heinz in this case. Similar to Heinz, the products liability defendants were defending against claims asserted by Mr. Burkhart for injuries he sustained due to his exposure to asbestos and/or asbestos-containing products at

his workplace(s). Fundamentally, the only topics Heinz could possibly cross-examine Decedent, if he were still alive, would be: (1) if he was employed by Heinz, where he worked and what his job duties were; (2) if he was exposed to asbestos while employed at Heinz; (3) where he was exposed to asbestos; and (4) how he knew that he was exposed to asbestos. Mr. Burkhart was cross-examined by the products liability defendants on all of these topics, as well as many others, to the point of exhaustion. Thus, Heinz's interest was adequately represented by the products liability defendants, who had an opportunity, similar motive, and the same community of interest as Heinz to cross-examine Mr. Burkhart about the same topics. As such, the products liability defendants are predecessors in interest to Heinz, satisfying the elements of 804(B)(1).

Heinz's argues in its brief that none of the other defendants at the deposition had a similar motive to develop Mr. Burkhart's testimony in the same manner that Heinz would have. To demonstrate this supposed fact, Heinz quotes to testimony from the deposition, which Heinz claims that, in hindsight, it would have asked differently, or would have asked additional questions had it been present at the deposition. Yet, like before the Industrial Commission, Heinz only provides very selective pieces of transcript testimony.

As an example, Heinz provides this Honorable Court, in its Brief, with the following quotations from the December 14, 2006 video deposition of Donald Burkhart. Plaintiff-Appellee then provides what should have been the full quote provided to this Honorable Court². Heinz's quote:

² Heinz also provides a quote which is supposed to be located on pg. 91-92 of the transcript, but Plaintiff-Appellee is unable to find any such a quote in any of the pages (including 91-92) affixed to the appendix of Defendant-Appellant's Brief.

Q. All right. 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 anyplace 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.

December 14, 2006 video deposition of Donald Burkhart, page 50.

However, the actual quote is quite different and greatly enhances the actual level of exposure to asbestos and Mr. Burkhart's confidence that it was asbestos:

Q. All right. 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. Well, like I said, Heinz never threwed nothing away, and this asbestos stuff was knocked off the pipes, had to put it in the 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 pipes in the boiler room?

A. Yes, or anyplace 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.

December 14, 2006 video deposition of Donald Burkhart, page 50, differences highlighted.

Another one of Heinz's quote from their Brief states:

Q. When you would pick up this asbestos in the bucket 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. Okay. And why do you say that?

A. Well, because I got this disease.

December 14, 2006 video deposition of Donald Burkhart, page 53.

Yet, a full quote of the testimony demonstrates that the questioning being done was exactly like the questioning one would have expected from Heinz's own attorneys.

Q. When you would pick up this asbestos in the bucket 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. Okay. And why do you say that?

A. Well, because I got this disease.

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

A. Never, no instructions.

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

A. Not in Bowling Green.

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

A. (Witness nodding.)

Q. Correct?

A. Right.

December 14, 2006 video deposition of Donald Burkhart, page 53-54, differences highlighted.

Another quote from Heinz's Brief:

Q. Okay. 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 bricklayers.

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

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

December 14, 2006 video deposition of Donald Burkhart, page 56.

Yet, a full quote again demonstrates how dusty the process of working in a boiler was, and also demonstrates that the questions being asked were once again exactly what one would expect Heinz's attorneys to ask.

Q. Okay. 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 bricklayers.

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

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

Q. **Was that a dusty process, the placing of the bricks?**

A. That was dusty no matter where.

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

A. Inside of a boiler, you hit something and dirt flies.

Q. Okay. So no matter where you were in the boiler, it was dusty?

A. On top of the tubes, there is a layer of dirt, that if you hit one, it will shake it off.

December 14, 2006 video deposition of Donald Burkhart, page 56, differences highlighted.

A further quote from Heinz's Brief:

Q. Okay. Do you have a belief as to whether those Garlock gaskets contained any asbestos?

Ms. 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.

December 14, 2006 video deposition of Donald Burkhart. page 67-68.

Again, the reality of the full quote is much different than what has been provided to this Honorable Court.

Q. Okay. Do you have a belief as to whether those Garlock gaskets contained any asbestos?

Ms. Hurley: Objection

A. I have no idea.

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

A. Well you went to the stockroom and told them that you wanted this and they would pull that sheet out and they would cut a chunk of it

out and then you would put your cutter in there and cut circles and things, and then take the gasket and lay it on the flange and cut the holes, take a ballpeen hammer about the same size as that and then take another hammer and hit it, and that would make a hole in there.

Q. Okay.

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.

December 14, 2006 video deposition of Donald Burkhart. page 67-68, differences highlighted.

What the full quotations from December 14, 2006 video deposition of Donald Burkhart clearly demonstrate is that not only did the other parties involved in the deposition have the opportunity to ask questions, but that the testimony developed in the deposition was similar to the kind of testimony that counsel for Defendant-Appellant Heinz would have developed had they been present at the deposition. Here, the defendants in the civil litigation, many of who represented the asbestos-containing products located at the Bowling Green and Fremont Heinz facilities, had the opportunity and similar motive in developing Mr. Burkhart's testimony. As stated by the court in *Whitaker*, "[a]lthough the motive behind this cross-examination may not have been identical to that in a will contest action, we nevertheless find the testimony admissible. Evid. R. 804(B)(1) merely requires a *similar* motive, not an *identical* motive, to develop the testimony." *Whitaker*, 12th Dist. No. CA86-12-179, 1987 WL 28437. Therefore, the testimony can be considered both relevant and reliable and the Court of Appeals holding should be sustained.

2. Defendant-Appellant Heinz Should Be Estopped From Attempting To Strike Donald Burkhart's Former Testimony.

Donald Burkhart's former testimony is needed to rebut Defendant Heinz's use of his former testimony on its own behalf. Heinz first used Mr. Burkhart's former testimony on its own behalf at

the hearing before the Industrial Commission in an attempt to get his claim denied. Heinz then used the Staff Hearing Officer's Order from the Industrial Commission as evidence in its motion for summary judgment before the trial court, by quoting the Order in its motion and highlighting the deposition aspects of the Order as evidence that Mr. Burkhart was not exposed to asbestos while employed at Heinz, and by attaching the Order as an exhibit to the Affidavit of Heinz's corporate representative (*Exhibit A to the Affidavit of Cathy Shell, attached to Defendant H.J. Heinz Co.'s Motion For Summary Judgment*). Heinz continues this trend before this Honorable Court by quoting the Staff Hearing Officer's Order in its brief for the proposition that whatever testimony Mr. Burkhart did give during his deposition was highly destructive to his claim.

The following quote can be found in both Heinz's motion for summary judgment at the Trial Court and in its brief before this Honorable Court:

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 03118/2009, 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.)

Throughout these proceedings, Heinz has used Mr. Burkhart's former testimony, either directly (as at the Industrial Commission hearings), or indirectly through use of the staff hearing officer's order and its references to Mr. Burkhart's former testimony (as at the trial court and now before this Honorable Court), as evidence that Mr. Burkhart was not exposed to asbestos while employed at Heinz. It is only when Plaintiff-Appellee attempts to use Mr. Burkhart's former testimony to rebut Heinz's claims that Defendant-Appellant complains about its use.

Justice requires that Plaintiff be given an opportunity to rebut this evidence through the introduction of Mr. Burkhart's testimony so a complete record exists before the court. To allow Defendant-Appellant Heinz to use the testimony selectively for its benefit, but at the same time deny Plaintiff-Appellee the opportunity to use other aspects of Mr. Burkhart's testimony to rebut the

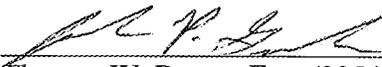
claims being made by Heinz, would create a perverse and unfair characterization of what Mr. Burkhart actually testified to. To leave the testimonial evidence from Mr. Burkhart to the selected quotations and references introduced by Defendant-Appellant Heinz would be patently unfair and a miscarriage of justice.

Therefore, the Court of Appeals holding should be sustained.

III. CONCLUSION

Therefore, for all the foregoing reasons, the trial court committed reversible error, and the holding of the Court of Appeals must be sustained.

Respectfully submitted,



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CERTIFICATE OF SERVICE

9th A true and correct copy of Plaintiff-Appellee Mary Lou Burkhart's Merit Brief was sent this day of September, 2013, via regular US Mail upon the following:

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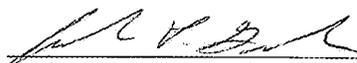
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