

ORIGINAL

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

REPLY BRIEF OF DEFENDANT-APPELLANT H.J. HEINZ CO.

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## REPLY BRIEF

### I. SUMMARY OF REPLY BRIEF

Plaintiff-Appellee Burkhart's Response to Heinz's Merit Brief fails to address the major weaknesses in the Sixth District Court of Appeals Opinion on this matter. The Response minimizes the errors of the Appellate Opinion in its marginal analysis of the application of Evidence Rule 804(B)(1) regarding the admissibility of former testimony under this hearsay exception. In the review of the "predecessor-in-interest and similar motive" test, the defects in Appellee's argument are as follows:

- The 2006 asbestos tort claim<sup>1</sup> lacked the necessary identity of facts and issues in comparison to the case at hand;
- Because the 2006 litigation did not involve an identity of facts and issues, there was no singular purpose or opportunity to develop testimony which would defend Heinz's interests;
- A review of the direct and cross-examination of Burkhart's 2006 video deposition demonstrates no community of interest in the development of the facts and issues; and
- There is a clear failure to recognize the substantial prejudice to Heinz in admitting this testimony outweighs its probative value in accordance with Evidence Rule 403(A).

Additionally, Appellee fails to identify the proper standard of review for this High Court in this matter. The abuse of discretion standard is appropriate only for the initial appellate review of a trial court's determination regarding the admissibility of evidence.

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<sup>1</sup> *Burkhart v. AW Chesterton, Inc., et al*, Cuyahoga County Case No. CV-06-599652.

*Rigby v. Lake County*, 58 Ohio St.3d 269, 569 N.E.2d 1056 (1991). The standard to be applied by the Supreme Court in reviewing a lower appellate court findings on the admissibility of evidence is whether that appellate court erred in determining whether the trial court reasonably exercised its discretion in admitting evidence. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993). As the trial court is in the best position to make evidentiary rulings, the Supreme Court will review whether the appellate court substituted its judgment for that of the trial judge rather than identifying whether an abuse of discretion occurred. *Vogel v. Wells*, 57 Ohio St.3d 91, 566 N.E.2d 154 (1991).

Finally, Appellee attempts to obviate the focus on the erroneous evidentiary ruling of the Appellate Court and instead, presents immaterial matters, such as the Trial Court's evidentiary consideration given to the deposition of Heinz Manager Cathy Shell, and the deposition of former worker Leland Bandeen, as well as Heinz review of the administrative history of this case. These matters are not on review before this Court, and have no relevance to the issues contained in the review of the Appellate Court's application of Rule 804(B)(1) and 403(A). And contrary to Appellee's assertion, in the last sentence of Heinz's Merit Brief, it is therefore "respectfully submitted that the decision of Sixth District Court of Appeals must be reversed, so that the *A.W. Chesterson* deposition of Donald Burkhart is stricken from any evidentiary consideration in this matter." (Merit Brief pg. 23)

**II. THE LOWER COURT ERRED IN ITS APPLICATION OF THE “PREDECESSOR-IN-INTEREST AND SIMILAR MOTIVE” STANDARD, AS IT FAILED TO ADDRESS THE LACK OF IDENTITY OF ISSUES IN THE 2006 LITIGATION; THE LACK OF INTEREST, OPPORTUNITY AND CROSS-EXAMINATION BY COUNSEL; AND THE PREJUDICIAL EFFECT WHICH OUTWEIGHED ANY PROBATIVE VALUE OF THE VIDEO DEPOSITION TESTIMONY.**

**A. Summary Review of Case Law Addressing 804(B)(1) Admissibility Standard.**

Both Appellee and the Lower Appellate Court ignored the salient holding in the seminal case of *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3<sup>rd</sup> Cir. 1978) in the application of term “predecessor in interest”. A portion of the citation to *Lloyd* in Heinz Merit Brief is restated as follows:

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. (emphasis added). 580 F2d at 1187.

The Sixth Circuit Federal Bench expanded this *Lloyd* holding in *Paducah Towing Co., Inc. v. Exxon Corp.*, 692 F.2d 412 (6<sup>th</sup> Cir. 1982), in recognizing that there must have existed a “meaningful opportunity” to fully examine prior and now unavailable witness whose testimony is being introduced into evidence.

The testimony of Dr. Kenneth Smith, the former medical director of Johns-Manville, who had died and was therefore no longer available to testify in asbestos related tort litigation concerning the manufacturing of asbestos-containing products, was the subject of the trilogy cases of *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6<sup>th</sup> Cir. 1983); *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6<sup>th</sup> Cir. 1985); and *Dykes v. Raymark Industries, Inc.*, 801 F.2d 810 (6<sup>th</sup> Cir. 1986). A thorough review of these cases reveal that Dr. Smith’s testimony was not simply admitted without scrutiny, but that

portions of his testimony were admitted as probative and not prejudicial in limited circumstances. For example, in *Clay*, the court recognized that there were appropriate objections and incisive cross-examination of the deposition of Dr. Smith in the case of *DeRocco v. 40-8 Insulation, Inc.*, Case No. 2880, (PA. Ct. Com. Pleas 1974), regarding the manufacturer's knowledge of the hazards of asbestos-containing products during the years when Clay worked at and was exposed to asbestos at the defendant business. The *Clay* Court specifically found that the defendants in their particular matter had the similar motive in confronting Dr. Smith's testimony as the party defendants in the *DeRocco* case "in terms of appropriate objections and searching cross-examination." 722 F.2d at 1295.

However, in *Murphy*, the Sixth Circuit determined that the trial court did not abuse its discretion in ruling that the deposition of Dr. Smith was more prejudicial than probative under Fed. R. 403. The *Murphy* court determined that Dr. Smith's testimony about industry knowledge after 1958, and his opinion as to how the defendant manufacturer of asbestos should respond to asbestos hazards, had no probative value concerning the knowledge in the industry prior to 1958. This point of distinction was based on the factual basis for Dr. Smith's conclusions, and while portions of his deposition were probative as to the "state of art" during his tenure, the facts within his knowledge were highly prejudicial to the defendant manufacturer's position concerning industry standards before his tenure.

In *Dykes*, the court determined that Dr. Smith's testimony was admissible for the limited purpose of identifying historical facts that were relevant in both the *Dykes* and prior litigation. However, the *Dykes* Court recognized the issue of potential prejudice was a significant factor to be weighed in any deliberation:

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**. Under said circumstances, we think it is incumbent upon counsel for the defendant when objecting to the admissibility of such proof to explain and clearly as possible to the judge precisely why **the motive and opportunity** of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness. (emphasis added). 801 F.2d at 8117.

The very essence of Heinz's argument to this High Court is an explanation that the lack of identity of facts and issues in the 2006 case, and the lack of interest, opportunity and cross-examination of counsel, and that the prejudicial effect of the video deposition outweighed its probative value, rendering the deposition inadmissible under Evidence Rule 804(B)(1).

**B. The Lower Court Failed to Review The Leading Questions, Lack of Cross-Examination and Lack of Objections to the 2006 Video Deposition Which Would Have Disclosed That No Community of Interest Existed Between The Former and Current Parties, Nor Was There a Common Motive to Develop Similar Facts and Issues.**

Appellee weakly argues that "Mr. Burkhart's exposure to asbestos at Heinz could also mean exposure to one of their products" in attempting to support his claim that similar motivation existed in the 2006 litigation compared with the current matter. (Appellee Brief pg. 8). Even more noteworthy is the unsupported contention that "nothing could undo the fact that the exposure at Heinz had occurred." (Response Brief pg. 9) Obviously, Appellee's presumption is false. This empty contention strikes at the very foundational issue of this case - - Plaintiff's obligation to prove that Donald Burkhart was exposed to asbestos containing materials at Heinz, and that such exposure was the proximate causation for Burkhart's contracting this disease. The focus of the defendants in the 2006 litigation was not on Burkhart's exposure to asbestos containing

materials during the time he worked at Heinz; the focus of those particular defendants, who are all manufacturers of asbestos-containing materials, was to defend each and every defendant by demonstrating that Burkhart had no knowledge that he was ever exposed to such materials **manufactured by their particular defendant!**

A review of the 2006 Burkhart video deposition, (parts of which are attached as Appendix D to Heinz's Merit Brief), demonstrates that there was no "community of interest" with the other party defendants in the 2006 case. Those transcript portions were not presented as verbatim transcripts in Heinz's Merit Brief, but to demonstrate the lack of common interest or similar motive of those defendants to provide a thorough cross-examination, as well as to properly object to any questions or answers that lacked knowledge, foundation, or other probative value, regarding the seminal issue of any exposure by Burkhart to asbestos-containing materials during his course of employment at Heinz. Again, Appellee minimizes the purpose of proper examination of Burkhart would not simply be to determine "if he was exposed to asbestos while employed at Heinz" (Response Brief pg. 10).

Cross-examination by parties with a similar motive and common interest would have inquired of Burkhart in the same type of examination done by Attorney Michalek on behalf of Gould Pump in the 2006 litigation (Burkhart Tr. pg. 126). The transcript reveals that Michalek questioned Burkhart on the issue of his "personal knowledge". (Merit Brief pgs. 17-189). It bears repeating that in that 2006 video deposition, 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 to any of the leading questions by Attorney Blevins to her client regarding Burkhart's inadmissible

responses to those leading questions, which were consumed with his “beliefs”. (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 boiler room pipes. (Burkhart Tr. pg. 50). There is no follow-up inquiry as to who in the position of authority and knowledge at Heinz was identified as “management”; what the circumstances were of such a statement; why it would have been said, where it was said, and when it was said. Such foundational information would have been significant in determining the trustworthiness and probative value of the statement’s admissibility under one of the hearsay exceptions.

Furthermore, there was no testimony whatsoever to support the probative value of Burkhart’s video deposition regarding his training, background or other education in working with or recognizing asbestos materials. Was he provided any training or education during his time in the Marines, where it was common knowledge that military personnel were highly exposed to asbestos-containing materials during naval transport? No attorney during the 2006 deposition even bothered to ask Burkhart whether he had encountered asbestos materials during his work with drywall or home remodeling through his life, or while working in his father’s repair shop. (Burkhart Tr. pgs. 27-44). Moreover, the fundamental issue is not whether there was dust in Heinz boiler room; the issue is whether the asbestos-containing materials were “friable”, in that the asbestos was no longer contained, but exposed to the atmosphere; and the atmosphere at Heinz was the proximate cause of the asbestos-related disease.

Indeed, the lower Appellate Court failed to recognize that Burkhart’s lack of personal knowledge, training, education, or background in recognizing and understanding

the nature of asbestos-making materials renders his deposition testimony from 2006 to be highly untrustworthy, objectionable, lacking in probative value, and obviously prejudicial. The Sixth District Court determined that “all would benefit if it were disproven that Donald Burkhart had been exposed to asbestos” (Appellate Opinion pg. 17, ¶41). While accurate in a very limited sense, the Court’s finding fails to recognize that the motives and interest of the parties in the prior proceeding were only directed to self-interest, not to preserving the interest of Heinz. Those defendants had no “community of interest” to Heinz. None of the attorneys developed any cross-examination, or even objected, from Heinz’s point of view to the obvious prejudicial questions, to Burkhart during that deposition. Those defendants were only concerned with whether Burkhart could identify a manufacturing brand of the defendants on any particular materials at Heinz. The only motive of those defendants was to establish that even assuming asbestos existed, that asbestos-containing materials were not manufactured by their client. There was no effect or attempt to refute the unsubstantiated presumption that asbestos existed at Heinz. None of those attorneys examined Burkhart with the attempt to refute the presence of asbestos material at Heinz. No party objected, and certainly did not protect Heinz’s interest, to the suggestion that Heinz was culpable in allowing hazardous materials to exist at its workplace.

In its Amicus brief, the Ohio Manufacturer’s Association presented an additional aspect of the Lower Court’s failure to properly analyze the motives of the 2006 litigants, in its review of the proportionate sharing of damages under ORC §2307.22. The law of torts in Ohio as pointed out by the Amicus party, promotes the motive for every defendant to allow or develop testimony to broaden the scope of potentially liable parties;

if two or more defendants are found to be less than 50% responsible, then each defendant is liable for only their proportionate share of the damages. However, if one defendant is found to be more than 50% responsible for plaintiff's injuries, that party is jointly and severally allowed for all of the damages under Ohio Statutory Law. Indeed, the 2006 litigants clearly saw Heinz as the scapegoat, and without being a party to those proceedings, Heinz was easily pointed to as the primary, if not sole responsible party, for Burkhart's health problems.

This obvious motivation of the defendants in the 2006 case was not considered by the Lower Court in its deliberation. It cannot be denied that a determination of a "predecessor-in-interest with similar motive" under Evidence Rule 804(A) requires more than simply determining whether there is a singular or global issue that is common to the parties in both the former and current litigation. The case law established by the Sixth Circuit in the *Clay-Murphy-Dykes* trilogy demands application by Ohio state courts. The Appellate bench clearly did not review the true motives and interests of the 2006 defendants; the Court did not inquire whether those defendants had either the interest or opportunity to develop testimony through cross-examination, as well as through their objections, which advanced any interest of Heinz. Even a cursory review of the video deposition demonstrates that there was no true cross-examination or objections whatsoever to leading questions and speculative answers which lacked foundation and were obviously inadmissible. The most critical failure of the Lower Court was its failure to balance the probative value of the video deposition with the obvious prejudicial affect according to Evidence Rule 403(A).

The overriding aspect of the application of the admissibility of former testimony under Evidence Rule 804(A) is the policy of fundamental fairness and due process. The commentators that have addressed this concern during the evolutionary process of the “predecessor-in-interest and similar motive” standard had been identified in both the Heinz Merit Brief (pg. 20) and in the Amicus Brief (pgs. 5-8). The concepts of fundamental fairness and due process require that the right to full and complete cross-examination be acknowledged and adhered to; that hearsay evidence is in and of itself inadmissible, and exceptions to that inadmissibility must be advanced by its proponent; and that the judiciary must utilize a balancing test to determine whether the probative value of the evidence is outweighed by its prejudicial effect.

The Lower Appellate Court failed to apply these fundamental fairness factors in its determination to overturn the Trial Court and admit the 2006 video deposition. The Court merely made a cursory review in a broad stroke to determining that both the prior and current litigation involved asbestos-containing materials. A proper review by the Court, as required under 804(A)(1) would have been to note: that there was no cross-examination of Burkhart in 2006; that there were no objections to the leading questions and his speculative responses; that the prior defendants had no value in defending the issue of whether asbestos materials existed at Heinz; that those defendants only concern were that Burkhart could not identify their manufacturing brand anywhere at Heinz; and that there was no appropriate balance of probative value versus prejudice in its deliberations. Had the Appellate Bench followed such a review, it would have recognized the Trial Court’s ruling of inadmissibility was correct and could not in any sense be construed as an abuse of discretion. The Lower Court clearly erred by

substituting its judgment from that of the Trial Court in reversing the order of summary judgment and admitting the 2006 video deposition.

**C. The Trial Court Properly Weighed the Deposition Testimony of Cathy Shell and Leland Bandeen in Granting Summary Judgment to Heinz.**

Appellee has attempted to obfuscate the primary issue of analyzing the Lower Court's application of Evidence Rule 804(B)(1) and 403(A) by presenting the other evidentiary matters, such as through the depositions of Heinz Manager Cathy Shell, and of Donald Bandeen, a former co-worker of Donald Burkhardt (Response Pgs. 2-3) Appellee also attempts to augment its statement of facts with Burkhardt's video deposition testimony, whose admissibility is the essential purpose of this Supreme Court review. (Response pg. 1) The Trial Court reviewed the concept of "injurious exposure", in recognizing that proximate causation required "constant exposure to free [asbestos] during many years in prior places of employment." citing *State ex rel. China Hall Co. v. Indus. Comm. of Ohio*, 120 Ohio App. 374, 202 N.E.2d 628 (10<sup>th</sup> Dist. 1962) syllabus ¶1 (App. C, pg. 30, Trial Court Opinion Granting Summary Judgment). Further, the Trial Court did consider and determined that the deposition of Leland Bandeen as well that of Cathy Shell. It found that even if it was "possible" that someone working in the boiler house at the Heinz Bowling Green Plant could have been exposed to asbestos, and that asbestos existed in the Freemont Plant at least until 1987, this barely "creates an issue of fact regarding exposure much less injurious exposure required to support a workers' compensation death claim". (App. C, pg. 31) As neither of these issues were presented as assignments of error, they are outside the scope of the Supreme Court review. The evidentiary consideration of the Burkhardt 2006 video deposition is of weighted importance in determining whether the summary judgment order to Heinz is proper. The

other noted depositions were given their due weight by the Trial Court, and were ruled insufficient to thwart summary judgment.

**D. Defendant Appellant Was Not Estopped From Moving To Strike Donald Burkhart's Former Testimony.**

At the conclusion of its Response Brief (pg. 15) Appellee argues for the first time in this appeal that Heinz is now somehow estopped from seeking to strike Donald Burkhart's former testimony. This argument was never made before either the trial or appellate courts. Heinz moved to strike Donald Burkhart's testimony when it received Appellee's summary judgment motion opposition which contained Mr. Burkhart's deposition testimony. (Record No. 27, Defendant H.J. Heinz Company's "Motion to Strike Plaintiff's Evidentiary Material Incorporated Into Plaintiff's Opposition Motion to Defendant's Motion for Summary Judgment" at pgs. 3 and 7, R 27). Appellee never made an estoppel argument in opposition to the Motion to Strike. (Record No. 31, "Plaintiff's Response to Defendant H.J. Heinz Company's Motion to Strike Evidentiary Material Incorporated Into Plaintiff's Opposition to Defendant's Motion for Summary Judgment" at pgs. 8 and 9, are 31). Nor did she make an estoppel argument on appeal to the Sixth Appellate District (Appellate Record No. 16, "Brief of Appellant").

Heinz's reference to the Industrial Commission Orders in its prior pleadings was merely a recitation of the procedural history. Mrs. Burkhart filed the depositions of her late husband in the Industrial Commission proceedings. The rules of evidence do not apply to Industrial Commission hearings. ORC §4123.10. *State ex rel. Roberts v. Industrial Commission of Ohio*, 10 Ohio St.3d 1, 460 N.E.2d 251 (1984). Consequently, Heinz was forced to make the best arguments it could regarding this deposition testimony when confronted by it in the Industrial Commission hearings. However, the rules of

evidence do apply in workers' compensation appeals pursuant to ORC §4123.512. Such appeals are de novo. *State, ex rel. Federated Dept. Stores v. Brown*, 165 Ohio St. 521 , 138 N.E.2d 248 (1956); *Crabtree v. Young*, 1 Ohio St.2d 93, 204 N.E.2d 685 (1965). On appeal to the court of common pleas, the claimant has the burden of proof as well as the burden of going forward with the evidence. *Youghioghney & Ohio Coal Co. v. Mayfield*, 11 Ohio St.3d 70, 464 N.E.2d 133(1984). The principles are long established that the Claimant bears the burden of proving his or her right to participate in the Workers' Compensation Fund regardless of the Industrial Commission decision. *Bennett v. Administration, Ohio Bureau of Workers' Compensation*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666 (2012). R.C. 412.512 involves a *de novo* review in which the claimant has the burden of proof. *Benton vs. Hamilton County Educational Service Center*, 123 Ohio St.3d 347, 2009-Ohio-4969, 916 N.E.2d 778 (2009).

Accordingly, while Heinz had no mechanism to object or strike the deposition submitted to the Industrial Commission it had that opportunity in Plaintiff's court appeal. Accordingly, Heinz was not estopped from moving to strike the video taped deposition of Burkhart which was attached to Plaintiff's summary judgment opposition, as such evidence was not compliant with Ohio Civil Rule 56 (C).

### **III. CONCLUSION**

Appellee's Response Brief does nothing to refute every indicator that the Appellate Court erred in determining that the 2006 video deposition of Donald Burkhart met the standards required of admissibility under Evidence Rule 804(B)(1) and 403(A). Scrutiny of the record containing the video deposition reveals that none of the asbestos manufacturers who were a party in that 2006 case had a similar motive to that of Hein; in

that none of these defendants were concerned whether asbestos containing materials existed at Heinz. The only interest of those parties was to assure that Burkhart could not identify their manufacturing brand on any of those products.

The fundamental question of the existence of friable asbestos at Heinz was never explored or pursued by those 2006 litigants. The 2006 video deposition discloses that there was no cross-examination whatsoever concerning Heinz which would assist or promote any interest of Heinz in that litigation; there were no objections to any of the leading questions, and furthermore Burkhart's answers which were replete with mere speculation and belief. None of the counsel for those litigants pursued any background, training or education of Burkhart concerning the nature of asbestos containing materials. Most critically, there was no inquiry of Burkhart concerning the basis of his personal knowledge, if any, concerning the existence of such materials at the Heinz workplace. Not only did the Appellate Court fail to scrutinize the deposition testimony in that regard; it also failed to provide any consideration to whether the prejudicial effect of such evidence outweighed the probative value.

As the overriding nature of jurisprudence requires fundamental fairness in the pursuit of the truth, the evidentiary rules which dictate the admissibility of hearsay evidence were not adhered to by the Sixth District bench. The only conclusion to be reached is that the errors of the Lower Appellate Court demand that the Appellate decision be reversed, and the decision of the Trial Court be reinstated on all matters pertinent to this review.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A true and exact copy of the foregoing Reply Brief of Defendant-Appellant H.J. Heinz Co. has been sent via regular US Mail to David S. Bates, Esq., Attorney for Plaintiff-Appellant, Bevan & Associates, LPA, Inc., 6555 Dean Memorial Parkway, Boston Hts., Ohio 44236; 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, and Richard D. Schuster, Attorney for Amicus Curiae The Ohio Manufacturers Association, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216 on this 26<sup>th</sup> day of September, 2013.



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