ORIGINAL

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| SONJA GRAHAM,<br><br>Appellant-Plaintiff,<br><br>v.<br><br>GENE SZUCH, individually and as Administrator of the Estate of Sandra L. Szuch.<br><br>Appellee-Defendant. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | CASE NO. CA-2014-0962<br><br><br>*Appeal from the Eighth Appellate District*<br>*Case No. CA-13-100228* |

**MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEE GENE SZUCH**


Eric J. Weiss (0073066) (Counsel of Record)
CAVITCH, FAMILO & DURKIN, CO., LPA
1300 East Ninth St. – 20th Floor
Cleveland, Ohio 44114
Telephone: (216) 621-7860
Facsimile: (216) 621-3415
Email: eweiss@cavitch.com
*Attorney for Appellee Gene Szuch*

John Malone (0023580) (Counsel of Record)
Andrew Malone (0079465)
614 W. Superior Ave. #1150
Cleveland, Ohio 44113
Telephone: (216) 861-5511
Facsimile: (216) 861-0211
Email: jmaloneattorney@gmail.com
*Attorneys for Appellant Sonja Graham*

Melissa Zujkowski (0078227) (Counsel of Record)
Ulmer Berne, LLP
1660 West 2nd St., Suite 1100
Cleveland, OH 44113
Telephone: (216) 583-7364
Facsimile: (216) 583-7365
Email: mzujkowski@ulmer.com
*Attorneys for Appellee Key Bank*



RECEIVED
JUL 01 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUL 01 2014
CLERK OF COURT
SUPREME COURT OF OHIO

## MEMORANDUM IN RESPONSE

## I. STATEMENT OF POSITION OF APPELLEE GENE SZUCH AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED OR THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.

Despite Appellant Sonja Graham's argument to the contrary, Appellant has not identified any issues of public or great general interest. Although undoubtedly important to the parties involved, this appeal is restricted to resolving this case only. This Court's review of the issues raised by Appellant will not: 1) impact parties other than these litigants, 2) have widespread effect on the public; 3) address any issues of first impression; or 4) resolve a conflict between or among any of the appellate district courts. Thus, the issues raised by Appellant do not embody the concept of "public or great general interest."

Similarly, no substantial constitutional question or constitutional issues are involved. There exists no debatable constitutional question to be resolved. No statute or ordinance has been struck down as unconstitutional. The issues presented are not novel, nor do they involve an unsettled area of law.

Recognizing these deficiencies, Appellant seeks to manufacture an appealable issue where none exists by contending that the Eighth Appellate District utilized an improper heightened standard requiring "unequivocal proof" of renunciation, which in turn purportedly led to an incorrect interpretation of R.C. 5815.36(N)(1). A review of the Eighth Appellate District's April 24, 2014 opinion ("Opinion"), however, reveals that no basis exists to support Appellant's arguments.

To the contrary, the real crux of Appellant's argument is that she simply disagrees with the decision reached by the trial court and the Eighth Appellate District. Simply put: Appellant seeks to invoke this Honorable Court's jurisdiction for the sole purpose of *error correction* that is aimed

solely at benefitting Appellant. In words of Justice O'Donnell, however, this is not sufficient grounds for review:

> We are not an error-correcting court; rather, our role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest.

*State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63 (O'Donnell, J., dissenting).

For these reasons, this Honorable Court should decline jurisdiction in this case, and instead let the Eighth Appellate District's decision stand.

## II. APPELLEE GENE SZUCH'S ARGUMENT REGARDING EACH PROPOSITION OF LAW RAISED IN APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION.

### A. Appellant's "Unequivocal Proof" Argument Is Not Supported by the Record And Is Misplaced.

Appellant contends in her first and second proposition of law that the Eighth Appellate District committed error when it ruled that an act of renunciation under R.C. 5815.36(N)(1) must be "unequivocal." Because Appellant's argument is supported by neither Ohio law nor the plain language of the Eighth Appellate District's Opinion, Appellant's first and second proposition of law are incorrect and do not warrant review by this Honorable Court.

A review of the Eighth Appellate District's Opinion reveals that the court not only considered and analyzed Appellant's argument concerning common law disclaimer pursuant to R.C. 5815.36(N)(1), but that the court's final conclusion was proper and correct under Ohio law. The Opinion properly cites the relevant subsections of R.C. 5815.36, discusses the interplay between subsections (B) and (N), and correctly determined that the record did not contain the requisite evidence to support common law disclaimer as argued by Appellant.

In coming to this conclusion, the Eighth Appellate District court relied on *Brown v. Routzhan*, 63 F.2d 914 (6th Cir.1933), for the proposition that "while the acceptance or

renunciation need not be in writing, an acceptance or renunciation still required a 'deliberate and unequivocal act indicating the intention.'" Opinion at ¶ 20. Following this directive, the Eighth Appellate District held:

> As previously explained, there is no evidence in the record that Sandra ever made a "deliberate and unequivocal act" manifesting an intent to renounce her shares. Her service to the Skrl Companies demonstrates an ongoing interest in them rather than renunciation. Therefore, there is no evidence in the record to support Sonja's claim that Sandra renounced her gift of shares under either statutory or common law.

*Id.* at ¶ 21. In an effort to convince this Honorable Court that this case is of public or great general interest, Appellant improperly and inaccurately characterizes the court's reliance on *Brown.*[1] Specifically, Appellant contends that the Eighth Appellate District imposed the improperly heightened burden of "unequivocal" proof, which amounted to "clear error" and "reversible error."

In making this argument, Appellant overlooks the critical difference between the nature/type of evidence required to be presented, and the standard by which that evidence must be proven as a matter of law. While interrelated, they are not one and the same.

In the present matter, the Eighth Appellate District properly determined that the nature/type of evidence required to be presented by Appellant was a "deliberate and unequivocal act" (in accordance with *Brown*) on the part of Sandra Szuch demonstrating an intent to disclaim or renounce her interest. The Eighth Appellate District did <u>not</u>, however, require that Appellant prove such facts by some heightened burden of proof as suggested by Appellant. Nothing in the Opinion suggests that the Eighth Appellate District held Appellant to a "heightened" burden of proof beyond that normally required in similar civil matters.

---

[1] Ironically, it was Appellant who first cited to and relied on the *Brown* decision in her appellate brief before the Eighth Appellate District.

More importantly, Appellant's claim did not fail before the Eighth Appellate District because she was unable to satisfy this purported heightened burden of proof as suggested by Appellant. To the contrary, Appellant's claim failed because there was "**no evidence** in the record to support Sonja's claim that Sandra renounced her gift of shares under either statutory or common law." (Emphasis added.) Opinion at ¶ 21. Consequently, any suggestion by Appellant that she would have prevailed before the Eighth Appellate District if some lesser burden of proof had been applied is patently false.

Because Appellant's first and second proposition of law are premised on the faulty conclusion that the Eighth Appellate District imposed an improperly heightened burden of proof, any argument that this case is of public or great general interest is incorrect and misplaced. For these reasons, this Honorable Court should decline jurisdiction in this case, and instead let the Eighth Appellate District's decision stand.

### B. Appellant's Proposition That an Improper Summary Judgment Standard was Applied Is Not Supported by the Record And Is Misplaced.

Appellant also contends in her second proposition of law that the Eighth Appellate District committed error when it failed to adhere to the proper summary judgment standard. Because Appellant's argument is supported by neither Ohio law nor the plain language of the Eighth Appellate District's Opinion, Appellant's second proposition of law is incorrect and does not warrant review by this Honorable Court.

In its Opinion, the Eighth Appellate District identified the standard of review that it applied in reaching its conclusion in the present matter:

> **Standard of Review**
>
> {¶ 10} Szuch's first four assignments of error assert that the trial court erred in granting summary judgment in favor of Szuch for various reasons. We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N .E.2d 241 (1996). The party moving for

> summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact as to the essential element of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E). Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club,* 82 Ohio St.3d 367, 369–370, 696 N.E.2d 201 (1998).

A review of the legal authority cited in the Opinion reveals that the Eighth Appellate District utilized the applicable *de novo* review, applied the appropriate burden shifting analysis required by Civ. R. 56, and properly construed the evidence when making its decision. Appellant overlooks this fact.

More importantly, while Appellant contends that "it is clear that the Appellate Court did not properly apply the appropriate standard in a light most favorable to Appellant," Appellant points to no specific language utilized by the court to support such conclusion. Likewise, Appellant cites no facts or examples in the Opinion in support of such statement. Stated more simply: Appellant offers nothing more than a self-serving blanket statement.

For these reasons, Appellant's second proposition of law does not warrant review by this Honorable Court, and this Court should decline jurisdiction in this case.

### C. Appellant's Third Proposition of Law Is Not Supported by Either Ohio Law or the Record And Thus Misplaced.

Appellant next contends in her third proposition of law that Sandra Szuch's failure to register the shares of company stock at issue amounted to a waiver and resulted in "defeasance" of her interest. Because Appellant's argument is supported by neither Ohio law nor the record, Appellant's third proposition of law likewise does not warrant review by this Honorable Court.

The foundation of Sonia's argument is Sandra's failure to register the 93 shares of stock in her and Sonja's names. The accepted rule in Ohio is that share certificates are not essential to ownership. *Algren v. Algren,* 183 Ohio App.3d 114, 2009-Ohio-3009, 916 N.E.2d 491 (2d Dist.), ¶ 22. The rationale behind this is that because a certificate only represents a share, one does not need a certificate in hand to prove ownership. *Id.* While the existence and transfer of certificates may be the clearest evidence of a completed gift of corporate stock, such evidence is not required as a matter of law. *Id.*

Therefore, a person may be considered a shareholder *even though the corporation's books do not so indicate. Smith v. Koehler,* 91 Ohio App.3d 337, 340, 632 N.E.2d 914 (3d Dist.1992); *Wheeler v. Johnson,* 2d Dist. Montgomery No. 22178, 2008-Ohio-2599, ¶ 26. Put another way, the issuance of a stock certificate is not necessary to establish corporate ownership. *Thomas v. Thomas*, 6th Dist. Lucas No. L-11-1064, 2012-Ohio-3992, ¶ 40. The fact that a purchaser of shares fails to have the shares transferred into his name upon the corporation's books *does not deprive him of the beneficial interest in the shares. Smith*; *Wheeler,* at ¶ 26.

In addition, Sonja's argument that Sandra renounced her rights and interest in the stock by failing to register the shares is similarly misplaced because it overlooks the fact that Sandra's rights and interest in the stock vested under the Trust upon her mother's death in 2002. Article IV(C) of the Trust reads in pertinent part:

> Upon the latter to occur of the deaths of Donor and his wife, the remaining trust estate shall, subject to the provisions of paragraph D below, forthwith be distributed to Donor's then living issue, per stirpes.

All remaining assets of the Trust were required to be distributed to Sandra and Sonja upon the death of their mother, Olga. The use of the term "shall" in Article IV(C) of the Trust dictates that such distribution was mandatory, not discretionary on the part of the Trustee. It is undisputed that

the Settlor died in 1988 and his wife died in 2002. Therefore, Sandra became *vested in interest* in her 50% of the 93 corporate shares upon the death of her mother in 2002 – *some nine years before Sandra died.*

It should also be noted that the Trust does not contain a "lapse" provision wherein Sandra's beneficial interest lapses if she dies prior to the distribution of the shares from the Trust. Likewise, the Trust contains no provisions limiting Sandra's inheritance to her "lifetime." Nor does the Trust include any provisions suggesting that her death divests her estate of her interest in the Trust. The omission of such language is fatal to Appellant's argument.

Appellant also conveniently overlooks the clear and express dictates of Ohio law on this very issue. R.C. 5808.17 addresses the distribution of trust assets at termination when a beneficiary is deceased, and reads in pertinent part:

> (D) If a beneficiary who was entitled to receive a distribution is deceased, the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and an administration of the beneficiary's estate is open, the trustee **shall** make the distribution to the personal representative of **the beneficiary's estate**.

(Emphasis added.) The Trust contains no provision(s) that terminates Sandra's right to receive the distribution, and/or reflect the intent to limit the application of R.C. 5808.17 to the Trust.

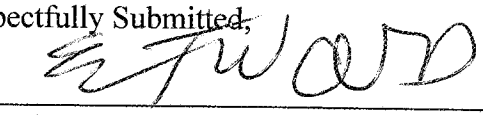
Finally, Appellant's reliance on *In the Matter of the Estate of Krakoff,* 87 Ohio Law Abs. 387, 179 N.E.2d 566 (P.C.1961), is misplaced because there was no dispute in *Krakoff* as to the decedent's wife's renunciation where she submitted to the trial court a written disclaimer specifically requesting that the disclaimed property be administered as probate property. Sandra submitted no such written disclaimer. To the contrary, it is Sandra's alleged renunciation itself that forms the basis of the underlying dispute. Consequently, Sonja's reliance on *Estate of Krakoff* is misplaced.

For these reasons, Appellant's Third proposition of law does not warrant review by this Honorable Court.

## III. CONCLUSION

For each of the foregoing reasons, this Honorable Court should decline jurisdiction in this case, and instead let the Eighth Appellate District's decision stand.

Respectfully Submitted,



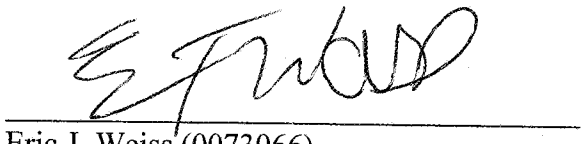
Eric J. Weiss
(0073066)
CAVITCH, FAMILO & DURKIN CO., LPA
1300 East Ninth Street – 20th Fl.
Cleveland, Ohio 44114
Telephone (216)621-7860
Email: eweiss@cavitch.com
Facsimile (216)621-3415
*Attorney for Appellee Gene Szuch*

## CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Response to Jurisdiction of Appellee Gene Szuch* will be served via regular U.S. mail, postage prepaid, this 30th day of June 2014, upon:

John Malone, Esq.
Andrew Malone, Esq.
614 W. Superior Ave. #1150
Cleveland, Ohio 44113
*Attorneys for Appellant*

Melissa Zujkowski
Ulmer Berne, LLP
1660 West 2nd St., Suite 1100
Cleveland, OH 44113
*Attorneys for Appellee Key Bank*



Eric J. Weiss (0073066)