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IN THE SUPREME COURT OF OHIO

PETER BARUK, et al., Appellants, v. HERITAGE CLUB HOMEOWNERS' ASSOCIATION, et al., Appellees.	Case No. 2014-1220 On Appeal from the Warren County Court of Appeals, Twelfth Appellate District Case No. CA2013-09-086

APPELLEES EVANS AND CATHY NWANKWO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. STATEMENT OF APPELLEE'S POSITION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The decision by the Twelfth District Court of Appeals in this case does not meet the discretionary appeal standard set forth in the Ohio Constitution, Article IV, Section 2(B)(2)(e) because it is not a case of public or great general interest. The Baruks' assertion that this case involves questions of statutory interpretation and statutory rewriting is misplaced. This is simply a case involving the burden of a non-moving party to present a genuine issue of material fact in response to a supported motion for summary judgment.

The Court of Appeals based its decision upon a strict application of Civil Rule 56. This rule and the requirements pursuant to the rule have been well-established by the Supreme Court. *See Dresher v. Burt*, 75 Ohio St. 3d 293; 662 N.E. 2d 274 (1996); *Mitseff v. Wheeler*, 38 Ohio St. 3d 115; 526 N.E. 2d 801 (1988). The Court of Appeals determined that the Baruks failed to meet their reciprocal burden to submit evidence to refute the fact that construction projects such as the one undertaken by the Nwankwos are not regulated by the Mason City zoning or building code. The Baruks have not suggested that the summary judgment standard or the reciprocal burden imposed by the standard constitute a great public and general interest for the Court, as these issues are settled under Ohio law.

In arguing that a court is not permitted to consider administrative construction of a statute, administrative practice, or administrative opinions when the statute is unambiguous, the Baruks admit in their Memorandum that the Supreme Court has "reached this exact holding." Since this issue already has been ruled upon, there is no need for the Supreme Court to review it again. The Baruks also point out that the Court "reached a similar result" in *Stokes v. Brunner*, 120 Ohio St. 3d 250; 2008-Ohio-5392. There is no great public and general interest for the Court to reexamine

the issue yet again to reach the same result. Furthermore, statutory interpretation is not before the Court in this case, as the Court of Appeals made clear.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves a dispute between neighbors over a backyard fire pit that was dismissed through summary judgment pursuant to Ohio Civ. R. 56. Plaintiffs-Appellants Peter and Rosa Baruk ("the Baruks") and Defendants-Appellees ("the Nwankwos") are neighbors living in the City of Mason on property designated by Mason's Zoning Code ("Zoning Code") as R-2 residential property. *Baruk*, 2014-Ohio-1585 at ¶ 2. The dispute centers on the Nwankwos' construction in their backyard of a concrete patio that contained a fire pit.

After construction of the patio was complete, the Baruks filed suit against the Nwankwos in the Warren County Court of Common Pleas claiming, among other things, that the location of the patio fire pit violated the Zoning Code. *Id.* at ¶ 14. The Nwankwos and the Baruks filed for summary judgment on this issue. In support of their motion for summary judgment, the Nwankwos relied upon the affidavit of Gregory Nicholls, the chief building official for the City. The Baruks argued in response that the affidavit contained inadmissible evidence. However, the Baruks relied solely upon this argument and failed to present any additional evidence to refute the evidence contained in the affidavit.

The trial court disagreed with the Baruks' claim that the affidavit contained inadmissible evidence and granted the Nwankwos' motion for summary judgment. *Id.* at ¶ 16. Upon appeal, the Court of Appeals affirmed the trial court's decision. *Id.* at ¶ 45. The Baruks then filed an Application for Reconsideration and a Motion to Certify Conflict. The Court of Appeals denied both. In the Entry denying the Baruks' Application for Reconsideration and Motion to Certify Conflict, the Court of Appeals explained that it based its decision to affirm the trial court's

summary judgment decision "upon a strict application of Civ. R. 56 and the Baruks' failure to meet their reciprocal burden to submit evidence to refute the fact that construction projects such as the one undertaken by the Nwankwos are not regulated by the Mason City zoning or building code." Simply put, the Nwankwos moved for summary judgment and supported their motion with admissible evidence. The Baruks failed to refute the Nwankwos' evidence or put forth evidence that a material fact existed. Although the Baruks argued against summary judgment, they did not present any evidence to refute the motion despite bearing the burden of production at trial.

III. ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW PUT FORTH BY APPELLANTS

A. Appellants' Proposition of Law No. 1: A Court Is Not Permitted to give Any Weight to an Enforcement Official's Interpretation of a City's Zoning Code When the Zoning Code Is Unambiguous.

B. Appellants' Proposition of Law No. 2: A City's Enforcement Officer Does Not Have the Discretionary Authority to Rewrite an Unambiguous Zoning Ordinance That Was Established by the City's Legislature.

Both of the Baruks' propositions of law are based upon the same flaw, as neither correctly addresses the issue before the Court. Therefore, they will be addressed together.

The Nwankwos do not disagree with the law set forth by the Appellants regarding statutory interpretation or regarding a City's Enforcement Officer's authority. The Supreme Court has set forth the rules for interpreting statutes and has determined when the rules of construction may be employed to determine the meaning of a statute. *See e.g. Celebrezze v. Bd. of Cnty. Comm'rs of Allen Cnty.*, 32 Ohio St. 3d 24, 27; 512 N.E. 2d 332 (1987). Similarly, the Supreme Court has set forth clear law holding that zoning code ordinances may not be rewritten by courts. *See Pratte v. Stewart*, 125 Ohio St. 3d 473 (2010). However, the Nwankwos disagree with the Baruks' characterization of the issues in question being whether a Zoning Code may be interpreted without

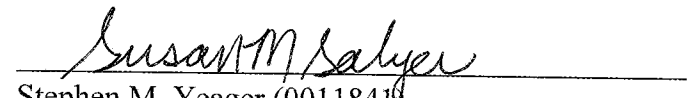
first being deemed ambiguous and whether the Court of Appeals was allowed to rewrite the City's Zoning Code.

As the Court of Appeals unanimously set forth in the Entry Denying Application for Reconsideration and Motion to Certify Conflict (Appellants' Exhibit C), its decision was not based upon an interpretation of the Zoning Code. Instead, it was based upon a strict application of Civil Rule 56 and the Baruks' failure to meet their reciprocal burden to submit evidence that refuted the evidence put forth by the Nwankwos. Because the Baruks failed to meet their summary judgment burden, the Nwankwos were entitled to summary judgment as issued by the trial court and confirmed by the Court of Appeals.

IV. CONCLUSION

This case does not involve matters of public and great general interest. The law in question is well-settled by the Supreme Court. The Court of Appeals based its decision on a strict application of the summary judgment standard as set forth in Civil Rule 56. Therefore, the Nwankwos respectfully request that the Court deny jurisdiction in this case.

Respectfully submitted,



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V. CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon the following counsel via regular U.S. mail, postage prepaid on August 13, 2014:

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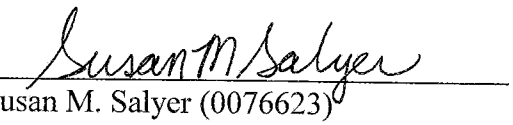

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