

ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA A. VANDERBILT	)	CASE NUMBER: 2014-1764
	)	
Appellant	)	ON APPEAL FROM THE MEDINA
	)	COUNTY COURT OF APPEALS,
	)	NINTH APPELLATE DISTRICT
	)	
vs.	)	COURT OF APPEALS
	)	CASE NO: 13CA0084-M
SHANE W. VANDERBILT	)	
	)	
Appellee	)	

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE SHANE W. VANDERBILT

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Now comes Appellee Shane W. Vanderbilt, and in opposition to this Court's accepting jurisdiction of the above captioned matter states as follows:

PROPOSITION OF LAW NO. 1

THE UNCONSCIONABILITY OF A PRENUPTIAL WAIVER OF SPOUSAL SUPPORT IS MEASURED AT THE TIME OF DIVORCE IN A FULL FACTUAL REVIEW OF THE IMPACT OF THE ENFORCEMENT ON THE ECONOMICALLY LESS ADVANTAGED SPOUSE UNDER THE FACTORS OF R.C 3105.18(C)(11) AND THE PRENUPTIAL BUT WITHOUT A RULE THAT ONLY THE DIFFERENCES IN THE DISADVANTAGE OF SPOUSES INCOME AND STATION IN LIFE IS RELEVANT TO THE CHANGE OF LIFESTYLE TEST.

The Appellee herein submits that this is not a matter of great public importance, nor does the opinion of the Court of Appeals assert any new proposition of law or conflict with any decision of any other jurisdiction.

Without intending any disrespect, Appellee must candidly state that it is difficult to directly respond to the above stated proposition of law, as the language contained therein is virtually indiscernible.

However, Appellee believes that the essence of Appellant's argument is contained in the following quoted section of her memorandum on pages 1 and 2:

In the matter of supreme public interest in this case is that the Appellate Court has stated essentially that if the economic less independent spouse has the same job he/she had when married and the same or similar assets he or she had when married and the economically advantaged spouse has accumulated extremely more wealth and assets and has created a lavish lifestyle for the couple, that it is not significant what has happened in the lifestyle of the economically dependent spouse on the simplified assertion that spouse should have foreseen that the economically advantaged spouse would continue to prosper and that the court can only consider the changes in the circumstances of the economically disadvantaged spouse when determining whether or not it would be unconscionable to enforce the prenuptial agreement. This matter should be of even greater public interest because the Appellate Court set forth this new test

while discarding the specific findings of the trier of fact as to all of the changes in circumstances of the lifestyle of these parties at the time of divorce.

Once again, and without intending any disrespect, the sentence structure, or lack thereof, in syntax of the above quoted statement is difficult to sort through. However, it appears to Appellee that Appellant is asserting essentially two points:

1. That the Appellate Court Decision in this case set forth a test of conscionability that required only a showing that the less advantaged spouse did not lose assets or income during the marriage regardless of what happened to the more advantaged spouse; and,
2. That this proposition of law is new.

Frankly both of these assertions are incorrect.

In the Decision of the Court of Appeals in this matter, the Court emphasized the fact that the lifestyle of the parties changed before they were ever married as they had a lengthy pre-marital relationship. It is true that the Court also pointed out that both parties remained essentially in the same economic position as they had before the marriage throughout the marriage. However, the emphasis of the Court's Decision was on the failure of the Appellant herein to show that there had been a change of circumstances occasioned by the marriage.

As the Appellate Court stated on Page 6, ¶12, of its' Decision,

To the extent that Wife's standard of living has changed, it is significant that the changed occurred over the course of the couple's lengthy relationship and not merely as a result of the marriage. Due in part to the Husband's higher income, the couple enjoyed a higher standard of living than Wife did on her own, but the record indicates that the higher standard of living was established before the marriage. In other words, Wife enjoyed a higher standard of living as a result of her relationship with Husband at the time she executed the prenuptial agreement. It was neither drastic nor unanticipated, but was, instead, part and parcel of the couple's lengthy pre-marital relationship. Even considering a higher standard of

living after the marriage, that fact alone would not be the type of change in circumstances that justifies setting aside part of a valid prenuptial agreement. If that were so, it is hard to imagine a situation in which a spousal support limitation in a prenuptial agreement would be valid, especially given that such agreements are often the product of income inequality.

Though it may be difficult to glean a specific holding from the Court of Appeals opinion, the Appellee submits that the following is essentially the holding of the Court, from Page 4, ¶7, of its decision:

Put simply, the conscionability analysis considers whether a couple's circumstances have changed during the marriage to such a degree that the spouse seeking spousal support should be relieved of the agreement he or she made regarding spousal support. Because a valid prenuptial agreement is one that the parties entered into freely and with full disclosure, this analysis presumes that the changed circumstances would not have been contemplated at the time of the agreement. When a trial court declines to apply a spousal support provision without first determining that such changed circumstances exist, it errs as a matter of law, and our review is de novo.

This holding is not new law. This holding is only a further explanation for the Ninth District of the State of Ohio as to the meaning of the conscionability provisions of *Gross v Gross* (1984) 11 Ohio St. 3d 99.

In fact, instead of setting off on a new course the Court of Appeals in this decision simply compared its reasoning to previous cases, specifically *Gross* and the Ninth District's own case of *Saari v Saari* 2009 Ohio 4940. The Court noted that these two cases "illustrate the importance of a true change of circumstances to our analysis."

Comparing the facts of *Gross* and *Saari*, the Appellate Court concluded that this case is closer, from a factual standpoint, to *Saari* than it was to *Gross*. This not only shows that the Court was not making new law but rather applying precedent, and also is factually accurate.

While Appellant herein asserted that in the case before this Court “the economically advantaged spouse has accumulated extremely more wealth and assets...” This statement is not supported by the record. In fact the evidence in the record was that both parties began the marriage and ended the marriage in essentially the same circumstances. Both maintained same job. While there was an income disparity between them, the income disparity did not increase during the period of the marriage. The record shows that the only change in lifestyle was their moving into a much nicer home, but that they had planned the construction of that home before they were ever married. It was on this record that the Court of Appeals determined the facts of this case were closer to those of *Saari* than of *Gross*.

Appellant herein also asserts, although the question has not been certified by any Court of Appeals, that the decision in this case conflicts with the decision of the Sixth District Court of Appeals in *Newcomer v Newcomer* 2013 Ohio 5627. The decision in *Newcomer* and the decision before this Court do not conflict and Appellant herein significantly misstates the law of *Newcomer*.

While the *Newcomer* decision does contain an opposite result from that in the case currently before this Court, it does not set forth a different standard of reasoning to reach that result. In fact, in *Newcomer* the issue before the Court of Appeals was considerably different as *Newcomer* involved a party with four minor children, a wife who had dropped out of the labor market to rear the children and who needed to update her career skills. Plus the parties’ lifestyle had dramatically changed. Neither the facts of that case nor the reasoning of the Court bare any relationship to the issues presented by the case currently before this Court.

Moreover, the Appellant in her memorandum on Page 3 stated that in *Newcomer* unconscionable “was recognized to mean ‘unfair an inequitable’ as defined by Merriam-Webster Dictionary.” Appellee can only assume that this is meant to imply that this is to be contrasted with the finding by the Court of Appeals in the case currently before this Court and that it is a much lower standard for a finding of conscionability. However, that quote is misleading and incomplete. In fact what the *Newcomer* Court said was as follows: “Actually, unconscionable does mean unfair; specifically ‘extremely bad, unfair, or wrong: going far beyond what is usual or proper.” citing the Merriam-Webster Dictionary. Therefore, test applied by *Newcomer* was not significantly less stringent than that applied by the Court in this case.

Finally, Appellee would point out that on Page 2 of her memorandum as Appellant moves her argument from logos to pathos she significantly misstates both her circumstances and the circumstances of anyone who might be similarly situated. In this section of her memorandum Appellant states as follows:

The decision of this Appellate Court will take away the last remaining vestige of hope for an economically disadvantaged spouse by even denying the possibility of recovery of sustenance or rehabilitative support when divorced from an economically advantaged spouse. The policy is more like a caste system because under the simple standard set for here, the circumstances cannot change if the less advantaged has close to what he or she had when married when exiting the marriage.

First of all, this is not what the Court of Appeals did by any stretch of the imagination. The Court of Appeals did not simply rely on what Appellant had before the marriage and at the end of the marriage, but also what the Appellee had. As the Court compared this case to *Gross* and *Saari* and found it was closer to *Saari* factually, it specifically pointed out that in *Gross* the husband had increased his assets during the

marriage from \$500,000 to \$8,000,000. Therefore, by making that comparison the Court did not rely solely on the circumstances of the Appellant.

However, more importantly, the above stated argument by Appellant would imply that Appellant was a hopeless victim of forces beyond her control. Nothing could be further from the case. This matter went through a full trial on the validity of the prenuptial agreement and it was found to be valid. In short, this Appellant and any person similarly situated with this Appellant always has a choice simply not to sign a prenuptial agreement. The basic principle at work here is the right to contract. That is the essence of the holding in *Gross* that withstood the test of time for thirty (30) years.

Because of the unique nature of prenuptial agreements, the issue on unconscionability is viewed at the time of the implementation of the agreement as opposed to its institution. However, when such unconscionability is not found, the fact remains that two people under no compulsion and with full understanding of the situation entered into an agreement, and that agreement has to be enforced or the concept of prenuptial agreements means nothing.

This Appellant is not “a minimum wage clerk in a fast food restaurant.” She is a public employee of the State of Ohio who makes a decent living, has an excellent pension, and continues to enjoy those benefits.

As the Court of Appeals itself stated in ¶12 of its Decision, if this agreement is unconscionable, “it is hard to imagine a situation in which a spousal support limitation in a prenuptial agreement would be valid...”

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Memorandum in Opposition to Jurisdiction was served on this 6<sup>th</sup> day of November 2014 via email upon the following:

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