

ORIGINAL

IN THE SUPREME COURT OF OHIO

WAYNE K. LIPPERMAN,	:	
	:	Case No. 2015-0121
Appellee,	:	
	:	Appeal from the Court of Appeals
v.	:	for the Seventh Appellate District
	:	
NILE E. BATMAN, et al.,	:	Court of Appeals
	:	Case No. 14 BE 2
Appellants.	:	

MOTION OF DEFENDANTS/APPELLEES XTO ENERGY INC. AND PHILLIPS EXPLORATION, INC. FOR AN ORDER DEEMING PROPOSITION OF LAW NO. 3 TO BE MOOT AND SUBJECT TO DISMISSAL UNDER SUPREME COURT PRACTICE RULE 7.10, AND DISMISSING THE XTO PARTIES FROM THIS APPEAL

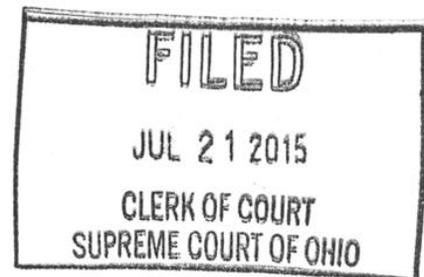
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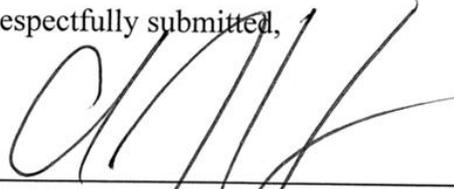
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Pursuant to Ohio Supreme Court Practice Rules 4.01 and 7.10, Defendants/Appellees XTO Energy Inc. and Phillips Exploration, Inc. (collectively, the “XTO Parties”) hereby move the Court for an order deeming Proposition of Law No. III, which pertains to XTO’s standing in this appeal, to be moot and subject to dismissal under Practice Rule 7.10. Further, the XTO Parties move for their dismissal from this appeal, in light of the same. The basis for this Motion is set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Under Rule 7.10 of this Court’s Practice Rules, the Court is authorized to *sua sponte* dismiss a case that has been accepted for determination on the merits if it later finds that there is “no substantial constitutional question or question of public or great general interest” The Court has exercised such authority, both on its own and in response to a motion filed by a party, in instances where no actual controversy was presented or where the issues presented were waived or ultimately did not satisfy the above-quoted criteria.

For example, in Ahmad v. AK Steel Corp., 119 Ohio St. 3d 1210, 2008-Ohio-4082, 893 N.E. 2d 1287, ¶ 1 (2008), the Court, *sua sponte*, dismissed an appeal. In a concurring opinion, Justice O'Connor made clear that such decision was appropriate due to a lack of evidence before the trial court as to the primary issue presented on appeal. Id. at ¶¶ 2-7. As a result, Justice O'Connor wrote:

A hallmark of judicial restraint is to rule only on those cases that present an actual controversy. To do otherwise—to simply answer a hypothetical question merely for the sake of answering it—would make this court nothing more than an advisory board. Thus, because we do not provide advisory opinions, Cascioli v. Cent. Mut. Ins. Co. (1983), 4 Ohio St. 3d 179, 4 OBR 457, 448 N.E.2d 126, the dismissal of this case is proper because there is no evidence of a building-code violation.

[Id. at ¶ 3.]

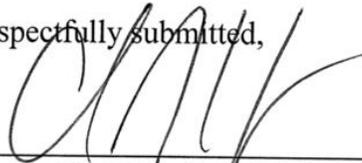
In CSAHS/UHHS-Canton, Inc. d/b/a Mercy Medical Center v. Aultman Health Foundation, Case No. 2012-0665, the Court granted a party's motion to dismiss an appeal under Practice Rule 7.10. [Exh. A (March 13, 2013 Entry in Mercy Medical Center).] In its Motion to Dismiss, which the Court granted, Mercy argued that the appellants' arguments on appeal did not raise substantial constitutional questions or questions of public or great general interest because, among other things, such arguments had been waived and/or amounted merely to a challenge to the weight of the evidence presented below. [Exh. B (Mercy's January 14, 2013, Motion to Dismiss in Mercy Medical Center).]

Here, the XTO Parties do not request that the Court dismiss this *entire* appeal. Rather, in an effort to preserve this Court's judicial resources, they submit only that Plaintiffs/Appellants' third proposition of law—that the XTO Parties lack standing to “appear” in this case—is moot. Such proposition, therefore, does not raise a substantial constitutional question or question of public or great general interest.

Specifically, as Appellants noted in their Jurisdictional Memorandum, the XTO Parties have, since the instant litigation and appellate process was commenced, filed for record a release of their interest in the specific oil and gas lease that is the subject of this case (the “Batman Lease”). As a result, the XTO Parties no longer claim or assert an interest in the specific lease or the specific dispute relating to the lease at issue. The question of the XTO Parties’ standing to continue in the case—the sole question presented by Proposition of Law No. III—is, therefore, moot.

As a result, and in order to preserve this Court’s resources consistent with Chief Justice O’Connor’s opinion in AK Steel, *supra*, the XTO Parties respectfully request that the Court deem Appellants’ Third Proposition of Law to be moot and subject to dismissal under Practice Rule 7.10. Further, for the same reasons, the XTO Parties request that they be dismissed as parties to this appeal.

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing has been served, via regular United States mail, postage prepaid, on July 21, 2011, upon the following:

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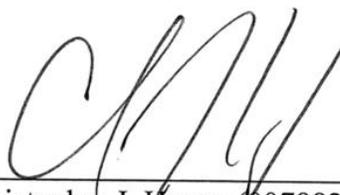
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The Supreme Court of Ohio

FILED

MAR 13 2013

CLERK OF COURT
SUPREME COURT OF OHIO

CSAHA/UHHS-Canton, Inc. dba Mercy
Medical Center

Case No. 2012-0665

v.

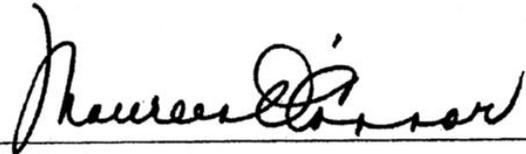
ENTRY

Aultman Health Foundation et al.

This cause is pending before the court as an appeal from the Court of Appeals for Stark County.

Upon consideration of appellee's motion to dismiss appeal as improvidently allowed, it is ordered by the court that the motion is granted. Accordingly, this cause is dismissed.

(Stark County Court of Appeals; No. 2010CA00303)



Maureen O'Connor
Chief Justice

EXHIBIT

A

ORIGINAL

IN THE SUPREME COURT OF OHIO

CSAHS/UHHS-CANTON, INC. d/b/a	:	Case No. 2012-0665
MERCY MEDICAL CENTER,	:	
	:	
Plaintiff-Appellee,	:	On Appeal From the
	:	Stark County Court
v.	:	Of Appeals, Fifth
	:	Appellate District,
AULTMAN HEALTH FOUNDATION,	:	Case No. 2010 CA 00303
et al.,	:	
	:	
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INTRODUCTION

By a 4-3 vote, this Court accepted Aultman's discretionary appeal last year.¹ But even after accepting an appeal, the Court may later find there is no substantial constitutional question or question of public or great general interest, and dismiss the appeal as improvidently accepted.

Now that Aultman has filed its merits briefs, it is clear it has not raised any issue warranting this Court's review. Aultman has not presented this Court with a constitutional issue or any conflict among the lower Ohio courts. Nor has it raised a question of great general interest. To the contrary, Aultman's appeal consists of challenges to the sufficiency of evidence, and an assortment of legal arguments Aultman has waived by failing to raise them—or in some instances, by taking exactly the opposite position—below. This Court ordinarily does not grant jurisdiction to determine issues like these. *See State v. Urbin*, 100 Ohio St. 3d 1207, 1210 (2003) (Moyer, C.J., concurring) (appeal improvidently accepted because “appellant waived the primary legal proposition he now presents” and “resolution of the case is dependent upon factual determinations and the sufficiency of the evidence.”); *see also Chemical Bank of N.Y. v. Neman*, 52 Ohio St. 3d 204, 207 (1990) (“[The Supreme Court] is not required to determine the weight of evidence in civil matters, and ordinarily will not do so.”).

The Court should dismiss this appeal as improvidently accepted. *See State v. Sutton*, 132 Ohio St.3d 1529, 2012-Ohio-4381 (granting dismissal on appellee's motion); S.Ct.Prac.R. 7.10.

¹ Chief Justice O'Connor and Justices Pfeifer and Lanzinger voted not to accept the appeal. Justice O'Donnell voted to accept the appeal, along with former Justices Lundberg Stratton, Cupp, and McGee Brown.

STATEMENT OF THE CASE AND FACTS

Under its Conversion Support Program (CSP), Aultman used funds from its charitable foundation to secretly pay millions of dollars to induce independent insurance brokers to convert their clients to Aultman's captive insurance companies. After a two-month trial, a Stark County jury found Aultman corruptly influenced the brokers in violation of 18 U.S.C. § 1954, a federal predicate act under Ohio's Pattern of Corrupt Activities Act, R.C. 2923.32 (PCA). The Fifth District Court of Appeals unanimously affirmed. *CSAHA/UHHS-Canton v. Aultman*, 2012-Ohio-897.

ARGUMENT

I. **Aultman's First Proposition of Law Concerning Proximate Cause Is in Reality a Challenge to the Sufficiency of Evidence That Does Not Warrant This Court's Review.**

Aultman's First Proposition of Law asserts "the person directly or indirectly injured must prove that the damages sustained were proximately caused by the violation of R.C. 2923.32." But no one contests that Mercy was required to prove proximate cause. And while Aultman initially challenged the jury instructions on this issue (which were based on OJI), Aultman now concedes in its reply that the trial court's general proximate cause instruction "accurately reflected" the law. (Aultman Reply Br. 5.)² Accordingly, this proposition of law is a non-issue.

As its merits briefs reveal, what Aultman is really asking this Court to do is revisit the jury's factual finding that Aultman's conduct proximately caused Mercy's injury.

² Aultman appears to argue the trial court erred in instructing the jury on the PCA claim that Mercy had to prove it "was injured, directly or indirectly, as a result of the Aultman Defendants' conduct." But that instruction comes straight from OJI as well, which in turn tracks the plain language of the PCA statute. See OJI Civil § 445.03; R.C. 2923.34(E) ("any person directly or indirectly injured" by corrupt activity may recover under PCA). The trial court's use of this statutory language hardly constitutes an issue of great public interest warranting the exercise of this Court's jurisdiction.

Aultman insists in its reply brief it has “not made a ‘weight of the evidence’ argument,” but in truth Aultman spends pages of its briefs arguing the evidence at this lengthy trial was insufficient to establish proximate cause. (Aultman Br. 23-26; Aultman Reply Br. 4-5.) At the same time, Aultman ignores overwhelming evidence that persuaded the jury—as well as the trial and appellate courts—to find otherwise. (Mercy Br. 15-20.)³

The fact-intensive question of whether a plaintiff has presented sufficient evidence of proximate cause at trial is not an issue worthy of this Court’s jurisdiction, particularly in a trial as complex and lengthy as this one.

II. Aultman’s Second Proposition Concerning Alter-Ego Liability Does Not Warrant Review Because Mercy Did Not Seek to Impose Liability on That Basis.

Under its Second Proposition of Law, Aultman argues that, absent alter-ego liability, “the actions of one corporation cannot be attributed to related entities.” (Aultman Reply Br. 6.) This proposition of law does not warrant this Court’s attention because Mercy did not seek to attribute the actions of one corporation to another. Rather, the undisputed evidence at trial showed *each* of the four Aultman entities directly participated in the CSP. (Mercy Br. 21-22.)

Aultman never denied this at trial. To the contrary, it presented itself at all times as a collective group. Aultman pinned its defense on its assertion there was nothing

³ Aultman tries to buttress its challenge to proximate cause by arguing the jury’s answer to an interrogatory on Mercy’s unfair competition claim was inconsistent with the jury’s PCA verdict. (Aultman Reply Br. 1, 5.) But this inconsistent verdict claim is not properly before the Court—Aultman waived it by failing to object, as it was required to do, before the jury was discharged, *see CSAHA/UHHS-Canton*, 2012-Ohio-897, at ¶ 66 n.4, and then failed to raise it as a Proposition of Law in this Court. Moreover, the jury’s verdict here may readily be harmonized with the interrogatory Aultman has seized upon. (Mercy Br. 14-15.) And in any event, Aultman’s erroneous position concerning inconsistent verdicts does not change the fact that the proximate cause instruction was (by Aultman’s own admission) correct, and that there was ample evidence to support the jury’s proximate cause finding.

wrong with the CSP—not that any of the defendants were not involved in the program. Now, for the first time in its reply, Aultman singles out one of its entities, arguing there is “no evidence Aultman Hospital participated in the CSP.” (Aultman Reply Br. 7.)⁴ But in its all-or-nothing defense at trial, Aultman raised the same defenses and arguments on behalf of all its entities, including the hospital. (Mercy Br. 21-23.)

For its own counterclaims, consistent with its unified-front strategy, Aultman proposed a collective verdict form for all four of its entities. (Mercy Br. 24.) But for Mercy’s claims, Aultman insists the jury should have been required to fill out over 500 pages of duplicative interrogatories and verdict forms, including a separate set for each of the four defendants. (Id.) Given Aultman’s failure at trial to dispute that each of its entities participated in the CSP, there was no evidentiary basis for imposing this extraordinary burden and risk of confusion on the jury.

No important question of law exists here. Aultman defended itself on a collective basis, and therefore was not prejudiced by a collective verdict. Aultman’s Second Proposition should be dismissed.

III. Aultman’s Third Proposition Does Not Merit Review Because It Challenges a Jury Instruction That Aultman Itself Proposed.

In its Third Proposition of Law, Aultman claims the trial court erred by instructing the jury that Mercy could recover actual damages based on proof by a preponderance of the evidence, rather than clear and convincing evidence. But Aultman *proposed* the preponderance-of-evidence standard it now claims was error, and then

⁴ In making this assertion, Aultman ignores undisputed trial evidence that the CSP’s purpose was to drive patients to Aultman Hospital, which then upstreamed the resulting profits to Aultman Health Foundation. (Mercy Br. 21-22.) This is more than enough to support the finding that the hospital, like each of the Aultman entities, “participate[d] in, *directly or indirectly*, the affairs of the enterprise through a pattern of corrupt activity.” See R.C. 2923.32(A)(1) (emphasis added).

objected to the clear-and-convincing interrogatory it now claims was required.

(Aultman Reply Br. 9; Mercy Br. 27-31.)

The instructions at issue correctly tracked OJI Civil § 445.03—but Aultman should not be entitled to invoke this Court’s jurisdiction over instructions it proposed in any event. “[A] litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible.” *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 93 (2002); *see also Lester v. Leuck*, 142 Ohio St. 91, 92 (1943) (“It is the well-settled rule that a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make.”).

And Aultman’s conduct here goes beyond a mere waiver. By objecting to a clear-and-convincing standard at trial, Aultman avoided the imposition of treble damages under the PCA. (Mercy Br. 28-31.) Having benefitted in this way, Aultman is now barred from raising the issue here by the doctrine of judicial estoppel. *See Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 25 (“Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.”). As the trial court held, “Aultman cannot object to the proposed jury instruction, then turn around and complain about the results, when the trial Court granted their wish.” (10/19/10 JE at 2.) *See Pace v. Pace*, 2010-Ohio-3573, ¶ 18 (5th Dist.) (findings of waiver and estoppel “are fact-driven and will not be reversed absent an abuse of discretion”).

This Court should refrain from reviewing an issue Aultman waived and invited—and from which it benefitted immensely. *See Urbin*, 100 Ohio St. 3d at 1210.

IV. Aultman's Fourth Proposition Does Not Warrant This Court's Review Because It Concerns an Issue of Federal Law.

Aultman's Fourth Proposition of Law challenges the trial court's instructions regarding the predicate act under R.C. 2923.32. But the predicate act at issue here was the violation of the *federal* statute dealing with bribery in the operation of employee benefit plans, 18 U.S.C. § 1954, and the trial court took its instructions from the federal model jury instructions.⁵ This Court should not exercise its jurisdiction to determine the propriety of a trial court's instruction as to the elements of a federal statute.

Aultman tries to cast this issue as "purely one of Ohio law." (Aultman Reply Br. 11.) But Aultman made the opposite argument when it tried to remove this action to federal court. The PCA claim, Aultman told the federal district court at that time, "only nominally invokes Ohio law," and the "keystone" of the claim was the violation of a federal statute. (Mercy Br. 43.)

Aultman's attempt to parse a jury instruction concerning a federal statute does not raise an important question of Ohio law meriting review by this Court.

V. Aultman's Sixth Proposition Concerning a PCA "Enterprise" Is Another Challenge to the Sufficiency of Evidence Not Warranting This Court's Review.

Aultman's Sixth Proposition of Law, which asserts "a plaintiff must prove the existence of an enterprise that is an entity separate and apart from the pattern of corrupt activity," is another sufficiency-of-evidence argument in disguise. (Aultman Br. 36-37.) The jury instructions provided precisely what Aultman requested and what it claims the law to be—that an enterprise must be "separate from the pattern of corrupt

⁵ The trial court's instructions relating to Section 1954 were correct. (Mercy Br. 33-36.) Aultman did not even raise the objection it now advances until after the jury had already been instructed. (Mercy Br. 36-38.)

activity.” (See Mercy Br. 38-39; Jury Instr. 48, Supp.2220.) Since the jury was instructed on the very standard Aultman requested, the only argument Aultman has left is to challenge whether the evidence was sufficient to support the jury’s factual finding that an enterprise existed under this standard.

The jury’s factual finding on this issue is particularly ill-suited for review by this Court given the wide range of associations that may constitute an enterprise under both RICO and the PCA. See *Boyle v. United States*, 556 U.S. 938, 944 (2009) (RICO enterprise is “obviously broad,” has “a wide reach,” and applies to any “group of persons associated together for a common purpose of engaging in a course of conduct”); *In re Nat’l Century Fin. Enters., Inc., Invest. Litig.*, 604 F.Supp.2d 1128, 1159 (S.D. Ohio 2009) (under Ohio PCA, enterprise defined “broadly”); R.C. 2923.31(C) (“Enterprise’ includes . . . any organization, association, or group of persons associated in fact although not a legal entity.”).

There was ample evidence to support the jury’s enterprise finding under this “broad” standard (Mercy Br. 40-41), and this Court should adhere to its practice of declining to second-guess a jury’s factual determinations.

VI. Aultman Has Waived All the ODI-Related Arguments It Raises Under Its Seventh Proposition.

In its Seventh Proposition of Law, Aultman says the trial court should have referred this matter to the ODI under the “primary jurisdiction” doctrine. But Aultman waived this argument by failing to raise it with the Fifth District. See *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34 (“A party who fails to raise an argument in the court below waives his or her right to raise it here.”); see also *State ex rel. v. Banc One Corp. v. Walker*, 86 Ohio St.3d 169, 171 (1999) (“the doctrine of primary jurisdiction is not, despite its name, jurisdictional,” and thus can be waived).

Aultman argues it preserved this argument by mentioning it in a motion to stay, in which it unsuccessfully requested that the Fifth District stay certain injunctive relief during the pendency of the appeal. (Aultman Reply Br. 15-16.) But when it later filed its brief on the merits, Aultman chose not to make this argument. Aultman did not assign the primary jurisdiction doctrine as error, did not raise it as one of its *seventeen* “Issues Presented for Review,” and never argued to the court of appeals the verdict should be reversed on that ground. Accordingly, the issue does not merit review by this Court.

Aultman also is estopped from making this argument, because it successfully argued the exact opposite position before the ODI after the Tuscarawas County Court of Common Pleas referred another case involving the CSP to the ODI. (Mercy Br. 43-44.) During that proceeding, when HomeTown informed the ODI of Mercy’s PCA victory, Aultman argued: “[T]he federal law that HomeTown cites, 18 U.S.C. § 1954, is *obviously not within the Department’s jurisdiction . . .*” (Aultman’s ODI Reply Br. 36 (emphasis added).) Aultman went on to state: “*Mercy’s POCA claim . . . has absolutely nothing to do with Ohio insurance law . . .*” (Aultman Res. To HomeTown Notice of New Auth. 1, Supp.2283 (emphasis added).) Reflecting its agreement with Aultman’s position, the ODI did not address Section 1954 in its report.

Taking that position served Aultman well in the “exigency of the moment” when Aultman was concerned with fending off the ODI. *See Greer-Burger*, 2007-Ohio-6442, ¶ 25. However, having successfully argued to the ODI that it had *no* jurisdiction over the PCA claim, Aultman should not be permitted to argue the ODI has *primary* jurisdiction over that claim now.

Finally, Aultman tries to fold into the Seventh Proposition of Law two additional arguments not set forth in the proposition itself. It first contends Mercy’s PCA claim

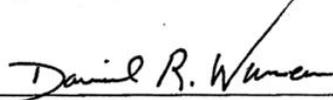
was “reverse preempted” by the McCarran-Ferguson Act, an issue Aultman has never raised before at any stage of this case. Second, Aultman offers garden-variety objections to evidentiary rulings over which “the trial court is vested with broad discretion” under Rule 403. *State v. Allen*, 73 Ohio St.3d 626, 633 (1995).

In short, none of Aultman’s ODI-related issues warrants review by this Court.

CONCLUSION

This Court should dismiss Aultman’s appeal as improvidently accepted.

Respectfully submitted,



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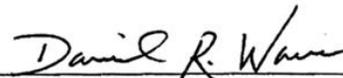
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