

ORIGINAL

In the Supreme Court of Ohio

MARY LOU BURKHART,	:	
	:	Case No. 2013-0580
<i>Plaintiff-Appellee,</i>	:	
	:	
v.	:	On Appeal from the
	:	Court of Appeals of Wood County,
H.J. HEINZ CO., et al,	:	Sixth Appellate District
	:	
<i>Defendant-Appellant.</i>	:	
	:	Court of Appeals
	:	Case No. WD-12-008

BRIEF OF AMICUS CURIAE THE OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT H.J. HEINZ CO.

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE FACTS	2
ARGUMENT	2
<u>Proposition of Law:</u>	2
Pursuant to Evid.R 804(B)(1), two distinct criteria must be met before testimony of an unavailable witness from a prior proceeding may be admitted against a party in a civil proceeding: 1) That party or that party’s predecessor in interest 2) must have had an opportunity and similar motive to develop the testimony	2
A. Testimony from a Prior Proceeding Is Inadmissible Against A Party Unless the Party or the Party’s Predecessor In Interest Had an Opportunity to Develop the Testimony.....	3
1. The Plain Meaning of Predecessor in Interest is One Who Precedes Another With Respect to a Legal Share in Something.....	3
2. The Non-Binding Federal Cases Cited by the Sixth District are Wrongly Decided and Should Be Rejected	6
B. Determining Whether a “Similar Motive to Develop the Testimony” Exists Requires a Case-By-Case Determination That Is Not Met Simply Because the Parties Are Both Defendants.....	9
CONCLUSION.....	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<i>Athridge v. Aetna Cas. & Sur. Co.</i> , 474 F.Supp.2d 102 (D.D.C. 2007)	6
<i>Burkhart v. H.J. Heinz Co.</i> , 6th Dist. No. WD-12-008, 2013-Ohio-723	passim
<i>D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health</i> , 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536	4
<i>Fehrenbach v. O'Malley</i> , 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489	4, 5
<i>Horton v. Harwick Chemical Co.</i> , 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995)	10
<i>In re IBM Peripheral EDP Devices Antitrust Litigation</i> , 444 F.Supp. 110 (N.D. Cal. 1978)	9
<i>In re Screws Antitrust Litigation</i> , 526 F.Supp. 1316 (D. Mass. 1981)	9
<i>Lane v. Brainerd</i> , 30 Conn. 565 (1862)	6
<i>Lloyd v. Am. Export Lines, Inc.</i> , 580 F.2d 1179 (3rd Cir. 1978)	6, 7, 8, 9
<i>Martin v. Elden</i> , 32 Ohio St. 282 (1877)	5
<i>Murphy v. Owens-Illinois, Inc.</i> , 779 F.2d 340 (6th Cir. 1985)	6
<i>Ohio Consumers' Counsel v. PUC</i> , 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213	7
<i>Smith v. Mitchell</i> , 35 Ohio St.3d 237, 520 N.E.2d 213 (1988)	5
<i>State ex rel. Lake Erie Constr. Co. v. Indus. Comm.</i> , 62 Ohio St.3d 81, 578 N.E.2d 458 (1991)	5
<i>State ex rel. Potts v. Comm'n on Continuing Legal Educ.</i> , 93 Ohio St.3d 452, 755 N.E.2d 886 (2001)	4
<i>State ex rel. Tyler v. Alexander</i> , 52 Ohio St.3d 84, 555 N.E.2d 966 (1990)	7
<i>State ex rel. Whitacre-Greer Fireproofing Co. v. Conrad</i> , 96 Ohio St.3d 340, 2002-Ohio-4742, 774 N.E.2d 1209	4
<i>State v. Banaag</i> , 9th Dist. No. 98CA33, 2000 Ohio App. LEXIS 167 (Jan. 26, 2000)	9
<i>State v. Boston</i> , 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989)	7

<i>State v. Dever</i> , 64 Ohio St.3d 401, 596 N.E.2d 436 (1992).....	7
<i>State v. McCormick</i> , 4th Dist. No. 95CA765, 1996 Ohio App. LEXIS 3072 (July 11, 1996).....	10
<i>Thomas v. Freeman</i> , 79 Ohio St.3d 221, 680 N.E.2d 997 (1997)	4

STATUTES

O.R.C. 2307.22	11
O.R.C. 2307.22(A)(1).....	11
O.R.C. 2307.22(B).....	11
O.R.C. 2307.96(B).....	10

RULES

56 F.R.D. 183, 321 (1973).....	8
Fed.R.Evid. 102	7
Fed.R.Evid. 804(b)(1).....	6, 7, 8
Ohio R.Evid. 804(B)(1)	passim

TREATISES

Weissenberger’s Ohio Evidence Treatise § 804.16.....	1
--	---

OTHER AUTHORITIES

Black’s Law Dictionary (8th Ed.2004) 828.....	5
Black’s Law Dictionary (9th Ed.2009) 1571	5
H.R. Rep. No. 650, 93 rd Cong.2d Sess. 4 (1975).....	8
Lawrence, <i>The Admissibility of Former Testimony Under Rule 804(b)(1): Defining A Predecessor In Interest</i> , 42 U.Miami L.Rev. 975 (1988).....	8
S.Rep. No. 1277, 93 Cong.2d Sess. 28 (1974).....	8
Weissenbrger, <i>The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers</i> , 67 N.C.L.Rev. 295 (1989).....	6

INTRODUCTION

The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,600 manufacturing companies which collectively employ the majority of the roughly 610,000 men and women who work in manufacturing in the State of Ohio. OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business.

Ohio Rule of Evidence 804(B)(1) provides that former testimony from an unavailable witness is not excluded by the hearsay rule if:

the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Evid.R. 804(B)(1). In other words, when the party against whom testimony is being offered in a proceeding had no opportunity to develop that testimony in a prior proceeding, the rule requires that both proceedings involve substantially similar parties ("predecessor in interest") with similar motivations ("similar motive to develop the testimony") before the testimony may be admitted.

These requirements "reflect[] the historical concern that it is generally unfair to impose upon the party against whom the hearsay evidence is offered responsibility for the manner with which the witness was previously handled by another party." 1-804 Weissenberger's Ohio Evidence Treatise § 804.16. In its ruling below, the Sixth District permitted testimony from a prior asbestos case to be used against an employer (not a party to the previous asbestos case) in a worker's compensation case when neither the parties nor motivations were sufficiently similar. The court reached this incorrect result by giving the predecessor in interest criteria no meaning and misapplying the similar motivation criteria. This case exemplifies how, without guidance from this Court, Ohio courts have misapplied Rule 804(B)(1), leading to the unfair results that the rule was designed to prevent.

OMA is interested in this case because it provides this Court an opportunity to restore the

protections that Rule 804(B)(1) was intended to provide. Contrary to the rule's requirements, OMA's members have regularly been forced to defend against testimony developed at a prior proceeding when neither they, nor their predecessors in interest, were parties to that proceeding. Moreover, the entities that were parties to the prior proceeding often did not have a similar motive to develop the testimony or were motivated to develop testimony *against* OMA's members. As a result, OMA's members have been impermissibly burdened with testimony over which it had no control, essentially being forced to try a case with someone else's evidence.

OMA urges this Court to issue guidance on the application of Rule 804(B)(1) to address situations beyond the specific facts presented by this case. This case provides a stark example of how Ohio courts have eroded the requirements of Rule 804(B)(1), but it is merely one example of a much larger problem. It is the experience of OMA that Ohio courts have regularly permitted parties to introduce this type of inadmissible hearsay evidence at summary judgment and trial in all types of litigation. As a result, this Court should restore Rule 804(B)(1) for the benefit of *all* Ohio litigants.

STATEMENT OF THE FACTS

OMA hereby adopts the statement of facts set forth by Defendant-Appellant H.J. Heinz Co. ("Heinz").

ARGUMENT

Proposition of Law: Pursuant to Evid.R 804(B)(1), two distinct criteria must be met before testimony of an unavailable witness from a prior proceeding may be admitted against a party in a civil proceeding: 1) That party or that party's predecessor in interest 2) must have had an opportunity and similar motive to develop the testimony.

The lower court's misinterpretation and misapplication of Rule 804(B)(1) was predicated on two fundamental flaws. First, it violated basic rules of construction by failing to give effect to the term "predecessor in interest" and failing to give that undefined term its plain meaning.

Under a plain meaning analysis, a corporation's "predecessor in interest" is one who previously owned and transferred some relevant aspect of the corporation. Applying the proper definition, the former testimony in this case should have been excluded as hearsay because neither Heinz nor Heinz's predecessor in interest had an opportunity to develop the testimony.

Second, the lower court failed to conduct an adequate inquiry into whether the asbestos defendants had "a similar motive" to Heinz in developing the testimony. The court, in a conclusory fashion, determined that the asbestos defendants and Heinz shared a similar motive simply because all were defendants who would benefit from disproving that the plaintiff was exposed to asbestos. This over-simplification of the two proceedings is insufficient to demonstrate a similar motive; defendants are not always motivated to develop or test the same facts as other defendants, even if they are facing claims arising from similar facts.

A. Testimony from a Prior Proceeding Is Inadmissible Against A Party Unless the Party or the Party's Predecessor In Interest Had an Opportunity to Develop the Testimony.

1. The Plain Meaning of Predecessor in Interest is One Who Precedes Another With Respect to a Legal Share in Something.

Evid.R. 804(B)(1) sets forth two independent criteria that must be satisfied before former testimony may be used against a party that did not have an opportunity to develop that testimony: (1) the party's predecessor in interest (2) must have had an opportunity and similar motive to develop the testimony. Evid.R. 804(B)(1). The lower court improperly merged these two criteria, finding that "predecessor in interest" was wholly defined by the second criteria. *Burkhart v. H.J. Heinz Co.*, 6th Dist. No. WD-12-008, 2013-Ohio-723, ¶ 30. This interpretation of Rule 804(B)(1) violates two basic rules of construction in that it (1) renders the term "predecessor in interest" redundant, and (2) fails to give the term its plain meaning.

This Court has recognized that the rules of statutory construction apply when analyzing

rules of court. *See State ex rel. Potts v. Comm'n on Continuing Legal Educ.*, 93 Ohio St.3d 452, 456, 755 N.E.2d 886 (2001) (applying rules of statutory construction to Rules for Government of the Bar); *Thomas v. Freeman*, 79 Ohio St.3d 221, 224-25, 680 N.E.2d 997 (1997) (applying rules of statutory construction to Rules of Civil Procedure). It is a well-settled rule that a court “must give effect to every word and clause” in a statute or rule and that words “should not be construed to be redundant.” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26. It is equally well-settled that, when faced with an undefined term, a court “will apply the term in its normal customary meaning.” *Fehrenbach v. O'Malley*, 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489, ¶ 21. The normal customary meaning of a term is ascertained through the term’s dictionary definition. *See, e.g., id.* at ¶ 21.

Rule 804(B)(1) includes both “predecessor in interest” and “similar motive” language to describe when former testimony is admissible, signifying that the two criteria were intended to have distinct meanings. *See State ex rel. Whitacre-Greer Fireproofing Co. v. Conrad*, 96 Ohio St.3d 340, 2002-Ohio-4742, 774 N.E.2d 1209, ¶ 16 (rejecting the argument that two unique terms used in a statute had the same meaning because it would render part of the statute redundant). If the rule was intended to require only that the parties share a similar motivation, as the Sixth District held below, the inclusion of “predecessor in interest” would have been unnecessary. Rule 804(B)(1) *does* include the term “predecessor in interest,” so it *must* require some additional relationship between the relevant parties.

Because the Rules of Evidence do not define “predecessor in interest,” this Court should look to the dictionary to determine the term’s plain meaning. *See Fehrenbach* at ¶ 21. The term “predecessor” is defined as “[o]ne who precedes another in an office or position.” Black’s Law Dictionary (9th Ed.2009) 1297. And, the term “[i]nterest” means “[a] legal share in

something.”” *Fehrenbach*, at ¶ 21 (quoting Black’s Law Dictionary (8th Ed.2004) 828). Thus, a “predecessor in interest” should be read as one who precedes another with respect to a legal share in something. In the context of a corporation, a predecessor in interest is one who previously had a legal share or ownership of some relevant aspect of the current corporation.

This plain meaning is confirmed when the term is viewed as the opposite of “successor in interest.” Black’s Law Dictionary defines “successor in interest” as “one who follows another in ownership or control of property.” Black’s Law Dictionary (9th Ed.2009) 1571. This Court has defined the term “successor in interest” as a “transferee of a business in whole or in part.” *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.*, 62 Ohio St.3d 81, 83-84, 578 N.E.2d 458 (1991) (defining term for worker’s compensation purposes). Thus, a predecessor in interest is one who *precedes* another in ownership or control of property or is a *transferor* of a business in whole or in part.

Accordingly, in order for the former testimony to be used against Heinz in this case under Rule 804(B)(1), either Heinz or an entity that preceded Heinz in the ownership or control of the property at issue must have had the opportunity to develop the testimony in the prior proceeding. This did not occur in the case below. As a result, the testimony is inadmissible hearsay.

This conclusion comports with the fairness policy behind Rule 804(B)(1). One of the oldest and most important fundamental rights in the American judicial system is the right to cross-examine an adverse witness. *See Smith v. Mitchell*, 35 Ohio St.3d 237, 239, 520 N.E.2d 213 (1988). As this Court stated in *Smith*, “[t]he importance of the *right* of full cross-examination, of an adverse witness, can scarcely be overestimated. As a test of the accuracy, truthfulness, and credibility of testimony, it is invaluable.” (Emphasis sic.) *Id.* (quoting *Martin v. Elden*, 32 Ohio St. 282, 287 (1877)). As the former testimony exception to the hearsay rule

was developed in the common law, courts recognized that “[f]orcing a party to accept another litigant’s cross-examination seemed unfair, unless there was only a nominal change in parties.” Weissenbrger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C.L.Rev. 295, 307 (1989)¹ (citing *Lane v. Brainerd*, 30 Conn. 565, 579 (1862)). To be sure, unless the “predecessor in interest” criteria is given proper meaning and effect, parties will be required to forfeit their right to cross-examination and will be forced to live or die by the evidentiary efforts (or lack thereof) of a completely unrelated party.

2. The Non-Binding Federal Cases Cited by the Sixth District are Wrongly Decided and Should Be Rejected.

The lower court justified its erroneous interpretation of the rule by relying on federal cases that follow the holding in *Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978). See *Burkhart*, 2013-Ohio-723, at ¶¶ 30, 36. Like the Sixth District below, the *Lloyd* court held that “the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.” *Lloyd*, 580 F.2d at 1187. The federal cases that have adopted *Lloyd*, while acknowledging that Federal Rule 804(b)(1) contains two requirements, have admittedly “collapsed the two criteria into one test.” *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 343 (6th Cir. 1985); see *Athridge v. Aetna Cas. & Sur. Co.*, 474 F.Supp.2d 102, 115 (D.D.C. 2007) (admitting that federal courts have “read[] the strict language of ‘predecessor in interest’ out of the rule”). These courts’ revision of Federal Rule 804(b)(1) to achieve a desired result is not in accord with this Court’s rules of construction or its judicial philosophy, and therefore should not be applied to Ohio Rule 804(B)(1).

A federal court’s interpretation of a federal rule is not binding on this Court’s

¹ This article provides a detailed history of how Federal Rule of Evidence 804(b)(1) developed and the purpose for including “predecessor in interest” into the rule.

interpretation of a state rule. See *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 89. Although such case law can be instructive, this Court has declined to follow federal case law when it is based purely on federal law, does not recognize the differences between state and federal law, or is incorrectly reasoned. See *id.*; *State ex rel. Tyler v. Alexander*, 52 Ohio St.3d 84, 84, 555 N.E.2d 966 (1990) (rejecting the United States Supreme Court's interpretation of similar federal rule as "remote from plain English").

The holding in *Lloyd* should be rejected for the same reasons. First, the holding in *Lloyd* was based purely on federal law and there is a "significant difference" between how the Federal Rules of Evidence and the Ohio Rules of Evidence are to be construed. See *State v. Dever*, 64 Ohio St.3d 401, 407, 596 N.E.2d 436 (1992) (citing *State v. Boston*, 46 Ohio St.3d 108, 113, 545 N.E.2d 1220 (1989)). In *Dever*, this Court examined Rule 102 of the Federal and Ohio Rules of Evidence and concluded that the Federal Rules of Evidence are to be construed to promote the "growth and development of the law of evidence," while the Ohio Rules of Evidence "shall be construed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended." *Id.* As a result, federal courts may "construe the rules of evidence broadly" but Ohio courts "may not do so." *Id.* Thus, even if the federal courts following *Lloyd* were justified in rewriting Rule 804(b)(1), an Ohio court would not.

Second, and most importantly, this Court should not adopt the holding in *Lloyd* because *Lloyd* was wrongly decided. The *Lloyd* court misconstrued the legislative history of Rule 804(b)(1) and Congress' decision to include the term "predecessor in interest" in the rule. See *Lloyd*, 580 F.2d at 1185. The United States Supreme Court initially proposed a version of Fed.R.Evid. 804(b)(1) that did not include a predecessor in interest requirement. See 56 F.R.D.

183, 321 (1973).² If passed, this version of the rule would have supported the holdings of the Sixth District and the *Lloyd* court. But Congress did not enact this version of the rule. As explained in a House Committee Report, the House of Representatives expressly rejected this approach and included the term predecessor in interest to require a formal relationship between the party developing the testimony and the party against whom the testimony would be used:

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person “with motive and interest similar” to his had an opportunity to examine the witness. **The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee’s view, is when a party’s predecessor in interest in a civil action had an opportunity and similar motive to examine the witness.**

H.R. Rep. No. 650, 93rd Cong.2d Sess. 4 (1975) (emphasis added). Although the Senate adopted the House’s version of Rule 804(b)(1) over the Supreme Court’s version, it opined that “the difference between the two is not great.” S.Rep. No. 1277, 93 Cong.2d Sess. 28 (1974). The federal courts that follow *Lloyd* recognize both that the House modified the Supreme Court’s proposed rule and that the Senate accepted the House’s modification, but they seize on only the Senate’s commentary without giving proper consideration to the House’s purposeful inclusion of “predecessor in interest” into the rule.

Due in part to this strong legislative history regarding the term “predecessor in interest,” acceptance of the holding in *Lloyd* “has not been universal.” See *Burkhart*, 2013-Ohio-723, at ¶ 36 (citing Lawrence, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining A Predecessor In Interest*, 42 U.Miami L.Rev. 975 (1988)); *In re Screws Antitrust Litigation*, 526

² The text of the proposed rule was: “Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of another proceeding at the instance of, or against, a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.”

F.Supp. 1316, 1318-19 (D. Mass. 1981); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 444 F.Supp. 110, 113 (N.D. Cal. 1978). A concurring judge in *Lloyd* warned that the majority opinion “eliminates the predecessor in interest requirement entirely” and charges “the party against whom the hearsay evidence is being offered with all flaws in the manner in which the witness was previously handled by another, and all flaws in another’s choices of witnesses, the very result characterized by the House Judiciary Committee as ‘generally unfair.’” *Lloyd*, 580 F.2d at 1192 (Stern, J., concurring).

Giving effect and plain meaning to all terms in the rule, Rule 804(B)(1) requires that before former testimony could be used against Heinz, Heinz or some entity that used to own relevant aspects of Heinz must have had an opportunity to develop that testimony. Because this did not occur, the testimony was inadmissible hearsay. As demonstrated by the foregoing, the federal cases cited by the lower court do not warrant a departure from this Court’s basic rules of construction and fundamental judicial philosophy.

B. Determining Whether a “Similar Motive to Develop the Testimony” Exists Requires a Case-By-Case Determination That Is Not Met Simply Because the Parties Are Both Defendants.

The lower court failed to adequately analyze whether Heinz and the asbestos defendants had a “similar motive” in developing the plaintiff’s testimony. The Sixth District stated that the parties had similar motives because “all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos.” *Burkhart*, 2013-Ohio-723, at ¶ 41. This superficial analysis reflects neither the realities of litigation nor the particular motivations of asbestos-tort defendants. The similar motive requirement “operates to screen out those statements which, although made under oath, were not subject to the scrutiny of a party interested thoroughly in testing its validity.” *State v. Banaag*, 9th Dist. No. 98CA33, 2000 Ohio App. LEXIS 167, *5 (Jan. 26, 2000) (quoting *State v. McCormick*, 4th Dist. No. 95CA765, 1996 Ohio App. LEXIS

3072 (July 11, 1996)). To determine if the party in the prior proceeding³ was truly interested in testing the validity of the testimony elicited, a court must engage in a much more thorough examination of a previous party's motivations than did the lower court below.

It is not enough to simply find that both parties are defendants to claims arising out of similar facts. There are countless legal and factual situations where potential co-defendants will have significantly divergent motivations in developing testimony. Potential co-defendants in asbestos-tort cases often have different motivations because of the product identification defense available to asbestos defendants and Ohio's apportionment statute. The impact of these legal principles was left unexamined by the lower court in this case.

The product identification defense available to asbestos defendants often leads to different motivations for developing testimony. The primary motivation of asbestos defendants is not, as postulated by the Sixth District, to "disprove[] that [plaintiff] had been exposed to asbestos;" instead, an asbestos defendant is motivated to disprove that plaintiff had been exposed to *its* asbestos-containing product. See *Horton v. Harwick Chemical Co.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph one of the syllabus (holding that an asbestos plaintiff has the burden of proving exposure to *each* defendant's product and that "the product was a substantial factor in causing plaintiff's injury."); R.C. 2307.96(B). Thus, although an asbestos defendant is motivated to test the veracity of any statement that pertains to its products, that defendant is not necessarily motivated to test the veracity of a deponent's statements regarding the presence of asbestos in a plant generally, the actions or knowledge of a deponent's employer regarding asbestos, or even the deponent's knowledge or training regarding asbestos.

The availability of the product identification defense to the asbestos defendants in this

³ If the former party was not a predecessor in interest, then the testimony would be barred on those grounds.

case apparently left them with little motivation to probe the plaintiff's testimony and knowledge about asbestos at the plant generally. Indeed, as set forth in Heinz's memo in support of jurisdiction, Burkhart's counsel deposed Burkhart to elicit testimony regarding the existence of asbestos at Heinz and the defendants were uninterested in defending that proposition. (Heinz Memorandum in Support of Jurisdiction, at 11.) Instead, the defendants were interested in ensuring that none of their products were identified in connection with the plant. (*Id.*, Appendix B, at p. 126 (defendant asking questions to establish that Burkhart had no personal knowledge whether any asbestos existed in the Gould pumps.)) While helpful in extracting those defendants from the asbestos case, the record was not developed to protect other potential defendants or to allow Heinz to mount a successful worker's compensation defense in the future. The issue is not that the asbestos defendants failed to ask the exact same questions as Heinz might have, as stated by the lower court — rather, the issue is that the defendants had no reason to ask the questions that Heinz would have asked. *See Burkhart*, 2013-Ohio-723, at ¶ 41.

Tort defendants facing claims arising out of similar facts are in fact often motivated to develop or allow harmful testimony against other potential defendants because Ohio is an apportionment state. Under Ohio Revised Code Section 2307.22, if two or more defendants are found to be less than 50% responsible for a plaintiff's injury, each defendant is liable for only their proportionate share of the damages. *See* R.C. 2307.22(B). If one defendant is found to be more than 50% responsible for a plaintiff's injury, it is jointly and severally liable for all damages. R.C. 2307.22(A)(1). Therefore, if a defendant believes that it will be found liable for a plaintiff's injury, that defendant has every motivation to develop or allow testimony that broadens the scope of potentially liable parties and reduces its potential share of damages. A court must also consider this possibility when determining if two defendants facing claims

arising out of similar facts actually shared a similar motive in developing testimony.

The above examples are not intended to provide this court with an exhaustive list of scenarios in which defendants will have different motivations regarding the development of testimony. However, both of the exemplar situations commonly influence the motivations of asbestos-tort defendants and were left completely unexamined by the lower court. Accordingly, this Court should reverse the lower court in this case and require Ohio courts to engage in a thorough analysis when determining whether the relevant parties had similar motives in developing testimony.

CONCLUSION

An Ohio litigant should not be forced to try a case with another party's evidence. This is especially true when the other party that developed that testimony did not share a genuine motive to develop testimony in the litigant's favor. To ensure that this unjust result will not occur in the future, this Court should reverse the lower court and issue an opinion that gives effect to the term "predecessor in interest" and applies its plain meaning. This Court should also instruct that, if the predecessor in interest criteria is met, Ohio courts must engage in a thorough case-by-case analysis of the motives of the relevant parties before admitting former testimony from a prior proceeding. Such an opinion will resolve decades of confusion regarding the application of Rule 804(B)(1) and prevent unfair results that violate the intent of the rule.

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CERTIFICATE OF SERVICE

I served a copy of this foregoing Answer Brief of Defendants-Appellees on the following counsel by first-class U.S. mail on August 12, 2013:

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