[Cite as *State ex rel. DeWine v. Baldarelli*, 2011-Ohio-5339.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO ex rel. MIKE DeWINE, ATTORNEY GENERAL,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-T-0086**
- vs -	:	
LEVIO BALDARELLI, d.b.a. B & B PAVING & SEALING,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CV 618.

Judgment: Affirmed.

Mike DeWine, Ohio Attorney General, *Samuel Peterson*, Assistant Attorney General, and *Thaddeus Driscoll*, Assistant Attorney General, State Office Tower, 25th Floor, 30 East Broad Street, Columbus, OH 43215-3428 (For Plaintiff-Appellant).

James A. Fredericka, Ambrosy & Fredericka, 144 North Park Avenue, Suite 200, Warren, OH 44481 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} The state of Ohio, through its Attorney General, appeals from a judgment of the Trumbull County Court of Common Pleas which granted summary judgment in favor of Levio Baldarelli. The dispute arose after Mr. Baldarelli, a paving contractor by trade, and his brother removed three residential structures on church-owned property as a favor to a cousin who was a member of the church. The state claims Mr. Baldarelli

removed the structures without complying with Ohio's asbestos inspection and reporting regulations. The trial court granted summary judgment in favor of Mr. Baldarelli. After a de novo review of the record and pertinent regulations, we affirm the trial court's judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Baldarelli is the owner of B & B Paving and Asphalt Sealing. His brother, Mark, a janitor at a school, helps him out occasionally. The company's work involves paving and patching, not demolition, although the brothers had done some demolition work around 1986 or 1988, in Pennsylvania.

{¶4} In 2003, the brothers were approached by St. Patrick Church, through a cousin who was a board member of the church, to remove three residential structures owned by the church, located near the church at 337, 343, and 347 North Main Street, Hubbard. Prior to the removal project, Mr. Baldarelli and Father O'Neill, the church's pastor, walked around the church and building grounds and discussed the project. In addition to tearing down the structures, Mr. Baldarelli was also to remove some trees and to pave the parking lot.

{¶5} As instructed by Father O'Neill, Mr. Baldarelli obtained three residential permits for the removal project from the city of Hubbard. As Mr. Baldarelli testified in his deposition, Father O'Neill never mentioned there was asbestos in the residences, and he did not think of inspecting the homes for the presence of asbestos, because he was not familiar with asbestos. He did not provide any notification to the Ohio EPA of the removal project; nor did he have the structures inspected for asbestos.

{¶6} Mr. Baldarelli's brother, Mark, rented an excavator, operated the machinery, and tore down the three residential structures over a weekend in June 2003.

Other than obtaining the permit for the project, the extent of Mr. Baldarelli's involvement was apparently that he drove over to the site twice "to see what they were doing." He stayed at the site for a total of two hours.

{¶7} The church compensated the brothers for the tree removal and paving of the parking lot in the amount of $6,000. In addition, they were allowed to salvage any valuable items found in the residences. They retrieved some cast iron tubs, which they sold for $500. No compensation was given by the church for the removal of the three structures.

{¶8} The state of Ohio, through the Attorney General, filed a complaint against Mr. Baldarelli, alleging he failed to comply with Ohio's asbestos inspection and notification requirements in connection with his involvement in the removal of three residential structures owned by St. Patrick's Church in the city of Hubbard.

{¶9} The state deposed Mr. Baldarelli regarding his participation in the removal project. Although Mr. Baldarelli testified he was not aware of the presence of asbestos in the houses, the church appears to have been so notified. During the deposition, which was filed with the court and part of the record before the trial court, counsel for the state produced a letter dated March 24, 2003, on the letterhead of A. Terreri & Sons, Inc., an environmental services general contractor. The letter was written by an asbestos hazard evaluation specialist and addressed to a "Ms. Lisa Hosack" of St. Patrick Church. It stated "[w]e have completed the necessary bulk sampling from three (3) residential structures," and advised the church that asbestos was present in the structures. Although this letter was dated prior to the removal of the structures, Mr. Baldarelli testified that he had never seen the letter.

{¶10} The state also produced a letter dated July 15, 2003 from the Mahoning-Trumbull Pollution Control Agency, addressed to "Levio Baldarelli" at B & B Paving & Sealing's business address. The letter informed Mr. Baldarelli that he had violated various requirements of the National Emission Standards for Hazardous Air Pollutants ("NESHAP") in the "demolition" of the three buildings. Mr. Baldarelli testified he had never seen this letter either. He revealed that he, his father, and his son all share the same name, and each operated their own business out of the same business address.

{¶11} The state's counsel in addition showed Mr. Baldarelli a letter, dated March 18, 2005, from the Ohio EPA, to which was attached a proposed "Director's Final Findings and Orders." The Director found him in violation of OAC R. 3745-20-03(A) and R.C. 3704.05(G), and assessed $23,000 in civil penalties. Mr. Baldarelli testified he had also never seen this document.

{¶12} **The Matter is Submitted Upon Competing Motions for Summary Judgment**

{¶13} Both parties filed a motion for summary judgment. A magistrate issued a decision granting summary judgment in favor of Mr. Baldarelli, and denying that of the state. The magistrate found Ohio's asbestos inspection and reporting regulations did not apply in this case, on the ground that the removal of three single family residences fell within the "residential exception" to these requirements. The Attorney General filed objections to the magistrate's decision. The court overruled the objections and adopted the magistrate's decision.

{¶14} The state now appeals, assigning the following error for our review:

{¶15} "The trial court erred in granting summary judgment in Appellee's favor because it incorrectly determined that Ohio's asbestos rules and regulations did not apply to Appellee's demolition activities."

{¶16} **Standard of Review**

{¶17} This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio 3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id., citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶18} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its

initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate, shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶19} The issue in this case is whether Mr. Baldarelli is liable under the asbestos regulations for his involvement in the removal of the three church-owned residential structures. We begin with a review of the pertinent regulations.

{¶20} **Asbestos Notification and Inspection Requirements**

{¶21} OAC 3745-20-03 ("Standard for notification prior to demolition or renovation") requires notification to Ohio EPA prior to "demolition or renovation" by an "owner or operator." It provides, in pertinent part:

{¶22} "(A) Each *owner or operator* to whom this rule applies shall:

{¶23} "(1) Provide the director of Ohio EPA with written notice of intention to demolish or renovate.

{¶24} "***

{¶25} "(3) Postmark or deliver the notice to the Ohio EPA field office having jurisdiction in the county where the demolition or renovation is to occur as follows:

{¶26} "(a) At least ten working days before the beginning of any demolition operation, asbestos stripping or removal work, or any other activity including salvage activities and preparations that break up, dislodge or similarly disturb asbestos material

if the operation is a demolition or renovation operation subject to this rule; ***." (Emphasis added.)

{¶27} OAC 3745-20-02 ("Standards for demolition and renovation, facility inspection, and determination of applicability") requires an asbestos inspection prior to demolitions or renovation operations. It provides, in pertinent part:

{¶28} "(A) Notwithstanding any other exclusion of this rule, and to determine which requirements of this rule and of rules 3745-20-03 and 3745-20-04 of the Administrative Code apply, each *owner or operator* of any demolition or renovation operation shall have the affected *facility* or part of the facility where a demolition or renovation operation will occur thoroughly inspected by a certified asbestos hazard evaluation specialist, in accordance with paragraph (C) of rule 3701-34-02 of the Administrative Code prior to the commencement of the demolition or renovation for the presence of asbestos ***." (Emphasis added.)

{¶29} Pursuant to these rules, when an "owner or operator" undertakes the demolition of a "facility," he or she is required to give notice to the EPA and to have inspection for asbestos performed by a certified specialist. The terms "owner or operator" and "facility" are defined by OAC 3745-20-01.

{¶30} **Definitions of "Owner or Operator," "Facility," and "Installation"**

{¶31} "Owner or operator" is defined in OAC 3745-20-01(B)(39):

{¶32} "(a) As it applies to rules 3745-20-02 to 3745-20-05 of the Administrative Code, any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or *any person who owns, leases, operates, controls or supervises the demolition or renovation*, or both ***." (Emphasis added.)

{¶33} "Facility" is defined in OAC 3745-20-01(B)(18):

{¶34} "'Facility' means any institutional, commercial, public, industrial or residential structure, *installation*, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but *excluding residential buildings having four or fewer dwelling units);* any ship; and any active or inactive waste disposal site. For purposes of this definition, any structure, installation or building that contains a loft used as a dwelling is not considered a residential structure, installation or building. ***" (Emphasis added.)

{¶35} "Installation," in turn, is defined in AC 3745-20-01(B)(28):

{¶36} "'Installation' means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator, or owner or operator under common control."

{¶37} **Trial Court's Finding Based on the Residential Exemption**

{¶38} We first determine whether the three residential structures fall under the definition of a "facility." The trial court found these structures did not qualify as a "facility" or an "installation." That determination was based on the definition of "facility" in OAC 345-20-01(B)(18), which excludes residential buildings having four or fewer dwelling units. As it was undisputed that the three houses owned by the church were residential structures, and each was a single family dwelling, the trial court determined that the three structures, which contained a total of four or fewer dwelling units individually as well as collectively, did not constitute a "facility" and therefore were not subject to the asbestos regulations.

{¶39} Our reading of OAC 345-20-01(18) indicates otherwise. Although the definition of a "facility" excludes "residential buildings having four or fewer dwelling units," this case involves a *group* of residential buildings which were owned by the

church and removed at the same time. Pursuant to OAC 3745-20-01(B)(18), such a group of residential buildings potentially qualified as an "installation."

{¶40} As defined in OAC 3745-20-01(B)(28), an "installation" means "any building or structure or any group of buildings or structures at a single demolition or renovation site that are *under the control of the same owner or operator*, *or owner or operator under common control*." Thus, a group of residential structures at a single site that are *under the control or the same owner/operator* constitutes an "installation," which is a subcategory of "facility," therefore subject to the regulations. As the state correctly observed, unlike the definition of a "facility," the definition of an "installation" does *not* contain the residential building exception.

{¶41} We also note that OAC 3745-20-01(C) incorporates by reference the rules and regulations of the Environmental Protection Agency ("U.S. EPA") set forth in "40 CFR Part 61, Subpart M; 'National Emission Standards for Hazardous Air Pollutants;' 38 FR 8820, Apr. 6, 1973, as amended at 55 FR 48414, Nov. 20, 1990." See OAC 3745-20-01(C)(2)(d). These promulgations provide additional guidance on the National Emission Standard for Hazardous Air Pollutants ("NESHAP") regulations. The following statements from the promulgations regarding the definition of "installation" are helpful here:

{¶42} "Definition of Installation

{¶43} "Comment: Commenter IV-D-83 argued that the definition of 'installation' needs clarification and asks whether a group of residential buildings would be excluded. The commenter argued that a group of residential buildings at one location being demolished or renovated by one developer should be covered.

{¶44} "Response: A group of residential buildings under the control of the same owner or operator is considered an installation according to the definition of 'installation' and is, therefore, covered by the rule. As an example, several houses located on highway right-of-way that are all demolished as part of the same highway project would be considered an 'installation,' even when the houses are not proximate to each other. In this example, the houses are under the control of the same owner or operator, i.e., the highway agency responsible for the highway project." (Emphasis added.) Although the example given concerns a group of houses removed for a public project, a public project purpose does not appear to be required for a group of residential buildings to constitute an "installation."

{¶45} Statements from "Asbestos NESHAP Clarification of Intent," 60 F.R. 38725, dated July 28, 1995, provide additional clarification on the applicability of NESHAP to residential buildings. In that document, the EPA stated: "EPA believes that the residential building exemption does not apply where multiple (more than one) small residential buildings on the same site are demolished or renovated by the same owner or operator as part of the same project ***." Id. at 38726 (footnote omitted).

{¶46} Thus, it appears the key inquiry in this case is whether the group of residential structures demolished is under the control of the same owner or operator. If it is, it qualifies as an "installation," and is therefore subject to the asbestos regulations.

{¶47} **Whether Appellee was Owner or Operator**

{¶48} Both parties briefed the "owner or operator" issue in their respective motions for summary judgment. Mr. Baldarelli asserted he was not the owner or operator; the state argued Mr. Baldarelli was the operator because he was responsible for "supervising" or "controlling" the demolition operation.

{¶49} In granting summary judgment in favor of Mr. Baldarelli, the trial court focused on the residential buildings exception to find Mr. Baldarelli not liable, without considering whether he was the owner or operator of the demolition project. On appeal, the State's brief fails to argue this issue; while Mr. Baldarelli maintains the trial court properly granted summary judgment in his favor because residential homes are excepted from the definition of "facility" and because he was not an owner or operator for purposes of the asbestos regulations. We agree with Mr. Baldarelli that the evidence did not establish him as an owner or operator of the demolition project.

{¶50} An "owner or operator" is defined as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation, or both." OAC 3745-20-01(B).

{¶51} It is undisputed the church owned the three houses. Based on the evidence contained in the record, particularly Mr. Baldarelli's deposition, we do not find a genuine issue of material fact exists regarding whether Mr. Baldarelli was an "operator" liable under the EPA regulations.

{¶52} The evidence shows that the extent of Mr. Baldarelli's participation in the removal of the three houses was rather limited: he obtained the permit for the demolition project as instructed by Father O'Neill, and he drove by the site a few times to watch as his brother operated the excavator. Mr. Baldarelli did not hire or instruct the workers, or otherwise operate, control, or supervise the removal of the houses. As reflected in the evidence presented by the state, Mr. Baldarelli's involvement in the demolition does not rise to the level of an "operator."

{¶53} The trial court properly granted summary judgment in Mr. Baldarelli's favor, albeit for the wrong reason. The trial court based its decision granting summary judgment on the ground that the three residential structures did not qualify as a "facility" because they contained a total of less than four dwelling units. As noted, although OAC 345-20-01(18) excludes a residential building having four or fewer dwelling units from the definition of a "facility," the three residential homes here, being "a group of buildings," could qualify as an "installation," thus would be subject to the regulations, if the buildings were under control of the same "owner or operator." However, because the evidence fails to establish Mr. Baldarelli as an "owner or operator," he cannot be held liable in this case.

{¶54} Upon a de novo review, we find summary judgment to be proper and therefore affirm the trial court. *State ex rel. Swain v. Bartleson,* 123 Ohio St.3d 125, 2009-Ohio-4690, ¶1 ("[w]e will not reverse a correct judgment simply because some or all of a lower court's reasons are erroneous"); *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, fn3 ("when a trial court has stated an erroneous basis for its judgment, an appellate court must affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such an error is not prejudicial").

{¶55} The assignment of error is without merit.

{¶56} **J**udgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs with Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring.

{¶57} I respectfully concur with the opinion of the majority.

{¶58} As the majority points out, the trial court, in ruling on the motion for summary judgment, never addressed appellee's assertion that he did not meet the definition of "owner or operator," in spite of the fact that appellee raised this defense and submitted evidentiary material in support of this contention in his motion for summary judgment.

{¶59} In his brief on appeal, appellee resurrected the argument that he was not an "owner or operator," as defined, and therefore had no compliance requirements. The presentation of this contention under these circumstances is most properly raised by a cross-assignment of error. R.C. 2505.22 states:

{¶60} "In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court."

{¶61} There are no clear rules established for the timing or presentation of a cross-assignment of error. However, as the majority points out, review of a motion for summary judgment is de novo. By accepting and addressing the argument raised in appellee's brief concerning his "owner or operator" status, we are essentially considering it as a cross-assignment of error. Appellant's sole assignment of error was well-taken. However, as contemplated by the statute, before the final order of the trial court is reversed, the argument raised by appellee at the trial court and on appeal should be addressed.

{¶62} Appellant notes in its reply brief that the "application of the definition of 'owner or operator' was never addressed in the court below and may not be considered now." We do not agree. It was not addressed by the trial court, but it *was* addressed by the parties. Under the circumstances of this case, the evidentiary material submitted at the trial court is sufficient to allow our de novo review and to enter final judgment affirming the result in the trial court.