**[Cite as *Poneris v. A & L Painting, L.L.C.*, 2009-Ohio-4128.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| CONSTANTINOS (GUS) PONERIS, et al., | : | |
| Plaintiffs-Appellants/Cross-Appellees, | : | CASE NOS. CA2008-05-133<br>CA2008-06-139 |
| | : | |
| - vs - | : | O P I N I O N |
| | : | 8/17/2009 |
| A&L PAINTING, LLC, et al., | : | |
| Defendants-Appellees/Cross-Appellants. | : | |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-01-0066

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**YOUNG, J.**

**{¶1}** Plaintiff-appellant/cross-appellee, Constantinos Poneris, appeals the decision of the Butler County Court of Common Pleas to deny a motion in limine and to allow the jury to hear certain testimony during trial. We affirm the decision of the trial court.

**{¶2}** Defendant-appellee/cross-appellant, A&L Painting, LLC (A&L), employed

Poneris as part of its bridge painting workforce. Poneris' job was to blast old paint away from bridges using steel grit under high pressure. In May 2002, while working on the Carnegie Bridge in Cleveland, Ohio, Poneris prepared to blast a certain portion of the bridge, but misjudged his footing on the scaffolding and fell to the metal decking below. Poneris suffered several injuries but returned to work eight days later. Eventually, however, Poneris could no longer tolerate the side effects of the injuries he sustained from his fall and had to cease working as a bridge painter.

**{¶3}** Poneris and his wife filed an intentional tort suit against A&L, claiming that A&L knew of the dangerous working conditions on the bridge, that A&L had knowledge that exposure to a dangerous condition was substantially certain to result in harm to Poneris, and despite that knowledge, A&L required Poneris to continue to perform the dangerous task. In response, A&L argued that working conditions were not dangerous, and that it provided Poneris with lifelines and safety equipment according to code. A&L asserted that despite providing its employees with proper safety equipment, Poneris chose not to wear it at the time of his accident.

**{¶4}** During the pretrial phase, both parties filed multiple motions based on reports, administrative agency decisions, depositions and other information. In particular, Poneris filed a motion in limine asking the court to apply the doctrine of res judicata to an Industrial Commission report that stated A&L did not provide Poneris with a lifeline on the day of his accident (res judicata motion). Because of that finding, Poneris asked that A&L "be precluded from asking questions of witnesses, making suggestions of, or arguing to the jury in either opening or closing statements that plaintiff was provided a lifeline on May 2, 2002. Moreover, the jury should be instructed that defendants did not provide lifelines to plaintiff on May 2, 2002." The trial court overruled the motion.

**{¶5}** Poneris also filed a motion in limine to prevent A&L from pursuing a defense

that Poneris could have avoided his fall by tying off his safety harnesses and lanyards to the bridge (tying off motion). Poneris based his argument on two Ohio Supreme Court cases that rejected the assertion that tying off to a beam was an acceptable substitute for the lifelines required by the Ohio Administrative Code.[1] Based on the case precedent, Poneris argued that if A&L was permitted to pursue the tying off defense, it would be contrary to law, unethical, and prejudicially confusing to the jury. The trial court agreed and granted the motion.

**{¶6}** During the trial, and because the trial court did not apply the doctrine of res judicata to the Industrial Commission's report, the jury heard evidence regarding the existence of lifelines at the job site on the day of Poneris' fall. Poneris did not object to the questions or references to lifelines being installed on the day Poneris fell. Additionally, and although the trial court granted the tying off motion, the jury heard testimony related to tying off. Specifically, during the direct and cross-examination of James Stanley, a safety expert and former OSHA employee, the jury heard references to the ability to tie off to the bridge and why or why not doing so would comply with OSHA regulations.

**{¶7}** A jury heard the case over a seven-day trial. After hearing extensive testimony, considering numerous exhibits, and weighing conflicting evidence, the jury returned a verdict in favor of A&L. Poneris now appeals the decision of the trial court to permit the jury to hear testimony regarding the existence of lifelines and tying off during the trial, raising two assignments of error. A&L asserts two cross-assignments, which are rendered moot by our decision.

**{¶8}** Assignment of Error No. 1:

**{¶9}** "THE TRIAL COURT ERRED IN REFUSING TO APPLY THE DOCTRINE OF

1. *State ex rel. Avalotis Painting Co. v. Indus. Comm*., 91 Ohio St.3d 137, 2001-Ohio-243; and *State ex rel. Highfill v. Indus. Comm.,* 92 Ohio St.3d 525, 2001-Ohio-1275.

RES JUDICATA TO THE OHIO INDUSTRIAL COMMISSION'S FINDING THAT NO LIFELINES WERE PRESENT ON CARNEGIE BRIDGE THE DAY PONERIS FELL."

**{¶10}** In his first assignment of error, Poneris asserts that the Industrial Commission's decision was binding on future litigation involving his fall so that the trial court erred by not applying res judicata. This argument lacks merit.

**{¶11}** Before the trial commenced, Poneris moved to apply the doctrine of res judicata to the Industrial Commission's finding that A&L failed to provide Poneris a lifeline the day he fell. Because Poneris asked the court to preclude A&L from garnering testimony or presenting evidence that it provided Poneris with a lifeline, the request is treated as a motion in limine. The trial court denied the request, finding that res judicata did not apply.

**{¶12}** A motion in limine is a "tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipated treatment of the evidentiary issue. *** Therefore, finality does not attach when a motion in limine is decided and those decisions are not final orders." *Technical Constr. Specialties, Inc. v. Shenigo Constr., Inc*., Erie App. No. E-03-004, 2004-Ohio-1044, ¶8. (Internal citations omitted.) Because of the interlocutory nature of a motion in limine, this court will not review the trial court's decision to admit or exclude evidence unless the party objects when the issue is actually reached at trial. Id.

**{¶13}** By considering the objection at the moment the issue is reached at trial, the trial court is able to determine the evidence's admissibility in its actual context. *Patterson v. Colla*, Mahoning App. No. 03 MA 18, 2004-Ohio-3033. "Therefore, failure to object to the evidence at trial waives the right of the objecting party to raise the court's ruling on the preliminary motion as error on appeal." Id. at ¶18. Based on the need to rule on evidence's admissibility given the context in which it appears at trial, the objection to such evidence or testimony needs to be contemporaneous with the given proffer so that "when a question is asked and answered without objection, the error, if any, will be considered to have been waived." Id. at

¶19.

**{¶14}** On multiple occasions, Poneris failed to object to evidence regarding lifelines, and often elicited testimony on direct or cross-examination about whether lifelines existed on the day Poneris fell. Specifically, during the direct examination of James Stanley, a safety consultant and former OSHA employee, Poneris asked Stanley several questions regarding OSHA requirements and what safety equipment employers were required to provide employees.

**{¶15}** Stanley spoke in detail about fall arrest systems and testified that they were comprised of full body harnesses, lanyards, and horizontal lifelines that are attached to safety points. Stanley then went into detail regarding what types of lifelines are available in the industry. Soon after this testimony, Poneris asked Stanley if there was "any indication that lifelines had been installed in the area where [Poneris] was working." Stanley replied, "I saw no indication at all that lifelines or horizontal lifelines or rope grabs or self retracting lifelines were installed, no."[2] Going beyond a failure to object, Poneris actually elicited the very testimony that he moved the court to prohibit in his motion in limine.

**{¶16}** Furthermore, throughout the remainder of the trial, Poneris failed to object to multiple questions about lifelines and whether A&L provided them to its workers. Specifically, on cross-examination, A&L asked Stanley if he was familiar with a report by OSHA in which the inspector concluded that A&L provided the employees the requisite safety equipment. The following exchange then occurred with no objection from Poneris:

**{¶17}** "[A&L] [The inspector] interviewed Mr. Poneris, did he not?

**{¶18}** "[Stanley] Yes.

**{¶19}** "[A&L] And that's what's referenced in this note, is it not?

**{¶20}** "[Stanley] Yep.

**{¶21}** "[A&L] And in this note it appears that Mr. Poneris had told him there were no lines to tie off to. Do you see that?

**{¶22}** "[Stanley] Yep.

**{¶23}** "[A&L] Now, the inspector didn't buy his story did he? He found that lines were up.

**{¶24}** "[Stanley] He found that lines were up at the time he was there."

**{¶25}** Again, this line of questioning is directly related to the evidence Poneris hoped to exclude via his motion in limine, yet he failed to object at the time the question was asked and answered. The trial court could have determined that the evidence and testimony was inadmissible, had it been given the opportunity to address an objection. However, Poneris failed to object, and consequently waived his right to argue the admissibility of such evidence before this court based on the trial court's ruling on the motion in limine.

**{¶26}** Poneris asserts that even if he waived the right to contest the trial court's ruling on his motion in limine, it was plain error to admit the evidence because res judicata applied.

**{¶27}** "Although in *criminal* cases '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court,' no analogous provision exists in the Rules of *Civil* Procedure. * * * In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401.

2. While Poneris claims that there was no need to object to any testimony because his own witness and others never explicitly said that lifelines were not up on the day Poneris fell, it is patently obvious that Poneris' question

(Emphasis in original.)

**{¶28}** The case at bar does not represent this kind of exceptional case the Ohio Supreme Court envisioned when it reservedly agreed that the criminal law concept of plain error could apply to a civil case. Instead, a review of the record indicates that there was no plain error because a manifest miscarriage of justice did not occur, as res judicata would not have barred testimony or evidence regarding the existence of lifelines the day Poneris fell.

**{¶29}** Res judicata encompasses related concepts of claim preclusion and issue preclusion also known as collateral estoppel. *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704. "Collateral estoppel applies when (1) the fact or issue was actually and directly litigated in the prior action, (2) the fact or issue was passed upon and determined by a court of competent jurisdiction, and (3) the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Vickers v. Vasu Communications, Inc.*, Richland App. No. 2007CA0120, 2008-Ohio-5800, ¶24.

**{¶30}** Although res judicata is traditionally applied to judicial hearings, the doctrine can be employed to prohibit the retrying of issues once they have been determined by an administrative agency. *Gerstenberger v. City of Macedonia* (1994), 97 Ohio App.3d 167. "Res judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings. An administrative proceeding is quasi-judicial for purposes of res judicata if the parties have had an ample opportunity to litigate the issues involved in the proceeding." *State ex rel. Schachter* at ¶29.

**{¶31}** In *State ex rel. Schachter*, the Ohio Supreme Court determined that res judicata applied to the administrative hearing in which the retirement board of the Public Employees Retirement System determined that the appellant was not considered a public employee and

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and Stanley's answer in this exchange was specific to, or at least included, the day Poneris fell.

was therefore not entitled to service credit. The court determined that the administrative proceeding was quasi-judicial because "notice was provided and the appeal resembled a trial, with the parties represented by counsel and presenting sworn evidence, cross-examining witnesses, and making objections." Id. at ¶30.

**{¶32}** Here, however, no such proceedings occurred so that the Industrial Commission was not acting in a quasi-judicial capacity when it rendered its determination. According to the record of proceedings, the matter was heard before Lisa Grosse, a staff hearing officer, and was specific to Poneris' application for an additional Workers' Compensation award based on A&L's violation of a specific safety requirement (VSSR). The report states that notice of the hearing was sent to Poneris and A&L and "their respective representatives." Grosse goes on to state that "neither the employer nor its attorney appeared at the hearing on the merits of the VSSR Application. Accordingly, the hearing proceeded without a record transcription."

**{¶33}** Before making her determination, Grosse considered Poneris' affidavit in which he claimed that A&L failed to provide lifelines and other personal protective equipment. In making her finding, Grosse concluded that there was a violation and that Poneris would not have been injured had A&L provided him with a lifeline or lanyard. Grosse concludes her report by stating that "this order is based on the affidavit of the injured worker contained in the claim file and the Bureau of Workers' Compensation Safety Violations Investigation Unit report contained in the claim file."

**{¶34}** However, relying on Poneris' affidavit and the Bureau of Workers' Compensation report was not enough to turn Grosse's decision into one made after a quasi-judicial administrative proceeding. Instead, A&L was not present at the hearing and was not represented by counsel, as it went out of business in 2004. Though the report indicates that notice was sent to A&L's counsel of record, A&L was not represented by counsel because it

was winding up its business, had no money to retain counsel, and was not acting as a company at the time of the hearing in 2006.

**{¶35}** Unlike the appellant in *State ex rel. Schachter*, without an appearance by A&L or representation, it is obvious that A&L was unable to present its own evidence, cross-examine Poneris and other potential witnesses, or object to any information contained in Poneris' affidavit or the Workers' Compensation report. See *Goodson v. McDonough Power Equip.* (1983), 2 Ohio St.3d 193, 202 (warning that res judicata cannot be applied rigidly because of "the principle of fundamental fairness in the due process sense. It has accordingly been adjudged that the public policy underlying the principle of res judicata must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case").

**{¶36}** Because the issue was not determined after a quasi-judicial proceeding, res judicata would not have applied to prohibit the admissibility of evidence and testimony regarding the existence of lifelines on the day Poneris fell. Therefore, having found that res judicata did not apply, Poneris' argument fails because there was no plain error or defect affecting his substantial rights, and his first assignment of error is overruled.

**{¶37}** Assignment of Error No. 2:

**{¶38}** "THE TRIAL COURT ERRED IN ALLOWING DEFENDANT-APPELLEE/CROSS-APPELLANT TO IMPROPERLY ASSERT THAT PLAINTIFFS-APPELLANTS/CROSS-APPELLEES COULD HAVE "TIED OFF" TO CARNEGIE BRIDGE."

**{¶39}** In his second assignment of error, Poneris asserts that the trial court erred in permitting A&L to imply that tying off to the bridge was permitted after the court granted his motion in limine to prohibit such evidence. There is no merit to this argument.

**{¶40}** In his tying off motion, Poneris argued that Ohio law prohibits employers from requiring its employees to tie off to structures instead of providing them with lifelines. Poneris

based this assertion on two Ohio Supreme Court Cases, and the trial court agreed and granted the motion in limine. Without passing judgment as to the merits or legality of tying off, we find that the trial court did not err in allowing the testimony relating to tying off. Instead, we apply the doctrine of invited error to the case at bar.

**{¶41}** Simply stated, "under the 'invited error' doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *Corporate Interior Systems, Inc. v. Lewis*, Butler App. No. CA2004-10-269, 2005-Ohio-6685, ¶14. "Once a party has opened the door to a subject on direct exam, the trial court has wide latitude in allowing cross-examination of the subject matter. A reviewing court should be slow to disturb a trial court's determination on the scope of cross-examination." *Sims v. Dibler*, Jefferson App. No. 05 JE 53, 2007-Ohio-3035, ¶34. (Internal citations omitted).

**{¶42}** As already discussed, during the direct testimony of James Stanley, Poneris asked him to talk about how OSHA requirements impact an employer's obligation to provide its employees with proper safety gear. Stanley explained in great detail OSHA requirements and the fall arrest system an employer is required to provide in lieu of guardrails. After discussing the harness and lanyard, Stanley then stated that the third component is a lifeline that "is attached to a device that will hold five thousand pounds dead weight per person attached to it." Poneris then asked Stanley if an employee would be served if he had a body harness but no lifeline to tie off to. Stanley replied that having a harness without a tie off would be of "no value."

**{¶43}** Given the detailed account Stanley gave of OSHA requirements and what safety measures A&L should have had in place for its employees, A&L used is cross-examination to probe into the specific wording of pertinent OSHA requirements and on which standards Stanley relied. During its cross- examination, A&L questioned Stanley regarding the definition of a fall arrest system he gave on direct examination. A&L then read directly

from the OSHA regulations regarding what a personal fall arrest system is comprised of, and then asked Stanley if the definition read was inconsistent with his direct testimony. Stanley replied that it was not, at which time the following exchange occurred:

**{¶44}** "[A&L] Your testimony on direct examination was that a personal fall arrest system is a harness, a lanyard and a lifeline, but that's not what this says does it?

**{¶45}** "[Stanley] It's not what this says, but that's what a personal fall arrest system is.

**{¶46}** "[A&L] This says 'may include,' does it not?

**{¶47}** "[Stanley] I've never seen one in the last twenty years that didn't have a lanyard, and attached to something.

**{¶48}** "[A&L] Right. The lanyard is attached to an anchorage. Do you see that?

**{¶49}** "[Stanley] I do.

**{¶50}** "[A&L] But your testimony was that the lanyard is attached to a lifeline. You remember that?

**{¶51}** "[Stanley] My testimony is the lifeline is attached to an anchorage and the lanyard is attached to the lifeline."

**{¶52}** After continuing to discuss lanyards and anchorages throughout the next few pages of trial transcripts, A&L then asked Stanley if he agreed that an anchorage "is a secure point of attachment that can support five thousand pounds." After Stanley agreed with the definition provided, A&L asked Stanley if he had seen photographs of the Carnegie Bridge and if so, what aspects of the bridge could support 5,000 pounds of weight. Stanly replied that if the bridge could not support 5,000 pounds of weight, "there's a lot of people in trouble."

**{¶53}** From this testimony, Poneris argues that A&L violated the motion in limine by eliciting an unlawful inference that tying off was possible and that Poneris' failure to do so demonstrated that he was contributory negligent. However, based on a review of the trial transcripts, the cross-examination of Stanley was well within the scope of issues covered on

direct, and the trial court did not err by permitting the testimony to occur.

**{¶54}** If Poneris did not want tie offs and anchorage points discussed at trial, he should not have raised the issue during Stanley's direct examination. While Poneris claims that the references to the bridge as an anchorage was "a blatant attempt to imply that Poneris acted negligently by not tying his lanyard to the steel bridge structure," his own expert witness opened the door by discussing anchorage points and by stating that a component to the required fall arrest system was a lifeline that "is attached to a device that will hold five thousand pounds dead weight per person attached to it." While we do not ignore the possibility that the jury could have drawn inferences regarding Poneris' failure to tie off to the bridge, A&L 's cross-examination of Stanley simply illustrated its position that it complied with the very same OSHA regulations Stanley discussed during direct examination by providing Poneris with a harness, lanyard, and proper anchorage point.

**{¶55}** If Poneris was concerned about improper inferences drawn from this and other testimony, he could have requested a limiting instruction regarding the purpose of the tying off testimony. He did not. Instead, when asked if Poneris was satisfied with the jury instructions, Poneris' counsel responded, "I believe so. The only – and again (unclear) I think we talked about the possibility of – during the course of trial the (unclear) instruction and if need be an instruction here if there's any suggestion that someone under Ohio law can tie off to a bridge. *I don't think it's gotten to that state*." After the court stated its reason for believing that no instruction was necessary, A&L stated, "and, and so in terms of the limiting instruction, I think at this stage it probably wouldn't serve any purpose." The court gave both sides the opportunity to argue the point further, and then stated that it thought the request for a limiting instruction was Poneris "speaking anticipatorily." Poneris' counsel agreed, and clarified counsel's previous statement by stating that, "I was saying only if it goes beyond what we've had so far." The parties then moved on to discuss another issue.

**{¶56}** Also during this exchange regarding jury instructions, the trial court stated that based on the circumstances of the trial and the testimony elicited regarding tying off, it had a greater understanding of the Ohio Supreme Court cases it originally relied on while determining the tying off motion. The court stated, "they were basically saying that tying off to the bridge in a manner described in *Avalotis* and *Highfill* which appeared to be just the lanyard on there was not acceptable. But that there – okay, it appears to me that according to Stanley and according to the CFR there may be – there are alternative recognized anchorage points that as long as they don't compromise the lanyard. You know, in other words I think that is – finally I understand where the beam rollers fit in. You know. That that can be an anchorage point, it can be then tied off to and secured to the structure in a way that doesn't compromise the lanyard."

**{¶57}** As we have discussed previously, a motion in limine is an interlocutory order only, and the trial court's decision does not become binding until it makes an official determination on the admissibility of the evidence at the point it is reached during trial. Throughout the trial, the court received more information and was able to clarify its understanding of the rules set forth in the Ohio Supreme Court cases it relied on when first making its decision to grant the tying off motion. During Stanley's testimony, on both direct and cross-examination, the trial court permitted questions regarding tying off and because of that, came to an understanding of when doing so to a structure may or may not be permissible. Therefore, the trial court did not err in permitting such testimony and Poneris' second assignment of error is overruled.

**{¶58}** Cross-Assignment of Error No. 1:

**{¶59}** "THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION IN LIMINE PREVENTING A&L PAINTING FROM PRESENTING EVIDENCE THAT EMPLOYEES COULD TIE OFF TO A SUBSTANTIAL STRUCTURE OR ANCHORAGE POINT."

**{¶60}** Cross-Assignment of Error No. 2:

**{¶61}** "THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE RELATED TO OSHA'S HEALTH AND SAFETY INSPECTION ON CARNEGIE BRIDGE."

**{¶62}** Because we find no merit to Poneris' two assignments of error, A&L's two cross-assignments of error are rendered moot by our decision.

**{¶63}** Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.

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