[Cite as *Burkhart v. H.J. Heinz Co.*, 2013-Ohio-723.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Mary Lou Burkhart

Appellant

v.

H.J. Heinz Co., et al.

Appellee

Court of Appeals No. WD-12-008

Trial Court No. 2011 CV 254

DECISION AND JUDGMENT

Decided: March 1, 2013

* * * * *

David S. Bates and Joshua P. Grunda, for appellant.

Keith A. Savidge and Eric D. Baker, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a summary judgment issued by the Wood County Court of Common Pleas in an R.C. 4123.512 appeal from a denial of workers' compensation death benefits. Because we conclude that the trial court abused its discretion in sustaining multiple motions to strike evidence and, with proper consideration of such evidence, questions of material fact preclude an award of summary judgment, we reverse,

{¶ 2} Appellant is Mary Lou Burkhart, widow of Donald Burkhart. Following his release from World War II service in the Marine Corps, in 1946 Donald Burkhart began working at the Bowling Green ketchup bottling plant operated by appellee, H.J. Heinz, Co. He worked there as a maintenance worker/electrician until the plant closed in 1975, at which point he transferred to appellee's Fremont plant where he worked until he retired in 1986. Subsequent to his retirement, Donald Burkhart developed mesothelioma, a pulmonary cancer due to exposure to asbestos.

{¶ 3} Believing that his disease was caused by exposure to asbestos in his work environment, Donald Burkhart initiated a products liability suit against certain asbestos manufacturers in the Cuyahoga County Common Pleas Court. As part of this suit, Burkhart was subject to a 2006 video deposition by attorneys for the asbestos manufacturers. In this deposition, Burkhart described the white insulation on the pipes at the Bowling Green Heinz plant. Burkhart testified that he was told by Heinz managers this insulation was asbestos. According to Burkhart, one of his duties was to repair frayed or missing insulation on the pipes. The disposition of that suit is not in the record before us. Donald Burkhart died in 2007.

{¶ 4} After her husband's death, appellant filed for death benefits with the Ohio Bureau of Workers' Compensation. When appellee contested the claim, the matter was heard before an Ohio Industrial Commission hearing officer who found that, based on the 2006 deposition, appellant failed to show workplace asbestos exposure. Subsequently, a staff hearing officer also found insufficient evidence of exposure and denied the claim.

{¶ 5} On March 24, 2011, appellant appealed the Industrial Commission's decision and, pursuant to R.C. 4123.512, re-filed her complaint in the trial court. Appellee again contested the claim and moved for summary judgment. Appellant filed a 389-page response to appellee's motion. This response included a transcript of Donald Burkhart's 2006 video deposition, medical records, affidavits of co-workers, invoices showing delivery of asbestos pipe insulation to the Bowling Green plant, an environmental report on asbestos pipe insulation in the Fremont plant, interrogatories from a Summit County asbestos litigation and the reports of experts opining that Burkhart's disease was caused by his exposure to asbestos at Heinz.

{¶ 6} Appellee responded with a motion to strike much of appellant's supporting material. Appellee argued it was not a party to the Cuyahoga County asbestos suit, therefore, the Donald Burkhart depositions from that suit should not be considered in this matter. The affidavit authenticating the invoices showing the sale of asbestos pipe insulation to the Bowling Green plant failed to allege personal knowledge. The portion of medical records that attributed Donald Burkhart's disease to asbestos at the Heinz plants was hearsay, not for purposes of medical diagnoses. Co-worker affidavits were conclusory or opinions. Asbestos abatement documents for the Fremont plant were not properly authenticated. Expert opinions were predicated on inadmissible evidence.

{¶ 7} The court struck the asbestos insulation invoices, the Donald Burkhart depositions, the interrogatories, co-worker affidavits, portions of medical records attributing Donald Burkhart's disease to asbestos exposure at Heinz and expert testimony

based on any of the stricken documents. The court then denied appellant's request for reconsideration of the evidentiary rulings and entered summary judgment in favor of appellee, concluding that, without the support of the stricken materials, appellant failed to present evidence of exposure to asbestos in the workplace. From this judgment, appellant now brings this appeal.

{¶ 8} Appellant sets forth the following six assignments of error:

Assignment of Error No.1

The Trial Court Erred in striking certain invoices from Owens-Corning Fiberglas Corporation to the H.J. Heinz Bowling Green facility.

Assignment of Error No. 2

The Trial Court Erred in striking Owens-Corning Fiberglas Corporation's Supplemental Responses to Interrogatories.

Assignment of Error No. 3

The Trial Court Erred in striking certain statements from Donald Burkhart's medical records composed by Dr. Bahu S. Shaikh.

Assignment of Error No. 4

The Trial Court Erred in striking the Videotape Deposition of Donald Burkhart.

Assignment of Error No. 5

The Trial Court Erred in striking the expert reports of William Ewing and Dr. Stephen Demeter.

Assignment of Error No. 6

The Trial Court Erred in granting Defendant-Appellee H.J. Heinz Company's motion for summary judgment.

{¶ 9} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but

must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 11} Civ.R. 56(E) governs the types of material which may be used to support or defend against a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

{¶ 12} Documents submitted in defense against a motion for summary judgment must be properly "sworn, certified or authenticated by affidavit" or they may not be considered in determining whether there is a triable issue of fact. *Green v. B.F. Goodrich Co.*, 85 Ohio App.3d 223, 228, 619 N.E.2d 497 (9th Dist.1993).

{¶ 13} Decisions concerning the admission or exclusion of evidence are within the discretion of the court and will not be reversed absent an abuse of that discretion. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 20. The term "abuse of discretion" connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

I. Insulation Invoices

{¶ 14} In her first assignment of error, appellant asserts that the trial court abused its discretion in striking invoices from Owens Corning Fiberglas Company for asbestos containing pipe insulation delivered to appellee's Bowling Green plant between 1957 and 1961.

{¶ 15} At issue is the affidavit of Andrew Oh, Director of Analysis Research Planning Company, who authenticated copies of invoices from Owens Corning to appellee for the sale and delivery to appellee's plant of an asbestos containing pipe insulation product trade named "Kaylo." Appellee moved to strike these documents as irrelevant and on the ground that affiant Oh had no personal knowledge of appellee's Bowling Green plant. The trial court struck the invoices, concluding that Oh did not have personal knowledge of the invoices. As a result, the invoices were hearsay for which there was no exception.

{¶ 16} The trial court's decision to strike these invoices was erroneous. Andrew Oh's affidavit states that he has personal knowledge of the matters to which he testifies

and states that he is "authorized and qualified to attest to matters involving the Kaylo sales invoices" contained in a database established for the Owens Corning Asbestos Personal Injury Trust. He then outlines how the database was established and avers that the documents attached are authentic invoices recorded at or near the time of the transactions by persons with knowledge of and a business duty to record such matters. The invoices were kept by Owens Corning in the course of a regularly conducted activity, according to Oh's affidavit.

{¶ 17} Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(A). Hearsay is not admissible into evidence unless an exception is provided by law or rule. Evid.R. 802. Evid.R. 803 provides exceptions to the hearsay rule for when the declarant is available as a witness. Evid.R. 803(6) makes admissible certain business records. The rule provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes

business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶ 18} There are four essential elements that must be shown for hearsay to be admitted under the rule as a business record:

> (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the "custodian" of the record or by some "other qualified witness." 1 Weissenberger, Ohio Evidence, Section 803.73, 124 (2012); State v. Davis,116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 171.

{¶ 19} Andrew Oh testified that he was authorized to attest to matters concerning Kaylo sales and the attached invoices were authentic. They were records of business activity recorded contemporaneous to the transactions by persons with knowledge. The documents were kept in the normal course of business. Appellee made no attempt to impeach any of Oh's statements. Oh needed no personal knowledge of the transactions themselves under the rule. He need only aver that the documents are authentic and produced in qualifying circumstances. On its face, Andrew Oh's affidavit succeeds in that regard.

{¶ 20} Concerning appellee's relevance objection, any evidence that makes the existence of a fact of consequence more or less probable is relevant. Evid.R. 401. Since

the presence of asbestos at appellee's Bowling Green plant is a fact of consequence, appellee's relevance objection is misplaced.

{¶ 21} Since the insulation invoices were both relevant and authentic, the trial court's decision to strike the documents was unreasonable. Accordingly, appellant's first assignment of error is well-taken.

II. Videotape Deposition

{¶ 22} Because consideration of the testimony by Donald Burkhart in his videotape deposition in the Cuyahoga County proceedings is dispositive in other assignments of errors, we shall next consider appellant's fourth assignment of error.

{¶ 23} In its motion to strike the video deposition, appellee conceded that a deposition from another proceeding may be treated as an affidavit and considered for summary judgment purposes when the testimony is from personal knowledge and the witness is available to testify at trial. *See Hastings Mut. Ins. v. Halatek*, 174 Ohio App.3d 252, 2007-Ohio-6923, 881 N.E.2d 897, ¶ 25 (7th Dist.). Since Donald Burkhart is deceased, however, he is unavailable as a witness at trial and the court may not consider the deposition, appellee maintained.

{¶ 24} The only remaining way that the court may consider the deposition would be as a hearsay exception for former testimony found in Evid.R. 804(B)(1), but this path too is unavailable, appellee argued. The rule allows testimony from a different proceeding only if the party against whom it is now offered was a party to the prior proceeding or a predecessor in interest, with a similar motive to develop testimony and

had an opportunity to examine the witness. Appellee asserts it was not a party to the Cuyahoga County asbestos litigation and was not represented there by a predecessor in interest. As a result, appellee insisted, the video deposition should be stricken.

{¶ 25} The court found that there was no evidence that Heinz or a predecessor in interest was involved in prior litigation and struck the transcript of the video deposition. In her fourth assignment of error, appellant asserts that this determination was wrong. According to appellant, there were no less than 25 parties in the Cuyahoga County asbestos litigation, each with a motive to discredit Donald Burkhart's assertion of exposure to asbestos.

{¶ 26} Appellee responds that it undisputed that it was not a party in the Cuyahoga County asbestos litigation. It had no predecessor in interest in the litigation. Moreover, those parties involved did not represent appellee's interests and were not similarly motivated. Appellee points to a specific portion of testimony as an exemplar of these divergent motives. In an inquiry by counsel for Cuyahoga County defendant Standard Oil, there was the following exchange:

> Q: All right. Now, in 1946, you said that you went into the boiler room, what did you have to do in the boiler room, what was your job?
>
> A: Well, like I said, Heinz never throwed nothing away, and this asbestos stuff was knocked off the pipes, had to put it in a bucket and saved it and we would, in spare time, would beat it to pieces, make a paste out of it and put it back on the pipes.

Q: Okay. And would these be the pipes in the boiler room?

A: Yes, or anyplace else.

Q: Now, when you say this asbestos stuff –

A: Well, it was flaky, they called it asbestos, I don't know what it was.

Q: Who is they that called it asbestos?

A: Management.

{¶ 27} Appellee insists that if the defendants in the Cuyahoga County case had truly been of similar motive to it, they would have inquired as to the identity of the person or persons in management who characterized the substance as asbestos.

{¶ 28} Evid.R. 804(B)(1), in material part, provides:

(B) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony**. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, 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. * * *. (Emphasis added.)

{¶ 29} Evid.R. 804(B)(1) is patterned after the federal rule. Its language is identical to the original Fed.R.Evid. 804(b)(1). Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1942.[1]

{¶ 30} At issue is whether the defendants in the Cuyahoga County asbestos suit are predecessors in interest to appellee. A survey of the Ohio cases in which Evid.R. 804(B)(1) was an issue reveals that the vast majority are either criminal proceedings or concern whether the prior deponent was indeed unavailable. The few cases that touch on the qualifications of a predecessor in interest under the rule simply conclude that the party in the prior proceeding akin to the party against whom the testimony is offered in the current suit must have had an opportunity and similar motive. *House of Wheat v. Wright*, 2d Dist. No. 8614, 1985 WL 17381 (Oct. 10, 1985), *Whitaker v. Weinrich*, 12th Dist. No. CA86-12-179, 1987 WL 28437 (Dec. 14, 1987), *Shepard v. Grand Trunk W. R.R., Inc.*, 8th Dist. No. 92711, 2010-Ohio-1853, ¶ 77. *Compare Yates v. Black*, 9th Dist. No. 13525, 1988 WL 133675 (Dec. 7, 1988). These cases seem in conformity with what appellant characterizes as the dominant federal interpretation of the rule as articulated in *Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.1978).

{¶ 31} Lloyd and Alverez were seamen involved in a fight on a U.S. flagged merchant marine vessel in Japan. Subsequently, the Coast Guard convened an inquiry to determine whether Lloyd's merchant mariner's document should be suspended.

[1] The language of the rule was restyled in 2011. No change in the substance of the rule was intended. 2011 Advisory Committee Notes, Fed.R.Evid. 804.

Concurrently, Lloyd sued the ship's owner. The ship's owner joined Alverez as a third-party defendant and Alverez, in turn counterclaimed against the ship owner.

{¶ 32} Lloyd disappeared. The suit continued on Alverez' counterclaim. *Id.* at 1181. During trial, the ship owner attempted to introduce portions of Lloyd's testimony before the Coast Guard inquiry, but the court denied admission. The jury returned a verdict in Alverez' favor. On appeal, the ship owner assigned as error the trial court's refusal to admit Lloyd's prior testimony. *Id.* at 1182.

{¶ 33} The appeals court reversed, concluding that Lloyd's prior testimony should have been admitted pursuant to Fed.R.Evid. 804(b)(1). The court noted that clearly Lloyd was unavailable and that the Coast Guard hearing was conducted before a professional hearing examiner, under oath and that Lloyd was subject to direct and cross-examination. *Id.* at 1183.

{¶ 34} The issue, according to the appeals court, was whether Alverez or a "predecessor in interest" had an opportunity and similar motive to develop testimony at the inquiry. The court noted that Congress did not define the term "predecessor in interest," but left to the courts the interpretation of the phrase. *Id.* at 1185. The court examined the legislative history of the provision and concluded a "predecessor in interest" is a party with a motive similar in interest to the party against whom the prior testimony would be offered. *Id.*

> "[I]f it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was

accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, 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. *Id*. at 1186, quoting McCormick, Handbook of the Law of Evidence Section 256, at 619-621(2d Ed.1972).

{¶ 35} On the facts before it, the court concluded that the Coast Guard and Alverez shared a "sufficient community of interest" to satisfy the rule.

Alvarez sought to vindicate his individual interest in recovering for his injuries; the Coast Guard sought to vindicate the public interest in safe and unimpeded merchant marine service. Irrespective of whether the interests be considered from the individual or public viewpoints, however, the nucleus of operative facts was the same the conduct of Frank Lloyd and Roland Alvarez aboard the [ship]. Id. (Footnote omitted.)

{¶ 36} While acceptance of the *Lloyd* test for "predecessor of interest" has not been universal, *see* Lawrence, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining A Predecessor In Interest*, 42 U.Miami L.Rev. 975 (1988), its holding has been adopted by federal and state courts in several circuits, including our own Sixth Circuit. *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir.1983), *Dykes v. Raymark Ind., Inc.*, 801 F.2d 810, 816 (6th Cir.1986), *Burke v. Johns-Manville*, S.D.Ohio No. C-1-81-289, 1983 WL 314571 (Nov. 3, 1983), *New England*

Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 651(10th Cir.1989), *In re Screws Antitrust Litigation*, 526 F.Supp. 1319 (D.C.Mass.1981), *Athridge v. Aetna Cas. and Sur. Co.*, 474 F.Supp.2d 102, 115-116 (D.D.C.2007), *Rich v. Kaiser Gypsum Co.*, 103 So.3d 903 (Fla.App.2012), *White Pine Ranches v. Osguthorpe*, 731 P.2d 1076, 1079 (Utah 1986).

{¶ 37} Both Sixth Circuit cases were asbestos cases and both involved the admission of prior deposition testimony from an expert witness in a proceeding unrelated to either party in the pending actions. Dr. Kenneth Smith had been a physician for asbestos manufacturer Johns-Manville for 22 years. He testified in a deposition in a Pennsylvania asbestos case concerning the manufacturer's prior knowledge about asbestos diseases. By the time of the *Clay* and *Dykes* cases, Smith had died.

{¶ 38} In *Clay*, the trial court refused to admit Smith's deposition because neither of the parties in *Clay* was in privity with any of the parties in the case in which the Smith deposition was taken. The appeals court reversed, concluding that the defendants in the Pennsylvania case had a similar motive to the *Clay* defendants in confronting Dr. Smith's testimony. Applying *Lloyd*, the court found that Fed.Evid.R. 804(b)(1) was satisfied. *Clay* at 1295.

{¶ 39} In *Dykes*, the district court admitted Dr. Smith's deposition. On appeal, the Sixth Circuit again applied *Lloyd* and affirmed the district court's ruling. *Dykes*, 801 F.2d at 817.

{¶ 40} *Lloyd* is well reasoned and in conformity with Ohio cases concerning the definition of "predecessor in interest" as used in Evid.R. 804(B)(1). There is also merit

in applying the rule in conformity with the federal courts of this circuit. Accordingly, we adopt the *Lloyd* holding.

{¶ 41} Applying this to the facts before us, we conclude that the defendants in the Cuyahoga County asbestos cases and appellee share the same position with respect to appellant: all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos. In that regard, the Cuyahoga County asbestos defendants had the same motive to develop testimony through direct and cross-examination as appellee. As to appellee's argument that the questioners at the Burkhart video deposition did not ask the exact same questions as appellee might have, this is not required. *See Whitaker,* 12th Dist. No. CA86-12-179, 1987 WL 28437.

{¶ 42} The Cuyahoga County asbestos defendants were predecessors in interest and shared the same motive to develop testimony as appellee. As a result, Donald Burkhart's video deposition testimony in the prior proceeding was admissible pursuant to Evid.R. 804(B)(1) and the trial court acted unreasonably in refusing to consider such testimony on summary judgment. Accordingly, appellant's fourth assignment of error is well-taken.

III. Expert Witness Reports

{¶ 43} In her fifth assignment of error, appellee complains that the trial court should not have stricken the affidavits of expert witnesses William Ewing and Dr. Steven Demeter.

{¶ 44} The court did not expressly strike the Ewing affidavit, but questioned it on the ground that it improperly relied on the Burkhart deposition and the Owens Corning Kaylo invoices. Moreover, the court also faulted the expert's reliance on co-worker affidavits in which the affiants averred that Burkhart worked in areas where they believed asbestos insulation was present. The court stated the same grounds for striking Dr. Demeter's affidavit.

{¶ 45} We have already held the Kaylo invoices and Burkhart's prior deposition testimony admissible. The same is true of the co-worker affidavits. The court parses the language of the affidavit of former Bowling Green Heinz personnel manager Leland Bandeen. Bandeen averred that he believed Donald Burkhart was exposed to asbestos wrapped steam pipes throughout the plant. In his deposition testimony, Bandeen testified that he saw Burkhart in the boiler room with pipes wrapped with what he recognized as asbestos. As to whether Bandeen had a proper basis for thinking the material was indeed asbestos, that goes to the issue of weight of the evidence, not admissibility. The same is true of the affidavit of Burkhart's co-worker, Wally Koons.

{¶ 46} Accordingly, it was unreasonable for the court to strike the affidavits of Dr. Demeter and Mr. Ewing. Appellant's fifth assignment of error is well-taken.

IV. Physician Letter

{¶ 47} Appellant complains in her third assignment of error that the trial court erred in striking a portion of a letter from Donald Burkhart's treating physician, Dr. Bahu S. Shaikh, to the referring physician from the Cleveland Clinic. The court struck

the portion of the document that stated Burkhart had "a history of asbestos exposure while working in the Heinz plant." The court found that, since Burkhart had already been diagnosed with mesothelioma, the stricken statement was not relevant to the treating physician's diagnosis or treatment and, therefore, not properly admissible hearsay through Evid.R. 803(4).

{¶ 48} Evid.R. 803 provides exceptions to the exclusion of hearsay when the availability of the declarant is immaterial. Evid.R. 803(4) exempts:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶ 49} The trial court's decision here is somewhat perplexing. The letter to the referring physician was, for the most part, a summary of the information transmitted with the referral and informing the referring physician of a planned course of treatment. Mesothelioma arises exclusively from asbestos exposure and the fact of such exposure is certainly relevant to diagnosis and treatment. Simply because a diagnosis has been made does not mean that the record must now be purged of relevant information obtained in the course of diagnosis.

{¶ 50} The medical treatment exception to the hearsay rule is premised on the presumption that a statement made for treatment and diagnosis "generally guarantees trustworthiness: the declarant has a motive to tell the truth because his treatment will

depend upon what he says." Weissenberger, *Ohio Evidence*, Section 803.45, 100 (2012). We fail to see how such a statement becomes less trustworthy after there is a diagnosis. Striking such a statement is unreasonable. Accordingly, appellant's third assignment of error is well-taken.

V. Supplemental Response to Interrogatories

{¶ 51} Appellant's exhibit No. 7 with her memorandum in opposition to summary judgment contains certain pages from a "Supplemental Response to Plaintiffs' Master Discovery Requests" by Owens Corning Fiberglas Corporation in a Summit County Common Pleas Court case, *In re: Northern Ohio Tireworker Asbestos Litigation*, Summit C.P. No. 88-04-1087, et seq. (Sept. 23, 1994). Appellee moved to strike the exhibit on the ground that it had not been properly authenticated. The court struck the exhibit on the ground that it had not been filed in the present action. In her second assignment of error, appellant asserts this ruling was erroneous.

{¶ 52} The supplemental response itself is authenticated by the notarized signature of one who purports to be authorized to make such responses by Owens Corning. The authenticity of the copy of the document is attested in an affidavit by appellant's counsel. Absent contradictory evidence, these attestations are sufficient to establish the authenticity of this document.

{¶ 53} As to whether the "answers to interrogatories" which Civ.R. 56(C) expressly includes as a basis for consideration is limited to those in the present matter only, the rule provides that:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment * * *. No evidence or stipulation may be considered except as stated in this rule.

{¶ 54} It is interesting to note that, until a 1999 amendment, the rule read "transcripts of evidence in the pending case." The amendment removed the phrase "in the pending case" so that transcripts of evidence from another case could be filed and considered in deciding the motion. Civ.R. 56(C), Staff Note to 7-1-99 Amendment. Indeed, prior to the amendment, transcripts from different cases could not be considered. *See Frazier v. Sites*, 4th Dist. No. 1679, 1984 WL 5674 (Dec. 3, 1984).

{¶ 55} Clearly, the drafters of the rule were capable of using language restricting the material that may be considered to that in the pending case. Since "answers to interrogatories" was not so restricted, we may conclude that the interrogatories that may be considered are not limited to those in the pending case. Accordingly, the trial court erred in striking exhibit No. 7. Appellant's second assignment of error is well-taken.

VI. Summary Judgment

{¶ 56} An employee who becomes disabled or dies as the result of an occupational disease is entitled to compensation. R.C. 4123.68. Mesothelioma is an occupational disease caused by exposure to asbestos. *State ex rel. Pilkington N. Am. v. Indus. Comm.*,

118 Ohio St.3d 161, 2008-Ohio-1506, 887 N.E.2d 317, ¶ 3. To establish a claim for mesothelioma, the employee or the employee's dependent must show an injurious exposure to asbestos in the employee's workplace. An injurious exposure is that which proximately causes the disease or augments or aggravates a pre-existing condition. *State ex rel. Hall China Co. v. Indus. Comm.*, 120 Ohio App. 374, 377, 202 N.E.2d 628 (10th Dist.1962). Proof of exposure with the last employer is a sufficient basis for an award, even though other employment may have contributed to the occupational disease. *State ex rel. Burnett v. Indus. Comm. of Ohio*, 6 Ohio St.3d 266, 268, 452 N.E.2d 1341 (1983).

{¶ 57} Donald Burkhart testified that there was asbestos at the Bowling Green Heinz site, that he was exposed and, indeed, regularly worked with this material. The sales records from Owens Corning support a reasonable inference of the presence of asbestos in the Bowling Green Heinz plant. The affidavits of Wally Koons and Leland Bandeen support appellant's assertion that Burkhart was exposed to asbestos at least in the boiler room of the plant. The medical experts agree that Burkhart had mesothelioma and that the cause of this disease was his exposure to asbestos.

{¶ 58} Construing the evidence in favor of the non-moving party, we can only conclude that appellant presented evidence which, if believed, establishes that he was injuriously exposed to asbestos at the Heinz plant in Bowling Green and possibly Fremont. Whether Burkhart, or Koons, or Bandeen had the expertise to properly identify asbestos insulation is a question of fact. Whether the asbestos at either location was friable is a question of fact. When there are questions of material fact, summary

judgment is inappropriate. Accordingly, appellant's sixth assignment of error is well-taken.

{¶ 59} On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to said court for trial. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE