ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 17-0635

CLARKWESTERN DIETRICH BUILDING SYSTEMS LLC d/b/a CLARKDIETRICH,

Appellant,

v.

CERTIFIED STEEL STUD ASSOCIATION, INC., *et alia*,

Appellees.

Appeal from the Butler County Court of Appeals, Twelfth Appellate District

Court of Appeals Case No. CA2016-05-098

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CLARKWESTERN DIETRICH BUILDING SYSTEMS LLC d/b/a CLARKDIETRICH

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EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

This case under Ohio's Valentine Act, R.C. 1331.01 *et seq.*, raises a critical question for Ohio antitrust enforcement: can an antitrust claim be established when a product is excluded from a *segment* of the market or only when it is *completely* excluded? The Court of Appeals, in effect, required total exclusion. This precedent runs counter to basic economic principles about harm to competitive markets, is inconsistent with federal antitrust law, and reduces the effectiveness of the Valentine Act. Antitrust cases are inherently ones of public and great general interest because anticompetitive conduct impacts the public as consumers of goods and services. Antitrust litigation "vindicate[s] the public interest in free competition." *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969). "Antitrust laws in general . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). This Court's review is important to ensure that the Valentine Act remains an important tool for ensuring free and open markets for the benefit of Ohio's citizens.

This case involves the manipulation of industry standards by the defendants to disadvantage their biggest rivals in the nonstructural steel framing industry. The defendants – members of a trade association and the trade association itself – conspired to adopt requirements in a building code compliance program that were intended to prevent the sale and use of an innovative product. This innovative product provided a significant cost advantage over traditional products and thereby restrained overall pricing of nonstructural steel framing products.

To belong to the trade association, companies had to comply with the requirements of

this compliance program, including the ones aimed at eliminating the innovative product. And membership in the trade association mattered. This conspiracy worked because many industry specifications – written requirements governing building methods and acceptable products for construction projects – required membership in the trade association. By effectively outlawing the innovative product among members of the trade association, the defendants ensured that the innovative product could not be used for any projects with specifications requiring membership in the trade association. This conduct forced the suppliers of the innovative product to choose between two options, either of which would harm themselves as well as the marketplace: either (1) stay in the trade association, abandon the innovative product, and produce only traditional products; or (2) continue to produce the innovative product, leave the trade association, and be precluded from selling that product to many customers.

The Court of Appeals affirmed the summary judgment for the defendants on the basis that the plaintiff – ClarkWestern Dietrich Building Systems LLC ("ClarkDietrich") – was still able to sell its innovative product notwithstanding the defendants' conduct. The Court of Appeals rested its decision on the fact that, because membership in the trade association was not required to sell this type of product, ClarkDietrich was able to continue selling the innovative product in a *portion* of the market. Therefore, the Court of Appeals held, ClarkDietrich had not shown harm to competition (as opposed to harm to itself), which is required for the type of antitrust claim brought here.

The Court of Appeals brushed aside evidence that the defendants' conduct made the innovative product unavailable to a large segment of the market – as much as 70% of the customers for these products. Thus, the Court of Appeals required that a product be *completely* excluded from a market to show harm to competition. This ignores harm to that portion of the

market for which the defendants' conduct made the innovative product unavailable. And it makes for bad antitrust precedent.

First, this precedent is at odds with basic principles of economics. Antitrust law ultimately protects consumers, and harm to consumers can arise from anticompetitive conduct that does not *completely* exclude a product from the market. As ClarkDietrich's economist explained:

> It is not necessary for the innovative product to be completely excluded from the market for injury to competition to have occurred. Partial exclusion, or simply raising the cost of producers of the lower cost product to reach the market, can adversely affect competition.

It is nearly self-evident that consumers in the *segment* of the market affected by anticompetitive conduct are harmed, even if consumers in another segment of the market may not be. In this case, for example, there was evidence that consumers in a large segment of the market were not able to use the innovative product supplied by ClarkDietrich. Moreover, there was evidence that the innovative product had a restraining effect on the pricing of all products in the market. Indeed, the Court of Appeals found that the innovative product "had a restraining effect on market prices and certain competitors of ClarkDietrich reduced their prices on the traditional . . . products to compete with ClarkDietrich's new . . . product." The only logical conclusions from this evidence are that (1) consumers in a segment of the market were unable to purchase the innovative product, and (2) prices in that segment were not subject to the same restraining forces as elsewhere. That is obviously harm to competition – even though the product was not totally excluded from the market.

Second, this precedent is inconsistent with federal antitrust precedent. "Ohio has long followed federal [antitrust] law in interpreting the Valentine Act." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 8, 834 N.E.2d 791. And federal precedents make clear

that exclusion of a product from a segment of the market is enough to establish harm to competition. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (exclusion from a segment of the market is a harm to competition); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370-71 (5th Cir. 1980). In the *Visa* litigation, for example, the United States Court of Appeals for the Second Circuit found that the exclusion of American Express from a *segment* of the market was "the most persuasive evidence of harm to competition." 344 F.3d at 240. Visa and MasterCard prevented the banks that issued Visa or MasterCard credit cards from issuing American Express or Discover credit cards or using "network services" for credit cards offered by American Express or Discover. *Id.* This practice violated antitrust law, because American Express and Discover were thereby excluded from selling services to Visa-issuing and MasterCard-issuing banks, and those banks were prohibited from using American Express or Discover network services. *Id.* The Second Circuit therefore found harm to competition even though American Express and Discover had access to other financial institution customers and therefore were not excluded entirely from the market. *Id.*

Third, this precedent reduces the effectiveness of the Valentine Act as a tool for ensuring free and open markets. The antitrust laws embody "the fundamental national values of free enterprise and economic competition . . . ." *Federal Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 133 S.Ct. 1003, 1010 (2013). If collusion must entirely exclude an innovative product before the Valentine Act provides a remedy, then that Act will become useless in many instances of anticompetitive conduct. This result is contrary to the General Assembly's intent to provide a strong state law remedy for conduct that interferes with the workings of competitive markets.

For all of these reasons, this Court's review is important to secure the critical role of the Valentine Act in protecting Ohio businesses and consumers.[1]

STATEMENT OF THE CASE AND FACTS

Relevant products. Structural and nonstructural steel framing products, rather than wood studs, are used to frame almost all commercial buildings in the United States because the International Building Code ("IBC") requires noncombustible framing materials. Structural framing products support the weight of the building itself. Nonstructural framing products provide framing for gypsum drywall. This case is about nonstructural framing products. Traditionally, manufacturers of these products made them from prime steel with a "G40" coating – a zinc-based coating providing corrosion protection. The IBC includes standards for the coatings on nonstructural steel framing products.

Plaintiff. ClarkDietrich is a joint venture formed by ClarkWestern Building Systems LLC ("ClarkWestern") and Dietrich Industries, Inc. ("Dietrich") in March 2011, shortly after many of the relevant events occurred. This memorandum sometimes refers to ClarkDietrich as a shorthand way of describing its predecessors.[2]

ClarkDietrich's innovation. In 2010, ClarkWestern and Dietrich produced nonstructural steel framing products through an innovative "cold reduction" process that provided a significant cost advantage. This process uses less expensive secondary steel. The cold reduction process involves running steel coils through a cold-reduction mill – involving large, powerful rollers – resulting in thinner but more rigid sheets of steel. The reduction process also makes the thinned

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[1] This Court has not considered the Valentine Act since 2005. *See Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 8, 834 N.E.2d 791.

[2] The trial court held that ClarkWestern and Dietrich had properly assigned their antitrust claims to ClarkDietrich.

steel stronger, so a nonstructural steel stud can be made from less steel, providing another source of cost savings.

The existing coating on secondary steel may or may not meet IBC standards, and the reduction process can damage the existing coating. Therefore, ClarkDietrich applies an additional proprietary coating that bonds with the coating already on the reduced steel. The combined coating meets applicable IBC requirements in that it provides corrosion resistance equal to or better than a standard G40 coating. ClarkDietrich calls this "G40EQ," signifying that the products have an alternative coating equivalent to (or better than) G40.

In 2010, only a small number of competitors – including ClarkWestern and Dietrich – were using cold reduction technology to produce nonstructural steel framing products. Executives of the defendants admitted that this provided a cost advantage as high as 10-20%.

Because of its significant cost advantage, the G40EQ product exerted a restraining force on market prices. The owner of one defendant testified that ClarkDietrich had "depressed price on those products" and that "overall pricing is reduced" by G40EQ. Another defendant's vice president testified to having to cut prices on its traditional G40 products to match G40EQ pricing. The court of appeals acknowledged this effect, finding that "the G40EQ product had a restraining effect on market prices and certain competitors of ClarkDietrich reduced their prices on the traditional G40 NSSF products to compete with ClarkDietrich's new G40EQ product."

Specification requirements. In 2010, the steel framing industry's trade association was the Steel Stud Manufacturers Association ("SSMA"). The SSMA represented 85% or more of industry volume at the time, including all of the competitors in this case. The SSMA had successfully lobbied architects and specification writers to include a requirement of SSMA membership in specifications for building projects. Architects provide specifications for

projects, which they either write themselves or outsource to specification writers, that dictate what types of materials must be used as well as how the project is to be constructed. Contractors generally must follow those specifications.

SSMA members benefited substantially from the SSMA's success in getting architects and specifiers to include an SSMA-membership requirement in specifications covering steel framing. One executive wrote in an email that about 70% of specifications required SSMA membership. A former employee of a defendant likewise testified that specifications that listed SSMA products "became the norm" and represented as much as 70% of specifications.

Specifications in this industry have a long-lasting effect. Project specifications for a given construction project rarely start from scratch. Instead, architectural firms usually start with a "master spec" that is then adapted for a particular project. In some instances, architectural firms do not use their own master specs, but one developed by a specification writer, who may have many architectural firm clients all using the same master spec. As a result, once a requirement or prohibition is written into a specification (particularly a master specification), it tends to persist for a very long time across many construction projects. And defense witnesses testified that it was difficult to get specifications changed or to get a particular manufacturer's product allowed if the specification as written did not permit it.

SSMA's sham standard targeting innovation. In early 2010, the SSMA created a technical task force to develop an IBC compliance program for nonstructural steel products. The IBC did not always provide ready answers as to how to apply its standards or test them. The SSMA's code compliance program was supposed to solve that problem. The task force worked for eight months, publishing a draft program in August 2010. The draft program did not contain an "elongation" requirement (relating to the rigidity of steel) because the IBC contained no such

requirement for nonstructural steel framing products. The draft program did contain a standard for coatings, but it was one that G40EQ products (and other products) would satisfy.

The code compliance program changed radically once the draft was submitted to the SSMA Board of Directors. Several board members orchestrated the insertion of an elongation requirement and a more restrictive coatings provision into the nonstructural code compliance program. These board members recognized that the use of secondary steel, cold reduction, and EQ coatings provided significant competitive advantages over traditional production methods using prime steel and G40 coatings. In board meetings, these competitors expressed their dislike for competing against secondary steel and coatings other than G40. They discussed an elongation requirement and more restrictive coatings provision as a way to protect their own use of prime steel and G40 against the use of secondary steel, cold reduction, and EQ coatings. As one competitor told another, everyone would be "FORCED to move in [ClarkDietrich's] direction if we ignore elongation."

The proposed elongation requirement would not affect SSMA members that used prime steel. That standard would only affect manufacturers that used cold reduction on secondary steel. Similarly, the proposed, more restrictive coatings provision required no testing of traditional G40 coatings, but required G40EQ products to pass rigorous performance tests that most coatings, including G40, were unlikely to satisfy.

These standards were not required by the IBC or justified by any safety consideration. They were added, in fact, against the advice of the SSMA's own Technical Director. They were intended to eliminate the competitive advantages of G40EQ products, as the defendants' own words show. One Board member testified that the program would create "an equal playing field if they [ClarkWestern and Dietrich] *have to use G 40*." (Emphasis added.)

SSMA members were warned that these proposals would harm competition. The trade association for the *consumers* of these products – the Association of the Wall and Ceiling Industry – explained to the SSMA Board that the new elongation standard would "raise the cost of more than 50 percent of the products being produced today" without any offsetting benefit. The SSMA nonetheless passed these proposals.

SSMA members had to comply with the code compliance program's requirements to remain in the SSMA. This left ClarkWestern and Dietrich (and any other SSMA member that wished to use cold reduction technology) with two undesirable options. They could either abandon the cold reduction process (which would increase production costs and eliminate G40EQ products), or they could leave the SSMA (which risked exclusion from the many SSMA-only specifications as well as adverse market reaction). Given the "choice" to give up either their innovative product or their access to SSMA-only specifications, they left the SSMA in March of 2011. The SSMA immediately attacked ClarkDietrich in the marketplace, publishing an unprecedented letter to the industry announcing that "Clark and Dietrich are no longer certified code compliant by the SSMA program" and urging recipients to "remov[e] them from SSMA-member specifications." ClarkDietrich's market share plummeted.[3]

As a result of these events and others[4], ClarkWestern Dietrich Building Systems LLC ("ClarkDietrich") sued fifteen competitors and two trade associations for violations of Ohio's

[3] In a further demonstration of the extent to which competitors were using the SSMA as a competitive weapon, the SSMA Board repealed the original elongation and coatings standards a few months after ClarkDietrich was driven out of the organization – and then quickly reinstated the coatings standard.

[4] After several of the companies that spearheaded this anticompetitive scheme left that organization in 2012 to form a new trade association, the Certified Steel Stud Association ("CSSA"), the SSMA and the CSSA conspired to continue the concerted attack on cold reduction and EQ coatings by, among other things, agreeing to a three-prong strategy to eliminate EQ coatings from the marketplace and then implementing components of that strategy.

antitrust statute, the Valentine Act. R.C. 1331.01 *et seq.* After dismissing several defendants on personal jurisdiction grounds and others by agreement, the trial court granted summary judgment to the remaining defendants. As relevant here, the trial court found that ClarkDietrich had failed to establish two related elements of its claim – harm to competition and antitrust injury. The Court of Appeals for Butler County affirmed on the basis that ClarkDietrich had failed to show harm to competition.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

> **Proposition of Law: Exclusion of a product from an important part or segment of the market establishes harm to competition for purposes of antitrust claims under the Valentine Act; it is not necessary to show that the product was excluded *entirely* from the market.**

The SSMA was acting as a private standard-setting organization in adopting the non-structural code compliance program. It is settled law that a standard-setting organization and its members can be held liable for enacting anticompetitive standards. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), 108 S.Ct. 1931; *American Soc'y of Mechanical Eng'rs v. Hydrolevel*, 456 U.S. 556, 102 S.Ct. 1935 (1982). The U.S. Supreme Court has warned that although standard setting can have pro-competitive benefits, standard-setting organizations are rife with the propensity for unlawful collusion. *Allied Tube*, 486 U.S. at 500-501; *Hydrolevel*, 456 U.S. at 571. "[P]roduct standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U.S. at 500.

Antitrust cases against standard-setting organizations or their members usually are analyzed under the "rule of reason." *Id.* Rule of reason analysis requires proof (1) that the defendants contracted, combined, or conspired; (2) that the contract, combination, or conspiracy caused harm to competition; (3) that the harm occurred within relevant product and geographic markets; (4) that the objects of and conduct resulting from the contract were illegal; and (5) that

the plaintiff suffered antitrust injury. *See, e.g., Island Express Boat Lines, Ltd. v. Put-in-Bay Boat Line Co.*, 6th Dist. Case No. E-06-002, 2007-Ohio-1041, ¶ 74.

The defendants conceded that a reasonable jury could find that the defendants conspired against ClarkDietrich. The trial court agreed, and held that a reasonable jury also could find that the conspiracy was illegal and that ClarkDietrich had properly defined the market. The trial court held, however, that the defendants were entitled to summary judgment based on a purported lack of evidence of harm to competition and antitrust injury. The Court of Appeals for Butler County, Twelfth Appellate District, affirmed based on the perceived absence of evidence of harm to competition.

Harm to competition is a disruption to the normal competitive workings of a market. *See, e.g., Aventis Environmental Science USA LP v. Scotts Co.*, 383 F. Supp. 2d 488, 503 (S.D.N.Y. 2005).[5] Product standardization through private standard-setting organizations "might impair competition in several ways. . . . [I]t might deprive some consumers of a desired product, eliminate quality competition, [or] exclude rival producers. . . ." *Allied Tube*, 486 U.S. at 500 n.5 (quotation and citation omitted).

There was evidence that the defendants' collusion caused the exclusion of EQ-coated products from a substantial part of the market, thereby depriving consumers in that segment of the market of the pro-competitive benefits (*i.e.*, lower prices, more product choices) resulting from the innovative cold-reduction technology used to produce those products. That is harm to competition. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (exclusion

[5] Antitrust injury is the link between this harm to competition and the plaintiff's injury in fact. Antitrust injury is present when a competitor's injury is part of, is the reason for, or flows from the harm to marketplace competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690 (1977). The Court of Appeals did not provide, and the defendants did not offer, any analysis of the antitrust injury requirement independent of the harm to competition requirement.

from a segment of the market is a harm to competition). As much as 70% of the specifications for commercial building projects required the steel framing supplier to be a member of the SSMA. Defense witnesses also testified that it was difficult to get specifications changed and difficult to get a manufacturer's product allowed if the specification as written did not permit it. Because SSMA members had to comply with the SSMA code compliance program, and because that program excluded G40EQ products, consumers could not choose G40EQ products wherever job specifications required SSMA membership. Thus, consumers of these products – distributors and contractors – could not use products made with cold reduction and EQ coatings in a large segment of the market. That is a quintessential harm to competition. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (reduced consumer choice is a harm to competition).

The reduction in consumer choice was exacerbated by other effects of the defendants' conduct. First, as the Court of Appeals found, the G40EQ product exerted a restraining force on prices in the market. ClarkDietrich's cold reduction technology gave it a significant cost advantage versus its competitors – as much as 10-20%, according to one defendant's president. This cost advantage in turn led ClarkDietrich to price its products aggressively, and that pricing acted as a restraining force on overall industry pricing, as the defendants' executives admitted. One defense witness testified that "the *overall* pricing is reduced, because they [ClarkDietrich] have a competitive advantage." The defendants' collusion had the effect of removing this restraining force from at least the large segment of the market covered by specifications requiring SSMA membership. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789-90 (6th Cir. 2002) (conduct that impacts market pricing harms competition).

Second, as ClarkDietrich's expert explained, the defendants' collusion reduced incentives

to innovate in the nonstructural steel framing market. Because ClarkDietrich's innovative technology put the defendants at a significant cost disadvantage, the defendants had two choices to remain viable: they could innovate themselves to eliminate the cost disadvantage, or they could use the SSMA's code compliance program to eliminate the competitive advantage derived through cold reduction technology. The defendants chose the latter course; as one defendant's executive wrote in an e-mail to a competitor, SSMA members would be "FORCED to move in that direction [cold reduction / alternative coatings] if we ignore elongation." ClarkDietrich's expert explained that this conduct affected incentives to innovate in the industry:

> Lower costs or lower prices would have provided incentives for competitive manufacturers to use secondary steel and cold reduction if economically feasible. Competitor manufacturers unable to use secondary steel and cold reduction due to freight costs would have had incentives to innovate in other ways to meet the competition of ClarkDietrich (and, over time, of other manufacturers who had adopted cold-reduction-of-secondary-steel- with-equivalent-coating processes). In short, SSMA actions deprived the consumers of nonstructural steel products of these direct, and indirect, benefits of innovation.

This is a harm to competition. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240-41 (2d Cir. 2003) (stunting product innovation is a harm to competition); *Aventis*, 383 F. Supp. 2d at 504 (same).

It makes no difference to the competitive harm analysis that not *all* projects required SSMA membership. As ClarkDietrich's expert explained:

> It is not necessary for the innovative product to be completely excluded from the market for injury to competition to have occurred. Partial exclusion, or simply raising the cost of producers of the lower cost product to reach the market, can adversely affect competition.

This economic analysis comports with settled law. *See, e.g., Total Renal Care, Inc. v. Western Nephrology & Metabolic Bone Diseases, P.C.*, 2009 WL 2596493, *6 (D. Colo. Aug. 21, 2009) ("[J]ust because [the plaintiff] has not yet been driven out of the market does not deprive it of the

ability to recover under the antitrust laws"). It also makes no difference that ClarkDietrich was able to continue selling the innovative product to the segment of the market unaffected by specifications that required SSMA membership. What matters is that, for a segment of the market, producers could not sell, and consumers could not buy, a type of product. This amounts to harm to competition, regardless of what happened in that portion of the market untainted by the effects of wrongful conduct. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 788-90 (6th Cir. 2002) (finding injury to competition even though the number of brands increased, total market output increased, and plaintiff's market share grew).

The defendants nonetheless have argued that their actions did not restrain ClarkDietrich from selling the innovative G40EQ product. They argued that specifications limiting acceptable manufacturers to SSMA members were merely expressions of consumer choice. They claim that the SSMA program was a "voluntary" program and that competitors were not required to participate in it to sell their products.

There was nothing "voluntary" about the SSMA program for the lion's share of the market – a manufacturer *had* to be in the SSMA and *had* to comply with the SSMA program to qualify to sell products under those specifications. And these specifications were not adopted by *consumers* of the product – distributors and contractors – to express their own product choices. These specifications were drafted by architects and specifiers *before* the defendants later rigged the rules of the game at the SSMA.

That is the essence of the problem here. Before the defendants colluded on the SSMA compliance program, ClarkDietrich was able to sell its innovative product, and consumers were able to buy it, without any artificial restraints. After the defendants colluded on the program, ClarkDietrich could not sell that innovative product, and consumers could not use it, for many

commercial construction projects. That is harm to competition, and it is sufficient to establish a claim under the Valentine Act.

CONCLUSION

The Valentine Act serves a critical purpose in protecting Ohio citizens from the effects of anticompetitive conduct. The precedent set by the Court of Appeals effectively limits the Act to instances where a product has been *completely* excluded from a market, or a product has been made unavailable to *every* consumer in a market, or the anticompetitive effects of collusion reach *every* part of a market. But competition can be harmed without being completely destroyed. The Valentine Act therefore should be construed to reach anticompetitive conduct that harms competition in a market in whole *or in part*. For these reasons, ClarkDietrich respectfully requests that this Court grant jurisdiction and decide this case on the merits.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant ClarkWestern Dietrich Building Systems LLC has been served by regular U.S. mail and e-mail on this 11th day of May, 2017 to:

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APPENDIX

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

FILED
2017 MAR 27 PM 1:18
MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC d.b.a. CLARKDIETRICH, :

Plaintiff-Appellant, :

- vs - :

CERTIFIED STEEL STUD ASSOCIATION, INC., et al., :

Defendants-Appellees. :

CASE NO. CA2016-05-098

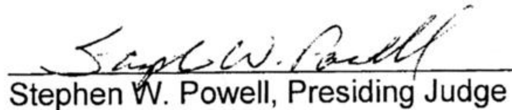
JUDGMENT ENTRY

FILED BUTLER COUNTY
COURT OF APPEALS
MAR 27 2017
MARY L. SWAIN
CLERK OF COURTS

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Mike Powell, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC d.b.a. CLARKDIETRICH,	:	
	:	CASE NO. CA2016-05-098
Plaintiff-Appellant,		
	:	OPINION 3/27/2017
- vs -		
	:	
CERTIFIED STEEL STUD ASSOCIATION, INC., et al,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2013-10-2089

Frost Brown Todd LLC, Matthew C. Blickensderfer, Stephen R. Hernick, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202 and Cohen & Grigsby, P.C., Anthony Cillo, Barbara Scheib, Fridrikh V. Shrayber, 625 Liberty Avenue, Pittsburgh, PA 15222-3152, for plaintiff-appellant

Taft Stettinius & Hollister LLP, Daniel R. Warncke, Kim K. Burke, John B. Nalbandian, Aaron M. Herzig, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202-3957 and Fox Rothschild LLP, Jeffrey M. Pollock, Robert J. Rohrberger, 997 Lenox Drive, Bldg. 3, Lawrenceville, NJ 08648-2311, for defendant-appellee, Ware Industries, Inc.

RINGLAND, J.

{¶ 1} This is an appeal from a decision of the Butler County Court of Common Pleas, in which the trial court granted summary judgment to appellees for claims involving the Ohio Valentine Act. For the reasons detailed below, we affirm.

{¶ 2} Structural and nonstructural steel framing products are used to frame commercial buildings because the International Building Code ("IBC") requires noncombustible framing materials. This dispute centers on certain nonstructural steel framing ("NSSF") products that provide framing for drywall.

{¶ 3} Clarkwestern Dietrich ("Clark Dietrich") is a joint venture formed by Clarkwestern Building Systems L.L.C. and Dietrich Industries, Inc. Both companies manufacture NSSF products for use in commercial construction. For purposes of continuity, we will refer to the joint venture as Clark Dietrich. While some background information is necessary to accurately detail the dispute between the parties, we may dispense with an exhaustive description of the specific technology and science behind the NSSF products and instead focus on the issues relevant to the Valentine Act claim.

{¶ 4} As previously noted, all NSSF products must comply with the IBC. IBC compliance may be demonstrated in a variety of ways. For example, a manufacturer may apply to an accredited code evaluation company and request independent proof of the product's code compliance. Alternatively, a manufacturer can also seek to have its products certified under a trade association's certification program.

{¶ 5} The dispute here arises between Clark Dietrich and the Steel Stud Manufacturing Association ("SSMA"). The SSMA is a voluntary trade association that represents approximately 85 percent of industry volume. Clark Dietrich was a member of the SSMA, as are numerous other firms also named as defendants in this action.

{¶ 6} Traditionally, NSSF products are manufactured from prime steel with a "G40" coating, which is a zinc-based coating that provides corrosion protection. In 2010, Clark Dietrich produced NSSF products through an innovative "cold reduction" process.[1] This

1. While this court is aware that the entities were distinct at the time, that fact is not material to the outcome of the case and for purposes of continuity will use the term Clark Dietrich.

process utilized less expensive secondary steel and provided other significant cost advantages based on the amount of steel required for each product. To meet applicable IBC requirements, Clark Dietrich applied an additional proprietary coating which, Clark Dietrich contends, will provide corrosion resistance equal or better than the standard G40 coating. Clark Dietrich refers to this product as G40 equivalent or "G40EQ."

{¶ 7} The development of the G40EQ product provided Clark Dietrich with a competitive advantage because of the lower manufacturing cost. Thus, the G40EQ product had a restraining effect on market prices and certain competitors of Clark Dietrich reduced their prices on the traditional G40 NSSF products to compete with Clark Dietrich's new G40EQ product.

{¶ 8} In 2010, the SSMA created an IBC compliance program for NSSF products. The compliance program ultimately adopted certain requirements that negatively impacted those SSMA members who utilized cold reduction and G40EQ products. Clark Dietrich, in its brief, refers to those requirements as "sham standards" and alleges that the Board adopted those requirements to benefit manufacturers who did not invest the resources to produce the G40EQ products. Eventually, Clark Dietrich resigned from the SSMA because it would no longer be able to produce the G40EQ products.

{¶ 9} Following Clark Dietrich's resignation, the SSMA released an industry letter announcing that Clark Dietrich was no longer SSMA compliant and advised that Clark Dietrich should be removed from SSMA member specifications.

{¶ 10} While Clark Dietrich's market share decreased after it left SSMA, the company continued to sell G40EQ products. From 2011 to 2014, Clark Dietrich shipped 650,000 tons of G40EQ product.

{¶ 11} Clark Dietrich filed this lawsuit against the SSMA and several individual manufacturing members, alleging a variety of claims. This appeal deals solely with alleged

antitrust violations under the Ohio Valentine Act. The trial court granted summary judgment in favor of SSMA, finding that Clark Dietrich failed to present evidence of an actionable claim under the Ohio Valentine Act. Clark Dietrich now appeals the decision of the trial court, raising a single assignment of error for review:

{¶ 12} THE TRIAL COURT ERRED BY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

{¶ 13} In its sole assignment of error, Clark Dietrich argues the trial court erred by granting summary judgment in favor of SSMA on the Valentine Act claim.

{¶ 14} This court reviews summary judgment decisions de novo. *Ludwigsen v. Lakeside Plaza, L.L.C.*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶ 8. Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there are no genuine issues of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law and, (3) when all evidence is construed most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St .3d 367, 369-70 (1998).

{¶ 15} The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Robinson v. Cameron*, 12th Dist. Butler No. CA2014-09-191, 2015-Ohio-1486, ¶ 9. Once this burden is met, the nonmoving party has a reciprocal burden to set forth specific facts showing there is some genuine issue of material fact yet remaining for the trier of fact to resolve. *Id.* In determining whether a genuine issue of material fact exists, the evidence must be construed in favor of the nonmoving party. *Vanderbilt v. Pier 27, L.L.C.*, 12th Dist. Butler No. CA2013-02-029, 2013-Ohio-5205, ¶ 8.

{¶ 16} The Ohio Valentine Act is patterned after the federal Sherman Antitrust Act and the courts have interpreted the statutory language in light of federal construction of the

Sherman Act. R.C. 1331.01; *C.K. & J.K., Inc. v. Fairview Shopping Center*, 63 Ohio St.2d 201, 204 (1980). To establish a restraint of trade claim, a plaintiff must show both that there was a combination of effort, economically or by action, and that such effort unreasonably restrains trade in a relevant market. *Szuch v. King*, 6th Dist. Erie No. E-09-069, 2010-Ohio-5896, ¶ 53, citing *N.H.L. Players' Assn. v. Plymouth Whalers Hockey*, 325 F.3d 712, 718 (6th Cir. 2003).

{¶ 17} "Two approaches are used to determine whether a defendant's conduct unreasonably restrains trade: the per se rule and the rule of reason." *Id.* As Clark Dietrich abandoned its argument with respect to the per se rule on appeal, we will consider only the rule of reason approach.

{¶ 18} The rule of reason approach requires the plaintiff to prove all of the following: (1) that the defendants contracted, combined, or conspired; (2) that the contract, combination, or conspiracy produced adverse anticompetitive effects (3) within the relevant product and geographic markets; (4) that the objects of and conduct resulting from the actions were illegal; and (5) that the conduct was a proximate cause of plaintiff's antitrust injury. *Island Express Boat Lines, Ltd. v. Put-in-Bay Boat Line Co.*, 6th Dist. Erie No. E-06-002, 2007-Ohio-1041, ¶ 74, citing *Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir. 2005).

{¶ 19} As to the second prong, "[i]t is well-established that the purpose of the Sherman Act and, by extension, the Valentine Act, is to protect competition and the market as a whole, not individual competitors." *Care Heating & Cooling, Inc. v. Am. Std., Inc.*, 427 F.3d 1008, 1014 (6th Cir.2005). The foundation of an antitrust claim is the alleged adverse effect on the market. *Id.* Accordingly, an "[i]ndividual injury, without accompanying market-wide injury, does not fall within the protections of the Sherman Act." *Id.* An antitrust claim will not succeed if it is "based upon nothing more than injuries allegedly suffered by a

competitor, rather than on harm to competition in the relevant market." *Baseball at Trotwood, LLC v. Dayton Prof. Baseball Club, LLC*, 113 F.Supp.2d 1164, 1172 (S.D.Ohio 1999).

{¶ 20} The trial court found that Clark Dietrich failed to prove harm to competition or antitrust injury and therefore failed to prove all the elements of the Valentine Act claim. In so doing, the trial court found:

> * * * There is no evidence that Clark Dietrich was prevented from selling its EQ coated products or that customers were prevented from buying them. SSMA certification is not required to prove a product is IBC compliant, nor is it necessary to market and sell NSSF products. Clark Dietrich was free to counter the statements of the Defendants and to talk to and educate the architects and specifiers about EQ coated products and to request that the EQ coated products be added to the specifications. The fact that the architects or specifiers may choose to specify other products instead of Clark Dietrich's products does not create an antitrust violation. To the extent that the Defendants [sic] statements were false or misleading, Clark Dietrich may be able to prove other claims, but not an antitrust claim.

{¶ 21} Based on our review, we agree with the trial court's decision. The record does not support an antitrust claim. In *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir.1988), a manufacturer of oil well equipment sued the American Petroleum Institute (API), alleging the API excluded it from the market by delaying trade standard certification to its equipment. Similar to the present case, API was a standard-setting body that granted manufacturers a license to display its monogram on the manufacturer's equipment if the API found that the equipment satisfied its standards. *Id.* at 286.

{¶ 22} The plaintiff in *Consolidated* applied for, and was denied, a license to use API's monogram and filed suit under the Federal Sherman Act. *Id.* at 288. The trial court granted summary judgment on that claim and the Sixth Circuit affirmed. In so doing, the

Sixth Circuit held that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations," does not violate the Sherman Act by unfavorably evaluating a manufacturer's product. *Id.* at 292. The court noted that: (1) API approval was not required by law and equipment was frequently sold without it, and (2) consumers were in no way constrained from buying the plaintiff's products. *Id.* at 296. As a result, the manufacturer was not excluded "in a real sense" from the market because it was still free to sell its products and consumers were free to buy them. *Id.* at 292. The court emphasized that manufacturers of equipment still had the ability, even without an API monogram, to market the quality of their products. *Id.* at 296.

{¶ 23} The *Consolidated* decision has been followed by a number of courts. *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir.1989). In *Schachar*, the plaintiffs were ophthalmologists who performed a surgical procedure labeled "experimental" by the National Advisory Eye Council. *Id.* The American Academy of Ophthalmology endorsed the Council's position and issued a press release advising physicians and patients not to use the procedure until more research had been completed. *Id.* The plaintiffs alleged that the press release was part of a conspiracy to restrain trade. *Id.*

{¶ 24} The Seventh Circuit held that there was no violation of the Sherman Act because there was no enforcement device that operated to restrain trade. *Id.* at 400. None of the plaintiffs were prevented from doing the procedure or sanctioned for performing it. *Id.* at 398. The court characterized the challenged action as "warfare among suppliers and their different products," not as restraint, but as competition. *Id.* at 399.

> *Consolidated Metal Products, Inc.* * * * holds that when a trade association provides information (there, gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws. We agree. An organization's towering reputation does not reduce its freedom to speak out. Speech informed, hence affected, demand for radial keratotomy, but the plaintiffs had no entitlement to consumers' favor. The

> Academy's declaration affected only the demand side of the market, and then only by appealing to consumers' (and third-party payors') better judgment. If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech – the marketplace of ideas.

Id. at 399-400 (citations omitted).

{¶ 25} More recently, this analysis was followed in *Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.*, 401 F.3d 123 (3d Cir.2005). In *Santana*, a toilet partition manufacturer sued its competitor, Bobrick, alleging that Bobrick gave architects false information about Santana's products to coerce or convince architects to specify Bobrick's product rather than Santana's product. *Id.* at 127-128. There was no dispute that the defendants in the case informed customers that Santana's products posed a safety hazard. *Id.* at 132.

{¶ 26} However, in affirming summary judgment in favor of the defendant on the antitrust claims, the Third Circuit found that the manufacturer was not excluded "in a real sense" from the market because Santana was still free to sell its products and consumers were still free to buy them. *Id.* at 133. The architects made the ultimate decision on which products to specify and jockeying over specifications is a valid form of competition. *Id.* "If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation." *Id.* at 134. Absent an enforcement device that restrained trade and prevented plaintiff from selling or customers from buying its products, there is no antitrust violation.

{¶ 27} In contrast, Clark Dietrich relies on several cases, including *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1998), to argue that private standard-setting organizations may be held liable for enacting anticompetitive standards. However, *Allied Tube* is distinguishable. Here, the relevant standard is the IBC

and approval of the SSMA was one method of showing compliance with the IBC. Unlike the situation in *Allied Tube*, the SSMA does not set, adopt, or enforce the industry standard. Furthermore, the court in *Allied Tube* was specifically determining whether *Noerr* immunity applied to a private organization and does address antitrust liability governing such organizations:

> Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

Id. at 509-510.[2] While it is true that private standard-setting organizations may be liable for enacting anticompetitive standards, Clark Dietrich does not cite any analogous case to support its position based on these particular facts.

{¶ 28} The trial court found a number of undisputed facts related to the Valentine Act. As the parties do not dispute these facts, we will summarize them below:

> In most cases, specifications for commercial building projects are developed by design professionals, i.e., architects or specification writers contracted by the architects. These specifications detail the products and materials acceptable for use on a particular construction project.
>
> The specifications may list manufacturers, code requirements, industry groups, or in some cases may list a particular company's products.
>
> Companies in the industry are free to lobby or work to persuade architects and specifiers to educate them about products and to persuade them to include the company's products in job specifications.
>
> The SSMA is a voluntary trade organization and membership in

2. The *Noerr* doctrine shields certain political actions from the Sherman Act, recognizing that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961); *See United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965).

the SSMA is not required in order to sell NSSF products.

There are competitors in the industry who are not members of the SSMA.

The SSMA has a certification program that allows manufacturers to demonstrate that their products are compliant with the IBC.

SSMA membership and the SSMA compliance program are not necessary to manufacture products that comply with the IBC and are not the only way to show compliance with the IBC.

In 2010, SSMA created a task force to develop an IBC compliance program. The draft program did not contain an elongation requirement relating to the rigidity of steel. Instead, the draft program contained a coatings standard that G40EQ products would satisfy.

Upon submission of the draft to the SSMA Board of Directors, an elongations requirement and more restrictive coatings standards were adopted. The new elongation requirement would not affect members using prime steel, but would affect those using secondary steel and the processes utilized in the production of G40EQ products.

SSMA members were required to comply with the new standards. Therefore, Clark Dietrich resigned in March 2011 and formed an alternative trade association. At the time of their resignation, Clark Dietrich has a combined market share of 46%.

{¶ 29} As in *Consolidated* and *Schacher*, this matter involves a trade association that adopted standards unfavorable to the complaining party. Here, Clark Dietrich complains that the "sham standards" adopted by the SSMA amounted to a violation of the Valentine Act. In support of its position, Clark Dietrich presented the testimony of its expert, James Kearl. In his deposition, Kearl acknowledged that Clark Dietrich was not prevented from selling its G40EQ products and customers were not prevented from purchasing them. In addition, Kearl noted that SSMA certification was not required to prove that the product was IBC compliant. Rather, Kearl's position is that there was an antitrust violation because:

(1) If Clark Dietrich had been granted this certification it could have competed effectively with rivals,

> (2) As the innovative technology was produced at a lower cost, Clark Dietrich would have had a higher margin of return on its product,
>
> (3) Clark Dietrich's competitors would invest in this technology to also achieve the higher margin of return,
>
> (4) Therefore, the failure to grant this certification was an injury to competition because the industry did not adopt technology that would ultimately lower the cost of the innovative technology

{¶ 30} We have reviewed the record, including the testimony of Clark Dietrich's expert, Kearl, and conclude the trial court did not err by granting summary judgment in favor of SSMA. Aside from being speculative, Kearl's testimony does not raise any genuine issue of material fact as to the Valentine Act claim. There is no evidence that Clark Dietrich was prevented from selling its G40EQ product or that customers were prevented from purchasing those products on the open market. While it is undisputed that the standards adopted by the SSMA prevented Clark Dietrich from manufacturing its G40EQ products as an approved SSMA product, such action does not amount to a restraint on trade. As addressed earlier, SSMA certification is not required to prove that the product is IBC compliant, nor was it a requirement that Clark Dietrich be a member of the association. Similar to *Santana*, Clark Dietrich was free to continue selling its G40EQ products and educate architects and specifiers about the benefit of their products. As noted by the court in *Consolidated*, "[a] plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products." *Consolidated*, 846 F.2d at 293.

{¶ 31} As a result, we find the trial court did not err by granting summary judgment on the Valentine Act claim. Therefore, Clark Dietrich's sole assignment of error is without merit and is hereby overruled.

{¶ 32} Judgment affirmed.

S. POWELL, P.J., and M. POWELL, J., concur.