[Cite as *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 2010-Ohio-4657.]

STATE OF OHIO))ss: COUNTY OF WAYNE)		IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
DRAGWAY 42, L.L.C., aka DRAGWAY PROPERTIES, L.L.C. Appellee v. KOKOSING CONSTRUCTON CO., INC. Appellant		C. A. No. 09CA0073 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 07-CV-0378

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Kokosing Constr. Co., Inc. appeals the judgments of the Wayne County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} In 2006, Toby Ehrmantraut and his wife purchased Dragway 42, LLC and Dragway Properties, LLC (collectively "Dragway") from his father. Dragway 42, LLC owns and operates a drag strip known as Dragway 42. Dragway Properties, LCC owns the land where the drag strip and related facilities are located. Prior to purchasing the businesses from his father, Toby raced professionally.

{¶3} The track of the drag strip begins two hundred feet behind the starting line and is composed of concrete. In addition, the first two hundred ten feet beyond the starting line is also concrete. Beyond this area are two, approximately eleven hundred foot long, lanes composed of asphalt, which constitute the remainder of the quarter-mile race distance. Following that area is

another approximately twenty-two hundred feet of asphalt used by the cars to decelerate following the race.

{¶4} Due primarily to the appearance of the track, Dragway began looking for a construction business that would be willing to resurface portions of the track. Ultimately, on April 10, 2006, Dragway entered into a contract with Kokosing to resurface the center portion of each of the two asphalt racing lanes by milling 1.5 inches of asphalt and replacing it with 1.5 inches of asphalt. In addition, Kokosing was to repave the main pit road. The total cost was $65,885. Construction began the next day.

{¶5} Prior to beginning work, Kokosing did not do any testing to determine the status of the subsurface of the drag strip. During the construction process, Kokosing utilized heavy equipment and machinery which it placed directly on the drag strip. The milling, or grinding of the asphalt, began in the right lane. Two passes were made with the machine, then Kokosing moved on to the left lane. After going three-quarters of the way down the left lane on the second pass, Kokosing began to run into problems. At least one individual observing the construction process noticed that some of the equipment began to sink into the asphalt. The layer of asphalt underneath what was being milled began to crumble, or delaminate, and thus could not provide support for the new asphalt that was yet to be laid. Large ruts developed. Kokosing stopped working, told Dragway of the problem, and began to discuss concrete stabilization, an extremely expensive option. Kokosing also discussed taking core samples of the surface. As the discussion continued, Toby indicated that he could not afford concrete stabilization. Kokosing also proposed a second option which was to remove an extra half-inch of asphalt and dig out a certain section of the track where there was insufficient base. Dragway ultimately agreed to the latter option and signed a change order, increasing the price of the contract by $24,743.

{¶6} Kokosing continued to experience problems and decided that the only method which would ensure that the race track was smooth and safe would be the much more expensive concrete stabilization process. Dragway could not afford that option and the two reached an impasse.

{¶7} In addition to the problems with the asphalt track, areas of concrete began to crack and break after Kokosing parked heavy equipment on it, despite being told by Toby not to park there because the concrete was not thick enough to support such machinery.

{¶8} Ultimately, Dragway hired another company to do a "Band-Aid" fix on the asphalt track so that Dragway could reopen. However, the "Band-Aid" fix left the track wavy. This made the track more dangerous, and after the fix, Dragway's business began to decrease. Kokosing sent Dragway a bill for $29,906.45 for the work it completed.

{¶9} In May 2007, Dragway filed suit against Kokosing for breach of contract and negligence. Kokosing answered, denying many of the allegations, and asserted multiple affirmative defenses including mutual mistake, unilateral mistake, and differing site conditions. In addition, Kokosing asserted counterclaims for breach of contract, negligence, and quantum meruit.

{¶10} At the beginning of trial, the trial court granted Kokosing a directed verdict on Dragway's negligence claim. Thereafter, the remaining claims were tried to a jury. Dragway maintained that Kokosing failed to perform the job in a workmanlike manner, leading to the damage of the drag strip. To support its claim, it presented several witnesses, including Toby and Gary Ferguson, an expert witness. Ferguson discussed the testing that could have been performed on the drag strip prior to the start of the job which would have provided information to Kokosing about the condition of the drag strip. Ferguson opined that Kokosing's placement of

heavy machinery on the drag strip caused the damage to the drag strip and that such placement breached the standard of care. Kokosing maintained that it performed in a workmanlike manner and was entitled to payment for the services it rendered. The jury found in favor of Dragway and against Kokosing in the amount of $434,000. Kokosing filed a motion for judgment notwithstanding the verdict and a motion for a new trial. Prior to the trial court ruling on its motions, Kokosing twice appealed to this Court, and twice we dismissed the appeal for lack of jurisdiction. Thereafter, the trial court issued a judgment entry denying Kokosing's motions. Kokosing again appealed; however, after reviewing the entry, we concluded that the trial court failed to dispose of all the claims in the entry and failed to utilize Civ.R. 54(B) language. *Dragway 42, LLC v. Kokosing Constr. Co., Inc.*, 9th Dist. No. 09CA0008, 2009-Ohio-5630, at ¶14. Thus, we again dismissed the appeal. Id. at ¶15. Subsequently, the trial court issued a "Nunc Pro Tunc Clarification Judgment Entry on Verdict." Kokosing then appealed to this Court, raising seven assignments of error for our review.

II.

> "The Trial Court Committed Reversible Error By Failing To Instruct The Jury On The Law Pertaining To Differing Site Conditions And Mutual Mistake Of Fact."

{¶11} Kokosing asserts in its first assignment of error that the trial court erred when it refused to instruct the jury on differing site conditions, mutual mistake of fact, and unilateral mistake of fact. We disagree.

{¶12} The Supreme Court of Ohio has stated that:

> "the trial court will not instruct the jury where there is no evidence to support an issue. However, the corollary of this maxim is also true. Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds

> might reach the conclusion sought by the instruction." (Internal quotations and citations omitted.) *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591; see, also, *Messenger v. Lorain Cty. Commrs.* (Aug. 2, 2000), 9th Dist. No. 99CA007372, at *2.

Differing Site Conditions

{¶13} Kokosing requested a jury instruction on what it characterized as the affirmative defense of Type II differing site conditions. Kokosing asserts that proving the existence of differing site conditions would prevent Dragway from succeeding on its breach of contract claim.

{¶14} We begin by noting that the Ohio Jury Instructions do not contain an instruction on differing site conditions. In addition, a search of Ohio case law produces very few cases discussing differing site conditions. Notably, the two cases Kokosing relies on for the elements necessary to establish the existence of differing site conditions each involve a *claim* for additional money due to the existence of differing site conditions; neither involve using differing site conditions as an affirmative defense. See *Youngdale & Sons Constr. Co., Inc. v. United States* (1993), 27 Fed.Cl. 516, 517-518, 537-538 (involving a plaintiff seeking to recover on a Type II differing site condition claim against the United States pursuant to the Contract Disputes Act); *Sherman R. Smoot Co. of Ohio v Ohio Dept. of Adm. Services* (2000), 136 Ohio App.3d 166, 173 (Emphasis added.) ("Differing site conditions *claims* arise from two separate and distinct circumstances, usually referred to as Types I and II differing site conditions.") Kokosing has failed to direct this Court to any legal authority which characterizes differing site conditions as an affirmative defense.

{¶15} Even assuming Kokosing could properly request a differing site conditions instruction as an affirmative defense, it failed to provide sufficient evidence to support its proposed instruction. Under Kokosing's requested instruction, it believed it could establish that it encountered conditions "which were of an unusual nature and differ[ed] materially from those

ordinarily encountered and generally recognized as inherent in the work." Thus, it would have had to establish that the conditions it encountered differed materially from those ordinarily encountered in the work. Kokosing presented no evidence to support this element. In fact, Dragway's witness Gary Ferguson testified that generally, because drag strips are not engineered, one has to be cautious in approaching them because when heavy equipment is put on the strip "there's a high likelihood * * * that you can do some damage." The trial court likewise noted that the evidence necessary to establish a Type II differing site condition was technical in nature, and Kokosing failed to present sufficient testimony to support the requested instruction.

{¶16} Thus, in light of the foregoing, particularly Kokosing's failure to point this Court to factually similar cases in which a court gave an instruction using differing site conditions as an affirmative defense, we cannot say that the trial court erred in failing to give the requested instruction. Kokosing has not convinced us that the instruction was legally appropriate or that it presented sufficient evidence to support that instruction, if it were appropriate.

Mutual Mistake

{¶17} Kokosing also requested a jury instruction on mutual mistake of fact. Kokosing asserted in the trial court that the "condition of the track was mutually mistaken[,]" thereby entitling it to a jury instruction on the doctrine.

{¶18} Kokosing's requested instruction largely reflects the Ohio Jury Instruction on the topic, which provides:

> "The defendant claims that he/she/it is excused from performing the contract because of a mutual mistake of fact. If all of the requirements of mutual mistake are proved, then the defendant is excused from performing the contract. A 'mutual mistake of fact' occurs when
>
> "(A) both parties were mistaken as to a fact that is material to the contract; and
>
> "(B) the defendant was not negligent in failing to discover the mistake.

> "Nevertheless, if the plaintiff proved by the greater weight of the evidence that the defendant was aware at the time the contract was made that he/she/it had only limited knowledge with respect to the facts to which the mistake relates and treated his/her/its limited knowledge as sufficient, you must find that the defendant has failed to establish the affirmative defense of mutual mistake of fact." 5 Ohio Jury Instructions, Section 501.11(2).

{¶19} In the instant case, we agree with the trial court that there was insufficient evidence to warrant an instruction on mutual mistake of fact. At the time the parties entered into the contract, the condition of the subsurface was unknown to Kokosing, Kokosing did not perform testing to determine the nature of the subsurface, Toby did not know the condition of the subsurface, and Kokosing did not have extensive experience in resurfacing drag strips. Gary Ferguson testified that a construction company could guard against problems by performing certain simple tests ahead of time. Further, despite Kokosing's limited experience in this area of resurfacing, and despite uncontradicted testimony by Ferguson concluding it is inappropriate to approach drag strip resurfacing in the same way as highway resurfacing, that is exactly what an employee from Kokosing testified it did. The parties were not mistaken as to facts, they did not know one way or the other what the facts were. Kokosing was aware that it had limited knowledge of the condition of the track underlying the surface, yet it proceeded anyway. We cannot say a reasonable jury could conclude that a mutual mistake of fact existed.

Unilateral Mistake

{¶20} In addition, Kokosing asserts that it was entitled to a jury instruction on unilateral mistake of fact.

{¶21} In Kokosing's requested instruction on unilateral mistake, it stated that "Kokosing claims that Dragway 42 knew of the track's sub-layers' condition and failed to disclose such to Kokosing." Thus, at the trial court level, Kokosing claimed that it was mistaken as to the condition of the subsurface while Dragway knew the condition of it and withheld this

information from it. There was no evidence presented which supports such a conclusion. Thus, we cannot say the trial court erred in denying the requested instruction on unilateral mistake.

{¶22} Kokosing argues in its appellate brief that it was entitled to an instruction on unilateral mistake of fact because after it was discovered that the problem encountered could not be remedied under the change order, and after Dragway refused to agree to the concrete stabilization procedure, the parties reached an impasse, justifying rescission. It is unclear how this would constitute a unilateral mistake of fact. In addition, Kokosing did not present this argument to the trial court in support of the instruction. See *Renacci v. Evans*, 9th Dist. No. 09CA0004-M, 2009-Ohio-5154, at ¶24, quoting *Stefano & Assoc., Inc. v. Global Lending Group, Inc.,* 9th Dist. No. 23799, 2008-Ohio-177, at ¶18. ("It is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal.").

{¶23} In the light of the above, we overrule Kokosing's first assignment of error.

III.

> "The Trial Court Committed An Abuse of Discretion And Committed Reversible Error When It Permitted Gary Ferguson To Offer Expert Proximate Cause Testimony."

{¶24} Kokosing asserts in its second assignment of error that the trial court erred in allowing Gary Ferguson to testify concerning the cause of the damage to the drag strip as Ferguson's testimony did not meet any of the requirements of Evid.R. 702.

{¶25} While Kokosing objected multiple times during Ferguson's direct testimony, Kokosing did not cite a basis for its objections. In addition, Kokosing did not object at all when Ferguson testified concerning causation. Thus, Kokosing has forfeited all but plain error on appeal. See Evid.R. 103(A), (D).

{¶26} Kokosing has argued in its reply brief that the error constitutes plain error, as the result of the trial would have clearly been different had Ferguson not testified as to causation. However, based upon controlling precedent, we do not believe the circumstances of this case warrant application of the doctrine.

{¶27} The Supreme Court had noted that in civil cases, the application of the plain error doctrine is not favored:

> "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,' Crim.R. 52(B), no analogous provision exists in the Rules of *Civil* Procedure. The plain error doctrine originated as a criminal law concept. 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." (Emphasis in original.) *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

The Court reaffirmed its position that the doctrine "is sharply limited to the extremely rare case involving exceptional circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." Id. at 122. Thus, "[t]he plain error doctrine should never be applied to reverse a civil judgment simply because a reviewing court disagrees with the result obtained in the trial court, or to allow litigation of issues which could easily have been raised and determined in the initial trial." Id.

{¶28} Kokosing has not demonstrated that exceptional circumstances exist here. When Kokosing did object in the trial court to Ferguson's testimony for reasons other than causation, the trial court considered the objection, and, in some cases, would not allow Ferguson to continue to testify on a topic until Dragway's counsel sufficiently established how Ferguson knew the information Dragway's counsel was attempting to elicit. A review of the record

demonstrates that the trial court was thoughtful and responsive to objections, thus this issue could have been easily raised and addressed in the trial court. Id. Assuming there was error in admitting the testimony, we cannot say that the error present "rises to the level of challenging the legitimacy of the underlying judicial process itself." Id. Kokosing's second assignment of error is overruled.

IV.

"The Trial Court Erred In Denying Kokosing's Motion For Directed Verdict On Plaintiff's Claims."

{¶29} In Kokosing's third assignment of error it asserts that the trial court erred in denying its motion for a directed verdict. However, within the assignment of error, Kokosing only asserts that it was entitled to a directed verdict "[f]or those same reasons and argument articulated *supra*[.]" As this Court has already overruled the previous arguments, we likewise overrule Kokosing's third assignment of error.

V.

"The Trial Court Erred In Denying Kokosing's Motion for Directed Verdict On Its [Counterclaim]."

{¶30} Kokosing lists in its statement of the assignments of error in its appellate brief the error stated above; however, the text of Kokosing's brief does not address or mention this assignment of error. See App.R. 16(A)(7). Thus, this assignment of error is overruled.

VI.

"The Trial Court Erred In Denying Kokosing's Motion For New Trial."

{¶31} In this assignment of error Kokosing asserts that the trial court erred in denying its motion for a new trial. Specifically, it asserts that the jury's verdict is excessive, the judgment is against the manifest weight of the evidence, the judgment is contrary to law, and errors of law occurred at trial. We disagree.

{¶32} "Depending upon the basis of the motion for a new trial, this Court will review a trial court's decision to grant or deny the motion under either a de novo or an abuse of discretion standard of review." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶13, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraphs one and two of the syllabus. Thus, when the basis of the motion involves a question of law, the de novo standard of review applies, and when the basis of the motion involves the determination of an issue left to the trial court's discretion, the abuse of discretion standard applies. Id.

{¶33} Civ.R. 59(A) states that:

> "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> "(2) Misconduct of the jury or prevailing party;
>
> "(3) Accident or surprise which ordinary prudence could not have guarded against;
>
> "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
>
> "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;
>
> "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;
>
> "(7) The judgment is contrary to law;
>
> "(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;
>
> "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application."

Excessive Jury Verdict

{¶34} Kokosing asserts that it is entitled to a new trial pursuant to Civ.R. 59(A)(4) because the jury verdict is excessive. Essentially, Kokosing argues the award of $434,000 was excessive because it was unsupported and duplicative. We review Kokosing's argument under the abuse of discretion standard as the denial of the motion for a new trial on the grounds advanced by Kokosing involved the exercise of the trial court's discretion.

{¶35} "An appellate court reviewing whether a trial court abused its discretion in ruling on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury." *Pena v. Northeast Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 104. "To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." (Internal quotations and citation omitted.) *Prince v. Jordan*, 9th Dist. No. 04CA008423, 2004-Ohio-7184, at ¶20. Based on the testimony presented to the jury and discussed below, we cannot say the trial court abused its discretion in denying the motion.

{¶36} Kokosing asserts that the award was influenced by passion or prejudice because the trial court refused to give certain jury instructions and allowed Ferguson to testify as to causation. As this Court has previously addressed these arguments supra, and found no merit in them, they likewise do not support an argument that the jury's award was due to passion or prejudice.

{¶37} Dragway requested that the jury award it $434,000: $300,000 to resurface the drag strip and $134,000 to repair the damaged concrete. This is the amount the jury awarded and

there is testimony in the record to support this amount: Toby testified without objection that Kokosing was going to charge him $300,000 to completely resurface the track and also testified that a company provided him with an estimate of $134,190 to repair the concrete.

{¶38} Kokosing also maintains that because Dragway's counsel improperly referred to a resurfacing estimate and concrete repair estimate during closing argument and the exhibits associated with those estimates were not admitted, the jury was prejudiced; thus, the jury had no basis for the award. We note that Kokosing did not object during closing argument and thus has forfeited all but plain error. See *Williams v. Noden* (Feb. 15, 1995), 9th Dist. No. 16857, at *1. As we noted above, assuming there was error, we cannot say this error "rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss,* 79 Ohio St.3d at 122.

{¶39} Nonetheless, even if Kokosing had objected, we conclude the comments were not improper as there was evidence in the record to support the damages Dragway requested.

{¶40} Kokosing argues that the award is duplicative as Dragway is getting money to both replace and repair the track. This argument is without merit. The $300,000 is what Toby stated Kokosing wanted to resurface the drag strip and the $134,000 is the estimate to repair entirely different areas of concrete. Thus, the award is not duplicative.

{¶41} In light of the above, we cannot say the trial court erred in denying Kokosing's motion.

Manifest Weight of the Evidence, Contrary to Law, Errors of Law Occurred at Trial

{¶42} Kokosing also argues that it was entitled to a new trial because the verdict was against the manifest weight of the evidence, Civ.R. 59(A)(6), was contrary to law, Civ.R. 59(A)(7), and because errors of law occurred at trial, Civ.R. 59(A)(9).

{¶43} However, with respect to each of these arguments, Kokosing only reiterates previous arguments which this Court has already concluded were insufficient to warrant reversal. Therefore, this Court likewise determines these arguments are without merit.

VII.

"The Trial Court Erred In Denying Kokosing's Motion For Judgment Notwithstanding The Verdict."

{¶44} Kokosing argues in this assignment of error that the trial court erred in denying its motion for JNOV. We disagree.

{¶45} Kokosing does not present an argument for this section; instead, it asserts that it was entitled to have its JNOV motion granted based upon its previous arguments. As we have determined the previous arguments were without merit, we conclude this argument must fail as well.

VIII.

"The Trial Court Erred in Denying Kokosing's Motion For Summary Judgment."

{¶46} In Kokosing's final assignment of error, it asserts that the trial court erred in denying its motion for summary judgment. We disagree.

{¶47} The denial of summary judgment is reviewable following an adverse jury verdict. *Chuparkoff v. Farmers Ins. of Columbus, Inc.,* 9th Dist. No. 22712, 2006-Ohio-3281, at ¶11. "However, any error in denying the motion 'is rendered moot or harmless where evidence at a subsequent trial on the same issues demonstrates that there were genuine issues of material fact and that evidence supported a judgment for the party opposing summary judgment.'" Id., quoting *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 156.

{¶48} Assuming that Kokosing's summary judgment motion was meritorious, this Court concludes that there was evidence presented at trial to support a verdict for Dragway on its claim

for breach of contract due to unworkmanlike conduct. In addition, it is clear that at trial there were genuine disputes of material fact with respect to what or who caused the damage to the drag strip.

{¶49} It is clear the parties entered into a contract. Here, the dispute centers on the cause of the damage to the drag strip and whether Kokosing was responsible for that damage. If Kokosing performed the work in a workmanlike manner, it would be reasonable for a jury to find that Kokosing could recover for the services it actually performed. At trial, Ferguson provided testimony opining that Kokosing deviated from the standard of care and that the deviation caused the damage to the drag strip. Thus, the evidence adduced at trial does demonstrate the existence of a genuine dispute of material fact, namely whether Kokosing performed in a workmanlike manner. Further, there was evidence to support judgment in Dragway's favor on both its claim and Kokosing's counterclaim. Therefore, even assuming the trial court committed error in denying Kokosing's motion for summary judgment, any error made by the trial court is moot or harmless. Id. We overrule Kokosing's final assignment of error.

IX.

{¶50} In light of the foregoing, we affirm the judgment of the Wayne County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

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D. KIM MURRAY, Attorney at Law, for Appellee.