

APPELLANT'S BRIEF
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No. 36094-2-II

STATE OF WASHINGTON

BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RANDY S. JENSEN,

Respondent

v.

LAKE JANE ESTATES,

Appellant

BRIEF OF RESPONDENT

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ORIGINAL

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I. ARGUMENT

- A. This case is appropriate for disposition by a motion on the pleadings because Lake Jane Estates admitted all material facts.**

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. CR 12(c). Lake Jane Estates admitted all material facts in its answer to the complaint. The following facts material to the motion on the pleadings are alleged in plaintiff's complaint and admitted by defendant's answer:

Randy Jensen is the owner of two lots in Pierce County legally described as Lots 4 and 23, Block 2, of the plat of Debra Jane Lake.¹ The plat of Debra Jane Lake was recorded in 1959.² On the face of the plat, under the heading "RESTRICTIONS" is the following language:

The following restrictions are hereby declared to be covenants running with the land and binding upon future owners, their heirs, successors or assigns on the following described real property and said restrictions are as follows:

...

6. No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO.

...

14. The breach of any of the foregoing conditions shall constitute a cause of action against the persons committing the breach by the T & J maintenance Co. or the Lake Tapps Development Co., Inc.

¹ CP 1, 4.

² CP 1, 4.

15. If any of the foregoing restrictions are declared to be legally unenforcible [sic] with respect to all or any portions of said property, the applicability and enforcement of the remaining restrictions shall not otherwise be affected.³

Lake Tapps Development Co., Inc. was a Washington corporation incorporated on April 15, 1954.⁴ It filed articles of dissolution on March 31, 2003, and is no longer in existence.⁵

Defendant is a Washington non-profit corporation incorporated August 3, 1959 under the name "T & J Maintenance Co."⁶ Defendant changed its name to Lake Jane Estates in 1970.⁷ Defendant is a homeowners' association as defined in Chapter 64.38, RCW.⁸

In August, 2005, Randy Jensen submitted a request to Lake Jane Estates for consent to the subdivision of his two lots into a total of six lots, through a boundary line adjustment and two short plats.⁹ On May 18, 2006, Lake Jane Estates declined Mr. Jensen's request for consent to subdivision of the lots.¹⁰ Mr. Jensen was informed of this decision by a

³ CP 1, 2, 4.

⁴ CP 2, 4.

⁵ CP 2, 4.

⁶ CP 1, 4.

⁷ CP 1, 4.

⁸ CP 1, 4.

⁹ CP 2, 4.

¹⁰ CP 2, 4.

letter from appellant's counsel dated May 23, 2006.¹¹ This case was filed on July 28, 2006.¹²

Lake Jane Estates argues that the motion on the pleadings should have been denied because Lake Jane Estates disputed "material factual allegations" in the first and third sentences of paragraph 7 of the complaint.¹³ However, it is obvious that the first and third sentences of that paragraph are not factual allegations but legal arguments regarding the effect of prior factual allegations. Thus, in denying these two sentences, Lake Jane Estates was disagreeing with Mr. Jensen's legal conclusions. As noted in a case cited by Lake Jane Estates in its brief, a party who moves for judgment on the pleadings admits the truth of every **fact** well pleaded by his opponent, not the truth of the opponent's conclusions or construction of the subject matter. *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143, 149 (1965).

In response to the motion for judgment on the pleadings, Lake Jane Estates filed a lengthy declaration from its attorney, reciting facts extraneous to the issue raised in the motion. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not

¹¹ CP 2, 4.

¹² CP 1.

¹³ Appellant's Opening Brief, p. 10.

excluded by the court, the court will treat the motion as one for summary judgment and dispose of it under CR 56. CR 12(c). However, where the matters outside of the pleadings are not material to the issue presented in the motion on the pleadings, they will not be considered by the Court. *Cary v. Mason County*, 132 Wn. App. 495, 498-499, 132 P.2d 157, 159 (2006), *review denied*, 153 P.3d 196 (2007).

The trial court did not consider the contents of the declaration of counsel, nor treat the motion as one for summary judgment. Rather, the trial court entered a judgment on the pleadings that recited that it had considered only the allegations of plaintiff's complaint and defendant's answer.¹⁴ Thus, the trial court's order was a motion on the pleadings, which this Court will review *de novo*. *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 858, 974 P.2d 1257, 1259 (1999), *review denied*, 137 P.2d 1022 (1999). The factual allegations in the pleadings of the non-moving party will be accepted as true for purposes of the motion, since the purpose of a motion on the pleadings is to determine whether a genuine issue of fact exists, not to determine issues of fact. *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140, 142 (1984).

¹⁴ CP 183.

In its Statement of Facts, Lake Jane Estates improperly cites to an unpublished decision of this Court,¹⁵ as it did previously to the trial court.¹⁶ As Mr. Jensen pointed out to Lake Jane Estates at that time,¹⁷ this Court has strongly condemned the practice of citing unpublished opinions of the Court of Appeals to the trial court. *Johnson v. Allstate Insurance Company*, 126 Wn. App. 510, 519-520, 108 P.3d 1273, 1278 (2005). Citation of the unpublished decision by Lake Jane Estates in its opening brief directly violates RAP 10.4(h). This case does not come within an exception for collateral estoppel or res judicata, since Mr. Jensen was not a party to the prior case, that case occurred before the dissolution of Lake Washington Development Company, and there is no indication that the current issue was ever argued to the court.

Generally, sanctions are appropriate for violation of RAP 10.4(h). *Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wn. App. 393, 401, 44 P.3d 938, 942 (2002). This is particularly true when the prohibition was previously pointed out to Lake Jane Estates in the trial court briefing.

¹⁵ Appellant's Opening Brief, p. 6-7.

¹⁶ CP 18.

¹⁷ CP 181.

B. The plain meaning of Restrictive Covenant 6 is that the only entity that can approve the subdivision of lots is no longer in existence.

In a nutshell, Lake Jane Estate's defense is that the applicable restrictive covenant is ambiguous and should be liberally construed in defendant's favor. However, the covenant is not ambiguous, and interpretation is neither necessary nor appropriate.

The interpretation of a restrictive covenant is a question of law that this Court will review *de novo*. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402, 407 (2006). Like the trial court, the primary task of this Court is to determine the intent of the drafters. *Id.*; *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). In ascertaining this intent, the courts give a covenant's language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. *Viking Properties, supra.*, at 120. Basic rules of contract interpretation apply to restrictive covenants. *Wimberly, supra.*, at 327.

The restrictive covenant at issue in this case states:

6. No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO.

There is no dispute that Lake Tapps Development Co., Inc. was a Washington corporation incorporated on April 15, 1954, that it filed

articles of dissolution on March 31, 2003, and is no longer in existence. There is no dispute that Lake Jane Estates is separate Washington non-profit corporation incorporated August 3, 1959 under the name "T & J Maintenance Co.," which changed its name to Lake Jane Estates in 1970.

Both Lake Tapps Development Co. and T& J Maintenance Co. (now Lake Jane Estates) were named in Restrictive Covenant 14 as entities authorized to bring suit to enforce the covenants. However, only Lake Tapps Development Co., and not T & J Maintenance Co., was named in Restrictive Covenant 6 as an entity to approve subdivision of lots. Common sense would indicate that this distinction was intentional. The drafters were aware of the two entities, and only gave one of the entities the power to approve or reject subdivisions of lots.

This common sense interpretation is supported by common principles of contract interpretation. As stated in 5 Corbin on Contracts § 24.28, at 315-316 (rev. ed. 1998):

The maxim *expressio unius est exclusio alterius* means literally "the expression of the one is the exclusion of the other." If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed.

For example, in *Illinois Cent. RR. v. Gulf, Mobile & Ohio RR.*, [191 F. Supp. 275 (E.D. La. 1961), *aff'd*, 308 F.2d 374 (5th Cir.)] several railroads promised in a contract with the

City of New Orleans to relocate their railroad lines so that these lines would lead to a central terminal being constructed by the city and financed by city-issued bonds. The railroads promised also to pay rental fees to the city in amounts sufficient to service the debt and retire the bonds at maturity. Each railroad promised in the document to continue these rental payments even if it were to discontinue all passenger service to New Orleans. The document stated also that the railroads would pay for maintenance and operation of the terminal. It did not mention, however, whether the railroads would continue paying these maintenance and operation expenses if they were to discontinue passenger service to the city--which discontinuance did occur. In the ensuing lawsuit, the court held that the express statement that rental payments would continue even after cancellation of passenger service, viewed together with the failure to state that maintenance and operation payments would continue, indicated an intention that the maintenance and operation payments would stop when passenger service ceased.

The common sense interpretation is also supported by common principles of statutory construction. It is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258, 264 (2001).

Lake Jane Estates alleges that the language used in Restrictive Covenant 6 is ambiguous. A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning. *Murray v. Western Pacific Insurance Co.*, 2 Wn. App. 985, 989, 472 P.2d 611, 614 (1970). Restrictive covenant 6 clearly states which

entity has authority to approve the subdivision of lots. It is not ambiguous; it simply does not state what Lake Jane Estates would like it to say.

To get around the plain meaning of the language used in Restrictive Covenant 6, Lake Jane Estates tries to bring in self-serving extrinsic evidence of its own conduct over the last eighteen years, to show the intent of the drafters when the restrictive covenant was placed on the plat forty-eight years ago, in 1959. However, such extrinsic evidence cannot be used to contradict the plain meaning of the covenant.

Courts apply the *Berg* “context rule” in determining the intent and purpose of restrictive covenants. *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 695-696, 974 P.2d 836, 843 (1999). Under that context rule, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. *Id.* However, admissible extrinsic evidence does not include evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, evidence that would show an intention independent of the instrument, or evidence that would vary, contradict or modify the written word. *Id.* Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written. *Id.*, 137 Wn.2d at 697, 974 P.2d at 843.

Courts continue to impute an intention corresponding to the reasonable meaning of the words used. *Hearst Communications, Inc. v Seattle Times Company*, 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005). Courts will generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Id.* As stated in *Wimberly v. Caravello, supra*, at 336-337:

Context evidence is not admissible to import into a writing an intention not expressed. It is admissible solely to clarify the meaning of the written words used. The court is to declare the meaning of what the parties wrote, not what they intended to write. If the evidence illuminates the situation of the parties and the circumstances under which they executed the agreement, then it is admissible.

A portion of the Supreme Court's recent decision in *Hearst Communications, Inc. v Seattle Times Company, supra*, is instructive. In that case, Hearst attempted to use subsequent acts and conduct by the Seattle Times to demonstrate the meaning of one portion of the joint operating agreement between them. The Court rejected that evidence, stating at 510, note 14:

None of this evidence, however, sheds any light on the meaning of the words themselves, nor does it suggest that the Times had an understanding of the words that reflected the interpretation of those words urged by Hearst. As such, the evidence of the Times subsequent conduct is not relevant to our consideration of the meaning of the JOA.

Similarly, in the case at bar, none of the evidence offered by Lake Jane Estates regarding its subsequent conduct opposing subdivision of lots suggests that the drafter of the restrictive covenant also meant T & J Maintenance Company when it said Lake Tapps Development Company.¹⁸

Lake Jane Estates argues that it is “simply illogical that the parties would manifest an intent to limit subdivisions only to have that protection removed upon some arbitrary event over which they have no control.”¹⁹ This statement demonstrates a misunderstanding of who actually created the covenants. Lake Tapps Development Co. platted this subdivision and created the covenants, not the homeowners. It retained to itself the right to approve subdivision of lots, and did not give that right to the newly created T & J Maintenance Company, which would become the defendant homeowners association. The expiration of control over subdivisions was not an arbitrary event over which Lake Tapps Development Co. had no control. If it so wished, it could have transferred that right to someone else prior to dissolving itself. Failure to make that transfer prior to dissolution is an affirmative choice to let the approval authority expire.

¹⁸ Though the opinion of current residents is clearly irrelevant, Lake Jane Estates misrepresents that opinion when it asserts that 85% opposed subdivisions in a 2000 survey. What the cited page actually says is that 85% of the 117 owners who responded opposed subdivision. CP 136. This equates to 99 owners in opposition, which is less than 23% of the 440 lots in the plat of Debra Jane Lake. CP 133.

¹⁹ Appellant’s Opening Brief, p. 17.

C. A restrictive covenant is unenforceable when it requires approval of an entity that no longer exists.

The law is clear in Washington and in other states that a restrictive covenant becomes unenforceable when it requires approval of an entity that no longer exists. *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407 (1983), *review denied*, 100 Wn.2d 1025 (1983), is directly on point. In that case, developers of a subdivision recorded restrictive covenants which required building plans to be approved by the Architectural Control Committee (the “ACC”). When the Wilhelms began construction of a swimming pool enclosure, the Whites filed suit to enjoin that construction, alleging violation of several restrictive covenants, including the requirement to obtain approval by the ACC prior to construction. The Court of Appeals affirmed the trial court’s factual determination that there had been no ACC in existence for several years, and its legal conclusion that:

The fact that the defendants did not try to submit their plans to a non-existent ... Committee provides no legal cause of action to the plaintiffs.

Id., at 770-771.

In *Barbato v. Shundry*, 1991 WL 115949 (Ohio App. 5 Dist.,

1991),²⁰ a copy of which is attached in Appendix A, the Ohio Court of Appeals also addressed the same issue as in the case at bar. In *Barbato*, the recorded covenants required plans for all buildings to be approved in writing by the grantor. When the defendants attempted to construct a garage, plaintiffs sued for an injunction. The trial court found that the grantor mentioned in the restrictive covenants was a corporation which was no longer in existence. It also found no evidence of a successor corporation having been created for the purpose of exercising its approval authority, or any evidence of a written transfer of such approval authority. The trial court concluded that those covenants requiring the written approval of the grantor are not enforceable “due to the abandonment of the approval authority by the grantor without a proper transfer to another entity.” The Ohio Court of Appeals affirmed, stating:

However, as the trial court properly found, the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment.

²⁰ RAP 10.4(h) does not prohibit citation of unpublished decisions of courts in other states. Until its amendment in 2002, Rule 2(G) of the Ohio Supreme Court Rules for the Reporting of Opinions stated that unpublished opinions of the court of appeals may be cited by any court or person as persuasive though not controlling authority. In 2002, that language was deleted, and Rule 4 of the Ohio Supreme Court Rules for the Reporting of Opinions was adopted stating that distinctions between controlling and persuasive opinions based on whether they have been published are abolished, and that all court of appeals opinions issued after the effective date of the rules may be cited as legal authority and weighted as deemed appropriate by the courts. *See Appendix B.*

The circumstances in the case at bar are indistinguishable. Restrictive Covenant 6 requires written approval from an entity that no longer exists. Lake Jane Estates cannot unilaterally assume the approval authority set forth in that restrictive covenant.

Since there is no entity authorized to grant or reject approval for subdivision of a lot within the plat, the restrictive covenant is unenforceable. The trial court correctly entered a judgment on the pleadings determining that the covenant was unenforceable.

After entry of the judgment on the pleadings, Lake Jane Estates moved for reconsideration based solely upon the recent decision by Division One in *Green v. Normandy Park Riviera Section Community Club, Inc.*, 137 Wn. App. 665, 151 P.3d 1038 (2007). Since that case is clearly different from the case at bar, and does not change the result in this case, the trial court correctly denied that motion.

In *Green*, one of the issues was whether the Community Club was the successor to the developer. The recorded covenants for the plat required building plans for any lot to be approved by the developer. The developer's estate had been sold to the Normandy Park Company, which recorded a conveyance of all of its right, title and interest in the covenants, as well as its right to enforce the covenants, to a specific corporation and

its successors and assigns. After that corporation was administratively dissolved, its officers continued to meet and take steps to enforce the covenants. Those officers then formed a new corporation with the same name, the defendant Community Club, which continued to enforce the covenants. The Court of Appeals held that the authority to approve construction plans was transferable, and this authority was effectively transferred from the original developer to the defendant Community Club.

The Court stated at 686:

As with the covenants themselves, we favor the interpretation of the conveyance of authority that does not frustrate either the purpose of the covenants or the reasonable expectations of the lot owners of the Riviera Section neighborhood. Accordingly, we hold that the Edlemans, on this record, have not raised an issue of material fact preventing the conclusion that the Community Club as it exists today is a valid successor to the NPRSCC and its predecessors and, as such, has the authority to enforce the covenants against the Edlemans.

[emphasis added]²¹

The obvious difference in the case at bar is that there is no evidence of any attempt by Lake Tapps Development Company to transfer the right to approve subdivision of lots. Until 2003, Lake Tapps Development Company and Lake Jane Estates were two separate and

²¹ This language is different from that quoted in Appellant's Opening Brief at page 23, because appellants quoted the original opinion before modification by the Court of Appeals on reconsideration.

distinct legal entities, with separate legal powers under the covenants. In the absence of any evidence of a transfer of the power to approve subdivisions to Lake Jane Estates, it is without any authority to approve or deny such subdivisions.

The same distinction inheres in the other case cited by Lake Jane Estates, *Sherwood Estates Homes Association, Inc. v Schmidt*, 592 S.W.2d 244 (Mo.App.W.D. 1979). In *Sherwood*, the original developer recorded covenants prohibiting construction without approval of plans by the developer. After the development was complete, the developer recorded an assignment to the plaintiff association the right to enforce all restrictions. The Court held that this assignment included the right to approve the plans.

The importance of an effective assignment was made clear by the same Missouri Court of Appeals the following year, when it ruled that a homeowners association had no authority to approve construction plans when the original developer had not assigned or transferred that authority to the association. *Ashelford v. Baltrusaitis*, 600 S.W.2d 581, 586-587 (Mo.App.W.D. 1980). In the case at bar, there is no evidence of any assignment of authority from the Lake Tapps Development Co. to the defendant.

Lake Jane Estates emphasizes the fact that the restrictive covenants in *Green* contained a statement that the covenants run with the land and bind future owners and successors, as do the covenants in the case at bar, as if that made some difference.²² In *Green*, the only significance of that language was to support a conclusion that the authority to approve could be assigned to a successor. The Court said:

Accordingly, we interpret the provision in the covenants which states that the covenants run with the land to mean that the benefit of the developer's enforcement power properly passed to those companies who acquired the developer's estate, the Seattle Trust and Savings Bank in 1934 and the Normandy Park Company in 1937.

The determinative issue in the case at bar is not whether the approval authority could be assigned, but whether it ever was assigned. In *Green*, a recorded document conveyed the authority to approve construction plans from one entity to another. In the case at bar, there is no document that purports to convey the right to approve the subdivisions of lots within the plat. Lake Jane Estates is not the “de facto” successor to Lake Tapps Development Company when they coexisted for almost forty-four years, from the former’s incorporation in 1959 until the latter’s dissolution in 2003.

²² Actually, a restrictive covenant written on the face of a plat will run with the land and bind future owners whether or not that is expressly stated. *Hollis v. Garwell, Inc.*, *supra*, at 690-693.

Lake Jane Estates repeatedly states that restrictive covenants are to be liberally construed, and construed as a whole. That also is not the issue. Restrictive Covenant 6 is plain on its face and requires no construction. The only entity which was given authority to approve subdivision of lots was Lake Tapps Development Company. The covenants as a whole gave Lake Jane Estates the right to approve construction plans, and to enforce the covenants, but reserved the right to approve subdivision of lots to another company. There is no evidence that anyone ever tried to assign to Lake Jane Estates the right to approve subdivisions. Since the entity which had that authority no longer exists, and never transferred that authority to another, the cases cited above clearly state that the covenant is no longer enforceable. Lake Jane Estates has cited no case authority to the contrary.

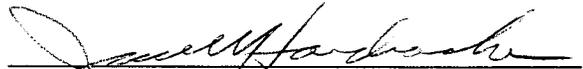
Finally, almost as an afterthought, Lake Jane Estates suggests that this Court should remand the matter to the trial court for additional discovery. Lake Jane Estates did not make a motion before the trial court for more time to conduct discovery. Mr. Jensen did nothing to prevent Lake Jane Estates from conducting any appropriate discovery in the six months that passed from the filing of this action to the filing of the motion for judgment on the pleadings. Most significantly, Lake Jane Estates has

not suggested what additional discovery would be pertinent. No discovery will change the fact that the covenant refers only to an entity which no longer exists.

II. CONCLUSION

Since all material facts are admitted in the pleadings, this case was properly decided by a motion on the pleadings. The Honorable Vicki Hogan correctly determined that the only entity authorized to approve or reject the subdivision of lots under Restrictive Covenant 6 was no longer in existence, and thus the covenant was no longer enforceable. This Court should affirm the judgment on the pleadings.

RESPECTFULLY SUBMITTED this 26th day of July, 2007.


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III. APPENDICES

APPENDIX A

Westlaw.

Not Reported in N.E.2d

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Not Reported in N.E.2d, 1991 WL 115949 (Ohio App. 5 Dist.)
(Cite as: Not Reported in N.E.2d)

Barbato v. Shundry
 Ohio App., 1991.
 Only the Westlaw citation is currently available.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark
 County.

Samuel BARBATO and Harriet Barbato,
 Plaintiffs-Appellants,

v.

Gary SHUNDRY and Paula Shundry,
 Defendants-Appellees.

No. CA-8451.

June 10, 1991.

Civil Appeal from the Court of Common Pleas,
 Case No. 90-1719-OC.

Rex W. Miller, Lesh, Casner & Miller, Canton, for
 plaintiffs-appellants.

Terrence L. Seeberger, Ross A. Carter, Black,
 McCuskey, Souers & Arbaugh, Canton, for
 defendants-appellees.

Before GWIN, P.J., and SMART and WILLIAM B.
 HOFFMAN, JJ.

OPINION

SMART Judge.

*1 This is an appeal from a judgment of the Court
 of Common Pleas of Stark County, Ohio, denying
 the petition of plaintiffs-appellants Samuel and
 Harriet Barbato (appellants) for temporary and
 permanent injunctive relief to prohibit
 defendants-appellees Gary and Paula Shundry
 (appellees) from building a detached garage on their
 property.

After a bench trial, the trial court made extensive
 findings of fact and conclusions of law, which we

have attached hereto and incorporate herein by
 reference, rather than paraphrasing those findings.

Appellants assign two errors to the trial court:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT'S JUDGMENT IS
 AGAINST THE MANIFEST WEIGHT OF THE
 EVIDENCE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT JUDGMENT IS
 CONTRARY TO LAW.

I

In *C.E. Morris v. Foley Construction Co.* (1978),
 54 Ohio St.2d 279, our Supreme Court held:

Judgments supported from some competent,
 credible evidence going to all the essential elements
 of the case will not be reversed by a reviewing court
 as being against the manifest weight of the evidence.

Syllabus by the Court.

Appellants assert that the trial court's determination
 that the grantor refusal provisions of the restrictive
 covenants have been abandoned is not supported by
 the record.

We have examined the record before us, and we do
 not agree. The record contains evidence which, if
 believed by the trial court in its function as fact
 finder, indicates that the corporation that developed
 the allotment has been dissolved, and no new
 successor corporation has asserted approval
 authority, that the individual grantors have
 expressly refused to assert the authority to reject the

Not Reported in N.E.2d

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Not Reported in N.E.2d, 1991 WL 115949 (Ohio App. 5 Dist.)
(Cite as: Not Reported in N.E.2d)

proposed garage, that the grantors consider that they have no legal authority to exercise and that no clear procedure for approval or rejection had been set up.

Appellants also maintain that the equities and public policies supporting enforcement of the restrictive covenant outweigh the right of appellees to use their property for the proposed garage.

In *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, the Supreme Court opined that our legal system does not favor restrictions on the use of property, citing *Loblow, Inc. v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, that agreements restricting the use of real estate must be strictly construed against those limitations.

The trial court found that appellees would be substantially inconvenienced and would incur costs and possible property damage if they cannot build this garage. There was evidence before the court that indicated that the proposed garage would increase, not decrease, the property value of appellees' premises and nearby properties.

In short, we find sufficient, competent and credible evidence to support the trial court's judgment, and we conclude therefore that it is not against the manifest weight of the evidence.

The first assignment of error is overruled.

II

Appellants next maintain that the trial court's conclusion of law no. 6, finding that the restriction that requires the approval of the grantor is not enforceable, is contrary to Ohio law. Appellants cite us to several cases from other appellate districts. We have reviewed these cases and find them distinguishable because in each case where the courts found a general plan that was reasonably exercised, they held them enforceable. Those that were not were struck down. Here, the general plan that was arguably once in effect has broken down and there is no entity available to reasonably exercise the authority to disapprove of the proposed garage. Keeping in mind the dictates of *Driscoll*,

supra I, the language in these covenants must be strictly construed against the limitations which they impose.

*2 Appellants raise a number of issues under this assignment of error that interrelate. Basically, appellants assert that by virtue of the fact that they own property in the allotment, they have standing to enforce restrictive covenants even if the grantor has refused, arbitrarily or not, to enforce them. If the restrictive covenants are enforceable at all, then a property owner such as appellants may enforce the restrictions. However, as the trial court properly found, the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment.

In short, we find that the trial court's judgment is in accord with Ohio law.

The second assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

GWIN, P.J., and WILLIAM B. HOFFMAN, J.,
concur.

ATTACHMENT

IN THE COURT OF COMMON PLEAS

STARK COUNTY, OHIO

SAMUEL BARBATO, Plaintiff

vs.

GARY SHUNDRY, Defendant

Case No. 90-1719-OC

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 (Cite as: Not Reported in N.E.2d)

Dec. 19, 1990.

*FINDINGS OF FACT AND CONCLUSIONS OF
 LAW AND JUDGMENT ENTRY*

FINDINGS OF FACT

1. The parties stipulated that the respective spouses of the plaintiff and defendant could be added as parties, and be bound by the decision in this case; and, in fact, each spouse, Paula Shundry and Harriet Barbato, was present and were made parties.

2. The parties further stipulated that the hearing of December 7, 1990 constituted the consolidated hearing on the merits of plaintiff's suit for preliminary and permanent injunctive relief.

3. Plaintiff is the owner of property located at 2533 57th Street N.E., North Canton, Ohio, and further known as Lot No. 18 in Meadow Glen Allotment No. 1 by virtue of a deed from Leroy H. Dieringer and Florence J. Dieringer dated November 24, 1958, recorded in Deed Volume 2609, page 693, Stark County Recorder's Office.

4. Defendant is the owner of certain property located at 2527-57th Street N.E., North Canton, Ohio, and further known as Lot No. 19 in Meadow Glen Allotment No. 1 by virtue of a deed from James R. Pugh and Dorothy J. Pugh dated June 10, 1978, recorded in Deed Volume 4086, page 127, which grantor acquired title to such property from Donald E. Joseph by deed dated April 25, 1977, recorded in Deed Volume 3959, page 187, and which grantor acquired title to such property from Leroy H. Dieringer and Florence J. Dieringer by deed dated September 7, 1960, recorded in Deed Volume 2721, page 681, Stark County Recorder's Office.

5. The title to lots in Meadow Glen Allotment No. 1, including the titles to both plaintiff and defendant's properties identified above, are subject to uniform protective covenants and restrictions which provide in relevant part as follows:

"... said covenants and restrictions are adopted for the benefit and protection of all Meadow Glen Allotment No. 1 and that all the restrictions shall be construed together, ... and no violations of these restrictions shall act as a precedent in allowing others to violate the same or other restrictions, and it being further understood and agreed that the Grantors shall have the right to interpret these restrictions, which interpretation shall be binding as to all persons or property benefitted or bound by them:"

*3 "FIRST: No lot shall be used or occupied for other than private residence purposes ..."

"TWELFTH: No buildings or fence may be erected or maintained on the property herein sold until the plans, elevation, location, materials and grade thereof have been submitted to the Grantors and by them approved in writing and a copy of said plans which shall include all four elevations deposited with said Grantors nor shall any change or alteration be made in the design of any buildings or fences after the original construction thereof until approval thereof has been given in writing by the Grantors. The Grantors shall have the right to refuse any building, grading or location plans and the materials thereof which are not suitable or desirable in their opinion, for aesthetic or other reasons, and they shall have the right to take into consideration the suitability of the proposed building or other structure, and of the materials of which it is to be built, to the site upon which it is proposed to erect the same, the harmony thereof with the surroundings, and the effect of the building or other structure as planned on the outlook from the adjacent or neighboring property."

"THIRTEENTH: ... The garage, if not designed in with the dwelling, shall be located with the advice and consent of the Grantor so as not to be detrimental to adjoining lots or to conflict with the general plan of beautifying the rear portions of lots as garden sites. The Grantor may disapprove the location of any garage which does not comply herewith."

"EIGHTEENTH: Any covenant or restriction contained in this agreement may be enforced against

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any violation thereof by any present or future owner or owners of any lots located in said Meadow Glen Allotment No. 1 by any proper, legal or equitable proceedings, the same being for the benefit of all present and future owners of land in said Allotment.”

6. Defendants obtained zoning approval from Plain Township for the construction of a detached garage to be located in the rear of their property.

7. The proposed garage would be 24 feet wide and 25 feet deep with a maximum peak of 15 feet and a 10 foot high garage door. Said garage was to be built with its outside walls 10 feet from the North lot boundary line, and 10 feet from the East lot boundary line. The exterior of the garage and defendants' home would be compatible in appearance. The driveway extension to the garage is designed so that it would come no closer to the East lot boundary line than does the presently existing concrete walkway at the side of defendants' home.

8. Defendants plan to landscape the garage, and were willing to do so in a way as to minimize the garage's visibility to plaintiff and to minimize any potential increase in noises.

9. The garage would be used to store a boat and a truck used by defendants in a part time cleaning business. No chemicals will be stored in the garage; nor would any commercial activities be conducted there.

10. The “grantors” referred to in the restrictive covenants for Meadow Glen Allotment No. 1 were Leroy H. Dieringer and Florence J. Dieringer. Testimony was elicited at trial that L.H. Dieringer, Inc. is the “grantor” for purposes of approving or disapproving plans for other Meadow Glen Allotments, but there is no evidence of a written transfer of approval authority to that corporation for Meadow Glen Allotment No. 1. L.H. Dieringer, Inc. is a dissolved corporation.

*4 11. Defendants attempted to obtain written approval for the proposed garage from Leroy H. Dieringer, who had been the principal of L.H.

Dieringer, Inc. Mr. Dieringer did not review the proposal. Mr. Dieringer told the defendants that the restrictive covenant was invalid, and that they did not need his written approval. He did not approve or reject the plans for the proposed garage. Mr. Dieringer, while testifying that he did not approve or disapprove of the plans, further testified that his reasons for not agreeing to the proposal, without reviewing it, were complaints of neighbors and the fact that there was no two-car detached garage in the allotment.

12. Plaintiff Samuel Barbato objected to the proposed garage because it would be visible from his yard, which he has landscaped, and because vehicles driving down the driveway would pass by his bedroom window.

13. Three neighbors objected to the proposed garage for the reason that it would, among other things, diminish their property value, and would set a precedent which could lead to other detached garages in the allotment.

14. Three neighbors testified that they did not object to the proposed garage. One neighbor, Carolyn Valentine, testified that even if she lived in plaintiffs' home or next to the defendants' home, she would not object to the proposed garage.

15. John Boebinger, an experienced real estate broker, testified that based on his view of the plans, property and allotment, that the proposed garage would increase the value of defendants' property and the immediately surrounding properties. His opinion was based in large part on the garage replacing an old green outbuilding, and that defendants' truck, which is often parked in front of defendants' home, would be stored in the garage.

16. Defendants' cleaning truck needs to be kept in a heated garage during winter months to prevent damage to its equipment. It will not fit inside defendants' present attached garage. Defendants are currently renting a garage several miles away to house the truck at a rate of \$350.00 a month. Housing the truck several miles away constitutes a substantial inconvenience to defendants' part-time cleaning business.

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(Cite as: Not Reported in N.E.2d)

17. Of the eighty-five (85) homes in Allotments 1, 2, 3 and 4, over thirty (30) have outbuildings, some as high as twelve (12) to fourteen (14) feet, and over thirty (30) have driveways that go to the side of, or to the rear of said homes. Several have attached garage additions. None of the outbuildings referred to herein have a foundation as is proposed in the present case.

18. The applicable zoning regulations and the restrictive covenant do not contain a prohibition against detached garages.

19. The defendants' truck is a one ton truck, and therefore, does not violate a Plain Township zoning regulation which prohibits the parking of trucks with an axle weight exceeding 1 1/2 tons in a residential district. The restrictive covenants do not contain a provision prohibiting the parking or storage of a truck on an owner's property.

CONCLUSIONS OF LAW

*5 1. The restrictive covenants for Meadow Glen Allotment No. 1 do not prohibit a detached garage. This is not a case where an adjoining property owner in an allotment is coming in to court seeking injunctive relief against an activity by a property owner which is prohibited pursuant to the restrictive covenants. The restrictive covenants in the present case allow for a detached garage, but set forth a procedure to be followed in obtaining approval of the plans and certain guidelines to be followed by the "grantor" in reviewing the plans.

2. The grantor mentioned in the restrictive covenants for other Meadow Glen Allotments required to review plans was L.H. Dieringer, Inc., a corporation. That entity is no longer in existence. There is no evidence of a successor corporation having been created for the purpose of exercising that approval authority, be it another corporation controlled by the original grantors, the grantor individually, or a homeowner's association.

3. The evidence before the Court is that L.H. Dieringer, individually, has not exercised approval authority for Meadow Glen Allotment No. 1. for

some period of time, and that he himself is of the opinion that the covenants are not enforceable. There is no evidence of a written transfer of the approval authority to a third party entity. Mr. Dieringer, by his testimony, indicated a clear "hands off" approach to being involved in the approval process.

4. The Court finds that there are sufficient guidelines in the restrictions relative to the requirement of approval of plans for a detached garage to have made them enforceable when adopted. However, the Court finds in the present case that due to the passage of time, the position of not being involved articulated by Mr. Dieringer, and the dissolution of L.H. Dieringer, Inc., that there is no clear procedure in effect for the exercise of the approval authority.

5. Even assuming that Mr. Dieringer, individually, still had the right to exercise that authority, such right may not be exercised in an arbitrary manner. In the present case, there is no evidence that he even reviewed the plans. Since a detached garage is not prohibited in the allotment, disapproval of the plans on the basis that there is no other detached garage in the allotment at the present time, or that neighbors objected to the attached garage, would not be a sufficient basis or in keeping with the guidelines set forth in the deed restrictions.

6. Accordingly, this Court is of the opinion that while most of the restrictive covenants in the allotment may still be enforceable, those covenants requiring the approval of the grantor in the absence of an entity or are not enforceable due to the abandonment of the approval authority by the grantor without a proper transfer to another entity.

7. This Court further holds that even assuming arguendo that "non approval" constituted action on his part, that the injunctive relief would still have been denied because his action was arbitrary and not based on the guidelines established by the restrictions.

*6 /s/John G. Haas, Judge

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(Cite as: **Not Reported in N.E.2d**)

Atty. Rex W. Miller

Atty. Terrence Seeberger

Atty. Ross Carter

Ohio App., 1991.
Barbato v. Shundry
Not Reported in N.E.2d, 1991 WL 115949 (Ohio
App. 5 Dist.)

END OF DOCUMENT

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APPENDIX B



Rules for Reporting Opinions, Rule 2

Baldwin's Ohio Revised Code Annotated Currentness
 Supreme Court Rules for the Reporting of Opinions (Refs & Annos)

→Rep R 2 Opinions shall be promptly published and posted

Opinions shall be published in the Ohio Official Reports and posted to the Supreme Court website as promptly as reasonably possible after their announcement. Posting and publication of opinions shall not be delayed by the filing of motions for reconsideration or by pending appeals.

(Adopted eff. 5-1-02)

HISTORICAL AND STATUTORY NOTES

Amendment Note: Effective May 1, 2002 the Supreme Court amended its Rules for the Reporting of Opinions. Prior to amendment, Rep. R. 2 read:

(A) No Court of Appeals opinion (which phrase includes per curiam opinion) in any case shall be reported in the Ohio Official Reports (1) if the Supreme Court has the case pending for adjudication upon the merits or has ruled upon the merits, unless the Supreme Court expressly orders such opinion to be reported, (2) if the case is pending before the Supreme Court on a motion to certify the record or a motion for leave to appeal, or (3) unless a period of seventy days has expired from the journalization of the judgment of the Court of Appeals.

(B) No opinion of a Court of Appeals or parts thereof shall be reported in the Ohio Official Reports unless (1) it is approved for official reporting by the Supreme Court Reporter; and (2) the majority of the judges of the Court of Appeals hearing the case certifies to the Supreme Court Reporter that the opinion meets any one or more of the standards for reporting specified in Section (E) of this rule.

(C) In addition to or in lieu of the provisions of Section (B)(2) of this rule, a Court of Appeals may determine by rule that each of its opinions or parts thereof, excluding orders on procedural matters, orders without opinion, brief memorandum decisions, and judgment entries under App. R. 11.1(E), may be sent to the Supreme Court Reporter for determination whether such opinion shall be reported in the Ohio Official Reports.

(D)(1) Opinions forwarded to the Supreme Court Reporter by Courts of Appeals shall be written in as concise form as may be consistent with a clear presentation of the point or points of law decided in the case and should not normally exceed twenty-five pages in length. The Supreme Court Reporter may cause opinions which have manuscripts greater than twenty-five pages to be reduced in length, subject to the approval of the judge writing the opinion.

(2) Each opinion forwarded to the Supreme Court Reporter shall have a cover page indicating thereon the number and style of the case, the character of the proceeding, (e.g., mandamus, habeas corpus, criminal appeal from common pleas court, civil appeal from municipal court), the Court of Appeals deciding the case, the attorneys of the parties, the judgment of the court and the date said judgment was journalized. (See Form 1.)

(3) The Supreme Court Reporter shall prepare, edit, index, and cause to be officially reported all Courts of Appeals opinions properly submitted and approved for reporting in the Ohio Official Reports.

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Rules for Reporting Opinions, Rule 2

(E) An opinion of a Court of Appeals may be selected for official reporting if it is determined by the Supreme Court Reporter that the case contributes significantly to the body of Ohio case law, and that the Court of Appeals which heard the case certifies that the opinion meets one or more of the following standards for reporting:

- (1) It establishes a new rule of law, which term as used in this rule includes common law, statutory law, procedural rules and administrative rules;
- (2) It alters, or modifies, or overrules an existing rule of law;
- (3) It applies an established rule of law to facts significantly different from those in previously published applications;
- (4) It explains, criticizes, or reviews the history of an existing rule of law;
- (5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
- (6) It concerns or discusses one or more factual or legal issues of significant public interest;
- (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
- (8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Supreme Court of Ohio.

(F) The syllabus of a Court of Appeals opinion shall not be considered the controlling statement of either the point or points of law decided, or law of the case, but rather as a summary for the convenience of the public and the Bar as a research and indexing aid. In a Court of Appeals opinion, the point or points of law decided in the case are contained within the text of the opinion, and are those necessarily arising from the facts of the specific case before the court for adjudication. Opinions submitted to the Supreme Court Reporter may be submitted with a syllabus approved by the judge writing the opinion.

(G) Unofficially published opinions and unpublished opinions of the Courts of Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions:

- (1) An unofficially published or unpublished opinion shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant;
- (2) In all other situations, each unofficially published opinion or unpublished opinion shall be considered persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered. Opinions reported in the Ohio Official Reports, however, shall be considered controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction;
- (3) A party who cites an unpublished opinion shall attach a copy of the opinion to his brief or memorandum and indicate any disposition by a superior appellate court of any appeal therefrom known after diligent search.

(H) Notwithstanding any provision to the contrary in Section (G), unofficially published opinions or unpublished opinions of one appellate district may be cited by the Court of Appeals of another appellate district for purposes of certifying to the Supreme Court a conflict question within the provisions of Sections 3(B)(4) and 2(B)(2)(e) of Article IV of the Ohio Constitution.

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Rules for Reporting Opinions, Rule 2

(1)(1) The acceptance or rejection for reporting of any opinion by the Supreme Court Reporter shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated therein.

(2) The refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated within the case.

CROSS REFERENCES

Laws to be passed providing for reporting of cases, O Const Art IV §3

Officers and employees to be appointed, 2501.16

Reporter of supreme court shall prepare only opinions of court of appeals furnished him for publication, 2503.20

LIBRARY REFERENCES

Reports ↵ 1, 3.
Westlaw Topic No. 336.

C.J.S. Reports §§ 2, 3, 10 to 13.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Courts & Judges § 370, Unreported and Unofficially Published Decisions.

Treatises and Practice Aids

Painter & Dennis, Ohio Appellate Practice § 1:49, Appellate Review-- Unpublished Reports; Availability.

Painter & Dennis, Ohio Appellate Practice § 5:18, Briefs--Addenda or Appendices.

LAW REVIEW AND JOURNAL COMMENTARIES

In Defense of Unpublished Opinions, The Honorable Boyce F. Martin, Jr. 60 Ohio St L J 177 (1999).

Unreported Opinions: Unravelling the Riddle, Joyce S. Anderson. 40 Columbus B Briefs 5 (February 15, 1984).

NOTES OF DECISIONS

Affirmed trial court decision 2
Controlling authority 3
Unreported cases 1

1. Unreported cases

Court of Appeals case requiring that civil suits for money damages against state be brought in Court of Claims was considered persuasive authority within appellate district "unless and until" reversed or modified by the Supreme Court. *Cristino v. Administrator* (Ohio App. 8 Dist., Cuyahoga, 02-20-2003) No. 80619, 2003-Ohio-766, 2003

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Rules for Reporting Opinions, Rule 2

WL 361283, Unreported, appeal allowed 99 Ohio St.3d 1471, 791 N.E.2d 985, 2003-Ohio-3801, reversed 101 Ohio St.3d 97, 802 N.E.2d 147, 2004-Ohio-201. Courts ↪ 90(1)

While Court of Appeals was not bound by its prior unreported opinion in unrelated case, Court was required to give persuasive weight to that opinion. (Annotation from former Rep R 2.) State v. Bird (Ohio App. 10 Dist., 06-01-2000) 138 Ohio App.3d 400, 741 N.E.2d 560, dismissed, appeal not allowed 90 Ohio St.3d 1427, 736 N.E.2d 25. Courts ↪ 107

While it is not improper for a trial court to rely on an appellate decision from another district as persuasive authority, such a decision, whether reported or not, is not controlling authority. (Annotation from former Rep R 2.) Stapleton v. Holstein (Ohio App. 4 Dist., 12-14-1998) 131 Ohio App.3d 596, 723 N.E.2d 164. Courts ↪ 99(2)

Unreported decision of a sister appellate district is not controlling authority, and a court is not constrained to follow that decision, though the decision can be considered persuasive authority on which any court can premise its decision in whole or part. (Annotation from former Rep R 2.) Beder v. Cleveland Browns, Inc. (Ohio App. 8 Dist., 07-20-1998) 129 Ohio App.3d 188, 717 N.E.2d 716, appeal not allowed 84 Ohio St.3d 1438, 702 N.E.2d 1215. Courts ↪ 107

In an action for attorney's fees for a victim of crimes case, the Court of Claims may not criticize counsel for failing to cite numerous unreported decisions since Rule 2(G)(1) provides that an unpublished opinion shall not be considered controlling authority. (Annotation from former Rep R 2.) State ex rel. Graves v. State (Franklin 1983) 9 Ohio App.3d 260, 459 N.E.2d 913, 9 O.B.R. 473.

A motion to certify a wrongful death case to the supreme court because of an alleged conflict of law with another court of appeals case, will be denied because recognition and sanction are not accorded to unofficially reported opinions. (Annotation from former Rep R 2.) Bevan v. Century Realty Co. (Mahoning 1940) 64 Ohio App. 58, 27 N.E.2d 777, 17 O.O. 349, appeal dismissed 136 Ohio St. 549, 27 N.E.2d 148, 17 O.O. 263.

Rule 2(G) of the Supreme Court Rules for the Reporting of Opinions does not prohibit the use or citation of an unpublished or unofficially published appellate opinion from another judicial district and though such opinions do not constitute binding authority, they are commonly cited as persuasive authority and the analysis therein may be adopted by any court where there is no binding authority to the contrary; therefore, a trial court's reliance on an unreported court of appeals decision from a different judicial district is not improper. (Annotation from former Rep R 2.) Nutter v Concord Twp Bd of Zoning Appeals, No. 92-L-118, 1993 WL 256808 (11th Dist Ct App, Lake, 6-30-93).

Unpublished opinion of Court of Appeals is not considered controlling authority. (Annotation from former Rep R 2.) State v. Parker (Ohio Mun., 03-18-1994) 66 Ohio Misc.2d 1, 642 N.E.2d 66. Courts ↪ 107

Unpublished Court of Appeals cases have limited precedential force. (Annotation from former Rep R 2.) McMeans v. Brigano (C.A.6 (Ohio), 10-05-2000) 228 F.3d 674, rehearing and suggestion for rehearing en banc denied, certiorari denied 121 S.Ct. 1487, 532 U.S. 958, 149 L.Ed.2d 374. Courts ↪ 107

Although opinion of Ohio Court of Appeals relied on by Ohio trial court in deciding evidentiary issue was unpublished, federal Court of Appeals was bound by it on habeas review unless convinced that the Ohio Supreme Court would decide the issue differently. (Annotation from former Rep R 2.) Johnson v. Karnes (C.A.6 (Ohio), 12-01-1999) 198 F.3d 589, rehearing and suggestion for rehearing en banc denied. Courts ↪ 107; Federal Courts ↪ 383

Unpublished opinions of the Sixth Circuit are not binding authority. Collins v. U.S. Playing Card Co. (S.D. Ohio, 11-06-2006) 466 F.Supp.2d 954. Courts ↪ 107

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Rules for Reporting Opinions, Rule 2

Although disfavored, citation to unpublished authority is allowed where facts of unpublished case are similar to those of case at bar and reasoning of unpublished opinion is sound. (Annotation from former Rep R 2.) *Frilling v. Honda of America Mfg., Inc.* (S.D. Ohio, 08-26-1998) 101 F.Supp.2d 841. Courts ↻ 107

Plaintiff was prejudiced by not receiving a copy of unpublished opinions to which defendant cited, and thus, court would not consider those opinions in deciding defendant's motion for summary judgment. (Annotation from former Rep R 2.) *Ashiegbu v. Purviance* (S.D. Ohio, 11-17-1998) 74 F.Supp.2d 740, affirmed 194 F.3d 1311, certiorari dismissed 120 S.Ct. 1287, 529 U.S. 1001, 146 L.Ed.2d 215. Federal Civil Procedure ↻ 2554

When citing unpublished opinions, copies of those opinions should be attached to the relevant brief, especially in cases involving pro se litigants who should not be expected to have copies of those opinions. (Annotation from former Rep R 2.) *Ashiegbu v. Purviance* (S.D. Ohio, 11-17-1998) 74 F.Supp.2d 740, affirmed 194 F.3d 1311, certiorari dismissed 120 S.Ct. 1287, 529 U.S. 1001, 146 L.Ed.2d 215. Federal Civil Procedure ↻ 921

Although unpublished decisions of the Sixth Circuit are not binding precedent, they can be cited if persuasive, especially where there are no published decisions which will serve as well. (Annotation from former Rep R 2.) *In re Hammermeister* (Bkrtcy.S.D. Ohio, 12-17-2001) 270 B.R. 863. Courts ↻ 107

Although unpublished decisions of the Sixth Circuit are not binding precedent, they can be cited if persuasive, especially where there are no published decisions which will serve as well. (Annotation from former Rep R 2.) *In re Slygh* (Bkrtcy.N.D. Ohio, 02-03-2000) 244 B.R. 410. Courts ↻ 107

2. Affirmed trial court decision

The appellate court is not required by the Ohio Constitution or statute to write an opinion when it affirms the decision of the trial court convicting the defendant for violation of the Barber's Code since the Supreme Court Rules merely require the appellate court to state the error upon which a judgment is reversed. (Annotation from former Rep R 2.) *Feeman v. State* (Ohio 1936) 131 Ohio St. 85, 1 N.E.2d 620, 5 O.O. 409.

Unpublished authority is without precedential value, except for purpose of establishing res judicata, estoppel, or law of the case. *In re Fixel* (Bkrtcy.N.D. Ohio, 11-27-2002) 286 B.R. 638. Courts ↻ 107

3. Controlling authority

Uninsured motorist insurer's reliance on local appellate precedent in declining to provide coverage to insured who sought wrongful-death damages for granddaughter who was killed in collision with uninsured driver was reasonable, and thus insurer did not act in bad faith, despite fact that insurer had provided benefits in similar situation in another appellate district, as controlling legal authority in district where accident occurred did not require that insurer provide coverage. (Annotation from former Rep R 2.) *Addington v. Allstate Ins. Co.* (Ohio App. 9 Dist., 07-05-2001) 142 Ohio App.3d 677, 756 N.E.2d 750. Insurance ↻ 3360

Rules for Reporting Opinions, Rule 2, OH ST RPT OPINIONS Rule 2

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Rules for Reporting Opinions, Rule 4

Baldwin's Ohio Revised Code Annotated Currentness
 Supreme Court Rules for the Reporting of Opinions (Refs & Annos)

→ Rep R 4 "Controlling" and "persuasive" designations based on form of publication abolished; use of opinions

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

- (1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;
- (2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;
- (3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;
- (4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

(Adopted eff. 5-1-02)

HISTORICAL AND STATUTORY NOTES

Amendment Note: Effective May 1, 2002 the Supreme Court amended its Rules for the Reporting of Opinions. Prior to amendment, Rep. R. 4 contained provisions relating to the effective date and applicability of the rules. See now Rep. R. 12 for provisions analogous to former Rep. R. 4.

RESEARCH REFERENCES

Treatises and Practice Aids

Painter & Dennis, Ohio Appellate Practice § 1:48, Appellate Review-- Reporting of Decisions.

Rules for Reporting Opinions, Rule 4, OH ST RPT OPINIONS Rule 4

Current with amendments received through 4/9/07

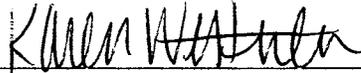
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CERTIFICATE OF SERVICE

I certify that on the date set out below I mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT, to:

Dianne K. Conway
Gordon, Thomas, Honeywell, Malanca,
Peterson & Daheim LLP
1201 Pacific Avenue, Suite 2100
PO Box 1157
Tacoma, WA 98401-1157

DATED this 26th day of July, 2007.



KAREN WESTERLIN
Legal Assistant to JAMES V. HANDMACHER
Morton McGoldrick, P.S.
Attorneys for Respondent Randy Jensen

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