

**IN THE SUPREME COURT OF OHIO**

<b>TODD DEVELOPMENT CO., INC., et al.</b>	:	Sup. Ct. Case No. 2007-0041
	:	
Plaintiffs-Appellants,	:	On Appeal from the Warren County
	:	Court of Appeals, Twelfth Appellate
vs.	:	District
	:	
<b>SONNY D. MORGAN, et al.</b>	:	Court of Appeals
	:	Case No. CA2005-11-124
Defendants-Appellees.	:	

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**BRIEF ON THE MERIT OF APPELLANTS**

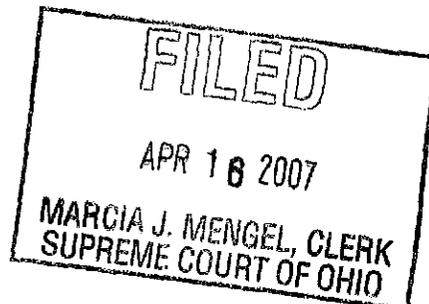
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## STATEMENT OF THE CASE AND FACTS

The underlying facts of the dispute between the parties are essentially undisputed and are accurately set forth in the Opinion of the Twelfth District Court of Appeals in its Opinion dated February 18, 2006 Appendix at App. – 000040.

This matter commenced in the Warren County Common Pleas Court through the filing of a Complaint for Declaratory Judgment by Appellees on May 19, 2004. In the complaint, the developer and its allied plaintiffs requested that the trial court issue a declaration that certain lots, owned by Appellants herein, had been “removed” and preempted from the effect of subdivision regulations in the chain of title of all properties located in the Shaker Ridge Subdivision, in which Appellants’ properties had been originally platted. Essentially, plaintiffs in the trial court (appellees herein) argued that certain subdivision restrictions, including a driveway agreement, had been voided as a result of the “replatting” of the property into a new subdivision through the action of the Warren County Commissioners.

The appellants herein, the defendant property owners who had been sued by the developer, filed a counterclaim arguing that the Plaintiff-developer had violated Shaker Ridge covenants effecting the property owners, specifically including a prohibition of subdividing of lots.

Upon cross motions for summary judgment, the trial court concluded that the covenants were in full force and effect and were in fact applicable to all lots originally in the Shaker Ridge Subdivision. Dec. of Trial Court, November 5, 2007 Appendix at App. – 000060. Insofar as the heart of the dispute between the parties involves the applicability of restrictive covenants to the subject properties originally in the Shaker

Ridge Subdivision, the trial court included Civil Rule 54(E) certification that there was “no just cause for delay.” Id. at App. – 000058. The court of appeals concluded that the matter involved a final appealable order. Dec. of Court of Appeals, September 18, 2006 at App. – 000044.

As the court of appeals below found, on November 24, 1998 the plat, containing “protective covenants,” was filed for the Shaker Ridge Subdivision in the Warren County Recorder’s Office. Id. at App. – 000045. Those covenants included a restriction on “subdividing” indicating that “no lot in this subdivision shall be divided into smaller lots or parcels except to be joined to an existing full-sized lot adjacent thereto.” Id. Fenco Development Company was the original developer of the property. Id. at App. – 000044. It had retained six lots in the original sixteen lot subdivision and subsequently sold the property to appellee Todd Development Co., Inc. Todd Development Co., Inc. proceeded to “replat” the properties and include the specific lots, in subdivided form, into a new recorded plat known as “The Trails of Greycliff,” which included several dedicated streets. Id. at App. – 000046.

Both the trial court and the court of appeals concluded that the language contained in the original Shaker Ridge protective covenants applied and that it “clearly means that no lot can be reduced in size unless part of the lot is joined to an adjacent full-size lot.” Id. at App. - 000049. Although the court of appeals concluded that a “driveway agreement” did not retain substantial value and was not enforceable, the court of appeals agreed with the trial court that the size restrictions on the subject lots retained substantial value and were enforceable. Id. at App. 000051.

Having lost the Motion for Summary Judgment, appellees next requested that the trial court review and reconsider its decision. The trial court declined. Dec. of Trial Court, November 9, 2005 Appendix at App. – 000058. The court of appeals concluded that the failure of the trial judge to review the decision was an abuse of discretion finding that plaintiff had raised a genuine issue of material fact concerning laches, as an affirmative defense to appellants’ counterclaim. Dec. of Court of Appeals, September 18, 2006 Appendix at App. – 000055. The court of appeals concluded the trial court had erred insofar as the defendant property owners had not affirmatively excluded by evidentiary material the affirmative defense of laches, which had been simply pled by plaintiffs as an affirmative defense to the counterclaim of Plaintiff, but never assert in response to the summary judgment motion of Appellants, in support of appellees’ own summary judgment motion, or at any point prior to the request for reconsideration of the summary judgment decision. Id. at App. – 000056.

The Court of Appeals concluded that “summary judgment was not appropriate, due to genuine issues of material fact...on the laches issue.” Id. at App. - 000054.

Upon consideration of a Motion for Reconsideration and a Motion to Certify filed by appellant property owners herein, the court of appeals below overruled the request for reconsideration but did conclude that its decision conflicted with the decision of the Third District Court of Appeals in Countrymark Cooperative, Inc. v. Smith (1997), 124 Ohio App.3d 159. Dec. and Entry of Court of Appeals, December 13, 2006 Appendix at App. 000038. The Twelfth District Court of Appeals below issued its decision through a panel of judges from the Second District Court of Appeals, sitting in response to the voluntary recusal of the Twelfth District Court of Appeals Judges on a conflict basis. The panel

below cited the Second District Court of Appeals decision in ABN AMRO Mtge. Group v. Meyers (2002), 159 Ohio App.3d 608 in which the Second District conceded that the Third District Court of Appeals in Countrymark Cooperative had “reached a contrary conclusion” finding that a moving plaintiff did not bear the burden of proof to demonstrate the actions of a genuine issue of material fact on an affirmative defense. Id. at App. – 000036.

The Twelfth District Court of Appeals concluded that the following questions should be certified to the Ohio Supreme Court herein on the basis of conflict:

“Does a plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims bear the initial burden of addressing the non-moving party’s affirmative defenses in its motion?” Id. at App. – 000038.

The court of appeals below also noted that the Third District further applied its prior decision in Countrymark in Marion Plaza, Inc. v. The Fahey Banking Co. (Mar. 6, 2001), Marion App. No. 9-2000-59, 2001-Ohio-2158, 2001WL218434.

Subsequently this Court concluded by Entry filed February 28, 2007, that in fact a conflict exists. The parties were ordered to brief the precise issue set forth above.

## ARGUMENT

### Proposition of Law No. I:

**Pursuant to Civil Rule 56 summary judgment is properly rendered in favor of a moving party unless affirmative proof is presented by the opposing party, through evidence or stipulation, of the existence of a contested issue of material fact upon which reasonable minds can differ.**

Civil Rule 56, Ohio Rules of Civil Procedure, adopted in its initial form in 1970, has provided a complete framework for analysis of summary judgment issues in a clear unambiguous fashion.

Specifically, when a moving party asserts a motion for summary judgment “made and supported as provided in this rule” the burden shifts to an adverse party to reply. That adverse party “may not rest upon mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial.** If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.” (emphasis added) Simply stated, the trial court correctly concluded that no issues of a material fact had been raised in response to the summary judgment motion of the appellant homeowners. No reference to “laches,” no allegations of delay and no hint of any basis for a factual dispute was there set forth. Summary judgment was properly awarded consistent with the clear provisions of Civil Rule 56.

The belated effort to cause the trial court to reconsider its decision granted summary judgment by submission of new alleged factual materials concerning the supposed delays.<sup>1</sup>

The Twelfth District panel, citing its own decision from the Second District Court of Appeals, concluded that a party moving for summary judgment bears the initial burden of addressing affirmative defenses in a motion for summary judgment, citing ABN AMRO Mtge. Group, Inc. v. Arnold, Montgomery App. No. 20530, 2005-Ohio- 925.

The appellant property owners herein simply contend that they had no duty to alert their opponents to develop and assert a laches defense in response to a motion for summary judgment which addressed all issues necessary to support the relief sought by plaintiff. Nowhere in the Ohio Rules of Civil Procedure exists a requirement to demonstrate a negative, i.e. the inability of the adverse party to prevail on its affirmative factual claims. The full and complete opportunity was available to the property owner, through its attorney, to assert a laches claim in response to a motion for summary judgment, which thereby would have allowed further response from the appellee homeowners. The developer failed to do so, yet the court of appeals below, in overruling the trial judge, recognized a standard not contained in the Civil Rules to allow such an

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<sup>1</sup> The alleged factual dispute raised in the Request for Reconsideration simply involved a claim by the developer that notice had been given to the property owners "sometime" before April 26, 2004. A declaratory judgment action which gave rise to the litigation in this matter was filed by the developer less than a month later, with a counterclaim filed by the owners (consistent with the Civil Rules) explicitly claiming that the protective covenants applied. Although no facts were discussed, the court of appeals below, in its original decision, queried "exactly when each owner found out about the proposed subdivisions," "what the owners observed as to construction of streets and homes" and "what, if anything, the owners did to assert their rights..." Although the court of appeals observed that these matters were "fact sensitive," the factual record was not complete and did not demonstrate an issue of material fact insofar as no specific facts that appropriately demonstrated laches were asserted by the developer even in his Request for Reconsideration of the earlier summary judgment decision. As a matter of law laches could not have been properly found upon these alleged facts. As the Twelfth District Court of Appeals noted below, laches can only be found where there is an "unreasonable and unexplained" delay prejudicial to an adverse party. Baughman v. State Farm Mut. Auto. Ins. Co. (2005), 160 Ohio App.3d 642.

additional opportunity. The meaning of Civil Rule 56(E) is remarkably clear. If the opposing party does not respond with specific evidentiary materials, summary judgment will be awarded. The rule and the underlying policy favors the orderly administration of justice, prompt summary handling of claims, and the imposition of burdens on litigating parties to assert their positions in their entirety in response to a Rule 56 motion.

In its decision in Countrymark Cooperative, Inc. v. Smith (1997), 124 Ohio App.3d 159 (from which a discretionary appeal to the Supreme Court of Ohio was not allowed), the Hancock County Court of Appeals recognized, in consideration of a contract claim, that the affirmative defense of “illegality of contract” had been asserted by the party adverse to a motion for summary judgment filed in the trial court. Indeed, the Third District Court of Appeals expressly found that liability “depends on whether [the] affirmative defense creates a genuine issue of material fact.” The affirmative defense was raised by the non-moving party through a deposition filed in the action which was not “filed in time to permit the trial court to consider it when ruling on a Motion for Summary Judgment...” Analysis was quite simple for the Countrymark court, finding that once “the moving party had satisfied its initial burden, the non-moving party then as a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party.” Id. at p. 168.

The decision by this Court in Drescher v. Burt (1996), 75 Ohio St.3d 280, relied upon by the appellate court below (as well as the Third District Court of Appeals) contains the holding that “summary judgment requires the party opposing the motion to

produce evidence on any issue for which that party bears the burden of proof at trial.” Clearly the burden of proof of an affirmative defense (such as illegality of contract in the Third District case, and laches in the instant case) bears the burden and must produce evidentiary materials in response to Civil Rule 56 motion.

As in the instant case, the trial court in Countrymark concluded that a request for reconsideration of summary judgment motion, supported by exhibits and evidentiary material, “was improper and cannot be considered as part of the record on which summary judgment was ordered.” Countrymark at 169.

In Drescher this court expressly held that “our reading of Celotex and of Civ. R. 56 is that there is simply no requirement that a party who moves for summary judgment must support the motion with affidavits negating the opponent’s claims...Indeed, there is no requirement in Civil Rule 56 that the moving party support its Motion for Summary Judgment with any affirmative evidence, i.e., affidavits or similar materials produced by the movant.”

The presumed basis of the renewed vitality of Civil Rule 56 over the last 20 years is the decision of the United States Supreme Court in Celotex Corporation v. Catrett (1986), 47 U.S. 317. In Celotex, the Supreme Court held that there is in fact no requirement that a moving party support its motion with affidavits which negate the opponent’s claims. A non-moving party must produce evidentiary materials adequate to support its own defensive claims. Indeed, “summary judgment procedure is properly regarded not as a disfavored procedure with shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” Id. at p. 8.

The Tenth District Court of Appeals agreed with the Third District Court of Appeals. In Citibank, N.A. v. Kessler (April 15, 2004), 2004 Ohio 1899, 2004 Ohio App. LEXIS 1656, the Franklin County Court of Appeals concluded, citing that Countrymark decision as authority, that an adverse party must produce evidence “showing a genuine issue of fact regarding...his affirmative defenses in order to avoid summary judgment...” Id. at p. 9.

The Supreme Court of Indiana agrees. In Criss v. Bitzegaio (1981), 420 N.E.2d 221, 1981 Ind. LEXIS 749, held that “it is clear that the burden of pleading and proving any affirmative defenses is on the defendants” in response to a Motion for Summary Judgment. Although no affirmative defense had been raised in Criss, the opposing party “failed to meet their burden of proof in establishing any affirmative defense.” The Criss court found no error in applying the near identical Indiana Rules of Civil Procedure.

The courts of Texas agree. In Barrand, Inc. v. Whataburger, Inc. (2006), 214 S.W.3d 122, the Thirteenth District Court of Appeals of Texas rejected an adverse party’s argument that the party moving for summary judgment “does not address any of those affirmative defenses...” and should therefore “fail as a matter of law...” . Id. (at 49). The court expressly found that “the mere pleading...of an affirmative defense does not prevent the rendition of summary judgment for a plaintiff.” Specifically, the court held:

“That is, an affirmative defense will prevent the granting of summary judgment only if each element of the affirmative defense is supported by summary judgment evidence.” Id. at p. 49.

As noted by this court in Ormet Primary Aluminium Corp. v. Employer’s Ins. of Wausau (2000), 88 Ohio St.3d 292, 300, the “principle purpose of Civil Rule 56(E) is to enable movement beyond allegations and pleadings and to analyze the evidence so as to

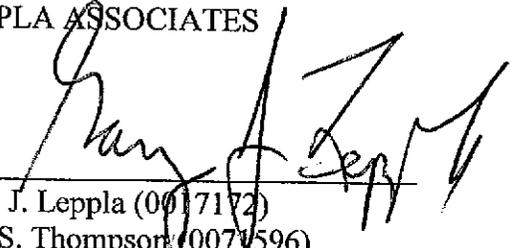
ascertain whether an actual need for a trial exists.” Citing Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64.

**CONCLUSION**

Requiring a party moving for judgment under Civil Rule 56 to prove a negative, i.e., to affirmatively preempt positions set forth in pleadings which are not asserted through evidentiary materials by an adverse party, amounts to a judicial redrafting of Civil Rule 56.

Respectfully submitted,

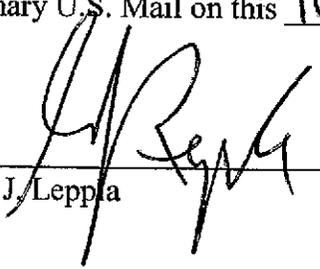
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**PROOF OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon James A. Matre, Esq./Kerrie K. Matre, Esq., Matre & Matre, Co., LPA, 225 Pictoria Drive, Suite 200, Cincinnati, Ohio 45246 via ordinary U.S. Mail on this 16 day of April, 2007.



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Gary J. Leppla

IN THE SUPREME COURT OF OHIO

07 - 0041

TODD DEVELOPMENT COMPANY, INC., et al.

Sup. Ct. Case No. \_\_\_\_\_

Plaintiffs-Appellants,

On Appeal from the Warren County Court of Appeals, Twelfth Appellate District

vs.

SONNY D. MORGAN, et al.

Court of Appeals Case No. CA2005-11-124

Defendants-Appellees.

NOTICE OF APPEAL OF APPELLANTS

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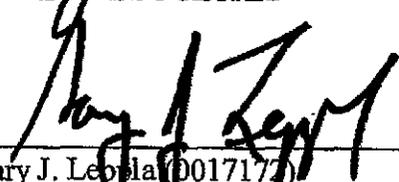
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**NOTICE OF APPEAL**

Appellants, Sonny D. Morgan, et al. hereby give their Notice of Appeal to the Supreme Court of Ohio from the judgment of the Warren County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2005-11-124, a copy of which is attached hereto as Appendix 1. On December 13, 2006 the Twelfth District Court of Appeals certified that its decision in this matter was in conflict with the decision reached by the Third District Court of Appeals in Countrymark Cooperative, Inc. v. Smith (1997), 124 Ohio App.3d 159, a copy of which is attached hereto as Appendix 2. This appeal is brought pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. A copy of the decision of the Twelfth District Court of Appeals certifying conflict is attached hereto as Appendix 3.

Respectfully submitted,

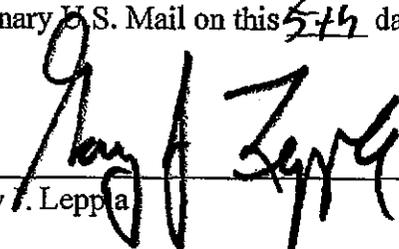
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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

TODD DEVELOPMENT COMPANY, INC., :  
et al., :

Plaintiffs-Appellants, :

- VS - :

SONNY D. MORGAN, et al., :

Defendants-Appellees. :

CASE NO. CA2005-11-124

OPINION  
9/18/2006

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 04-CV-62533

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**BROGAN, J.** (By Assignment)

{¶1} This case is before us on the appeal of Todd Development Company and HDC II,  
L.L.C. (Todd, HDC, or Plaintiffs), from a summary judgment granted to various defendants  
(Owners) who own lots in Shaker Ridge Estates Subdivision (Shaker Ridge). Shaker Ridge is  
located in Warren County, Ohio.

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{12} In May, 2004, Todd and HDC filed a declaratory judgment action alleging that they owned certain lots that were originally part of Shaker Ridge. As platted, all the lots in Shaker Ridge were subject to restrictions against subdivision. In addition, Todd's lots were subject to a Common Driveway Maintenance Agreement (Driveway Agreement). Todd and HDC alleged that their lots were subsequently re-platted, and that the earlier restrictions should not be enforced because of a change in circumstances. Accordingly, Todd and HDC asked the trial court to declare the subdivision restriction and the Driveway Agreement void and of no effect.

{13} Fenco Development Company and Martin Realty, Inc. (Fenco and Martin) were also named as parties in the declaratory judgment action. Fenco was the original developer for Shaker Ridge, and both Fenco and Realty, Inc. (Martin), were signatories to the subdivision restriction and Driveway Agreement. The Warren County Commissioners were included as Defendants because the Commissioners had approved the re-platting of Plaintiffs' lots. Furthermore, Warren County allegedly had an interest in the property because certain streets in the re-platted area had been dedicated as public streets.

{14} The Owners filed a counterclaim and amended counterclaim, alleging that Plaintiffs had violated a covenant on trucks, a restriction on subdividing the lots, and the Driveway Agreement. Additionally, the Owners claimed that Plaintiffs had committed trespass. The Commissioners filed an answer in which they admitted having an interest in the property, since certain streets in the re-platted area had been dedicated as public streets.

{15} In March, 2005, the Plaintiffs and the Owners both filed summary judgment motions. After considering the motions, the trial court found that the covenants were not ambiguous and should be enforced. The court granted summary judgment in favor of the Owners, and subsequently filed an entry prohibiting Plaintiffs from violating the subdivision restriction and Driveway Agreement. The court later amended the judgment by adding a

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Civ.R. 54(B) certification.

{¶6} On appeal, Plaintiffs raise the following assignments of error:

{¶7} "I. The trial court erred by overruling Plaintiff-Appellant's Motion for Summary Judgment.

{¶8} "II. The trial court erred by sustaining Defendant-Appellees' Motion for Summary Judgment.

{¶9} "III. The trial court erred in Overruling and Disregarding the Plaintiff-Appellants' Second Motion for Summary Judgment and Objections to the Decision and Proposed Entry by Defendants-Appellees."

{¶10} Before addressing the first assignment of error, we will briefly consider the issue of jurisdiction, which we may raise on our own motion. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366. The complaint for declaratory judgment in the present case raised issues regarding whether the subdivision restriction and Driveway Agreement were valid. In responding, the Owners filed a counterclaim and then filed an amended counterclaim containing four counts, which alleged violations of various covenants as well as a claim for trespass. In the prayer for relief, the Owners asked that Plaintiffs be prohibited from violating the covenants. The Owners also asked for damages for trespass, which was the subject of Count IV. In that count, the Owners alleged that Plaintiffs had parked vehicles in front of the Owners' driveways and blocked access to their homes, had left construction vehicles in the common driveway, exceeding the scope of any easement Plaintiffs had, and had trespassed on the common driveway by planting trees and constructing a berm.

{¶11} In ruling on the cross motions for summary judgment, the only issues the trial

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court considered were the validity of the subdivision restriction and the Driveway Agreement. The court did not hold that Plaintiffs had violated the covenants nor did it find that Plaintiffs had committed acts of trespass. Instead, the court entered prospective relief only, stating that Plaintiffs were prohibited from violating the covenants. And, as we noted, the court did file a Civ.R. 54(B) certification.

{¶12} An order is final for purposes of appeal if the requirements of R.C. 2505.02 and Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus. Declaratory judgments have been classified as special proceedings, and orders in such cases will be final orders if they affect a substantial right. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 21. A substantial right is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). Generally, property rights are considered substantial rights. See, e.g., *Chef Italiano*, 44 Ohio St.3d at 88 (orders dismissing specific performance and quiet title claims affected substantial rights).

{¶13} In *Chef Italiano*, the Ohio Supreme Court found that a summary judgment decision was not final because it had resolved only two of four claims against a party. However, Civ.R. 54(B) and App. R. 4 were subsequently amended to clarify that Civ.R. 54(B) allows immediate appeal of judgments on less than all claims for or against a party. *Walker v. Firelands Community Hosp.*, Erie App. No. E-06-023, 2006-Ohio-2930, at ¶13-23. As a result,

{¶14} "[A]n order that disposes of fewer than all of the claims in an action, and contains a Civ.R. 54(B) determination that there is no just reason for delay, is appealable if the claim or claims disposed of are entirely disposed of and either of the following applies. First, are the disposed of claim(s) factually separate and independent from the remaining

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claim(s)? An example would be claims that are based on different transactions or occurrences such as one claim for slander and another for negligence because of an automobile accident. Second, if the claims are not factually separate and independent, do the legal theories presented in the disposed of claim(s) require proof of substantially different facts and/or provide for different relief from the remaining claim(s)?" Id. at ¶23.

{¶15} In *Walker*, the appellate court found that four dismissed claims were not factually separate and independent from two remaining claims that had not been dismissed. The appeal was allowed, however, because of some differences in factual proof and relief between the two sets of claims. Id. at ¶24.

{¶16} In the present case, there is some factual overlap between the claim upon which summary judgment was granted and the claims that remain pending. However, there are also substantial differences in the required factual proof and relief requested. As we noted, the trial court focused on the validity of the covenants, and did not consider whether any particular act was a violation. The alleged acts themselves also involve different factual transactions. And finally, the trial court ordered prospective relief, i.e., the court did not hold that Plaintiffs had violated any covenants. If the court finds that the covenants were violated, or that Plaintiffs have committed trespass, the relief will be different from what has already been granted. Accordingly, we find that the present appeal is properly before us.

{¶17} Turning now to the first assignment of error, we note that it challenges the trial court's decision to overrule Plaintiffs' motion for summary judgment. In order to place Plaintiff's claims in perspective, we will briefly outline the factual background that led to this action.

{¶18} The record indicates that Fenco was the original developer for Shaker Ridge subdivision, which is located in Warren County, Ohio. Originally, Fenco proposed building 210 lots on 250 acres. Fenco proposed 30 lots for the first phase of development, but

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eventually reduced the number to 16, based on recommendations from the Warren County Combined Health District (Health District). The reduction was due to the Health District's concern over shallow rock soils and low-lying, unacceptable permeability soils in the proposed subdivision. Public sewerage was not available, and Fenco needed to increase lot sizes to allow for acceptable private sewage systems. A number of lots were acceptable "as is," but several lots had to be combined.

{¶19} The final plat for Shaker Ridge was approved on November 24, 1998, and contained 16 lots. The recorded subdivision plat also contained several covenants that were identified as "protective covenants." These covenants and restrictions were described as being:

{¶20} "for the benefit of all lots owners and are to run with the land and shall be binding on all parties and all persons claiming under them for a period of forty (40) years, from the date of the recording of this instrument at which time said Covenants shall be automatically extended for successive periods of Ten (10) years. At any time these Covenants may be amended by written consent of seventy-five (75%) of the then owners, each owner having one vote for each separate lot owned by him."

{¶21} Among the covenants was a restriction on "subdividing," which stated that "No lot in this subdivision shall be subdivided into small lots or parcels except to be joined to an existing full-size lot adjacent thereto." At the time the subdivision covenant was filed, the 16 lots reflected on the subdivision plat ranged between 1.00015 and 3.18166 acres, with several lots being only a bit more than an acre in size. Only two lots were over three acres.

{¶22} Lots one (1) through eight (8) in Shaker Ridge were also subject to a common driveway easement on the north side of the lots. This easement had a common drive entrance onto St. Rt. 122, which gave the lot owners access to St. Rt. 122. The subdivision plat indicates that the owners of Lots 1 through 8 were responsible for common drive

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maintenance and repair. In addition, a Driveway Agreement, dated October 18, 2000, was filed with the County Recorder. The original signatories to this agreement were Fenco and Martin Realty. Among other things, the agreement provided for installation of an initial base coat of asphalt on the common driveway after completion of all new home construction, but no later than June 30, 2003. The agreement further stated that each owner would thereafter be responsible for maintaining and repairing the asphalt in proportion to the frontage of that owner's lot.

{¶23} On January 27, 2003, Fenco sold Todd lots 1, 2, 3, 14, 15, and 16, plus two additional adjoining parcels of land. One additional parcel was about 30 acres, and the other was around 11 acres. Notably, the lots Todd purchased were the larger lots out of the original 16, while the remaining ten individual lots (those now belonging to Owners) ranged between 1.0015 and 2.0871 acres, with only one lot being over two acres. The warranty deeds from Fenco to Todd indicate that Lots 1, 2, 3, 14, 15, and 16 were conveyed "subject to easements, conditions, public highways, restrictions of record, and taxes and assessments not yet due and payable."

{¶24} Lots 1, 2, and 3 originally included about 10.0753 acres. These lots were subsequently re-platted and included in a record plat known as The Trails of Greycliff, which was approved by the Warren County Commissioners. The total acreage of The Trails of Greycliff was 21.4143 acres, and this plat consisted of 42 lots ranging between .3214 and .6699 acres. This plat also included several streets, one of which (Greycliff Trail Drive) exited onto St. Rt. 122.

{¶25} Todd did not keep, nor did it develop lots 14, 15, and 16. Instead, Todd sold these lots, along with the 30-acre parcel, to HDC. Again, this property was conveyed "subject to easements, conditions, public highways, restrictions of record, and taxes and assessments not yet due and payable." After the sale, Lots 14, 15, and 16 were also re-platted and

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included in a record plat known as Greycliff Landing, which was approved by the Warren County Commissioners. Greycliff Landing encompassed a 21.1018-acre parcel, with a total of 38 lots. Former lots 14, 15, and 16 originally consisted of about 7.3294 acres, but were now divided into 11 lots and partial parts of two other lots, along with three streets or parts of streets (Cardinal Cove, a cul-de-sac; Greycliff Landing, and Red Fox Run). The new lot sizes ranged between .3224 and .8740 acres, with most lots being close to a half-acre or larger.

{¶26} Various streets in the new plats, including Greycliff Landing, Black Squirrel Way, Greycliff Trail Drive, and Red Fox Run, were approved by Warren County and dedicated as public streets. The Ohio Department of Transportation also approved the dedication of Greycliff Trail Drive as permitting access to St. Rt. 122. In addition, the new streets included parts of former Lots 1, 2, 3, 14, 15, and 16.

{¶27} Unlike Shaker Ridge, The Trails of Greycliff and Greycliff Landing had public water and sewer. As a result, the new lot sizes could be smaller than what had been allowed in Shaker Ridge.

{¶28} In the trial court, the Owners submitted the affidavits of two property owners in Shaker Ridge. One owner had lived in Shaker Ridge since 1999, and testified that the character of the neighborhood had not changed since he arrived. Another owner, Thomas Olson, said that he had lived in Shaker Ridge since January 2004. Olsen stated that he would not have purchased property without a covenant against subdividing lots. Olsen also said that the common driveway ended at his driveway. Based on the exhibits, it appears that Olson is the owner of Lot 4 in the Shaker Ridge plat, and that his home sits on a lot of about 1.2687 acres. The exhibits also indicate that all the properties in Shaker Ridge that need access to St. Rt. 122 still have access through the common driveway. This consists of five homes, including Olson's house.

{¶29} In May 2004, Plaintiffs filed a declaratory judgment action, asking the court to

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declare that the subdivision restriction and the Driveway Agreement were of no effect. In granting summary judgment against Plaintiffs, the trial court found that the subdivision restriction was not ambiguous and that the restriction retained substantial value. The trial court also found that the Driveway Agreement was not ambiguous.

{¶30} In the first assignment of error, Plaintiffs contend that the trial court erred in disregarding the fact that Warren County required the subdivision restriction, due to the sewerage issue. They also claim that the subdivision restriction and Driveway Agreement were no longer of substantial value, due to changes in the neighborhood.

{¶31} We review summary judgment decisions de novo, which means that we use "the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383 (citations omitted). "De novo review requires that we review the trial court's decision independently and without deference to it." *Id.*

{¶32} As we noted, the trial court found the subdivision restriction and Driveway Agreement unambiguous. Like other written instruments, language in deed restrictions is construed in order to carry out the intention of the parties, which is determined from the language that is used in the deed. *Corna v. Szabo*, Ottawa App. No. OT-05-025, 2006-Ohio-2766, at ¶38. If the language is unambiguous, the restriction must be enforced as written. Courts will also apply the common and ordinary meaning of the language that is used. *Id.* However, if a deed restriction is "\* \* \* indefinite, doubtful and capable of contradictory interpretation, that construction must be adopted which least restricts the free use of the land." *Id.*

{¶33} In the present case, there is little doubt about the original purpose for the subdivision restriction. It was obviously caused by the poor soil and need to provide adequate disposal of sewage. Unfortunately for Plaintiffs, the original purpose is irrelevant, because the

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language of the restriction is unambiguous. Notably, the recorded plat does not inform individuals who purchase lots of the underlying reason for the restriction. Instead, a purchaser sees only the plain meaning of the terms used in the restriction, which says that "No lot in this subdivision shall be subdivided into small lots or parcels except to be joined to an existing full-size lot adjacent thereto."

{¶34} This language clearly means that no lot can be reduced in size unless part of the lot is joined to an adjacent full-size lot. As an example, we will use Lots 1 and 2 of the original Shaker Ridge plat. Lot 1 is 3.1866 acres, and Lot 2 is 3.7448 acres. Under the subdivision restriction, an acre could be taken from Lot 2 and added to Lot 1, causing Lot 1 to be 4.1866 acres, and reducing Lot 2 to 2.7448 acres. However, the acre taken from Lot 2 could not be subdivided into a separate lot (in this case, Lot 17, since there were 16 lots in the original subdivision). An individual reading the subdivision restriction would conclude that lots in Shaker Ridge might vary slightly in size from their original proportions, but the number of lots would never be more than 16. Accordingly, we agree with the trial court that the restriction was unambiguous.

{¶35} Plaintiffs also claim that the trial court erred in ignoring the legal significance of Warren County's approval of the re-platting of the property. We disagree, because zoning authorities do not have the power to change or vary covenants that run with the land if the covenants are valid. See *Gray v. Wainwright* (Apr. 20, 1984), Lucas App. No. L-83-340, 1984 WL 7842, \*6, and *Willott v. Village of Beachwood* (1964), 175 Ohio St. 557, 559. Consequently, we find no legal relevance in the fact that Warren County approved new plats without restrictions.

{¶36} Plaintiffs also argue that even if the subdivision restriction is valid, it should not be enforced due to a change in circumstances. In Ohio, the test for such situations is:

{¶37} "whether in view of what has happened there is still a substantial value in the

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restriction, which is to be protected.' \* \* \* In essence, if the nature of a neighborhood or community has so changed that the restriction has become valueless to the owners of the property, a court will not, in the exercise of its discretion, enforce the restrictive covenant." *Landen Farm Community Serv. Assn., Inc. v. Schube* (1992), 78 Ohio App.3d 231, 235-236, quoting from *Romig v. Modest* (1956), 102 Ohio App. 225, 230.

{¶38} *Landen* involved a restriction against front yard basketball poles and backboards that had been violated by 50 homeowners in a planned community of about 2,400 residential units. In that situation, we upheld a finding that freestanding basketball hoops had been integrated into the community and that the character of the community had been substantially altered such that the restriction no longer had substantial value to other homeowners. 78 Ohio App.3d at 238. Similarly, in *Dillingham v. Do*, Butler App. Nos. CA2002-01-004 and CA2002-01-017, 2002-Ohio-3349, we found that the value of a covenant restricting sheds, fences, and satellite dishes had been destroyed, due to the proliferation of these nonconforming devices in the community. *Id.* at ¶24-25.

{¶39} Plaintiffs argue that the subdivision restriction no longer has substantial value because of the current availability of public sewer and water facilities. We do not find this argument persuasive because the subdivision restriction does not refer to sewerage. A condition to that effect could have been added to the plat that was recorded, but Fenco chose not to add such a limitation. Thus, the only notice purchasers received was that the plat contained restrictions against subdivision.

{¶40} The Owners' affidavits indicate that the neighborhood has a rural character, and that its character has not changed since they purchased their lots. Accordingly, there is no basis upon which one could conclude, at present, that the covenant lacks substantial value. Such a state of affairs might eventually occur, but it does not presently exist. Compare *Pelster v. Millsaps*, Summit App. No 20507, 2001-Ohio-1419 (finding a restriction on lot-

splitting unenforceable because lot-splitting had occurred in the neighborhood over time and the overall value and quality of the neighborhood had been enhanced by the split that was being litigated).

{¶41} In view of the preceding discussion, we agree with the trial court that the subdivision restriction was valid and retained substantial value. Using the same reasoning, however, we find that the Driveway Agreement involves different circumstances and did not retain substantial value. The character of the neighborhood has changed so as to render the agreement valueless, at least to the extent that the agreement requires extension of the asphalt driveway across Lots 1, 2, and 3. These three lots can now access St. Rt. 122 via Greycliff Trail Drive, which has already been constructed and has been accepted as a dedicated street for that purpose. Since the five lots in Shaker Ridge have their own entrance onto St. Rt. 122 from the common driveway, extending the common driveway onto Lots 1, 2, and 3 retains no substantial value for Shaker Ridge lots. Accordingly, the trial court erred to the extent that it found the Driveway Agreement valid as to Lots 1, 2, and 3. The part of the agreement that requires Owners to maintain the driveway in front of their premises still has value.

{¶42} Based on the preceding discussion, first assignment of error is overruled in part and is sustained in part. This case will be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

II

{¶43} In the second assignment of error, Plaintiffs claim that the trial court erred by sustaining the Owners' motion for summary judgment. Plaintiffs' initial point in this regard is that the trial court gave improper weight to the Owners' self-serving comments about the purpose of the subdivision restriction. We disagree, as the trial court did not appear to give

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any particular weight to these comments. The trial court did mention the Owners' affidavits in the factual part of its decision, but did not refer to the affidavits thereafter. Instead, the court simply found that the subdivision restriction was not ambiguous. We have agreed with that finding. We also found that the Owners' affidavits are relevant to the issue of whether the restrictions retained substantial value.

{¶44} Plaintiffs' second point is that the trial court should have dismissed the Owners' motion for summary judgment because the Owners failed to file a counterclaim against the Warren County Commissioners. In this regard, Plaintiffs argue that they do not have authority to order Warren County to take action on public improvements now owned by Warren County throughout the six vacated and re-platted lots. We do not find this argument persuasive.

{¶45} In the first place, the trial court decision did not order Plaintiffs to take action. Instead, the court simply upheld the validity of the covenants and ordered prospective relief. Furthermore, the presence of publicly dedicated streets does not even relate to the subdivision restriction. The restriction simply states that lots may not be subdivided into small lots; it does not mention dedicating land for public use.

{¶46} And finally, even if the subdivision restriction did contain language about public streets, it could not be enforced against Warren County. See *Shepherd v. United Parcel Serv.* (1992), 84 Ohio App.3d 634, 646 (holding that when plats are accepted by public authorities and dedicated by owners, roads on the plats are public roads); and *Eggert v. Puleo* (1993), 67 Ohio St.3d 78, paragraphs one and two of the syllabus (holding that when a plat is approved by a municipal corporation and recorded with the county recorder, the fee of land designated for public use vests in the municipal corporation and a restrictive covenant binding private landowners cannot be enforced against the municipal corporation). The same reasoning applies to counties where land is designated for public use.

{¶47} Accordingly, the trial court did not err in granting summary judgment in the

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absence of counterclaims against the Warren County Commissioners. Even if the Owners had filed a counterclaim against Warren County, the trial court could not have ordered the County to destroy the public streets that had been approved and dedicated. For the reasons previously mentioned, however, summary judgment should not have been granted for Owners on the Driveway Agreement.

{¶48} Based on the preceding discussion, the second assignment of error is sustained in part and is overruled in part.

### III

{¶49} In the third assignment of error, Plaintiffs claim that the trial court erred in overruling their second motion for summary judgment and in overruling their objections to a judgment entry that was proposed by the Owners. This assignment of error has merit.

{¶50} When the trial court filed its decision on summary judgment, it asked the Owners to submit a judgment entry. Plaintiffs thereafter objected to the proposed entry and also filed a second motion for summary judgment, claiming that the trial court failed to consider the dedicated roadways that had already been platted and were now owned by Warren County. Plaintiffs also pointed out that the trial court had failed to address affirmative defenses, including the fact that the Owners had both actual and constructive notice of the entire building project to its current state of completion without raising objections or concerns.

At the time Plaintiffs' motion and objections were filed, the summary judgment decision was not yet final, because the trial court had not included a Civ.R. 54(B) certification. However, the court refused to consider the matters Plaintiffs had raised, stating that it had invested considerable time in deciding the first motion. Notably, the Civ.R. 54(B) certification was not filed until more than five months after the original decision on summary judgment was issued. It was also filed almost five months after Plaintiffs' second summary judgment motion.

{¶51} An interlocutory order of summary judgment may be reconsidered and revised

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at any time before final judgment is entered. *Brown v. Performance Auto Center, Inc.* (May 19, 1997), Butler App. No. CA96-10-205, 1997 WL 264203, \*9, and *Davis v. Becton Dickinson & Co.* (1998), 127 Ohio App.3d 203, 207. Reconsideration has even been granted where the court previously considered the facts and law supporting the renewed motion. *Id.*

{¶52} We review the trial court's decision on such matters for abuse of discretion. See, e.g., *White v. McGill* (1990), 67 Ohio App.3d 1, 4. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, courts have noted on many occasions that decisions are unreasonable if they are not supported by a sound reasoning process. *Raizk v. Brewer*, Clinton App. Nos. CA2002-05-021 and CA2002-05-023, 2003-Ohio-1266, at ¶10.

{¶53} After reviewing the record, we find that the trial court's failure to reconsider its interlocutory order was unreasonable. Compare *Hundsrucker v. Perlman*, Lucas App. No. L003-1293, 2004-Ohio-4851, at ¶29 (finding that the trial court acted unreasonably and abused its discretion in failing to reconsider an interlocutory decision on a motion for summary judgment).

{¶54} The issues in the present case are complicated. Nonetheless, the trial court simply dismissed the Warren County Commissioners without even considering whether the County's fee interest in the dedicated public streets might be affected. While we ultimately found that the County's fee interest could not be disturbed, this was a matter requiring research. It was not something that could be dismissed outright. Moreover, the issue was significant, since public roads had already been built.

{¶55} Furthermore, there was evidence before the trial court that raised genuine issues of material fact on the issue of laches, which Plaintiffs had raised as an affirmative defense to the counterclaim. Plaintiffs did not discuss their affirmative defenses prior to filing the second motion for summary judgment. However, they were not required to do so, since

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the Owners failed to address affirmative defenses in their motion for summary judgment and in their reply memorandum.

{¶56} A party moving for summary judgment bears the initial burden of addressing affirmative defenses in its motion for summary judgment. If the moving party fails to meet its burden as to these defenses, the nonmoving party has no burden and the trial court errs in granting summary judgment. *ABN Amro Mtge. Group, Inc. v. Arnold*, Montgomery App. No. 20530, 2005-Ohio-925, at ¶13-16.

{¶57} For example, in *ABN*, the plaintiff met its burden of establishing a default in a promissory note, but did not address the affirmative defense of civil conspiracy. Accordingly, the Second District Court of Appeals found that the trial court had erred in granting summary judgment on all the issues and in entering judgment in the plaintiff's favor. The Second District noted that the defendant had no burden because the plaintiff had failed to meet its burden, as the movant, on the affirmative defense. *Id.*

{¶58} "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 160 Ohio App.3d 642, 646-647, 2005-Ohio-1948, at ¶10. The elements of this defense are: "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 122, 2006-Ohio-954, at ¶81 (citation omitted).

{¶59} The following facts are pertinent to the laches issue. The executive vice-president of Todd, Richard Martin, indicated that the Owners were all notified that new subdivisions were being built adjacent to Shaker Ridge, and that Todd wanted to amend the subdivision restriction. This notice to the Owners would have occurred some time before April 26, 2004. The Owners were also aware of the new public water system for the subdivisions.

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One owner, Christopher Sizemore, told Martin that Shaker Ridge residents were going to be forced by Warren County to connect to the new water system at their own expense. The Owners wanted Martin to connect them to the system at no cost. Again, these discussions occurred prior to April 26, 2004. The action for declaratory judgment was filed on May 19, 2004, by Plaintiffs, not by the Owners. Even when the Owners filed a counterclaim, they did not ask the court for a temporary restraining order, nor did they request an injunction.

{¶60} The evidence submitted below also indicates that lots in the new subdivisions were platted and sold, and that substantial development had occurred. An aerial photo shows fully constructed, paved streets and courts, together with about 25 constructed homes that are arranged fairly close together, in plats. These facts raise issues about whether Owners unreasonably delayed in asserting their rights, and about whether Plaintiffs were prejudiced as a result. As Plaintiffs indicate, the Owners could not sit by and watch homes and streets being constructed, yet do nothing.

{¶61} Pertinent issues include exactly when each owner found out about the proposed subdivisions, which were approved by Warren County in January, 2004; what Owners observed as to construction of streets and homes; what, if anything, the Owners did to assert their rights; and reasons for any delay in asserting rights. Also relevant is the extent to which Plaintiffs proceeded with construction after being notified that Owners intended to assert their rights. These matters are obviously fact-intensive, and while the factual record is not complete, it does reveal genuine issues of material fact.

{¶62} We express no opinion on the merits, but simply note that summary judgment was not appropriate, due to genuine issues of material fact. Either side may ultimately prevail on the laches issue; all that is clear for now is that summary resolution was not appropriate. Consequently, the third assignment of error is sustained, and this matter will be remanded for trial on the issue of laches.

{¶63} Based on the preceding discussion, the first and second assignments of error are sustained in part and are overruled in part, and the third assignment of error is sustained. The judgment of the trial court is affirmed in part, is reversed in part, and is remanded for further proceedings.

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FAIN, J., and DONOVAN, J., concur.

Brogan, J., Fain, J., and Donovan, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

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[Cite as Countrymark Cooperative, Inc. v. Smith (1997), 124 Ohio App.3d 159]\*

\*Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1998), 81 Ohio St.3d 1496, 691 N.E.2d 1058.

Court of Appeals of Ohio, Third District, Hancock County.

No. 59721.

Decided Dec. 8, 1997.

Thompson, Hine & Flory, L.P.A., and Jack F. Fuchs, for appellee.

Tompkins & Denkwalter Co., L.P.A., and Ronald C. Tompkins, for appellant.

THOMAS F. BRYANT, Judge.

Defendant-appellant, Biron J. Smith, appeals from the judgment entered by the Common Pleas Court of Hancock County granting Countrymark Cooperative, Inc.'s motion for summary judgment pursuant to Civ. R. 56(C).

Countrymark alleged that Smith had failed to perform, and to give adequate assurances of performance, on eleven grain contracts entered into between Smith and Countrymark in December 1994 and May and June 1995. Smith, a farmer and producer of grain, signed eleven contracts with Countrymark, which required Smith to deliver to Countrymark a total of seventy-five thousand bushels of No. 2

yellow corn. The corn was due in multiple shipments over designated delivery periods, with thirty-five thousand bushels due after the fall harvest in 1995 and forty thousand bushels due after the 1996 harvest. It is undisputed that Smith delivered no corn, and offered no adequate assurances of delivery, to Countrymark.

After deposing Smith, Countrymark moved for summary judgment pursuant to Civ. R. 56(C). The trial court granted Countrymark's motion for summary judgment, finding that Countrymark was entitled to judgment as a matter of law upon its complaint and Smith's counterclaims. The trial court also issued a final judgment entry in favor of Countrymark in the amount of \$112,000, based on the parties' stipulated damages, pending appeal. Smith now takes this appeal.

Smith has failed to present assignments of error as required by App. R. 16(A)(3). Rather, Smith merely sets forth "issues presented." An appellate court must determine an appeal based on the "assignments of error set forth in the briefs." App. R. 12(A)(1)(b). Nevertheless, for the sake of judicial economy, we construe the issues presented by Smith as raising the following assignments of error:

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Relating to Countrymark's complaint:

I. The trial court erred when granting summary judgment in favor of Countrymark because a genuine issue of material fact existed as to whether Smith could prove the affirmative defense of illegality of contract.

Relating to Smith's counterclaim:

II. The trial court erred when granting summary judgment in favor of Countrymark because a genuine issue of material fact existed as to whether Countrymark breached eleven HTA grain contracts.

III. The trial court erred when granting summary judgment in favor of Countrymark because a genuine issue of material fact existed as to whether Smith was fraudulently induced to enter into eleven HTA grain contracts.

IV. The trial court erred when granting summary judgment in favor of Countrymark because a genuine issue of material fact existed as to whether Countrymark violated three federal acts: the Commodity Exchange Act, the Capper-Volstead Act, and the Clayton Antitrust Act.

I

Smith claims that the trial court erred in finding no genuine issue of material fact as to whether he could prove his affirmative defense of illegality of contract.

Pursuant to Ohio Civ. R. 56(C), the moving party is entitled to summary judgment as a matter of law "when the movant establishes the following: 1) that

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there is no genuine issue as to any material fact; 2) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *Carpenter v. United Ohio Ins. Co.* (May 9, 1997), Crawford App. No. 3-96-16, unreported, at 6, 1997 WL 232727, at \*2, citing *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

When reviewing a ruling on a motion for summary judgment, an appellate court undertakes an independent review. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 536 N. E.2d 411.

A defense alleging illegality of contract is an affirmative defense. *McCabe/Marra Co. v. Dover* (1995), 100 Ohio App.3d 139, 652 N.E.2d 236; *Arthur Young & Co. v. Kelly* (1993), 88 Ohio App.3d 343, 623 N.E.2d 1303. When challenging a contract's enforceability based on illegality, one does not challenge the terms to the agreement; "[I]n short, asserting that defense does not contest the existence of an offer, acceptance, consideration, and/or a material breach of the terms of the contract." *McCabe/Marra Co.*, 100 Ohio App.3d at 148, 652 N.E.2d at 241.

Smith admitted at his deposition that though he signed and voluntarily entered into eleven grain contracts, he failed to deliver and failed to offer adequate assurances of delivery of corn to Countrymark pursuant to those agreements. Accordingly, no genuine issue of material fact exists as to whether Smith breached the contracts as written. R.C. 1302.85 and 1302.67. Smith's liability, therefore, depends on whether his affirmative defense creates a genuine issue of material fact. Accordingly, the issue is

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whether there is any evidence in the record, when viewed most strongly in favor of Smith, which indicates that a triable issue exists as to whether the eleven grain contracts entered into by Smith and Countrymark were illegal and unenforceable under Ohio law.

Where the performance of a contract violates a statute or act, public policy may prevent the enforcement of its obligations. *Diversified Property Corp. v. Winters Natl. Bank & Trust Co.* (1967), 13 Ohio App.2d 190, 42 O.O.2d 307, 234 N.E.2d 608. Smith and Countrymark agree that grain contracts of the type they had entered into have been termed "hedge-to-arrive" ("HTA") contracts. Smith contends that the HTA contracts he signed enabled him, as the grain seller, to indefinitely roll, or extend, the date of delivery of corn to Countrymark, the purchaser. Indefinitely extending the date of delivery, Smith maintains, makes these eleven contracts illegal under the Commodity Exchange Act ("CEA"), Section 1 et seq. Title 7, U.S.Code and unenforceable under Ohio law.

Hedge-to-Arrive Contracts

In a basic HTA contract, farmers promise to deliver grain at a specific date in the future and purchasers promise to pay an agreed futures price set by reference to the Chicago Board of Trade ("CBOT"), plus or minus a basis, which accounts for local fluctuation in price. *Eby v. Producers Coop.* (W.D.Mich.1997), 959 F.Supp. 428, 430, fn. 1. The basis can float until fixed by the farmer at any time prior to delivery. *Id.* If basis is not fixed prior to delivery, it will automatically be set by the terms of the contract. *Id.*

Because the market price of grain at the time of delivery may be less than the agreed price, purchasers hedge their position on the contracts with suppliers by taking a short position on the CBOT. *Id.* A short position is an equal and opposite position to that taken in the original grain contract. Short positions are taken by purchasing a put on the CBOT, "[a]n option permitting its holder to sell a certain stock or commodity at a fixed price for a stated quantity and within a stated period." *Black's Law Dictionary* (6 Ed.1990). Once the put is purchased, the grain purchaser is hedged against a market downturn occurring at the time of delivery.

HTA contracts may benefit farmers by permitting them to lock in a favorable price of grain well before harvest, avoiding the normal market downturn at harvest time. *Eby*, 959 F.Supp. 428. The risk, however, is that grain prices could rise, as they did in the fall of 1995, and a farmer could be forced to comply with the agreed price, well below current market value. *Id.* A variation to the basic HTA contract, called a flex-HTA, provides more flexibility to a farmer, but with more risk. *Id.*

Flex-HTAs permit farmers to roll, or extend, their delivery obligation to a future date, potentially indefinitely at their sole discretion. *Id.* Thus, when the market rises, a farmer under a flex-HTA may elect to extend the original delivery period and sell the current harvest to another buyer at a more favorable market price. The farmer then waits for the market to return a lower position before fulfilling the original obligation. When a farmer decides to extend delivery, the purchaser rehedges on the CBOT and passes the cost on to the farmer in the form of a fee.

Flex-HTA contracts that permit the seller to indefinitely extend the date of delivery may lend themselves to speculation and force the seller to settle up with the buyer without ever actually delivering grain. The concern is that instead of actually contracting for the sale and delivery of a commodity, farmers and grain elevators are engaging in speculative off-exchange margin transactions, without oversight by a board of exchange. Accordingly, where a contract is entered into with no intention of delivering the commodity at issue, but instead

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with the promise to pay the difference on margin, the Commodity Exchange Act is implicated. Eby, 959 F.Supp. 428. In Eby, the court found that a triable issue existed as to whether flex-HTA contracts permitting unlimited rolling of the delivery date are illegal off-exchange transactions in violation the CEA.

### Commodity Exchange Act

The CEA prohibits "any person to offer to enter into \* \* \* any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery \* \* \* unless (1) such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a 'contract market' for such commodity." Section 6(a)(1), Title 7, U.S.Code.

An additional limitation to the act's application is how "future delivery" is defined. "The term 'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery." Section 1a(11), Title 7, U.S.Code.

This definition of future delivery continues the original exemption as set forth in the Futures Trading Act of 1921 and the Grain Futures Act of 1922. *Commodity Futures Trading Comm. v. Co Petro Marketing Group, Inc.* (C.A.9, 1982), 680 F.2d 573. Though the motivation for this legislation was to curb "excessive speculation and price manipulations occurring on the grain futures markets," the definition of future delivery was limited "to meet a particular need such as that of a farmer to sell part of next season's harvest at a set price to a grain elevator or miller." *Id.*, 680 F.2d at 577.

Co Petro interprets a "cash commodity for deferred shipment or delivery" as excluding "cash-forward" contracts and not futures contracts. *Id.* at 577-578. The latter contract is viewed as a transaction in a commodity for future delivery forbidden by the CEA unless entered into on a board of trade. *Id.* A cash-forward contract, on the other hand, meets the act's exception as a "cash commodity for deferred shipment or delivery" and may be entered into outside a board of trade. *Id.* Critical to whether a transaction is a cash-forward contract or the more speculative futures contract is whether "both parties to the contracts deal in and contemplate future delivery of the actual grain." *Id.* at 578; see, also, *Salomon Forex, Inc. v. Tauber* (C.A.4, 1993), 8 F.3d 966, 971 (cash-forward contracts "are usually entered into between parties able to make and receive physical delivery of the subject goods"); and *In re Bybee* (C.A.9, 1991), 945 F.2d 309, 314 ("the parties to forward contracts 'have the capacity to make or take delivery' and that delivery generally occurs").

It should be noted that the facts in Co Petro did not permit that court to address specifically whether a grain contract for future delivery was an off-exchange transaction in violation of the CEA. Rather, the decision held that fuel

oil marketing contracts for future delivery violated the CEA when both parties were not in the fuel oil business and never actually anticipated delivery of the commodity.

A recent federal district court addressed CEA restrictions on grain contracts for future delivery and held that "the forward contract exclusion, 7 U.S.C. § 1a(11), is available for cash contracts for the sale of grain that are made between persons engaged in the grain business and that are predicated on the expectation of actual, albeit deferred, delivery." *In re Grain Land Coop Cases*, 1997 U.S. Dist. 14712 (Sept. 25, 1997, Third Div. Minn.), No. 3-96-1209, at 13, reinstated on other grounds (Oct. 1, 1997), 978 F.Supp. 1267.

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## Smith and Countrymark's Contracts

Here, Smith argues that a triable issue of material fact exists as to whether the contracts are illegal off-exchange transactions. Smith claims that evidence in the record if believed indicates that the contracts are for the purchase or sale of a commodity, corn, which is to be delivered in the future, thus implicating the CEA. While it is true that the transactions at issue implicate provisions of the CEA, their enforceability under Ohio law is not prevented by this federal Act.

Smith primarily contends that the agreements between himself and Countrymark enabled him to indefinitely roll or extend the date of delivery of grain. This contractual right, Smith maintains, makes the contracts illegal off-exchange transactions in commodities futures. However, as noted above, the mere right to extend delivery is not what causes a contract to violate the CEA. Rather, the CEA prohibits off-exchange transactions for the delivery of commodities in the future when the parties never actually intend to deliver the commodity or have no capacity to do so. *Co Petro*, 680 F.2d 573; see, also, *In re Bybee*, 945 F.2d at 313.

Countrymark attached the eleven grain contracts to its complaint and introduced them as deposition exhibits. Upon review of the contracts we find no language permitting Smith, the seller, to extend the delivery dates at his discretion. The only mention of extending the delivery date reserves that right exclusively for Countrymark, the purchaser, not Smith. All eleven contracts state:

"6. Seller agrees that Purchaser may extend the due date delivery of the grain and/or soybeans beyond the aforementioned date at Purchaser's sole option on written notification of such extension to Seller mailed to Seller's address as shown on this contract."

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Further, no language in the contracts indicates that the parties never intended to actually deliver corn. The agreements all contain the following:

"4. Seller and Purchaser agree that this is a contract for delivery of Seller's grain and/or soybeans and is not a futures contract which can be purchased back by Seller's failure or inability to deliver said grain and/or soybeans in no way relieves him of his obligation of delivery of said grain and/or soybeans [sic]  
\* \* \*"

Finally, all eleven contracts contain the following integration clause:

"15. This agreement constitutes the entire understanding of the parties, and may be modified only by a signed writing of both parties, excepting Purchaser's right to extend this contract, and is binding on their heirs, assigns and successors of the parties."

Smith admits that he signed all eleven contracts. Smith further testified that he understood that the contracts required him to actually deliver corn to Countrymark. Furthermore, Smith actually delivered over nine thousand bushels of corn in the fall of 1995 to a different grain purchaser at a more favorable price. Countrymark satisfied its initial burden of presenting evidence that, when viewed most favorably to Smith, demonstrates that the parties actually contemplated delivery of corn and that Smith could not extend the delivery time indefinitely at his discretion. No genuine issue of material fact exists as to the legality of these contracts based on the evidence submitted by Countrymark. *Kulch v. Structural Fibers* (1997), 78 Ohio St.3d 134, 145, 677 N.E.2d 308, 317.

Though the moving party has the initial burden to come forward with evidence in support of its

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motion for summary judgment, once "the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Kulch, 78 Ohio St.3d at 145, 677 N.E.2d at 317, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264, 275. Further, "[s]ummary judgment requires the party opposing the motion to produce evidence on any issue for which that party bears the burden of proof at trial." *Nice v. Marysville* (1992), 82 Ohio App.3d 109, 116, 611 N.E.2d 468, 472. Because Smith bears the burden of establishing at trial his affirmative defense of illegality of contract, Smith must bring forth evidence of illegality to survive Countrymark's motion for summary judgment. *Dresher*, 75 Ohio St.3d 280, 295, 662 N.E.2d 264, 275.

Smith submitted the following evidence: first, affidavits from his marketing advisor Roger Wright and himself, second, an attachment to the first contract entered into between himself and Countrymark, entitled Attachment 110; third,

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correspondence between Countrymark and Roger Wright; and, fourth, a civil complaint filed by the Commodity Futures Exchange Commission ("CFTC") against an affiliate of Countrymark, Buckeye Countrymark, as well as Smith's marketing advisor Roger Wright.

Smith also attempts to place before this court the deposition of Daniel Webb. However, the Webb deposition was not taken as part of this action, but rather as part of an unrelated action before the Common Pleas Court of Hancock County, *CoBank ABC Corp. v. Bower et al*, No. 96-307-OC. The Webb deposition was not before the trial court when ruling on Countrymark's motion for summary judgment. This deposition was attached to Smith's motion for reconsideration of that ruling.

For evidence to be considered on a motion for summary judgment, it must be "timely filed in the action." Civ. R. 56(C) and Civ. R. 32(A). Because the Webb deposition was not filed in time to permit the trial court to consider it when ruling on the motion for summary judgment, it was not timely and cannot be considered here. *Nice*, 82 Ohio App.3d 109, 611 N.E.2d 468.

Further, Smith's argument that the Webb deposition was newly discovered evidence presented to the court in a motion for reconsideration is not well taken either. The civil rules do not permit a motion for reconsideration of a final judgment. Civ. R. 54(B). A motion for reconsideration may be made only as to an interlocutory order. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 21 O.O.3d 238, 423 N.E.2d 1105. Because the order of summary judgment entered by the trial was a final order, the subsequent motion for reconsideration and exhibits attached thereto were outside of rule. *Id.* Accordingly, any evidence sought to be introduced through this vehicle was improper and cannot be considered as part of the record on which summary judgment was ordered.

Smith's deposition testimony and affidavits demonstrate at best that he might not have understood all the terms within the contracts he was signing. Smith testified that he relied on his marketing advisor, Roger Wright, to inform him of the contract details. However, Smith, not his agent, signed all eleven contracts. Ignorance as to contract terms is no defense when one signs a contract without proper precaution. *McAdams v. McAdams* (1909), 80 Ohio St. 232, 88 N.E. 542; *Pippin v. M.A. Hauser Ent.* (1996), 111 Ohio App.3d 557, 676 N.E.2d 932.

Attachment 110 relates only to the first of the eleven contracts. Upon review of this document, we find no terms that can be read to permit Smith to extend the date of delivery of corn to Countrymark. This document, at best, demonstrates that Smith had the right to change pricing options, not delivery

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dates. The document states in part:

"The Opportunity Plus Contract (OPC) contains many pricing alternatives which may be exercised. Prior to the designated delivery period, customer may change pricing options as often as desired. However, customer understands that the selection of pricing options (or the change therefrom) involves price risk." (Emphasis added.)

Smith also points to three letters from Countrymark to Smith's marketing advisor, Roger Wright, as evidence of Smith's right to indefinitely extend the delivery dates under his contracts. This correspondence, however, at most indicates that Smith could only request that Countrymark extend the delivery dates on his contracts. Further, the letters make clear that no issue exists as to whether the parties intended that the corn never be delivered. In defendant's exhibit No. 4, the letter from Kenneth Parrent of Countrymark responds to Roger Wright's request on behalf of Smith and another farmer to change the delivery period from January 1996 to July 1996 and states:

"I am willing to consider your request for Duvall and Smith if you are willing to make a firm commitment on the number of bushels to be delivered in July. I do not wish to roll the delivery on these contracts indefinitely, particularly where the customer has the ability to make delivery in this crop year. I am willing to defer delivery beyond July if the customer finds himself unable to deliver because of a shortfall in production, or where contracts are the result of the exercise of options. This is per our Opportunity Plus agreement, and has always been the case." (Emphasis added.)

Smith's final exhibit, the CFTC complaint filed against Countrymark's affiliate, Buckeye Countrymark, offers no explanation of the contracts in this case. This complaint describes contracts that permit grain sellers to indefinitely roll the delivery date. The complaint further alleges that the parties to the contracts never intended to actually deliver grain. The contracts here are clearly distinguishable. The Smith and Countrymark contracts require delivery during a specific delivery period, and no evidence has been introduced that indicated that the parties actually intended never to deliver grain pursuant to the contracts.

Upon consideration of all the evidence in a light most favorable to Smith, we cannot say that the trial court erred when granting summary judgment in favor of Countrymark. No genuine issue exists as to whether Smith and Countrymark intended to deliver corn upon their contracts. Smith testified that he intended to deliver corn to Countrymark and would even buy corn off the market if necessary to fulfill his contractual obligation. The most generous reading of the correspondence from Countrymark to Smith indicates only that Countrymark contemplated extending the delivery of corn, but continued to seek actual delivery from Smith. Smith has presented no evidence that creates an issue of fact as to his affirmative

defense of illegality of contract. Kulch, 78 Ohio St.3d 134, 677 N.E.2d 308. Summary judgment was properly granted in favor of Countrymark.

Smith's first assignment is overruled.

II

In Smith's second assignment of error, he argues that the trial court erred in finding for Countrymark as a matter of law on the issue of Countrymark's alleged breach of the eleven grain contracts. Smith

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argues that Countrymark breached the agreements by refusing to extend the delivery periods for corn when requested by Smith.

The agreements between Smith and Countrymark concern the purchase and sale of goods, corn. Accordingly, these written agreements are governed by R.C. Chapter 1302 (codifying the UCC Article 2). *Burkhart v. Marshall* (1989), 63 Ohio App.3d 281, 578 N.E.2d 827. R.C. 1302.05 limits a court's consideration of contradictory evidence outside "a writing intended by the parties as a final expression of their agreement." Contrary to Smith's argument, the terms of these agreements can only be read as clear and unambiguous. Further, the contracts all contain the following integration clause:

"15. This agreement constitutes the entire understanding of the parties, and may be modified only by a signed writing of both parties, excepting Purchaser's right to extend this contract, and is binding on their heirs, assigns and successors of the parties."

As noted above, no reading of these eleven, fully integrated contracts can be said to require Countrymark to extend the date of delivery merely because Smith so requests. Only the purchaser, Countrymark, at its sole option could extend the date of delivery. Further, evidence of a course of dealing, where Countrymark extended the delivery date once on these contracts, still does not present a set of facts showing that Smith had the right to extend the delivery periods at his sole discretion.

Smith's second assignment of error is overruled.

### III

Smith's third assignment of error claims that the trial court erred in finding for Countrymark as a matter of law on Smith's claim that he was fraudulently induced to enter into the eleven grain contracts. Specifically, Smith claims that Countrymark promised him he had the right to extend the delivery periods for his corn at his discretion. The prima facie elements of a claim for fraudulent inducement are (1) a representation, (2) material to the transaction, (3)

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which is made falsely, with knowledge of its falsity or with utter disregard and recklessness as to its falsity, (4) intent to mislead, (5) justifiable reliance on the representation, and (6) a resulting injury. *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101.

Smith could not recall whether any representations were made to him personally by Countrymark promising him the right to extend indefinitely the delivery periods for his promised corn. Without evidence of a representation, a claim for fraudulent inducement cannot be made. *Id.*

Nevertheless, Smith contends that oral inducements were made to his agent, Roger Wright. Smith reasons that since Countrymark required Smith to execute a power of attorney permitting Roger Wright to act on Smith's behalf, Countrymark's representations to Wright were representations to Smith. Even if the evidence could demonstrate an agency relationship between Smith and Wright, the written agreements, signed by Smith, expressly contradict the alleged representations made by Countrymark to Wright.

The parol evidence rule codified in R.C. 1302.05 states:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with

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respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

"(A) by course of dealing or usage of trade \* \* \* or by course of performance \* \* \* and

"(B) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive state of the terms of the agreement."

As noted above, all eleven contracts contained the following clause:

"15. This agreement constitutes the entire understanding of the parties, and may be modified only by a signed writing of both parties, excepting Purchaser's right to extend this contract, and is binding on their heirs, assigns and successors of the parties."

These contracts were fully integrated documents. Accordingly, Smith may not introduce evidence that he, the seller, had the right to indefinitely extend the date of delivery under the contracts when such evidence is in direct opposition to the written agreement. As stated in *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 274, 533 N.E.2d 325, 334, "[t]he Statute of Frauds may not be overcome by a fraudulent inducement claim which

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alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing."

Smith's third assignment of error is overruled.

#### IV

Smith's fourth assignment claims that a genuine issue of material fact exists as to whether he is entitled to damages as a result of Countrymark's violation of several federal Acts: the Commodity Exchange Act, Section I et seq., Title 7, U.S.Code; the Capper-Volstead Act, Section 291 et seq., Title 7, U.S.Code; and the Clayton Antitrust Act, Section 17, Title 15, U.S.Code.

Smith's theory of action under each act is rooted in the assumption that the eleven HTA contracts he entered into were illegal futures contracts that permitted unlimited rolling of the delivery date of grain. This court has already determined that no evidence in the record supports this construction of the contracts. Accordingly, just as Smith had no defense under the Commodity Exchange Act for his breach of the agreements, he has no cause of action for its alleged violation.

Further, the Capper-Volstead Act and the Clayton Antitrust Act are generally considered statutes that empower agricultural cooperatives to engage in market activities free from most antitrust violations. *Maryland & Virginia Milk Producers Assn. v. United States* (1960), 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. The enforcement of these acts is within the discretion of the Secretary of Agriculture pursuant to Section 292, Title 7, U.S.Code. The secretary may direct a cease-and-desist order to a cooperative that has engaged in activities that may have "monopolized or restrained trade to such an extent that the price of an agricultural commodity has been unduly enhanced." *Milk Producers Assn.*, 362 U.S. at 462, 80 S.Ct. at 851, 4 L.Ed.2d at 885. Smith has failed to identify any set of facts that could entitle him to relief pursuant to these acts.

Smith's fourth assignment is overruled.

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Judgment affirmed.

EVANS, P.J., and SHAW, J., concur.

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DEC 13 2006

*James L. Spauth*, Clerk  
LEBANON OHIO

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT  
WARREN COUNTY

TODD DEVELOPMENT CO., INC., :  
ET AL. :  
Plaintiff-Appellants : C.A. Case No. 2005-11-124

vs. :

SONNY D. MORGAN, ET AL. : DECISION AND ENTRY  
: :  
Defendant-Appellees :

This case is before us on a motion for reconsideration and a motion to certify a conflict that have been filed by Appellees. The Appellees are property owners who were named as defendants in the trial court. Appellants in this case are Todd Development Company and HDC II, L.L.C. (Todd and HDC or Appellants). We will consider the motion for reconsideration first.

Without repeating the entirety of the factual background outlined in our prior opinion, we note that Appellees (Owners) own various lots in Shaker Ridge Estates Subdivision (Shaker Ridge). Appellants are developers and own certain lots that were originally part of Shaker Ridge. See *Todd Dev. Inc. v. Morgan*, Warren App. No. CA2005-11-124, 2006-Ohio-4825, at ¶1-2. Because the Shaker Ridge lots were all subject to a restriction that would have prohibited further subdivision of the

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lots, Appellants filed suit against Owners, seeking a declaration that the restriction was void and of no effect. Owners then filed a counterclaim, alleging, among other things, that Appellants had violated the subdivision restriction. And finally, Appellants filed a response to the counterclaim, asserting the affirmative defense of laches. *Id.* at ¶¶2-4 and 55.

In ruling on the appeal, we agreed with the trial court that the subdivision restriction was unambiguous and retained substantial value. Accordingly, we affirmed the trial court's decision to grant summary judgment on that point. However, we also found that the third assignment of error had merit. In that assignment of error, Appellants claimed that the trial court erred in overruling Appellants' objection to a proposed judgment entry and by refusing to consider Appellants' second motion for summary judgment. In the motion, Appellants had raised the trial court's failure to address affirmative defenses, including the fact that "Owners had both actual and constructive notice of the entire building project to its current state of completion, without raising objections or concerns." *Id.* at ¶¶50.

We agreed with Appellants that the trial court had abused its discretion by failing to reconsider its interlocutory order. Therefore, we reversed the case in part and remanded the matter for further proceedings. *Id.* at ¶¶50-63.

Owners now ask for reconsideration, claiming that Appellants cannot show they were materially prejudiced by Owners' alleged delay in filing their counterclaim, since there has been a finding that the subdivision restriction was valid and enforceable. Owners further contend that Appellants "lost" their claim for relief due to the finding that the subdivision restriction was unambiguous and enforceable.

According to Owners, this finding would have occurred even if no counterclaim had ever been filed, and precludes Appellants from obtaining any relief on the counterclaim.

Reconsideration is reserved for situations where a court makes obvious errors in its decision or where the court fails to either consider or fully address certain issues. See, e.g., *City of Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 515. After reviewing the Owners' arguments, we find no obvious error in our decision, nor is there anything that we failed to consider.

The finding that the subdivision restriction was unambiguous and, therefore, enforceable does not prevent Appellants from claiming on remand that the Owners prejudicially delayed in asserting their rights. Where a party knows a right is being infringed, but makes no attempt to enforce the right, a logical assumption is that the party is indifferent to the right or has no intention of enforcing it.

More importantly, the prejudice involved in the laches doctrine is based on steps a party takes during a period of delay that cannot be changed. For example, in *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145-146, 1995-Ohio-269, 656 N.E.2d 1277, an elector protested the residency of a candidate, and the board of elections refused to remove the candidate's name from the ballot. The elector then delayed filing an appeal for seventeen days, which meant that even under an expedited briefing schedule, the board of elections would not have time to change the absentee ballots, which had already been mailed. Thus, the Ohio Supreme Court applied laches and held that the elector was not entitled to relief. 24 Ohio St. 3d at 145-46.

Notably, the elector in *State ex rel. Polo* could have been absolutely correct on the merits of the case, but his lawsuit was still rejected because of prejudice caused by his delay in asserting the claim. In fact, this is the very nature of an affirmative defense, which "acts as a confession and avoidance. 'It admits for pleading purposes only that the plaintiff has a claim (the "confession"), but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the "avoidance").'" *ABN AMRO Mtge. Group v. Meyers*, 159 Ohio App.3d 608, 614, 2002-Ohio-602, 824 N.E.2d 1041 (citation omitted). In the context of building restrictions, the Second District Court of Appeals has also said that "[t]he extent of the delay which, in the case of acquiescence, will constitute laches, varies according to the nature of the case, thus, slight acquiescence in the violation of a building restriction will defeat an injunction suit." *Demarco v. City of Vandalia* (Mar. 7, 1983), Montgomery App. No. 7953, 1983 WL 4844, \*4 (citation omitted).

Based on the preceding discussion, the motion for reconsideration is overruled. As we noted in our opinion, the only issues that the trial court considered in ruling on the cross motions for summary judgment were the validity of the subdivision restriction and the validity of a Driveway Agreement. *Todd Dev. Inc.*, 2006-Ohio-4825, at ¶¶11. The Driveway Agreement was a separate issue that has not been contested on reconsideration.

In our prior opinion, we agreed with the trial court that the subdivision restriction was valid and retained substantial value. *Id.* at ¶41. We also found that the trial court erred in upholding the Driveway Agreement as to Lots 1, 2, and 3 of Shaker Ridge. *Id.* Finally, we did find that the Driveway Agreement retained value,

but only insofar as it required Owners to maintain the driveways in front of their premises. *Id.* These findings may not be further litigated in the trial court, on remand.

## II

The second motion at issue is the motion to certify an alleged conflict between our prior decision in this case and the Third District Court of Appeals' decision in *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App. 3d, 705 N.E.2d 738. Before we can certify a conflict, we must first find that our judgment conflicts:

"with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032 (emphasis in original).

Our prior opinion in the present case stated that the trial court had abused its discretion by refusing to consider the matters raised in Appellants' second motion for summary judgment. In particular, we found that the trial court's actions were unreasonable, i.e., not supported by a sound reasoning process. 2006-Ohio-4825, at ¶¶49-55. This conclusion was based on several reasons, including the fact that the issues in the case were too complicated and significant to be dismissed without due consideration. *Id.* at ¶¶50-54. In addition, we found that evidence before the

court raised genuine issues of material fact on the affirmative defense of laches, which Appellants had raised in response to the Owners' counterclaim. *Id.* at ¶55. In this regard, we noted that parties moving for summary judgment bear the initial burden of addressing affirmative defenses in their motions for summary judgment. If the moving party fails to meet its burden as to these defenses, then the nonmoving party has no burden and the trial court errs in granting summary judgment. *Id.* at ¶56.

The case we cited for this proposition was *ABN AMRO Mortgage Group, Inc. v. Arnold*, Montgomery App. No. 20540, 2005-Ohio-925. In turn, *ABN AMRO* relied on a prior decision of the Second District Court of Appeals in *Myers*, 159 Ohio App.3d 608, 2002-Ohio-602, 824 N.E.2d 1041.

In *Myers*, the Second District discussed *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, which is the leading summary judgment case in Ohio. After considering *Dresher* and its underlying logic, the Second District concluded that "the moving party has the initial burden to demonstrate the absence of a genuine issue of material fact 'on one or more issues of fact determinative of the non-moving party's claim for relief or affirmative defense.'" 2002-Ohio-602, at ¶8 (citations omitted). The Second District then commented that:

"the Third District Court of Appeals reached a contrary conclusion in *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App.3d 159, 705 N.E.2d 738. There the court rejected an argument that a moving plaintiff bears the burden to demonstrate the absence of a genuine issue of material fact on an affirmative defense, reasoning:

" Though the moving party has the initial burden to come forward with evidence in support of its motion for summary judgment, once "the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Further, "[s]ummary judgment requires the party opposing the motion to produce evidence on any issue for which that party bears the burden of proof at trial." Because Smith [the defendant] bears the burden of establishing at trial his affirmative defense of illegality of contract, Smith must bring forth evidence of illegality to survive Countrymark's motion for summary judgment." ' " Meyers, 2005-Ohio-602, at ¶10-11, quoting from *Countrymark*, 124 Ohio App.3d at 168.

Following the above quotation, the Second District went on to say that "[u]pon review, we respectfully disagree with the Third District's analysis. A nonmoving party's reciprocal obligation applies only to those matters that form the basis of the moving party's motion." *Meyers*, 2005-Ohio-602, at ¶12.

Appellants claim that this constitutes a certifiable conflict and that we should certify the following question to the Ohio Supreme Court:

"Does a plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims bear the initial burden of addressing the non-moving party's affirmative defenses in its motion?"

In responding to the motion to certify, Appellants have attempted to distinguish *Countrymark* by stating that it is an "earlier case." Appellants also argue

that the majority, if not all, of Ohio courts have applied the standard set forth in *ABN AMRO* and *Myers*. However, these arguments are beside the point.

Admittedly, the Eleventh and First District Courts of Appeal have both taken an approach to *Dresher* that is consistent with the position of the Second District Court of Appeals. See *McCoy v. Maxwell*, Portage App. No. 2002-Ohio-7157, at ¶30, and *Thomas v. Cranley* (Nov. 2, 2001), Hamilton App. No. C-0100-96, 2001 WL 1346184, \*3. However, the Third District has not overruled *Countrymark*, and, in fact, has followed *Countrymark's* approach in a fairly recent case. See *Marion Plaza, Inc. v. The Fahey Banking Co.* (Mar. 6, 2001), Marion App. No. 9-2000-59, 2001-Ohio-2158, 2001 WL 218434, \*5. The conflict in the present case is also on the same question as the one in *Countrymark*, and is based on a rule of law, not facts. *Whitelock*, 66 Ohio St.3d at 596.

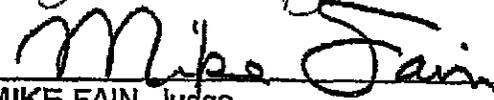
Accordingly, we find that our decision in *Todd Dev. Inc. v. Morgan*, Warren App. No. CA2005-11-124, 2006-Ohio-4825, conflicts with the decision of the Third District Court of Appeals in *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App.3d 159, 705 N.E.2d 738. Having found that a conflict exists, we certify the following question to the Supreme Court of Ohio for review and determination:

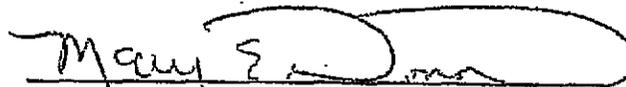
“Does a plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims bear the initial burden of addressing the non-moving party’s affirmative defenses in its motion?”

Based on the preceding discussion, the motion for reconsideration is overruled, and the motion to certify a conflict is granted.

IT IS SO ORDERED.

  
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JAMES A. BROGAN, Judge

  
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MIKE FAIN, Judge

  
\_\_\_\_\_  
MARY E. DONOVAN, Judge

(Brogan, J., Fain, J., and Donovan, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), of the Ohio Constitution.)

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Lebanon, Ohio 45036-2398

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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

TODD DEVELOPMENT COMPANY, INC.,  
et al.,

CASE NO. CA2005-11-124

Plaintiffs-Appellants,

O P I N I O N  
9/18/2008

- vs -

SONNY D. MORGAN, et al.,

Defendants-Appellees.

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 04-CV-62533

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**BROGAN, J.** (By Assignment)

{¶1} This case is before us on the appeal of Todd Development Company and HDC II, L.L.C. (Todd, HDC, or Plaintiffs), from a summary judgment granted to various defendants (Owners) who own lots in Shaker Ridge Estates Subdivision (Shaker Ridge). Shaker Ridge is located in Warren County, Ohio.

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{¶2} In May, 2004, Todd and HDC filed a declaratory judgment action alleging that they owned certain lots that were originally part of Shaker Ridge. As platted, all the lots in Shaker Ridge were subject to restrictions against subdivision. In addition, Todd's lots were subject to a Common Driveway Maintenance Agreement (Driveway Agreement). Todd and HDC alleged that their lots were subsequently re-platted, and that the earlier restrictions should not be enforced because of a change in circumstances. Accordingly, Todd and HDC asked the trial court to declare the subdivision restriction and the Driveway Agreement void and of no effect.

{¶3} Fenco Development Company and Martin Realty, Inc. (Fenco and Martin) were also named as parties in the declaratory judgment action. Fenco was the original developer for Shaker Ridge, and both Fenco and Realty, Inc. (Martin), were signatories to the subdivision restriction and Driveway Agreement. The Warren County Commissioners were included as Defendants because the Commissioners had approved the re-platting of Plaintiffs' lots. Furthermore, Warren County allegedly had an interest in the property because certain streets in the re-platted area had been dedicated as public streets.

{¶4} The Owners filed a counterclaim and amended counterclaim, alleging that Plaintiffs had violated a covenant on trucks, a restriction on subdividing the lots, and the Driveway Agreement. Additionally, the Owners claimed that Plaintiffs had committed trespass. The Commissioners filed an answer in which they admitted having an interest in the property, since certain streets in the re-platted area had been dedicated as public streets.

{¶5} In March, 2005, the Plaintiffs and the Owners both filed summary judgment motions. After considering the motions, the trial court found that the covenants were not ambiguous and should be enforced. The court granted summary judgment in favor of the Owners, and subsequently filed an entry prohibiting Plaintiffs from violating the subdivision restriction and Driveway Agreement. The court later amended the judgment by adding a

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Civ.R. 54(B) certification.

{16} On appeal, Plaintiffs raise the following assignments of error:

{17} "I. The trial court erred by overruling Plaintiff-Appellant's Motion for Summary Judgment.

{18} "II. The trial court erred by sustaining Defendant-Appellees' Motion for Summary Judgment.

{19} "III. The trial court erred in Overruling and Disregarding the Plaintiff-Appellants' Second Motion for Summary Judgment and Objections to the Decision and Proposed Entry by Defendants-Appellees."

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{110} Before addressing the first assignment of error, we will briefly consider the issue of jurisdiction, which we may raise on our own motion. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366. The complaint for declaratory judgment in the present case raised issues regarding whether the subdivision restriction and Driveway Agreement were valid. In responding, the Owners filed a counterclaim and then filed an amended counterclaim containing four counts, which alleged violations of various covenants as well as a claim for trespass. In the prayer for relief, the Owners asked that Plaintiffs be prohibited from violating the covenants. The Owners also asked for damages for trespass, which was the subject of Count IV. In that count, the Owners alleged that Plaintiffs had parked vehicles in front of the Owners' driveways and blocked access to their homes, had left construction vehicles in the common driveway, exceeding the scope of any easement Plaintiffs had, and had trespassed on the common driveway by planting trees and constructing a berm.

{111} In ruling on the cross motions for summary judgment, the only issues the trial

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court considered were the validity of the subdivision restriction and the Driveway Agreement. The court did not hold that Plaintiffs had violated the covenants nor did it find that Plaintiffs had committed acts of trespass. Instead, the court entered prospective relief only, stating that Plaintiffs were prohibited from violating the covenants. And, as we noted, the court did file a Civ.R. 54(B) certification.

¶12) An order is final for purposes of appeal if the requirements of R.C. 2505.02 and Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kerit State Univ.* (1989), 44 Ohio St.3d 86, syllabus. Declaratory judgments have been classified as special proceedings, and orders in such cases will be final orders if they affect a substantial right. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 21. A substantial right is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). Generally, property rights are considered substantial rights. See, e.g., *Chef Italiano*, 44 Ohio St.3d at 88 (orders dismissing specific performance and quiet title claims affected substantial rights).

¶13) In *Chef Italiano*, the Ohio Supreme Court found that a summary judgment decision was not final because it had resolved only two of four claims against a party. However, Civ.R. 54(B) and App. R. 4 were subsequently amended to clarify that Civ.R. 54(B) allows immediate appeal of judgments on less than all claims for or against a party. *Walker v. Firelands Community Hosp.*, Erie App. No. E-06-023, 2006-Ohio-2930, at ¶13-23. As a result,

¶14) "[A]n order that disposes of fewer than all of the claims in an action, and contains a Civ.R. 54(B) determination that there is no just reason for delay, is appealable if the claim or claims disposed of are entirely disposed of and either of the following applies. First, are the disposed of claim(s) factually separate and independent from the remaining

claim(s)? An example would be claims that are based on different transactions or occurrences such as one claim for slander and another for negligence because of an automobile accident. Second, if the claims are not factually separate and independent, do the legal theories presented in the disposed of claim(s) require proof of substantially different facts and/or provide for different relief from the remaining claim(s)?" *Id.* at ¶23.

¶15) In *Walker*, the appellate court found that four dismissed claims were not factually separate and independent from two remaining claims that had not been dismissed. The appeal was allowed, however, because of some differences in factual proof and relief between the two sets of claims. *Id.* at ¶24.

¶16) In the present case, there is some factual overlap between the claim upon which summary judgment was granted and the claims that remain pending. However, there are also substantial differences in the required factual proof and relief requested. As we noted, the trial court focused on the validity of the covenants, and did not consider whether any particular act was a violation. The alleged acts themselves also involve different factual transactions. And finally, the trial court ordered prospective relief, i.e., the court did not hold that Plaintiffs had violated any covenants. If the court finds that the covenants were violated, or that Plaintiffs have committed trespass, the relief will be different from what has already been granted. Accordingly, we find that the present appeal is properly before us.

¶17) Turning now to the first assignment of error, we note that it challenges the trial court's decision to overrule Plaintiffs' motion for summary judgment. In order to place Plaintiffs' claims in perspective, we will briefly outline the factual background that led to this action.

¶18) The record indicates that Fenco was the original developer for Shaker Ridge subdivision, which is located in Warren County, Ohio. Originally, Fenco proposed building 210 lots on 250 acres. Fenco proposed 30 lots for the first phase of development, but

eventually reduced the number to 16, based on recommendations from the Warren County Combined Health District (Health District). The reduction was due to the Health District's concern over shallow rock soils and low-lying, unacceptable permeability soils in the proposed subdivision. Public sewerage was not available, and Fenco needed to increase lot sizes to allow for acceptable private sewage systems. A number of lots were acceptable "as is," but several lots had to be combined.

{19} The final plat for Shaker Ridge was approved on November 24, 1998, and contained 16 lots. The recorded subdivision plat also contained several covenants that were identified as "protective covenants." These covenants and restrictions were described as being:

{20} "for the benefit of all lots owners and are to run with the land and shall be binding on all parties and all persons claiming under them for a period of forty (40) years, from the date of the recording of this instrument at which time said Covenants shall be automatically extended for successive periods of Ten (10) years. At any time these Covenants may be amended by written consent of seventy-five (75%) of the then owners, each owner having one vote for each separate lot owned by him."

{21} Among the covenants was a restriction on "subdividing," which stated that "No lot in this subdivision shall be subdivided into small lots or parcels except to be joined to an existing full-size lot adjacent thereto." At the time the subdivision covenant was filed, the 16 lots reflected on the subdivision plat ranged between 1.00015 and 3.18166 acres, with several lots being only a bit more than an acre in size. Only two lots were over three acres.

{22} Lots one (1) through eight (8) in Shaker Ridge were also subject to a common driveway easement on the north side of the lots. This easement had a common drive entrance onto St. Rt. 122, which gave the lot owners access to St. Rt. 122. The subdivision plat indicates that the owners of Lots 1 through 8 were responsible for common drive

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maintenance and repair. In addition, a Driveway Agreement, dated October 18, 2000, was filed with the County Recorder. The original signatories to this agreement were Fenco and Martin Realty. Among other things, the agreement provided for installation of an initial base coat of asphalt on the common driveway after completion of all new home construction, but no later than June 30, 2003. The agreement further stated that each owner would thereafter be responsible for maintaining and repairing the asphalt in proportion to the frontage of that owner's lot.

{123} On January 27, 2003, Fenco sold Todd lots 1, 2, 3, 14, 15, and 16, plus two additional adjoining parcels of land. One additional parcel was about 30 acres, and the other was around 11 acres. Notably, the lots Todd purchased were the larger lots out of the original 16, while the remaining ten individual lots (those now belonging to Owners) ranged between 1.0015 and 2.0871 acres, with only one lot being over two acres. The warranty deeds from Fenco to Todd indicate that Lots 1, 2, 3, 14, 15, and 16 were conveyed "subject to easements, conditions, public highways, restrictions of record, and taxes and assessments not yet due and payable."

{124} Lots 1, 2, and 3 originally included about 10.0753 acres. These lots were subsequently re-platted and included in a record plat known as The Trails of Greycliff, which was approved by the Warren County Commissioners. The total acreage of The Trails of Greycliff was 21.4143 acres, and this plat consisted of 42 lots ranging between .3214 and .6699 acres. This plat also included several streets, one of which (Greycliff Trail Drive) exited onto St. Rt. 122.

{125} Todd did not keep, nor did it develop lots 14, 15, and 16. Instead, Todd sold these lots, along with the 30-acre parcel, to HDC. Again, this property was conveyed "subject to easements, conditions, public highways, restrictions of record, and taxes and assessments not yet due and payable." After the sale, Lots 14, 15, and 16 were also re-platted and

included in a record plat known as Greycliff Landing, which was approved by the Warren County Commissioners. Greycliff Landing encompassed a 21.1018-acre parcel, with a total of 38 lots. Former lots 14, 15, and 16 originally consisted of about 7.3294 acres, but were now divided into 11 lots and partial parts of two other lots, along with three streets or parts of streets (Cardinal Cove, a cul-de-sac, Greycliff Landing, and Red Fox Run). The new lot sizes ranged between .3224 and .8740 acres, with most lots being close to a half-acre or larger.

{¶26} Various streets in the new plats, including Greycliff Landing, Black Squirrel Way, Greycliff Trail Drive, and Red Fox Run, were approved by Warren County and dedicated as public streets. The Ohio Department of Transportation also approved the dedication of Greycliff Trail Drive as permitting access to St. Rt. 122. In addition, the new streets included parts of former Lots 1, 2, 3, 14, 15, and 16.

{¶27} Unlike Shaker Ridge, The Trails of Greycliff and Greycliff Landing had public water and sewer. As a result, the new lot sizes could be smaller than what had been allowed in Shaker Ridge.

{¶28} In the trial court, the Owners submitted the affidavits of two property owners in Shaker Ridge. One owner had lived in Shaker Ridge since 1999, and testified that the character of the neighborhood had not changed since he arrived. Another owner, Thomas Olson, said that he had lived in Shaker Ridge since January 2004. Olson stated that he would not have purchased property without a covenant against subdividing lots. Olson also said that the common driveway ended at his driveway. Based on the exhibits, it appears that Olson is the owner of Lot 4 in the Shaker Ridge plat, and that his home sits on a lot of about 1.2687 acres. The exhibits also indicate that all the properties in Shaker Ridge that need access to St. Rt. 122 still have access through the common driveway. This consists of five homes, including Olson's house.

{¶29} In May 2004, Plaintiffs filed a declaratory judgment action, asking the court to

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declare that the subdivision restriction and the Driveway Agreement were of no effect. In granting summary judgment against Plaintiffs, the trial court found that the subdivision restriction was not ambiguous and that the restriction retained substantial value. The trial court also found that the Driveway Agreement was not ambiguous.

{¶30} In the first assignment of error, Plaintiffs contend that the trial court erred in disregarding the fact that Warren County required the subdivision restriction, due to the sewerage issue. They also claim that the subdivision restriction and Driveway Agreement were no longer of substantial value, due to changes in the neighborhood.

{¶31} We review summary judgment decisions de novo, which means that we use "the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brower v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383 (citations omitted). "De novo review requires that we review the trial court's decision independently and without deference to it." *Id.*

{¶32} As we noted, the trial court found the subdivision restriction and Driveway Agreement unambiguous. Like other written instruments, language in deed restrictions is construed in order to carry out the intention of the parties, which is determined from the language that is used in the deed. *Corn v. Szabo*, Ottawa App. No. OT-05-025, 2006-Ohio-2766, at ¶38. If the language is unambiguous, the restriction must be enforced as written. Courts will also apply the common and ordinary meaning of the language that is used. *Id.* However, if a deed restriction is " \* \* \* indefinite, doubtful and capable of contradictory interpretation, that construction must be adopted which least restricts the free use of the land." *Id.*

{¶33} In the present case, there is little doubt about the original purpose for the subdivision restriction. It was obviously caused by the poor soil and need to provide adequate disposal of sewage. Unfortunately for Plaintiffs, the original purpose is irrelevant, because the

language of the restriction is unambiguous. Notably, the recorded plat does not inform individuals who purchase lots of the underlying reason for the restriction. Instead, a purchaser sees only the plain meaning of the terms used in the restriction, which says that "No lot in this subdivision shall be subdivided into small lots or parcels except to be joined to an existing full-size lot adjacent thereto."

{134} This language clearly means that no lot can be reduced in size unless part of the lot is joined to an adjacent full-size lot. As an example, we will use Lots 1 and 2 of the original Shaker Ridge plat. Lot 1 is 3.1866 acres, and Lot 2 is 3.7448 acres. Under the subdivision restriction, an acre could be taken from Lot 2 and added to Lot 1, causing Lot 1 to be 4.1866 acres, and reducing Lot 2 to 2.7448 acres. However, the acre taken from Lot 2 could not be subdivided into a separate lot (in this case, Lot 17, since there were 16 lots in the original subdivision). An individual reading the subdivision restriction would conclude that lots in Shaker Ridge might vary slightly in size from their original proportions, but the number of lots would never be more than 16. Accordingly, we agree with the trial court that the restriction was unambiguous.

{135} Plaintiffs also claim that the trial court erred in ignoring the legal significance of Warren County's approval of the re-plating of the property. We disagree, because zoning authorities do not have the power to change or vary covenants that run with the land if the covenants are valid. See *Gray v. Wainwright* (Apr. 20, 1984), Lucas App. No. L-83-340, 1984 WL 7842, \*6, and *Willott v. Village of Beechwood* (1964), 175 Ohio St. 557, 559. Consequently, we find no legal relevance in the fact that Warren County approved new plats without restrictions.

{136} Plaintiffs also argue that even if the subdivision restriction is valid, it should not be enforced due to a change in circumstances. In Ohio, the test for such situations is:

{137} "whether in view of what has happened there is still a substantial value in the

restriction, which is to be protected." In essence, if the nature of a neighborhood or community has so changed that the restriction has become valueless to the owners of the property, a court will not, in the exercise of its discretion, enforce the restrictive covenant." *Landen Farm Community Serv. Assn., Inc. v. Schube* (1992), 78 Ohio App.3d 231, 235-236, quoting from *Romig v. Modest* (1956), 102 Ohio App. 225, 230.

(¶138) *Landen* involved a restriction against front yard basketball poles and backboards that had been violated by 50 homeowners in a planned community of about 2,400 residential units. In that situation, we upheld a finding that freestanding basketball hoops had been integrated into the community and that the character of the community had been substantially altered such that the restriction no longer had substantial value to other homeowners. 78 Ohio App.3d at 238. Similarly, in *Dillingham v. Do*, Butler App. Nos. CA2002-01-004 and CA2002-01-017, 2002-Ohio-3349, we found that the value of a covenant restricting sheds, fences, and satellite dishes had been destroyed, due to the proliferation of these nonconforming devices in the community. *Id.* at ¶24-25.

(¶139) Plaintiffs argue that the subdivision restriction no longer has substantial value because of the current availability of public sewer and water facilities. We do not find this argument persuasive because the subdivision restriction does not refer to sewerage. A condition to that effect could have been added to the plat that was recorded, but Fenco chose not to add such a limitation. Thus, the only notice purchasers received was that the plat contained restrictions against subdivision.

(¶140) The Owners' affidavits indicate that the neighborhood has a rural character, and that its character has not changed since they purchased their lots. Accordingly, there is no basis upon which one could conclude, at present, that the covenant lacks substantial value. Such a state of affairs might eventually occur, but it does not presently exist. Compare *Pelster v. Millsaps*, Summit App. No. 20507, 2001-Ohio-1419 (finding a restriction on lot-

splitting unenforceable because lot-splitting had occurred in the neighborhood over time and the overall value and quality of the neighborhood had been enhanced by the split that was being litigated).

{141} In view of the preceding discussion, we agree with the trial court that the subdivision restriction was valid and retained substantial value. Using the same reasoning, however, we find that the Driveway Agreement involves different circumstances and did not retain substantial value. The character of the neighborhood has changed so as to render the agreement valueless, at least to the extent that the agreement requires extension of the asphalt driveway across Lots 1, 2, and 3. These three lots can now access St. Rt. 122 via Greycliff Trail Drive, which has already been constructed and has been accepted as a dedicated street for that purpose. Since the five lots in Shaker Ridge have their own entrance onto St. Rt. 122 from the common driveway, extending the common driveway onto Lots 1, 2, and 3 retains no substantial value for Shaker Ridge lots. Accordingly, the trial court erred to the extent that it found the Driveway Agreement valid as to Lots 1, 2, and 3. The part of the agreement that requires Owners to maintain the driveway in front of their premises still has value.

{142} Based on the preceding discussion, first assignment of error is overruled in part and is sustained in part. This case will be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

## II

{143} In the second assignment of error, Plaintiffs claim that the trial court erred by sustaining the Owners' motion for summary judgment. Plaintiffs' initial point in this regard is that the trial court gave improper weight to the Owners' self-serving comments about the purpose of the subdivision restriction. We disagree, as the trial court did not appear to give

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any particular weight to these comments. The trial court did mention the Owners' affidavits in the factual part of its decision, but did not refer to the affidavits thereafter. Instead, the court simply found that the subdivision restriction was not ambiguous. We have agreed with that finding. We also found that the Owners' affidavits are relevant to the issue of whether the restrictions retained substantial value.

{144} Plaintiffs' second point is that the trial court should have dismissed the Owners' motion for summary judgment because the Owners failed to file a counterclaim against the Warren County Commissioners. In this regard, Plaintiffs argue that they do not have authority to order Warren County to take action on public improvements now owned by Warren County throughout the six vacated and re-platted lots. We do not find this argument persuasive.

{145} In the first place, the trial court decision did not order Plaintiffs to take action. Instead, the court simply upheld the validity of the covenants and ordered prospective relief. Furthermore, the presence of publicly dedicated streets does not even relate to the subdivision restriction. The restriction simply states that lots may not be subdivided into small lots; it does not mention dedicating land for public use.

{146} And finally, even if the subdivision restriction did contain language about public streets, it could not be enforced against Warren County. See *Shepherd v. United Parcel Serv.* (1992), 84 Ohio App.3d 634, 646 (holding that when plats are accepted by public authorities and dedicated by owners, roads on the plats are public roads); and *Eggert v. Puleo* (1993), 67 Ohio St.3d 78, paragraphs one and two of the syllabus (holding that when a plat is approved by a municipal corporation and recorded with the county recorder, the fee of land designated for public use vests in the municipal corporation and a restrictive covenant binding private landowners cannot be enforced against the municipal corporation). The same reasoning applies to counties where land is designated for public use.

{147} Accordingly, the trial court did not err in granting summary judgment in the

absence of counterclaims against the Warren County Commissioners. Even if the Owners had filed a counterclaim against Warren County, the trial court could not have ordered the County to destroy the public streets that had been approved and dedicated. For the reasons previously mentioned, however, summary judgment should not have been granted for Owners on the Driveway Agreement.

{148} Based on the preceding discussion, the second assignment of error is sustained in part and is overruled in part.

### III

{149} In the third assignment of error, Plaintiffs claim that the trial court erred in overruling their second motion for summary judgment and in overruling their objections to a judgment entry that was proposed by the Owners. This assignment of error has merit.

{150} When the trial court filed its decision on summary judgment, it asked the Owners to submit a judgment entry. Plaintiffs thereafter objected to the proposed entry and also filed a second motion for summary judgment, claiming that the trial court failed to consider the dedicated roadways that had already been platted and were now owned by Warren County. Plaintiffs also pointed out that the trial court had failed to address affirmative defenses, including the fact that the Owners had both actual and constructive notice of the entire building project to its current state of completion without raising objections or concerns. At the time Plaintiffs' motion and objections were filed, the summary judgment decision was not yet final, because the trial court had not included a Civ.R. 54(B) certification. However, the court refused to consider the matters Plaintiffs had raised, stating that it had invested considerable time in deciding the first motion. Notably, the Civ.R. 54(B) certification was not filed until more than five months after the original decision on summary judgment was issued. It was also filed almost five months after Plaintiffs' second summary judgment motion.

{151} An interlocutory order of summary judgment may be reconsidered and revised

at any time before final judgment is entered. *Brown v. Performance Auto Center, Inc.* (May 19, 1997), Butler App. No. CA96-10-205, 1997 WL 264203, \*9, and *Davis v. Bacton Dickinson & Co.* (1998), 127 Ohio App.3d 203, 207. Reconsideration has even been granted where the court previously considered the facts and law supporting the renewed motion. *Id.*

{¶52} We review the trial court's decision on such matters for abuse of discretion. See, e.g., *White v. McGill* (1990), 67 Ohio App.3d 1, 4. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, courts have noted on many occasions that decisions are unreasonable if they are not supported by a sound reasoning process. *Rätzk v. Brewer*, Clinton App. Nos. CA2002-05-021 and CA2002-05-023, 2003-Ohio-1266, at ¶10.

{¶53} After reviewing the record, we find that the trial court's failure to reconsider its interlocutory order was unreasonable. Compare *Hundsrucker v. Perlman*, Lucas App. No. L003-1293, 2004-Ohio-4851, at ¶29 (finding that the trial court acted unreasonably and abused its discretion in failing to reconsider an interlocutory decision on a motion for summary judgment).

{¶54} The issues in the present case are complicated. Nonetheless, the trial court simply dismissed the Warren County Commissioners without even considering whether the County's fee interest in the dedicated public streets might be affected. While we ultimately found that the County's fee interest could not be disturbed, this was a matter requiring research. It was not something that could be dismissed outright. Moreover, the issue was significant, since public roads had already been built.

{¶55} Furthermore, there was evidence before the trial court that raised genuine issues of material fact on the issue of laches, which Plaintiffs had raised as an affirmative defense to the counterclaim. Plaintiffs did not discuss their affirmative defenses prior to filing the second motion for summary judgment. However, they were not required to do so, since

the Owners failed to address affirmative defenses in their motion for summary judgment and in their reply memorandum.

{¶56} A party moving for summary judgment bears the initial burden of addressing affirmative defenses in its motion for summary judgment. If the moving party fails to meet its burden as to these defenses, the nonmoving party has no burden and the trial court errs in granting summary judgment. *ABN Amro Mtgs. Group, Inc. v. Arnold*, Montgomery App. No. 20530, 2005-Ohio-925, at ¶¶13-16.

{¶57} For example, in *ABN*, the plaintiff met its burden of establishing a default in a promissory note, but did not address the affirmative defense of civil conspiracy. Accordingly, the Second District Court of Appeals found that the trial court had erred in granting summary judgment on all the issues and in entering judgment in the plaintiff's favor. The Second District noted that the defendant had no burden because the plaintiff had failed to meet its burden, as the movant, on the affirmative defense. *Id.*

{¶58} "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 160 Ohio App.3d 642, 646-647, 2005-Ohio-1948, at ¶10. The elements of this defense are: "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 122, 2006-Ohio-954, at ¶81 (citation omitted).

{¶59} The following facts are pertinent to the laches issue. The executive vice-president of Todd, Richard Martin, indicated that the Owners were all notified that new subdivisions were being built adjacent to Shaker Ridge, and that Todd wanted to amend the subdivision restriction. This notice to the Owners would have occurred some time before April 26, 2004. The Owners were also aware of the new public water system for the subdivisions.

One owner, Christopher Sizemore, told Martin that Shaker Ridge residents were going to be forced by Warren County to connect to the new water system at their own expense. The Owners wanted Martin to connect them to the system at no cost. Again, these discussions occurred prior to April 26, 2004. The action for declaratory judgment was filed on May 19, 2004, by Plaintiffs, not by the Owners. Even when the Owners filed a counterclaim, they did not ask the court for a temporary restraining order, nor did they request an injunction.

{¶60} The evidence submitted below also indicates that lots in the new subdivisions were platted and sold, and that substantial development had occurred. An aerial photo shows fully constructed, paved streets and courts, together with about 25 constructed homes that are arranged fairly close together, in plats. These facts raise issues about whether Owners unreasonably delayed in asserting their rights, and about whether Plaintiffs were prejudiced as a result. As Plaintiffs indicate, the Owners could not sit by and watch homes and streets being constructed, yet do nothing.

{¶61} Pertinent issues include exactly when each owner found out about the proposed subdivisions, which were approved by Warren County in January, 2004; what Owners observed as to construction of streets and homes; what, if anything, the Owners did to assert their rights; and reasons for any delay in asserting rights. Also relevant is the extent to which Plaintiffs proceeded with construction after being notified that Owners intended to assert their rights. These matters are obviously fact-intensive, and while the factual record is not complete, it does reveal genuine issues of material fact.

{¶62} We express no opinion on the merits, but simply note that summary judgment was not appropriate, due to genuine issues of material fact. Either side may ultimately prevail on the laches issue; all that is clear for now is that summary resolution was not appropriate. Consequently, the third assignment of error is sustained, and this matter will be remanded for trial on the issue of laches.

(¶63) Based on the preceding discussion, the first and second assignments of error are sustained in part and are overruled in part, and the third assignment of error is sustained. The judgment of the trial court is affirmed in part, is reversed in part, and is remanded for further proceedings.

**FAIN, J., and DONOVAN, J., concur.**

Brogan, J., Fain, J., and Donovan, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at <http://www.twelfth.courts.state.oh.us/search.asp>

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COMMON PLEAS COURT  
WARREN COUNTY, OHIO  
FILED

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JAMES L. SPAETH  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
WARREN COUNTY, OHIO

TODD DEVELOPMENT COMPANY  
INC., et al.  
Plaintiffs,

CASE NO. 04CV62533

vs.

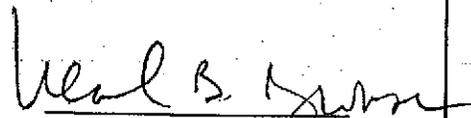
SONNY D. MORGAN, et al  
Defendants,

MODIFICATION OF JUDGMENT  
ENTRY OF JULY 1, 2005

This matter came before the court on Plaintiffs and Defendant  
Homeowners' Motion for Summary Judgment<sup>1</sup>.

The court fully adopts the July 1, 2005 Judgment Entry as if fully  
rewritten. The sole addition is the following language: The court further  
finds there is no just cause for delay<sup>2</sup>.

To the clerk: Please serve a copy of this Entry on all counsel, or if not  
represented, parties of record.

  
Neal B. Bronson, Judge  
Common Pleas Court

<sup>1</sup> Counsel have been unable to agree on the intent of the court's Decision filed June 3, 2005 and  
subsequent Judgment Entry filed July 1, 2005.

<sup>2</sup> The court is aware there is additional relief sought by homeowners. Declaratory judgment is a  
"special proceeding." *General Accident Ins. Co. v. Insurance Co. of N. Am.* (1989), 44 Ohio St.3d  
17.

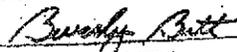
WARREN COUNTY  
COMMON PLEAS COURT  
JUDGE NEAL B. BRONSON  
100 Justice Drive  
Warren, Ohio 45036

11-9-05  
12/5



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COMMON PLEAS COURT  
WARREN COUNTY OHIO  
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JAMES L. SPALDING  
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF WARREN COUNTY, OHIO  
CIVIL DIVISION

TODD DEVELOPMENT COMPANY, \* CASE NO. 04 CV 62533  
INC., et al. \*  
 \* Judge Bronson  
 \*  
 \*  
 Plaintiffs, \*  
 \*  
 vs. \* JUDGMENT ENTRY  
 \*  
 \*  
 SONNY D. MORGAN, et al. \*  
 \*  
 \*  
 Defendants. \*

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This matter having come before the Court upon consideration of cross Motions for Summary Judgment, it is hereby ordered that the Motion for Summary Judgment filed by Plaintiffs, Todd Development Company, Inc. and HDC II, LLC is hereby overruled and the Motion for Summary Judgment filed by Defendants, Sonny D. Morgan; Helen Morgan; Robert C. Hill; Cherie Hill; Thomas Olson; Greg S. Williams; Amy L. Williams; Ronald Januszki, II, STE; Charles P. Winston; Shu Winston; William F. Jones; Amy M. Jones; Gary K. Holt; Debra L. Holt; Robert D. Kramer; Mary Kramer and Christopher D. Sizemore is hereby sustained, consistent with the Decision of this Court announced on June 3, 2005.

Accordingly, the Complaint filed in this matter is hereby dismissed with prejudice. The Court further issues a declaratory judgment in favor of Defendants, Sonny D. Morgan; Helen Morgan; Robert C. Hill; Cherie Hill; Thomas Olson; Greg S. Williams; Amy L. Williams; Ronald Januszki, II, STE; Charles P. Winston; Shu Winston; William F. Jones; Amy M. Jones;

Gary K. Holt; Debra L. Holt; Robert D. Kramer; Mary Kramer and Christopher D. Sizemore finding that as a matter of law restrictive covenants which are of record effecting the Shaker Ridge Subdivision are valid and viable and that both the restrictions and easement rights of said Defendants are clear and unambiguous in their meaning. It is further ordered that Plaintiffs are prohibited from violating the terms and conditions of the easements or any other restrictions contained in the protective covenants. This matter will proceed with respect to any remaining claims.

SO ORDERED:

**/s/ NEAL B. BRONSON**

---

Judge Bronson

c: Gary J. Leppla, Esq./Eric S. Thompson, Esq., Leppla Associates, 2100 S. Patterson Blvd., Dayton, Ohio 45409-0612; Attorneys for Defendant Homeowners;  
C. Edward Combs, Esq., 1081 North University Blvd., Suite B, Middletown, Ohio 45402; Attorney for Martin Realty;  
Bruce A. McGary, Esq., Assistant Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036; Attorney for Warren County Commissioners;  
James A. Matre, Esq., Matre & Matre Co., LPA, Pictoria Corporate Center, 225 Pictoria Drive, Suite 200, Cincinnati, Ohio 45246; Attorney for Plaintiffs and  
Lancer R. Weinrich, Jr., Esq., 2 North Main Street, Suite 304, Middletown, Ohio 45042; Attorney for Fenco Development Co.

**§ RULE 56**

**Ohio Court Rules**

**RULES OF CIVIL PROCEDURE**

**TITLE VII. JUDGMENT**

**RULE 56 Summary Judgment**

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**RULE 56. Summary Judgment**

**(A) For party seeking affirmative relief.**

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(B) For defending party.**

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(C) Motion and proceedings.**

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(D) Case not fully adjudicated upon motion.**

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed

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established, and the trial shall be conducted accordingly.

**(E) Form of affidavits; further testimony; defense required.**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

**(F) When affidavits unavailable.**

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

**(G) Affidavits made in bad faith.**

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.]

Staff Note (July 1, 1999 Amendment)

RULE 56(C) Motion and proceedings thereon

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

Staff Note (July 1, 1997 Amendment)

RULE 56(A) For party seeking affirmative relief.

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(B) For defending party.

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The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**RULE 56(C) Motion and proceedings thereon.**

The 1997 amendment to division (C) changed the word "pleading" to "pleadings" and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**RULE 56(E) Form of affidavits; further testimony; defense required.**

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**RULE 56(F) When affidavits unavailable.**

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**RULE 56(G) Affidavits made in bad faith.**

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

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