

IN THE SUPREME COURT OF OHIO

08-1139

RANDY A. TURTURICE,

Plaintiff-Appellant,

vs.

AEP ENERGY SERVICES, INC.,

Defendant-Appellee.

On Appeal From the
Franklin County Court of
Appeals, Tenth Appellate
District

Court of Appeals
Case No. 06APE-12-1214

**NOTICE OF THE TENTH APPELLATE DISTRICT
COURT'S DECISION DENYING APPELLANT RANDY
A. TURTURICE'S MOTION TO CERTIFY A CONFLICT**

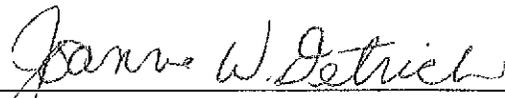
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FILED
JUN 27 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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APPELLANT RANDY A. TURTURICE'S MOTION TO CERTIFY A CONFLICT**

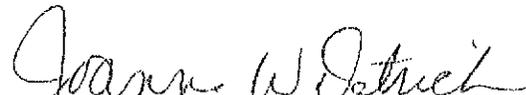
Appellant Randy A. Turturice hereby gives notice that the Tenth Appellate District Court denied Appellant's Motion to Certify a Conflict on June 24, 2008. The Memorandum Decision is attached. Appellant sought to certify a conflict in the Tenth Appellate District Court from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in the Court of Appeals Case No. 06-APE 12-1214 on April 28, 2008.



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PROOF OF SERVICE

This is to certify that a copy of the foregoing Notice of Decision Denying Motion to Certify a Conflict was this 27th day of June, 2008 served by first class U.S. Mail upon counsel for Appellees, Adele E. O'Conner, Esq., Bradd Seigel, PORTER, WRIGHT, MORRIS & ARTHUR LLP, 41 South High Street, Columbus, Ohio 43215.


Counsel for Appellant, Randy A. Turturice

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FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

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TENTH APPELLATE DISTRICT

CLERK OF COURTS

Randy A. Turturice,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 06AP-1214
v.	:	(C.P.C. No. 04CVH05-5604)
	:	
AEP Energy Services, Inc.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on June 24, 2008

Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for appellant.

Porter, Wright, Morris & Arthur, LLP, Adele E. O'Conner and Bradd N. Siegel, for appellee.

ON MOTION TO CERTIFY CONFLICT

DESHLER, J.

{¶1} Plaintiff-appellant, Randy A. Turturice, has moved this court to certify a conflict between our merit decision in this matter, *Turturice v. AEP Energy Servs., Inc.*, Franklin App. No. 06AP-1214, 2008-Ohio-1835, and the decisions of two other Ohio appellate districts, *Bush v. O'Dell* (Feb. 26, 1992), Licking App. No. CA-3705, and *Novomont Corp. v. The Lincoln Electric Co.* (Nov. 1, 2001), Cuyahoga App. No. 78389.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution provides that a court of appeals may certify the record of the case to Supreme Court of Ohio for review when it is

"in conflict with a judgment pronounced upon the same question by any other court of appeals of the state." App.R. 25 provides the specific mechanism by which such a motion is brought. "[A]t least three conditions must be met before and during the certification of a case * * *. First, the certifying court must find that its judgment is in conflict 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.* (1993), 66 Ohio St.3d 594 (emphasis sic).

{¶3} Because the proposed conflict claimed by appellant in the present case does not meet the standard set forth in *Whitelock*, we must deny his motion to certify the record to the Supreme Court of Ohio.

{¶4} Our merit decision in this matter held that the trial court did not err in finding that appellant's equitable claims in quantum meruit and unjust enrichment would be tried to the bench rather than to the jury. Appellant asserts that *Bush* and *Novomont* hold to the contrary and a conflict exists. Unfortunately, as we pointed out in our merit decision, neither *Bush* nor *Novomont* expressly holds that there is a right to a jury trial on such equitable claims, but merely reflect that such questions were in practice tried to the jury in those cases. The fact that the trial courts allowed those claims to go to the jury does not reflect an express holding that there was a right to do so. Most significantly, equitable claims could have been tried by the jury by consent of the parties under Civ.R. 39(C) even where there existed no right to a jury trial at common law or by statute. Without an

express holding on the question of a right to a jury trial on equitable claims, *Bush* and *Novomont* cannot establish a conflict between districts upon this question on which we have expressly ruled in the negative. We accordingly deny appellant's motion to certify a conflict in this matter.

Motion to certify conflict denied.

SADLER, J., concurs.
TYACK, J., dissents.

DESHLER, J., retired, of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.

TYACK, J., dissenting.

{¶5} Once again, I respectfully dissent.

{¶6} First, if the courts in *Bush v. O'Dell* (Feb. 26, 1992), Licking App. No. CA-3705 and *Novomont Corp. v. The Lincoln Elec. Co.* (Nov. 1, 2001), Cuyahoga App. No. 78389 had felt that a plaintiff in a quantum meruit or unjust enrichment situation had no right to a trial by jury, they would have given some indication in their opinions that no such right existed. Hence, I see our opinion as conflicting on this legal issue. Second, I believe this issue is an open issue which the Supreme Court of Ohio should address, in light of the strong bias in favor of jury trials in Ohio.

{¶7} Because the majority of this panel does not certify a conflict, I respectfully dissent.
