

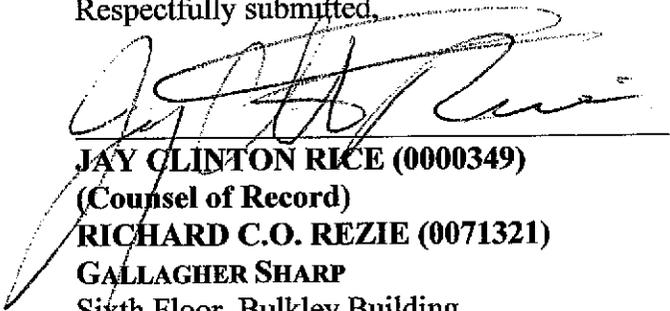


**NOTICE OF DENIAL OF MOTION TO CERTIFY A CONFLICT**

Now comes Appellant, NAMIC Insurance Company, and pursuant to Supreme Court Rule of Practice IV, Section 4(B), hereby gives notice that the Court of Appeals for Sandusky County, Sixth Appellate District, has overruled Appellee Elevators Mutual Insurance Company's Motion to Certify a Conflict. A copy of the Appellate Court's "Decision and Judgment" overruling, *inter alia*, Elevators Mutual's Motion to Certify a Conflict is attached hereto.

In accordance with S.Ct. Prac. R. III., Appellant NAMIC Insurance Company requests consideration of its jurisdictional memorandum filed on February 12, 2009 in its discretionary appeal, case no. 2009-0321.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

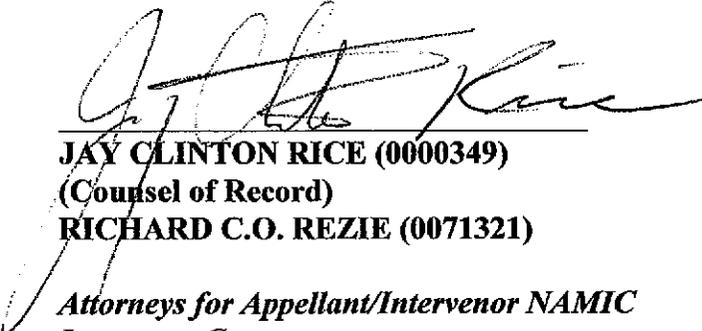
A copy of the foregoing *Notice That the Court of Appeals for Sandusky County, Sixth Appellate District, Has Overruled Elevators Mutual Insurance Company's Motion to Certify a Conflict* was sent by regular U.S. Mail on this 12 day of February, 2009, to:

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SANDUSKY COUNTY  
COURT OF APPEALS  
FILED

FEB 09 2009

WARREN P. BROWN  
CLERK

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
SANDUSKY COUNTY

Elevators Mutual Insurance Company

Court of Appeals No. S-08-006

Appellee

Trial Court No. 01-CV-987

v.

J. Patrick O'Flaherty's, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: FEB 09 2009

\* \* \* \* \*

This matter is before the court on the motions of appellee, Elevators Mutual Insurance Company, for reconsideration or, in the alternative, rehearing en banc of our decision in *Elevators. Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc., et al.*, 6th Dist. No. S-08-006, 2008-Ohio-6946. Appellee also moves to certify a conflict. Appellants, J. Patrick O'Flaherty's, Inc. and Richard A. and Jan N. Heyman, have filed a memorandum in opposition to which appellee has filed replies.

Reconsideration and En Banc

On an application for reconsideration, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or

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was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. The application is not designed for use when a party simply disagrees with the logic or conclusions of the court. *State v. Owens* (1996), 112 Ohio App.3d 334, 336. Neither is it an opportunity to reargue the case.

Although appellee exhaustively attacks what it considers our errant reasoning in the principal decision, it has not directed our attention to any issue that we failed to consider or did not fully consider. With respect to the conflict appellee perceives between the principal decision and our prior decision in *Jaros v. Ohio Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, as we stated at ¶ 29 in the principal decision, we do not share appellee's perception that such a conflict exists. Accordingly, appellee's motions for reconsideration and for rehearing en banc are found not well-taken and are denied.

#### Certify a Conflict

Section 3(B)(4), Article IV, Ohio Constitution requires that when a court of appeals finds itself in conflict with another court of appeals on the same question of law, that court must certify its decision and the record of the matter to the Supreme Court of Ohio for a resolution of the question. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

In the principal case, pursuant to *State v. Mapes* (1985), 19 Ohio St.3d 108, we held that a criminal conviction resulting from a no contest plea is only admissible in subsequent proceedings if made relevant by statute. Appellee insists that this holding

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conflicts with that of other courts of appeals in *State v. Williams* (Nov. 21, 1997), 2d Dist. No. 16306; *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798; *State v. Smith* (Nov. 14, 1990), 4th Dist. No. CA 1847; *State v. Cook* (Mar. 27, 1992), 7th Dist. No. CA 80; *State v. Charlton* (Jan. 29, 1992), 9th Dist. No. 91CA005113; and, *Haley v. Holderman* (Mar. 13, 1997), 10th Dist. No. 96APE08-1019.

We have already distinguished *Steinke* in the principal decision. 2008-Ohio-6946, ¶ 30. *Smith*, *Cook*, and *Charleton* are all cases in which a defendant's probation was revoked because of a later conviction obtained on a no contest plea. Each defendant had as a term of probation, entered under express statutory authority of former R.C. 2951.02(C) (rev. 7/1/96), that he not commit future crimes. Thus, each defendant had his subsequent conviction made relevant to the probation revocation proceeding under authority derived from a statute. Consequently, there is no conflict with the principal decision.

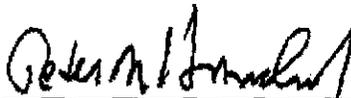
*Williams* involved an issue of whether a no contest plea to a minor misdemeanor mooted the question of the propriety of the arrest as a basis for suppressing evidence obtained in a post arrest search. The appellate court stated that the misdemeanor conviction precluded a trial court finding in the suppression proceeding that the arrest was improper. Nevertheless, the court reversed the order of suppression based not on this conclusion, but because the police had probable cause to arrest the defendant. As a result, the portion of the decision upon which appellee asserts conflict was not necessary to the resolution of the case and does not form a basis to premise conflict.

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*Haley* concerned whether a defendant's conviction for securities violations as the result of a no contest plea waived his right to challenge the constitutionality of the statute and administrative code section under which he was convicted. Inclusion of this case among those purportedly in conflict with the principal decision frankly mystifies us. We find no conflict.

Because we fail to find any of the cases appellee sets forth is in conflict with the decision at issue, appellee's motion to certify a conflict is not well-taken and is, hereby, denied.

Peter M. Handwork, J.

  
\_\_\_\_\_  
JUDGE

Arlene Singer, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.  
CONCURS AND  
WRITES SEPARATELY.

  
\_\_\_\_\_  
JUDGE

OSOWIK, J.

I would concur with the majority in the analysis of the decisions cited by appellee to certify the decision as a conflict with other appellate jurisdictions. Specifically, in its decision and judgment entry, the majority distinguished *Steinke v. Allstate Ins. Co.* The other referenced cases are of little relevance to the issue involved in this matter now before the court or are supported by the analysis in *State v. Mapes*.

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That being stated, the facts of this case are unique. I would maintain my opinion that the proscription against the subsequent use of a no contest plea against a defendant is not affected.

A no contest plea is not being used against a convicted arsonist when he submits a claim for benefits to his property insurer. In this instance, his pleas in the criminal cases are not subjecting him to civil liability.

Appellant's suggested approach does not hold enough water to extinguish the raging flames of his pleas. This is nearly an inflammatory application of Crim.R. 11(B)(2) and Evid.R. 410 and its implications could be incendiary.

The Supreme Court should review this court's decision as a result of the exceptional facts of this case; however, I agree with the majority that there is not at the present time a conflict to support a certification.

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