

ORIGINAL

In the  
Supreme Court of Ohio

JAMES SPENCER,	:	Case No. 2010-2138
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Miami County
	:	Court of Appeals,
FREIGHT HANDLERS, INC, et al.,	:	Second Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 09CA00044
	:	

NOTICE OF DENIAL OF MOTION TO CERTIFY A CONFLICT

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FILED  
JAN 13 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

## NOTICE OF DENIAL OF MOTION TO CERTIFY CONFLICT

Pursuant to S. Ct. Prac. R. 4.4(B), Defendant-Appellant Stephen Buehrer,<sup>1</sup> Administrator, Bureau of Workers' Compensation, gives notice that the Miami County Court of Appeals, Second Appellate District, denied Appellant's motion to certify a conflict in Case No. 09CA00044. See *Spencer v. FHI, LLC*, Case No. 09CA00044, Decision & Entry (Jan. 6, 2011) (attached).

Appellant moved the Second District to certify a conflict on November 8, 2010. (A copy of the motion is attached as Exhibit 3 to Appellant's Memorandum in Support of Jurisdiction.) The Second District denied the motion on January 6, 2011, explaining its view that there was no conflict on the jurisdictional question because it had decided the case on different grounds. *Id.* at 2. Specifically, the court characterized its earlier opinion as having held "that the jurisdictional defect was waived by the administrator's voluntary appearance in the action filed in the common pleas court." *Id.* The administrator notes that the Second District's earlier opinion neither mentioned "waiver" nor obviated the conflict on the jurisdictional question, since it held only "[a]lternatively" that "an appearance by the Administrator, as in the present case, demonstrates that the Administrator was put on notice to the extent that R.C. 4123.512(B) requires." *Spencer v. FHI, LLC*, 2010-Ohio-5288, at ¶ 24.

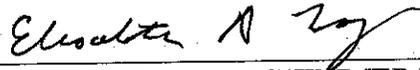
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<sup>1</sup> Stephen Buehrer is substituted for his predecessor, Marsha Ryan.

Whatever the basis for the Second District's denial, the conflict has not been certified, and the Court should now consider Appellant's Memorandum in Support of Jurisdiction, which explains why this case is one of public and great general interest. S. Ct. Prac. R. 3.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General



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**CERTIFICATE OF SERVICE**

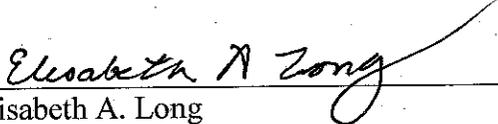
I certify that a copy of the foregoing Notice of Denial of Motion to Certify Conflict was served by U.S. mail this 13th day of January, 2011 upon the following counsel:

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\_\_\_\_\_  
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Deputy Solicitor

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER :  
Plaintiff-Appellant : C.A. CASE NO. 09-CA-44  
vs. : T.C. CASE NO. 09-988  
FHI, LLC, et al. :  
Defendants-Appellees :

.....  
DECISION AND ENTRY

Rendered on the 6th day of January, 2011.  
.....

PER CURIAM:

This matter is before the court on two motions to certify a conflict to the Supreme Court filed pursuant to App.R. 25. The motions were filed by Defendant-Appellee Freight Handlers, Inc., and by the Attorney General on behalf of the Administrator of the Bureau of Worker's Compensation.

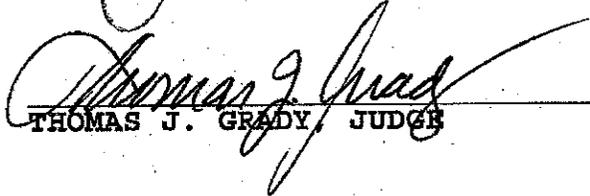
The movants contend that our decision in the present case is in conflict with the decision of the Sixth District Court of Appeals in *Olaru v. FedEx Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376. The alleged conflict concerns whether the provisions of R.C. 4123.512(B) regarding naming the administrator as a party to an action on an appeal to the common pleas court filed pursuant to that section and serving a copy of the notice of appeal in the action on the administrator are jurisdictional.

We acknowledge that our holding herein and the holding in *Olaru*, at least with respect to their outcomes concerning the question of jurisdiction, are in conflict. However, we also held in the present case that the jurisdictional defect was waived by the administrator's voluntary appearance in the action filed in the common pleas court, citing the holding in *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21. Because of our reliance on those alternative grounds, the jurisdictional issue in the present case was decided on facts different from those in *Olaru*. To qualify for certification, "the alleged conflict must be on a rule of law-not facts." *Whitelock v. Gilbane Building Company* (1993), 66 Ohio St.3d 594.

The motions to certify are Denied.

  
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 MARY E. DONOVAN, PRESIDING JUDGE

  
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 JAMES A. BROGAN, JUDGE

  
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 THOMAS J. GRADY, JUDGE

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