



**NOTICE OF DETERMINATION OF NO CONFLICT BY  
TRUMBULL COUNTY ELEVENTH DISTRICT COURT OF APPEALS**

Appellants, pursuant to Supreme Court Practice Rule 7.07(B)(1), hereby give notice of the attached Judgment Entry of the Eleventh District Court of Appeals majority opinion, with dissenting opinion, overruling Appellants' Motion for Reconsideration to Certify a Conflict.

Respectfully Submitted,



FRANK R. BODOR (0005387)  
157 Porter Street, NE  
Warren, Ohio 44483  
Phone: (330) 399-2233  
Facsimile: (330) 399-5165  
Email: [frank.bodor@gmail.com](mailto:frank.bodor@gmail.com)  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Determination of No Conflict by Trumbull County Eleventh District Court of Appeals was sent by regular U.S. mail, postage pre-paid, and electronically this 27th day of March 2018, to the following:

Thomas C. Nader, Esq.  
5000 E. Market Street -- Suite 33  
Warren OH 44484  
Attorney for Appellee

James M. Brutz, Esq.  
410 Mahoning Avenue NW  
Warren, OH 44483  
Attorney for Appellant Eric M. Kapp



FRANK R. BODOR (0005387)  
Attorney for Appellants

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

GRACE FELLOWSHIP CHURCH, INC.,

Plaintiff-Appellee,

- vs -

JACK HARNED, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2013-T-0030

Pending before this court is defendants-appellants' February 6, 2014 Application for Reconsideration of Judgment Entry Denying Motion to Certify a Conflict. Plaintiff has not filed a response.

On December 31, 2013, this court released its decision in *Grace Fellowship Church, Inc. v. Harned*, 11th Dist. Trumbull No. 2013-T-0030, 2013-Ohio-5852, affirming the Judgment Entry of the Trumbull County Court of Common Pleas, entering partial summary judgment in favor of appellee, Grace Fellowship Church. Appellants filed a Motion to Certify to the Ohio Supreme Court a Conflict on January 7, 2014, asserting that a conflict arose between this court's opinion and the Twelfth District's decision in *Maasen v. Zopff*, 12th Dist. Warren Nos. CA98-10-135, et al., 1999 Ohio App. LEXIS 3422 (July 26, 1999).

On February 4, 2014, this court issued a Judgment Entry, denying the Motion to Certify, and holding that the conclusions and application of law reached

by the two courts were based on factual distinctions in the cases and there was no conflict warranting certification.

When considering a motion 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 was not fully considered by us when it should have been." (Citation omitted.) *State v. Jones*, 11th Dist. Ashtabula No. 2001-A-0027, 2003-Ohio-621, ¶ 5.

Importantly, an application for reconsideration is not designed to be used in situations where a party simply disagrees with the logic employed or conclusions reached by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). App.R. 26 provides "a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court" renders a decision that is not supported by law. *Id.*

In appellees' Application for Reconsideration, they essentially raise the same arguments that have been raised previously, i.e., that the *Maasen* court concluded that a landowner has notice of subsequent changes in plat covenants where the original covenant provides authority for the majority to amend them, while this court did not. We specifically addressed this issue both in the opinion and in the Judgment Entry denying certification. In the Judgment Entry, this court noted that the *Maasen* opinion held that an amended covenant should be enforced "absent any basis in equity." We emphasized that the differing facts in

*Grace Fellowship* created a basis in equity, since *Grace Fellowship* already owned the property when the amendment occurred. The fact that the appellees disagree with this conclusion does not entitle them to reconsideration.

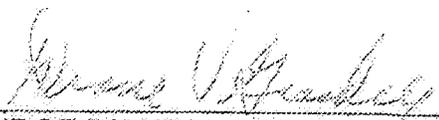
Appellants take issue with this court's characterization of the defendant in *Maasen*, Zopff, as a "prospective purchaser," arguing that he had entered into a purchase contract and "in *Maasen*, the court did not describe the purchaser as a 'prospective purchaser.'" This is incorrect, as the *Maasen* court specifically stated that, at the time the covenant was amended, Zopff "did not own" the tract of land, and that he was "but a *prospective purchaser* by cont[r]act." (Emphasis added.) *Maasen*, 1999 Ohio App. LEXIS 3422, at 19. Further, as has been extensively noted in our opinion and Judgment Entry, the *Maasen* court emphasized that Zopff, through his contract to purchase, had only an equitable interest in the land. *Id.* at 17. This creates a distinction between Zopff's rights and expectations under the covenants and those of *Grace Fellowship*, which had completed the purchase of its property prior to the amendment of the covenants.

Finally, appellants assert that this court failed to recognize that, for the purposes of certification, the conflict must be on a rule of law and not the facts. However, as explained extensively in this court's Judgment Entry, since the facts present in *Grace Fellowship* and *Maasen* were dissimilar, this warranted the different application of the law and results. As was also noted in the Judgment Entry, any pronounced rule in *Maasen* was restricted to its specific facts. We also emphasized that "the *Maasen* court was not required to pronounce any

general rule to be applicable in all circumstances involving restrictions or burden on landowners, since it found no burden based on the appellee's status as a prospective purchaser." See *State v. Burke*, 10th Dist. Franklin No. 04AP-1234, 2006-Ohio-1026, ¶ 18 (where the court's legal ruling was unnecessary or dicta, there was no basis to certify a conflict).

Based on the foregoing, appellants have not demonstrated any obvious error or pointed to any issues not fully considered by this court in its Judgment Entry ruling on the Motion to Certify. Accordingly, appellants' Application for Reconsideration is denied.

FILED  
COURT OF APPEALS  
MAR 25 2014  
TRUMBULL COUNTY, OH  
KAREN DEANTE ALLEN, CLERK

  
\_\_\_\_\_  
JUDGE DIANE V. GRENDALL

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

---

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

Upon reconsideration of whether the majority's disposition of this case conflicts with the Twelfth Appellate District's decision in *Maasen v. Zopff*, 12th

Dist. Warren Nos. 98-10-135, 98-10-138, 98-12-153, 1999 Ohio App LEXIS 3422 (July 26, 1999), I conclude the matter should be certified to the Supreme Court of Ohio to resolve a conflict of law.

The majority maintains the cases have disparate outcomes, and should not be certified, due to differing facts. I initially agreed with this conclusion. However, after further consideration of the judgment denying appellant's motion to certify in light of my original dissent, as well as the nuances of the *Maasen* decision, I now conclude it is appropriate to reconsider my original vote. The majority distinguishes this case from *Maasen* by pointing out the amendment in that matter was recorded prior to the defendant taking ownership of the property. While this is a *factual* distinction, it has no bearing on the ultimate holding. As such, the legal conclusions of *Maasen* and the majority opinion in this case stand in conflict.

First of all, in *Maasen*, although the purchaser had not taken ownership of the property prior to the amendment, the purchaser was *under contract* to purchase the property. Although not factually the same, this point renders the two cases more factually akin than distinct. That said, the *Maasen* court determined the modification clause was valid and could be utilized to change material aspects of the covenants in that case, without limitation, if 60 percent of the owners agreed. In this case, appellee took possession and ownership of the lot in question with the knowledge that, through a democratic vote, the covenants could be modified or changed by 51 percent of the landowners. Similar to

*Maasen*, the words "change" and "modify" in the covenant-modification clause in the instant case afford the landowners unlimited ability to increase or decrease the restrictions by a majority vote. And, because appellee took the property with actual knowledge of this possibility, it is bound by the amendments enacted pursuant to the procedures unequivocally set forth in the original modification clause.

After reassessing the arguments advanced by appellants on reconsideration, I would grant the instant application to reconsider and, in turn, grant appellants' motion to certify a conflict with the Supreme Court of Ohio on the following issue of law:

"Whether an existing modification clause in a subdivision's restrictive covenants, permitting a specified percentage of landowners the unlimited ability to 'modify or change' the existing covenants by adding new burdens to the property, is legal and the amendments enacted thereto are enforceable."

I therefore respectfully dissent.

