

IN THE SUPREME COURT OF OHIO  
CASE NO. 2007-0868

JULIUS J. SZABO,	)	On Appeal from Cuyahoga County
	)	Court of Appeals, Eighth Appellate
Plaintiff-Appellant,	)	District
	)	
vs.	)	Court of Appeals
	)	Case No. CA 06 88125
ALEXANDER GOETSCH, et al.,	)	
	)	
Defendants-Appellees.	)	

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APPELLEE, ALEXANDER GOETSCH'S, MEMORANDUM  
IN OPPOSITION TO JURISDICTION

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## I. CASE OF PUBLIC OR GREAT INTEREST

This matter is not a case of public or great general interest. Contrary to Appellant's assertion, the Eighth District Court of Appeals' decision in *Szabo v. Goetsch*, 8th Dist. No. 88125, 2007-Ohio-1147, does not create a new standard regarding the accrual date for triggering the commencement of the statute of limitations in a legal malpractice action. Rather, the Eighth District Court of Appeals upheld established precedent determining when a party "discovers" the act that constitutes legal malpractice. Although the court noted the "harsh" nature of the results,<sup>1</sup> the court realized that "the *law* requires us to conclude that the cognizable event in the instant case took place" more than one year prior to the filing of Appellant's legal malpractice action. *Id.* at ¶19 (emphasis added).

Rather than a case of public or great interest, this simply is Appellant's continued pursuit of a cause of action that now is time barred by the one-year statute of limitations applicable to legal malpractice claims. Appellant simply disagrees with the lower courts' proper determinations that the cognizable event which alerted or should have alerted Appellant that his attorney committed an improper act during the course of representation occurred more than one year prior to the filing of the within legal malpractice action. The Eighth District Court of Appeals simply and properly applied the well-established standard first set forth in *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398 in determining the cognizable event that triggers the running of the applicable statute of limitations. *Szabo*, 2007-Ohio-1147, at ¶¶13-18. The Eight District Court of Appeals did not modify or negate any established legal principals.

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<sup>1</sup> In every case where a plaintiff's claims are barred by the applicable statute of limitations, the result is harsh because the plaintiff does not get his or her day in court.

In its decision, the appellate court discussed the statute of limitations for a legal malpractice action. The court then considered the standard for defining the cognizable event as articulated in *Zimmie. Szabo*, 2007-Ohio-1147, at ¶14. Applying the standard set forth in *Zimmie* and the well-established principle that the cognizable event occurs when the client is put on notice that his or her attorney may have committed an improper act rather than a judicial determination, the court found that cognizable event occurred when Appellant was put on notice of the improper act thereby placing on Appellant “the need to investigate and pursue possible legal malpractice remedies.” *Id.* at ¶¶15-18. Because this cognizable event occurred more than one year before Appellant instituted his legal malpractice action against Goetsch, the court upheld the trial court’s granting of summary judgment in favor of Goetsch. *Id.* at ¶¶19-20.

This was a rather simple case presenting a statute of limitations defense to Appellant’s claims. Both the trial court and the appellate court applied the correct summary judgment standard as articulate in Civ.R. 56 in rendering their decisions in this matter. As required, after construing all the evidence in favor of Appellant, the trial court and the appellate court found that reasonable minds can come to but one conclusion, the evidence demonstrates that, despite Appellant’s arguments to the contrary, the cognizable event occurred more than one year prior to Appellant’s filing of his complaint. Thus, both courts correctly found that under the existing law, Appellant’s complaint is barred by the statute of limitations.

Although Appellant takes issue with the decision and with the case law on the issue of the statute of limitations, both the trial court and the appellate court correctly applied the relevant case law to the facts presented in this case. Appellant is clinging to

one paragraph in the appellate court's decision where the appellate court discussed the harsh results of its decision. The appellate court, however, explained that the relevant law on the issue of the cognizable event requires such a result. In essence, Appellant is requesting this Court to overrule the precedent established in *Zimmie* and its progeny and now hold that the statute of limitations does not occur until the plaintiff actually discovers the full legal ramifications of the attorney's improper act regardless of when the plaintiff learned of the attorney's improper act. Simply, such a position directly is contrary to the well established law on this issue.

Under Appellant's proposed new standard, a cause of action for malpractice would toll until a client fully comprehends the legal ramifications of the attorney's improper act of which the client is aware. Appellant's new standard would require a definitive court ruling before the statute of limitations would accrue. Such a new standard would be in direct conflict with applicable case law.

The appellate court's decision in this case does not create a new standard for determining the accrual date of the applicable statute of limitations. The decision also does not hold clients to the same standards as attorneys in recognizing and appreciating the ramifications of potential malpractice. The appellate court decision simply does not represent any change or shift in established legal principles. The lower courts properly applied the applicable law to the facts presented in this case. Appellant simply disagrees with the lower courts' decisions and attempts to propose a new standard that this Court and other courts already have rejected.

This Court should recognize that after the Appellant failed to file his claim within the one-year statute of limitations, he continues in his attempts to save his barred claim

by proposing a new standard for determining the accrual date that previously has been rejected on numerous occasions. The lower courts properly recognized Appellant's unsubstantiated position in this case and granted relief accordingly. This matter simply will not have the far reaching ramifications that Appellant asserts. Thus, this case does not present a case of public or great interest and, therefore, this Court should deny jurisdiction over this case.

## **II. STATEMENT OF THE CASE AND FACTS**

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Goetsch entered an appearance as one of Appellant's attorneys in Cuyahoga County Court of Common Pleas case numbers CV-03-494416 and CV-03-505451 on October 16, 2003. (See Court Dockets attached to Motion for Summary Judgment, Exh. 1 and Exh. 2). Soon thereafter, the opposing parties in both cases moved for summary judgment. (Id.). Responsive pleadings were filed on behalf of Appellant on November 11, 2003, neither of which was prepared, filed or signed by Goetsch. (Id.). The two responsive pleadings failed to include a certificate of service.

The trial court granted summary judgment in both cases on November 28, 2003. (Id.). On December 4, 2003, the opposing parties moved to strike Appellant's responsive pleadings because of the failure to include certificates of service. (Id.). The motion to strike was denied on December 10, 2003. (Id.).

Appellant retained new counsel who filed notices of appeals on December 22, 2003. (See Docket in Eighth District Court of Appeals case number CA-03-083975 attached to Motion for Summary Judgment, Exh. 3). On December 23, 2003, Goetsch sent Appellant a letter terminating Goetsch's representation of Appellant. (Goetsch

Affidavit attached to Motion for Summary Judgment, Exh. 8). The two separate appeals subsequently were consolidated.

The appellees in the consolidated appeal raised the following cross-assignment of error:

On Appellees' first Cross-Assignment of Error, the trial court should have stricken from the files and from the court's consideration Mr. Appellant's response brief in opposition to summary judgment and the opposition affidavits submitted to the court but not served in contravention of Civil Rule 5.

(Kenneth Walsh Affidavit, Exh. A, attached to Motion for Summary Judgment, Exh.7).

Appellant's new counsel responded to appellees' cross-assignment of error arguing that appellees were not prejudiced by the trial court's failure to strike because summary judgment was granted in appellees' favor despite the consideration of the brief in opposition.

On July 21, 2004, the Eighth District Court of Appeals conducted oral arguments on the consolidated appeal. (See Docket in Eighth District Court of Appeals case number CA-03-083975). Appellant was present during the oral arguments. (Walsh Affidavit). The issue regarding the failure to include the certificate of service with the responsive pleadings was asserted and argued *by the parties' respective attorneys* at the July 21, 2004 oral arguments. (Id.). On August 5, 2004, the Eighth District Court of Appeals issued its decision affirming the trial court decision granting summary judgment.

On August 3, 2005, Appellant filed a complaint for legal malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and breach of fiduciary duty against Goetsch, Bruce Freedman and William Love. Appellant's allegations stem from Goetsch's representation of Appellant in the

two separate matters before the Cuyahoga Court of Common Pleas during which the briefs opposing summary judgment were not properly served upon opposing counsel.

On November 1, 2005, Goetsch moved for summary judgment on all claims asserted by Appellant against Goetsch in Appellant's complaint. Goetsch argued in his motion that all claims were subject to the one-year statute of limitations applied to legal malpractice actions because they all arose from Goetsch's representation of Appellant and, thus, regardless of how the claims are couched, they all constituted legal malpractice claims. It was then argued that the one-year statute of limitations for legal malpractice had run because the cognizable event occurred no later than July 21, 2004.

Citing to sufficient evidence, it was demonstrated that Appellant was present at the July 21, 2004 oral arguments of his appeal in the underlying cases wherein it was argued by the parties' respective attorneys that the failure properly to serve the responsive summary judgment pleadings rendered the Motion for Summary Judgment unopposed. Thus, it was argued during the oral arguments that the trial court's decision granting summary judgment should be affirmed based upon the failure properly to serve the responsive pleadings. Goetsch also argued in his Motion for Summary Judgment in this matter that Appellant's attorney's knowledge of the purported malpractice, which was gained prior to July 21, 2004, should be imputed to Appellant.

On November 30, 2005, Appellant timely filed his opposition to summary judgment. Appellant argued that he did not actually discover the injury from the failure properly to serve the responsive pleadings until the appellate court's decision affirmed the granting of summary judgment based upon such failure. Appellant argued that his injury was not clear until the release of the appellate decision. In his opposition to

summary judgment, Appellant wholly failed to set forth any facts or any argument that his other claims were not subject to the one-year statute of limitations applicable to legal malpractice claims.

On April 4, 2006, the trial court granted Goetsch's motion for summary judgment on all claims. The trial court concluded that the statute of limitations on Appellant's claims began to run no later than the date of the oral arguments in the appeal of the underlying matter, July 21, 2004. Thus, because Appellant's complaint in this case was not filed until August 3, 2005, the trial court found that the statute of limitations barred Appellant's complaint against Goetsch.

Appellant timely appealed the trial court's decision on May 4, 2006 raising one assignment of error challenging the trial court's decision to grant summary judgment based upon the one-year statute of limitations. Appellant did not raise any issue on appeal regarding the trial court's decision to apply the one-year statute of limitations to all claims asserted in Appellant's complaint. Appellant subsequently dismissed without prejudice his claims against the other defendants.

The Eight District Court of Appeals affirmed the trial court's decision on March 15, 2007. See, generally, *Szabo*, 2007-Ohio-1147. The appellate court held that the cognizable event triggering the running of the applicable one-year statute of limitations occurred as of July 21, 2004. *Id.* at ¶18. Because Appellant did not file his malpractice claim until August 3, 2005, the appellate court held that Appellant's claim was barred by the statute of limitations. *Id.* at ¶19.

Appellant timely appealed to this Court and has filed a Memorandum in Support of Jurisdiction.

### III. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

- A. **Proposition of Law No. I: Arguments set forth during an oral argument made before a court of appeals panel do not constitute a cognizable event or notice necessary to investigate and pursue legal malpractice claims against a litigant’s trial counsel; litigant should not be held to the same standard as attorneys in reference to recognizing and appreciating legal concepts relating to potential legal malpractice claims; litigants should not be required to file suit (for legal malpractice) prior to the resolution of a matter, especially where the result cannot be predicted or guaranteed.**

In regards to the accrual of the statute of limitations for a legal malpractice claim,

this Court has held:

Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable events whereby the client discovers or should have discovered that his injury was related to his attorney’s act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

*Zimmie*, 43 Ohio St.3d 54, 538 N.E.2d 398, at syllabus.

Appellant claims that he did not “clearly” discover the act of malpractice until the Eighth District Court of Appeals released its decision in *Nosal v. Szabo*, 8th Dist. Nos. 83974, 83975, 2004-Ohio-4076 on August 5, 2004. (See Appellant’s Memorandum in Support of Jurisdiction, p. 12). Until the appellate court decision was released, Appellant claims “it was not clear to Appellant \*\*\* that [the failure properly to serve the brief in opposition to summary judgment in the underlying matter] would injure and/or damage the claims of [Appellant in the underlying matter].” (Id. at 14) (emphasis sic).

Under Appellant’s theory of determining the occurrence of the cognizable event, the cognizable event would not occur until the client actually discovered the significance of the attorney’s improper act. In other words, Appellant argues that the cognizable event

cannot occur until the client conclusively discovers the extent of the actual injury. Appellant's position directly is contrary to well established case law.

Injury, for purposes of the statute of limitations "is defined in terms of notice." *Spencer v. McGill* (1993), 87 Ohio App.3d 267, 278, 622 N.E.2d 7, 15. "Whether there was 'an injury' depends upon whether an event has occurred 'which does or should alert a reasonable person' that [the attorney] committed an improper act in its legal representation of [the client]." *Id.* (citations omitted). The cognizable event occurs when a client discovers or should have discovered the existence of the error and not the conclusive knowledge of the error's legal significance. See *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284, 1288 ("[C]onstructive knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule.") (citations omitted) (emphasis sic);<sup>2</sup> *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420, 704 N.E.2d 317, 321; *Lynch v. Dial Fin. Co. of Ohio No. 1, Inc.* (1995), 101 Ohio App.3d 742, 747, 656 N.E.2d 714, 718; *Hahn v. Jennings*, 10th Dist. No. 04AP-24, 2004-Ohio-4789, ¶¶34-35; *Mandato v. Horton* (Mar. 20, 1997), 8th Dist. No. 70560, 1997 WL 127178, \*2-\*3; *Barna v. Joseph* (June 22, 1989), 8th Dist. No. 56806, 1989 WL 70007, \*3.

Knowledge of the improper act itself and not knowledge of the extent of the injury resulting from the malpractice puts the client on notice to conduct further investigation into the error and commences the running of the statute of limitations. See *Halliwell v. Bruner* (Dec. 14, 2000), 8th Dist. Nos. 76933, 77487, 2000 WL 1867398, \*5

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<sup>2</sup> Although *Flowers* is a case dealing with the discovery rule in a medical malpractice case, this Court utilizes and applies such case law when analyzing the discovery rule in the legal malpractice setting as well. *Spencer v. McGill* (1993), 87 Ohio App.3d 267, 275, 622 N.E.2d 7, 13.

(the statute of limitations “begins to run when a cognizable event occurs that puts the client on sufficient notice that he should have known, in the exercise of reasonable diligence, that malpractice may have occurred to warrant further investigation”); *Hahn*, 2004-Ohio-4789, at ¶34 (citation omitted); *Koerber v. Levey & Gruhin*, 9th Dist. No. 21730, 2004-Ohio-3085, ¶35. Thus, contrary to Appellant’s position, a client does not need to be aware of the actual extent of the injury to commence the running of the statute of limitations. Rather, the statute of limitations begins to run when a client discovers or should have discovered the existence of the improper act.

Moreover, knowledge of the improper act, i.e. the cognizable event, on the part of the client’s subsequent counsel will be imputed to the client and will begin the running of the statute of limitations. *Mandato*, 1997 WL 127178, at \*2; *Schultz Trust v. Strachan* (June 2, 1994), 8th Dist. No. 66550, 1994 WL 245622, \*2.

In this case, Appellant learned of the improper act, i.e. the failure to include the certificate of service, more than one year prior to the filing of the complaint in this matter. In June 2004, the appellees in the consolidated appeal raised their cross-assignment of error arguing that the trial court should have granted its motion to strike Appellant’s responsive pleadings to the motion for summary judgment for failing to include the certificate of service. (See Docket in Eighth District Court of Appeals case number CA-03-083975; Walsh Affidavit, Exh. A). At the very least, this filing put Appellant’s subsequent counsel on notice of the improper act. On July 21, 2004, the underlying consolidated appeal was presented to the appellate court on oral arguments. One of the issues raised and argued by the parties’ respective attorneys at oral arguments

was the failure to include the certificate of service and the ramifications of such failure. (Walsh Affidavit). Appellant admittedly was present at these oral arguments. (Id.).

Because Appellant's subsequent attorney's knowledge of the improper act is imputed to Appellant for purposes of the statute of limitations and because of Appellant's presence at the July 21, 2004 oral arguments, Appellant clearly was on notice of the improper act, i.e. the failure properly to serve the brief in opposition to summary judgment, no later than July 21, 2004. Although Appellant may not have fully understood the ramifications of the improper act, he clearly was aware of the existence of the improper act. Thus, at this point, the cognizable event occurred requiring Appellant to conduct further investigation into the improper act and, thereby, triggered the commencement of the statute of limitations. Appellant's August 3, 2005 complaint, therefore, was not timely filed. *Spencer*, 87 Ohio App.3d at 278, 622 N.E.2d at 15; *Flowers*, 63 Ohio St.3d 546 at 589 N.E.2d at 1288; *Whitaker*, 123 Ohio App.3d at 420, 704 N.E.2d at 321; *Lynch*, 101 Ohio App.3d at 747, 656 N.E.2d at 718; *Hahn*, 2004-Ohio-4789, at ¶¶34-35; *Mandato*, 1997 WL 127178, at \*2-\*3; *Barna*, 1989 WL 70007, at \*3; *Halliwell*, 2000 WL 1867398, at \*5.

Appellant essentially requests that this Court hold that the statute of limitations on a legal malpractice claim does not commence until a court determines the *ramifications* of the improper act. As discussed above, the statute of limitations begins when discovery is made of the improper act and knowledge of the injury or result of the improper act is not required to commence the running of the statute of limitations. Moreover, a court determination is not necessary to trigger the statute of limitations.

A client's legal malpractice action "accrues not \*\*\* as a result of some judicial determination, but when he knew or should have known of his counsel's alleged failure." *Disabato v. Thomas M. Tyack & Assoc. Co., L.P.A.* (Sept. 14, 1999), 10th Dist. Mo. 98AP-1282, 1999 WL 715901, at \*6. In other words, an ultimate determination by a court regarding the legal significance of the improper act is not necessary to commence the running of the statute of limitations. Rather, the statute of limitations begins to run when the plaintiff learned of the attorney's improper act. See *Whitaker*, 123 Ohio App.3d at 421, 704 N.E.2d at 321-322 ("the cognizable event occurred when [the plaintiff learned of the alleged improper act], not when the probate court entered judgment against him"); *McDade v. Spencer* (1991), 75 Ohio App.3d 639, 642-643, 600 N.E.2d 371, 374 ("An ultimate determination [by the court] \*\*\* is not necessary \*\*\* to commence the running of the one-year statute of limitations."); *Koerber*, 2004-Ohio-3085, at ¶¶35-36 (an inquiry into the date the court rendered judgment on the issue is unnecessary); *Disabato*, 1999 WL 715901, at \*5-\*6; *Mandato*, 1997 WL 127178, at \*2 (the cognizable event occurs when the plaintiff learns of the alleged malpractice and a court's ultimate ruling on the issue is not necessary); *Schultz*, 1994 WL 245622, at \*2 (the filing of the motion for summary judgment rather than the court's ultimate ruling on the motion is the cognizable event that begins the running of the statute of limitations); *Barna*, 1989 WL 70007, at \*3.

Appellant finally asserts that the appellate court decision requires clients to be held to the same standard as attorneys in recognizing and appreciating legal concepts related to potential malpractice. (*Id.* at 9-10, 12). The appellate court's decision did not

modify or alter the standard of determining the occurrence of the cognizable event. The court simply applied the law to the facts presented in this case.

As the above analysis demonstrates, the established case law applied by the appellate court does not hold a client to the same standard as attorneys. The law does not require a client to understand the legal significance of the improper act. See *Flowers*, 63 Ohio St.3d at 549, 589 N.E.2d at 1288 (“[C]onstructive knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule.”) (citations omitted) (emphasis sic). Rather, a client simply must understand that his or her attorney committed an improper act. Once the client possesses such knowledge, he or she has a duty to conduct further investigation into the misconduct of the attorney. Thus, contrary to Appellant’s position, a client is not held to the same standard as attorneys.

Both the trial court and the appellate court applied the correct standard for determining the accrual date of the applicable statute of limitations. Appellant simply disagrees with the court’s proper application of the well established case law on this issue to the facts of this case.

**B. Proposition of Law II: Disputed issues of material fact relating to when a cognizable event occurred in reference to a legal malpractice claim are to be decided by the trier of fact; and it is not proper for a trial court to determine such issues.**

Initially, it must be noted that Appellant’s Proposition of Law II was not raised in his initial appeal to the Eighth District Court of Appeals. Thus, Appellant has not preserved this issue on appeal to this Court. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶¶22-24. This Court, therefore, should not consider such issue for possible review.

Even if Appellant properly preserved the issue for appeal to this Court, Appellant's proposition wholly is without merit. Although Civ.R. 56(B) requires a trial court to deny a motion for summary judgment if there exists an issue of material fact, contrary to Appellant's contention no such disputed issue of material fact is present in this case. The evidence, as discussed above, clearly demonstrates that the cognizable event occurred no later than July 21, 2004. At that point, Appellant's subsequent counsel had become aware of the improper act. Further, Appellant attended oral arguments where the issue regarding the failure properly to serve the brief in opposition to summary judgment and its ramifications was argued by the parties' respective counsel. Thus, as the trial court and the appellate court found, reasonable minds could come to but one conclusion, the cognizable event occurred no later than July 21, 2004 thereby rendering Appellant's August 3, 2005 complaint barred by the one-year statute of limitations.

Appellant would have this Court hold that all a plaintiff would have to do to avoid summary judgment on a statute of limitations defense is to claim that, despite all the evidence to the contrary, he or she did not become aware of the malpractice until sometime within the applicable statute of limitations. Such a position directly is contrary to law.

In applying the summary judgment standard of Civ.R. 56, a trial court must construe all evidence in favor of the non-moving party. If the trial court determines that there are no material issues of fact and that reasonable minds can come to but one conclusion in favor of the moving party, summary judgment is appropriate. A plaintiff does not sufficiently oppose summary judgment by make self-serving allegations that are not supported by the evidence. *Pinchot v. Mahoning Cty. Sheriff's Dept.*, 164 Ohio

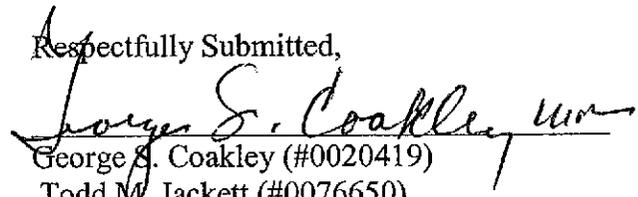
App.3d 718, 2005-Ohio-6593, 843 N.E.2d 1238, ¶26. In fact, the case law is replete with cases resolved on summary judgment involving similar issues regarding the occurrence of the cognizable event. *Spencer*, 87 Ohio App.3d at 278, 622 N.E.2d at 15; *Flowers*, 63 Ohio St.3d 546 at 589 N.E.2d at 1288; *Whitaker*, 123 Ohio App.3d at 420, 704 N.E.2d at 321; *Hahn*, 2004-Ohio-4789, at ¶¶34-35; *Mandato*, 1997 WL 127178, at \*2-\*3; *Barna*, 1989 WL 70007, at \*3.

Both the trial court and the appellate court correctly applied the Civ.R. 56 standard for ruling on a motion for summary judgment and correctly found that Appellant's self-serving statements are not sufficient to rebut the evidence submitted by Goetsch in his motion for summary judgment. Again, Appellant simply disagrees with the lower courts' decisions that the evidence demonstrates that his malpractice claim is barred by the one-year statute of limitations.

#### IV. CONCLUSION

For the foregoing reason, this case does not present matters of public or great interests. Appellee, therefore, respectfully requests that this Court decline jurisdiction over this matter and allow the properly supported decision of the appellate court to stand.

Respectfully Submitted,



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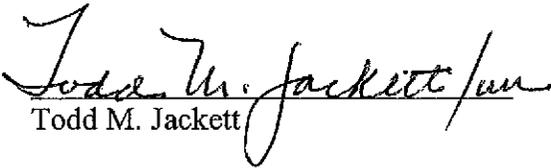
**CERTIFICATE OF SERVICE**

A copy of the foregoing *Appellee's Memorandum In Opposition to Jurisdiction*  
has been sent by regular U.S. mail, postage prepaid, on this 11<sup>th</sup> day of June 2007 to:

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