

**IN THE SUPREME COURT OF OHIO**

Olympic Holding Co. LLC, *et al.*, :  
 :  
 Plaintiffs-Appellees : Case No. 08-0200  
 :  
 v. : ON APPEAL FROM THE  
 : FRANKLIN COUNTY  
 : COURT OF APPEALS,  
 ACE Capital Title : TENTH APPELLATE  
 Reinsurance Co. : DISTRICT  
 :  
 :  
 Defendant-Appellant. : Court of Appeals  
 : Case No. 07-AP-168

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**APPELLANT ACE CAPITAL TITLE REINSURANCE COMPANY'S  
MEMORANDUM IN OPPOSITION TO APPELLEES'  
MOTION TO DISMISS OR STRIKE**

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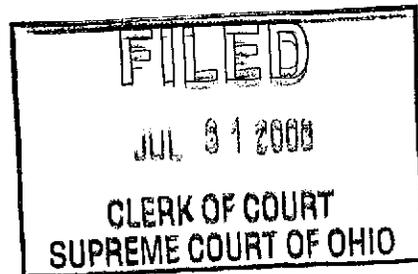
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## INTRODUCTION

This Court accepted jurisdiction over this appeal in May 2008, thereby agreeing with Appellant ACE Capital Title Reinsurance Co. (“ACE Capital”) that the case presents issues of great general interest regarding Ohio’s Statute of Frauds. On July 15, 2008, ACE Capital filed its Merit Brief addressing the Propositions of Law accepted by this Court. ACE Capital also asked the Court, in the interests of judicial economy, to consider resolving certain issues that had been deemed to be moot by the court of appeals, such that the case could be remanded directly to the trial court. In making this request, ACE Capital simply suggested a procedural option that this Court has invoked in some cases, although not as a general rule. *See e.g. M.J. DiCorpo, Inc. v Sweeney* (1994), 69 Ohio St.3d 497, 504. Appellees have now moved the Court to dismiss the appeal as improvidently allowed or to strike portions of ACE Capital’s Merit Brief, erroneously contending that ACE Capital’s Merit Brief (i) contains an issue not raised in its jurisdictional memorandum and (ii) seeks review of issues found moot by the court of appeals. Appellees’ Motion wholly lacks merit and should be summarily denied.

**A. Contrary To Appellees’ Assertions, ACE Capital Expressly Sought This Court’s Guidance In Its Jurisdictional Memorandum On Whether An Alleged “Agreement to Agree” Could Avoid The Statute of Frauds.**

In their Motion, Appellees baldly assert that ACE Capital never “argued, mentioned, or even alluded to” the court of appeals’ disposition of their “agreement to agree” claim. Under Proposition of Law I in its jurisdictional memorandum, however, ACE Capital expressly noted that this Court’s “guidance is sorely needed to determine whether sophisticated parties engaged in arms-length negotiations may sue on a contract, otherwise barred by the Statute of Frauds, based on an alleged oral ‘agreement to agree’ and/or an alleged promise to deliver a signed writing.” (ACE

Capital Mem. at 13) (emphasis added). In addition, ACE Capital explicitly referred this Court to paragraphs 43-45 of the appellate opinion – the *only* paragraphs addressing the “agreement to agree” issue raised in Appellees’ Assignment of Error IV. *Id.* Thus, ACE Capital’s jurisdictional memo quite clearly encompassed both of the court of appeals’ theories for finding the Statute of Frauds inapplicable in this case and allowing Appellees’ contract claims to proceed to trial. (Opinion at ¶ 33, 49.) The point of ACE Capital’s jurisdictional memorandum, and of Proposition of Law No. I, is that there should be no exception to the Statute of Frauds that would allow disappointed plaintiffs’ breach-of-contract claims to proceed to trial based on alleged oral agreements – regardless of whether the plaintiffs claim that the defendant promised to sign an agreement or had an “agreement to agree” to one – for an unconsummated, unwritten and unsigned multiyear deal. The “agreement to agree” theory and the “promise to deliver a signed writing” theory are two sides of the same coin trying to circumvent the Statute of Frauds through a judge-made exception. Both theories are properly before the Court and present an issue of public and great general interest.

**B. This Court Has The Power To Review Assignments Of Error Deemed Moot By Appellate Courts *If This Court So Chooses.***

A logical question, frequently raised by this Court, is how the Court should dispose of the appeal if it adopts the Appellant’s propositions of law. ACE Capital anticipated this question and addressed it directly in its Merit Brief, so that the Appellees and this Court would have time to consider the proper disposition of the case in the event the Court agrees with ACE Capital’s Propositions of Law – hardly a “surprise attack.”

Under the heading, “Disposition of the Appeal,” ACE Capital argues that this Court has discretion to, and should, address the two remaining assignments of error that relate to Appellees’ contract claims and the Statute of Frauds, even though the court of appeals found them moot. (Merit Brief at 42; Opinion at ¶¶ 33, 49.) This is not an improper request. Although, as ACE Capital acknowledged at page 43 of its Merit Brief, this Court typically remands cases back to the court of appeals to consider an assignment of error the court of appeals deemed moot, this Court has on occasion exercised its discretion to resolve such issues itself. This Court’s power to do so is made plain not only by the authority cited by ACE Capital but also by the cases quoted by Appellees themselves. (Motion at 9-10 (quoting cases in which Court “refrained” from addressing, or “declined” to address, issues mooted below)).

In *M.J. DiCorpo v. Sweeney*, the court of appeals reversed a trial court’s grant of summary judgment on a breach of contract claim and held that because the case would proceed to trial on the breach of contract claim, the issue of whether the trial court erred in granting summary judgment on the plaintiffs’ unjust enrichment claims was moot. This Court reversed and reinstated the summary judgment of the trial court on the breach of contract claim. It then found “it is appropriate for us to now consider whether the trial court erred in granting summary judgment on the claims for unjust enrichment” – the assignment of error the court of appeals held moot. *Id.* 69 Ohio St. 3d at 504. ACE Capital’s argument regarding the proper disposition of this appeal

tracks *M.J. DiCorpo*.<sup>1</sup> ACE Capital is merely suggesting that this Court consider and resolve the two Statute of Frauds issues the court of appeals deemed moot, assuming, of course, it first reverses the court of appeals' holding on the purported "promise to deliver a signed writing" and "agreement to agree" exceptions to the Statute of Frauds.

Appellees argue that the two moot issues – whether the purported oral agreement was performable within a year as intended and whether there was a signed writing sufficient to satisfy the Statute of Frauds – are not of public or great general interest and will require the Court to delve into the factual record. These arguments add nothing to the pending Motion. This Court, of course, is free to exercise its discretion not to address the issues deemed moot by the court of appeals *for any reason*, including that it does not find them to be of sufficient weight to warrant its time or that it will require the Court to dig too deeply into factual issues. But that certainly does not mean that the inclusion of the request for this Court's review of these issues in ACE Capital's Merit Brief warrants the dismissal of the appeal as improvidently granted, or warrants striking the request for a complete disposition as improper. Appellees are free to raise in their merit brief any arguments about whether the Court should address the moot issues as well as addressing the merits of those issues. Only then will the Court be able to properly decide whether it is prudent and more efficient for it to address the remaining issues and fully dispose of the question of whether the trial court correctly granted

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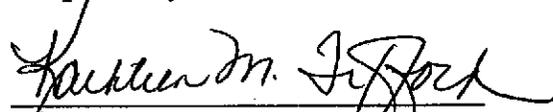
<sup>1</sup> The statement in note 5 of the Motion about *M.J. DiCorpo* is not accurate. This Court reinstated the trial court's grant of summary judgment on the contract claims addressed in DiCorpo's propositions of law. It then analyzed the unjust enrichment claims and, upon review of the record, reinstated the trial court's grant of summary judgment as to those claims because it agreed with the trial court that there was no unjust enrichment and that the parties had a separate agreement whereby DiCorpo was to be compensated at an hourly rate for any services it did perform. *M.J. DiCorpo*, 69 Ohio St. 3d at 504.

summary judgment on Appellees' contract claims, rather than remanding these two open issues back to the court of appeals.

### CONCLUSION

The Motion should be denied. The Court properly accepted this case for review because the propositions of law advanced by ACE Capital raise issues of public and great general interest to all commercial entities doing business in Ohio as to whether there should be *any* judicial exception to the Statute of Frauds, regardless of the theory advanced. While the resolution of that question is not dependent upon the simultaneous resolution of the two issues deemed moot by the court of appeals, the resolution of the remaining issues surely will result in judicial economy and further the expeditious administration of justice for the parties in this case.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 31, 2008, a copy of this *Memorandum in Opposition to Appellees' Motion to Dismiss Or, In the Alternative, To Strike* was served via hand-delivery upon the following counsel of record:

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