

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-1066

GAYLE STIPE, :  
Plaintiff-Appellee, :

On Appeal from the Hamilton County Court  
of Appeals, First Appellate District

Court of Appeals  
No: C-080544

vs. :

R. CASEY BARACH, :  
Defendant-Appellant.

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPEAL  
OF APPELLANT R. CASEY BARACH

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## TABLE OF CONTENTS

I	EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
III	STATEMENT OF THE CASE AND FACTS	6
IV	ARGUMENT IN SUPPORT AND PROPOSITIONS OF LAW	10
	<u>Proposition of Law No. 1:</u> In order to achieve an equitable distribution of property under R.C. 3105.171, trial courts must hold an evidentiary hearing to determine what percentage, if any, of the work that resulted in a sales commission was done prior to the termination of the marriage; if substantial work during the marriage culminated in a sales commission, then this portion is marital property and subject to an equitable distribution under the statute.	10
	<u>Proposition of Law No. 2:</u> When an appellate court makes an error regarding a fundamental fact in the matter, the upholding of a Summary Judgment must be reversed and the matter remanded to the trial court for a full evidentiary hearing.	10
	CONCLUSION	12
	CERTIFICATE OF SERVICE	13
	EXHIBITS	
	Court of Appeals Judgment Entry – April 29, 2008	A
	Magistrate’s Decision – November 19, 2007	B
	Trial Court’s Entry Sustaining Objections – February 22, 2008	C

**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The issues presented in this matter are both of public and great general interest and involve substantial constitutional questions.

Divorce actions are a very common occurrence in the daily life of Ohioans, are a substantial portion of trial court dockets and the most significant legal issue most members of the public will face in their life. The legal profession and the public must have clear and non-conflicting interpretations of the divorce statutes. R.C. 3105.171 has received conflicting interpretations in sales commissions and similar cases (the *Metz* case involved contingent attorney fees). The conflicting interpretations include:

1. The Magistrate's *Decision and Entry* regarding summary judgment motion in this matter;
2. The Trial Court's *Entry Sustaining Objections* regarding summary judgment motion in this matter;
3. The Second District Court of Appeals in *Wells v. Wells (1999)*, 1999 Ohio App. LEXIS 6349; and
4. The First District Court of Appeals in *Metz v. Metz (2007)*, 2007 Ohio 549, 2007 Ohio App. LEXIS 507. Discretionary appeal not allowed, *Metz v. Metz*, 114 Ohio St.3d 1480, 870 N.E.2d 732; and in this matter.

This is not the first time that the Supreme Court has been asked to interpret and clarify the statute as the *Metz* case was presented to the Supreme Court in 2007.

The conflicting and unclear interpretations of the divorce property settlement and distribution statute causes confusion and adds to the litigation burden on domestic courts in Ohio. This matter has been in the courts for nearly 5 years simply because the parties do not

have a clear and consistent interpretation of the statute by the courts available. All citizens of Ohio have a right to a clear understanding of the property settlement statutes in Ohio. The normally contentious matter of divorce should not be exacerbated by divorce statutes that are unclear and have multiple interpretations by the courts. This requirement for judicial and statutory clarity is demanded in the Constitution of Ohio:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. *Ohio Constitution*, Article 4 – Judicial Section 04 – Courts of Appeal.

Given the conflict in the First District and the Second District Court of Appeals, the Ohio Constitution requires the Supreme Court to review the conflicts and provide a clear interpretation of R.C. 3105.171 for the courts and the citizens of Ohio.

An additional jurisdictional issue that is of that is of public and great general interest, as well as raises significant constitutional issues, is that the court of appeals decision was erroneously based upon a fact that does not exist. The court based its decision upon the fact that the husband had been involved in an “extramarital affair” which caused the wife to file for divorce. There was never a Finding of Fact in any lower court opinion of an “extramarital affair” or that the wife filed for divorce as a result of an “extramarital affair.” The law is clear in Ohio that appellate courts must not substitute their judgment for that of the trial courts. See, e.g., *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181. Further, under Ohio law, an appellate court must presume that the findings of the trial court are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 10 Ohio B. 408, 461 N.E.2d 1273; see, also, *Mahlerwein v. Mahlerwein* 160 Ohio App.3d 564, 2005 Ohio 1835, 828 N.E.2d 153, at P 19.

This violation of a basic tenet of law in Ohio is cause for the Supreme Court to review this clearly erroneous decision.

While the record does reflect a marriage suffering from multiple problems and an honest confession to the Wife by the Husband that he was concerned that he was developing feelings for another person, this is far from an “extramarital affair.” The commonly used dictionary, The Merriam-Webster Dictionary, defines extramarital as follows:

**Main Entry:ex·tra·mar·i·tal**

**Pronunciation:\ek-strə-ma-rə-təl\**

**Function:adjective**

**Date:1925**

**: of, relating to, or being sexual intercourse between a married person and someone other than his or her spouse : adulterous <an extramarital affair>**

*<http://www.merriam-webster.com/dictionary/extramarital> (June 8, 2009).*

The record reflects no Findings of Fact or testimony from the lower courts of “sexual intercourse.”

Publicly publishing an accusation that someone was having sexual intercourse with a married person or with someone other than his or her spouse without proof is tantamount to defamation under Ohio law. And while the Wife will attempt to send up a smoke screen regarding the definition of “extramarital affair,” the reality is that she agrees with the definition provided by the dictionary – sexual intercourse with a married person or someone other than his or her spouse, is the common definition accepted by all.

The Supreme Court is the last court in Ohio that a citizen can turn to in order to correct an egregious error of law and ask for the correction of an erroneous branding of adultery by a

court in Ohio. There is public interest and great general interest that Ohio courts get the fundamental facts of a case correct. This Supreme Court is the last chance for the citizens of Ohio to ask our judicial system to fix the egregious mistakes of lower courts. We cannot have our courts erroneously branding a person an adulterer and then not provide Ohio citizens any method of redress to have such errors corrected.

Further, given that our judicial system is based upon precedent, it is a matter of great public and general interest that the precedent of a published opinion is not fundamentally incorrect and contains unproven facts.

The appellate court's extra legal Fact Finding of a fact regarding the nonexistent "extramarital affair" was a violation of the law of Ohio and this resulted in the taking of property in violation of the husband's procedural due process rights under the Constitutions of Ohio and the United States.

Once the erroneous fact is corrected by the Supreme Court, further fact finding at the trial court level is necessary in order to protect the Husband's constitutional and legal rights. Clearly, the entire opinion is tainted by the fundamental erroneous fact and additional fact finding is in order.

As a matter of public and great general interest, as well as, a constitutional question, in divorce actions the power to determine the distribution of property is with the courts rather than letting interested parties "work the system" to achieve an inequitable distribution of the property. In this matter, the wife "worked the system" and to achieve an inequitable distribution of the property. The parties were having marital difficulties. On June 2, 2004, the wife was close to closure on a sales contract that she had worked on for years. She consulted with a lawyer and on June 2, 2004 told the Husband to not come home and changed the locks on the doors of the

marital home. The sale closed within days and a six figure commission was the reward. The wife claims the large sales commission was not “earned” during the marriage as required by statute. Clearly, the wife (in consultation with a lawyer), took the actions that determined the property settlement on the sales commission. The courts were taken out of the property settlement and distribution on the sales commissions and this is a violation of the intent of the Ohio statute and the Ohio Constitution’s due process requirement.

Divorce is a fact of life and Ohio courts, the Constitution and the legislature has vested the determination of property settlement in divorce actions with the courts. Given the nature of a Summary Judgment, the wife’s actions also precluded the full development of facts in the lower court in this matter. What if the wife asked the client to hold off signing the contract until she could tell the husband not come home and changed the locks on the marital home? The granting of the Summary Judgment precluded any hearing that would allow an exploration at the trial court of facts such as these to be explored. The upholding of the Summary Judgment sets a dangerous precedent and provides a roadmap for future domestic relations litigants of how to take property settlement out of the courts and this will result in inequitable property distributions that are controlled by litigant’s actions.

The granting of the Summary Judgment in this matter sets a dangerous precedent and this is a matter of great public and general interest. The granting of a Summary Judgment is by far the greatest power given to the judicial system as it takes away a party’s “day in court” without allowing a party the chance to put facts into evidence that provides his side of the story or cross-examine the other party in front of a trier of fact. Given the draconian nature of a Summary Judgment and the strict rules imposed by rule and law on Summary Judgments, how can multiple experienced legal professionals find that material facts remain in dispute, if there are not material

facts in dispute? An experienced domestic relations magistrate, that has been the case's first hand trier of material facts in this matter found that material facts remain in dispute.

Furthermore, Judge Painter, an appellate judge with 27 years of experience who was been selected to serve as a judge on the United Nations Appellate Tribunal stated in his dissent,

The magistrate was correct in denying summary judgment. There were facts in dispute. The court should have held an evidentiary hearing . . .

The law of Ohio is that Summary Judgments are so closely scrutinized that all questions of doubt are ruled in favor of the non-moving party. Clearly, in this case there were questions of doubt in the trier of facts opinion (Magistrate Schneiders) and in Judge Painter's opinion. This court must review this case to ensure that no material facts remain in dispute.

#### STATEMENT OF THE CASE AND FACTS

This is a divorce case from the Hamilton County Domestic Relations Court. The only remaining issue in the matter is a Summary Judgment ruling on a single property settlement issue (sales commission issue) that is of significant financial value. On May 25, 2007, Stipe filed a Motion for Partial Summary Judgment on the sales commission issue. On August 16, 2007, Magistrate Schneiders ruled against the Summary Judgment Motion in a four page opinion as he found that Civ. R. 56(C) precluded a Summary Judgment as genuine issues of fact needed to be considered at the property trial. The trial court sustained Stipe's Objections and Summary Judgment was granted. The First District Court of Appeals upheld the Summary Judgment in a 2-1 decision with a dissent by Judge Painter on April 29, 2009.

#### Statement of the Facts

Barach and Stipe were married in September 1995. Stipe's two children from a prior marriage lived with Stipe and Barach. All children's expenses were shared by Stipe and Barach,

including Barach's child support payments. The Stipe's children college education expenses were shared by Barach and Stipe (and the Stipe's children's father), including payments made in June of 2004. Stipe and Barach jointly contributed all income and paid all expenses from joint accounts in the 9 year term of the marriage (1995-2004).

Both Stipe and Barach worked fulltime during the term of the marriage. During the period 1997 to 2000, Stipe started and operated a business named AwardOvations. The couple jointly provided the start-up capital. Stipe's AwardOvations utilized the family home to operate. From 1997 to 2000, AwardOvations lost money each year.

In 2000, Stipe began a sales position. Stipe's sales position employer did not provide an office for her to work and Stipe used the family home as her sales office. Home sales office expenses were paid from Stipe and Barach's joint account. Stipe's sales position required extensive travel. Stipe made sales calls on colleges and universities in five or six different states. Stipe's sales position had a base salary of \$85,000-\$95,000. Stipe's sales position required frequent trips in addition to her frequent sales trips. These a few examples include: Cambridge, MA, Herndon VA, Malvern PA (4 trips), Hilton Head SC (2 trips), Newfoundland Canada, Salt Lake City UT, and Philiadelphia PA (3 trips). In addition, Stipe frequently attended multi-day trade shows.

The products and services that Stipe sold had a very long and extensive sales cycle. Sales took as long as four years from initial contact to the sale. One of the sales by Stipe was to Youngstown State University (hereinafter "YSU") on June 29, 2004. Stipe worked on the YSU sale for two years before the contract was signed. Stipe traveled to YSU in person at least ten times. Stipe did not visit YSU after April 29, 2004.

<b>Date</b>	<b>School</b>	
2/20/2003	YSU	

4/15/2003	YSU	
4/22/2003	YSU	Multiple night stay
5/19/2003	YSU	
7/7/2003	YSU	Multiple night stay
8/7/2003	YSU	
10/15/2003	YSU	
3/24/2004	YSU	
4/15/2004	YSU	Multiple night stay
4/29/2004	YSU	

The couple separated when Stipe requested that Barach not return to the marriage home on June 2, 2004. After June 2, 2004, the couple communicated via Instant Messenger and telephone. Barach and Stipe discussed their marriage at the family home in early June. On June 15, 2004, Barach discussed with Stipe about getting together over dinner to discuss their marriage. On June 18, 2004, Stipe and Barach had dinner and discussed the future of their marriage.

During the marriage, Barach and Stipe exclusively used joint financial accounts and credit cards for all income and payments. In June 2004 and in July 2004, Stipe exclusively used the joint financial accounts and credit cards for her business travel and business expenses in her work to earn sale's commissions, including the YSU contract. Stipe purposefully chose to use the couple's joint credit cards for business travel and declined to use a company credit card.

During June 2004 and July 2004, Stipe used the couple's American Express credit card for household, personal and business charges, including required business travel charges.

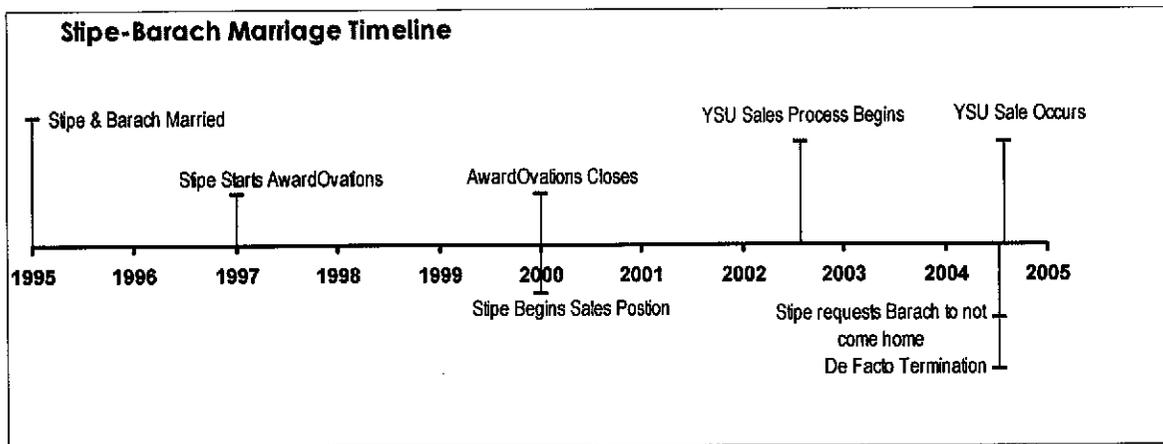
- June 2004 - \$7,298
- July 2004 - \$15,361
- October 2004 - \$101.24

Stipe and Barach had an additional joint credit card – Marriott Rewards Visa. The couple both used this credit card in the months of June 2004 and July 2004. Stipe used the card in June

2004 and July 2004 for such things as to provide money for Stipe's children while they were at college and purchasing lawn and garden materials for the marital residence.

Stipe and Barach maintained a US Bank joint checking account. Stipe and Barach continued to use this account for deposits and bill payments in June 2004 and July 2004. As he had done throughout the marriage, Barach continued to deposit his paycheck into the joint account on June 15, 2004 and June 30, 2004. Stipe used the joint account to pay household bills and to pay business expenses in June 2004 and July 2004. Stipe's home office for her sales position required a separate business telephone lines. In June 2004, the couple's joint checking account paid the for the business telephone lines that Stipe used to earn sales commissions.

On June 29, 2004 Stipe signed a contract with YSU and earned an associated sales commission.



## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. 1: In order to achieve an equitable distribution of property under R.C. 3105.171, trial courts must hold an evidentiary hearing to determine what percentage, if any, of the work that resulted in a sales commission was done prior to the termination of the marriage; if substantial work during the marriage culminated in a sales commission, then this portion is marital property and subject to an equitable distribution under the statute.**

The statute governing distribution of marital property is titled “*Equitable division of marital and separate property; distributive award.*” R.C. 3105.171 (emphasis added). The facts of this case demonstrate that the granting of the Summary Judgment created an inequitable result and a result contrary to the law of Ohio. During a nine year marriage, the husband and wife jointly contributed income and jointly paid all expenses. During the last two years of the marriage, the wife worked on a sale’s contract. The wife stops the husband from coming home on June 2 and closes a sale’s contract with a substantial sales commission on June 29. Ninety-six percent of the sales commission work (using 730 days of sales effort of which 703 days took place during the marriage (i.e. prior to the wife telling the husband not to come home and changing the locks)). By upholding the Summary Judgment, the appellate court found that all of the real time, real sacrifice, and real effort on the sale that took place during the marriage really did not take place. This is clearly not true and clearly creates an inequitable result. The work during the marriage has value and the sales commission was the result of that work.

**Proposition of Law No. 2: When an appellate court makes an error regarding a fundamental fact in the matter, the upholding of a Summary Judgment must be reversed and the matter remanded to the trial court for a full evidentiary hearing.**

The appellate court made a fundamental and harmful error in their decision. The Judgment Entry was erroneously based upon a fact that does not exist. The court stated that the

husband had been involved in an “extramarital affair” which caused the wife to file for divorce. There was never a Finding of Fact in any lower court opinion of an “extramarital affair” or that the wife filed for divorce as a result of an “extramarital affair.” The law is clear in Ohio that appellate courts must not substitute their judgment for that of the trial courts. See, e.g., *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181. Further, under Ohio law, an appellate court must presume that the findings of the trial court are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 10 Ohio B. 408, 461 N.E.2d 1273; see, also, *Mahlerwein v. Mahlerwein* 160 Ohio App.3d 564, 2005 Ohio 1835, 828 N.E.2d 153, at P 19.

This decision included the violation of a basic tenet of law in Ohio and must be reversed.

While the record does reflect a marriage suffering from multiple problems and an honest confession to by the Husband to the Wife that he was concerned that he was developing feelings for another person, this is far from an “extramarital affair.” The commonly used dictionary, The Merriam-Webster Dictionary, defines extramarital as follows:

**Main Entry:ex·tra·mar·i·tal**

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**Date:1925**

**: of, relating to, or being sexual intercourse between a married person and someone other than his or her spouse : adulterous <an extramarital affair>**

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The record reflects no Findings of Fact or testimony from the lower courts of “sexual intercourse” and the decision must be reversed.

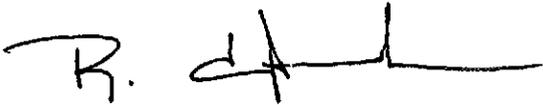
Publicly publishing an accusation that someone was having sexual intercourse with a married person or with someone other than his or her spouse without proof would give rise to a defamation action under Ohio law. And while the Wife will attempt to send up a smoke screen regarding the definition of “extramarital affair,” the reality is that the general public agrees with the definition provided by the dictionary – sexual intercourse with a married person or someone other than his or her spouse.

### CONCLUSION

When 96% of the work to create an asset takes place during a marriage, it is mandatory and equitable that the trial court hold an evidentiary hearing regarding the effort during the marriage. This asset is marital and subject to the equitable distribution required under R.C. 3105.171. In addition, when an appeals court makes a finding of fact (and the finding is not supported by the evidence) that is erroneous, the decision must be reversed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Jeffrey S. Goodman, Goodman & Goodman, 123 East Fourth Street, Cincinnati, Ohio 45202 and Bruce M. Allman, 6526 Harnesswood Court, Mason, OH 45040 counsel of record for the Plaintiff, by U.S. Mail this 12<sup>th</sup> day of June, 2009.

A handwritten signature in black ink, consisting of the letter 'R.' followed by a stylized, cursive signature that appears to be 'dhl'.

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

GAYLE STIPE,	:	APPEAL NO. C-080544
	:	TRIAL NO. DR-0401837
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
R. CASEY BARACH,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant R. Casey Barach contests the trial court's entry of partial summary judgment in favor of plaintiff-appellee Gayle Stipe in her divorce action. For the following reasons, we affirm.

Barach and Stipe were married in 1995. They had no children born of this marriage. Stipe filed for divorce in August 2004 after learning that Barach was having an extramarital affair. During their nine-year marriage, Stipe and Barach contributed to and paid all expenses from joint accounts. In 2004, Barach earned a salary of \$125,000, and Stipe earned a base salary of \$85,000, plus sales commissions. Since 2001, Stipe had worked as a sales representative for Sungard Higher Education Inc., formerly known as Systems and Computer Technology

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Corporation ("SCT"), selling software systems to colleges and universities. This involved some travel, but all travel expenses and her home-office expenses were reimbursed by SCT. From January 2004 through March 2005, Stipe earned over \$300,000 in sales commissions.

For the division of the marital property, a hearing was held before a magistrate to determine the de facto termination date of the marriage. The magistrate found that the de facto termination date of the marriage was June 2, 2004, as this was when the parties began to disentangle themselves financially and Barach stopped living at the marital home. The trial court affirmed this ruling.

Stipe then moved for partial summary judgment, asking the trial court to determine that Barach was not entitled to any portion of the sales commissions she had "acquired" after June 2, 2004, even though some of the work generating the commissions had occurred during the marriage. In support of her motion, she submitted the affidavit of Candace A. Brooks, the Senior Financial Analyst for SCT. Attached to Brooks's affidavit was a copy of the commission agreement between SCT and Stipe, which detailed how and when a commission was earned and when it was paid. The agreement stated that any commissions for software or service agreements sold would be paid "subject to [SCT]'s receipt of a License [or Service] agreement at its Malvern, Pennsylvania corporate headquarters \* \* \*." Furthermore, the agreement indicated that commissions would be paid "30 days following the date [SCT] receives fully executed, original copies of the Licenses Agreement/Services agreement for which the Commissions are payable." Finally, a sales representative had to be employed by SCT on the date that a commission was paid. Stipe argued

that since all the commissions at issue were based on contracts executed after June 2, 2004, those commissions were her separate property.

The magistrate denied Stipe's motion, relying on *Metz v. Metz*,<sup>2</sup> where this court held that even though the de facto termination date of a marriage was July 30, 2003, the trial court had not abused its discretion in "treating all of the contingency fees earned by the husband in his law practice in 2002 and 2003 as marital property, where the fees were the result of work that the husband had performed during the marriage."<sup>3</sup> Based on *Metz*, the magistrate determined that there were disputed issues of fact regarding whether the commissions earned by Stipe were the result of work that she had performed during the marriage.

Stipe filed objections to the magistrate's decision. The trial court sustained the objections, distinguishing the contingency fees at issue in *Metz* from the commissions at issue here, and found that there were no genuine issues of material fact. Ultimately, a decree of divorce was entered, incorporating a settlement agreement. The issue whether Barach was entitled to a portion of the commissions Stipe had earned and was paid after June 2, 2004, was to be determined following the outcome of this appeal.

From the entry of the decree of divorce, Barach brings forth two assignments of error. We address both assignments of error together, as they both essentially argue that the trial court erred in granting partial summary judgment in favor of Stipe. Specifically, Barach maintains that *Metz* was applicable to the facts in this case and that the entry of summary judgment was inequitable. We disagree.

<sup>2</sup> 1<sup>st</sup> Dist. No. C-050463, 2007-Ohio-549.

<sup>3</sup> *Id.*

In *Metz*, although the de facto termination date of the marriage was July 30, 2003, we upheld the trial court's finding that all of the husband's contingent fees paid to him after the de facto termination date were marital property, because he had earned and was entitled to those fees during the marriage. In holding that the trial court had not abused its discretion in considering the contingent fees earned prior to, but paid after, the de facto termination date as marital property, we noted that the trial court had relied on the fact that the wife had "made a significant contribution to the marriage by staying at home and caring for the parties' children, thus allowing [the husband] to devote long hours to his law practice and to reach the income level he then enjoyed \* \* \*. [Furthermore,] to permit the husband to claim all the fees earned since the separation would have disregarded the wife's efforts during the marriage and the particular nature of the husband's employment."

The facts in the case before us are distinguishable from *Metz*. First, the nature of Stipe's employment was different from the husband's employment in *Metz* because sales commissions are not analogous to fees an attorney may earn due to a contingent-fee contract. The entitlement to a contingent fee is fixed at the beginning of the attorney/client relationship when the client executes the contingent-fee agreement. Thus, the husband in *Metz* had a right to the contingent fees at issue during the marriage, even though they were not paid until after the de facto termination date of the marriage. But here Stipe was not entitled to a commission merely because she began working with a client in an effort to make a sale during her marriage to Barach. Instead, she was only entitled to a commission when her client had executed a license or service agreement and that agreement had been delivered to her company. Thus, Stipe did not receive the right to the commissions in dispute

until there was an executed contract, which in this case was after the de facto termination date of the marriage.

Second, unlike the circumstances in *Metz* where the husband was not compensated for his time invested in a case prior to a judgment or settlement, Stipe was compensated simultaneously for her sales efforts by a significant base salary. Barach, unlike the wife in *Metz*, had the benefit and use of this salary during the marriage. Furthermore, there is nothing in the record to demonstrate that Barach put forth some type of significant effort that allowed Stipe to perform her sales job, while in *Metz* the wife stayed at home and cared for the parties' children to allow her husband to put in long hours at work.

Therefore, given that it was undisputed that Stipe's entitlement to the sales commissions did not vest until a license or service agreement was executed and that the commissions at issue were all based on contracts executed after June 2, 2004, we hold that the trial court did not err by holding that these commissions were her separate property and by granting partial summary judgment in favor of Stipe.<sup>4</sup>

Additionally, we are not persuaded that the trial court's judgment was "inequitable." Barach appears to argue that the de facto termination date used by the court caused an inequitable result with respect to the division of property. But the record does not demonstrate any such inequity. Barach points to the fact that Stipe had charged her business expenses to the couple's joint credit cards. She did. But her employer reimbursed her for those expenses. Barach points out that Stipe's children from a previous marriage lived with them and that the couple shared in

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<sup>4</sup> See R.C. 3105.171(A)(3)(a); see, also, *Wells v. Wells* (Dec. 30, 1999), 2<sup>nd</sup> Dist. No. 99-CA-0010 (holding that although the wife performed some labor during the marriage that led to a sales commission she earned after the de facto termination date of the marriage, that commission was her separate property).

those related expenses. They did, but the couple also shared the costs of Barach's child-support payments for a child from a previous marriage. Accordingly, because our review of the record does not reveal that the trial court abused its discretion and created an inequitable result by choosing June 2, 2004, as the de facto termination date of the marriage, we hold that the trial court's entry of partial summary judgment was proper.

The first and second assignments of error are overruled, and the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

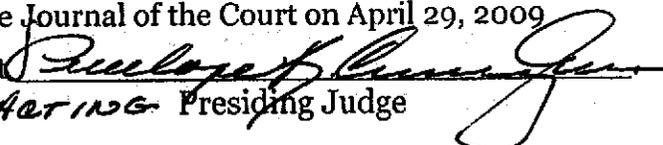
**HILDEBRANDT, P.J and SUNDERMANN, JJ.**

**PAINTER, J.,** dissenting.

The magistrate was correct in denying summary judgment. There were facts in dispute. The court should have held an evidentiary hearing to determine what percentage, if any, of the commissions were earned before the marriage terminated. If substantial work were done that culminated in a payment, Barach would be entitled to a percentage. I would not distinguish Metz in such a technical manner—the majority draws irrelevant distinctions.

*To the Clerk:*

Enter upon the Journal of the Court on April 29, 2009  
per order of the Court

  
**ACTING** Presiding Judge

**COURT OF COMMON PLEAS  
DIVISION OF DOMESTIC RELATIONS  
HAMILTON COUNTY, OHIO**

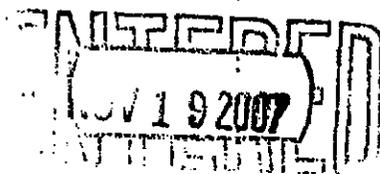
**Gayle Stipe**

Plaintiff

-vs-

**R Casey Barach**

Defendant



Case No: DR0401837

File No: E232375

CSEA:

**MAGISTRATE'S DECISION  
WITH FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Judge Mattingly

Magistrate Schnieders

An Entry, captioned "General Order of Reference" which is a matter of record in this Court, provides "... that all matters be and are hereby referred to a Magistrate in accordance with Rule 53 of Ohio Rules of Civil Procedure".

On May 25, 2007, Plaintiff filed Plaintiff's Motion For Partial Summary Judgment, which was submitted to the court without oral hearing on the matter. On June 4, 2007, Defendant filed Defendant's Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment. On August 16, 2007, a Decision of Magistrate (without findings of fact and conclusions of law) was entered of record. On August 17, 2007, Plaintiff filed a Request For Findings of Fact And Conclusions Of Law Re Magistrate's Decision Entered August 16, 2007. On September 14, 2007, Plaintiff filed Plaintiff's Motion To Reconsider And Proposed Findings of Fact And Conclusions of Law. Finally, on September 14, 2007, Defendant filed Defendant Proposed Findings of Fact And Conclusions of Law.

Plaintiff is represented by Jeffrey S. Goodman, Esq., and Bruce MacNeil Allman, Esq.

Defendant is represented by Mary Jill Donovan, Esq.

Based on the foregoing, the following findings of fact and conclusions of law are made:

### Findings of Fact

1) On September 22, 2006, a Decision of Magistrate With Findings of Fact and Conclusions of Law was entered in which it was determined that "During the Marriage" in the case sub judice was determined to be September 23, 1995 through June 2, 2004.

2) From approximately year 2000/2001 through 2005, Wife sold software to colleges and universities for a company known as SCT. Wife would sometimes spend significant amounts of time and effort through sales contacts and other work before a college would agree to buy the product and close the deal.

3) The dispute now before the court is whether or not any monies received by Wife after June 2, 2004, and the proceeds from any or all contracts executed and completed by Wife after June 2, 2004 may be deemed marital property and subject to division between the parties. Wife, citing RC 3105.171(A)(2), requested partial summary judgment on this matter declaring that any monies received by her after June 2, 2004 and the proceeds from any contracts consummated by her after June 2, 2004 be declared her separate property and that the proceeds not be subject to division. Husband, conversely argues that if there was significant effort and work put in by Wife in developing a successful sale prior to or after June 2, 2004, the fact that the reward from the preliminary work arrived after June 2, 2004 should not render all or a portion of the monies received after June 2, 2004 to be non-marital.

4) Upon considering this matter and the Ohio First District Court of Appeals case cited below, it is found that there are factual issues which remain to be determined, and as a result, Plaintiff's request for partial summary judgment on this issue should be denied and the matter heard fully at a property trial.

### Conclusions of Law

Civ. R. 56(A) provides that:

**(A) For party seeking affirmative relief.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a

responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for a pretrial or trial, a motion for summary judgment may be made only with leave of court.

Civ. R. 56(C) provides that:

**(C) Motion and proceedings thereon.** The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

In the instant case, there is a dispute as to whether or not any monies received by Wife from SCT after June 2, 2004 or contracts executed after June 2, 2004 and the resulting commissions payable to Wife is her separate property or whether all or part of any such sums are marital in nature and subject to division between the parties. There is evidence in this case to support that before a contract with a school was consummated, Wife would sometimes spend up to two years in the sales and negotiation process.

The law to be applied to this issue may be found in the First District Court of Appeals case of *Metz v. Metz*.<sup>1</sup> In that case, Husband was a medical malpractice attorney who often received fees on his cases years after the initial filing of those cases. In the interim much work went into the development of those cases prior to final resolution and recovery of awards for his clients. In *Metz*, the Court of Appeals ruled that the trial court did not abuse its discretion in

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<sup>1</sup> *Metz v. Metz*, 2007 Ohio 549, 2007 Ohio App. Lexis 507.

treating all of the contingency fees earned by Mr. Metz through his law practice in years 2002 and 2003 as marital property where the fees were the result of work that he performed during the marriage. Also, the trial court had extensive information that the fees that Mr. Metz earned in 2002 and 2003 were the result of work that was performed during the marriage. Under the conditions of the Metz case, the Court of Appeals determined that the contingency fees in question were marital property.

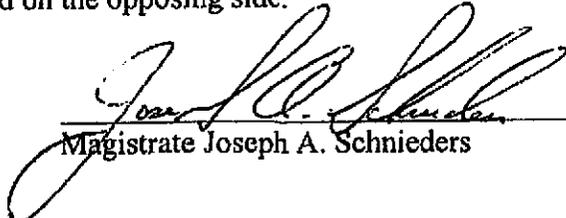
In the case sub judice, and in light of the Metz case, there are genuine issues of fact as to the work performed by Wife in developing and executing her contracts with colleges while working for SCT and the time frames in which such work was performed and the portions of such work most significant to the closing of a contract with a college. Given the evidence in this case vis-à-vis the Metz case, it cannot be said that reasonable minds could come to but one conclusion which conclusion would be favorable to Wife. Furthermore, notwithstanding that the Metz case involved legal contingency fees and that the case sub judice involves contract commission fees, the underlying principle remains the same. Upon considering the evidence most strongly in Wife's favor, it is found that there are genuine questions of fact to be considered before this issue can be resolved. The time for such consideration to occur is at the property trial of this case.

Based on the foregoing, the following Decision is made:

### **DECISION**

The Motion for Partial Summary Judgment filed by Plaintiff on May 25, 2007 is denied.

Copies of this Decision have been mailed to the parties or their counsel. Objections to this Magistrate's Decision must be filed within fourteen (14) days of the filing date of the Magistrate's Decision with a copy served on the opposing side.

  
Magistrate Joseph A. Schnieders

11/14/2007

Copies sent by Clerk of Courts to:

Jeffrey S. Goodman, Esq., Attorney for Plaintiff  
Bruce MacNeil Allman, Esq., Attorney for Plaintiff  
Mary Jill Donovan, Esq., Attorney for Defendant

**ENTRY ADOPTING MAGISTRATE'S DECISION**

Pursuant to Civil Rule 53, the Court hereby adopts the Magistrate's Decision. The timely filing and serving of written objections to the decision, or of any civil post-judgment motions pursuant to Appellate Rule 4, shall operate as an automatic stay of execution of this judgment until the Court disposes of such objections or motions by vacating, modifying, or affirming same.

If the Magistrate's Decision addressed a post-decree motion for relief, and, if no written objections to same, or no civil post-judgment motions pursuant to Appellate Rule 4, are timely filed and served, this judgment constitutes a final appealable order, as defined in ORC Section 2505.02, and, accordingly, pursuant to Civil Rule 58(B), the Hamilton County Clerk of Courts is hereby directed to serve upon all parties not in default for failure to appear, notice of this judgment and its date of entry upon the Court's journal. **A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIVIL RULE 53(E)(3).**

  
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Judge, Court of Common Pleas  
Division of Domestic Relations

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COURT OF COMMON PLEAS  
DIVISION OF DOMESTIC RELATIONS  
HAMILTON COUNTY, OHIO

Gayle Stipe  
Plaintiff

Enter: E. Mattingly  
Date: 02/22/2008

Case No. DR0401837

-vs-

File No. E232375

R Casey Barach  
Defendant

CSEA No. \_\_\_\_\_

Judge: Elizabeth B Mattingly

**ENTRY SUSTAINING OBJECTIONS**

This matter came before the Court pursuant to objections to the Decision of Magistrate Joseph Schnieders filed November 19, 2007.

This matter came on for decision on Plaintiff/Wife's ("Wife") objection to the Magistrate's finding that Wife's commissions earned after the de facto date of termination of the marriage may constitute marital assets. He therefore concluded that issues of fact remain as to what effect Wife's pre-June 2, 2004 sales calls had on sales that were made by Wife after June 2, 2004. For this reason, the Magistrate ruled that Wife's Motion for Partial Summary Judgment finding the commissions to be separate property should be denied and additional factual evidence taken.

Defendant/Husband ("Husband") filed a Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment. However, the memorandum does not dispute the only facts significant to determination of this matter: (1) the date of the de facto termination of the marriage;

(2) the fact that Wife was not entitled to any commission until a contract was signed; (3) that all the commissions at issue were based on contracts signed after the de facto termination date of the marriage; and (4) Wife was earning a salary for her sales efforts of \$85,000 per year. Thus, Husband's Objection does not argue that facts remain in dispute. Rather, he argues the legal significance of those undisputed facts.

Wife argues that no commissions were "acquired" during the marriage since Wife had no contractual right to any commissions until a contract for purchase was signed. Husband argues that the Magistrate did not err in denying Wife's Motion for partial summary judgment since the critical issue that remains to be determined is when the commissions in dispute accrued. In this respect, the Magistrate based his decision on the First District Court of Appeals decision in *Metz v. Metz*, 2007 WL 431014 (Ohio App. 1 Dist.), 2007-Ohio. 549.

In *Metz*, the parties' de facto date of termination was July 30, 2003. Metz was a medical malpractice attorney who often worked eight to ten years on a case before receiving his fee. The fees in dispute in *Metz* were those earned during 2002 and 2003 which were determined to be marital property and equally divided between husband and wife. In sustaining the Magistrate's decision, the First District wrote in relevant part:

The record reveals that John had approximately 39 cases pending in state and federal courts...John began work of the oldest of those cases, the *Brotherton* case, in 1989. The trial court found that given the nature of his work and the significant amount of time routinely invested (typically six to twelve years) before his cases yielded any income, all earnings generated by John during 2002 and 2003 were marital in nature (Para.15).

As to the fee Husband John received for his work in the *Brotherton* case, the Court made the following observation:

John's work ... began in 1989 and essentially concluded in 2001. John was awarded fees slightly in excess of \$1 million in that case. The last of the four installments on those fees was expected in 2004, but would not

be paid until the plaintiffs in the case had been fully compensated. The trial court determined that John's work on the *Brotherton* case was completed during the marriage. The trial court held that because the fees were earned in 2001, but were not distributed until a later time, the unpaid portion of those fees ... was essentially an account receivable and therefore subject to equal division as a marital asset. (Para. 21).

Applying the findings in *Metz v. Metz* to the case at bar, the Court must consider "the nature of the work" and whether Wife invested significant time before this work yielded any income. In examining these issues, the Court finds that sales commissions are not analogous to the fees an attorney may earn due to a contingent fee contract. As pointed out by Wife, an attorney's contractual entitlement to a fee is fixed at the beginning of the attorney/client relationship; only the precise amount is unknown. It is beyond dispute in this case that the sales commissions at issue were only due Wife when a contract for purchase was signed. (See Plaintiff's Exh. 3 to Plaintiff's Motion for Partial Summary Judgment, Exh. A, Affidavit of Candace Brooks, page 3, Para. 1 and page 4, Para. 8). It is also beyond dispute that the commissions Wife received here were all based on contracts signed after June 2, 2004.

In addition, in this case, unlike *Metz*, the time invested by Wife did yield income during the marriage, that being Wife's base salary of \$85,000 per year.

While the Court agrees with Husband's argument that the attorney still has to win the case taken on a contingent fee basis to get a fee, the more important fact is that when he does win the case, he is legally entitled to a fee. Wife here was legally entitled to nothing pursuant to her contract with SCT until a contract to purchase was signed.

For the above-stated reasons, the Court sustains Wife's Objections and finds that Partial Summary Judgment should be granted on the issue that Wife's commissions paid after the de facto termination date of the marriage are not marital property subject to division between Husband and Wife for that reason that there is no genuine issue as to any material fact. Wife is entitled to Partial

Summary Judgment as a matter of law and the Court further finds that reasonable minds can come to but one conclusion, and that conclusion is adverse to Husband.

After reviewing the Magistrate's Decision and the Objection and upon a careful and independent analysis of the record herein, the Court finds the objection to be well taken and hereby sustains this objection and the Decision of the Magistrate of November 19, 2007 is set aside. The remainder of issues will be heard at the property trial scheduled for March 27 and 28, 2008 before Magistrate Schnieders.

IT IS SO ORDERED.

TRANSCRIPT OF PROCEEDINGS HAS  
BEEN PROVIDED TO THE COURT