

IN THE SUPREME COURT OF OHIO

<p><b>GAYLE STIPE,</b></p> <p style="padding-left: 40px;"><b>Plaintiff-Appellee,</b></p> <p style="text-align: center;">v.</p> <p><b>R. CASEY BARACH,</b></p> <p style="padding-left: 40px;"><b>Defendant-Appellant.</b></p>	<p>: <b>CASE NO. 2009-1066</b></p> <p>:</p> <p>: <b>On Appeal from the Hamilton County</b></p> <p>: <b>Court of Appeals, First Appellate District</b></p> <p>:</p> <p>: <b>Court of Appeals No. C-080544</b></p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>
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**APPELLEE, GAYLE STIPE'S MEMORANDUM  
IN OPPOSITION TO JURISDICTION**

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**FILED**

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 SUPREME COURT OF OHIO

**TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR**

**I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST, ONE THAT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, OR AN APPEAL OF RIGHT ..... 1**

**II. APPELLEE’S STATEMENT OF THE CASE AND FACTS ..... 3**

**III. ARGUMENT IN OPPOSITION TO APPELLANT’S FIRST AND SECOND PROPOSITIONS OF LAW ..... 7**

**A. Response to Proposition of Law No. 1: When it is uncontested that sales commissions were legally earned and acquired by a spouse after the marital termination date, such commissions are not marital property as defined by R.C. 3105.171(A)(3)(a) ..... 7**

**B. Response to Proposition of Law No. 2: The First District’s observation that Barach was having an “extramarital affair” is irrelevant to the issue Barach seeks to raise ..... 11**

**IV. CONCLUSION ..... 13**

**V. PROOF OF SERVICE ..... 14**

**I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST, ONE THAT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, OR AN APPEAL OF RIGHT**

Appellant, R. Casey Barach, *pro se*, asserts that the issues presented in his Notice of Appeal are both of public and great general interest and involve substantial constitutional questions. His assertion is belied by the facts of the case and the law applied by the trial and appellate court. Barach's assertion that R.C. 3105.171 has been the subject of conflicting court interpretations involving sales commissions is refuted by the cases uniformly applying the plain language of the statute. The First District affirmed the trial court's decision below that sales commissions earned by Appellee after the marital termination date were her separate property. That decision is fully consistent with the statute and other cases applying the statute.

Appellant also argues that this case has been in the lower courts for nearly five years because the parties and the lower courts did not have a clear and consistent interpretation of R.C. 3105.171 to guide them. The record amply demonstrates that any undue delay was due to Appellant's own choices with respect to the litigation, which included a last-minute rejection of a fully negotiated settlement agreement in September of 2005, followed by numerous seriatim motions on discrete issues that consumed the court's and the parties' time.

Appellant's sole authority supporting a purported conflict in cases interpreting R.C. 3105.171 is the magistrate's order denying Appellee's motion for partial summary judgment on the commissions question. The trial court properly corrected the magistrate's decision, and the trial court's order was ultimately affirmed by the First District based upon the clear statutory language, and two decisions from two district courts of appeal, *Wells v. Wells*,<sup>1</sup> and *Metz v. Metz*.<sup>2</sup> All cases applying the statute to sales commissions fully support the decision below, that

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<sup>1</sup> 1999 Ohio App. LEXIS 6349 (Second Dist. App., No. 99-CA-0010, December 30, 1999)(unreported).

<sup>2</sup> 2007 Ohio 549, 2007 Ohio App. LEXIS 507 (First Dist. App.).

domestic relations courts are required to allocate as marital property only those assets that were “acquired during the marriage.”

Appellant is not entitled to appeal of right, which is specifically permitted by the Ohio Constitution when the judges of a court of appeals find that their decision is in conflict with a judgment pronounced upon the same question by another court of appeals. No such conflict has been declared here because there is no conflict. The only opinion arguably in conflict with the First District opinion below, or with *Metz* or *Wells*, is the magistrate’s finding that issues of fact existed with respect to the sales commissions at issue. To suggest that a magistrate’s order (unreported and twice corrected) is a basis for a constitutional appeal of right is simply wrong.

Contrary to Appellant’s argument, this case is not one of public or great general interest. Appellant suggests that “divorce law” is an issue of wide general interest. But that is plainly insufficient. Ohio citizens will not be generally affected by the First District’s opinion in this case, and certainly will not be prejudiced by this Court’s denial of jurisdiction. Rather, the interests of the public will be fully served by permitting Ohio courts to continue to apply the plain language of R.C. 3105.171 as uniformly interpreted by the First and Second Districts.

Appellant also asserts that a constitutional issue exists because the Court of Appeals observed that Appellant was having an “extramarital affair,” which he vigorously denies. Appellant ignores the fact of his admission that he was “involved” with and thought he was “in love with” another woman. But whether or not Appellant engaged in “extramarital sex” with that other woman is truly irrelevant to the only issue that was before the First District and which Appellant presents here: is Appellant entitled to claim any right to sales commissions earned and acquired by Appellee after the marital termination date. The plain language of R.C. 3105.171,

and the decisions in *Wells* and in *Metz* are all in accord and fully support the decision below.

There is no contra authority. This Court should decline to exercise jurisdiction over this appeal.

## II. APPELLEE'S STATEMENT OF THE CASE AND FACTS

In May of 2004, after nine years of marriage, Appellee Stipe became aware that Appellant Barach was romantically involved with another woman. He admitted to Stipe by the end of that month that he thought he was "in love" with "the other women." The magistrate found that Barach left the marital home on June 2, 2004 and did not return. Stipe filed for divorce in August of 2004. In September of 2005, after counsel for both parties negotiated a full settlement agreement, Barach refused to sign, asserting for the first time that sales commissions earned and received by Stipe after June 2, 2004 were marital property subject to division. Barach changed counsel shortly thereafter, and then filed a motion to disqualify Stipe's co-counsel. That motion was denied, and Barach did not file objections to the magistrate's order.

The magistrate held a May 18, 2006 hearing to determine the marital termination date. Barach argued that for purposes of valuation and division of assets, the final hearing date in the case was the proper marital termination date. Stipe argued the date the parties separated, June 2, 2004, was the proper de facto marital termination date. The magistrate agreed with Stipe. Barach filed objections to that ruling and to the Magistrate's Findings of Fact and Conclusions of Law with the trial court. After hearing, the trial court overruled Barach's objections and found:

Specifically, the Court notes that after June 2, 2004, Defendant demonstrated no objective indicia of a continuing interest in preserving his marriage to Gayle Stipe. He took no steps to commence counseling, did not inform his wife where he was living, never invited his wife to visit his residence at the Extended Stay Hotel, while frequently entertaining [the other woman] there. The Court further discounts the argument that the disproportionate number of calls between Defendant and [the other woman] was reasonably attributable to their business relationship, since there is no testimony as to the nature of the employment relationship in the record except in the briefest of terms. Moreover, Defendant

Barach testified that he never asked Gayle Stipe to come back. There were no attempts to reconcile initiated by Defendant Barach. The alleged business entanglement does not support an ongoing relationship in that Plaintiff and Defendant were partners with multiple other individuals in G & C Properties and paid additional contributions into the partnership when required as individuals, not as a couple in an ongoing relationship.

The Court therefore finds that from and after June 2, 2004, Defendant Barach made no effort to try to continue his marriage; Plaintiff Stipe had already as of this date begun separating their assets and was no longer co-habiting with Defendant. Given the facts in this case, the Court finds it equitable and appropriate to use a de facto termination of marriage date of June 2, 2004.<sup>3</sup>

Barach has not appealed this order establishing the de facto marital termination date.

Stipe then filed a motion for partial summary judgment, arguing that the sales commissions she earned after the marital termination date were her separate property and not subject to division. The magistrate cited *Metz v. Metz*<sup>4</sup> to deny Stipe's motion. Even though it was undisputed that Stipe did not earn or receive these commissions during the marriage, the magistrate found that she had called upon the customers during the marriage. The magistrate concluded that *Metz*, which dealt with attorney fees fully earned during a marriage, raised issues of fact concerning Stipe's unearned sales commissions – namely, what portion of the commissions Stipe “earned” during the marriage due to her sales calls.

Stipe objected to the magistrate's ruling. After hearing, the trial court sustained Stipe's objections and noted that Barach did not dispute the only facts that were significant to the proper characterization of the commissions. Those facts, as stated by the trial court, were:

- (1) the date of the de facto termination of the marriage;

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<sup>3</sup> Jan. 23, 2007 Trial Court Entry Overruling Objections, Court of Appeals T.d. 48 (citations omitted).

<sup>4</sup> 2007 Ohio 549, 2007 Ohio App. LEXIS 507 (First Dist. App.).

- (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 [during the marriage] of \$85,000 per year.<sup>5</sup>

The trial court held that the only question raised by these undisputed facts was their “legal significance.” The trial court properly distinguished *Metz* because it addressed an attorney’s contingent fee that was earned and vested by binding contract during the marriage, but not actually paid to the attorney until after the marriage ended. An attorney’s contingent fee entitlement that vests upon a client’s execution of the fee agreement is not analogous to a conditional sales commission that is earned and paid to an employee only after a customer signs and delivers a contract to her employer. The trial court rejected Barach’s assertion that he was entitled to some portion of Stipe’s commission simply because Stipe called on those customers during the marriage. Following this ruling, Barach’s counsel withdrew and Barach, (who is a lawyer), proceeded *pro se*.

The magistrate scheduled a property division hearing for June 2, 2008. The day before the hearing, Barach finally agreed to negotiate the remaining property issues with Stipe, which resulted in an overall agreement. Barach reserved the right to appeal the trial court’s decision with respect to the disputed commissions. Barach’s subsequent appeal was rejected by the First District Court of Appeals in the decision below. The First District clearly distinguished *Metz* from the present case based upon its facts:

Barach maintains that *Metz* was applicable to the facts in this case and that the entry of summary judgment was inequitable. We disagree.

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<sup>5</sup> Feb. 22, 2008 Trial Court Entry Sustaining Objections, pp. 1-2, Court of Appeals T.d. 76.

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 a 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>6</sup>

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<sup>6</sup> Judgment Entry, First District Court of Appeals, April 29, 2009, Exhibit to Appellant's Notice of Appeal.

The court's opinion in footnote 4, cited R.C. 3105.171(A)(3)(a), and *Wells v. Wells, supra*, to support its conclusion. The First District also rejected Barach's argument that the record in the case demonstrated any inequity in this result.

Barach then filed a "Motion Requesting Depublication of Judgment Entry, Stay of Judgment Entry and Correction of Judgment Entry" and a "Motion for Rehearing/Reconsideration." These motions were denied, and this appeal followed.

### III. ARGUMENT IN OPPOSITION TO APPELLANT'S FIRST AND SECOND PROPOSITIONS OF LAW

- A. **Response to Proposition of Law No. 1: When it is uncontested that sales commissions were legally earned and acquired by a spouse after the marital termination date, such commissions are not marital property as defined by R.C. 3105.171(A)(3)(a).**

R.C. 3105.171(A)(3)(a) states:

(3)(a) "Marital property" means, . . .

- (i) All real and personal property that currently is owned by either or both of the spouses, including but not limited to, the retirement benefits of the spouses, ***and that was acquired by either or both of the spouses during the marriage.*** (Emphasis added)

The uncontested facts here are clear. The disputed sales commissions were earned and "acquired" by Stipe after the termination date of the marriage. The property division statute was carefully drafted by the Ohio Legislature to clearly distinguish "marital property" subject to division, from separate property that is not. Because Stipe's commissions were not "acquired" during the marriage, the trial court and the Court of Appeals correctly determined that they are Stipe's separate property.

This result is fully consistent with *Wells v. Wells* cited in the opinion below. In *Wells*, the wife worked on a sales project during the marriage and received a large six-figure commission after the de facto marital termination date. The trial court found that wife had earned the commission after marital termination, and thus it was not marital property. Because the commission was the wife's separate property, the court distributed it to her. On the husband's appeal, the Second District rejected the husband's argument which is virtually identical to Barach's here:

To be classified as "marital," property must be *acquired* by one or both of the spouses "during the marriage." ...

[Husband] argues that the commission should be classified as marital property because [Wife] performed some of the work that ultimately produced it prior to the *de facto* termination of their marriage on November 11, 1997. We do not agree. [Wife's] right to the commission did not accrue until the contract that produced the commission was signed on May 31, 1998, and the commission was not paid until July 1998. ***Absent the right to receive the commission, there is no property to divide.***

Because [Wife's] ownership interest in the commission was not *acquired* during the marriage, the commission that she subsequently received is her separate property.<sup>7</sup>

(citations omitted; emphasis added)

*Wells* is fully consistent with the First District's application of R.C. 3105.171 here. Stipe did not "acquire" any part of the commissions at issue during the marriage. Had she quit or had her job been terminated after June 2 before the sales contracts were signed and delivered, she would have received nothing. If she had died during the same time period, her estate would have received nothing.

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<sup>7</sup> *Wells v. Wells*, 1999 Ohio App. LEXIS 6349, *supra*, at \*\*7-8.

Barach argued in the courts below that because it may take three or four years of sales calls to procure a contract, any resulting commission should be apportioned based upon the time involved. This argument, if accepted, would lead to endless apportionment disputes between divorcing spouses, and impose needless discovery burdens on employers and on their customers. It would also undercut the goal of finality that is inherent in a marital termination; a divorced spouse should not face a potential claim from his or her ex-spouse when a sales commission is acquired after the marriage ends simply because the spouse may have called on that customer during the marriage. To avoid these sorts of battles, the Legislature created a "bright line" to distinguish marital from non-marital assets: those acquired during the marriage are marital, and those acquired after the marriage are not.

Barach cites no contra authority other than the magistrate's incorrect conclusion that *Metz* applies across the board to dissimilar factual scenarios. The trial court and the First District properly distinguished *Metz* because it involved a far different factual scenario; an attorney's vested right to a contingent fee. The legal right to that fee accrued upon a client's execution of the contingent fee agreement; the only uncertainty was when the payment would be made. And, the attorney had fully earned that fee and "acquired" that right during the parties' marriage. Those fees were like a matured account receivable that was not paid until after the marriage terminated. The fees were properly held to be marital assets subject to division. *Metz* is not contra to the decision here. It involved totally different facts.

Barach also cites the dissent in the First District below. The dissenting opinion is five sentences long, and fails to explain any basis for the dissent. Nor does the dissent provide any explanation of why it believed that *Metz* should not be distinguished from this case. It is

therefore not a sound basis upon which Barach can argue that the courts are in “conflict” with respect to the statute.

Barach darkly suggests that both the decision below and *Wells* erred in applying the statute, because a domestic relations litigant could intentionally delay a sale while planning to terminate a marriage, secure a favorable de facto termination date, and thus wrongly convert a marital asset into a non-marital asset. He accuses Stipe of this very behavior in his memorandum without any support in the record. Barach never made this argument below, and indeed he did not contest the date of the sales at issue, the terms of Stipe’s contract with her employer, nor the court’s determination of a de facto termination date. Given the type of product Stipe was selling, large computer software packages to major institutional purchasers, it is extremely unlikely that Stipe would have any ability to manipulate the timing of a sale simply to gain some hypothetical, uncertain advantage, in a divorce she had not foreseen. And there is no doubt that a domestic relations trial court, presented with some evidence and not mere conjecture that a party manipulated the process to his or her advantage, has broad discretion to remedy that situation. There is absolutely nothing in the record before this Court suggesting that any such scenario occurred here, and Barach’s late-blooming speculation raised in this Court for the first time should be soundly rejected.

Throughout his memorandum in support of jurisdiction, Barach argues that there are factual disputes that must be determined, and that equity compels a different application of the marital property statute. There are no disputed facts that are relevant to the issue Barach presents. Stipe earned and “acquired” the commissions at issue after the marital termination date. Those commissions are therefore Stipe’s separate property, not marital property, and the court below properly concluded that Barach has no right to any portion of them. If an asset is

“marital property” as clearly defined by R.C. 3105.171(A)(3)(a), then the courts are fully vested to make a proper distribution. But when an asset is non-marital property, the courts must award the asset to the spouse who owns it.

**B. Response to Proposition of Law No. 2: The First District’s observation that Barach was having an “extramarital affair” is irrelevant to the issue Barach seeks to raise.**

Barach takes great umbrage at the Court of Appeals’ observation that he was having an “extramarital affair.” Webster’s defines an “affair” as “an amorous relationship or episode between two people not married to each other; an amour.” Webster’s Dictionary of the English Language Unabridged, Encyclopedic Edition (1977). The record reflects that Stipe confronted Barach about his “affair” during a joint counseling session in May of 2004. She testified at the marital termination date hearing that she told the counselor that she had “trust issues” with Barach:

A. I asked the counselor specifically, I said, “How do you continue going through counseling when you feel your husband’s having an affair?” And the reason that I asked that is, I looked over at Casey and he had makeup on the collar of his shirt.

Q. What happened after the counseling session ended?

A. We left there and went across the street to Ruby Tuesdays and had dinner over at Ruby Tuesdays.

...

I asked him at that time if he was having an affair and he said he was emotionally involved with someone. And, during that conversation, I asked him if he loved her, and he said, “Yes, I think I do.” And I asked him who it was. And he said - - he just sat there and he just shook his head. And I said - - I actually thought it was somebody else. And he said, no, it wasn’t her. And I said, “Well, is it A \_\_\_\_ B \_\_\_\_\_?”, and he said, “Yes.”<sup>8</sup>

The magistrate’s findings of fact after this hearing included:

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<sup>8</sup> May 18 2006 Hearing to determine the marital termination date, Court of Appeals T.d. 46, p.p. 17-18 .

- 3) By May, 2004, the parties had grown distant, and Wife believed that Husband was having an extramarital affair.
- 4) . . . On May 28, 2006, Wife enquired of Husband if he was having an affair to which Husband replied that he was “involved with someone” who he identified as [A\_\_\_\_ B\_\_\_\_\_]. When Wife asked if Husband loved [A\_\_\_\_], Husband replied “Yes”.

....

- 9) Between March and June 2004, cell phone records of Husband and [A\_\_\_\_ B\_\_\_\_\_] indicate there were at least 4,460 minutes in calls between Husband and Ms. [B\_\_\_\_\_]. During this period there were 642 minutes in calls between Husband and Wife. Between June 2 and June 17, 2004, calls between Husband’s cell phone and Wife’s phone totaled ten minutes. These ten minutes of calls between Husband and Wife from June 2 through June 17, 2004 consisted of five separate calls of which some were to just leave a message. During this same time, Husband called Ms. [B\_\_\_\_\_] 232 times and Ms. [B\_\_\_\_\_] called Husband 55 times.<sup>9</sup>

As noted above, Barach objected to these findings, which the trial court overruled, noting that after June 2, 2004, Barach did not inform Stipe of where he was living, and never invited Stipe to visit his new residence at an Extended-Stay Hotel – although he frequently entertained [A\_\_\_\_ B\_\_\_\_\_] at that hotel. He has not, however, appealed either the findings of fact or the determination that June 2, 2004 was the appropriate marital termination date of the marriage.

Contrary to Barach’s assertion, the record supports the observation that Barach was having an “affair.” But most important, whether or not Barach was having “extramarital” sexual relations is truly irrelevant to the legal issue presented to the First District, and on which Barach now seeks review: whether he can claim any portion of Stipe’s sales commissions she “acquired” after the marriage terminated. This issue simply presents no constitutional question meriting this Court’s review.

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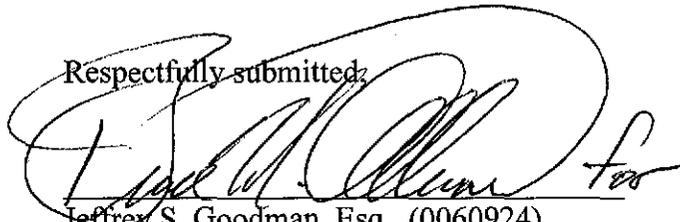
<sup>9</sup> Magistrate’s Decision with Findings of Fact and Conclusions of Law, Court of Appeals T.d. 43, p.p. 1-2.

#### IV. CONCLUSION

Barach complains that this case is now nearly 5 years old, suggesting that its age is a reflection of uncertain law. This is plainly belied by the record. The statute at issue is unambiguous and the cases interpreting that statute with regard to post-termination acquired assets are consistent with the First District's decision below. In each case, *Wells*, *Metz*, and the case at bar, the courts are in accord that assets legally acquired during a marriage are marital property, and assets acquired after a marriage terminates are not. Stipe is fully entitled to the sales commissions she earned and acquired after her marriage to Barach terminated. She is also entitled to finality. The statute and case law upon which both the trial court and the First District premised their decisions is clear, unambiguous, and consistent. There is no issue here that requires clarification or remediation by this Court.

Therefore, Appellee respectfully requests that this Court dismiss Barach's appeal and decline jurisdiction.

Respectfully submitted,



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**VI. PROOF OF SERVICE**

I certify that a copy of **APPELLEE, GAYLE STIPE'S MEMORANDUM IN OPPOSITION TO JURISDICTION** was served on Appellant, R. Casey Barach, Esq., at 327 Amazon Avenue, Cincinnati, OH 45220, by ordinary mail, postage prepaid on July 9, 2009.



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