

ORIGINAL

IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB	:	CASE NO. 10-0511
	:	
Plaintiff-Appellant	:	(On Appeal from Hamilton County
	:	Court of Appeals, First Appellate District)
vs.	:	
	:	Court of Appeals No. C-0900166
AIRLINE UNION'S MORTGAGE	:	
COMPANY, et al.	:	
	:	
Defendants-Appellees	:	

**APPELLEE JOHN L. REINHOLD'S  
MEMORANDUM IN OPPOSITION TO MEMORANDUM  
IN SUPPORT OF JURISDICTION OF APPELLANT FLAGSTAR BANK FSB**

Scott A. King (#0037582)  
Terry W. Posey, Jr. (#0078292)  
THOMPSON HINE, LLP  
2000 Courthouse Plaza, NE  
P.O. Box 8801  
Dayton, OH 45401-8801  
Telephone: (937) 443-6560  
Facsimile: (937) 443-6830  
Email: [Terry.Posey@Thompsonhine.com](mailto:Terry.Posey@Thompsonhine.com)  
[Scott.King@Thompsonhine.com](mailto:Scott.King@Thompsonhine.com)

Brian E. Hurley (#0007827)  
Robert J. Gehring (#0019329)  
CRABBE BROWN & JAMES, LLP  
30 Garfield Place, Suite 740  
Cincinnati, OH 45202  
Telephone: (513) 784-1525  
Facsimile: (513) 784-1250  
Email: [RGehring@cbjlawyers.com](mailto:RGehring@cbjlawyers.com)  
[BHurley@cbjlawyers.com](mailto:BHurley@cbjlawyers.com)

*Counsel for Defendant-Appellee,  
John L. Reinhold*

Samir Dahman (#0082647)  
THOMPSON HINE LLP  
41 South High Street, Suite 1700  
Columbus, OH 43215-6101  
Telephone: (614) 469-3317  
Facsimile: (614) 469-3361  
Email: [Samir.Dahman@Thompsonhine.com](mailto:Samir.Dahman@Thompsonhine.com)

*Counsel for Plaintiff-Appellant,  
Flagstar Bank, FSB*

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**I. APPELLEE’S STATEMENT AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED OR WHETHER THE CASE IS OF A PUBLIC OR GREAT GENERAL INTEREST**

**A. Introduction And Summary Of Statement**

On February 10, 2010 the First Appellate District Court Of Appeals (“First District”) certified the following question in this case:

Under R.C. §2305.09(D), does a cause of action for professional negligence accrue on the date the negligent act is committed, or on the date that the negligent act causes actual damage?

In addition, Appellant Flagstar FSB (“Flagstar” or “Appellant”) filed a Memorandum In Support Of Jurisdiction, asserting that “this case presents an important but unresolved question for the Court.”<sup>1</sup>

For the following reasons, Appellee John L. Reinhold (“Reinhold” or “Appellee”) disagrees with Flagstar’s assertions about the certified question and that this is a case of public or great general interest and involves a substantial constitutional question.

1. This Court addressed and resolved the issue presented in this case in *Investors REIT One v. Jacobs*.<sup>2</sup>

2. The issue presented herein can be resolved by this Court’s ruling on the certified question by its application of normal rules of statutory construction and the principle of *stare decisis*.

3. The appeal does not raise any substantial constitutional questions because the Trial Court’s application of the four-year statute of limitations under R.C. §2305.09 that commences on the date of the professional’s negligent act does not violate the “Right-To-A-Remedy” or “due process” clauses of Ohio’s Constitution.

4. The conflict in this case is created by two appellate courts that have incorrectly interpreted and limited the holding of *Investors REIT One*. As such, this case is not one of public or great general interest.

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<sup>1</sup> Memorandum In Support Of Jurisdiction Of Appellant, Flagstar Bank FSB (hereinafter referred to as “Memorandum In Support”), at p. 1.

<sup>2</sup> (1989), 46 Ohio St.3d 176, 546 N.E.2d 206.

**B. Appellee's Statement Relating To The Certified Question**

Reinhold disagrees that First District correctly framed the question it certified because the question itself assumes that “actual damages” are *not* suffered at the time an appraiser such as Reinhold performs an allegedly negligent appraisal. In other words, by the certified question the First District incorrectly assumed that no actual damages are suffered at the time of the alleged negligent act. For that reason, Reinhold respectfully submits that the question that should have been certified is:

Under R.C. §2305.09(D), does a cause of action for professional negligence accrue on the date the negligent act was committed?

**C. Statement Of The Case**

With one important exception, Flagstar's Statement Of The Case is accurate.

Flagstar states that the Trial Court granted summary judgment in Reinhold's favor on the basis that “the four-year statute of limitations for [professional] negligence began to run at the time Reinhold issued the re-appraisals, *and not on the date Flagstar actually suffered damages.*”<sup>3</sup> That statement is incorrect. When it granted Reinhold's motion for summary judgment, the Trial Court was fully aware of, but did not accept, Flagstar's argument that Flagstar did not suffer any actual damages when the appraisals were performed, and it did *not* make a finding that Flagstar had not suffered damages on the date the appraisals were completed by Reinhold.

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<sup>3</sup> See Memorandum in Support, p. 3, emphasis added.

**D. Combined Statement Of Facts And Procedural Posture**

**1. The Appraisals And Loans**

Reinhold is a retired real estate appraiser. In 2001 and 2002, Reinhold was hired by Airline Union's Mortgage Company ("AUM") to perform appraisals for AUM in connection with several pieces of residential real estate. Three of those appraisals are the subject of this appeal. On March 10, 2001, he appraised property located at 1861 State Road 44 West, Connersville, Indiana in connection with a loan AUM later made to Harold Vandivier. On June 12, 2002, he appraised 2017 Woodlawn Avenue, Middletown, Ohio in connection with a loan AUM later made to Marion Broz. On December 19, 2001, he appraised 134 Cecil Street, Springfield, Ohio in connection with a loan AUM later made to James Whited.<sup>4</sup>

**2. Flagstar's Purchase Of The Loans And Subsequent Defaults**

On May 18, 2001, Flagstar Bank, FSB, ("Flagstar" or "Appellant"), a mortgage lender, purchased the State Road Loan from AUM. On July 29, 2002, Flagstar purchased the Woodlawn Avenue Loan from AUM. On January 24, 2003, Flagstar purchased the Cecil Street Loan from AUM.<sup>5</sup>

Flagstar alleges that it relied on Reinhold's Appraisals in connection with each of those purchases.<sup>6</sup> However, Flagstar makes no allegation that it at any time hired or had a relationship

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<sup>4</sup> T.d. 54 and exhibits attached thereto, T.d. 55 and 56. These loans will hereinafter be referred to as the "State Road Loan," the "Cecil Street Loan" and the "Woodlawn Avenue Loan" and the appraisals will hereinafter be referred to as "the Appraisals."

<sup>5</sup> T.d. 60 and exhibits attached thereto. Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

<sup>6</sup> T.d. 2. Appellee accepted this allegation as true only for the purpose of the motion for summary judgment he had filed.

with Reinhold in connection with those appraisals, or that Reinhold had anything to do with or knowledge of these purchases by Flagstar.

Flagstar alleges that it sold both the Cecil Street Loan and Woodlawn Avenue Loan on the secondary market, and the borrowers on those loans subsequently defaulted. In connection with those loans, Flagstar also alleges that, after foreclosure sales on those properties were completed (September 3, 2004 for the Cecil Street Loan and March 19, 2005 for the Woodlawn Avenue Loan), the secondary lenders on both loans required Flagstar to pay the deficiency balances and expenses incurred in connection with the foreclosures.<sup>7</sup>

With respect to the State Road Loan, Flagstar alleges that the property securing that loan was destroyed as a result of a fire, and the insurance proceeds it received in connection with the fire left it with a deficiency balance and losses of over \$390,000.00.<sup>8</sup>

### 3. The Lawsuit

On April 28, 2008, Flagstar filed suit, and Reinhold and AUM are two of nine the Defendants named in Flagstar's Complaint. Flagstar brought claims of negligent representation and professional negligence against Reinhold based entirely on the Appraisals.<sup>9</sup>

Reinhold filed a motion for summary judgment, asserting that Flagstar's claims are barred by the statute of limitations set forth in R.C. §2305.09. Relying on this Court's decision in *Investors*

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<sup>7</sup> T.d. 2 and T.d. 60 and exhibits attached thereto. Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

<sup>8</sup> *Id.* Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

<sup>9</sup> T.d. 2.

*REIT One* and the First District's decision in *Hater v. Gradison, Division of McDonald & Co. Securities, Inc.*,<sup>10</sup> the Trial Court granted Reinhold's motion for summary judgment.<sup>11</sup>

Flagstar dismissed without prejudice its claims against the other defendants in this lawsuit, and filed an appeal of the Trial Court's grant of summary judgment in favor of Reinhold.

#### 4. The Appeal

On February 10, 2010 the First District issued its decision, and upheld the Trial Court's grant of summary judgment in favor of Reinhold. In its Decision, the First District referred to three cases cited by Flagstar in its brief, and stated that those cases "arguably conflict with our analysis in *Hater*." Further, the First District certified the question set forth on page 1 of this memorandum.

#### **E. Discretionary Jurisdiction Should Not Be Accepted Because The Certified Question Provides This Court With The Opportunity To Resolve The Conflicts Among The Districts, No Substantial Constitutional Question Is Involved, And The Case Is Not Of Public Or Great Interest**

##### 1. Introduction

In *Investors REIT One v. Jacobs*,<sup>12</sup> this Court held that under R.C. §2305.09(D) a claim for professional negligence accrues on the date of the negligent act. The majority of appellate courts have faithfully followed the clear dictate of *Investors REIT One*, and held that the statute of limitations for claims against professionals begins to run from the date of the negligent act.<sup>13</sup>

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<sup>10</sup> (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, appeal denied, 72 Ohio St.3d 1539.

<sup>11</sup> T.d. 66.

<sup>12</sup> 1989, 46 Ohio St.3d 176, 546 N.E.2d 206.

<sup>13</sup> *Schnippel Construction, Inc. v. Profit* (Nov. 9, 2009), *Third Dist. No. 17-99-12*, 2009 Ohio 5905, ¶ 16-19, (providing a summary of cases following *Investors REIT One*); *Hater v. Gradison Div. of McDonald & Co. Securities, Inc.* (1995), 101 Ohio App.3d 99, 655 N.E.2d 189; *James v. Partin* (May 28 2002), 12 Dist. No. CA2001-11-086, 2002-Ohio-2602; *Bell v. Holden Survey, Inc.* (Sept. 29, 2000), 7<sup>th</sup> Dist. No. 729, 2000 W.L. 1506495 .

However, two Appellate Districts, the Fifth and Sixth Districts, have ignored this Court's holding in *Investors REIT One*, and held that, in limited circumstances, professional negligence claims accrue, not on the date of the negligent act, but rather on a later date under a "delayed damages" theory<sup>14</sup> that has been rejected by the majority of the Districts on the basis that it is nothing more than a re-packaged "discovery rule" argument.<sup>15</sup>

This Court should not accept discretionary jurisdiction of this appeal. First, the issue presented herein can be resolved by this Court's ruling on the certified question. As such, even assuming constitutional issues have been raised by this appeal, this Court need not consider those arguments,<sup>16</sup> but will be able to resolve the underlying conflict by applying the normal rules of statutory construction and the principle of *stare decisis*.

Second, since *Investors REIT One*, the law has been well settled that the statute of limitations on professional negligence claims begins to run on the date of the negligent act. This clear statement of the law has been applied to a variety of professional negligence claims, and it has been relied upon by professionals.<sup>17</sup>

Third, as more fully discussed below, this appeal does not raise a substantial constitutional question. In fact, when this Court decided *Investors REIT One*, it was very much aware of the same constitutional arguments Flagstar makes in this case. Specifically, the dissent in *Investors REIT One*

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<sup>14</sup> *JP Morgan Chase Bank NA v. Lanning*, 5<sup>th</sup> Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Brunner Cox, L.L.P.* (2001), 152 Ohio App.3d 664, 756 N.E.2d 740; *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729.

<sup>15</sup> See e.g., *James v. Partin*, supra, at ¶ 9, quoting *Riedel v. House* (1992), 79 Ohio App.3d 546, 549, 607 N.E.2d 894.

<sup>16</sup> See e.g., *Hyle v. Porter* (2008), 117 Ohio St.3d 165, 882 N.E.2d 899, 2008 Ohio 542.

<sup>17</sup> See e.g., *Schnippel Construction, Inc. v. Profit* at ¶ 16-18; *Local 219 Plumbing and Pipefitting Industry Pension Fund v. Buck Consultants LLC* (6<sup>th</sup> Cir. 2009) No. 08-3100, 2009 W.L. 396168, "The legal issue in this appeal is neither novel nor unsettled under Ohio law."

expressly informed the majority of its belief that the majority’s holding violated the “open courts” or “right to remedy” provisions of Section 16, Article I of the Ohio Constitution.<sup>18</sup> Fully recognizing this argument, the majority chose not to accept it.

Fourth, apart from the conflict issue that may be resolved, the case is not of public or great general interest. Only two appellate courts have incorrectly interpreted and limited the holding of *Investors REIT One*. Moreover, *Investors REIT One* has provided a workable and rational basis for determining when the statute of limitations begins to run against professionals because four years is a reasonable statute of limitations to bring claims against professionals in that it provides notice to professionals as to when the statute for negligence claims against them begin to run and to claimants when their claims will be extinguished by the passage of time.

**2. The Trial Court’s And First District’s Application Of *Investors REIT One* Does Not Raise Substantial Constitutional Questions.**

**a. R.C. §2305.09 And *Investors REIT One***

Professional negligence claims are governed by the four-year statute of limitations set forth in Section D of R.C. 2305.09. That section of the statute provides:

An action for any of the following causes shall be brought within four (4) years after the cause thereof accrued:

\* \* \* \* \*

(D) for an injury for the right of the plaintiff not arising on contract nor enumerated in Sections 1304.35, 2305.10, 2305.12 and 2305.14 of the Revised Code, . . .

\* \* \* \* \*

If the action is for trespassing underground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

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<sup>18</sup> *Investors REIT One*, at pp. 183, 184.

Thus, when it enacted R.C. §2305.09(D), the Ohio legislature made clear that the claims governed by R.C. §2305.09(D) were subject to the general statute of limitations rule because the statute itself explicitly sets forth the few claims covered by the statute that *are* governed by the “discovery” rule. The General Assembly’s choice to exclude general negligence claims under the discovery rule set out in R.C. §2305.09 makes clear that it was not the legislature’s intent to apply the discovery rule to such claims.

In *Investors REIT One*, this Court explicitly addressed and rejected the argument that the “discovery” rule applies to claims of professional negligence covered by R.C. §2305.09.<sup>19</sup> In so ruling, the Court stated that “[t]he legislature’s express inclusion of a discovery rule for certain torts arising under R.C. §2305.09 . . . implies the exclusion of other torts arising under the statute, including negligence.”<sup>20</sup> The Court also made clear that it could not “interpret R.C. §2305.09 to include a discovery rule for professional negligence claims against [professionals] arising under R.C. §2305.09 absent legislative action on the matter.”<sup>21</sup> Two years later in *Grant Thornton*,<sup>22</sup> this Court affirmed its holdings in *Investors REIT One*.

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<sup>19</sup> *Investors REIT One*, at 46 Ohio St.3d 181.

<sup>20</sup> *Id.*, at 46 Ohio St. 2d 182.

<sup>21</sup> *Id.*

<sup>22</sup> *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220, cert. denied (1991), 502 U.S. 822.

b. **The Application Of The Four-Year Statute Of Limitations That Commences On The Date Of The Negligent Act Does Not Violate The Ohio Constitution’s “Right-To-A-Remedy” Clause.**

**Groch v. General Motors**

In *Groch v. General Motors Corp.*,<sup>23</sup> this Court, relying on *Sedar v. Knowlton Construction Co.*,<sup>24</sup> set forth a four-part test as the appropriate analysis of a plaintiff’s argument that the barring of his claim on the basis of the applicable statute of limitations violates his rights under the Ohio Constitution. First, all statutes have a strong presumption of constitutionality, and, for a plaintiff to meet the difficult burden of establishing that a statute is unconstitutional, he must establish “beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”<sup>25</sup>

Second, a statute is valid “[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and [2] if it is not unreasonable or arbitrary.”<sup>26</sup>

Third, a party raising a facial challenge to a statute must demonstrate that there is no set of circumstances in which the statute would be valid.<sup>27</sup>

Fourth, a party raising an “as applied” challenge must show that the application of the statute is not related to the health, safety or welfare of the state, and, in analyzing the statute, it is not the Court’s role to establish legislative policies or second-guess the General Assembly’s choices.<sup>28</sup>

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<sup>23</sup> 117 Ohio St.3d 192, 883 N.E.2d 337, 2008 Ohio 5461.

<sup>24</sup> (1990) 49 Ohio St.3d 193, 551 N.E.2d 930.

<sup>25</sup> *Groch*, at ¶ 25; *Sedar*, at 49 Ohio St. 3d 199.

<sup>26</sup> *Sedar*, supra, at 199.

<sup>27</sup> *Groch*, at ¶ 26.

<sup>28</sup> *Groch*, at ¶¶ 157, 172-173.

### There Has Been No Violation To Flagstar's Right To A Remedy

Flagstar's right to a remedy as guaranteed by Section 16, Article I of the Ohio Constitution has not been violated by the Trial Court's correct application of the four-year statute of limitations set forth in R.C. §2305.09(D) to Flagstar's claims against Reinhold. First, that Section of the Constitution "applies only to existing, vested rights. State law determines what injuries are recognized and what remedies are available,"<sup>29</sup> and Ohio law is clear that causes of action as they existed at common law are not immune from legislative attention.<sup>30</sup> Here, the Ohio legislature properly exercised its power to recognize claims of negligence against real estate appraisers, and, at the same time, require that those claims be brought within four years of the date the appraiser performed his services. As such, no cause of action has been taken from Flagstar because Flagstar itself destroyed its claim when it did not bring it in a timely manner.

Second, the fact that Flagstar's claims against Reinhold are time-barred does not mean it has been deprived of a remedy. Indeed, as the Supreme Court held in *Groch*, "in many situations, an injured party may be able to seek recovery against other parties,"<sup>31</sup> and "a plaintiff's right to a remedy is not necessarily extinguished" when a particular statute of limitations might apply to foreclose suits by that plaintiff against certain but not all defendants.<sup>32</sup> Here, Flagstar has claims against and may obtain remedies from AUM and the individuals who agreed to pay the mortgage loans. In fact, it brought claims against AUM in this lawsuit. As such, the application of the four-

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<sup>29</sup> *Groch*, at ¶ 150; *Sedar*, supra, at 292.

<sup>30</sup> *Sedar*, supra, at 202, quoting *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 49, 512 N.E.2d 626.

<sup>31</sup> *Groch*, at ¶¶ 151-152.

<sup>32</sup> *Groch*, at ¶ 151.

year statute of limitations to Flagstar claims against Reinhold does not deprive Flagstar of a remedy because it has claims and potential remedies against AUM and those individuals.

**c. The Application Of The Four-Year Statute Of Limitations That Commences On The Date Of The Negligent Act Does Not Violate The Ohio Constitution’s “Due Process” Clause.**

A legislative enactment is valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.<sup>33</sup> Moreover, when a court is faced with the task of determining whether a statute violates a party’s due process rights, the court must use a rational-basis review and grant “substantial deference to the predictive judgment of the General Assembly.”<sup>34</sup> In other words, a court does “not sit in judgment of the wisdom of legislative enactments [because it] has nothing to do with the policy or wisdom of a statute.”<sup>35</sup> Finally, as the Court made clear in *Sedar*, the legislature’s determination of a reasonable length of time a plaintiff has to bring a cause of action is obviously related to the general welfare “[b]ecause extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence.”<sup>36</sup>

When it enacted R.C. §2305.09, the legislature decided that a claim of professional negligence must be brought within four years of the date of the negligence. That decision does not violate the due process protections provided under the Ohio and United States Constitutions because

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<sup>33</sup> *Sedar*, supra, at 199, citations omitted; *Groch*, at ¶ 172.

<sup>34</sup> *Groch*, at ¶ 172.

<sup>35</sup> *Sedar*, supra, at 201.

<sup>36</sup> *Id.*, at 200.

it is neither unreasonable nor arbitrary. Indeed, requiring that suit be brought against a professional within four years of the date of the negligent act provides a party with a reasonable amount of time to bring his claim, and, at the same time, it significantly limits the problems and dangers caused by stale litigation.

The facts of this lawsuit illustrate the legislature's reasonableness in enacting R.C. §2305.09. This lawsuit was not commenced until 6 or 7 years after Reinhold performed his appraisals. Absent the four-year statute of limitations, Reinhold would be faced with the task of attempting to reconstruct what he did 6 or 7 years earlier to arrive at his appraisal figures. Forcing Reinhold to do so would be grossly unfair to him for several reasons, including the likelihood that much of the supporting documentation no longer exists, the likelihood that the neighborhoods and housing near the appraisal properties have changed, the dramatic drop in the past few years in the value of residential property, and destruction by fire of one of the subject properties.

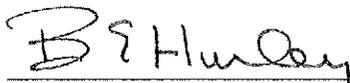
Most residential real estate mortgages last between 15 to 30 years. As such, if Flagstar's position (i.e. the statute of limitations does not begin to run until after a foreclosure has occurred) is accepted, a claim of professional negligence could in some cases be brought against an appraiser well more than 30 years after he performed an appraisal. It was hardly unreasonable or arbitrary for the legislature to decide that those professionals covered by R.C. §2305.09 should not be exposed to the possibility that claims of negligence could be brought for that many years after the alleged negligence occurred.

## V. CONCLUSION

For the reasons set forth above, the Court should not accept discretionary jurisdiction over this case.

Respectfully submitted,

CRABBE BROWN & JAMES LLP



By: Brian E. Hurley (#0007827)

Robert J. Gehring (#0019329)

CRABBE BROWN & JAMES, LLP

*Counsel for Defendant-Appellee,*

*John L. Reinhold*

30 Garfield Place, Suite 740

Cincinnati, OH 45202

Telephone: (513) 784-1525

Facsimile: (513) 784-1250

Email: [RGehring@cbjlawyers.com](mailto:RGehring@cbjlawyers.com)

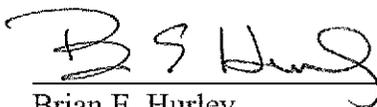
[BHurley@cbjlawyers.com](mailto:BHurley@cbjlawyers.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been served on the following via regular U.S. Mail this 16<sup>th</sup> day of April, 2010:

Scott A. King, Esq.  
Terry W. Posey, Jr., Esq.  
Thompson Hine, LLP  
2000 Courthouse Plaza, NE  
P.O. Box 8801  
Dayton, OH 45401-8801  
*Attorneys for Plaintiff-Appellant*

Samir Dahman, Esq.  
Thompson Hine, LLP  
41 South High Street, Suite 1700  
Columbus, OH 43215-6101  
*Attorney for Plaintiff-Appellant*



Brian E. Hurley