

IN THE SUPREME COURT OF OHIO

Peggy Sexton, et al.

Appellants,

v.

City of Mason, et al.

Appellees.

07-0305

] On appeal from the Warren County  
] Court of Appeals, Twelfth Appellate  
] District

] Court of Appeals Case No.  
] CA2006-02-026

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS PEGGY SEXTON AND LARRY SEXTON

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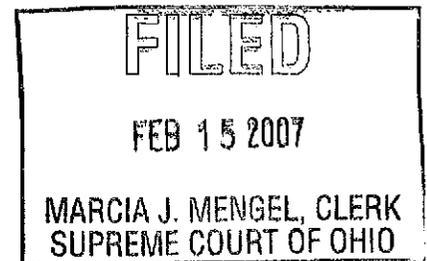
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

**This Case is a Case of Public or Great General Interest**

Ohio is in an era of rapidly expanding suburban development, in which former farmlands, meadowlands, or woodlands are converted from their previously undeveloped state, in which there is adequate drainage into the soil and existing natural channels, to a state of developed residential communities, in which drainage and adjacent property rights become significant, with the attendant legal cases and controversies. Coupled with this is a split in the Ohio law on what constitutes continuing versus permanent trespass with this issue's attendant implications of when the four-year statute of limitations in R.C. 2305.09(D) begins to run (or the six-year limitations period of 2305.07 for municipal takings of private property). The demographic fact of ever increasing suburban development combined with the unresolved split in the Ohio law of trespass make this case one of public or great general interest.

In the last 35 years, Ohio has witnessed rapid urbanization of land with much less corresponding population growth. According to the U.S. Environmental Protection Agency (2001), from 1982 to 1996, the Cleveland metropolitan area increased 23.8 percent in total urbanized (urban and suburban) land, while the population growth in the metropolitan area was 6.3 percent (a ratio of 3.8 to 1). Anecdotal experience would indicate that other Ohio metropolitan areas have experienced similar growth.

Such growth places a great strain on the environment. Paved surfaces and roofs do not allow water to drain down through the soil into natural aquifers as was previously the case when the land was farmland, meadowland or woodland. In addition, such previous natural drainage allowed surface water to gradually run into existing watercourses and metropolitan

storm water systems. However, when development occurs, increased run off and flash flooding occurs, with a corresponding greater need for storm water management systems.

This case, and others that will undoubtedly occur like it in the future, has resulted from the intersection of rapid development and adjacent property rights.

This is where the legal split comes into play. What is not in dispute is that the Supreme Court of Ohio has ruled that there is a distinction between a permanent trespass and a continuing trespass. *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623. A permanent trespass occurs when “a man commits an act of trespass upon another’s land, and thereby injures the other at once and to the full extent that such act will ever injure him... and the time of the statute of limitations runs from the time of such act of trespass.” *Id.* at 625. The Court goes on to define a continuing trespass:

And when the owner of land...lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects another's land, without... consent or permission, such owner and actor is liable to such other for the damages thereby so caused..., and at once a cause of action accrues for such damages; and such force, if so continued, is continued by the act of such owner and actor, and it may be regarded as a continuing trespass...; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action. *Id.* at 627.

The split in the Ohio law of trespass, in essence, is between two competing interpretations of what constitutes a continuous trespass under *Franz*. Is a continuous trespass shown only by continuous conduct, or can it also be shown by continuous damages? The trial court relied predominantly on *Reith v. McGill Smith Punshon, Inc.* (Twelfth District 2005), 163 Ohio App. 3d 709, 2005-Ohio-4852. *Reith* states, “A permanent trespass occurs when the defendant’s tortious act has been fully accomplished, but injury to the plaintiff’s estate from that act persists in the absence of continued conduct by the defendant. In contrast, a continuing

trespass results when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights." 2005-Ohio-4852 at ¶49.

The Court of Appeals also relied on *Reith*, as well as three other county appellate decisions, with *Abraham v. BP Exploration & Oil, Inc.* (2002), 149 Ohio App.3d 471, 2002-Ohio-4392, being the most relied upon decision. The Court of Appeals states that a "trespass under Ohio law is a continuing trespass only if the trespass itself, and not the ongoing injury or harm caused by a past, completed misdeed, is continuing. Ongoing conduct is the key to a continuing trespass." Warren CA2006-02-026 at ¶17. However that decision goes on to identify the split in the law by then stating, in the next sentence, "But see, *Nieman v. NLO, Inc.* (C.A. 6, 1997), 108 F.3d 1546 (a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct)." *Id.*

The rule of law from the *Nieman* case, which is that a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct, is derived after the Sixth Circuit summarizes and explains a significant body of Ohio case law. It first examines *Boll v. Griffith*, 41 Ohio App. 3d 356, 535 N.E.2d 1375 (Ohio Ct. App. 1987), a Fourth District case. In that case, the defendant was alleged to have negligently removed a structure that was connected to a party wall separating the defendant's property from the plaintiff's property, thereby damaging the party wall. The plaintiff brought suit more than four years after the structure was removed. The Court of Appeals rejected the defendant's argument that the four-year limitations period of R.C. 2305.09(D) had run and held that the plaintiff's complaint had stated a claim for continuing trespass. 535 N.E.2d at 1377.

In *Neiman*, the Sixth Circuit then explained *Franz* itself, stating that “the Ohio Supreme Court implicitly found that a claim for continuing damages is sufficient, because the defendant railway company built the dam seven years before the plaintiff filed his lawsuit.” *Nieman* at 1556. It goes on to address *Franz*’s requirement that the “force” at issue be continued. It states that the passage quoted above (*Franz* at 627), “properly should be interpreted to read ‘such force, if so continued, is deemed continued by the act of such owner and actor.’” *Id.*

The Sixth Circuit then examines *Wood v. American Aggregates Corp.*, 67 Ohio App. 3d 41, 585 N.E.2d 970, 973 (Ohio Ct. App. 1990), and it finds that “the focus is on continuing damages, not continuing conduct.” *Nieman* at 1556. In *Wood*, the plaintiffs brought suit in 1988 and the quarry at issue had been constructed in 1973, with notice to plaintiffs of diminished water quality “shortly thereafter.” The Tenth District Court of Appeals found that suit was timely brought under the fresh or continuing damages approach.

Following its exegesis of *Wood*, the Sixth Circuit goes on to summarize the Restatement (Second) of Torts, stating that “under the Restatement, a claim for continuing trespass is not defeated where the defendant’s last affirmative act of wrongdoing precedes the filing of the complaint by a period longer than the statute of limitations.” *Nieman* at 1557.

From the foregoing, it is apparent that there is a split in the Ohio law between those Districts in which the Ohio Court of Appeals applies the continuing or fresh damages approach to what constitutes a continuing trespass and those Districts in which the Ohio Court of Appeals applies the continuing conduct approach. This split calls for an authoritative decision by the Supreme Court of Ohio. In addition, there is the fact that the Sixth Circuit has interpreted *Franz* as incorporating the continuing damages approach. While the *Neiman* decision is not binding on the Supreme Court of Ohio under our federal system, it is very

persuasive authority because it is only one step below a decision of the Supreme Court of the United States, because it is very complete in its elucidation of this area of Ohio law, and because it is extremely well-reasoned. Appellants urge that this interpretation has the weight of authority and should be specifically adopted by the Supreme Court of Ohio.

**This case presents a constitutional question.**

Because the Court of Appeals of Warren County, Twelfth District, erroneously found that Appellants had failed to state an action against the City of Mason, despite their well pleaded complaint under Ohio Civ. R. 8(A), the City of Mason has been allowed to take Appellants' property without compensation in violation of Ohio Const. art. I, § 19. There is no doubt that under Ohio law, the wrongful dumping of water by changing the natural course of water is the wrongful taking of another's property.

Turning to the procedural element of this case, in deciding on a motion for summary judgment, "[a]ll competing inferences and evidence must be construed in favor of the non-moving party." Ohio Civ. R. 56(E); *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505. In addition, the Supreme Court of Ohio has stated that Ohio courts "must liberally construe the petition favorably to the plaintiff, and, for the purpose of testing its legal sufficiency, must indulge in every reasonable inference from the facts alleged therein to sustain same." *Hack v. Salem*, 174 Ohio St. 383, 389 (Ohio 1963).

In the case sub judice, the trial court and the Court of Appeals place all their emphasis on their contention that the complaint's allegations were limited to Appellee City of Mason's oversight of the storm water system rather than management or maintenance of it. However, Appellants clearly allege in paragraph 24 of their Amended Complaint that the "City of Mason was placed on notice by Plaintiffs of the danger resulting from it negligently allowing

unreasonable amounts of surface water to flow on, into and/or across Plaintiffs' property." The City could not allow "negligently allow" damage from the storm water system to occur unless they bore responsibility for managing it.

Because of the trial court's clearly erroneous mischaracterization of Appellants' complaint, the trial court only briefly addressed their taking claim. With regard to that claim, the trial court found that the last decision taken by the City with regard to approving the storm water system was in 1995, so that the constitutional claim against the City fell outside the six-year limitations period of O.R.C. § 2305.07, which the Supreme Court of Ohio has held applies to taking cases under Ohio Const. art. I, § 19. *State ex. Re. RTG v. State* (2002), 98 Ohio St.3d.

Because the taking claim is based on the trespass alleged against Appellees, Rishon Enterprises and McGee Smith Punshon, Inc., the continuing damages approach described above is just as applicable to the allegations against the City. Appellants assert that their constitutional rights have been violated, and it is clear that their claims, and those of others like them, will evade review in cases where claimants do not allege specifically that a municipality manages a storm water system constructed by suburban developers or that any act of approval or inspection occurred within six years of the time of the bringing of the action, despite when the last claimed damage occurred.

Substantively, the First District Court of Appeals has held that "where a municipality fails to maintain a public improvement such as a sewer system and thereby effectively takes private property in that municipality for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Art. I, Sec. 19 of the Ohio Constitution." *H. Hafner & Sons v. Cincinnati Metro. Sewer Dist.*, 118 Ohio App. 3d 792, 796-797 (Ohio Ct. App. 1997). See also, *Masley v. Lorain* (1976), 48 Ohio St. 2d 334, 336.

Thus, if the City of Mason is responsible for repair or upkeep on the storm system created by the other Appellees, then it must pay for compensation for the property it took from them through its flooding. In that regard, Richard Fair, the Mason City Engineer, describes the City's storm water management duties for Trailside Acres, whose inadequate storm water system caused the flooding of Appellants' property. In addition to the types of pipe and gutters that were mandated, there were bond requirements that called for regular inspections of the system. With the inspection process and the notice of problems by Appellants, the City of Mason was indeed "placed on notice by Plaintiffs of the danger resulting from it negligently allowing unreasonable amounts of surface water to flow on, into and/or across Plaintiffs' property." Under Ohio Civ. R. 8(A), this is sufficient to allege a taking under Ohio Const. art. I, § 19. By stating that it is not sufficient, the courts below have erroneously deprived Appellants of their constitutional rights, and such deprivations will continue without redress unless the Supreme Court of Ohio addresses what is sufficient to allege that a municipality is liable, due to inadequate management and oversight and due to the ongoing duty of management of storm water, under the Ohio law of trespass and the takings clause, for storm water flooding.

#### STATEMENT OF THE CASE AND FACTS

Appellants purchased their property, located at 4721 Cox Smith Road, in approximately 1988 and constructed a home on said property. Appellee Rishon Enterprises started construction of the Trailside Acres Subdivision, which is on property that runs adjacent to Appellants, in the late 1980's or early 1990s. Trailside Acres Subdivision contains six sections of residential homes, with the last phase completed in 1995.

During the development of the subdivision, Appellee Rishon Enterprises contracted with Appellee McGill Smith Punshon to design the storm water drainage system for the

subdivision and with Defendant Don Thompson Excavating to perform excavation as determined by Rishon and McGill. Appellants experienced minor water problems since the construction of Trailside Acres began, and the water problems worsened with the development of the second phase in approximately 1992. Prior to the construction of Trailside Acres, Appellants' property did not experience flooding.

Appellants worked with Richard Fair, City Engineer for the City of Mason, for twelve years to address water issues on their property. Richard Fair visited Appellants' property several times. Appellants also wrote a letter to Scott Lahrmer, then the City Manager, putting him on notice of their concerns of flooding. Richard Fair has been in charge of storm water in the City of Mason for the duration of Appellants' water problems and has been aware of the Appellants' complaints for approximately fourteen to fifteen years. The City of Mason included in their Capital Improvement Projects the downstream erosion at Trailside Acres, in the amount of \$135,000. Moreover, Richard Fair advised Appellant Peggy Sexton that Appellee City of Mason had made some changes to the existing pipes with regards to the retention pond. However, the date and scope of those changes is unclear.

Although the water problems continued to occur on Appellants' property, they took a severe turn on July 17, 2001. On that date, unprecedented damages of massive proportions were thrust upon them. Appellants and their daughter were trapped at their residence due to severe flooding. The local fire department responded to the residence, but because of the driveway flooding, it was unable to bring Appellants to safety. It was on this evening that the doors to Appellants' basement were pushed out of their frame as the result of a wall of water, allowing approximately three feet of water to enter the basement. Appellants' home was filling with water, but the fire department was unable to reach them due to the contemporaneous

flooding of their driveway. Appellants, when building the bridge located on their property, exceeded the pipe size required by Warren County by a foot by installing a three foot instead of two foot pipe at the bridge.

Trailside Acres subdivision was built in the City of Mason. Appellee City of Mason, is responsible for and maintains the storm water systems within its jurisdiction, pursuant to law. Appellee Rishon Enterprises was the developer for the Trailside Acres Subdivision throughout the entire building process. Appellee McGill Smith Punshon was the engineering firm hired by Rishon to design and engineer the sewer and storm water systems for Trailside Acres and completed its work in 1994.

In approximately 2003, the ongoing discussions that had been taking place between Appellants and Appellee City of Mason broke down. Although Appellants had been seeing a very gradual increase in flooding that only caused minor damage to their property, the catastrophic flooding that took place on July 17, 2001 was the culmination of the continuous progression of damages that had started when Trailside acres was begun but did not arise to the level of full notice until that point.

On July 14, 2003, Appellants brought an action against Appellee City of Mason, alleging trespass and an unconstitutional taking without compensation. On August 27, 2003, they filed an amended complaint with the same allegations against the City and adding an action sounding in trespass against Appellees, Rishon Enterprises and McGee Smith Punshon, and Defendant Don Thompson Excavating.

Appellees, Rishon Enterprises and the City of Mason, timely filed a Motion to Dismiss and/or Motion for Summary Judgment. On October 26, 2004, Appellee McGill Smith Punshon filed a Motion for Summary Judgment. Appellants timely responded to each motion. The

Magistrate, on February 2, 2005, ruled in favor of Appellants and against all Appellees. This decision was upheld by the trial court on May 13, 2005. Appellees, Rishon Enterprises and McGill Smith Punshon, each filed a Motion for Reconsideration. Appellee City of Mason filed a second Motion for Summary Judgment. On April 6, 2005, oral argument was held. On February 6, 2006, the trial court granted Appellees summary judgment. Using the definition of continuing trespass in *Reith*, the trial court found that Appellants suffered from a permanent trespass and that, therefore, R.C. 2305.09(D) applied, so that, according to the trial court, Appellants filed their Complaint against Rishon and McGee outside of the four-year limitations period. As to Appellee City of Mason, the trial court found that it had exercised a governmental function in its oversight and approval of the storm water system and was entitled to sovereign immunity. The Trial Court further found that Appellants had not alleged in their complaint that Appellee City of Mason undertook to manage any storm water system on the development or that they did so negligently. Finally, it found that Appellants had filed their lawsuit outside the applicable six-year limitations period on the constitutional taking claims.

On February 22, 2006, Appellants filed a Notice of Appeal. Appellants timely submitted their appellate brief requesting that the Court of Appeals reverse the trial court's decision finding that Appellants suffered from a permanent trespass to which a four year statute of limitations applied, rather than a continuing trespass and that the Court of Appeals reverse the trial court's decision finding Appellants failed to allege Appellee City of Mason negligently managed the storm water system. The Court of Appeals filed its decision with the Warren County Clerk of Courts on January 8, 2007. That decision found against Appellants on both assignments of error, and now Appellants invoke the jurisdiction of the Supreme Court of Ohio.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: A claim for a continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct.**

This is the rule of law described above, and it stems from the following cases: *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, *Boll v. Griffith*, 41 Ohio App. 3d 356, 535 N.E.2d 1375 (Ohio Ct. App. 1987), and *Wood v. American Aggregates Corp.*, 67 Ohio App. 3d 41, 585 N.E.2d 970, 973 (Ohio Ct. App. 1990).

First, *Franz* provides the rule for a permanent trespass, to which the four-year statute of limitations begins to run at the completion of the act of trespass and the singular damage caused thereby: A permanent trespass occurs when “a man commits an act of trespass upon another’s land, and thereby injures the other at once and to the full extent that such act will ever injury him... and the time of the statute of limitations runs from the time of such act of trespass.”

*Franz*, 43 Ohio St. at 625. The *Franz* court then provides the rule for a continuing trespass:

And when the owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects another's land, without such other's consent or permission, such owner and actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; and such force, if so continued, is continued by the act of such owner and actor, and it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action. Id at 627.

The Ohio Court of Appeals (Fourth District) explicated the doctrine of continuing trespass further, stating, “[A]s to [a] continuing trespass and continuing and permanent results, the four-year statute shall not apply, even though the initial step and successive steps of such wrongdoing occurred long prior to such four-year period, the trespass being of a continuing nature, so long as it was continued there was constantly arising a fresh wrong and fresh damage from such continuation of the act.” *Boll v. Griffith*, 41 Ohio App. 3d 356, 358 (Ohio Ct. App. 1987). The *Boll* court also states, “A court may not dismiss a complaint on statute-of-

limitations grounds where the statute's bar is not clearly evident from the wording of the complaint. Id at 357.”

In *Wood v. American Aggregates Corp.*, 67 Ohio App. 3d 41, 585 N.E.2d 970, 973 (Ohio Ct. App. 1990), the plaintiffs brought suit in 1988 and the quarry at issue had been constructed in 1973, with notice to plaintiffs of diminished water quality “shortly thereafter.” The Court of Appeals (Tenth District) found that suit was timely brought, stating, “There is a genuine issue of fact concerning the issue of appellants' damages after 1982 as a direct result of appellee's use of underground water.” Id. Similarly, in the instant case, there is a genuine issue of fact concerning Appellants damages after four years from 1994 (the year the McGill completed its engineering services) and 1995 (the year Rishon’s work was completed). Because the damages were continuous, so was the trespass, and Appellants’ suit against McGill and Rishon is timely.

The United States Sixth Circuit Court of Appeals has also interpreted Ohio law in the area of what constitutes a continuing vs. a permanent trespass. *Nieman v. NLO, Inc.* (C.A. 6, 1997), 108 F.3d 1546. Under U.S. federalism, this is federal common law, to be applied in federal cases in the Sixth Circuit; however, it carries persuasive weight in Ohio courts because it is a valid interpretation of Ohio law. The Sixth Circuit addresses *Franz's* requirement that the “force” at issue be continued. It states that the passage quoted above (*Franz* at 627), “properly should be interpreted to read ‘such force, if so continued, is *deemed* continued by the act of such owner and actor.’” *Nieman* at 1556 (emphasis in the original). The Sixth Circuit also succinctly summarizes the Ohio law of continuing trespass by stating the Proposition of Law stated above: “[A] claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct” Id. at 1559. To reach this

rule of law, the Sixth Circuit analyzes Ohio law and the Restatement (Second) of Torts, a synthesis of the common law of torts. Significantly, with regard to water seepage, the Restatement provides, "The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously . . . placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and . . . confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass." Restatement (Second) of Torts § 161(1) (1965).

Thus, the weight of authority of those Districts of the Ohio Court of Appeals which have interpreted *Franz*, as well as the United States Sixth Circuit Court of Appeals and the Restatement (Second) of Torts, have declared that the fresh or continuous damages approach is the Ohio law of continuous trespass. Under this law, Appellants claim against Appellees is timely, under both the four-year limitations period of R.C. 2305.09(D), with regard to Appellees, Rishon and McGee, and the six-year period of R.C. 2305.07, with regard to Appellee City of Mason. For this reason, the decisions of the trial court holding that Appellants' action is barred by the statute of limitations must be reversed.

**Proposition of Law No. II: Under Ohio Civ. R. 8, a claim that a City was placed on notice of the danger of it negligently allowing unreasonable amounts of surface water to flow on the claimant's property, that the claimant was damaged due to the City's negligence, and that the taking of the claimant's property by the City entitles the claimant to compensation under Ohio Const. art. I, § 19, is sufficient to state a claim and put the City on notice of the nature of that claim.**

The Supreme Court of Ohio has stated that Ohio courts "must liberally construe the petition favorably to the plaintiff, and, for the purpose of testing its legal sufficiency, must indulge in every reasonable inference from the facts alleged therein to sustain same." *Hack v. Salem* (1963), 174 Ohio St. 383, 389.

With regard specifically to a motion for summary judgment, the law in Ohio is as follows: Summary judgment is appropriate when: (1) there is no genuine issue of material fact; (2) the movant is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. Ohio Civ. R. 56(C); *Harless v. Willis Day Warehousing Co.* (1979), 54 Ohio St. 2d 64. All competing inferences and evidence must be construed in favor of the non-moving party in deciding a motion for summary judgment. Ohio Civ. R. 56(E); *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505.

Under this standard, the claims made by Appellants against Appellee City of Mason in this case, which are stated succinctly in Proposition of Law II, along with the transcripts, affidavits, and other evidence in support, were more than sufficient to get past the City's motion for summary judgment. As stated above, the courts below required Appellants to specifically allege that the City had managed the storm water system at issue. However, Ohio Civ. R. 8 does not put such an onus on Appellants, and the allegations of Appellants are sufficient under the law.

This Court has stated "[Ohio] Civ.R. 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief." *Illinois Controls v. Langham*, 70 Ohio St. 3d 512, 525-526 (Ohio 1994). Expanding on this statement, the Court of Appeals (First District), has stated, "A pleading which sets forth a claim for relief need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the action is provided; however, the pleading must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference

fairly may be drawn that evidence on these material points will be introduced at trial.” *Fancher v. Fancher*, 8 Ohio App. 3d 79 (Ohio Ct. App. 1982).

The substantive law underlying the procedural proposition of law, stated above, is as follows: “Where a municipality fails to maintain a public improvement such as a sewer system and thereby effectively takes private property in that municipality for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Art. I, Sec. 19 of the Ohio Constitution.” *H. Hafner & Sons v. Cincinnati Metro. Sewer Dist.*, 118 Ohio App. 3d 792, 796-797 (Ohio Ct. App. 1997).

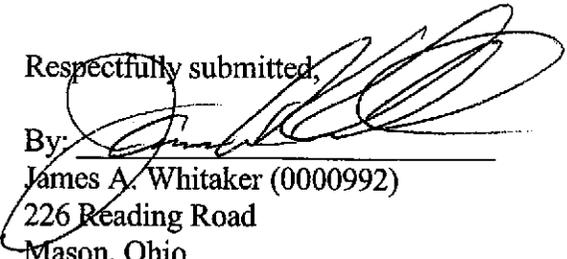
When Appellants made the claims summarized in Proposition of Law II, Appellee City of Mason was given fair notice of the nature of the action. By averring that the City negligently allowed water to flow onto Appellants’ land and that the City was given notice of that fact, Appellants allege causation and notice. The clear inference is that the City managed the storm water system in question. The Amended Complaint goes on to specifically state that the City was negligent. It also states that the City is liable for a taking under Ohio Const. art. I, § 19. Finally, it states that Appellants lost the use and enjoyment of their property from the damage caused by the water incursion.

Under Ohio Civ. R. 8, 56, and under Ohio Const. art. I, § 19 and the case law that effectuates it, Appellants have stated a claim. Thus, the decisions of the courts below must be reversed and the case remanded for a trial on the merits.

#### CONCLUSION

For the reasons discussed above, this case involved matters of public or great general interest and a substantial constitutional question. Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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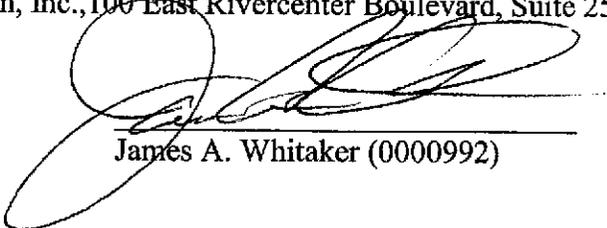
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**Certificate of Service**

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

COURT OF APPEALS  
WARREN COUNTY  
FILED

JAN 8 2007

*James L. Speth, Clerk*  
LEBANON OHIO

PEGGY SEXTON, et al.,

Plaintiffs-Appellants,

- vs -

CITY OF MASON, et al.,

Defendants-Appellees.

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CASE NO. CA2006-02-026

OPINION  
1/8/2007

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 03CV61152

James A. Whitaker, 226 Reading Road, Mason, OH 45040, for plaintiffs-appellants

Gary Becker, Jessica S. Hylander, 1900 Chemed Center, 225 East Fifth Street, Cincinnati, OH 45202, for defendant-appellee, city of Mason

B. Scott Jones, 525 Vine Street, Suite 1700, Cincinnati, OH 45202, for defendant-appellee, Rishon Enterprises

The Herfel Law Firm, LLC, Gary L. Herfel, 100 East Rivercenter Boulevard, Suite 250, Covington, KY 41011, for defendants-appellees, McGill Smith Punshon, Inc.

**YOUNG, J.**

{¶1} Plaintiffs-appellants, Larry and Peggy Sexton, appeal a decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, the city of Mason, Rishon Enterprises, Inc., and McGill Smith Punshon, Inc.

{¶2} The Sextons moved into their house on Cox Smith Road in Union Township,



just outside the city limits of Mason, in 1988. The Sextons built a bridge over the small creek that runs through their property. At the time, defendant-appellee, Rishon Enterprises, Inc. ("Rishon"), owned the property adjacent to the Sextons'. Beginning in 1987 and ending in 1997, the property was developed into the Trailside Acres Subdivision. Defendant-appellee, McGill Smith Punshon, Inc. ("McGill"), an engineering company, designed the storm water system for the subdivision. McGill completed its services by 1994. Rishon's work on the subdivision ended in 1995.

{¶13} Prior to the development of the subdivision, the Sextons did not experience any flooding on their property. However, after the construction of the subdivision began, the Sextons started to experience water problems; the problems worsened in 1992-1993, and became so severe that the Sextons wrote a letter to the city in 1995. In the letter, the Sextons stated that (1) the creek, which used to be dry most of the summer, was now always running and frequently flooded; (2) during heavy rains, the creek would rise and spill over the roadway and bridge, making the bridge impassable; (3) the water problems threatened to flood their basement; (4) the flooding was eroding their land and killing trees on the bank; and (5) the water problems were caused by the construction of the subdivision. The Sextons discussed their water problems with the city for several years, but the discussions broke down in 2003.

{¶14} On July 17, 2001, during a particularly severe storm, the Sextons' basement was badly flooded. According to the Sextons, the water entered their basement with such force that the basement double doors were pushed completely out of their frames. Trapped in their house, the Sextons called 911. The fire department went to their house but was unable to reach them due to the flooding of their driveway.

{¶15} On July 14, 2003, the Sextons filed a complaint against the city and its engineering department alleging claims relating to the construction, development, and the

city's approval of the subdivision. On August 27, 2003, the Sextons filed an amended complaint adding Rishon and McGill as defendants. The city and Rishon each filed a motion to dismiss or, in the alternative, for summary judgment on the ground that the Sextons' action was barred by the four-year statute of limitations set forth in R.C. 2305.09. McGill moved for summary judgment on the same ground. Specifically, appellees argued that the Sextons' cause of action accrued in 1992 when they first became aware of the flooding problems. Since their complaint was not filed until 2003, well outside the four-year statute of limitations, it was time-barred.

{116} The magistrate denied all three motions. The magistrate found that the Sextons' complaint stated a cause of action for continuing trespass. As a result, the action could "be brought at any time prior to the expiration of the prescriptive period of 21 years, but recovery may be had only for damages sustained within four years prior to the filing of the action." The trial court subsequently overruled objections to the magistrate's decision. Unabated, Rison and McGill each filed a motion for reconsideration while the city filed a second motion for summary judgment.

{117} By decision filed on February 3, 2006, the trial court granted summary judgment in favor of all three appellees. With regard to Rishon and McGill, the trial court found that the Sextons suffered from a permanent trespass. As a result, their claims were barred by the four-year statute of limitations set forth in R.C. 2305.09. With regard to the city, the trial court found that (1) the Sextons did not allege in their complaint that the city undertook to manage the subdivision storm water system or did so negligently; (2) the city exercised a governmental function in its oversight and approval of the subdivision storm water system and was therefore entitled to sovereign immunity; and (3) the Sextons' constitutional taking claim was barred by the applicable six-year statute of limitations. This appeal follows.

{118} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN FINDING A PERMANENT TRESPASS TO WHICH A FOUR (4) YEAR STATUTE OF LIMITATIONS APPLIES."

{¶10} The Sextons argue that because the water problem causing the flooding on their property was a continuing trespass, the trial court erred when it used the four-year statute of limitations to grant summary judgment to Rishon and McGill. In finding that the Sextons suffered from a permanent trespass, rather than a continuing one, the trial court relied on the First Appellate District's decision in *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852. The Sextons argue that under Ohio law, a claim for continuing trespass may be supported by proof of continuing damages, rather than continuing conduct. The Sextons contend that, as a result, the trial court improperly relied on *Reith*, and erred in relying solely on the fact that Rishon and McGill no longer controlled the storm water system by 1995, rather than the damages the Sextons continue to suffer.

{¶11} Under R.C. 2305.09(A), there is a four-year statute of limitations for all trespass actions upon real property. In *Harris v. Liston*, 86 Ohio St.3d 203, 1999-Ohio-159, the Ohio Supreme Court held that "tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D)." *Id.* at 207. The four-year statute of limitations begins to run when damage to the property "is first discovered, or through the exercise of reasonable diligence it should have been discovered." *Id.* It follows that the Sextons' claims against Rishon and McGill are governed by the four-year statute of limitations set forth in R.C. 2305.09.

{¶12} The Sextons, however, argue that because the flooding caused by the construction of the subdivision constitutes a continuing trespass, the statute of limitations has not yet run.

{¶13} In *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, the Ohio Supreme Court discussed the concept of permanent trespass as follows: "When a man commits an act of

trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass." Id. at 625. The court then went on to discuss the concept of continuing trespass as follows:

{¶14} "And when the owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action or directs a force against or upon, or that affects, another's land, without such other's consent or permission, such owner and actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; *and such force, if so continued, is continued by the act of such owner and actor*, and it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him, and is an additional cause of action; and, until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action." Id. at 627. (Emphasis added.)

{¶15} Applying the following concepts to the facts of the case, the supreme court then found that the property owner suffered from a continuing trespass as follows: "Valley Railway Company diverted the stream, and turned its course and current against and over the lands of Franz, and thereby caused the injury complained of. The company remained upon its own land, and cut the new channel, and *took control of the stream, and directed its course* when the same passed from its land and its control, *and has ever since so controlled and directed the stream that has caused the damage complained of*. The amended petition states a cause of action that is not barred by the statute of limitations provided for such cases." Id. at 628. (Emphasis added.)

{¶16} Thus, "[a] permanent trespass occurs when the defendant's tortious act has been fully accomplished, but injury to the plaintiff's estate from that act persists in the

absence of further conduct by the defendant. In contrast, a continuing trespass results when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights." *Reith*, 2005-Ohio-4852 at ¶49. See, also, *Weir v. East Ohio Gas Co.*, Mahoning App. No. 01 CA 207, 2003-Ohio-1229; *Hartland v. McCullough Constr., Inc.* (July 14, 2000), Ottawa App. No. OT-99-058; and *Frisch v. The Monford Supply Co.* (Nov. 21, 1997), Hamilton App. No. C-960522.

{¶17} Based upon *Franz* and the foregoing definitions, we find that "a continuing trespass occurs when there is some continuing or ongoing tortious activity attributable to the defendant. Conversely, a permanent trespass occurs when the defendant's tortious act has been fully accomplished." *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App.3d 471, 2002-Ohio-4392, ¶27. "Thus, the determinative question centers upon the nature of the defendant's tortious conduct, not upon the nature of the damage caused by that conduct." *Id.* That is, a trespass under Ohio law is a continuing trespass only if the trespass itself, and not the ongoing injury or harm caused by a past, completed misdeed, is continuing. Ongoing conduct is the key to a continuing trespass. But see, contra, *Nieman v. NLO, Inc.* (C.A.6, 1997), 108 F.3d 1546 (a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct); and *Boll v. Griffith* (1987), 41 Ohio App.3d 356.

{¶18} After reviewing the record, we find that this case involves a permanent rather than a continuing trespass. The damage to the Sextons' property occurred when the subdivision, along with its allegedly improperly designed storm water system, was constructed. The record shows that McGill completed its engineering services by 1994. Rishon's work on the subdivision, in turn, ended in 1995. While the Sextons experienced a severe flooding on their property in July 2001, they have had flooding problems on their property ever since construction of the subdivision began. Their 1995 letter to the city

directly attributes their water problems to the construction of the subdivision. The tortious act was therefore completed in 1994 for McGill and in 1995 for Rishon, and there was no ongoing conduct by either McGill or Rishon even though damage to the Sextons' property continued. Since the Sextons' complaint against McGill and Rishon was not filed until 2003, well outside of the four-year statute of limitations, it was time-barred.

**{¶19}** We therefore hold that the trial court did not err by granting summary judgment in favor of McGill and Rishon on statute of limitations ground. The Sextons' first assignment of error is overruled.

**{¶20}** Assignment of Error No. 2:

**{¶21}** "THE TRIAL COURT ERRED IN FINDING PLAINTIFFS/APPELLANTS FAILED TO ALLEGE DEFENDANT/APPELLEE CITY OF MASON NEGLIGENTLY MANAGED THE STORM WATER SYSTEM."

**{¶22}** In its decision granting summary judgment in favor of the city, the trial court found that:

**{¶23}** The Sextons "allege that the City of Mason and its Engineering Department negligently permitted the other parties Defendant to design and construct the development's storm water system in such a way that excess runoff flooded [the Sextons'] property. They also allege that Mason failed to remedy the problem, though it was asked to do so. [The Sextons] do not allege in their complaint that Mason undertook to manage any sewer system on the development, or that they did so negligently. Consequently, Mason's involvement with the subject development must be analyzed in light of its oversight or approval of the construction of a storm water system on the development. \*\*\* There is neither an allegation, nor a reference to any part of the record that supports the idea Mason maintained the 'storm sewer' system designed and installed by the other parties Defendant, or that it did so negligently." The trial court then went on to find that the city was entitled to sovereign

immunity.

{¶24} The Sextons argue that the trial court erred by finding they failed to plead that the city negligently managed the storm water system. The Sextons contend that in light of the overall liberal allowances accorded to pleadings under the Ohio Rules of Civil Procedure, their averments in their amended complaint sufficiently plead the city's negligence in maintaining the storm water system. The Sextons do not, "at this time, address the sovereign immunity or proprietary versus governmental function" of the city.

{¶25} Civ.R. 8(A) provides that a complaint must contain a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment for the relief to which the party claims to be entitled. A pleading setting forth a claim for relief "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, \*\*\* or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83.

{¶26} In their amended complaint, the Sextons alleged that Rishon and McGill were negligent in constructing the subdivision without an adequate storm water system, and that McGill was negligent in its drawings, design, and engineering of the subdivision. The Sextons also alleged that the city (1) was negligent in allowing the subdivision to be constructed without an adequate storm water system; (2) was negligent in releasing the bond of Rishon and McGill when it was aware that Rishon and McGill did not comply with the engineering and building specifications mandated by the city; (3) failed to rectify the problem caused by the water runoff from the subdivision after being informed of the problem; and (4) breached its promise to fix and correct the problem.

{¶27} According to the Sextons' amended complaint, because the city "has taken no

action to either repair the damage [to their] property [or] \*\*\* taken precautions to eliminate the same or similar actions in the future," and because the city "was placed on notice \*\*\* of the danger resulting from it negligently allowing unreasonable amounts of surface water to flow on, into, and across" their property, they have suffered damage to their property, and loss of enjoyment. The Sextons also alleged a constitutional taking claim based upon the "superimpose[ition]" by the city, Rishon, and McGill of "their drainage, storm sewer system (or lack thereof) upon the natural watercourse in a manner not consistent with [the Sextons'] riparian rights as an adjoining landowner."

{¶28} Upon reviewing the Sextons' amended complaint, we agree with the trial court that the Sextons did not directly allege that the city undertook to manage any storm water system on the subdivision, or that it did so negligently. Nor are there facts alleged to support any argument that the city maintained the storm water system designed and installed by the other parties, or that it did so negligently. The amended complaint did not place the city on notice that it would face a claim it undertook to manage and/or negligently maintained the subdivision's storm water system. We therefore hold that the Sextons failed to adequately allege under Civ.R. 8(A) that the city negligently managed the subdivision's storm water system. The Sextons' second assignment of error is accordingly overruled.

{¶29} Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

JAN 8 2007

WARREN COUNTY

James L. Spaeth, Clerk  
LEBANON OHIO

PEGGY SEXTON, et al.,

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Plaintiffs-Appellants,

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CASE NO. CA2006-02-026

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JUDGMENT ENTRY

- vs -

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CITY OF MASON, et al.,

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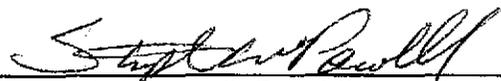
Defendants-Appellees.

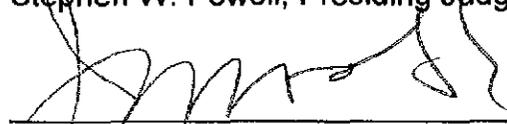
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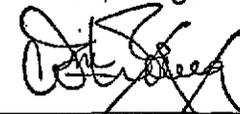
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
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Stephen W. Powell, Presiding Judge

  
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James E. Walsh, Judge

  
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William W. Young, Judge

