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**STATEMENT OF APPELLEE'S POSITION
THAT NO SUBSTANTIAL CONSTITUTIONAL
QUESTION IS INVOLVED AND THAT THIS CASE
IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This discretionary appeal is from the Court of Appeals affirmance of the trial court's routine grant of summary judgment in favor of appellee based upon appellants' failure to comply with Ohio's four year statute of limitations, ORC 2305.09, for tort actions for injury or damage to real property pursuant to this Court's holding in Harris v. Liston, (1999) 86 Ohio St. 3d 2003.

The opinion and judgment entry of the Court of Appeals appealed from is a routine enforcement of the four year statute of limitations as appellants first discovered water damage to their real property in 1992 and did not commence this action against appellee until 2003 which was more than four years after they first discovered the damage.

Appellants waited for more than ten years to file their lawsuit which is barred by the four year statute of limitation. There is simply nothing about this case which is of public or great general interest.

The fact that Ohio may along with other states have development is simply irrelevant. There is no split of authority as the recent Harris v. Liston decision holds that all tort actions for damage to real property, whether for permanent or continuing trespass, are subject to the four year statute of limitations.

ARGUMENT OF APPELLEE

Counter Proposition of Law No. 1 - All tort actions for injury or damage to real property are subject to the four year statute of limitations set forth in ORC 2305.09 (D) which statute commences to run when the damage is first discovered or through exercise of reasonable diligence should have been discovered under this Court's holding in Harris v. Liston,

Plaintiffs Peggy Sexton and Larry Sexton were owners of a house and lot which experienced flooding beginning in 1992. Plaintiffs filed their amended complaint against McGill Smith seeking recovery of damages for alleged negligence on August 27, 2003. McGill Smith and the other defendants filed motions for summary judgement by Decision and Entry entered February 3, 2006. The trial court concluded as a matter of law based on the undisputed facts of record that plaintiffs' claims were barred by the four year statute of limitation, ORC 2305.09. Plaintiffs filed this appeal.

All material facts are undisputed.

Appellants Peggy Sexton and Larry Sexton were owners of real property consisting of a house and lot located in Warren County, Ohio. Beginning in 1992, appellants knew that their house and lot was being flooded by storm water from a creek which runs through their property and was being damaged. (Peggy Sexton deposition, p. 35).

Defendant/appellee Rishon Enterprises, Inc. ("Rishon") was the developer of a residential subdivision known as Trailside Acres which is close to appellants' house and lot. Rishon retained McGill Smith to furnish it certain professional site engineering services for Rishon's development of the subdivision. All of McGill Smith's services were completed by 1994. (Affidavit of Stephen C. Roat).

Defendant Don Thompson Excavating, Inc. , which is not a party to this appeal, was the general contractor retained by Rishon for Rishon's development of the subdivision.

Appellants discussed the flooding of their real estate with defendant-appellee the City of Mason.

Appellants did not assert any claims against McGill Smith until appellants filed their amended complaint on August 27, 2003 in which they alleged that McGill Smith negligently performed its engineering services so as to cause damage to appellants' real property.

Beginning in 1992 and thereafter, appellants knew that their real property consisting of their house and lot was being flooded and damaged by water from the creek. Appellants did not assert any claims against McGill Smith until appellants' amended complaint was filed on August 27, 2003.

Under the Ohio Supreme Court's decision in Harris v. Liston, appellants' claims against McGill Smith are barred by the four year statute of limitations ORC 2305.09.

In Harris v. Liston, supra, the Ohio Supreme Court held:

Accordingly, we reaffirm 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). In addition, we hold that a negligence action against a developer-vendor of real property for damage to the property accrues and the four year statute of limitations or R.C. 2305.09(D) commences to run when it is first discovered, or through exercise of reasonable diligence it should have been discovered, that there is damage to the property. p.4. (Emphasis added)

Harris involved continuing water damage to the real property over a number of years as the Court stated:

The lot was eventually purchased by Elaine Liston. In 1985, Elaine and her husband constructed an approximately six-thousand-square-foot home on the lot. From the time the Listons moved into the home in 1985 they were aware that a "water situation" existed on the property. Drainage tiles were installed by the

Listons, and, during certain times of the year, there was standing water on the real property. p.2. (Emphasis added)

Theater, in 1992, appellees Dr Frederick D. Harris and his wife, Bernice, purchased the home. After purchasing the home, appellees became aware of the standing-water problem. p.2. (Emphasis added)

The Ohio Supreme Court held that since the homeowners knew that their property had been continually damaged by water beginning in 1985, their lawsuit which was filed in 1993 was time barred by ORC 2305.09(D) because they discovered the continuing water damage more than four years before they filed suit.

Thus, whether appellants' tort claim for trespass is for so called "continuing trespass" or "Permanent trespass" is irrelevant as Harris v. Liston, supra, holds that all tort actions for damage to real property are subject to the four year statute of limitations.

It is undisputed that appellants didn't file this lawsuit against McGill Smith until more than four years after appellants discovered the alleged damage to their real property in 1992 and appellants' suit is therefore time barred.

Virtually identical facts were involved in the case of Leonard Reith v. McGill Smith Pushon, Inc., Appeal No. C-040760, in the Court of Appeals, Hamilton County, Ohio, 163 Ohio App.3d 709, (Discretionary appeal to Ohio Supreme Court denied 108 OhioSt. 3d 1439, February 8, 2006.)

In Leonard Reith, supra, plaintiffs-appellants' house and lot experienced flooding and damage from 1993 until 2003 and they filed suit against McGill Smith and the developer of a residential subdivision located across the street from where they believed the water originated. The trial court granted McGill Smith's motion for summary judgment under the four year statute of limitations, ORC 2305.09, and the Court of Appeals affirmed since the appellants experienced damage from McGill Smith's alleged negligence beginning in 1993, but did not sue McGill Smith until ten years later.

The Court of Appeals held:

We conclude, as a matter of law, on these undisputed facts that the Reiths knew or should have known that their property was being damaged by water flow associated with the Chatham Woods development at least four years before their lawsuit against McGill. Therefore, the Reiths' claim against McGill was barred by the statute of limitations. P. 12.

In the present action, appellants admittedly knew that their real property was being damaged in 1992 and did not file suit against McGill Smith until ten years later in 2003 and appellants' claims are therefore barred by the four year statute of limitations.

The cases cited by appellants are simply inapplicable. The case of Nieman v. NLO, Inc., (1997) 108 F.3d 1546 is a federal Sixth Circuit decision which was decided prior to the Ohio Supreme Court's controlling decision in Harris v. Liston, supra, and is simply not controlling authority in this action.

The case of Davis v. Allen (2002) Ohio 193; 2002 Ohio App. LEXIS 158 cited by appellants is not applicable to the undisputed facts and procedures in the present action.

In Davis, supra, the trial court granted defendants' CR 12(B) (6) motion to dismiss plaintiffs' complaint.

The Court of Appeals reversed the dismissal and held that a motion to dismiss tests the sufficiency of the face of the complaint and that all facts necessary to decide the statute of limitations defense were not evident from the face of the complaint.

The Court noted that ordinarily a statute of limitations defense cannot be raised by a motion to dismiss the complaint, but must usually be addressed by a motion for summary judgment.

In the present action, McGill Smith filed a motion for summary judgment and all material facts are undisputed and under the Ohio Supreme Court's controlling decision in Harris v. Liston, McGill Smith's motion for summary judgment was granted.

The Court of Appeals decision in Davis did not cite Harris and the Court of Appeals cannot overrule the holding of Davis that all tort actions for injury or damage to real property are subject to the four year statute of limitations.

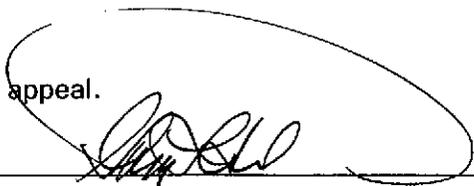
The old cases of Valley Ry. Co. v. Franz (1885) 43 Ohio St. 623, Norwalk v. Blatz (1906) Ohio Misc. LEXIS 208, unreported, and Wood v. American Aggregates Corp. (1990) 67 Ohio App. 3d 41, are simply inapplicable under the Ohio Supreme Court's 1999 decision in Harris v. Liston, *supra*.

CONCLUSION

The 1999 decision of the Ohio Supreme Court in Harris v. Liston, is the controlling authority which governs this action and there is no split of authority on this issue.

Under such decision any characterization of damage as being "continuing" or "permanent" or otherwise is simply irrelevant. Rather, all tort actions for injury or damage to real property are subject to the four year statute of limitations on ORC 2305.09 which commences to run when such is first discovered or through the exercise of reasonable diligence should have been discovered. In the present action, appellants admittedly knew of the flooding and water damage in 1992 and did not sue McGill Smith until ten years later and appellants' claims are therefore barred.

This Court should deny discretionary appeal.



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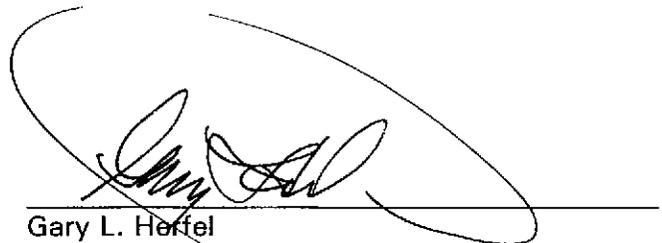
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary U.S. Mail, postage pre-paid, on the 1st day of March, 2007, upon the following:

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