

IN THE SUPREME COURT OF OHIO

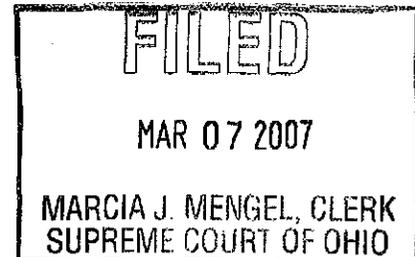
PEGGY SEXTON, et al. : Case No.: 07-0305
Appellants, : On Appeal From the Warren County
VS. : Court of Appeals,
Twelfth Appellate District
CITY OF MASON, et al. : Court of Appeals
Appellees. : Case No.: CA2006-02-026
:

APPELLEE, RISHON ENTERPRISES', MEMORANDUM IN
RESPONSE OPPOSING JURISDICTION

B. Scott Jones (0070296)
REMINGER & REMINGER CO., LPA
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
(513) 721-1311
sjones@reminger.com

COUNSEL FOR APPELLEE, RISHON ENTERPRISES

James A Whitaker (0000992)
Whitaker & Shade, LLC
226 Reading Road
Mason, Ohio 45040
(513) 398-0181
jawhitaker@jwhitakerlaw.com



COUNSEL FOR APPELLANTS, PEGGY SEXTON AND LARRY SEXTON

Gary Becker (0012716)
Jessica S. Hylander (0077030)
Dinsmore & Shohl LLP
1900 Chemed Center
225 E. Fifth Street
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE, CITY OF MASON

Gary L. Herfel (0011680)
The Herfel Law Firm
100 East Rivercenter Boulevard, Suite 250
Covington, KY 41011

COUNSEL FOR MCGILL SMITH PUNSHON, INC.

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The sole issue for determination on the jurisdictional memorandum filed herein, regarding Appellants' First Proposition of Law, is whether the grant of summary judgment pursuant to an expiration of the statute of limitations on a permanent trespassing claim is a matter of great public or general interest. For the reasons below, Rishon Enterprises submits that this is not a matter of great public or general interest, and therefore, this Honorable Court should decline to accept jurisdiction.

The Appellant has petitioned this court to accept jurisdiction over this appeal from a decision and judgment of the Twelfth District Court of Appeals, which upheld a grant of summary judgment in favor of Rishon Enterprises. The issues and outcome of this case in the courts below were premised upon the particular facts in the record. The courts below were asked to apply the well-established statute of limitations requirement set forth in R.C. 2305.09 and this Court's decision in Harris v. Liston and grant summary judgment pursuant to the expiration of the statutory period relevant to the claim. They properly did so.

In their Jurisdictional Memorandum, Appellants have not advanced any proposition of law that is new or unsettled. In fact, the Appellants now assert review for clarification on a legal principle that is clear and well formulated. It is well settled in Ohio law that R.C. 2305.09 is a statute of limitations, and if not met, it bars claim brought under the statute. Furthermore, this Court recently held in Harris v. Liston (1999), 86 Ohio St.3d 203, 714 N.E.2d 377, "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. In addition, the court said the four-year statute of limitations begins to run when the damage to the property “is first discovered, or through the exercise of reasonable diligence it should have been discovered.” Id. Therefore, it is irrelevant whether Appellants’ trespass claim is labeled “permanent or continuous.”

Even if the classification of “permanent or continuous” trespass were relevant, it is well settled in Ohio law that “[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 v. McGill Smith Punshon, Inc., 163 Ohio App.3d 709, 2005-Ohio-4852. See also, Weir v. East Ohio Gas Co., Mahoning App. No. 01 CA 207, 2003-Ohio-1229; Hartland v. McCullough Constr., Inc. (July 12, 2000), Ottawa App. No. OT-99-058; and Frisch v. The Mondford Supply Co. (Nov. 21, 1997), Hamilton App. No. C-960522. It is these doctrines that the lower courts relied on to support the granting of summary judgment.

The Appellant argues that this case has resulted from the intersection of rapid development and adjacent property rights and that others like it will undoubtedly occur in the future due to the rapid urbanization of land and population growth. This argument is without merit. The argument is speculative, as the Appellants attempt to predict what may happen in the future without adequate support for this prediction. In addition, the Appellants point out the fact that this rapid urbanization of land and corresponding population growth has been occurring over the last 35 years. However, in those 35 years, the issue of “continuous damages” has never come before the Supreme Court of

Ohio. Most likely because the issues of permanent trespass and continuous trespass are well-settled in the law, as recognized by the lower courts. Therefore, any argument that this issue is of great public or general interest founded on the above argument is based on speculation and, therefore, is without merit.

Furthermore, Appellants' main argument relies on the case Neiman v. NLO, Inc.; however, this case is not binding authority on this Court and it is outdated by this Court's decision in Harris v. Liston. Neiman is a federal Sixth Circuit decision, which is not binding authority. In addition, Neiman was decided prior to the Ohio Supreme Court's decision in Harris. See Harris v. Liston (1999), 86 Ohio St.3d 203, 714 N.E.2d 377. However, Appellants' failed to address the Harris decision in their Memorandum in Support of Jurisdiction, relying solely on the argument in Neiman, demonstrating their concession to the merits of the Harris decision. Clearly, their inability to mention or distinguish this case further supports the affirmation of the lower courts' holding.

The lower courts have done nothing more than apply well-settled law to the facts in evidence. The lower courts determined, based on the relevant facts and applicable law, that the facts in this case constituted a permanent trespass; and as the Appellant did not file the suit within the statutory period, summary judgment was granted. The Appellant, understandably, disagrees with the interpretation of the trial judge and the Appellate court's opinion. However, further review by this Court will result in no precedential value to persons other than Appellants. Consequently, the case is not one of public or great general interest and jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

Appellants were owners of a house and lot which experienced flooding beginning in 1992. Appellants filed their amended complaint against Rishon Enterprises (hereinafter "Rishon") on August 27, 2003. Rishon and the other defendants filed respective motions for summary judgment praying for dismissal of Appellants' claims for being time barred by the four-year statute of limitations pursuant to R.C. §2305.09. The trial court concluded as a matter of law, based on the undisputed facts of record that Appellants' claims indeed were barred by the four-year statute of limitations pursuant to R.C. §2305.09. Subsequently, Appellants filed an appeal to the Twelfth District Court of Appeals on February 26, 2006, setting forth two assignments of error. The Court of Appeals filed its decision on January 8, 2007. That decision found against Appellants on both assignments of error. The Appellants then filed a Memorandum in Support of Jurisdiction with this Court.

B. Statement of the Facts

Since 1988, Appellants Peggy and Larry Sexton have resided at 4721 Cox Smith Road, Mason, Ohio. (Deposition of Peggy Sexton at 8, hereinafter "Peggy Sexton Depo at ___"). Appellee, Rishon Enterprises, owned the real property that abuts the Appellants' property. Beginning in 1987, and ending in 1997, Rishon developed the property into the Trailside Acres Subdivision. Prior to the development of the Trailside Acres Subdivision, Appellants did not experience any flooding on their property. (*Id.* at 20). However, beginning in 1992, Appellants knew that their house and lot was being flooded and damaged by storm water from a creek which runs through their property.

(Id. at 35). Specifically, Appellants stated that they experienced water problems since the construction of Trailside Acres began, the problems worsened during 1992-1993, and became so severe that Appellants wrote a letter to the City of Mason in 1994-1995. (Plaintiff's Response to Rishon Enterprises Interrogatory at 12; Peggy Sexton Depo at 19-20).

By at least 1994, Appellants were of the opinion that their water problems and flooding were due to the development of the Trailside Acres Subdivision. (Peggy Sexton Depo at 21). Furthermore, Appellants were also aware that Paul Heiman of Rishon was the person developing the Trail Side Acres subdivision. (Id. at 21, 32-33).

The Appellants discussed their problems with the City of Mason for many years; however, these discussions broke down in 2003. (Id. at 25, 30). Aside from one conversation in the early 90s, Appellants never discussed with Paul Heiman or Rishon regarding their flooding problems. (Id. at 32-33). Furthermore, neither Paul Heiman nor Rishon ever made any representations to the Sextons that Rishon would remedy any alleged flooding problems. (Id.). Appellants filed their original amended Complaint adding Rishon as a defendant on August 27, 2003, clearly beyond the four-year statute of limitations.

ARGUMENT

- A. **Counter Proposition of Law No. 1:** “[T]ort 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...a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year statute of limitations...commences to run when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property.” Harris v. Liston (1999), 86 Ohio St.3d 203, 714 N.E.2d 377. 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. Abram v. BP Exploration & Oil, Inc., 149 Ohio App.3d 471, 2002-Ohio-4392

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

Consistent with the Ohio Supreme Court’s decision in Harris v. Liston (1999), 86 Ohio St.3d 203, 714 N.E.2d 377., Appellants’ claims against Rishon are barred by the four-year statute of limitations pursuant to R.C. §2305.09. In Harris, the Ohio Supreme Court held:

[] 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...a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year statute of limitations...commences to run when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property. Id. at 207.

The so-called “discovery rule” is usually invoked in situations where the injury or damage may not present itself immediately, and as a result, fairness requires allowing the claim. Id. However, here it is clear from the record, that Appellants have been aware of the flooding problems and resulting damage since as early as 1992. (See Plaintiff’s Response to Rishon Enterprises Interrogatory at 12; Peggy Sexton Depo at 19-20). As such, the “discovery rule” is applicable to the case *sub judice*.

Harris involved continuing water damage to real property over a number of years, exactly the same situation present in the case *sub judice*. In Harris, This Court stated:

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...Thereafter, in 1992, appellees...purchased the home. After purchasing the home, appellees became aware of the standing-water problem. Id. at 203.

This 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 pursuant to R.C. §2305.09 because they discovered the continuing water damage more than four years before they filed suit.

Therefore, it is irrelevant whether Appellants’ claim for trespass is labeled as “continuous” or “permanent” because Harris clearly establishes that all tort actions for damage to real property are subject to the four-year statute of limitations pursuant to R.C. §2305.09.

It is undisputed that Appellants did not file their amended complaint against Rishon until more than four years after appellants discovered the alleged damage to their real property in 1992. Thus, Appellants' suit is time barred.

Assuming, *arguendo*, that Harris did not eliminate the distinction between a "continuous" and "permanent" trespass in damage to real property actions, Appellants' claims are still barred. In Leonard Reith v. McGill Smith Punshon, Inc. (2005), 163 Ohio App.3d 709, 840 N.E.2d 226., appellants' house and lot experienced flooding and damage from 1993 until 2003 when they filed suit against McGill Smith and a developer. The Court of Appeals outlined the difference between a continuous and permanent trespass:

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 right. Id.

In the case *sub judice*, the storm water drainage system which is the basis of Appellants' complaint was completed well before 1997, the date construction of Trailside Acres was completed. The storm water drainage system was completed in 1995 (See Magistrate Andrew Hasselbach's Decision denying Rishon's Motion to dismiss, or alternatively, motion for summary judgment) to accommodate the new construction of single family residences on lots within Trailside Acres. (Affidavit of Edward Frankel at ¶¶10-14, attached in Appendix p. 10). Consequently, the alleged tortious act (i.e. installing the storm water drainage system) was "fully accomplished" yet the alleged injury continued to "persist." There was no further "conduct" by Rishon with respect to said drainage system. Therefore, assuming *arguendo* there is a distinction

between “continuous” and “permanent” trespass in damage to real property actions, the trespass action at bar is properly characterized as “permanent”. Since Appellants noticed flooding at the latest in 1995 and Rishon had no further “contact” with said drainage system after 1995, Appellants did not file suit against Rishon until 2003, Appellants’ claim is barred under the four-year statute of limitations pursuant to R.C. §2305.09.

Furthermore, in Leonard Reith, the trial court granted McGill Smith’s motion for summary judgment under the four-year statute of limitations pursuant to R.C. §2305.09. 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...development at least four years before the lawsuit against McGill. Therefore, the Reiths’ claim against McGill was barred by the statute of limitations. Leonard Reith, 163 Ohio App.3d at 718, 840, N.E.2d at 223.

In the present action, it is undisputed that Appellants knew that their real property was being damaged in 1992 or at least in 1995 and did not file suit until 2003, far more than the four-year statute of limitations pursuant to R.C. 2305.09 permits.

Furthermore, the cases Appellants cite for support are inapplicable. Appellant cites Nieman v. NLO, Inc. (1997), 108 F.3d 1546, 1997 Fed.App. 0097P. However, Nieman is a federal Sixth Circuit decision, which is not binding authority. Furthermore, Nieman was decided prior to the Ohio Supreme Court’s binding decision in Harris. Therefore, Appellants cite to outdated law in lieu of Harris.

Finally, the antiquated cases of 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. (1990), 67 Ohio App.3d 41, 585 N.E.2d 970 are simply inapplicable and not controlling law in light of the this Court's decision in Harris, decided in 1999. Appellant makes no attempt to address the Harris decision in their Memorandum in Support of Jurisdiction, demonstrating their concession to the merits of this decision. Clearly, their inability to mention or distinguish this case further supports the affirmation of the lower courts' holding.

B. Counter Proposition of Law No. 2: Appellee Does not Respond to Appellant's Second Proposition of Law as it is Not Related to Appellee Rishon Enterprises.

CONCLUSION

For the reasons set forth herein, the questions argued in support of jurisdiction are not ones of public or great general interest. Ohio's well-settled law regarding statutes of limitations, property damage and trespass were properly applied. Therefore, the Appellee respectfully requests that this Court deny jurisdiction in this case.

Respectfully submitted,

REMINGER & REMINGER CO., L.P.A.



B. Scott Jones (0070296)
Attorney for Defendant/Appellee
Rishon Enterprises, Inc.
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
Telephone: 513/721-1311
Telecopier: 513/721-2553
Email: sjones@reminger.com

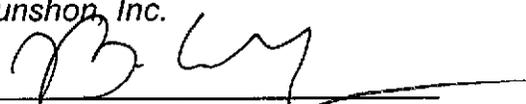
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular United States mail, this 2nd day of March, 2007, on the following:

James A. Whitaker, Esq.
226 Reading Road
Mason, Ohio 45040
Attorney for Plaintiffs/Appellants

Gary Becker, Esq.
Jessica Hylander, Esq.
1900 Chemed Center
225 East Fifth Street
Cincinnati, Ohio 45202
*Attorneys for Defendant/Appellee City of
Mason*

Gary Herfel, Esq.
100 East Rivercenter Blvd.
Suite 250
Covington, Kentucky 41011
*Attorney for Defendant/Appellee McGill Smith
Punshop, Inc.*



B. Scott Jones (0070296)