

IN THE SUPREME COURT OF OHIO

PEGGY SEXTON, et al.

Appellants,

-vs-

CITY OF MASON, et al.,

Appellees.

Case No. 2007-0305

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

Court of Appeals Case No. CA2006-02-026

**MEMORANDUM OF APPELLEES CITY OF MASON IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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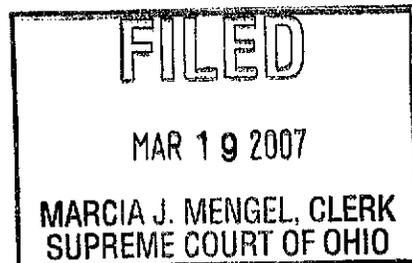


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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

This action arises out of the construction and development of the Trailside Acres Subdivision in Mason, Ohio, as well as a specific occurrence on July 17, 2001 during which Southeast Ohio, including Mason, Ohio, received an extraordinary volume of rain. Plaintiffs claim that Defendants Rishon Enterprises, Don Thompson Excavating, Inc., and McGill Smith Punshon International Inc. negligently failed to provide for adequate water management in the design and construction of Trailside, and that this failure resulted in "repeated flooding problems" since the construction of that subdivision. Additionally, Plaintiffs claim that the City of Mason and the City of Mason Engineering Department ("Mason" collectively) negligently allowed Trailside to be so constructed. Summary Judgment was granted to all Defendants by the trial court. The Twelfth District then affirmed Summary Judgment in favor of all Defendants.

Because this case is neither of public or great general interest, nor does it present a substantial constitutional question, this Court should decline to accept jurisdiction. Plaintiffs' first proposition of law has recently been addressed by this Court. *Harris v. Liston* (1999), 86 Ohio St. 3d 203 is dispositive. The statute of limitations for trespass claims upon real property is four years. Under the rule set forth by this Court in *Harris*, any trespass, whether considered permanent or continuous, is barred if not brought within four years. Even without consideration of *Harris*, Plaintiff's claims are not meritorious. Plaintiffs brought their claim in 2003, nearly eight years after the last alleged act by any of the Defendants. There is no public or general interest in expending this Court's resources in order to reexamine an issue so recently reviewed and decided.

Nor is there any public or great general interest or constitutional question involved regarding Plaintiff's Second Proposition of Law. Rather, Plaintiffs' appeal relative to Defendant City of Mason merely challenges the sufficiency of Plaintiffs' individualized pleadings. Plaintiffs unnecessarily implore this Court to review this matter in order to instruct other plaintiffs how to sufficiently plead negligent maintenance of a storm water system against a municipality. However, Plaintiffs do not need this Court to state the obvious -- plaintiffs must simply state that the municipality negligently failed to manage the storm water system or, at least, allege facts that would support a claim of negligent maintenance. The sufficiency, or lack thereof, of these individual Plaintiffs is neither a case of public or great general interest nor a Constitutional question. Moreover, Plaintiffs not only failed to sufficiently plead such a cause of action, but failed to present any evidence to support the idea that Mason either maintained the system or did so negligently.

Additionally, the "takings" issue addressed in Plaintiffs' brief not only lacks reason, merit and support, but was waived by Plaintiffs because it was not brought to the attention of the Court of Appeals. Even if this issue were before the Court, Plaintiffs' claims would still fail because their taking claims is barred by the statute of limitations. Plaintiffs' takings claim is not the issue before this Court, the true issue is merely whether or not Plaintiffs' pleadings are sufficient. The deficiencies of Plaintiffs' Complaint, specifically the interpretation of Plaintiffs' particular negligence allegations against Defendant City of Mason in this individual case, is neither a matter of great public interest nor a constitutional issue. As such, jurisdiction should be declined.

STATEMENT OF THE FACTS

Plaintiffs-Appellants purchased property located outside the city limits of Mason, Ohio at 4721 Cox-Smith Road, Mason, Ohio in 1986, built a home on that property, and moved into that home on October 15, 1988. In 1987, construction of an upstream subdivision within the City of Mason known as Trailside Acres began. Defendant Rishon owned the property and acted as the developer of Trailside Acres, Defendant Don Thompson Excavating, Inc. was the general contractor, and McGill Smith was the engineer for the Trailside Acres development. By 1994, McGill Smith had completed all of its engineering services and Mason had approved the final stages of Trailside's construction plans. Mason neither designed nor constructed Trailside Acres or its detention ponds.

As soon as the Trailside construction began, Plaintiffs experienced water problems on their property. Even before the development was complete, Plaintiffs believed that these problems were due to Trailside. Plaintiffs reported their water problems to Mason in 1992, but did not file suit until July 14, 2003.

Mason never assumed control over, or responsibility for, any of Trailside's drainage ditches or detention basins. Nor did Mason ever undertake responsibility for maintenance, operation or upkeep of the Trailside Acres' drainage ditches or detention ponds. Plaintiffs- concede that their action against Mason rests completely on Mason's "inspection capacity in approving plans and approving final layouts and designs" for the Trailside development.

Plaintiffs were never told that Mason would take a particular course of action with regard to either their property or the Trailside development. Mason investigated Plaintiffs' complaints -- even though Plaintiffs' property was not within the city limits -- and Plaintiffs were informed that Mason would not be taking action to fix the water problems or repair their property.

ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSED PROPOSITIONS OF LAW

Plaintiffs' Proposition of Law No. 1:

Plaintiffs incorrectly argue that the court must determine whether Defendants' acts constituted a permanent or continuous trespass to determine the appropriate statute of limitations. However, such a distinction is unnecessary. This Court recently addressed the statute of limitations for trespass actions in *Harris v. Liston* (1999), 86 Ohio St. 3d 203, 207, 714 N.E.2d 377, 380, holding 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 developer-vendor of real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D) 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."

This Court did not limit its holding to permanent trespasses or make any distinction between permanent or continuing trespass. In *Harris*, a couple purchased a lot in 1985 in order to build a home on the site. *Id.* at 203. That year they noticed a "water situation" on the property. *Id.* They eventually sold the property to a subsequent purchaser in 1992 without telling them of the water problem. *Id.* The subsequent purchaser soon discovered the water problem and brought suit in 1993 against many parties, including a negligence claim against the developers. *Id.* This Court explained that even though the subsequent purchaser brought suit within the four-year period of their discovery of the water problem, the water problem was actually discovered in 1985 by the original purchasers. *Id.* at 207. The Court ruled that the discovery by the original purchasers started the clock for calculating the statutory time. *Id.* at 208. Since the suit was brought in 1993, the subsequent

purchasers were time barred from bringing their negligence action against the developers. *Id.* The court was faced with continuing damage (standing water on the property each time it rained due to the subdivision's alleged faulty drainage system) yet applied the four-year statute of limitations set forth in R.C. 2305.09(D). As such, distinguishing between permanent and continuing trespass is unnecessary and irrelevant.

Assuming, *arguendo*, that a permanent/continuing trespass analysis was relevant, the result would not change for Plaintiffs. The difference between a permanent and continuing trespass has been clearly explained in the one hundred and twenty years since *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623. Recently, in the case of *Reith v. McGill Smith Punshon, Inc.* (1st Dist. 2005), 163 Ohio App. 3d 709, 840 N.E.2d 226, the difference was explained as follows,

"A permanent trespass occurs when the defendant's tortious act has been fully accomplished, but the 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." *Id.* at 720.

In *Reith*, the developer completed construction of a subdivision's drainage system in 1994. *Id.* Soon after, a neighboring homeowner began to experience flooding problems. *Id.* The neighboring homeowner's problems grew worse and in 2003 they filed suit against the developer. *Id.* at 713. The court held that developer's alleged tortious act was completed in 1994 upon completion of the drainage system the trespass was permanent in nature. *Id.* As a result, homeowner's were required to bring their trespass claim within four years of the completed act pursuant to R.C. 2305.09(D). *Id.* Their failure to do so rendered the trespass claim time barred. *Id.*

Here, Defendants, are in a nearly identical situation. Plaintiffs were aware of flooding and water damage as early as 1992 and attributed those water problems to the Trailside Acres development. Construction of Trailside Acres was completed in 1995, by that time all of the Defendants' acts -- construction, engineering, inspection services -- were completed. Therefore, any alleged trespass would properly be defined as permanent in nature. Under the law of *Reith* and *Harris*, the statute of limitations would have expired in 1999, four years after Defendants' acts were fully accomplished. Plaintiffs did not file suit until 2003 well outside the required four years.

Finally, Plaintiffs rely on non-binding and outdated authority to support their position. Plaintiffs base their continuing trespass argument on *Nieman v. NLO, Inc.* (6th Cir. 1997), 108 F.3D 1546 decided prior to this Court's ruling in *Harris*, decided in 1999. Furthermore, *Nieman* is a Sixth Circuit case which is non-binding on this Court. The cases cited in *Nieman*¹ are also outdated and inapplicable when considered with the *Harris* decision.² Additionally, Plaintiffs make no mention of nor attempt to distinguish *Harris*, signifying their acceptance of the merits of that decision.

Plaintiffs' Proposition of Law No. 2:

As Plaintiffs cite in their memorandum, 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 the same." *Hack v. Salem* (1963), 174

¹ *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 4 N.E. 88; *Boll v. Griffith* (4th Dist. 1987), 41 Ohio App. 3d 356, 535 N.E.2d 1375; and *Wood v. Am. Aggregates Corp.* (10th Dist. 1990), 67 Ohio App. 3d 41, 585 N.E.2d 970.

² *Nieman* and Plaintiff rely heavily on a case from the 10th District, *Wood v. Am. Aggregates Corp.* (10th Dist. 1990), 67 Ohio App. 3d 41, 585 N.E.2d 970 for their continuing trespass theory. *Wood* has become outdated itself. See *Abraham v. BP Exploration & Oil Inc.* (10th Dist. 2002), 149 Ohio App. 3d 471 (holding that when the tortious activity complained of has been completed and the defendant relinquished control over the source of the trespass, the cause of action is for a permanent trespass, not continuing trespass).

Ohio St. 383, 389. Explicit in this statement of law is the requirement that plaintiff allege facts to support its claim. The trial court found that "there is neither an allegation, nor a reference to any part of the record that supports the idea that Mason maintained the 'storm sewer' system designed and installed by the other party defendant, or that it did so negligently." (Id. 139, Decision pg. 6.) The appellate court agreed with the trial court that Plaintiffs did not directly allege that the city undertook to manage the storm water system, "nor are there facts alleged to support any argument that the city maintained the storm water system designed and installed by other parties, or that it did so negligently." (App opinion Paragraph 28)

Even under the most liberal of readings, Plaintiffs never alleged that their water problems were the result of issues relating to maintenance, operation, or upkeep of Trailside's stormwater system. Plaintiffs' claims of negligence against Mason remained consistent during over 23 months of discovery -- Plaintiffs fault Mason for releasing Rishon's bond and for allowing for Trailside to be built without an adequate stormwater system, specifically that the Trailside's detention basin was inadequate. (T.D. 60, P. Sexton Depo. pg. 128-130; T.D. 107, L. Sexton Depo. pg. 43-44; T.D. 1, Complaint; T.D. 18, Amended Complaint). When specifically asked about their claims against Mason, Plaintiffs conceded that their action rested completely on Mason's "inspection capacity in approving plans and approving final layout and designs." The record is devoid of any allegation, testimony or other evidence that Plaintiffs' claims of negligence involved anything more than Mason's role in the inspection and approval of Trailside Acres.

Contrary to Plaintiffs' Memorandum, since Plaintiffs' pleadings are insufficient further discussion about trespass and a constitutional taking is unnecessary. Even if an analysis were necessary it would be short and in Defendant's favor. First, Plaintiffs failed to raise the takings issue

on appeal, thus waiving review of the issue. *State ex rel. Porter v. Cleveland Dep't of Pub. Safety* (1998), 84 Ohio St. 3d 258, 259, 703 N.E.2d 308, 309 (reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed). Second, as discussed in response to plaintiffs' first proposition, the trespass issue clearly favors Defendant's closing off any recovery Plaintiffs may recover. Moreover, the law of trespass, be it permanent or continuous, is inapplicable to the law of a constitutional takings claim.

Finally, even if a takings claim were an issue, Plaintiffs would be barred from recovery based on the six-year statute of limitations on takings claims. *R.T.G. v. State of Ohio* (2002), 98 Ohio St 3d 1, 6-8, 780 N.E.2d 998, 1004-1006. Under current law, a party seeking compensation for real property that was taken from the property owner, or for damages to the residue remaining with the property owner, is bound by a six-year statute of limitations. *Id.* The statute begins to run as soon as the city makes a final decision regarding the property, such as approving the final construction plans. *Id.*

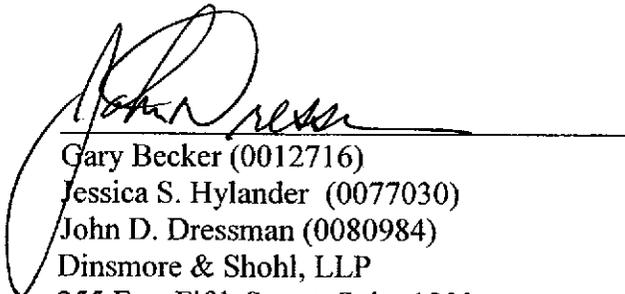
Here, Plaintiffs did not bring suit until years after the statute of limitations had lapsed. McGill Smith Punshon completed its engineering services, and Mason approved the final stage of Trailside's construction plans in 1994. At that time, Plaintiffs were well aware of the water problems and believed that those problems were caused by the construction of Trailside Acres. Nevertheless, Plaintiffs did not file their claim until July of 2003. Mason's actions were complete more than nine years prior to Plaintiffs' filing. As a result, even if Plaintiffs' had raised the takings issue on appeal, it would clearly be time barred.

CONCLUSION

Plaintiffs assert that this is a case of public or great general interest and involves a substantial constitutional question. As demonstrated above, this case is clearly neither. There is no great public or general interest in reexamining the thorough analysis behind the trial court's and the appellate court's decision to award summary judgment motions based on well-settled and established Ohio law. There is no public or great interest in expending this Court's resources to address an issue that was clearly and recently decided by this Court, as was the case in *Harris*. And there is certainly no public or great general interest in clarifying the obvious need for Plaintiffs to sufficiently plead a desired cause of action within their Complaint. The issue submitted by Plaintiffs with regard to Mason is not a constitutional question. Rather, it is merely a question of the insufficiency of these particular Plaintiffs to allege what they now claim to be a desired cause of action within their Complaint.

For all the reasons set forth herein, Defendant City of Mason requests this Court not accept jurisdiction on Plaintiffs' appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was served by regular U.S. mail, postage prepaid, this 16th day of March, 2007, upon the following:

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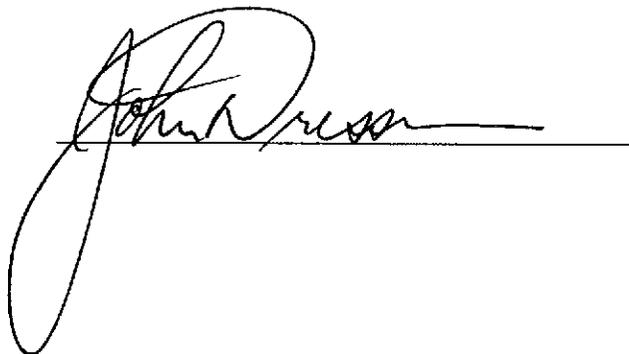
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A handwritten signature in black ink, appearing to read "John Punshon", is written over a horizontal line. The signature is stylized and cursive.