

**IN THE SUPREME COURT OF OHIO**

**TODD DEVELOPMENT CO., INC., et al.** : Sup. Ct. Case No. 2007-0041

Plaintiffs-Appellees, : On Appeal from the Warren County Court of Appeals, Twelfth Appellate District

: :

**v.** : Court of Appeals

**SONNY D. MORGAN, et al.** : Case No. CA2005-11-124

Defendants-Appellants. :

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**BRIEF ON THE MERIT OF APPELLEES**

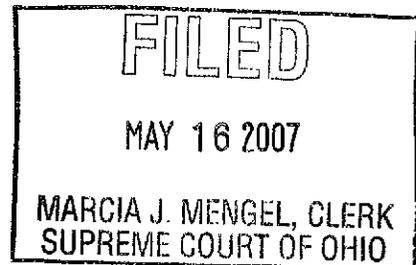
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## **STATEMENT OF THE CASE AND FACTS**

Two of the Appellees (“Developers”) purchased three lots each located at the out ends of the Shaker Ridge Subdivision, generally for ingress and egress into their proposed new subdivisions, and joined these lots to large parcels of acreage prior to requesting and being granted their re-plats of the new subdivisions. The Appellees (“Developers”) sought Declaratory Judgment as to whether certain restrictions remained upon those lots in the newly platted subdivisions, bringing their complaint after streets and utilities were completed in the new subdivisions, and after at least twenty-five homes had been built. In order to do so, all adjacent landowners (the “Appellants” and “Homeowners”) were named as parties in interest in the action. In response, the Appellants filed a Counterclaim, and then an Amended Counterclaim against the Developers citing claims of violation of a parking restriction as to trucks, a restriction on lot subdivision, a violation of a driveway easement and a claim in trespass resulting in damages. The Developers answered denying the claims and asserted various Affirmative Defenses, including laches. The Homeowners filed a Motion for Summary Judgment limited to the asserted claims of a violation of the restrictive covenants as to subdivision of lots; and the Developers filed their Motion for Summary Judgment arguing all of the issues they raised in their Declaratory Judgment action. The Trial Court sustained the Homeowners Motion for Summary Judgment and the Developers appealed. The Twelfth District Court of Appeals found that the Trial Court’s sustaining of the Appellants’ Motion for Summary Judgment was not appropriate due to genuine issues of material fact left unanswered, and sustained the Appellees’ third assignment of error, specifically remanding the matter back to the Trial Court on their affirmative defense of laches.

## ARGUMENT

Issue Certified for Review:

*Does a plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims bear the initial burden of addressing the non-moving party's affirmative defenses in its motion?*

**Appellees' Proposition of Law No. I:**

**Pursuant to Ohio Civ. Rule 56, summary judgment is properly rendered in favor of a moving party only after the moving party demonstrates the absence of a genuine issue of material fact on its claim and on a non-moving party's affirmative defenses; and if the moving party fails to meet its burden as to the affirmative defenses, the non-moving party bears no reciprocal burden on that issue.**

The nonmoving party in a summary judgment motion receives the benefit of all favorable inferences when evidence is reviewed for the existence of a genuine issue of material fact precluding summary judgment. *Byrd v. Smith* (2006), 110 Ohio St.3d 24, 850 N.E.2d 47. In *Gutierrez v. Mika Metal Fabricators*, (Ohio App. 11 Dist.), 2006 WL 266717, the Eleventh District Court reasoned as follows on this issue when referring to the seminal case on this issue: "The Ohio Supreme Court stated in *Dresher* \* \* \* the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.* The 'portions of the record' to which we refer are those evidentiary materials listed in Civ. R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case.' If the moving party satisfies this burden, then the nonmoving party has the burden, pursuant to Civ. R. 56(E), to provide evidence demonstrating a genuine issue of material fact." *Id.* at \*2, ¶ 3, See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

Clearly in the case before us, the moving party had the initial burden of demonstrating the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The Appellants filed a Counterclaim, and subsequently an Amended Counterclaim to Appellee's

Complaint for Declaratory Judgment alleging that the Developers violated a restriction against parking trucks, a restriction on subdividing lots, a violation of a driveway easement and trespass. However, the Appellants moved for summary judgment solely on the allegations of a violation of the subdivision restriction. The Appellants did not move for summary judgment on all of their claims, nor did the Appellants address the Appellees' affirmative defenses in the Appellee's Answer to the Amended Counterclaim; including the affirmative defense of laches. Since the moving party failed to meet their initial burden, the nonmoving party did not have a reciprocal burden as outlined in Civ. R. 56(E). There is no question that the moving party (i.e., Appellants) were required to address the pleadings. There is no question that the pleadings by both Appellants and the Appellees in this case raised the affirmative defense of laches; however the Appellants had the initial burden of addressing the Appellees' defenses in Appellants' motion for summary judgment. Instead, in this case, the Appellants simply did not address laches, nor did they address several of their own claims at all. As the Appellants failed to meet their initial burden; the reciprocal burden was never passed on to the Appellees.

Appellees agree with the Appellants' assertions that the meaning of Civil R. 56 is remarkably clear. This Court in *Dresher* held: "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absences of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ. R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim. **If the moving party fails to satisfy its initial**

**burden, the motion for summary judgment *must* be denied.** However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Id.* at 293, 662 N.E.2d 264 (emphasis added). The Appellees stated in their Second Motion for Summary Judgment that the Appellant Homeowners “sat by and did nothing” as the new subdivisions were built. It was incumbent upon the Appellants to provide some evidence that they did something to assert their claimed rights. In this case, the Appellants simply moved for summary judgment on one of the claims they brought in their Amended Counterclaim and remained silent as to the balance of their own claims as well as the Appellees’ affirmative defenses.

*Dresher* is interpreted as standing for the principle that the moving party has the initial burden to demonstrate the absence of a genuine issue of material fact “on one or more issues of fact determinative of the non-moving party’s claim for relief or affirmative defense.” See *Garcia v. Bailey* (May 22, 1998), Montgomery App. No. 16646, 1998 WL 310742; see, also, *O’Neal v. Shear’s Metro Markets, Inc.* (June 13, 1997), Montgomery App. No. 16218, 1997 WL 337664; *Haack v. Bank One, Dayton* (April 11, 1997), Montgomery App. No. 16131, 1997 WL 205998. This conclusion is consistent with many other Ohio state and federal cases. See *Bright Local School Dist. Bd. of Edn. v. Hillsboro School Dist. Bd. of Edn.* (1997), 122 Ohio App.3d 546, 554, 702 N.E.2d 449 (“Appellees failed to carry this initial burden during the proceedings below. Their motion for summary judgment contained no Civ. R. 56(C) evidentiary materials to address the affirmative defenses raised by appellants. Instead, the appellees ignored the statute of limitations issue entirely”); *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, ¶ 89-90, 2004-Ohio-411, 804 N.E.2d 979 (“\* \* \* the party moving for

summary judgment has the initial burden to show that no genuine issues of material fact exist (either with respect to its claims or with respect to any defenses to those claims) and that it is entitled to judgment in its favor as a matter of law.”); *Bobb Chevrolet, Inc. v. Dobbins*, (Ohio App. 4 Dist.), 2002 WL 1922115 (“On summary judgment, the moving party bears the initial burden of proving that no genuine issue of fact exists with regard to any material issue before the court. \* \* \* Thus, although comparative negligence constitutes an affirmative defense for which Dobbins would bear the burden of proof at trial, the initial burden lies with Bobb Chevrolet on its motion for summary judgment”); *Books A Million, Inc. v. H & N Enterprises, Inc.* (S.D. Ohio 2001), 140 F.Supp.2d 846, 851 (“In the context of summary judgment, it is well settled that the moving party always bears the initial responsibility of informing the district court of the basis for its motion. \* \* \* This initial burden remains with the moving party, even when the issue involved is one on which the non-movant will bear the burden of proof at trial, such as the Defendant's affirmative defenses in the present case”).

In this analysis it is worth briefly mentioning the basic concept behind affirmative defenses. “An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it.” *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (1996), 75 Ohio St.3d 31, 33, 661 N.E.2d 187.” An affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits that the plaintiff has a claim (the ‘confession’) but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the ‘avoidance’). *See 1 Klein, Browne & Murtaugh, Baldwin’s Ohio Civil Practice* (1988) 33, T 13.03. Affirmative defenses “\* \* \* include any other matters constituting an ‘avoidance or affirmative defense.’ An ‘avoidance or affirmative defense’ asserts “‘for pleading purposes only \* \* \* some legal reason why the plaintiff cannot have any recovery’ on an otherwise valid claim.” *Charles v. Conrad*, (Ohio App. 10<sup>th</sup> Dist.), 2005 Ohio 6106, ¶ 12,

quoting *ABN AMRO Mtge. Group v. Meyers* (2005), 159 Ohio App.3d 608, 824 N.E.2d 1041, ¶ 13, fn. 3. In the instant case, the Appellees unquestionably asserted the affirmative defense of laches that has never been addressed by the Appellants.

It is apparent by the fact we are before this Court that there must be a view on this issue which disagrees with the majority. For this “alternative” view, Appellants rely upon the holding from a single case, *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App.3d 159, 705 N.E.2d 738. While the Appellants rely on *Countrymark*, it appears the rest of this State and most of this Country follows the logic contained in cases such as *ABN AMRO Mtge. Group, Inc. v. Meyers, supra*, and, *ABN AMRO Mtge. Group v. Arnold*, (Ohio App. 2<sup>nd</sup> Dist.), 2005 WL 500792, and the many cases previously addressed.

In brief, the *Countrymark* Court stated that the moving party has the initial burden to come forward with evidence in support of its motion for summary judgment, and once “the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Countrymark at p. 168*, quoting *Dresher*. However, the *Countrymark* Court then appears to have misinterpreted the holding from *Dresher* when stating, “[s]ummary judgment requires the party opposing the motion to produce evidence on any issue for which that party bears the burden of proof at trial.” See also *Nice v. Marysville* (1992), 82 Ohio App.3d 109, 116, 611 N.E.2d 468, 472. This issue was addressed in *Dresher*. In *Dresher*, the Supreme Court of Ohio scrutinized the broad holdings from *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095 and *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265. In *Wing* and *Celotex*, the Courts followed the above holding that “A motion for summary judgment forces the nonmoving party to produce evidence

on any issue for which that party bears the burden of production at trial.” *Dresher, supra*, at p. 295. However, the *Dresher* Court specifically addressed this issue and stated, “We now believe that this holding in *Wing* is too broad. Specifically, paragraph three of the syllabus in *Wing fails to account for, among other things, the burden Civ. R. 56 places upon a moving party.*” *Dresher, supra*, at p. 295 (emphasis added). Realistically, the dispute or conflict before this Court has to do with the burden placed on the moving party. It is apparent the Countrymark Court misplaced its reliance upon *Celotex* and *Wing*, rather than following the holding from *Dresher*.

The *Countrymark* Court ultimately concluded and held that, “[b]ecause Smith bears the burden of establishing at trial his affirmative defense of illegality of contract, Smith must bring forth evidence of illegality to survive Countrymark’s motion for summary judgment.” *Countrymark* at 168. Clearly, the *Countrymark* court placed a higher burden on a non-moving party to a motion for summary judgment than this Court held in *Dresher*. The Third District then looked closely at all of the evidence that was presented in the case to determine whether the affirmative defense was ever supported by any evidence. The Court thereafter concluded that there had not been any evidence indicating illegality of contract.

*Countrymark* is distinguishable from the case at hand by the fact the Court of Appeals in this case was able to easily examine the facts and determine that an issue of fact existed as to the defense of “laches”. This is not a complicated affirmative defense that would have required heavy scrutiny. Quite simply, heavy machinery was used to construct roads and homes in the property adjacent to these Homeowners lots, while the Homeowners never said a word. The Court of Appeals could see this and raised questions as to “exactly when each owner found out about the proposed subdivisions,” “what the owners observed as to construction of streets and homes: and “what, if anything, the owners did to assert their rights....”

In *ABN AMRO v. Meyers*, the following question was proposed: “when a plaintiff moves for summary judgment, which party has the initial burden of informing the trial court as to the existence of a genuine issue of material fact with respect to affirmative defenses?” The Second District answered this question stating:

**"In such a case, a moving plaintiff bears the initial burden to demonstrate the absence of a genuine issue of material fact on its claim *and on a non-moving defendant's affirmative defenses*. If the moving plaintiff fails to meet its burden as to the affirmative defenses, then the defendant bears no burden on that issue. If the plaintiff does satisfy its initial burden as to the affirmative defenses, however, then the defendant has a reciprocal burden to establish a genuine issue of material fact on them."**

*ABN AMRO v. Arnold*, *supra* p. 3, ¶ 14 (emphasis not added)

Other than *Countrymark*, the Appellants reference a single additional Ohio case in support of their position which upon review is clearly distinguishable. The Appellants cite to *Citibank, N.A. v. Kessler*, (Ohio App. 10 Dist.), 2004 Ohio App. LEXIS 1656 as being additional authority on the issue at hand. In *Citibank*, the Tenth District upheld summary judgment and referenced the Decision from *Countrymark*. However, the procedural facts in that case are dissimilar to the facts at bar; as such this decision adds little assistance to the Court in this case before it. In *Citibank*, the plaintiff made a motion for summary judgment on a very simple claim on an account. Citibank presented to the court a contract and an affidavit of an account manager which verified the contract, the contract terms and the balance owed. Citibank presented sufficient evidence to meet all the elements of its claim on an account. The Court ruled in favor of Citibank and granted summary judgment. Then, *following* the ruling by the Court, the Defendant raised two sections of the Truth in Lending Act as his defense. The Tenth District ultimately looked at those newly raised, unsupported defenses regarding 15 U.S.C.A. §§1666, 1666i and decided that the court could not conclude that the appellant even pled a valid claim or defense arising out of the Truth in Lending Act.

Although *Citibank* references *Countrymark*, it appears as if the Tenth District may have accepted the defendant's affirmative defenses had they been valid defenses and/or pled properly. In the case at bar, no party can dispute that the defense of "laches" is at the very least a valid defense that creates a genuine issue of material fact in dispute. As previously briefed to the Trial Court, extensive construction took place without so much as a second look or comment from the Homeowners as "streets were built, there were numerous diggers, bulldozers, trucks and graders on the newly platted job site performing preparation work for the road and utility construction. The daily sight and sounds of the heavy machinery would have sent actual notice to Defendant homeowners that streets were being constructed. Instead of complaining, the Defendants remained unabashedly quiet." (See Plaintiffs' Reply Brief to Defendant Homeowners Memorandum in Opposition to Plaintiffs' Second Motion for Summary Judgment and Motion for Additional Time Pursuant to Civ R. 56(F) at p. 5).

Besides relying on *Countrymark*, the Appellants also reference other state's cases which at first glance appear to follow the minority view. The Appellants appear to incorrectly interpret an Indiana Supreme Court case, *Criss v. Bitzegaio* (1981), 420 N.E.2d 1221, 1981 Ind. LEXIS 749 . When simply doing a cursory review of *Criss*, it appears as if that case may lend some weight to the Appellants' position. However, upon careful analysis, *Criss* provides no support for the Appellants' position because in *Criss*, the nonmovant-appellant failed to raise an issue of fact, not an issue of law, in response to a motion for summary judgment. See also *Collins v. Dunifon* (1975), 163 Ind. App. 201, 206, 323 N.E.2d 264, 268 and *Mid-States Aircraft Engine, Inc. v. Mize Co.* (1984), Ind. App., 467 N.E.2d 1242. Clearly any reliance Appellant is placing on *Criss* is misplaced. The matter before this Court and the certified basis for this conflict has to do with an affirmative defense of "laches," i.e., an issue of law, not fact. However, once the defense of laches was asserted by the Appellees in its Answer, the Appellants were obligated to

address this legal issue in order to obtain a judgment as a matter of law. And, because the Appellants failed to address this issue, no reciprocal burden ever fell to the Appellees.

Also, in lieu of the fact that Appellants discussed other state cases as being supportive of their position, it is worth noting that the Appellants findings appear to be part of a small minority. In Hawaii, the Intermediate Court of Appeals held that, “where [a] party moving for summary judgment is [the] plaintiff, who will ultimately bear burden of [the] plaintiff’s claim at trial, plaintiff must: establish, by quantum of evidence required by substantive law, each element of his claim for relief and disprove every affirmative defense asserted against him.” *GECC Financial Corporation v. Jaffarian* (1995), 79 Hawaii 516, 904 P.2d 530. The Supreme Court of Tennessee stated that: “[i]f the party moving for summary judgment fails to negate the claims at issue, the burden never shifts to the nonmoving party to produce evidence establishing the existence of a genuine issue for trial, and the motion for summary judgment must fail.” *John Doe v. Roman Catholic Church of Nashville* (2004), 154 S.W.3d 22. In that case the court held that “the moving party on a summary judgment motion must satisfy its initial burden either by affirmatively negating an essential element of the nonmoving party’s claim or by conclusively establishing an affirmative defense; a moving party may accomplish this burden with or without supporting affidavits, but mere conclusory assertions that the nonmoving party has failed to make its claims are insufficient”. *Id.* at \*2.

In this matter, it was incumbent upon the Trial Court to consider the rights of all of the parties to this lawsuit, and consider all of the pleadings as a whole prior to rendering a judgment that could potentially affect those parties’ rights to their real property. The Trial Court failed to address all of the issues raised by Appellees in their pleadings. As such, the Decision by the Trial Court could only be partial in nature at best and a full motion for summary judgment was inappropriate. Following the holding from *ABN AMRO Mortgage Group v. Meyers*, it is clear

the award of summary judgment in the present case was improper as certain affirmative defenses were not addressed. *Id.*, *See also Ohio Civ. Rule 56 (D)*.

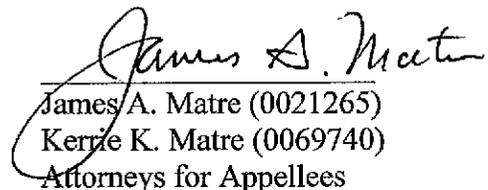
Certainly, in consideration of those facts and issues of law left unaddressed at the time the trial court sustained the Homeowners' motion for summary judgment, the Twelfth District Court of Appeals could only conclude that the trial court erred in sustaining summary judgment as the burden placed upon the moving party had not been met by either addressing all of the Homeowner's claims, and by failing to address the defenses raised in the Appellees' pleadings.

## CONCLUSION

Ohio law requires that a party moving for judgment under Civil Rule 56 bears the initial burden of demonstrating the absence of a genuine issue of material facts not only on its claims raised in its own Complaint, Crossclaim or Counterclaim, but the moving party is required to address the nonmoving party's affirmative defenses. The nonmoving party's duty to raise its own affirmative defenses does not arise unless and until the matter goes to trial before the fact finder. As such, if the party moving for summary judgment fails to meet its burden of demonstrating the absence of a genuine issue of material fact as to the affirmative defenses, then the nonmoving party bears no reciprocal burden on that issue and the motion for summary judgment must be overruled. Therefore, the Appellees respectfully request that the Court adopt its Proposition of law that:

**Pursuant to Ohio Civ. Rule 56, summary judgment is properly rendered in favor of a moving party only after the moving party demonstrates the absence of a genuine issue of material fact on its claim and on a non-moving party's affirmative defenses; and if the moving party fails to meet its burden as to the affirmative defenses, the non-moving party bears no reciprocal burden on that issue.**

Respectfully submitted,

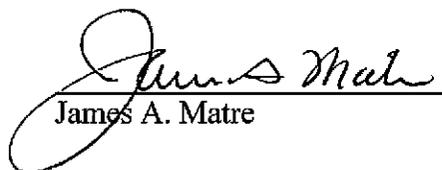


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served via ordinary U.S. Mail on this 15<sup>th</sup> day of May, 2007 upon the following: upon I certify that a copy of this document was mailed to:

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