

IN THE SUPREME COURT OF OHIO

PEGGY SEXTON, et al. : Case No.: 2007-0305
Appellants, : On Appeal From the Warren
VS. : County Court of Appeals,
CITY OF MASON, et al. : Twelfth Appellate District
Appellees. :

MERIT BRIEF OF APPELLEE RISHON ENTERPRISES

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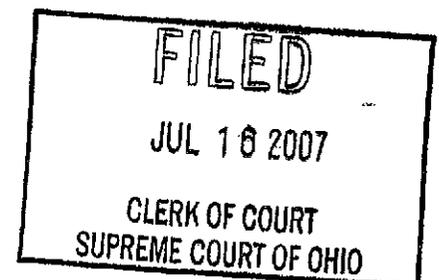


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STATEMENT OF THE CASE AND FACTS

Since 1988, Appellants, Peggy and Larry Sexton, have resided at 4721 Cox Smith Road, Mason, Ohio. 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. 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. 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.

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. Furthermore, Appellants were also aware that Rishon was developing the Trail Side Acres subdivision. The Appellants discussed their problems with the City of Mason for many years; however, these discussions broke down in 2003. Aside from one conversation in the early 90s, Appellants never discussed their flooding problems with Rishon.

On July 14, 2003, Appellants brought an action against the Appellee City of Mason, alleging trespass under the Ohio Rev. Code Ann. § 2305.09 (2007) and an unconstitutional taking without compensation. On August 27, 2003, Appellants filed an amended complaint with the same allegations against Appellees, Rishon Enterprises, McGee Smith Pushon and Don Thompson Excavating. Clearly, this amended complaint was filed more than four years after Appellants first discovered the water damage.

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 Pushon filed a Motion for Summary Judgment. On February 2, 2005, the magistrate ruled in favor of Appellants. This decision was then upheld by the trial court on May 13, 2005. Appellees, Rishon Enterprises and McGill Smith Pushon, filed a Motion for Reconsideration. Appellee, City of Mason, filed a second Motion for Summary Judgment. On February 6, 2006, the trial court granted Appellees summary judgment by overturning its prior decision. The trial court found that Appellants suffered from a permanent trespass and, therefore, the O.R.C. 2305.09 (D) four-year statute of limitations applied. Since Appellants filed their complaint against Rishon and McGee outside of the four-year statute of limitations period, the trial court granted summary judgment in favor of Rishon and McGee.

On February 22, 2006, Appellants filed a Notice of Appeal. Appellants submitted their appellate brief requesting that the Court of Appeals reverse the judgment of the trial court. Appellants argued that they suffered from a continuous trespass, therefore, the four-year statute of limitations did not bar the claim. The Court of Appeals filed its decision with the Warren County Clerk of Courts on January 8, 2007. Relying on this Court's decision in *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, the Court of Appeals determined that this case involves a permanent trespass rather than a continuing trespass. Therefore, the decision of the trial court was affirmed. Appellants now invoke the jurisdiction of the Supreme Court of Ohio.

ARGUMENT

Counter Proposition of Law No. 1: 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) and 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. Furthermore, a continuing trespass only occurs when there is some continuing or ongoing tortious activity attributable to the defendant and cannot be based solely on proof of continuing damages.

It is settled law in Ohio 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). *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207. In addition, a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year statute of limitation 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.* By 1994, Appellants were of the opinion that their water problems and flooding were due to the development of the Trailside Acres Subdivision. However, Appellants did not file suit against Rishon until August 27, 2003. Clearly, this is beyond the statute of limitations set forth in O.R.C. 2305.09 (D). Therefore, the lower courts correctly determined that Appellants' suit was 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. A continuing trespass occurs when there is some continuing conduct or ongoing tortious activity attributable to the defendant. *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 627; *Abraham v. BP Exploration & Oil, Inc.* (2002), 149 Ohio App.3d 471, 477. Conversely, a permanent trespass occurs when the defendant's tortious act has been fully accomplished. *Valley*, 43 Ohio St. at 625; *Abraham*, 149 Ohio App.3d at 477-78. As Rishon's work on the

subdivision ended in 1995, any alleged tortious conduct ceased after that time. Therefore, Appellants' claim was properly classified as a permanent trespass and the lower court's properly concluded that their suit is time barred.

Finally, this Court should not adopt the continuing damages approach as it would undermine the purpose of the statute of limitations and would be against public policy. Other state Supreme Courts have addressed the issue and, based on sound legal reasoning, determined that a cause of action for continuous trespass must focus on the conduct of the defendant. Furthermore, in the presence of clear legislative intent to create a statute of limitations, a continuous damages approach would destroy what the legislature intended to create.

A. 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 this case, it is not relevant whether Appellants' claim is labeled as a "permanent" or a "continuous" trespass because this Court determined that tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in O.R.C. 2305.09 (D). *Harris*, 86 Ohio St.3d at 207. Furthermore, this Court held that a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year statute of limitation 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.* By 1994, Appellants discovered that they had water problems and flooding. Therefore, the statute of limitations began to run at that time. However, Appellants did not file suit against Rishon until August 27, 2003, obviously beyond the statutory requirement. Thus, the lower courts properly found that Appellants' claim was time barred.

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. This Court reasoned that the homeowners discovered the continuing water damage more than four years before they filed suit.

Here, it is clear from the record that Appellants have been aware of the flooding problems and resulting damage since as early as 1992. Pursuant to *Harris*, the statute of limitations began to run at this time. However, Appellants did not file this suit against Rishon until August 27, 2003, more than four years after their discovery of the flooding. 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. Therefore, Appellants’ claim is time barred and this Court should affirm the decision of the Court of Appeals.

B. Under Ohio Law, a Continuing Trespass Only Occurs When There is Some Continuing or Ongoing Tortious Activity Attributable to the Defendant and Cannot be Based Solely on Proof of Continuing Damages

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. A continuing trespass occurs when there is some continuing conduct or ongoing tortious activity attributable to the defendant. *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 627; *Abraham v. BP Exploration & Oil, Inc.* (2002), 149 Ohio App.3d 471, 477. Conversely, a

permanent trespass occurs when the defendant's tortious act has been fully accomplished. *Valley*, 43 Ohio St. at 625; *Abraham*, 149 Ohio App.3d at 477-78. Therefore, a claim for continuing trespass cannot be based on continuing damages, as contended. By classifying acts of trespass in this manner, we give full effect to the intent of the Ohio legislature in adopting the four-year statute of limitations. Therefore, this case involves a permanent trespass, as recognized by the trial and Appellate court. As such, the suit is time barred.

In discussing the concept of a permanent trespass this Court stated the following:

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.

Franz, 43 Ohio St. at 625.

In discussing the concept of a continuous trespass this Court stated:

And when the owner of the land rightly and lawfully does an act entirely on his own land, and by means of such act utts 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 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.

By the use of the words, "if so continued by the act of such owner and actor," this Court has recognized and established that a claim of continuous trespass is supported by looking to the conduct of the alleged tortfeasor, and not the damages, as Appellants allege. Conversely, a man commits a permanent trespass when his tortious act has been fully accomplished. *Valley*, 43

Ohio St. at 625; *Abraham*, 149 Ohio App.3d at 477-78. 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 to accommodate the new construction of single family residences on lots within Trailside Acres. 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, Rishon had no further "contact" with said drainage system after 1995, and Appellants did not file suit against Rishon until 2003, Appellants' claim is barred by the four-year statute of limitations pursuant to R.C. §2305.09.

This interpretation is also consistent with how Ohio courts are applying this doctrine. In *Leonard Reith v. McGill Smith Punshon, Inc.* (2005), 163 Ohio App.3d 709, 711, 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.

The Court affirmed summary judgment in favor of the McGill Smith because the appellants experienced damage from McGill's Smith's alleged negligence beginning in 1993, but did not sue defendant 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.

Id. at 718.

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 four years after their discovery of the damage. Pursuant to this Court's interpretation of a continuous trespass and Ohio courts' application of the doctrine, this case does not involve a continuous trespass, but rather, involves a permanent trespass. Appellants did not file suit within the statutory period applicable to that claim, and therefore, Appellants are barred from bringing this suit.

C. This Court Should Not Adopt the Continuous Damages Approach Because it Would Undermine the Purpose of the Statute of Limitations and Would be Against Public Policy

In addressing Appellants' argument that this Court should adopt a "continuing damages" approach to the continuous trespass doctrine, other state Supreme Courts have addressed this issue and, based on sound reasoning, ruled that a cause of action for continuous trespass must be based on continuing conduct.

In *Breiggar v. H.E. Davis & Sons, Inc.* (Utah, 2002) 52 P.3d 1133, 1135 -1136 (Attached as Appendix pgs. 2-9), the Supreme Court of Utah addressed the issue as follows:

In *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998) (“Walker II”), we explained that, “[w]hether [a] trespass ... is continuous or permanent is a different question from whether the resulting injury ... is temporary or permanent.... A continuing trespass may cause either a permanent or a temporary injury.” *Id.* at 1246 n. 9. As Walker II makes clear, in classifying a trespass as permanent or continuing, we look solely to the act constituting the trespass, and not to the harm resulting from the act.

Because we look to the act constituting the trespass, Utah law cannot support a “reasonable abatability” test, which looks at the harm caused by the trespass.

Under this view, the difference between a permanent or continuing trespass is purely semantic. Once an act of trespass has occurred, the statute of limitations begins to run. If there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act. We characterize a trespass as “permanent” to acknowledge that the act or acts of trespass have ceased to occur. We characterize a trespass as “continuing” to acknowledge that multiple acts of trespass have occurred, and continue to occur, and that, in the event the statute of limitations has run on prior acts of trespass, recovery will only be allowed for those acts which are litigated in a timely fashion. Thus, as we explained in Walker I, “in the case of a continuing trespass ... the person injured may bring successive actions for damages until the [trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action.” 902 P.2d at 1232 (internal quotations, alterations, and citations omitted).

By classifying acts of trespass in this manner, we give full effect to the intent of the Utah Legislature in adopting a three-year statute of limitations for trespass. See Utah Code Ann. § 78-12-26(1) (1996) (setting forth a three-year limitations period for trespass); cf. *Carpenter*, 646 N.E.2d at 400 (“We decline to recognize ... a continuing trespass ... concept ... because, in adopting a three-year statute of limitations ... the Legislature stated a guiding public policy.”). To hold otherwise by, for example, adopting a reasonable abatability test as advocated by Breiggar, would allow a plaintiff to bring a complaint against any trespasser—even if the act of trespass occurred decades earlier—as long as the harm caused by the trespass could be reasonably abated. Such a view would clearly undermine the purposes behind statutes of limitations. See, e.g., *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 22, 993 P.2d 207 (“Statutes of limitations are intended to prevent unfair dilatory

litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur.”); *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989) (“In general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.”). While we do not condone acts of trespass, we agree with the Massachusetts Supreme Court that in cases of trespass, “plaintiffs [are] obliged to protect their own interests by timely action.” *Carpenter*, 646 N.E.2d at 400.

The same position was taken by the Massachusetts Supreme Court in *Carpenter v. Texaco, Inc.*, (Mass., 1995) 646 N.E.2d 398 (Attached as Appendix pgs. 10-12). *Carpenter* involved the release of gasoline from an underground tank, which seeped onto plaintiff's property no later than 1984. *Id.* at 399. The plaintiff brought suit in 1991, alleging a continuing trespass. *Id.* In holding that the suit was barred by the statute of limitations, the Massachusetts Supreme Court rejected the characterization of the trespass as continuing, noting that “a continuing trespass ... must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct.” *Id.* Thus, the court looked solely to the act of trespassing to determine whether the trespass was continuing, ignoring the injury caused by the trespass. The Massachusetts Supreme Court reaffirmed this principle in *Taygeta Corp. v. Varian Assocs., Inc.*, (Mass., 2002) N.E.2d 1053, 1064-65, again making a clear distinction between the act of trespassing and the injury caused by that act. *Id.* at 1065.

These decisions were based on sound legal reasoning and public policy. If this Court were to adopt the continuous damages approach, as proposed, it would eliminate the clear distinction between a permanent and continuous trespass. We characterize a trespass as “permanent” to acknowledge that the act or acts of trespass have ceased to occur. We

characterize a trespass as “continuing” to acknowledge that multiple acts of trespass have occurred, and continue to occur, and that, in the event the statute of limitations has run on prior acts of trespass, recovery will only be allowed for those acts which are litigated in a timely fashion.

Furthermore, to adopt any other approach would undermine the intent of the Ohio legislature in creating a four-year statute of limitations. Statutes of limitations serve a legitimate purpose and cannot be ignored; they are intended to put defendants on notice of adverse claims against them and to prevent plaintiffs from sleeping on their rights. *Barker v. Strunk* (March 5, 2007), Lorain App. No. 06CA008939, 2007 WL 633516; quoting *Crown, Cork & Seal Co., Inc. v. Parker* (1982), 462 U.S. 345, 352 (Attached as Appendix pgs. 13-18). Furthermore, statutes of limitations are intended to prevent prejudice to the defense caused by the passage of time. *State v. Davis* (April 19, 2006), Licking App. No. 05-CA-48, 2006 WL 1044460; citing *United States v. MacDonald* (1982), 456 U.S. 1, 8 (Attached as Appendix pgs. 19-24). If a claim for continuous trespass could be based on continuing damages it would allow a plaintiff to bring a complaint against any trespasser-even if the act of trespass occurred decades earlier as long as the harm caused by the trespass continued. If this could happen, much of the evidence essential to the defense could be destroyed, which would be great prejudice to the defendant. Furthermore, defendants would not be on notice of adverse claims and plaintiff’s would be able to sleep on their rights until some future time, allowing the damage to accumulate and worsen. Such a view would clearly undermine the purposes of the statute of limitations and would be against public policy.

CONCLUSION

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) and 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*, 86 Ohio St.3d at 207. As Appellants did not comply with the statute of limitations, this Court should affirm the decisions of the trial and Appellate courts. Even if *Harris* did not eliminate the distinction between a permanent and continuous trespass in damage to real property actions, under Ohio law, this case involves a permanent trespass. A claim for continuous trespass can only be based on continuing conduct by the defendant. To hold otherwise, would undermine the purposes of the statute of limitations and destroy legislative intent to create such a statute of limitations. Thus, Appellants' claim is still barred by the statute of limitations.

Respectfully submitted,

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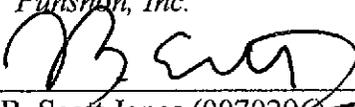
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular United States mail, this 11 day of July, 2007, on the following:

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APPENDIX

R.C. § 2305.09

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

⌘ Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

⌘ Limitations--Torts

➔ **2305.09 Four years; certain torts**

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Supreme Court of Utah.
BREIGGAR PROPERTIES, L.C., a Utah limited liability company, Plaintiff and Appellant,
v.
H.E. DAVIS & SONS, INC., a Utah corporation, and Sundance Development Corporation, a
Utah corporation, Defendants and Appellee.
No. 20000882.
June 7, 2002.

Landowner sued contractor for Department of Transportation who left debris on property for trespass. The District Court for the Fourth District, Provo Department, Gary D. Stott, J., granted summary judgment for contractor, and landowner appealed. The Supreme Court, Wilkins, J., held that: (1) trespass was a permanent, rather than a continuing trespass, and (2) limitations period began to run on date debris was dumped on property.
Affirmed.

West Headnotes

[1] KeyCite Notes 

- ◊30 Appeal and Error
 - ◊30XVI Review
 - ◊30XVI(G) Presumptions
 - ◊30k934 Judgment
 - ◊30k934(1) k. In General. Most Cited Cases

In reviewing a trial court's grant of summary judgment, Supreme Court views all the facts and the reasonable inferences drawn from them in a light most favorable to the nonmoving party.

[2] KeyCite Notes 

- ◊241 Limitation of Actions
 - ◊241II Computation of Period of Limitation
 - ◊241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
 - ◊241k95 Ignorance of Cause of Action
 - ◊241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

The discovery rule allows for tolling of a statute of limitations in several instances, including in exceptional circumstances when “application of the general rule would be irrational or unjust.

[3] KeyCite Notes 

- ◊241 Limitation of Actions

- ↳241II Computation of Period of Limitation
 - ↳241II(A) Accrual of Right of Action or Defense
 - ↳241k55 Torts
 - ↳241k55(5) k. Injuries to Property in General. Most Cited Cases

- ↳241 Limitation of Actions KeyCite Notes 
 - ↳241II Computation of Period of Limitation
 - ↳241II(A) Accrual of Right of Action or Defense
 - ↳241k55 Torts
 - ↳241k55(6) k. Continuing Injury in General. Most Cited Cases

If a trespass is characterized as permanent, the statute of limitations begins to run from the time the trespass is created, and the trespass may not be challenged once the limitations period has run; if, on the other hand, the trespass is characterized as continuing, the trespass may be challenged at any time, but recovery is limited. U.C.A.1953, 78-12-26(1).

[4] KeyCite Notes 

- ↳241 Limitation of Actions
 - ↳241II Computation of Period of Limitation
 - ↳241II(A) Accrual of Right of Action or Defense
 - ↳241k55 Torts
 - ↳241k55(5) k. Injuries to Property in General. Most Cited Cases

- ↳241 Limitation of Actions KeyCite Notes 
 - ↳241II Computation of Period of Limitation
 - ↳241II(A) Accrual of Right of Action or Defense
 - ↳241k55 Torts
 - ↳241k55(6) k. Continuing Injury in General. Most Cited Cases

In classifying a trespass as permanent or continuing for purposes of applying the statute of limitations, Supreme Court looks solely to the act constituting the trespass, and not to the harm resulting from the act. U.C.A.1953, 78-12-26(1).

[5] KeyCite Notes 

- ↳241 Limitation of Actions
 - ↳241II Computation of Period of Limitation
 - ↳241II(A) Accrual of Right of Action or Defense
 - ↳241k55 Torts
 - ↳241k55(5) k. Injuries to Property in General. Most Cited Cases

Once an act of trespass has occurred, the statute of limitations begins to run; if there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act. U.C.A.1953, 78-12-26(1).

[6] KeyCite Notes 

- ◌386 Trespass
 - ◌386II Actions
 - ◌386II(B) Proceedings in General
 - ◌386k35 k. Time to Sue. Most Cited Cases

A trespass is characterized as “permanent” to acknowledge that the act or acts of trespass have ceased to occur; a trespass is characterized as “continuing” to acknowledge that multiple acts of trespass have occurred, and continue to occur, and that, in the event the statute of limitations has run on prior acts of trespass, recovery will only be allowed for those acts which are litigated in a timely fashion. U.C.A.1953, 78-12-26(1).

[7] KeyCite Notes 

- ◌228 Judgment
 - ◌228XIII Merger and Bar of Causes of Action and Defenses
 - ◌228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
 - ◌228k600 Successive Causes of Action
 - ◌228k606 k. Continuing Trespasses or Nuisances. Most Cited Cases

- ◌241 Limitation of Actions KeyCite Notes 
 - ◌241II Computation of Period of Limitation
 - ◌241II(A) Accrual of Right of Action or Defense
 - ◌241k55 Torts
 - ◌241k55(6) k. Continuing Injury in General. Most Cited Cases

In the case of a continuing trespass, the person injured may bring successive actions for damages until the trespass is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action. U.C.A.1953, 78-12-26(1).

[8] KeyCite Notes 

- ◌241 Limitation of Actions
 - ◌241II Computation of Period of Limitation
 - ◌241II(A) Accrual of Right of Action or Defense
 - ◌241k55 Torts

☞241k55(5) k. Injuries to Property in General. Most Cited Cases

☞241 Limitation of Actions KeyCite Notes



☞241II Computation of Period of Limitation

☞241II(A) Accrual of Right of Action or Defense

☞241k55 Torts

☞241k55(6) k. Continuing Injury in General. Most Cited Cases

Debris dumped on landowner's property by contractor for the Department of Transportation was a "permanent," rather than a continuing, trespass, and landowner's cause of action accrued, and three year statute of limitations began to run, on the date the debris was dumped; fact that a pile of debris continued to remain on property, or the possibility it could be reasonably abated, was irrelevant to commencement of limitations period. U.C.A.1953, 78-12-26(1).

*1134 John C. Rooker, Salt Lake City, for plaintiff.
Stephen Quesenberry, Provo, David P. Williams, Eric K. Schnibbe, Salt Lake City, for defendants.

WILKINS, Justice:

¶ 1 Breiggar Properties, L.C., ("Breiggar") appeals from the trial court's grant of summary judgment in favor of H.E. Davis & Sons, Inc. ("Davis"). Because Breiggar's complaint was barred by the three-year statute of limitations in section 78-12-26(1) of the Utah Code, we affirm.

BACKGROUND

[1]  ¶ 2 In reviewing a trial court's grant of summary judgment, we view all the facts and the reasonable inferences drawn from them in a light most favorable to the nonmoving party. E.g., Pigs Gun Club, Inc. v. Sanpete County, 2002 UT 17, ¶ 7, 42 P.3d 379.

¶ 3 Davis entered into an agreement with the Utah Department of Transportation ("UDOT") to do slope work, rock removal, and shoulder-widening work on a portion of State Road 92. In the course of this work, Davis dumped rocks, soil, and other debris on property owned by Breiggar, without Breiggar's permission or knowledge. Davis completed the work by December 10, 1996.

¶ 4 In September 1997, Breiggar discovered that debris had been dumped on its property. Breiggar demanded that Davis remove the debris and attempted to negotiate a settlement of the dispute. After negotiations failed, Breiggar filed a complaint on March 21, 2000, against Davis and Sundance Development Corporation ("Sundance"),^{FN1} alleging causes of action for trespass, continuing trespass, and negligence.
FN1. The role of Sundance in this case is unclear from the record, as is the precise relationship between Sundance, Davis, and UDOT. However, the trial court stated that its decision applied to both Sundance and Davis, a determination which neither party has opposed. Likewise, our

holding applies to both Sundance and Davis, and any reference to one party incorporates the other.

¶ 5 Before the trial court, Davis moved for summary judgment on the grounds that (1) the three-year statute of limitations in section 78-12-26(1) of the Utah Code barred Breiggar's trespass and negligence claims, and (2) the debris did not constitute a continuing trespass, thereby rendering the claim time barred as well. Breiggar responded by arguing that (1) the discovery rule should be changed and applied to toll the statute of limitations for the trespass claim and (2) the statute of limitations did not bar the continuing trespass claim. Breiggar likewise moved for summary judgment in its favor.

¶ 6 The trial court granted Davis' motion, and, noting that both parties conceded "that the debris was not placed on Plaintiff's property after December 10, 1996," held that the trespass was permanent and that, therefore, as the three-year statute of limitations began to run by December 10, 1996, the complaint-filed on March 21, 2000-was time barred. The trial court declined to modify the discovery rule. Breiggar appeals.

ISSUES PRESENTED AND STANDARD OF REVIEW

[2]  ¶ 7 The determinative issue before us is whether Breiggar's complaint was barred by the statute of limitations in section 78-12-26(1) of the Utah Code.FN2 The proper application*1135 of the statute of limitations hinges on the distinction between permanent and continuing trespass. In addressing this issue, we consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact exist. See, e.g., Pigs Gun Club, Inc. v. Sanpete County, 2002 UT 17, ¶ 7, 42 P.3d 379.

FN2. Breiggar also raises the issue of whether the discovery rule should be broadened to toll the statute of limitations until a plaintiff knows or should know of its claim. The discovery rule allows for tolling in several instances, including in "exceptional circumstances" when "application of the general rule would be irrational or unjust." Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995) (" Walker I ") (quoting Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992)). Breiggar concedes that it cannot satisfy these standards but argues that application of the discovery rule as articulated in Walker I would be inequitable and that the rule should consequently be broadened and applied. We see no "exceptional circumstances" in this case and see no reason to modify the current discovery rule.

ANALYSIS

I. CHARACTERIZATION OF TRESPASS

[3]  ¶ 8 The dispute before us today arises out of confusion created by the seemingly different application of the statute of limitations to a trespass depending on whether the trespass is characterized as permanent or continuing. We have previously addressed this issue in Walker Drug Co. v. La Sal Oil Co., which explains:

When a cause of action for nuisance or trespass accrues for statute of limitations purposes

depends on whether the nuisance or trespass is permanent or continuing. Where a nuisance or trespass is of such character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance or trespass is created. However, if the nuisance or trespass may be discontinued at any time it is considered continuing in character.... [I]n the case of a continuing trespass or nuisance, the person injured may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action.

902 P.2d 1229, 1232 (Utah 1995) (citations, alterations, and quotations omitted) (“ Walker I ”). Under Walker I, if a trespass is characterized as permanent, the statute of limitations begins to run from the time the trespass is created, and the trespass may not be challenged once the limitations period has run. If, on the other hand, the trespass is characterized as continuing, the trespass may be challenged at any time, but recovery is limited. While these concepts may be clear, we acknowledge that characterizing a trespass as permanent or continuing can be confusing with only the standard articulated in Walker I.

¶ 9 In the instant case, Breiggar asserts that the debris dumped by Davis constitutes a continuing trespass. In support of this assertion, Breiggar suggests that Utah law on the characterization of permanent and continuing trespasses is unclear, and that a “reasonable abatability” test, adopted by several other jurisdictions, should be adopted here. See, e.g., *Mangini v. Aerojet-General Corp.*, 12 Cal.4th 1087, 51 Cal.Rptr.2d 272, 912 P.2d 1220, 1225-30 (1996). We disagree that a “reasonable abatability” test should be adopted and take this opportunity to clarify the distinction between permanent and continuing trespasses under Utah law.

[4]  ¶ 10 In *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998) (“ Walker II ”), we explained that, “[w]hether [a] trespass ... is continuous or permanent is a different question from whether the resulting injury ... is temporary or permanent.... A continuing trespass may cause either a permanent or a temporary injury.” *Id.* at 1246 n. 9. As Walker II makes clear, in classifying a trespass as permanent or continuing, we look solely to the act constituting the trespass, and not to the harm resulting from the act. FN3
FN3. Because we look to the act constituting the trespass, Utah law cannot support a “reasonable abatability” test, which looks at the harm caused by the trespass.

[5]  [6]  [7]  ¶ 11 Under this view, the difference between a permanent or continuing trespass is purely semantic. Once an act of trespass has occurred, the statute of limitations begins to run. If there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act. We characterize a trespass as “permanent” to acknowledge that the act or acts of trespass have ceased to occur. We characterize a trespass as “continuing” to acknowledge that multiple acts of trespass have occurred, and continue to occur, and that, in the event the statute of limitations has run on prior acts of trespass, *1136 recovery will only be allowed for those acts which are litigated in a timely fashion. Thus, as we explained in Walker I, “in the case of a continuing trespass ... the person injured may bring successive actions for damages until the [trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual

injury suffered within the three years prior to commencement of each action.” 902 P.2d at 1232 (internal quotations, alterations, and citations omitted).

¶ 12 The same position has been taken by the Massachusetts Supreme Court in *Carpenter v. Texaco, Inc.*, 419 Mass. 581, 646 N.E.2d 398 (1995). *Carpenter* involved the release of gasoline from an underground tank, which seeped onto the plaintiff's property no later than 1984. *Id.* at 399. The plaintiff brought suit in 1991, alleging a continuing trespass. *Id.* In holding that the suit was barred by the statute of limitations, the Massachusetts Supreme Court rejected the characterization of the trespass as continuing, noting that “a continuing trespass ... must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct.” *Id.* (emphasis added). Thus, the court looked solely to the act of trespassing to determine whether the trespass was continuing, ignoring the injury caused by the trespass. The Massachusetts Supreme Court reaffirmed this principle in *Taygeta Corp. v. Varian Assocs., Inc.*, 436 Mass. 217, 763 N.E.2d 1053, 1064-65 (2002), again making a clear distinction between the act of trespassing and the injury caused by that act. *Id.* at 1065 (citing, *inter alia*, *Walker II*, 972 P.2d at 1246 n. 9).

¶ 13 By classifying acts of trespass in this manner, we give full effect to the intent of the Utah Legislature in adopting a three-year statute of limitations for trespass. See Utah Code Ann. § 78-12-26(1) (1996) (setting forth a three-year limitations period for trespass); *cf.* *Carpenter*, 646 N.E.2d at 400 (“We decline to recognize ... a continuing trespass ... concept ... because, in adopting a three-year statute of limitations ... the Legislature stated a guiding public policy.”). To hold otherwise by, for example, adopting a reasonable abatability test as advocated by *Breiggar*, would allow a plaintiff to bring a complaint against any trespasser—even if the act of trespass occurred decades earlier—as long as the harm caused by the trespass could be reasonably abated. Such a view would clearly undermine the purposes behind statutes of limitations. See, e.g., *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 22, 993 P.2d 207 (“Statutes of limitations are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur.”); *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989) (“In general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.”). While we do not condone acts of trespass, we agree with the Massachusetts Supreme Court that in cases of trespass, “plaintiffs [are] obliged to protect their own interests by timely action.” *Carpenter*, 646 N.E.2d at 400.

II. APPLICATION TO BREIGGAR'S COMPLAINT

[8]  ¶ 14 With the foregoing legal principles in mind, we look to the record before the trial court at the time it made its ruling to determine when the statute of limitations began to run on *Breiggar's* causes of action. The uncontested facts before the trial court established that the act of trespass—the dumping of debris by *Davis* onto *Breiggar's* property—occurred not later than December 10, 1996. The trial court correctly determined that the applicable statute of limitations is found in section 78-12-26(1) of the Utah Code, which provides for a three-year limitations period. Because the date was not contested, the trial court was correct in holding as a matter of

law that the act of trespass occurred by December 10, 1996, and that, consequently, the three-year statute of limitations began to run on that date. The fact that the pile of debris continued to remain on Breiggar's property, or the possibility that it could be reasonably abated is irrelevant to this conclusion. Thus, Breiggar was required to file its complaint by December 10, *1137 1999, in order to be within the three-year limitations period. See Utah Code Ann. § 78-12-26(1) (1996). Breiggar's complaint-filed March 21, 2000-was not timely filed and was therefore barred by the statute of limitations. Thus, because the trial court "correctly applied the law and correctly concluded that no disputed issues of material fact existed," Pigs Gun Club, Inc. v. Sanpete County, 2002 UT 17, ¶ 7, 42 P.3d 379 (citations and quotations omitted), we affirm the trial court's grant of summary judgment in favor of Davis.

CONCLUSION

¶ 15 It was undisputed before the trial court that the act of trespass occurred, at the latest, on December 10, 1996. This date marked the beginning of the three-year limitations period. Breiggar's suit was filed after the limitations period expired and was, therefore, time barred. Accordingly, we affirm the trial court's grant of summary judgment.

¶ 16 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice HOWE, and Justice RUSSON concur in Justice WILKINS' opinion.

Utah, 2002.
Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.
52 P.3d 1133, 449 Utah Adv. Rep. 3

END OF DOCUMENT

Supreme Judicial Court of Massachusetts,
Suffolk.
Irma CARPENTER

v.

TEXACO, INC., & others ^{FN1} (and two companion cases ^{FN2}).

FN1. Hariklia Koronios, as trustee of the Metro Realty Trust, and George Koronios.

FN2. Josephine Kelly vs. Texaco, Inc., & others; and Jean Giunta vs. Texaco, Inc., & others.

Argued Jan. 9, 1995.

Decided March 2, 1995.

Landowners filed actions against owners and operators of gas station, asserting negligence, nuisance, trespass and violation of Massachusetts Oil and Hazardous Material Release Prevention Act concerning seepage of gasoline from underground storage tank. The Superior Court Department, Suffolk County, Margot Botsford, J., granted summary judgments in favor of defendants. Appeal was taken. After transfer on its own initiative, the Supreme Judicial Court, Wilkins, J., held that: (1) seepage onto owners' property occurred more than three years before landowners filed suit and, thus, three-year limitations period barred trespass and nuisance claims, and (2) continued presence of gasoline on owner's property from previous but terminated tortious or unlawful conduct did not establish continuing trespass or nuisance claims. Judgments affirmed.

West Headnotes

[1] KeyCite Notes



↻ 241 Limitation of Actions

↻ 241II Computation of Period of Limitation

↻ 241II(A) Accrual of Right of Action or Defense

↻ 241k55 Torts

↻ 241k55(6) k. Continuing Injury in General. Most Cited Cases

Seepage of gasoline onto owners' property from leaking underground storage tank occurred more than three years before landowners filed suit and, thus, three-year limitations period barred owners' trespass and nuisance claims, despite claim that continued presence of gasoline was continuing trespass or nuisance; landowners did not allege repeated or recurrent wrongs involving new harm to property within limitations period. M.G.L.A. c. 21E, § 11A(4).

[2] KeyCite Notes



↻ 241 Limitation of Actions

↻ 241II Computation of Period of Limitation

↻ 241II(A) Accrual of Right of Action or Defense

↻ 241k55 Torts

↻ 241k55(6) k. Continuing Injury in General. Most Cited Cases

Continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and cannot be established by continuation of harm caused by previous but terminated tortious or unlawful conduct. M.G.L.A. c. 21E, § 11A(4).

[3] KeyCite Notes



☞ 241 Limitation of Actions

☞ 241II Computation of Period of Limitation

☞ 241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War

☞ 241k105 Pendency of Action or Other Proceeding

☞ 241k105(2) k. Pendency of Action on Different Cause or in Different Forum. Most

Cited Cases

Landowners had no right to delay commencing actions based on seepage of gasoline onto their property from underground storage tank until after resolution of all actions brought by Commonwealth against owners of tank; Commonwealth was not representing landowners who were obliged to protect their own interests by taking timely action.

****399** George F. Hailer, Boston, for plaintiffs.

***582** Francis M. Lynch, Boston, for Texaco, Inc.

William F. Hicks, Boston, for George Koronios & others.

Before LIACOS, C.J., and WILKINS, NOLAN, LYNCH and GREANEY, JJ.

WILKINS, Justice.

A Superior Court judge allowed the defendants' motions for summary judgment and dismissed the plaintiffs' actions. She did so on the ground that the actions had not been commenced within three years of the date in 1982 when the respective plaintiffs became aware of the pollution of their property by gasoline that had leaked from an underground tank on nearby property. The defendant Texaco once owned a gasoline station on that property but had sold it in 1980. The offending underground tank was removed in 1981. After 1984, there was no continuing release of gasoline from the gasoline station property, nor seepage of gasoline onto the plaintiffs' property. The defendant George Koronios is a current operator of the station. The defendant trustee is the current owner of the land on which the station is located.

[1]  The plaintiffs allege causes of action in negligence, nuisance, and trespass, and a claim under the Massachusetts Oil and Hazardous Material Release Prevention Act, G.L. c. 21E (1992 ed.). In response to the defendants' contention that the statute of limitations had run on their claims, the plaintiffs agree that their claims are subject to a three-year statute of limitations (see G.L. c. 260, § 2A [1992 ed.]; Oliveira v. Pereira, 414 Mass. 66, 73, 605 N.E.2d 287 [1992]).^{FN3} They contend, however, that their nuisance and trespass claims, but not their other claims, are based on the continued presence of gasoline on their properties which, they argue, amounts to a continuing trespass and a continuing nuisance, and thus they may recover for damages occurring within three years of the dates of the commencement of their respective actions. Two of these actions were commenced in October, 1991, and the other in January, 1992. We transferred the plaintiffs' appeal to this court.

FN3. See now G.L. c. 21E, § 11A(4), inserted by St.1992, c. 133, § 309.

[2]  The plaintiffs argue that the continuing presence of the gasoline on their property is analogous to cases in which relief was granted because of the continued presence of an unauthorized ***583** structure erected on one's land. The judge rightly rejected this argument because a continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct. See Sixty-Eight Devonshire, Inc. v. Shapiro, 348 Mass. 177, 183-184, 202 N.E.2d 811 (1964); Wishnewsky v. Saugus, 325 Mass. 191, 194, 89 N.E.2d 783

(1950). The cases on which the plaintiffs rely concern not a single encroachment resulting in permanent harm but rather repeated or recurrent wrongs involving new harm to property on each occasion. ^{FN4} The gasoline on the plaintiffs' property ****400** is the consequence of tortious conduct and of seepage that occurred before 1985. There is, therefore, no continuing trespass or nuisance. ^{FN5}

FN4. Those cases involved continuing nuisances that were not barred by the statute of limitations because of the recurring nature of the harm. See, e.g., Sixty-Eight Devonshire, Inc. v. Shapiro, 348 Mass. 177, 184, 202 N.E.2d 811 (1964) (gutter repeatedly poured water onto plaintiff's building); Asjala v. Fitchburg, 24 Mass.App.Ct. 13, 19, 505 N.E.2d 575 (1987) (continuing damage from continuing private nuisance [defective retaining wall], cause of action not time barred). In those cases rights were being invaded from time to time, and thus there were continuing trespasses or continuing nuisances. See also Wishnewsky v. Saugus, 325 Mass. 191, 194, 89 N.E.2d 783 (1950) (recurrent flooding of drainage system causing damage to plaintiff's land); Wells v. New Haven & Northampton Co., 151 Mass. 46, 47-49, 23 N.E. 724 (1890) (culvert repeatedly channeled water onto plaintiff's land); Prentiss v. Wood, 132 Mass. 486, 487 (1882) (dam repeatedly set water back on plaintiff's mill).

The plaintiffs also rely on Worcester v. Gencarelli, 34 Mass.App.Ct. 907, 607 N.E.2d 748 (1993), which involved the filling of a wetland in violation of a statute (G.L. c. 131, § 40 [1992 ed.]). The facts recited in the opinion do not indicate whether there were recurring wrongs that would represent continuing trespasses or nuisances. It is unimportant to know the answer, however, because, even if there were no recurring events, G.L. c. 131, § 40, states that each day that a violation continues (such as leaving in place unauthorized fill) constitutes a separate offense.

FN5. This case does not involve the seepage of gasoline onto the plaintiffs' properties within three years of the commencement of these actions, a circumstance that would present a different case. The plaintiffs' brief points to no record facts that support such a contention.

We decline to recognize for the first time a continuing trespass or continuing nuisance concept in the circumstances such as exist in this case, in part, because, in adopting a ***584** three-year statute of limitations in 1992 for private actions under G.L. c. 21E, the Legislature stated a guiding public policy. See G.L. c. 21E, § 11A, inserted by St.1992, c. 133, § 309. There is no distinguishing reason to justify our granting relief under a label of continuing trespass or continuing nuisance in this case when the Legislature did not recognize a similar concept of a continuing wrong under G.L. c. 21E in its 1992 enactment of a statute of limitations for G.L. c. 21E.



[3] There is no merit to the plaintiffs' argument that they should be allowed to delay commencing their actions until all actions that the Commonwealth brought against the defendants had been resolved. The Commonwealth was not representing the plaintiffs' interests in pursuing the defendants. The plaintiffs were obliged to protect their own interests by timely action.

Judgments affirmed.

Mass., 1995.
Carpenter v. Texaco, Inc.
419 Mass. 581, 646 N.E.2d 398

Court of Appeals of Ohio,
Ninth District, Lorain County.
Paul E. BARKER, Appellant
v.
Todd STRUNK, et al., Appellees.
No. 06CA008939.
Decided March 5, 2007.

Appeal from Judgment Entered in the Court of Common Pleas County of Lorain, Ohio, Case No. 05CV144139.

Nathan J. Wills, Attorney at Law, for Appellant.
Angela M. Fox, Attorney at Law, for Appellee.

DECISION AND JOURNAL ENTRY

*1 This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶ 1} Appellant, Paul Barker, appeals from the judgment of the Lorain County Court of Common Pleas which granted summary judgment in favor of Appellee, Todd Strunk. This Court affirms.

I.

{¶ 2} On November 7, 2003, Appellant, Paul Barker, sustained personal injuries in a motor vehicle collision with Appellee, Todd Strunk. On November 14, 2005, Appellant filed suit against Appellee in Lorain County Common Pleas Court, alleging that he sustained injuries as a result of Appellee's negligent operation of his vehicle. Pursuant to Ohio's statute of limitations for personal injury actions, Appellant was required to file this action on or before November 7, 2005. Because Appellant filed his complaint outside of the statute of limitations, on November 14, 2005, Appellee filed a motion to dismiss Appellant's action.

{¶ 3} On December 12, 2005, Appellant filed a motion for leave to respond to Appellee's motion to dismiss. On December 15, 2005, Appellant filed a request for discovery. On January 11, 2006, Appellant filed a brief in opposition to Appellee's motion to dismiss. Appellant first alleged that representatives of Appellee misinformed him of the accident date. Appellant additionally requested discovery to determine whether Appellee left the state since November 7, 2003. Appellant alleged that if Appellee left the state during the time period between the accrual of the cause of action and the expiration of the statute of limitations, then the two year statute of limitations is tolled under R.C. 2305.15 for the time during which Appellee was absent.

{¶ 4} On January 26, 2006, the trial court entered an order informing the parties that it would treat Appellee's motion to dismiss as a motion for summary judgment. The court permitted the parties to conduct further discovery and to supplement their briefs accordingly. The parties conducted additional discovery and supplemented their briefs. On April 3, 2006, Appellant filed a supplemental brief in opposition to Appellee's motion to dismiss. In Appellant's brief, he argued that his complaint was timely filed because Appellee was outside the state in excess of seven days during the accrual period, thereby tolling the statute of limitations for at least seven days. On April 25, 2006, the trial court entered an order granting Appellee's summary judgment motion on the grounds that Appellant had failed to provide evidence demonstrating Appellee's absence for more than six days during the two years between November 7, 2003 and November 7, 2005. Appellant timely filed a notice of appeal, raising two assignments of error.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRONEOUSLY GRANTED [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE LIMITATIONS PERIOD BECAUSE THE LIMITATIONS PERIOD WAS TOLLED UNDER R.C. § 2305.15 DUE TO [APPELLEE'S] ABSENCE FROM OHIO FOR TEN (10) DAYS."

ASSIGNMENT OF ERROR II

*2 "THE TRIAL COURT ERRONEOUSLY GRANTED [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE LIMITATIONS PERIOD BECAUSE [APPELLEE] WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

{¶ 5} In Appellant's assignments of error he contends that the trial court erred in granting Appellee's motion for summary judgment because (1) the limitations period was tolled under R.C. 2305.15 due to Appellee's absence from Ohio for ten days, (2) the trial court failed to construe the evidence most strongly in favor of the non-moving party and (3) the trial court erred in finding that reasonable minds could not find that Appellee was absent from Ohio in excess of seven days. We disagree.

{¶ 6} This Court reviews an award of summary judgment de novo. Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. Viock v. Stowe-Woodward Co. (1983), 13 Ohio App.3d 7, 12.

{¶ 7} Pursuant to Civil Rule 56(C), summary judgment is proper if:

"(1) No genuine issue as to any material fact remains to be litigated;

(2) the moving party is entitled to judgment as a matter of law; and

(3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. Dresher v. Burt (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Henkle v. Henkle (1991), 75 Ohio App.3d 732, 735.

{¶ 8} Appellant concedes that the complaint was filed seven days after the two-year statute of limitations ran on his personal injury claim. However, Appellant asserts that summary judgment was inappropriate because Appellee was out of town for ten days thereby entitling him to toll the statute of limitations for the period during which Appellee was out of the state. Thus, the only issue present in this case is whether the statute of limitations was tolled for at least seven days, thereby making the filing of the complaint timely.

*3 {¶ 9} Statutes of limitations are remedial in nature. Elliot v. Fosdick & Hilmer, Inc. (1983), 9 Ohio App.3d 309, 312. Consequently, statutes of limitation are entitled to liberal construction. Cero Realty Corp. v. American Mfrs. Mut. Ins. Co. (1960), 171 Ohio St. 82, 85. In addition,

savings statutes should be liberally construed to ensure that cases are decided on the merits whenever possible, rather than on procedural technicalities. *Stenglein v. Nelson*, 11th Dist. No.2003-P-0004, 2003-Ohio-5709, at ¶ 11. "Statutes of limitations, however, do serve a legitimate purpose and cannot be ignored. A statute of limitations is 'intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.'" *Id.* at ¶ 12, quoting *Crown, Cork & Seal Co., Inc. v. Parker* (1982), 462 U.S. 345, 352.

{¶ 10} An action for bodily injury or injury to personal property shall be brought within two years after the cause thereof arose. R.C. 2305.10(A). Pursuant to R.C. 2305.15, the statute of limitations, however, tolls for the time period in which the person subject to suit departs the state. R.C. 2305.15(A) tolls the statute of limitations for the period during which the defendant is

"out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought."

{¶ 11} As Appellee pled R.C. 2305.10 as an affirmative defense, the obligation of showing a genuine issue of fact as to whether Appellee was absent from the state so as to prevent, or toll, the running of the statute of limitations is on Appellant. *American Bankers Ins. Co. of Florida v. Carroll* (Aug. 4, 1977), 10th Dist. No. 77AP-297, at *4. Consequently, Appellant has the burden of establishing that Appellee was absent from Ohio for at least seven days during the accrual period. *Walter v. Johnson* (1983), 10 Ohio App.3d 201, 202, citing *Conway v. Smith* (1979), 66 Ohio App.2d 65, 70.

{¶ 12} Appellant contends that between November 7, 2003 and November 7, 2005, Appellee was outside Ohio for ten days. More specifically, Appellant alleges that Appellee was visiting New York City on August 31, September 1, and September 2, 2004. Appellant contends that these absences constitute a three-day absence from the state. Appellant additionally contends that Appellee was visiting Ontario, Canada on March 17, March 18 and March 19, 2005. Appellant contends that this trip amounts to a three-day absence from the state. In addition, Appellant contends that on September 23, September 24, September 25 and September 26, 2005, Appellee was again out of the state, visiting New York City. Appellant contends that this trip amounted to a four day absence from the state.

*4 {¶ 13} We find guidance in both case law and secondary authorities for our computation of a day's absence from the state. Ohio Jurisprudence provides that

"As a general rule, fractions of a day are not considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded. The term 'day,' in law, embraces the entire day, and refers to a day as a unit of time, rather than as an aggregation of hours, minutes, or seconds. In this sense, a day is not capable of subdivision into hours, minutes, or seconds, but is to be taken as a whole. In such computations, the hours are not counted to ascertain whether a period of 24 hours or a given number of such periods has elapsed between the act to be done and the day from which the time is to begin running. Every day and every part of that day is, by this rule, one day. The last moment of any day is considered to be one day before the first moment of the next day, although the elapsed time is infinitesimal." 88 Ohio Jur.3d, Time, § 14.

{¶ 14} In *Elliott v. Davenport* (June 22, 1979), 6th Dist. No. L-78-254, the Sixth District Court of Appeals was faced with a factually similar situation. The plaintiff in *Elliott* filed her personal injury action more than a month after the two-year statute of limitations had run. The plaintiff asserted that the statute of limitations was tolled by virtue of R.C. 2305.15. As in this matter, the plaintiff asserted that the defendant's absences for part of a day should have been accumulated to

extend the time within which suit could be filed. The Sixth District declined to compute time in this manner. We find the court's reasoning particularly relevant to our analysis:

"Statutes of limitations are enacted in order to lay stale claims to rest. The legislature recognizes that, over time, witnesses move and memories fade. To permit a plaintiff who has slept on her rights to accumulate every theoretical hour the defendant was absent from the state in order to extend the time mandated by statute for asserting a claim, does violence to the legislative intent." *Id.* at * 1.

The court further explained that "[t]o [] extend the statute to hours, minutes or perhaps far away thoughts is too much." *Id.* at *2. Further, the court reasoned that if a defendant was out of the state for part of a day, then he was also in the state for part of a day. *Id.* We are persuaded by the court's reasoning. Accordingly, in computing the tolling time, we will only consider whole days, not fractions of days. Under this method of computation, absences from this state covering only a portion of one calendar day are not absences within the contemplation of R.C. 2305.15.

{¶ 15} On appeal, Appellant attempts to utilize Appellee's bank records to establish the dates on which Appellee was absent from the state. There is no indication that the trial court relied on the bank records in disposing of Appellee's summary judgment motion. However, the trial court is presumed to consider only admissible evidence in reviewing a controversy to determine whether there are material facts in dispute. *Plumbers Local Union No. 94, AFL-CIO v. Kokosing Constr. Co.* (Sept. 28, 1992), 5th Dist. No. 8865, at *3. The bank statements are not admissible evidence. See *Stuller v. Price*, 10th Dist. Nos. 02AP-29, 02AP-267, 2003-Ohio-583, at ¶ 20 (finding that the appellee was entitled to summary judgment because the appellants did not satisfy their reciprocal burden to present admissible evidence). Evid. R. 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." While Evid. R. 803(6) provides an exception to the hearsay rule for business records, Appellant failed to lay a proper foundation for the admission of these statements. To set a proper foundation for the admission of a business record, the party seeking to offer the document must demonstrate that

*5 "(1) the record was prepared by an employee of the business who had a duty to report the information; (2) the person providing the information contained in the record had personal knowledge of the event or transaction reported; (3) the record was prepared at or near the time of the event or transaction; and (4) it was a regular practice or custom of the business in question to prepare and retain the type of record." *State v. Hall*, 2d Dist. No. CIV.A.19074, 2003-Ohio2824, at ¶ 34, citing *McCormick v. Mirrored Image, Inc.* (1982), 7 Ohio App.3d 232, 233.

The record before us reveals that Appellant has failed to meet this burden. Accordingly, we decline to consider the bank statements.

{¶ 16} We now turn to Appellee's deposition testimony. With regard to Appellee's trip to New York City in August and September of 2004, Appellee testified:

"Q. So you could have left on August 31 st?

" * * *

"Q. * * * you would have been out of the state a good portion of the day on August 31st, yes?

"A. Yes.

"Q. All day September 1st, yes?

"A. All day September 2nd?

" * * *

"Q. So we're not sure if you were out of the state on the second or the third?

"A. Correct.

"Q. But you could have been?

"A. Correct."

{¶ 17} Appellee also testified regarding his March 2005 trip to Ontario, Canada. Appellee testified as follows:

"Q. So you left late afternoon of 3-17, you were out of the state 3-18?

"A. Yes.

" * * *

"Q. Do you have any recollection of what day you came back?

"A. To the best of my knowledge we came back Saturday afternoon, the 19th.

"Q. So that would be March 19th of 2005 in the afternoon?

"A. Yes."

{¶ 18} Finally, Appellee testified that he again traveled to New York City in September of 2005. With regard to this trip, Appellee testified that he was not certain as to the number of nights he spent in New York City. He agreed with appellant's counsel that he "could have been outside the state of Ohio for one day or two days[.]"

{¶ 19} Here, construing the evidence most strongly in favor of Appellant, R.C. 2305.15 could operate to toll the statute of limitations only five days. Considering only whole day absences, we find that Appellee was, at most, absent from the state during September 1 and September 2, 2004, March 18, 2005 and two days in September 2005. Thus, Appellant has failed to satisfy his burden of offering evidence to show a genuine issue of material fact as to the running of the two-year statute of limitations. We find that Appellee was entitled to judgment as a matter of law on the statute of limitations issue. Accordingly, summary judgment was properly granted in favor of Appellee. Appellant's assignments of error are overruled.

III.

{¶ 20} Appellant's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

*6 The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SLABY, P.J., and CARR, J., concur.

Ohio App. 9 Dist., 2007.

Barker v. Strunk

Slip Copy, 2007 WL 633516 (Ohio App. 9 Dist.), 2007 -Ohio- 884

END OF DOCUMENT

Court of Appeals of Ohio,
Fifth District, Licking County.
STATE of Ohio Plaintiff-Appellee

v.

Danny K. DAVIS Defendant-Appellant.

No. 05-CA-48.

Decided April 19, 2006.

Appeal from the Licking County Court of Common Pleas, Criminal Case No. 04CR367, Affirmed.
Amy Weeks, Licking County Prosecutors Office, Newark, for Plaintiff-Appellee.
Michael A. Marrocco, Delaware, for Defendant-Appellant.

HOFFMAN, J.

*1 {¶ 1} Defendant-appellant Danny K. Davis appeals his conviction and sentence entered by the Licking County Court of Common Pleas, on one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶ 2} On July 22, 2004, the Licking County Grand Jury indicted appellant on one count of rape, in violation of R.C. 2907.02(A)(1)(b); and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). Defendant entered a plea of not guilty to the indictment at his arraignment on August 2, 2004.

{¶ 3} Appellant filed numerous pretrial motions, including a motion to dismiss on speedy trial grounds, a motion for grand jury transcripts, and a motion ordering the State to produce school and counseling records of the victim. Following evidentiary hearings on the motion to dismiss and motion for grand jury transcripts, the trial courts denied both motions. At a status conference on February 16, 2005, the trial court ordered Wilson School and Moundbuilders Guidance Center to send the requested records to the Court by February 23, 2005. On February 22, 2005, the State filed a Motion to Continue after learning defense counsel was in possession of copies of the school records and had been for approximately two weeks. The State withdrew its motion after the trial court inspected the records and found such to be irrelevant to the issues involved in the matter. The trial commenced on February 23, 2005.

{¶ 4} Brenda Jefferies, the victim, testified appellant took her shopping and to lunch sometime in November around Thanksgiving. After lunch, appellant and Brenda returned to appellant's home. Appellant suggested Brenda try on the shirt he had just purchased for her. Brenda went into the bathroom and tried on the shirt. She returned to the living room and sat on the couch with appellant, who kissed her on the lips. Thereafter, appellant and Brenda proceeded upstairs. Brenda stated she was sitting on appellant's bed, appellant knelt on the floor in front of her, removed her shirt and bra, and placed his mouth on Brenda's breasts. Brenda further testified appellant removed her pants and underwear, and placed his tongue on her "lady's part". Tr. at 123-124. Appellant removed his pants and boxers, and instructed Brenda to touch his penis with her hand. Brenda described appellant's penis as slimy and looking like a "little dingly worm". Tr. at 126. Brenda proceeded to the bathroom and put on her clothes. Appellant drove her home. Brenda only told her mother about appellant's removing her shirt and bra, and kissing her breasts. At trial, Brenda testified she did not disclose everything to her mother and during the first interview with police because she was scared.

{¶ 5} Kathy Jefferies, Brenda's stepmother and appellant's sister, testified the only time Brenda was alone with appellant was the day after Thanksgiving in 2002, which she believed was November 29, 2002. On that day, appellant took Brenda Christmas shopping and to lunch. Although Brenda was unable to give the exact address of appellant's home, Jefferies testified Brenda and her brother often visited appellant's house on Friday evenings, where the three

watched movies and ate pizza. Jefferies noted appellant lived at 15 West Oak Street, in Newark, Licking County, Ohio. Jefferies also testified Brenda's date of birth was March 7, 1990. Jefferies explained she did not contact the authorities immediately, and when she did she was very vague, because she did not want to put Brenda or their family "through this". Tr. at 156.

*2 {¶ 6} Detective Kenneth Ballantine of the Newark Police Department testified he became involved in the investigation of appellant in mid-December, 2002. Ballantine recalled he and Cindy Robson of Licking County Children's Services interviewed Brenda in January, 2003. Ballantine described Brenda as nervous and shy, and very quiet. The detective did not request a medical evaluation of Brenda because of the amount of time which had passed between the offense and the interview, and he recognized a medical examination would not have revealed anything based upon the allegations. Detective Ballantine attempted to make contact with appellant at his home on West Oak Street. The LEADS printout for appellant indicated 15 West Oak Street as appellant's address. Additionally, Ballantine learned appellant's license was to expire on his birthday in October, 2003. After appellant's birthday in 2003, Detective Ballantine reran his license, which still indicated 15 West Oak Street as appellant's address. In January, 2004, Detective Ballantine requested a warrant for appellant's arrest be issued. Detective Ballantine explained the time gap between the initial investigation and his request for the warrant was his inability to locate appellant and his desire to speak to appellant prior to getting the warrant.

{¶ 7} Detective Ballantine conducted a second interview of Brenda on September 13, 2004. The prosecutor requested the second interview after Brenda made further disclosures during her preparation for Grand Jury. During the second interview, Brenda provided additional information about what had occurred on November 29, 2002.

{¶ 8} After hearing all the evidence and deliberations, the jury returned a verdict of guilty on the gross sexual imposition count, but not guilty as to the rape count. The trial court imposed a three year term of imprisonment upon appellant. The trial court memorialized appellant's conviction and sentence via Entry filed April 4, 2005.

{¶ 9} It is from this conviction and sentence appellant appeals, raising the following assignments of error:

{¶ 10} "I. THE TRIAL COURT ERRED WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR GROSS SEXUAL IMPOSITION AGAINST DEFENDANT/APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION AND WHEN THE CONVICTION WAS AGAINST (SIC) THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 11} "II. THE TRIAL COURT ERRED IN DENYING DEFENDANT/APPELLANT'S MOTION TO DISMISS IN VIOLATION OF HIS RIGHTS TO SPEEDY TRIAL.

{¶ 12} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT/APPELLANT'S REQUEST FOR GRAND JURY TRANSCRIPT.

{¶ 13} "IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT/APPELLANT'S REQUEST FOR SCHOOL/MENTAL HEALTH RECORDS.

I

{¶ 14} In his first assignment of error, appellant raises manifest weight and sufficiency of the evidence claims.

{¶ 15} In *State v. Jenks* (1981), 61 Ohio St.3d 259, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme

Court held: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* at paragraph two of the syllabus.

*3 {¶ 16} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶ 17} Appellant was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which provides: "No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: * * * (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 18} In support of his position the evidence was insufficient to support a conviction for gross sexual imposition and such conviction was against the manifest weight of the evidence, appellant questions the reliability of Brenda Jefferies' testimony. Appellant submits the State's case rested solely with Brenda's testimony, but her credibility and ability to recollect events accurately must be questioned as she gave conflicting accounts and descriptions of what occurred on November 29, 2002. Appellant notes Brenda was unable to recall in what grade she was when the offense occurred, who her teacher was, and the year. Furthermore, according to appellant, Brenda changed her story. Upon review of the entire record in this matter, we find appellant's conviction was neither against the manifest weight nor the sufficiency of the evidence.

{¶ 19} When Brenda was initially interviewed by Detective Ballantine and Cindy Robson, she only disclosed appellant had removed her top and bra, and placed his mouth on her breasts. As she was preparing to testify before the grand jury, Brenda further disclosed appellant had removed her pants and underwear and placed his tongue on her privates. She also revealed appellant removed his own clothing and instructed her to touch his penis. Brenda testified she did not tell her mother or the detective everything because she was scared. Although appellant claims the subsequent disclosure was supplemental in nature, we disagree. The additional disclosure was not inconsistent with her original testimony and gave more information regarding the full extent of the offense.

*4 {¶ 20} In the case sub judice, the jury was free to accept or reject any or all of the witnesses' testimony and assess the credibility of those witnesses. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236. Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶ 21} The jury clearly believed Brenda's testimony regarding appellant's removing her top and bra, and placing his mouth on her breasts. Alternatively, the jury did not believe Brenda's subsequent disclosure, which was the basis of the rape charge, as the jury acquitted appellant. Based upon the facts noted supra, and the entire record in this matter, we find there was sufficient, competent evidence to support appellant's conviction for gross sexual imposition, and such was not against the manifest weight of the evidence.

{¶ 22} Appellant's first assignment of error is overruled.

II

{¶ 23} In his second assignment of error, appellant asserts the trial court erred in denying his motion to dismiss based upon speedy trial violations. We disagree.

{¶ 24} The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Sixth Amendment right to a speedy trial applies to state prosecutions by virtue of the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina (1967), 386 U.S. 213, 222-223, 87 S.Ct. 988, 993, 18 L.Ed. 2d 1. Article I, Section 10 of the Ohio Constitution also guarantees an accused the right to a speedy trial.

{¶ 25} "The Sixth Amendment right to a speedy trial is * * * not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." State v. Triplett (1997), 78 Ohio St.3d 566, 568 (citing United States v. MacDonald (1982), 456 U.S. 1, 8, 102 S.Ct. 1497, 1502, 71 L.Ed.2d 696, 704).

{¶ 26} In Barker v. Wingo (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court set forth a four-part test to determine whether the state has violated an accused's right to a speedy trial. The four factors include: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. Id. at 530.

*5 {¶ 27} "The first factor, the length of delay, is a 'triggering mechanism,' determining the necessity of inquiry into the other factors. Doggett v. United States (1992), 505 U.S. 647, 652, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520, 528, fn. 1; State v. Triplett (1997), 78 Ohio St.3d 556, 558. This factor involves a dual inquiry. Id. First, a threshold determination is made as to whether the delay was "presumptively prejudicial," triggering the *Barker* inquiry. Next, the length of the delay is again considered and balanced against the other factors. Id.

{¶ 28} In this matter, the delay between the commission of the offense and the indictment was over a year and a half. A delay of more than one year is generally considered "presumptively prejudicial." Id.

{¶ 29} We now turn to the second *Barker* factor. Despite his own actions, appellant argues the State made an insufficient effort to locate him. Appellant explains his family and friends knew he was employed by Tamarack Farms, a Newark company, but the police did not inquire at his place of employment. Additionally, appellant submits the police never inquired of his relatives as to his phone number, never checked a current phone book, and never tried to locate appellant's son with whom they were informed he was living. The State counters with the fact Kathy Jefferies, the victim's mother and appellant's sister, purposefully withheld information regarding appellant's whereabouts as well as the name of appellant's employer. Detective Ballantine made

numerous visits during 2003, to the West Oak Street address. One time, the detective was told by a neighbor he had "just missed" appellant, which provided verification of appellant's address. We do not find the State was negligent or lacked diligence in its efforts to locate appellant.

{¶ 30} With respect to the third *Barker* factor, we find appellant timely asserted his right after he was indicted. Accordingly, this factor weighs in appellant's favor.

{¶ 31} The fourth *Barker* factor is the prejudice to appellant due to the delay. The *Barker* Court explained prejudice as follows: "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.* * *Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* at 532. (Footnote omitted.)

{¶ 32} We find appellant has not established any prejudice from the delay. Kathy Jefferies remark "it's been two and a half years now" does not demonstrate appellant's defense was in any way hampered or impaired.

{¶ 33} Based upon the foregoing, we cannot say appellant's right to a speedy trial was violated.

*6 {¶ 34} Appellant's second assignment of error is overruled.

III

{¶ 35} In his third assignment of error, appellant contends the trial court erred in denying his request to inspect the grand jury transcripts. Specifically, appellant argues because "Brenda Jefferies made wholesale changes to her material allegations, the trial court's failure to disclose the grand jury testimony deprived him of a fair adjudication of the allegations". Brief of Appellant at 22. We disagree.

{¶ 36} In *State v. Greer* (1981), 66 Ohio St.2d 139, the Ohio Supreme Court held:

{¶ 37} "1. Disclosure of grand jury testimony, other than that of the defendant and co-defendant, is controlled by Crim.R. 6(E), not Crim.R. 16(B)(1)(g), and the release of any such testimony for use prior to or during trial is within the discretion of the trial court.

{¶ 38} "2. Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy. * * *

{¶ 39} "3. Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony.

{¶ 40} "4. When defense counsel asserts and establishes to the satisfaction of the trial court a particularized need for certain grand jury testimony, the trial court, along with defense counsel and counsel for the State, shall examine the grand jury transcript *in camera* and give to defense counsel those portions of the transcript relevant to the state's witness' testimony at trial, subject to the trial court's deletion of extraneous matter, and issuance of protective orders where necessary." *Id.* at paragraphs one, two, three, and four of the syllabus.

{¶ 41} We have reviewed the record, and agree with the trial court appellant has not established a particularized need for the grand jury testimony. Accordingly, we conclude the trial court did not abuse its discretion by refusing to disclose it.

{¶ 42} Appellant's third assignment of error is overruled.

IV

{¶ 43} In his final assignment of error, appellant submits the trial court erred in denying his request for school and mental health records. Appellant speculates the Department of Human Services, Moundbuilders Guidance Center, and Brenda Jefferies' school have records pertaining to her "which may contain evidence favorable and/or relevant to the defense or relevant to her credibility." Brief of Appellant at 22.

{¶ 44} In a Judgment Entry filed February 16, 2005, the trial court ordered the Newark City School District, Moundbuilders Guidance Center, and the Department of Human Services to submit any and all records pertaining to Brenda Jefferies to the trial court for in-camera inspection by February 23, 2005. Upon receipt of the records, the trial court conducted an in-camera inspection of those records and determined the documents did not contain any information which would aid the defense. On February 22, 2005, the State received appellant's witness list as well as twenty-five pages of school records which appellant's defense counsel had had in his possession for approximately two weeks. Appellant's defense counsel never mentioned having these records, which counsel had previously requested the trial court to obtain. All of the requested records were proffered by appellant for appeal purposes.

*7 {¶ 45} This Court has reviewed those records. We find the trial court did not abuse its discretion in denying this motion.

{¶ 46} Appellant's fourth assignment of error is overruled.

{¶ 47} The Judgment of the Licking County Court of Common Pleas is affirmed.

WISE, P.J. and GWIN, J. concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

Ohio App. 5 Dist., 2006.
State v. Davis
Slip Copy, 2006 WL 1044460 (Ohio App. 5 Dist.), 2006 -Ohio- 1958

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