

IN THE SUPREME COURT OF OHIO

Peggy Sexton, et al. : Case No: 2007-0305  
: :  
Appellants, : : On appeal from the Warren  
: : County Court of Appeals,  
vs. : : Twelfth Appellate District  
: : (No. CA2006-02-026)  
City of Mason, et al. : :  
: :  
Appellees. : :

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**BRIEF OF AMICUS CURIAE THE OHIO MANUFACTURERS' ASSOCIATION  
IN SUPPORT OF APPELLEES**

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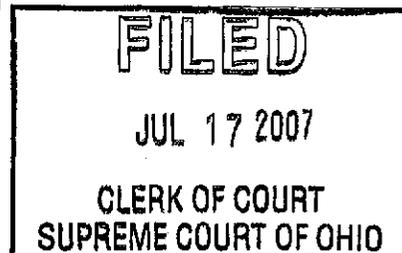
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## PRELIMINARY STATEMENT

In this appeal, the Sextons ask the Court to announce an unusual rule for trespass cases – that the statute of limitations does not run as long as there is some lingering injury from a past tortious act. The rule the Sextons advocate is not the law of Ohio. Nor should it be.

The Sextons' property in southwest Ohio floods repeatedly and has done so for at least the past 14 years. (Applt. Br. at 4). For nearly as long, the Sextons have been aware that this flooding is related to the storm-sewer system of an adjacent subdivision. (Id.) The Sextons did not sue to recover for the trespass of water for more than a decade after they first became aware of the problem and its source. Now, to avoid the consequences of the four-year statute of limitations for trespass, the Sextons ask this Court to adopt a novel rule – that their trespass claim is not tardy because they are repeatedly harmed by flooding, even though no Appellee has acted to cause a trespass for more than ten years. The Sextons would have this Court rewrite the law of trespass to enable them to hold liable defendants who have *no control* over the structures that allegedly cause the flooding on their property.

The Sextons frame this appeal as a matter of policy where this Court must make a choice about the proper framework to distinguish permanent from continuing trespass. But this Court's 1885 *Franz* decision and the weight of appellate court authority in Ohio show that the law in Ohio is settled. A continuing trespass exists *only* if a defendant's tortious *conduct* continues. If – as here – the offending *conduct* ceases or is complete, but the *injury* continues, the trespass is permanent, and the statute of limitations runs

from the date the plaintiff discovers the injury. Moreover, regardless of whether the act or the injury is the limitations trigger, this Court's 1999 *Harris* decision suggests that there is no longer a need for a special accrual rule for continuing trespass because it, like permanent trespass, is subject to a four-years-from-discovery limitations period. Against this background, the Sextons' call for this court to engage in policymaking is ill advised.

#### STATEMENT OF AMICUS CURIAE'S INTEREST

The Ohio Manufacturers' Association ("OMA") is a statewide association of nearly 2,000 manufacturing companies that collectively employ the majority of the 800,000 men and women who work in the manufacturing sector in Ohio. The OMA and its members have a substantial interest in this case because they frequently confront stale claims based on the tort theories of trespass or nuisance. The OMA and its members have a strong interest in a rule that balances the interests of plaintiffs and defendants and that encourages actions to be brought in a reasonable time.

#### STATEMENT OF FACTS

Amicus curiae, the Ohio Manufacturers' Association adopts the fact recitations of the Appellees.

#### ARGUMENT

##### Proposition of law:

**Real property torts are subject to the four-year limitations period in R.C. 2305.09 and a cause of action accrues under that statute when a plaintiff knew or should have known of the injury that resulted from the tortious act of the defendant.**

The Sextons ask the Court to permit trespass claims to extend the statute of limitations indefinitely as long as some damage continues, regardless of when the tortious act was complete. The Sextons present this appeal as a matter for the Court to choose

between competing lines of case law based on policy. That suggestion is wrong for two reasons. First, no Ohio court has held that continuing damages alone are sufficient to make a trespass continuous and extend the statute of limitations. Second, the domain of policy is usually reserved for the General Assembly, not this Court. But even if the Court decides to make policy, the rule the Sextons propose is bad policy.

**I. Ohio law is settled regarding the distinction between a permanent and a continuing trespass – the test is whether tortious conduct continues, not whether resulting damage continues.**

No Ohio court has endorsed the rule the Sextons want this Court to proclaim. Instead, Ohio case law is nearly uniform in *rejecting* a rule that – in the absence of continuing conduct – links accrual of a continuing trespass claim to continuing damages.

**A. This Court’s leading case about permanent and continuing trespass focused on an act, not damages, to distinguish permanent from continuing trespass.**

*Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 4 N.E. 88, remains the seminal case in Ohio about permanent and continuous trespass. In that case, this Court concluded that a defendant’s action of redirecting the Cuyahoga River, and maintaining a new channel that continually eroded the plaintiff’s land, was a continuing trespass. Yet *Franz* does not establish the rule the Sextons want this Court to legislate. The Court grounded its holding in the defendant’s act, not the plaintiff’s damages. In that Court’s words, the defendant’s continual act of “control[ing] and direct[ing] the stream that . . . caused the damage” was a continuing trespass. *Franz* does recognize that trespass comes in two flavors – continuous and permanent – but it does not distinguish between them based on injury alone.

*Franz* involved a railroad's act of *maintaining* a channel that continuously forced the Cuyahoga River onto plaintiff's land. The Court's focus on the continuing act rather than the damages is apparent in a passage where Justice Follett describes how the doctrine of continuing trespass applies to acts done on a defendant's own property: "and such force, if so continued, is continued by the *act* of such owner and actor, and it may be regarded as a continuing trespass or nuisance." *Franz*, 43 Ohio St. 623, 627 (emphasis added).

The Court's discussion of damages also highlights why *Franz* does not announce the rule the Sextons want this Court to create. The Court observed that, when the act causing the trespass and the injury arising from that act are not contemporaneous, the date of injury starts the statute of limitations. *Id.* at 628. *Franz*, treats *occurrence* of the first injury as triggering the running of the statute of limitations, but does not treat continuing injury *alone* as continuing the statute of limitations indefinitely.

Here, there is no dispute that the Sextons were aware of their injury more than four years before suing. Because they have not pointed to any continuing *conduct* by the Appellees, their trespass claims are barred by the four-year limit in R.C. 2305.09.

**B. The Ohio appellate authorities the Sextons cite do not endorse a rule that extends the limitations period indefinitely where damage continues, but tortious conduct does not.**

None of the Ohio cases the Sextons cite embraces a rule extending the limitations period indefinitely where damages continue but tortious conduct does not. Taking those citations chronologically, we see the appellate courts increasingly skeptical of attempts to use continued injury as a way to avoid a limitations bar.

The earliest case the Sextons cite is *Boll v. Griffith*, where the plaintiff sued to recover from damage to a party wall caused by the weight of debris left there when the defendant removed a building that had abutted the wall. (1987) 41 Ohio App.3d 356, 535 N.E.2d 1375. The appellate court concluded that “the constant weight of the debris, alleged to be gradually weakening the wall, is not distinguishable from the eroding force of flowing water [as in *Franz*], for the purpose of the statute of limitations.” *Id.* at 358. The key to the decision is that the debris on the wall represented a continuing force that the defendant maintained. Contrary to the rule the Sextons want this Court to impose, there was ongoing, continuous force – not merely ongoing damage – directed at the plaintiff’s property.

The Sextons also point to *Wood v. Am. Aggregates Corp.* (1990), 67 Ohio App.3d 41, 585 N.E.2d 970. There, the plaintiff sued “seeking monetary and injunctive relief . . . for the unreasonable use of underground water.” Although the defendant commenced using the groundwater in 1973, the plaintiff connected to city water in 1982 and sued in 1988. The defendant alleged that damages stopped in 1982 because the connection to the city water system eliminated any harm six years before plaintiffs sued. The appellate court disagreed, stating “[defendant] has not demonstrated that [plaintiffs] ceased to incur damages once city water was connected to [plaintiffs’] property. There is a genuine issue of fact concerning the issue of [plaintiffs’] damages after 1982 as a direct result of [defendant’s] use of underground water.” *Id.* at 45. The court did not mention whether the defendant’s actions had ceased, but the court does relate that the plaintiffs sought an injunction. The implication: the defendant’s **conduct** continued after 1988. If it had not, then there would have been no need for an injunction. Thus, *Wood* does not announce

the rule the Sextons would have this Court announce. The case turned on whether the plaintiffs were harmed by the defendant's use of water (a continuing act) despite access to city water, not whether damages continued in the absence of conduct.

The Sextons also make note of a series of other cases – some finding permanent trespass, some finding continuous – that fit into the rule set forth in *Franz*: conduct makes the distinction, not harm. For example, in *Frisch v. Monfort Supply Co.* (Nov. 21, 1997), 1<sup>st</sup> Dist. No.C-960522, 1997 WL 722796, the court concluded that an improperly installed home aeration system was a permanent trespass because “[t]he damage to Frisch’s property occurred when the home-aeration system was improperly installed. The tortious act was completed at that time, and there was no ongoing **conduct** by the defendants even though damage to Frisch’s property continued.” *Id.* at \*3 (emphasis added).

Quoting extensively from *Frisch*, the Sixth District affirmed a trial court’s conclusion – as a matter of law – that a dredging company’s act of leaving fill on plaintiff’s property was a permanent trespass that ended more than four years before the plaintiff sued. *Hartland v. McCullough Const., Inc.* (July 14, 2000), 6<sup>th</sup> Dist. No. OT-99-058, 2000 WL 966027. Approving the reasoning of *Frisch*, the court quoted that decision’s most important passage, “there was no ongoing **conduct** by the defendants even though damage to [the] property continued.” *Id.* at \*7 (quoting *Frisch*, 1997 WL 722796, at \*3) (emphasis added).

Another case defined in terms of the *Frisch* observation that continuing conduct is the key to continuing trespass is *Davis v. Allen* (Jan. 18, 2002), Nos. C-010165, C-010202, C-010260, 2002 WL 63560. Finding that continuing landslides onto the

plaintiffs' property were a continuing trespass, the court distinguished *Frisch* on the ground that the landslides were caused by repeated acts of the defendants. "Our review of the complaint convinces us that the Davises pleaded sufficient facts to show a continuing trespass. This case is distinguishable from *Frisch, supra*, where the entire injury was caused by one **act** of the defendants." *Id.* at \*2 (emphasis added).

*Weir v. East Ohio Gas Co.*, 7<sup>th</sup> Dist. No. 01 CA 207, 2003-Ohio-1229 also approves a distinction based on conduct. There, the court concluded that a trespass of oil and gas on the plaintiffs' property that arose from a single tortious event was a permanent trespass. As in *Frisch, Davis, and Hartland*, the court looked to the act, not the damages to decide the type of trespass even though damage to the plaintiffs' property was ongoing. "In the present case, it appears East Ohio was responsible for only one tortious **act**, namely, the leak that occurred in 1989." *Id.* at ¶28 (emphasis added).

Finally, the Sextons reference *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226. But this case, like the others mentioned above, supports the Appellees' position rather than the Sextons. The Sextons fail to explore the facts of the *Reith* case. Indeed, *Reith* involved a fact pattern indistinguishable from the instant one -- a plaintiff suing because of continuing damage stemming from a single act of installing a sewer system. Importantly, the court first set out the test that has been Ohio law since *Franz*: "A permanent trespass occurs when the defendant's tortious **act** has been fully accomplished, but injury to the plaintiff's estate from that act persists in the absence of further conduct by the defendant. In contrast, a continuing trespass results when the defendant's tortious **activity** is ongoing, perpetually creating fresh violations of the plaintiff's property rights." *Id.* at ¶49 (emphasis added). Then, applying

this test to the facts, the court observed that the trespass was permanent because “the allegedly tortious act . . . was the design of a drainage system that did not account for the eventual outfall of surface water.” *Id.* at ¶50. Finally, the court concluded that the statute of limitations barred the suit because it was “undisputed that [the] design of the system, including even the installation of the system, was completed [more than four years before the suit was filed].” *Id.*

A review of the six Ohio appellate decisions the Sextons cite shows that not one endorses the theory they want this Court to enact. Instead, the theme of those cases is that continuing conduct is needed to sustain a claim for continuing trespass.

From its roots in *Franz* to its incarnation in a case factually identical to this one (*Reith*), the rule in Ohio to distinguish permanent from continuous trespass is that the *conduct* of the defendant matters, not the consequences of that conduct.<sup>1</sup> To be sure, there are passages that could be read to suggest that continuing damages alone will support a continuing trespass. But those passages are isolated and out of step with the reasoning in *Franz* and the refinement of that reasoning in Ohio’s appellate courts. For example, the passage in *Wood* that reads, “Appellants’ damages are arguably ongoing in nature” is suggestive. 67 Ohio App.3d 41, 45. But as explained above, the court did not hold that damages *without concomitant conduct* supported the continuing trespass.

The Sextons also cite the federal case of *Nieman v. NLO, Inc.*, (C.A.6, 1997), 108 F.3d 1546. There, over a lengthy dissent, two judges concluded that Ohio law permits a plaintiff to support a continuing trespass claim with proof of continuing damages and

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<sup>1</sup> This Court’s decision in the criminal nuisance case, *State v. Swartz* (2000), 88 Ohio St.3d 131, 723 N.E.2d 1084, is consistent with *Franz* and its progeny. There, the Court found that a defendant maintained a continuing nuisance because there was a “continuing course of conduct.” *Id.* at 134.

“need not” allege continuing conduct. *Id.* at 1559. But the federal court reached this conclusion without fully considering the continuing force directed at the plaintiffs’ property in *Franz* and *Boll*, without considering the continuing conduct implicit in *Wood*, and only after acknowledging at least one case that rejected the theory the federal court endorsed. *Id.* at 1558 (citing *Hamo v. Exxon Corp.* (May 28, 1982), 11<sup>th</sup> Dist. No. 1143, 1982 WL 5760).

Nor did the federal court have the benefit of the recent Ohio appellate decisions in *Frisch*, *Hartland*, *Davis*, *Weir*, and *Reith*. The federal court’s holding is simply not faithful to this Court’s pronouncement in *Franz* that continuing trespass arises where “force, if so continued, is continued by the *act* of such owner and actor.” *Franz*, 43 Ohio St. 623, 627 (emphasis added). Nor is the federal court’s holding consistent with the weight of authority from Ohio’s appellate courts. Ten years on, the *NLO* majority opinion remains an outlier. Indeed, when the First District cited *NLO*, it cited the **dissent** – not the majority – as representing Ohio law. *Frisch*, 1997 WL 722796, at \*2.

The Sextons seize on stray comments to urge this Court to invert the longstanding rule by looking only to the result of tortious conduct, not the conduct itself. Fairly read, however, Ohio law has always looked to *conduct* to define a continuing trespass. Here, Appellees’ conduct ended more than a decade ago because the sewer system was designed and installed in the mid 1990s. Because no Appellee *acted* to cause a trespass since the mid 1990s, the Sextons’ suit was untimely when filed in 2003.

**C. The Sextons chose not to cite several Ohio appellate decisions that explicitly reject their proposed rule.**

The Sextons fail to cite cases where the courts have used conduct – not injury – to decide whether a trespass was permanent or continuing. For instance, the same year that

the Tenth District decided *Wood*, the Eighth District decided *Kuthan v. City of Independence* (Aug. 30, 1990), 8<sup>th</sup> Dist. No. 57073, 1990 WL 125458. The plaintiff there alleged a similar harm as the Sextons, suing because the defendants “damaged her property . . . by causing the erosion of the banks of her one-half-acre pond, which is fed by a stream . . . . Such erosion, according to appellant, was the direct result of the construction of a residential subdivision . . . .” *Id.* at \*1. The Eighth District affirmed a trial court ruling for the defendant because the “nuisance and trespass claims were barred by the statute of limitations since she had discovered her alleged damage . . . when she first complained to [the city] but failed to file suit until . . . more than four years later.” *Id.*

The Sextons do not reference *Hamo*, 1982 WL 5760. That case arose from a petroleum leak. Having delayed too long in filing suit, the plaintiff contended that “the trespass continued up to the date of trial.” *Id.* The appellate court rejected the argument, noting that even if “the damage is continuing, this still would not extend the four year Statute of Limitations.” *Id.*

The Sextons also fail to cite *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App.3d 471, 2002-Ohio-4392, 778 N.E.2d 48. Like *Hamo*, the *Abraham* case involved leaked petroleum. Also like *Hamo*, an appellate court affirmed a judgment against a plaintiff seeking to avoid the four-year statute of limitations in R.C. 2305.09. In *Abraham*, the Tenth District summarized Ohio’s law of permanent and continuing trespass this way: “the determinative question [to distinguish permanent from continuing trespass] centers upon the nature of the defendant’s tortious *conduct*, *not* upon the nature of the *damage* caused by that conduct.” *Id.* at ¶27 (emphasis added).

The Sextons want this Court to construct a rule from snippets of wording in isolated cases. But they ignore the unbroken line of holdings from Ohio courts that endorses exactly the opposite. In Ohio, a continuing trespass exists only where there is continuing conduct.<sup>2</sup> The Sextons' argument is not based on the weight of Ohio authority, but on a desire to avoid the statute of limitations that expired several years before they sued.

**D. Cases from other states support a decision that rejects continuing damages as a mechanism to prolong the statute of limitations for real property torts.**

Ohio hardly stands alone in rejecting efforts to skirt a statute of limitations for real-property torts by focusing on continuing damages alone. Two state supreme courts have recently rejected the idea that continuing damage without continuing conduct can support a claim for continuing trespass. In 2002, the Utah Supreme Court clarified its rule, stating that “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.” *Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.* (Utah 2002), 52 P.3d 1133, 1135. The Massachusetts Supreme Judicial Court has adopted a similar test: “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

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<sup>2</sup> At minimum, this conduct must involve a trespass defendant's ability to *control* the cause of the trespass. A recent decision of the Seventh District makes note of this theme in Ohio trespass law. See *Weir*, 2003-Ohio-1229, at ¶27 (“the parties deemed liable for a continuous trespass retained control over the source of the trespass”). This Court has also mentioned control in connection with a trespass defendant's ongoing conduct. See, *Franz*, 43 Ohio St. 623, 628 (observing that the defendant “*controlled* and directed the stream that has caused the damage complained of”) (emphasis added).

unlawful conduct.” *Carpenter v. Texaco* (Mass. 1995), 646 N.E.2d 398, 399 (emphasis added).

The Louisiana Supreme Court has also recently addressed continuing damages from a real-property tort. In a case that involved the diversion of water, the court held that damage alone does not make a continuing tort. The court reasoned that the “continued presence of the canal and the consequent continuous diversion of water from the ox-bow are simply the continuing ill effects arising from a single tortious act. A continuing tort is occasioned by unlawful acts, not the continuation of the ill effects of an original, wrongful act.” *Crump v. Sabine River Auth.* (La. 1999), 737 So.2d 720, 727-28.

Recent authority has also treated recurring floods resulting from improper drainage as permanent trespasses. A Georgia appellate court concluded that an allegation that a drainage pipe was inadequate to prevent “flooding during heavy rains” was barred by Georgia’s four-year statute of limitations for nuisances. *Macon v. Macrive Construction, Inc.* (Ga.App. 1999), 525 S.E.2d 418, 418. The court affirmed a directed verdict for defendants because “no evidence showed that [defendant] took any action subsequent to [constructing the drainage] that increased the flooding problem.” *Id.* at 419. Consequently, the facts did not show any “continuing nuisance.” *Id.*

Recent decisions from appellate courts in Texas, Alabama, Louisiana, and Pennsylvania have also concluded that repeated flooding caused by a permanent structure is not a recurring tort. See *Graham v. Pirkey* (Tex.App. 2006), 212 S.W.3d 507, 511-12 (flooding arising from neighbors grading project; court observed, “It is undisputed that the diverted water constituted a recurring *permanent* nuisance . . . . [A]ny damages incurred because of [neighbor’s] installation of the drainage pipe, grading and

leveling . . . are barred by limitations.”) (emphasis added); *Devenish v. Phillips* (Ala.App. 1999), 743 So.2d 492, 494 (affirming summary judgment for defendant because retaining wall that caused flooding was a permanent trespass that “resulted in a permanent change to the land, with a continuing harm”); *Kendrick v. St. John The Baptist Parish* (La.App. 1999), 734 So.2d 717, 722 (affirming dismissal of claim against neighbor where plaintiff claimed porch caused flooding of property because “[p]rescription began to run . . . when the first damages were sustained, not when each separate flooding occurred”); *Mancia v. Dept. of Transp.* (Pa.Comm.w.Ct. 1986), 517 A.2d 1381, 1385 (affirming summary judgment for defendant because damage from drain pipe was “a trespass that has effected a permanent change in [plaintiffs’] land and which will continue to recur as long as rain falls and flows downhill”).

The Sextons’ claims are indistinguishable. They allege that a solitary act – constructing the sewer system beneath the neighboring subdivision – has damaged their property by repeated flooding. Because they have been aware of that problem for at least a decade, their suit is untimely.

**II. The Sextons’ policy arguments are misguided because this Court is not a policy maker and because policy concerns do not support a rule that ties accrual of trespass and nuisance claims to continuing damages.**

Because Ohio law answers the question before this court – that is, continuing trespass is measured by *conduct*, not *injury* – the Sextons resort to policy arguments to urge this Court to rewrite Ohio law. They contend that a rule linking accrual of trespass claims to continuing damages (but not continuing conduct) is appropriate as a matter of “public policy and common sense.” (Applt. Br. at 8). This contention is wrong for two reasons. First, the General Assembly is the proper audience for policy arguments.

Second, even if this Court had to make a policy choice between the Sextons' proposed rule and the current law, current law represents the better policy because the Sextons' proposal means unending liability for defendants, even when their conduct stopped decades earlier.

**A. This Court does not usually make public policy.**

This Court has repeatedly noted that public policy arguments ordinarily belong in the General Assembly, not the courts. See, e.g., *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶28 (“[t]he General Assembly is the policy-making body in our state”); *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638, 640, at ¶13 (“We have held that the determination of Ohio’s public policy remains the province of the General Assembly”) (O’Connor, J., dissenting from decision to dismiss as improvidently granted). As Chief Justice Moyer explained in *State ex rel. Moorehead v. Indus. Comm.*, “Public-policy arguments . . . are better directed to the General Assembly.” 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, at ¶19. Similarly, Justice O’Donnell observed in *Johnson v. Microsoft Corp.*, that “The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.” 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, at ¶14.

If Ohio’s settled law regarding permanent and continuing trespass represents poor policy, it is the General Assembly’s role to change that law. The General Assembly has not shied away from adjusting statutes of limitations in response to citizen efforts to correct problems with those limits. In the recent past, the General Assembly has addressed concerns related to an entire field of litigation and even to a particular product. See, e.g., R.C. 2305.113 (medical malpractice); R.C. 2305.101 (Dalkon Shield claims).

If the settled law that limits trespass and nuisance claims to four years after the last tortious act is unfair to landowners, the remedy is in the General Assembly, not this Court.

**B. If this Court must make policy, it should draw on its precedents that emphasize the equities of enforcing definite statutes of limitation.**

The Sextons envision a world where construction of almost any improvement will create downstream liability no matter when the affected parties know the consequences and no matter how long the affected parties sit on potential causes of action. The rule the Sextons desire is inconsistent with this Court's repeated explanations of the underlying rationale for statutes of limitation. As explained in *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 447 N.E.2d 727, the motivating rationales are four: (1) to ensure fairness to defendants, (2) to encourage prompt prosecution, (3) to suppress stale and fraudulent claims, and (4) to avoid difficulties of proof. *Id.* at 88; see also *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10, 635 N.E.2d 1233 (same); *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, at ¶10 (same). This Court's cases echo Justice Jackson's famous summary of the purpose of statutes of limitation in *Order of R.R. Telegraphers v. Ry. Express Agency, Inc* (1944), 321 U.S. 342, 348-49, 64 S.Ct. 582. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

The Sextons' proposed rule runs counter to the theory of statutes of limitation and the components of that theory that this Court has identified because it would allow plaintiffs to sue as long as some injury lingered from a completed act. This is unfair to defendants whose acts may have been decades in the past; it also *discourages* prompt resolution of claims and encourages the filing of stale claims; and it exacerbates difficulties of proof. This appeal illustrates the dangers of a rule that permits plaintiffs to file trespass or nuisance actions long after the tortious conduct has ended. The Sextons relate that they knew of flooding problems on their property and had communicated those problems to city officials more than a decade before filing suit. (Applt. Br. at 4).

The Sextons' proposed rule ignores its consequences. In a world where continuing injury alone is the measure of whether a trespass or nuisance is continuing, plaintiffs will be able to sue for tortious conduct long since past even if the consequences of that conduct are apparent – and compensable – within the four years plaintiffs are permitted to sue after discovering a trespass or nuisance injury.

**C. This Court's decision in *Harris v. Liston* (1999), 86 Ohio St.3d 203, 714 N.E.2d 377, suggests that the policy rationale for the doctrine of continuing trespass and nuisance has narrowed with the advent of the discovery rule.**

The Sextons want this Court to break from the long line of Ohio cases that have used conduct – not damages – to distinguish permanent from continuing trespass or nuisance. The Sextons' proposal would dramatically *expand* the continuing trespass and continuing nuisance doctrine. This Court's decision in *Harris*, however, suggests an approach to real property torts that narrows the common-law exceptions to statutes of limitation for these continuing torts. If this Court accepts the Sextons' invitation to make

policy, *Harris* signals a retreat, not an expansion, of the continuing trespass and continuing nuisance doctrine.

In *Harris*, this Court decided that torts to real property are subject to the four-year statute of limitations in R.C. 2305.09 and that these torts accrue under that statute according to a discovery rule. *Id.* at syllabus 1 & 2. Like the Sextons' case, *Harris* involved an allegation of property damage arising from an inadequate "water-management system." *Id.* at 204. At various points, the Court characterized the complaint as one for nuisance. *Id.* at 204, 205, 207 (passage at 205 quoting the appellate court). *Harris* unequivocally held that a complaint for real property injury, including a "claim that [defendant's] negligence created a nuisance . . . [were] time-barred" because the injury was discovered more than four years before the suit was filed. *Id.* at 207-08.

*Harris* shows that this Court has signaled a choice in favor of a uniform four-year statute of limitations subject to a discovery rule for all real property torts. See *Harris* at 207 ("we reaffirm that tort actions for injury or damage to real property are subject to the four-year statute of limitations"). *Harris* did not use the labels continuing or permanent nuisance, but did describe the water issues on the property as present only "during certain times of the year." *Harris*, 86 Ohio St.3d at 203. That is, *Harris* dealt with a continuing nuisance and announced a rule for limitations of discovery plus four years.<sup>3</sup>

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<sup>3</sup> The *Harris* holding is equally applicable to trespass claims. Ever since *Franz*, Ohio courts have viewed the distinction between a permanent or continuing trespass through the same analytical lens as the distinction between a permanent or continuing nuisance. *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 627, 4 N.E. 88 ("such force . . . may be regarded as a continuing *trespass or nuisance*") (emphasis added); *Weir v. East Ohio Gas Co.*, 7<sup>th</sup> Dist. No. 01 CA 207, 2003-Ohio-1229, at ¶18 ("A continuing *trespass or nuisance* occurs when the defendant's tortious activity is ongoing") (emphasis added); *Davis v. Allen*, Nos. C-010165, C-010202, C-010260, 2002 WL 63560, at \*2 (Ohio App.

*Harris* indicates that the scope of the continuing nuisance-continuing trespass doctrine is narrowing. Because *Harris* announced a discovery rule for real-property torts, one of the supporting rationales for the continuing nuisance and continuing trespass doctrine – to avoid unfairness to plaintiffs – has been undone. This suggests that the continuing nuisance and continuing trespass *exceptions* to the four-years-from-discovery rule affirmed in *Harris* are narrowing. In contrast, the Sextons want to radically *expand* that doctrine by cutting it loose from its moorings to tortious conduct so that almost any property tort will have *no* statute of limitations. The Sextons’ proposal would mean unending liability exposure for defendants whose conduct ceased decades earlier.

The implication of *Harris* – that the discovery rule narrows the continuing tort exception to the statute of limitations – finds support in a recent decision of New York’s highest court. In *Jensen v. General Elec. Co.* (N.Y. 1993), 623 N.E.2d 547, the New York Court of Appeals held that the legislative decision to tie accrual for all causes of action for property injury arising from the exposure to any substance swept away any lingering exception to accrual in the common-law actions for continuing trespass or nuisance. Reversing the appellate division, the high court found that the statute (which includes a discovery rule) “displac[ed] the rationale for the common-law exception” for continuing wrongs. *Id.* at 551. The New York court explained that the statute protected societal interests by providing some “measure of repose” because “defendants are not left potentially liable in perpetuity.” *Id.* Contrasting a rule of continuing damages, the court noted that “under the rule proposed by plaintiffs, . . . a plaintiff would have the power to put off the running of the Statute of Limitations indefinitely.” *Id.*

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Jan. 18, 2002) (“A continuing *trespass or nuisance* occurs when the defendant’s tortious activity is ongoing”) (emphasis added).

The wording of the New York statute and this Court's description of the Ohio rule are nearly identical. The New York statute reads: "[T]he three year period within which an action [to recover for property injury] . . . must be commenced shall be computed from the date of discovery of the injury." N.Y.C.P.L.R. § 214-c (2). This Court's pronouncement in *Harris* reads: "a negligence action . . . for damage to the property accrues and the four-year statute of limitations . . . commences to run when it is *first* discovered . . . that there is damage to the property." *Harris*, 86 Ohio St.3d 203, 207 (emphasis added). The New York Court read the statute as eliminating the common-law exceptions of continuing trespass and continuing nuisance. *Jensen*, 623 N.E.2d 547, 550-51. This appeal gives the Court an opportunity to clarify the reach of *Harris* by ruling that its holding applies to *all* real property torts. At the very least, the *Harris* decision indicates that the Sextons' call for this Court to *expand* the continuing trespass and nuisance doctrine is out of step with this Court's recent real-property decisions, not only its historic ones.

The Sextons exhort this Court to announce a rule that allows plaintiffs to sue many years after a tortious act is complete, so long as some enduring damage from that act is ongoing. (Applt. Br. at 14-15). This would create a rule different from other torts, different from the rule announced in *Harris*, and different from the uniform approach the New York court recognized in *Jensen*. In short, the Sextons appeal to policy, but offer no rationale for that policy. This Court in *Harris*, like the court in *Jensen*, recognized that a discovery rule for property torts alleviates the continuing need for the doctrine of continuing trespass and continuing nuisance.

Even if this Court finds there is an ongoing need for a continuing-real-property-torts exception to R.C. 2305.09, a recent and comprehensive decision from the Texas Supreme Court explains why any exception should be narrow. In *Schneider Nat'l Carriers, Inc. v. Bates* (Tex. 2004), 147 S.W.3d 264, the Court concluded that the purpose of the distinction between continuing and permanent trespass or nuisance is to enable an injured plaintiff to recover damage to real property without forcing the plaintiff to guess about future harm that would be impossible to estimate. If a tortious act produces harms that can be reduced to money at the time of trial, the nuisance or trespass is permanent. In reaching this conclusion, the Texas court specifically rejected the idea that continuing damages alone can support a continuing nuisance. In the words of that court, "a permanent nuisance may be established by showing that either the plaintiff's injuries or the defendant's operations are permanent." *Id.* at 283. According to the Texas Supreme Court, the continuing nuisance doctrine exists only to avoid unfairness in exceptional situations where the injuries occur "so rare[ly] that . . . it remains uncertain whether or to what degree they may ever occur again." *Id.*

*Schneider* does not characterize the law of Ohio, but it does show why the Sextons' appeal to policy is a dead end. *Schneider* considered the underlying policy of the continuing trespass and continuing nuisance and rejected the idea that continuing damages alone delay the start of the statute of limitations. Even if this Court decided to engage in policymaking to depart from the holdings of *Franz* and *Harris*, *Schneider* shows why the Court should not adopt the Sextons' proposed rule that continuing injury alone extends the statute of limitations for trespass indefinitely.

## CONCLUSION

The Sextons accuse the Appellees of a single tortious act – designing and constructing an inadequate storm sewer system – that was completed by 1995. They have been aware for at least ten years that the storm sewer caused flooding on their property, but did not take legal action during those ten years. To avoid the consequence of delaying far in excess of the statute of limitations, they ask this Court to disregard settled Ohio law by making a policy decision to postpone indefinitely the running of the limitations period for real property torts. This Court should reject the invitation to jettison existing Ohio law in favor of a policy choice. But even if the Court decides to make policy, recent precedent from this and other supreme courts indicates that the Sextons' call to have *no statute of limitations* as long as damages persist is a policy this Court cannot endorse.

Respectfully submitted,

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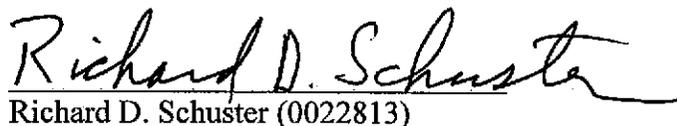
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