

IN THE SUPREME COURT OF OHIO

<b>Peggy Sexton, et al.,</b>	]	Case No.: 2007-0305
	]	
Appellants,	]	<b>On Appeal from the Warren County</b>
	]	<b>Court of Appeals, Twelfth Appellate</b>
v.	]	<b>District</b>
	]	
<b>City of Mason, et al.,</b>	]	
	]	
Appellees.	]	

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MERIT BRIEF OF APPELLEE CITY OF MASON

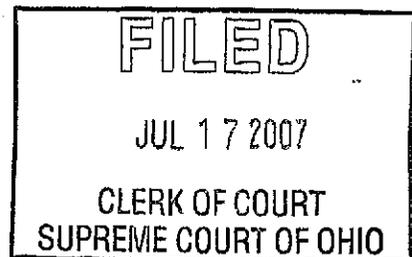
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## STATEMENT OF CASE AND FACTS

### A. Statement of Facts

Plaintiffs-Appellants purchased property located outside the city limits of Mason, Ohio at 4721 Cox-Smith Road, Mason, Ohio in 1986, built a home on that property, and moved into that home on October 15, 1988. (T.D. 111, 4/29/05 Aff. of Richard Fair; T.D. 60, Peggy Sexton Depo., Exhibit 1.)<sup>1</sup> In 1987, construction of an upstream subdivision within the City of Mason known as Trailside Acres began. Defendant-Appellee Rishon Enterprises (hereafter "Rishon") owned the property and acted as the developer of Trailside Acres, Defendant Don Thompson Excavating, Inc. was the general contractor, and Defendant-Appellee McGill Smith Punshon (hereafter "McGill Smith") was the engineer for the Trailside Acres development. (T.D. 111, 4/29/05 Aff. of R. Fair.) By 1994, McGill Smith had completed all of its engineering services and the City of Mason had approved the final stages of Trailside's construction plans. (T.D. 87, 11/29/04 Aff. of Edward Frankel.) The City of Mason neither designed nor constructed Trailside Acres or its detention ponds. (T.D. 111, 4/29/05 Aff. of R. Fair.)

As soon as the Trailside construction began, Plaintiffs-Appellants experienced water problems on their property. (T.D. 60, P. Sexton Depo., pg. 19-21.) Even before the development was complete, Plaintiffs-Appellants believed that these problems were due to Trailside. (T.D. 70, P. Sexton Depo., pg. 19-21.) Plaintiffs-Appellants reported their water problems to the City of Mason in 1992, but did not file suit until July 14, 2003. (T.D. 60, P. Sexton Depo., pg. 24.)

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<sup>1</sup> The T.D. ("transcript of docket") numbers referenced herein refer to the docket entry from the trial court proceedings.

## B. Procedural Posture

On July 14, 2003, Plaintiffs-Appellants filed a Complaint against the City of Mason, the Mason Engineering Department and others for claims relating to the construction, development, and approval of a subdivision known as Trailside Acres. On August 27, 2003, Plaintiffs-Appellants amended their Complaint adding Rishon, Don Thompson Excavating, and McGill Smith as defendants. Defendant-Appellees Rishon, McGill Smith, and the City of Mason filed Motions to Dismiss and/or Motions for Summary Judgment based on the statute of limitations on August 26, 2004, September 27, 2004 and October 25, 2004 respectively. On May 2, 2005, the City of Mason filed a separate Motion for Summary Judgment on the basis that the City was entitled to statutory immunity under R.C. § 2744 *et. seq.*, that Plaintiffs had failed to prove their promissory estoppel claim, and that Plaintiffs had failed to timely file their constitutional takings claim.

On February 6, 2006, Judge James Heath of the Warren County Court of Common Pleas journalized a Decision and Entry granting summary judgment to all Defendants. The Trial Court found, with regard to Appellees Rishon and McGill Smith, that Plaintiffs-Appellants suffered from a permanent trespass and, therefore, their trespass claims were time barred by the four year statute of limitations set forth in R.C. 2305.09. (Appendix at p. 5, ¶7; and Appendix pp. 15-21.)<sup>2</sup> With regard to the City of Mason, the Trial Court found (1) the Plaintiffs-Appellants did not allege in their complaint that the City undertook to manage the subdivision storm water or did so negligently; (2) the City exercised a governmental function in its oversight and approval of the storm water system and was therefore entitled to sovereign immunity; and (3) the Plaintiffs-Appellants' constitutional takings claim was time barred by the applicable six year statute of limitations. (*Id.*)

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<sup>2</sup> "Appendix" refers to the appendix attached to the Merit Brief of Appellants Peggy and Larry Sexton.

On February 22, 2006, Plaintiffs-Appellants filed a Notice of Appeal to the 12<sup>th</sup> Appellate District. In their brief on appeal, Plaintiffs-Appellants only raised, as error, (1) the Trial Court's finding of a permanent trespass to which a four year statute of limitations applied (Appendix at 6, ¶9), and (2) the Trial Court's finding that Plaintiffs failed to properly allege that the City negligently maintained the storm system. (Appendix at 9, ¶21.) Plaintiffs-Appellants never appealed, or raised as error, the Trial Court's entry of Summary Judgment in favor of the City of Mason on the promissory estoppel or constitutional takings claims.

On January 8, 2007, the 12<sup>th</sup> Appellate District affirmed the Trial Court's entry of summary judgment in favor of all Defendants-Appellees. On February 20, 2007, Plaintiffs-Appellants filed a notice of appeal to this Court. In their jurisdictional memorandum, Plaintiffs-Appellants again requested review of the same two issues, specifically: (1) whether a claim for a continuing trespass may be supported by proof of continuing damages rather than continuing conduct; and (2) the sufficiency of a negligence pleading against a City pursuant to Ohio Civ. R. 8. (See Memorandum in Support of Jurisdiction of Appellants Larry and Peggy Sexton at 13 and 15.) This Court has accepted only Proposition of Law No. I for review. (See Entry of 5/2/07.)

### **ARGUMENT**

#### **I. THERE ARE NO CLAIMS PENDING ON APPEAL AGAINST APPELLEE, CITY OF MASON.**

##### **A. Plaintiffs-Appellants Have Waived Their Appeal on Their Constitutional Takings and Promissory Estoppel Claims Against the City of Mason.**

As indicated above, Plaintiffs-Appellants have requested this Court review the exact same points of error as were raised in the 12<sup>th</sup> Appellate District. This time, however, in their jurisdictional argument for review, Plaintiffs-Appellants have insinuated that the Court's decision on

Proposition of Law No. I would somehow effect the dismissal of the constitutional takings claim against the City of Mason. (Memorandum in Support of Jurisdiction of Appellants Peggy Sexton and Larry Sexton at p. 8 ("Because the taking claim is based on the trespass alleged against Appellees . . . the continuing damages approach . . . is just as applicable to the allegations against the City."). Such a proposition is completely without merit.<sup>3</sup>

Ohio case law is clear: reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. State ex rel Porter v. Cleveland Dep't of Pub. Safety (1998), 84 Ohio St. 3d 258, 259, 703 N.E. 2d 308, 309; and Goldberg v. Industrial Com'n of Ohio (1936), 131 Ohio St. 399, 3 N.E.2d 364 at syll. 4. Plaintiffs-Appellants never raised on appeal to the 12<sup>th</sup> Appellate District any error with the Trial Court's entry of summary judgment on Plaintiffs' constitutional takings or promissory estoppel claims. Thus, any argument that the Trial Court's decision on those claims was made in error has been waived. Nor can Plaintiffs-Appellants argue for the first time in the Supreme Court, that a reversal of the Court's decision on this trespass issue would somehow effect the dismissal of the constitutional takings claim against the City of Mason. Such arguments have likewise been waived. Id.

The only issue that in any way pertains to the City of Mason, that was properly raised to the 12<sup>th</sup> Appellate District, and therefore, could even potentially be argued in this appeal, is the insufficiency of negligence pleading pursuant to Ohio Civ. R. 8. This Court has declined review of

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<sup>3</sup> It should be noted that in their Merit Brief, Plaintiffs'-Appellants argue only that their lawsuit against Appellees McGill Smith and Rishon were timely filed. (See Appellants' Merit Brief at p. 12 and p. 13.) Plaintiffs-Appellants do not state, in their Merit Brief, that any claims against the City of Mason have been appealed or could be effected by the trespass issue. It is solely because of the improper statement made in their Memorandum in Support of Jurisdiction that this appeal could effect the dismissal of their constitutional takings claim against the City (see Appellants' Memorandum in Support of Jurisdiction at 8) that precipitated the need for this response.

that issue. (Entry of 5/2/07) Because Plaintiffs have clearly waived all other issues, there are no claims pending on appeal against the City of Mason.

**B. Proposition of Law No. I is Irrelevant to the Entry of Summary Judgment in Favor of the City of Mason.**

Assuming, arguendo, that Plaintiffs-Appellants have not waived their constitutional takings claims (which they clearly have), the trespass issue currently pending before the Court pertains only to the claims against Appellees Rishon and McGill Smith and has no bearing on the Trial Court's entry of summary judgment in favor of the City of Mason. Indeed, Appellant's claims against the City of Mason were dismissed on entirely different grounds than the claims against Appellees Rishon and McGill Smith. The City of Mason filed a separate Motion for Summary Judgment, claiming Plaintiffs-Appellants' constitutional takings claim was barred by a six year statute of limitations, and that the City's sovereign immunity barred Appellant's negligence and promissory estoppel claims. The Trial Court agreed and granted the City's Motion for Summary Judgment. (Appendix at pp. 18-21.) Even the 12<sup>th</sup> Appellate District, in upholding the Trial Court's rulings, found the trespass issue only related to the claims against Rishon and McGill Smith (Appendix at p. 6, ¶ 10; and p. 9, ¶ 19.) Plaintiffs-Appellants, in their Merit Brief to this Court, indicated same. (Merit Brief of Appellants Peggy and Larry Sexton at pp. 6-7.) Thus, even if this Court reverses the Trial Court's finding of a permanent trespass, this reversal will have no effect on the dismissal of the claims against the City of Mason.

Moreover, the tort of trespass is completely inapplicable to the law of a constitutional takings claim. The two torts involve completely different elements of proof and statutes of limitations. In entering summary judgment in favor of the City, the Trial Court found the statute of limitations for a constitutional takings claim to be six years from the time the City of Mason issued its final decision

allowing the alteration of natural waterflow. State ex rel RTG v. State, 98 Ohio St.3d 1, 2002-Ohio-6716. (Appendix at p. 21.) The Trial Court found it to be uncontroverted that this final decision occurred sometime prior to October 27, 1995. (Id.) Indeed, the record indicates that the City of Mason approved the final stage of Trailside's construction plans as early as 1994. (T.D. 87, 11/29/04 Aff. of Edward Frankel) Regardless, Plaintiffs-Appellees' Complaint was filed on July 14, 2003, well after the six year statute of limitations had run. It is clear that whether a permanent or continuous trespass occurred in this instance had no bearing on the Trial Court's decision to find the constitutional takings claim to be untimely. (Appendix at p.21.) This Court's decision on the trespass issue should, likewise, have no effect on the City of Mason's dismissal.

Because the claims against the City of Mason were dismissed on wholly separate grounds, none of which relate to the trespass issue now pending before the Court, the City of Mason's award of summary judgment will stand regardless of this Court's ruling on appeal. As a result, there are no claims pending on appeal against the City of Mason. The City of Mason is, therefore, an unnecessary party to this appeal.

## **II. PROPOSITION OF LAW NO. I**

Defendant-Appellee, City of Mason, maintains its position that its involvement in this appeal is unnecessary and improper. However, should this Court decide that the issues involved in Proposition of Law No. I would somehow effect the disposition of the claims against the City, Defendant-Appellee hereby joins the arguments of Defendants-Appellees Rishon and McGill Smith, as well as the amicus party in support of Defendants-Appellees, and offers the following argument on Proposition of Law No. I.

A. When the Defendants' Tortious Activity Has Ceased, A Trespass is Permanent in Nature.

Plaintiffs-Appellants contend that their claims consist of a continuous trespass because they have experienced continuous damage. However, the determinative question as to whether a situation involves a permanent trespass rather than a continuing trespass "centers on the nature of the defendant's tortious conduct, not upon the nature of the damages caused by that conduct." Abraham v. BF Expiration & Oil Inc. (10th Dist. 2002), 149 Ohio App. 3d 471, 778 N.E.2d 48; Reith v. McGill Smith Punshon, Inc. (1st Dist. 2005), 163 Ohio App. 3d 709, 840 N.E.2d 226; Weir v. East Ohio Gas Comp. (7th Dist. 2003), 2003 Ohio 1229; Frisch v. Monfort Supply Co. (November 21, 1997), Hamilton App. No. C-960522. A trespass is considered continuing if the "defendant's tortious activity is ongoing, perpetually creating fresh violations." Frisch, App. No. C-960522 at 6-7; Abraham, 149 Ohio App. 3d at 477-78. Whereas, a permanent trespass occurs when "defendant's tortious act has been fully accomplished but injury resulting from that action persists in an absence of further conduct by the defendant." Id. When the tortious activity complained of has been completed and the defendant has relinquished control over the source of the trespass, the cause of action is for a permanent trespass. Abraham, 149 Ohio App. 3d 471; Reith, 163 Ohio App. 3d 709; Weir, 2003 Ohio 1229; Frisch, App. No. C-960522.

The cases of Frisch and Reith are directly on point in this case. In both instances, summary judgment was granted, and affirmed, in favor of the defendants based on a finding of permanent trespass. In the case sub justice, the tortious acts complained of were completed by 1995. (Appendix at p. 9, ¶18.) As such, Plaintiffs-Appellants' trespass claims must be considered permanent in nature.

**B. Plaintiffs-Appellants' Trespass Claim is Barred By a Four Year Statute of Limitations.**

Regardless of whether the Court finds the instant action to be a case of permanent or continuing trespass, the same four year statute of limitations would apply, barring Plaintiffs-Appellants claims in the instant action. As this Court stated in Harris v. Liston (1999), 86 Ohio St. 3d 203, 207, 714 N.E.2d 377, 380:

[T]ort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D). In addition, we hold that a negligence action against a developer-vendor of real property for damage to the property accrues and the four year statute of limitations set forth in 2305.09(D) commences to run when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property.

This Court did not limit its holding to permanent trespass or make any distinction between permanent and continuing trespass. In Harris, a couple purchased a lot in 1985 in order to build a home on the site. Id. at 203. That year they noticed a "water situation" on the property. Id. They eventually sold the property to a subsequent purchaser in 1992 without telling them of the water problem. Id. The subsequent purchaser soon discovered the water problem and brought suit in 1993 against many parties, including a negligence claim against the developers. Id. This Court explained that even though the subsequent purchaser brought suit within the four-year period of their discovery of the water problem, the water problem was actually discovered in 1985 by the original purchasers. Id. at 207. The Court ruled that the discovery by the original purchasers started the clock for calculating the statutory time. Id. at 208. Since the suit was brought in 1993, the subsequent purchasers were time barred from bringing their negligence action against the developers. Id. The court was faced with continuing damage (standing water on the property each time it rained due to the subdivision's alleged faulty drainage system) yet applied the four-year statute of limitations set

forth in R.C. 2305.09(D). As such, distinguishing between permanent and continuing trespass is unnecessary and irrelevant.

According to the facts of this case, the Plaintiffs-Appellants noticed water problems on their property as soon as the Trailside construction began. (T.D. 60, P. Sexton Depo., pg. 19-21.) Even before the development was complete, Plaintiffs-Appellants believed that these problems were due to Trailside. (T.D. 70, P. Sexton Depo., pg. 19-21.) Plaintiffs-Appellants reported their water problems to Mason in 1992, but did not file suit until July 14, 2003. (T.D. 60, P. Sexton Depo., pg. 24.) Thus, regardless of whether this is a permanent or continuous trespass, Plaintiffs-Appellants' trespass claims are time barred.

C. **Public Policy Does Not Favor Altering Long Standing Ohio Law in This Instance.**

Plaintiffs-Appellants argue, unpersuasively, that public policy dictates that the Supreme Court change the long-standing principles of continuing trespass, and allow such a claim to be based on continuing damages rather than tortious conduct. Additionally, Plaintiffs-Appellants ask this Court to allow a fresh cause of action to arise every time a plaintiff suffers damages stemming from a trespass, even though the tortious conduct at issue has long since passed. Such a proposition is in direct conflict with the very purpose of a statute of limitations.

This Court has recently found that the purpose of a statute of limitations is "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." McDowell v. DeCarlo, 2007-Ohio-1262, at ¶ 23, quoting Barker v. Strunk, 9<sup>th</sup> Dist. No. 06CA008939, 2007-Ohio-884, at ¶ 9. "The purpose of any statute of limitation is to prevent the assertion of stale claims because of the difficulties in asserting and defending against a legal claim after a substantial lapse of time from when the claim arose." Cocherl v. Ohio Dep't Trans., 2007-Ohio-3225, at ¶ 14, quoting

Stanley v. Lorac Const. Serv., Inc. (Sept. 10, 1998), Ross App. no. 97 CA2389, citing Sutton v. Mt. Sinai Med. Ctr. (1995), 102 Ohio App.3d 641.

Contrary to Plaintiffs-Appellants' assertions, a homeowner should not be encouraged (by allowing a fresh set of claims to arise every time he/she experiences damages) to "sleep on their rights," and allow water problems (and damages) to escalate. Once put on notice of a claim, the alleged tortfeasor has the opportunity to remedy the problem, preventing damages from becoming overly excessive. In addition, the potential plaintiff has four years from the discovery of the problem to ensure that it is remedied and, if not, file a lawsuit to preserve their rights. This Court, in Harris, took into consideration these very same policy issues, as well as the interests and equities involved, and reaffirmed the four year statute of limitations in a continuing damage case. Harris, 714 N.E.2d at 207. There is no reason for the Court to change its reasoning in this instance.

#### CONCLUSION

Because there are no claims pending on appeal against the City of Mason, this Court should find the City of Mason unnecessary for the purposes of this appeal, and affirm the Trial Court's entry of summary judgment in its favor. This Court should also find that summary judgment was properly rendered in Defendant-Appellees' favor because a permanent trespass occurred in this instance, and Plaintiffs-Appellants' claims were not brought within the appropriate four year statute of limitations.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Appellee, City of Mason, was served upon the following via regular U.S. mail, postage pre-paid, this 17<sup>th</sup> day of July, 2007.

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