

I. TABLE OF CONTENTS

| | PAGE |
|--|-------------|
| I. TABLE OF CONTENTS | 2 |
| II. TABLE OF AUTHORITIES | 3 |
| III. STATEMENT OF THE FACTS | 4 |
| IV. ARGUMENT | 5 |

II. TABLE OF AUTHORITIES

| | PAGE |
|--|------------|
| <u>Davis v. Allen</u> (2002) Ohio 193; 2002 Ohio App. LEXIS 158 | 8 |
| <u>Harris v. Liston</u> , (1999) 86 Ohio St. 3d 2003 | 5, 8, 9 |
| <u>Leonard Reith v. McGill Smith Punshon, Inc.</u> , Appeal No. C-040760, in the Court of Appeals, Hamilton County, Ohio | 6, 7 |
| <u>Nieman v. NLO, Inc.</u> , (1997) 108 F.3d 1546 | 8 |
| <u>Norwalk v. Blatz</u> (1906) Ohio Misc. LEXIS 208 | 9 |
| ORC 2305.09 | 4, 6, 7, 9 |
| <u>Valley Ry. Co. v. Franz</u> (1885) 43 Ohio St. 623 | 9 |
| <u>Wood v. American Aggregates Corp.</u> (1990) 67 Ohio App. 3d 41 | 9 |

III. STATEMENT OF THE FACTS

The issue on appeal as to appellee McGill Smith Punshon, Inc. ("McGill Smith") is whether the four year statute of limitations, ORC 2305.09, bars appellants' claims against McGill Smith. Appellants Peggy Sexton and Larry Sexton were owners of a house and lot which experienced substantial flooding beginning in 1992. Plaintiffs filed their amended complaint against McGill Smith seeking recovery of damages for alleged negligence on August 27, 2003. McGill Smith and the other defendants filed motions for summary judgment for dismissal of plaintiffs' claims as being time barred by the four year statute of limitations, ORC 2305.09. The trial court granted McGill Smith's and the other defendants' motions for summary judgment by Decision and Entry entered February 3, 2006. The trial court concluded as a matter of law based on the undisputed facts of record that plaintiffs' claims were barred by the four year statute of limitation, ORC 2305.09. Appellants appealed to the Court of Appeals which affirmed the decision of the trial court. Plaintiffs filed this appeal.

All material facts are undisputed.

Appellants Peggy Sexton and Larry Sexton were owners of real property consisting of a house and lot located in Warren County, Ohio. Beginning in 1992, appellants knew that their house and lot was being flooded by storm water from a creek which runs through their property and was being damaged.

Defendant/appellee Rishon Enterprises, Inc. ("Rishon") was the developer of a residential subdivision known as Trailside Acres which is close to appellants' real estate which contains their house and lot. Rishon retained McGill Smith to furnish it certain professional site engineering services for Rishon's development of the subdivision. All of McGill Smith's engineering services on the real estate near appellants' real estate were completed by 1994. McGill Smith never entered upon plaintiffs' property.

Defendant Don Thompson Excavating, Inc., which is not a party to this appeal, was the general contractor retained by Rishon for Rishon's development of the subdivision.

Appellants discussed the flooding of their real estate with defendant-appellee the City of Mason.

Appellants did not assert any claims against McGill Smith until appellants filed their amended complaint on August 27, 2003 in which they alleged that McGill Smith negligently performed its engineering services so as to cause damage to appellants' real property.

IV. 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 ORC 2305.09(D) and a negligence action 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 continuing damages.

Beginning in 1992 and thereafter, appellants knew that whenever it rained their real property consisting of their house and lot was being flooded and damaged by water from the creek which ran from the nearby Trailside Acres subdivision property. Appellants did not assert any claims against McGill Smith until appellants' amended complaint was filed on August 27, 2003.

Under the Ohio Supreme Court's decision in Harris v. Liston, (1999) 86 Ohio St. 3d 2003, appellants' claims against McGill Smith are barred by the four year statute of limitations in ORC 2305.09.

In Harris v. Liston, supra, the Ohio Supreme Court held:

Accordingly, we reaffirm that tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D). In addition, we hold that a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year

statute of limitations of R.C. 2305.09(D) commences to run when it is first discovered, or through exercise of reasonable diligence it should have been discovered, that there is damage to the property. p. 4. (Emphasis added)

Harris involved continuing water damage to the real property over a number of years as the Court stated:

The lot was eventually purchased by Elaine Liston. In 1985, Elaine and her husband constructed an approximately six-thousand-square-foot home on the lot. 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. p. 2. (Emphasis added)

Thereafter, in 1992, appellees Dr. Frederick D. Harris and his wife, Bernice, purchased the home. After purchasing the home, appellees became aware of the standing-water problem. p.2. (Emphasis added)

The Ohio Supreme 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 by ORC 2305.09(D) because they discovered the continuing water damage more than four years before they filed suit.

Thus, whether appellants' tort claim for trespass is for so called "continuing trespass" or "permanent trespass" is irrelevant as Harris v. Liston, supra, holds that all tort actions for damage to real property are subject to the four year statute of limitations.

It is undisputed that appellants did not file this lawsuit against McGill Smith until more than four years after appellants discovered the alleged damage to their real property in 1992 and appellants' suit is therefore time barred.

Virtually identical facts were involved in the case of Leonard Reith v. McGill Smith Punshon, Inc., Appeal No. C-040760, in the Court of Appeals, Hamilton County, Ohio. (Discretionary appeal to Ohio Supreme Court, Case 2005-2016, denied by Decision February 8, 2006.)

In Leonard Reith, supra, plaintiffs-appellants' house and lot experienced flooding and damage from 1993 until 2003 and they filed suit against McGill Smith and the developer of a residential subdivision located across the street from where they believed the water originated. The trial court granted McGill Smith's motion for summary judgment under the four year statute of limitations, ORC 2305.09, and the Court of Appeals affirmed since the appellants experienced damage from McGill Smith's alleged negligence beginning in 1993, but did not sue McGill Smith 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 Chatham Woods development at least four years before their lawsuit against McGill. Therefore, the Reiths' claim against McGill was barred by the statute of limitations. P. 12.

The Ohio Supreme Court denied discretionary review of the Court of Appeals decision.

In the present action, appellants admittedly knew that their real property was being damaged beginning in 1992 and did not file suit against McGill Smith until ten years later in 2003 and appellants' claims are therefore barred by the four year statute of limitations.

Appellants appear to contend that even though McGill Smith never entered upon appellants' real estate McGill Smith committed a continuing trespass because when it rains water from the nearby subdivision, for which McGill Smith completed all of its services in 1994, runs onto appellants' property. In effect, appellants contend that every rainfall which causes a water runoff on appellants' property is a new "trespass" or damage which would be "continuing" as rain falls on a daily, weekly, monthly and yearly basis and that the four year statute of limitations is triggered anew with every rainfall and water runoff. Obviously, such cannot be the law or the statute of limitations would never run.

Appellants also contend that a defendant could "wait out" the expiration of the statute of limitations, but such contention misses the point that it is always a plaintiff's burden to timely commence suit when the plaintiff knows it has been damaged. A defendant has no control or obligation in this regard.

The cases cited by appellants are simply inapplicable. The case of Nieman v. NLO, Inc., (1997) 108 F.3d 1546 is a federal Sixth Circuit decision which was decided prior to the Ohio Supreme Court's controlling decision in Harris v. Liston, supra, and is simply not controlling authority in this action.

The case of Davis v. Allen (2002) Ohio 193; 2002 Ohio App. LEXIS 158 cited by appellants is not applicable to the undisputed facts and procedures in the present action.

In Davis, supra, the trial court granted defendants' CR 12(B)(6) motion to dismiss plaintiffs' complaint.

The Court of Appeals reversed the dismissal and held that a motion to dismiss tests the sufficiency of the face of the complaint and that all facts necessary to decide the statute of limitations defense were not evident from the face of the complaint.

The Court noted that ordinarily a statute of limitations defense cannot be raised by a motion to dismiss the complaint, but must usually be addressed by a motion for summary judgment.

In the present action, McGill Smith filed a motion for summary judgment and all material facts are undisputed and under the Ohio Supreme Court's controlling decision in Harris v. Liston, supra, McGill Smith's motion for summary judgment was granted.

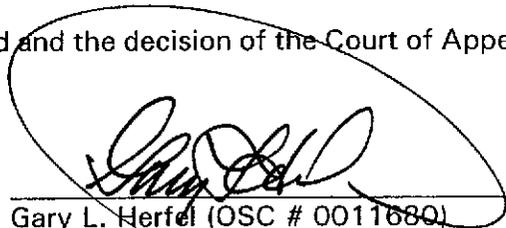
The Court of Appeals decision in Davis did not cite Harris and the Court of Appeals cannot overrule the holding of Davis that all tort actions for injury or damage to real property are subject to the four year statute of limitations.

The old cases of Valley Ry. Co. v. Franz (1885) 43 Ohio St. 623, Norwalk v. Blatz (1906) Ohio Misc. LEXIS 208, unreported, and Wood v. American Aggregates Corp. (1990) 67 Ohio App. 3d 41, are simply inapplicable under the Ohio Supreme Court's 1999 decision in Harris v. Liston, supra.

The 1999 decision of the Ohio Supreme Court in Harris v. Liston, supra, is the controlling authority which governs this action.

In this action, McGill Smith did not trespass. However, under such decision any characterization of damage as being "continuing" or "permanent" or otherwise is simply irrelevant. Rather, all tort actions for injury or damage to real property are subject to the four year statute of limitations in ORC 2305.09 which commences to run when such damage is first discovered or through the exercise of reasonable diligence should have been discovered. Under any other rule, the statute would never run and the important public policy of providing for lawsuits to be filed before evidence is lost and witness' memories are impaired will be thwarted. In the present action, appellants admittedly knew of the substantial and continuing flooding and water damage beginning in 1992 and thereafter did not sue McGill Smith until ten years later and appellants' claims are therefore barred.

Appellants' appeal should be denied and the decision of the Court of Appeals affirmed.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary U.S. Mail, postage pre-paid, on the 16th day of July, 2007, upon the following:

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