

IN THE SUPREME COURT OF OHIO

Peggy Sexton, et al.

Appellants,

v.

City of Mason, et al.

Appellees.

] Case Number: 2007-0305

]

] On appeal from the Warren County

] Court of Appeals, Twelfth Appellate

] District

] (No. CA2006-02-026)

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REPLY BRIEF OF APPELLANTS PEGGY SEXTON AND LARRY SEXTON  
TO THE OHIO MANUFACTURERS' ASSOCIATION AMICUS CURIAE  
BRIEF IN SUPPORT OF APPELLEES

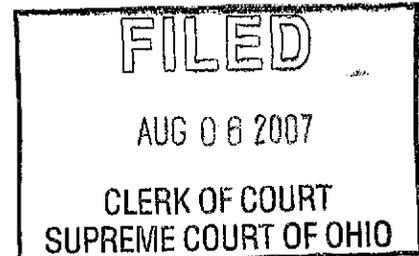
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## STATEMENT OF THE CASE AND FACTS

The facts of the original merit brief are adopted without change.

### ARGUMENT REBUTTAL

**Proposition of Law No. I: A claim for a continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct**

- I. Ohio law is not settled regarding the distinction between a permanent and a continuing trespass-the test should be that a cause of action for continuing trespass accrues upon each new fresh damage.

In the OMA's amicus brief they claim that Ohio case law is settled with regards to the difference between continuous and permanent trespass. (OMA Br. at 3.) Nothing could be further from the truth. Consider the language in *Valley R. Co. v. Franz*, (1885) 43 Ohio St. 623, 626, 4 N.E. 88, "where the act of trespass is a permanent trespass, as the *erection of buttresses to support a turnpike road* or the *erection and maintenance of a permanent building* it may be said to be a continuing trespass or nuisance for which a cause of action accrues, and may be brought at any time until, by adverse use or possession, the trespasser has enforced an adverse claim that has ripened, and has become a presumptive right or a valid estate." The OMA essentially would like this Court to hold that there is simply no such thing as continuous trespass-merely continuous permanent trespasses. That is not the holding of the *Franz* Court in distinguishing permanent trespass from continuous trespass. *Id.*

Again, in *Franz* the Court makes a distinction between permanent and continuous trespass. *Id.* at 625-626. When one 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. *Id.* On the other hand a continuous trespass consists of an *act* and *continuing damages*. Looking at the language of *Franz* again: "But where the act of trespass is a permanent trespass, as the erection of a buttress to support a turnpike road, or the erection and maintenance of a permanent building, it may be said to be a continuing trespass or nuisance for which a cause of action accrues, and may be brought at any time." *Id.* This passage indicates that the statute of limitation starts to runs at the point the act and damages are fully realized to fullest extent they ever will be in a permanent trespass. There are many examples of why a continuous trespass should not be considered by this Court to be a continuous permanent trespass. Often, there is one *act* with many different types and manners of damages flowing from that act over a considerable period of time. This is particularly true considering certain negligent actors often throw together subdivisions and neighborhoods for quick profits without concern for the long-lasting effects of their one *act*.

*Franz* is making clear that there is a difference between permanent and continuous trespass. It is not merely a matter of semantics. An erection of a buttress to support a turnpike road is one act, but the court holds that it may be said to be a continuous trespass thereby distinguishing it from permanent trespass.

The OMA attempts to argue that appellant's use of the *Wood v. Am. Aggregates Corp.* (1990), 67 Ohio App.3d 41, N.E.2d 970 case is misplaced. The OMA incorrectly reads the case.

Considering *Wood*, the OMA reasons that since an injunction was requested by the plaintiff this implies that conduct was ongoing and thus this is why the court in

*Wood* would suggest that the connection to underground water was a continuous trespass. (OMA Br. at 5). Yet when this Court considers the counter argument, that analysis by the OMA holds little weight. A connection to an underground aquifer, as was the case in *Wood*, is one act which is commenced fully and totally one time, and not at any other time is such act commenced, yet the Court in *Wood* still considers the continuous damages to trigger the statute of limitations. *Id.* at 973. However, what does continue is consistent wrongful acts of trespass in the form of ongoing *damages* which plaintiff suffers from. It is true the court in *Wood* on remand could have ordered defendant to remove its connection from the underground water, but the argument that the OMA makes is based on a cause of action for continuing trespass accruing from the time of the *act*. Thus in *Wood* there was only one *act*-the act of connecting to underground water. Indeed, it would seem that had the rule at that time been as the OMA suggests then defendant would simply argue that they had only *acted one time* and the four year statute of limitations barred plaintiff's claim from a cause of action sounding in continuous trespass.

The Colorado Supreme Court noted in *Hoery v. United States*, 64 P.3d 214, 219 (Colo. 2003) that *Wood* was an attempt by Ohio courts to clarify the distinction between continuing and permanent torts by focusing on the continuing damages, not conduct. *Id.* at FN 8 citing *Wood*,(1990) 67 Ohio App.3d 41, 585 N.E.2d 970, 973.

This is what the OMA wants: mega construction projects to consume vast areas in rapid time frames with little regard for surrounding homeowners or their property and for such actors to be able to claim at all times upon a suit four years down the road from such projects for continuing trespass brought by homeowners whose property values

have been destroyed that their original wrongful acts, occurring four years prior to a filed suit against them results in a bar to plaintiff's remedy at law. Such a result clearly indicates that the rule in Ohio should be that a cause of action for continuing trespass should be measured by ongoing damages and not acts.

The OMA takes issue with other cases cited by appellants. In *Frisch v. Monfort Supply Co.* (Nov.21, 1997), Hamilton App. No.C-960522, 1997 WL 722796 the court does hold that plaintiff's claims in continuous trespass are barred by the four year statute of limitations found in R.C. 2305.09(D), however the court found that defendant's tort was a *permanent trespass* and not a continuous trespass. Id. at \*3 (emphasis added).

The OMA also mischaracterizes the case of *Hartland v. McCullough Const., Inc.* (July 14, 2000), Ottawa App. No. OT-99-058, 2000 WL 966027. The rule held in that case is thus: "a continuous trespass happens when: 1) one party enters the land of another party and puts something that belongs to the first party on the land that belongs to the second party and *leaves it there permanently* so that it can eventually establish an adverse possession claim or 2) when one party does something on its own property that causes reoccurring damage to the land of the second party's property." Id. at \*5 (emphasis added). Thus, the court is not, according to the OMA's brief, holding that the key to what triggers a continuous trespass is ongoing conduct. (OMA Br. at 6). Instead the court clearly is holding that a tortfeasor could act one time (leaving an item on property is *one act*) or when there is *reoccurring damage* caused by a tortfeasor who acts one time on his or her own property. Id. The court held in the instant case the defendant did not commit a continuous trespass because it did not do something to adjoining land it owned that has resulted in *continuing damage* to appellant's land. Id. at

6. However, what is clear is that the court is not holding what the OMA argues it is. In analyzing *Frisch* the court merely agrees that the case at bar is more analogous to the facts of *Frisch* where the court concluded a permanent trespass occurred. *Id.* (quoting *Frisch*, 1997 WL 722796, at \*3).

The OMA is attempting to classify all trespasses as permanent. The OMA's reading of the Ohio cases suggests that continuous trespass is ongoing permanent trespasses. Yet case law from *Franz*, *Hartland*, and others makes clear that continuous trespass has to do with ongoing damages. It is true that many courts in Ohio are confused on how to apply the facts of the cases before them to the rules of continuous trespass and permanent trespass but simply because an appellate court finds that a fact situation is more prone to being labeled a permanent trespass does not make a distinction between permanent trespass and continuous trespass null and void.

The OMA argues that *Davis v. Allen* (Jan. 18, 2002), Hamilton App. Nos. C-010165, C-010202, C-010260, 2002 WL 63560 still stands for their proposition that continuous trespass is repeated permanent trespasses. (OMA Br. at 7) This is not the case. In *Davis* the court held that plaintiff suffered from a continuous trespass and not a permanent trespass. *Id.* at \*2. In fact, had the OMA read the case closely it would have noticed that the court held that the plaintiffs in the case had a cause of action sounding in continuous trespass because of defendant's *failure to act*. *Id.* (emphasis added). Thus, the defendants in the case acted once and then failed to act to remedy the problem and the resulting consequence was that there was then a continuous trespass. Thus, a failure to act to remedy a wrongful act which is causing trespass is not legally distinguishable

from an approach which uses ongoing damages as the triggering point to start the running of the statute of limitations.

This is a key point because often a defendant will act wrongfully and then fail to remedy that act in the hopes that the OMA rule of "ongoing conduct" applies and a suit by plaintiff will be barred. However *Davis* points out that a failure to act results in continuous trespass. *Id.* If the OMA gets their way then there is an incentive for defendants to never remedy their wrongful acts. It would not be necessary to remedy the wrongful act and risk resetting the limitations clock when the problem of a potential suit can be avoided by failing to act and then alleging that the statute of limitations bars the plaintiff's claim

Thus *Davis* does not stand for the rule that the OMA proposes: that ongoing conduct is what resets the limitations clock under the doctrine of continuous trespass. In contrast, a *failure to act* is a continuous trespass under *Davis*. *Id.*

**A. The OMA cites cases from other states in support of their position.**

**However, there is support for the appellant's proposition of law found in other states.**

There are several jurisdictions which hold that a claim for continuous trespass accrues upon each new damage that triggers the applicable period the statute of limitations defines. In *Hoery v. United States*, 2003 Colo. LEXIS 116, 64 P.3d 214 the Colorado Supreme Court gave a fairly comprehensive overview of their state law of continuing versus permanent trespass. *Id.* In *Hoery* the plaintiff brought an action under the Federal Tort Claims Act against the United States, alleging that negligent release of toxic chemicals from an Air Force Base into ground, which contaminated homeowner's nearby property, constituted continuing trespass and nuisance under Colorado law. *Id.*

The United States argued that the claims alleged cannot be continuing because any "wrongful conduct" that may have constituted a trespass or nuisance ceased in 1994, when the United States stopped operating Lowry as a military base. *Id.* at 20-21.

Because the tortious acts have stopped, the United States claims, the continued migration and ongoing presence of toxic chemicals on Hoery's property represent the damage caused by that tortious activity, but not the activity itself. *Id.* In other words, the continued migration and ongoing presence of chemicals represent property damage caused by past acts. *Id.* Therefore, the United States claims there is no continuing trespass or nuisance. *Id.* The court did not find the government's reasoning persuasive and held that although the government's wrongful "act" which had both invaded plaintiff's property and his use and enjoyment of property had occurred prior to the four year period statute of limitations there was still a claim of action for plaintiff to pursue in the form of continuous trespass. *Id.* (emphasis added).

Further, the Colorado Supreme Court reasoned that it is a fundamental principle of tort law that a defendant's failure to act, or its omissions, can be the basis for tortious conduct. *Id.* at 26-27. As the Restatement explains, "The word 'actor' is used merely for convenience, and is used not only in its primary sense of denoting one who acts, but also as denoting one who deliberately or inadvertently fails to act." Restatement (Second) of Torts § 3 cmt. a; § 158 cmt. 1 ("A trespass on land may be by a failure of the actor to leave the land of which the other is in possession."); *Graham v. Beverage*, (2002) 211 W. Va. 466, 566 S.E.2d 603, ("We hereby hold that where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of

limitations begins to run from the date of the last injury or *when the tortious overt acts or omissions cease.*") *Hoery*, 2003 Colo. LEXIS 116 at 26-27. (emphasis added).

Thus the Supreme Court of Colorado held that in environmental cases a failure to act to remedy a prior wrongful act that is either a trespass or a nuisance is a continuing trespass or nuisance even if the wrongful act has ceased prior to the statute of limitations time bar. *Id.* The question is whether the damages have continued without any further act on part of the defendant to remedy the wrong. *Id.*

In the appellants case the same is true for them as it was for the defendant in *Hoery*. Had appellees wanted to they could have acted to remedy the wrongful trespass inflicted upon the appellants, thus the act was abatable to a large degree.

Further support for appellants position comes from the Indiana Supreme Court which held in *Wabash County v. Pearson*, 120 Ind. 426, 22 N.E. 134, 16 Am.St.Rep. 325 that a cause of action for injuries arising from a defective bridge accrued only when the injury occurred and the statute of limitations did not begin to run until then, though defendant's negligence occurred at the construction of the bridge many years before. *Id.* The court further held, "there is, therefore, no force in the argument that the acts of negligence were committed in 1871, and that the statute then commenced to run, notwithstanding the fact that the appellee was not injured until 1884." *Id.* More support from the Supreme Court of Appeals of West Virginia, "we hereby hold that where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease." *Graham v. Beverage*, 211 W.Va. 466, 476; 566 S.E.2d 603, 613.

The OMA envisions a world where negligent actors can design and install defective products which cause intense damage to surrounding owners of property without liability from long term damages perhaps not seen for years. The OMA believes in a rigid set of rules designed to prevent plaintiffs who have suffered extreme damages to have no recourse because a period of time has elapsed since defendant's wrongful conduct and the filing of a suit. What the OMA does not consider is the varying types and manner of harms which occur to people who may have very little resources and who may be led to believe problems will be fixed by such negligent actors, only to discover upon a heavy rainstorm that new and severe damages have arisen; which have never occurred before. Ultimately, the aim of the OMA's arguments is to protect its members from lawsuits when they have negligently built or designed various types of products. If a defendant is making or designing the product with reasonable care then there should be no concern about liability. But when such designs or products break and create intense damage to surrounding property such homeowners should not be denied a remedy just because one year prior to such an injury a vastly less severe damage was suffered and discovered. As far as the OMA contention that appellant's envision a world of never ending liability, this Court should consider that often plaintiffs (OMA Br. at 15) try to work things out between themselves and an opposing party. However when severe damage occurs to such potential plaintiffs the realization that a suit is necessary to remedy their property rights will more than likely set in. The "ongoing conduct" rule proposed by the OMA will be an ugly legal fiction twisted to bar legitimate legal claims of homeowners while protecting wealthy tortfeasors who develop and move on without regard to the workmanship of their products. This Court should not adopt such a rule.

**II. Public policy arguments are appropriate for Ohio courts interpreting statutes that could substantially affect Ohio citizens.**

The OMA argues that the appellants are arguing that this Court usurp the General Assembly. Such an argument is without merit and is simply untrue. Appellants are not attempting to suggest that this Court usurp the General Assembly. In fact appellants are asking this Court to interpret the statute with an eye towards what the legislature intended.

Appellants are not interested in countering this state's governing body as the OMA suggest. (OMA Br. at 14). Instead appellants are interested in Ohio courts applying R.C. §2305.09 in a fashion which preserves claims of those who have been grievously harmed by the wrongful acts of parties whose behaviors, uncorrected, continue to severely harm property owners in this state-with special regard being given to the thousands of homeowners whose properties are at constantly in danger of being attacked and harmed by those whose aim it is to build enormous developments with little concern for pre-existing property owners who stand as a roadblock to profits.

**A. Public policy arguments are appropriate in this case.**

Public policy arguments are important in cases affecting Ohio citizens and when the legislature is silent in the context of when claims arise under the doctrine of continuous trespass. *Tamarkin v. Children of Israel, Inc.*, 2 Ohio App.2d 60, 206 N.E.2d 412, 31 O.O.2d 103 at 416.

The OMA cites *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶128, " The General Assembly is the policy-making body in our state and has restricted the exercise of judicial authority with respect to modification of a prior decree allocating parental rights and responsibilities." *Id.* The OMA cites a case in support of

its position that is addressing the breadth of power the judiciary may exercise in regards to modifying prior shared parenting decrees. *Id.* The case is not analogous to the appellants situation in the case at bar. In this case the Court is asked to consider public policy rationales in support of a position that defines continuous trespass to accrue upon each new and fresh damage. It is hardly an abuse of judicial precedent for Ohio courts to consider public policy arguments. Public policy is an important factor in Ohio courts determining case law as well as interpreting statutes.

The public policy arguments are important for this Court to determine when a claim "rises" in the context of continuing trespass; they are not meant as arguments compelling this court to overrule the General Assembly. *O'Stricker v. Jim Walter Corp.*, (1983), 4 Ohio St.3d 84, 4 O.B.R. 335, 447 N.E.2d 727, 730. (noting that absent legislative definition, it is left to the judiciary to determine when a cause "arose.") There is no legislative definition in R.C 2305.09 defining when claims arise in a continuing trespass situation.

Ohio courts may hear public policy arguments to interpret statutes does not imply that the court is elevating its interpretation of the statute at issue above that of the General Assembly, which would be inappropriate. *Shay v. Shay*, 113 Ohio St.3d 172, 2007 -Ohio- 1384, 863 N.E.2d 591, at ¶30. In analyzing statutes public policy arguments are appropriate and needed for the courts of Ohio to make just and equitable findings of fact as well as fair readings and interpretations of the state's statutes. *Ohio Presbyterian Homes v. Kinney*, 9 Ohio St.3d 90, 459 N.E.2d 500, 9 O.B.R. 319 dissenting in part and concurring in part at 9, (noting that a statutory tax exemption for

nursing homes should be construed with an understanding of the important public policy in taking care of the elderly).

It is appropriate for this Court to consider public policy rationales in regards to R.C. 2305.09 because this Court would not be usurping any province of the General Assembly because the General Assembly is silent on when claims arise in a continuous trespass claim.

**B. A rule which recognizes that R.C. 2305.09 four year period of limitations on continuing trespass is triggered by ongoing damages is an equitable result for all parties.**

The OMA's position centers around the idea that an interpretation of the four year period of limitations found in R.C. 2305.09 is only equitable if such a period starts to run at the time of conduct and conversely such a four year clock is not triggered by ongoing damages. The OMA argues that their definition of continuing trespass and the statute of limitations is the only equitable reading of R.C. §2305.09.

Citing Justice Jackson's purpose of the statute of limitations found in *Order of R.R. Telegraphers v. Ry. Express Agency, Inc* (1994), 321 U.S. 342, 348-49, 64 S.Ct. 582, in the OMA Br. at 15: "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." That is all true and it should be applied by this Court

to hold that the four year period in §R.C. 2305.09 should be triggered by the last act of damage which the tortfeasor caused in a continuous trespass. As stated in prior briefs, (Applt. Br. at 14-16) equitable doctrines work in appellant's favor-not the OMA.

It is true that statutes of limitation are designed to assure an end to litigation and to establish state of stability and repose. *LaBarbera v. Batsch*, 10 Ohio St.2d 106, 227 N.E.2d 55, 39 O.O.2d 103 at 114. The purpose of any statute of limitations is to prevent assertion of stale claims because of difficulty involved in asserting and defending against legal claim after substantial lapse of time *from point claim arose*. *Sutton v. Mt. Sinai Med. Ctr*, 102 Ohio App.3d 641, 657 N.E.2d 808 at 647 (emphasis added). Therefore, the issue is again, when the claim rose. The equitable arguments apply only when we can determine at which point a claim arose. This Court should hold that a claim for continuous trespass rises when the last act of damage from the trespass occurs.

If this Court holds that the four year period of limitations runs from each new damage-there is little problem with regards to evidence. The damage in a trespass is caused by the wrongful act of the defendant, thus evidence should and will be preserved if under the doctrine of continuing trespass, the statute of limitations is triggered by the last damage a plaintiff suffers from a trespass. Consider another point Justice Jackson makes: "memories have faded and witnessed have disappeared." *Order of R.R. Telegraphers* at 348-349. If the trigger for a new cause of action under the rule of continuous trespass are damages then most likely there are plenty of witnesses and memories have not faded. This is because often with trespass, as is the situation in the case at bar, an object has been negligently designed and/or installed which result in trespass and since there are continuous trespasses occurring to plaintiff it stands to

reason that the negligent party has records of such structures and how they were built. A plaintiff should have the opportunity to have his legal harms redressed.

**C. The OMA mischaracterizes *Harris v. Liston* (1999), 86 Ohio St.3d 203, 714 N.E.2d 377.**

In *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207, 714 N.E.2d 377 this Court did 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 the exercise of reasonable diligence it should have been discovered, that there is damage to the property. This Court should limit the *Harris* decision to real property torts based on nuisance not continuing trespass.

*Harris* involved a purchaser for value suing the developer for causing there to be standing water on his property. *Id.* at 377. The predecessor in ownership knew about standing water problems in 1985 but conveyed the property to plaintiffs in 1992. *Id.* In 1992 after plaintiffs purchased the home they discovered the standing water problem. *Id.* Plaintiffs commenced suit against several defendants in 1993. *Id.* The issue was whether the statute of limitations found in R.C. 2305.09(D) started to run in 1985 when the original homeowners knew of the problem or in 1992 when the plaintiff purchased the home and discovered the problem. This Court held it was the former, that the original homeowner upon discovering the harm of the standing water triggered the four year period found in R.C. 2305.09(D). *Id.*

This Court should keep the *Harris* holding narrow and confined to real property torts based on nuisance. The *Harris* discovery rule encompasses real property nuisance

torts and not real property trespass torts. Id. In appellants case they were led to believe that the problem they suffered from would be fixed by all defendants parties to the original action. They suffered a harmful unlawful invasion onto their property caused by appellees' negligence, not just simply a nuisance of standing water that interfered with their use and enjoyment of their property. Appellants experienced new harms on various occasions but the harms were of little effect in terms of damages. Finally the appellants suffered a major flood caused by appellees negligence where a six foot wall of water exploded by completely blowing the French doors leading out of the basement and flooded the basement. This degree and type of damage had never occurred before.

The discovery rule poses a problem to persons such as the appellants for this reason: the damages suffered by the appellants in this case were so varied and unique that it would be near impossible for them to bring an action against the defendant because of the inability of appellants to condense the different damages into one "discovery". In other words, a damage which an actor might discover in 2008 and file suit on become something totally different in 2010 which should give rise to a claim for a continuous trespass action. When an actor wrongfully causes water to trespass onto property due to her negligence the water's path of destruction is unique and often unpredictable. Thus, if a party discovers a trickle of water trespassing onto their property caused by defendant during a draught year then a claim for trespass will arise, however the next year if the nature and manner of the harm is so radically different than the damage from the prior year then the only just and equitable result would be that the plaintiff has "discovered" a new trespass with a new cause of action. The OMA is attempting to muddy the issue here. An actor can discover new harms from the same

defendants wrongful acts which in turn should give rise to new claims based on the law of continuous trespass. The harm suffered by appellants in the case at bar differs so dramatically from those suffered by the plaintiff in *Harris* that it stands to reason why *Harris* should be limited to real property nuisance torts.

In *Schneider Nat'l Carriers, Inc. v. Bates* (Tex. 2004), 147 S.W.3d 264, 270, 147 S.W.3d 264, 48 Tex. Sup. Ct. J. 6 the Texas Supreme Court was making a distinction between "temporary nuisance" and "permanent nuisance". It was not distinguishing permanent trespass from continuing trespass in the same manner as the OMA states. (OMA Br. at 20).

Further, the Texas Court states that many jurisdictions use different tests from Texas for determining the distinction between temporary and permanent nuisance (again, not trespass). *Id.* Many other jurisdictions make the same distinction between temporary and permanent nuisances for the purpose of determining when limitations accrues, noting that the test used to make the distinction in Texas is fairly unique. *Id.* The word "unique" according to the Merriam-Webster dictionary means "being the only one". Thus Texas courts are certainly not carrying the day with their test of distinguishing permanent from temporary nuisance.

The OMA mischaracterizes the distinctions between permanent and temporary nuisance made in *Schneider*. The court reasoned, "Texas courts have defined temporary and permanent nuisances along lines that are somewhat closer to the plain meaning of the words. We define a permanent nuisance as one that involves "an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely. Thus, a nuisance is permanent if it is "constant and continuous," and if

"injury constantly and regularly recurs." Id. at 272. And the Court defines "temporary nuisance as, "a nuisance is temporary if it is of limited duration. Thus, a nuisance may be considered temporary if it is uncertain if any future injury will occur, or if future injury "is liable to occur only at long intervals." A nuisance is also temporary if it is "occasional, intermittent or recurrent," or "sporadic and contingent upon some irregular force such as rain." Id. So when the OMA states in its brief that "the "Sextons' appeal to policy is a dead end" (Amicus brief at 20) they would be mistaken. The appellants are indeed claiming what the Texas Supreme Court held, that they are suffering from a continuing trespass because of the likelihood of a future injury to the appellants that is liable to occur possibly only at long intervals, or possibly during certain rains or seasons of the year.

It is the OMA who is misstating and confusing the issues. The OMA imagines a world where plaintiffs lose their right to a legal remedy against negligent parties who cause wrongful trespasses to occur on plaintiffs properties. Further, the OMA hopes to confuse the issue by leading this Court to believe that the discovery rule narrows the scope of continuing trespass. The discovery rule does not narrow the scope of continuous trespass. As previously mentioned the rule should be limited to real property torts based on nuisance and further such a rule does not help this court to determine when claims arise under the doctrine of continuous trespass. Harms may vary in manner and type and yet may still be caused by the same negligent actor. In such cases it should be understood that upon each new damage a new discovery has been made-giving rise to a new cause of action for trespass.

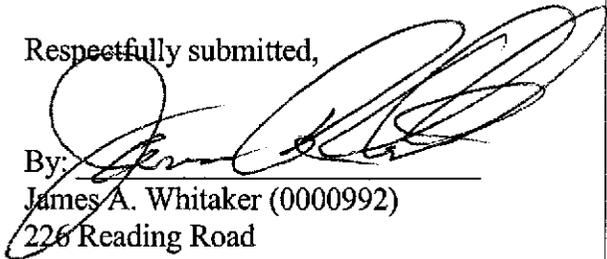
Such an argument does presuppose the issue before this court which is whether a claim for the real property tort of continuous trespass should accrue upon each new damage caused by the negligent acts of others thus triggering anew the four year period of the statute of limitations found in R.C. §2305.09.

### CONCLUSION

In conclusion this Honorable Court should hold that a claim for a continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct because homeowners will be protected by our courts from the wrongful acts of third parties and because there is no legal justification for recognizing a difference between a claim for continuous trespass which may be supported by proof of a failure to act (conduct) and a claim for continuous trespass supported by proof of continuous damages. Further, using an ongoing conduct approach gives an incentive to defendant's to not remedy problems. The discovery rule applied to the doctrine of continuous trespass bears out inequitable results for plaintiffs.

Situations surrounding discovering damages due to wrongful trespass often take a long time to develop and situations beyond a homeowners control will often make deciding when to bring a claim for trespass unclear at best. For the foregoing reasons this Honorable Court should conclude that a claim for continuous trespass sufficient to toll the four year statute of limitations should be supported by proof of continuous damages.

Respectfully submitted,

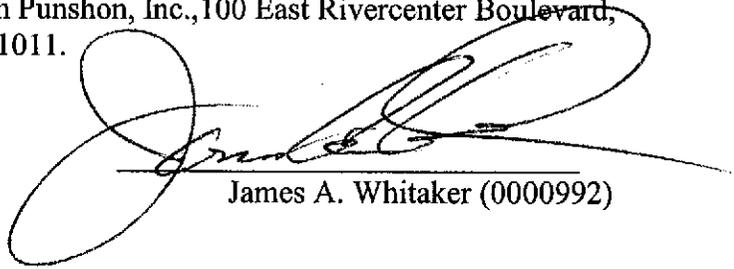
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**Certificate of Service**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Richard D. Schuster and Michael Hendershot, counsel of record for OMA, at 52 East Gay Street, Columbus, Ohio 43216-1008, and to Gary Becker and Jessica S. Hylander, counsel for Appellee City of Mason, at 1900 Chemed Center, 225 E. Fifth Street, Cincinnati, Ohio 45202, and to B. Scott Jones, counsel for Appellee Rishon Enterprises, Inc., at 525 Vine Street, Suite 1700, Cincinnati, Ohio 45202, and to Gary L. Herfel, counsel for Appellee McGill Smith Punshon, Inc., 100 East Rivercenter Boulevard, Suite 250, Covington, Kentucky 41011.

  
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