

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E.  
NICKOLI AND ROBIN L.B. NICKOLI,  
et al.,

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

**RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS'  
MOTION FOR LEAVE TO FILE AN AMENDED ANSWER**

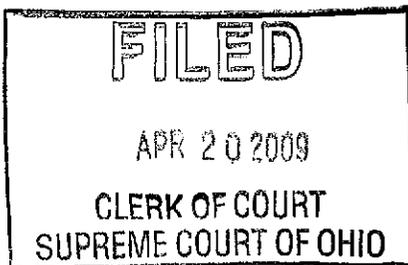
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## MEMORANDUM IN OPPOSITION

### INTRODUCTION

This Court's Rules of Practice do not allow amendments to an answer to a complaint filed in an original action after the court has issued an alternative writ. S. Ct. R. VIII, Section 7 makes clear that this Court does not permit amendments to pleadings when the deadline for filing the original pleading has passed. Respondents' motion to amend its answer now that the alternative writ has been issued violates this rule and their reliance on Civ. R. 15(A) is misplaced as it is inapplicable. Respondents' Motion for Leave should therefore be stricken or denied.

Respondents waited to file this motion until *after* this Court granted Relators an alternative writ, denied Respondents' Motion to Strike and denied Respondents' Request for Oral Argument. No new facts have emerged since the Respondents filed their answer on February 10, 2009 to warrant this motion and Respondents cite to none. Respondents cite only *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, which did not involve an attempt to amend an answer in an original action in the Supreme Court after an alternative writ had been granted.

Furthermore, even if this Court considers Respondents' motion, there is no merit to it. Respondents rely solely on *State ex rel. R.T.G., Inc. v. State* (2002), 98 Ohio St.3d 1, which is not only inapplicable on its facts but does not stand for the proposition for which it is cited. A cursory review of that decision shows that four Justices did not concur in the opinion, but only in the syllabus and the judgment. The syllabus did not address "the statute of limitations applicable to a mandamus action to compel the appropriation of property" as claimed by Respondents but instead addressed severable coal rights as part of the relevant parcel for takings analysis. Accordingly, *R.T.G.* does not support the new defense sought to be asserted and permitting Respondents to amend their answer based on *R.T.G.* is futile.

Moreover, the dictum in the R.T.G. opinion concerning the statute of limitations was superseded when in 2004, the Ohio General Assembly amended R.C. 2305.09 to create a 4-year statute of limitations for a physical or regulatory taking of real property running from the date of “accrual.” This Court has repeatedly recognized that when a trespasser enters land and engages in a continuing course of conduct on the land or retains control over the land, the trespass is continuing and the statute of limitations is tolled. *Sexton v. City of Mason* (2008), 117 Ohio St.3d 275, 279-284. Here, Relators have alleged that Respondents have engaged in a continuing course of conduct on their land and have retained control of their land. Respondents admit constructing and exclusively retaining this land for the purpose of a “multi-use bicycle and hiking trail” on the property. The statute of limitations is tolled by this conduct and the defense sought to be asserted in the Motion for Leave is completely without merit.

For any and all of the above reasons, Respondents’ motion should be denied.

## **ARGUMENT**

### **I. The S. Ct. Rules of Practice Do Not Permit Untimely Amendments To Pleadings.**

S. Ct. R. X, Section 2 provides that the Rules of Practice “shall govern the procedures and the form of documents filed” in original actions. That Rule further provides that the Ohio Rules of Civil Procedure shall supplement the Rules of Practice, but where in conflict with the Rules of Practice, the Rules of Practice “shall control.” S. Ct. R. VIII, Section 7 states, “corrections or additions” to a previously filed document “**shall** be filed within the time permitted by the rules for filing the original document (emphasis added).” Respondents are seeking to correct or add to the answer, which was required to be filed on February 10, 2009. The use of the word “shall” is clearly mandatory. Therefore, Respondents’ motion to amend their answer is directly contrary to the mandate of S. Ct. R. VIII. Further, pursuant to S. Ct. R.

VIII, the Clerk should “refuse to file a revised document that is not submitted...within the deadlines prescribed by this Rule.”

Thus, Respondents attempt to resort to Civ. R. 15(A), which is inapplicable and contrary to S. Ct. R. VIII, Section 7. Even if Rule 15(A) were to be applied, which it should not, Respondents’ proposed amendment does not meet the requirements of Civ. R. 15(A) either. Respondents do not identify any new facts they have discovered since they filed their answer that warrants their proposed amendment. Indeed, the *R.T.G.* case on which Respondents rely to claim they have a new defense was decided six years ago. The law has not changed since the Relators filed their complaint or Respondents filed their answer. There is no basis offered by Respondents that justifies permitting them to amend their answer to the complaint after the alternative writ has been granted.

**II. Even If Permitted To Seek An Amendment To Its Answer Outside The Scope Of The S. Ct. Rules Of Practice, Respondents Failed To Make Prima Facie Showing Of Support For The New Affirmative Defense.**

In cases governed by the Ohio Civil Rules, and not the Supreme Court Rules of Practice, in order to obtain leave to amend a pleading, a party must make a *prima facie* showing of support for its new claim or affirmative defense. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminating Co.* (1991), 60 Ohio St. 3d 120, syllabus and 122-123 (quoting *Solowitch v. Bennett* (8<sup>th</sup> Dist. Ct. App. 1982), 8 Ohio App.3d 115, 117). Respondents cannot do so. First, as a matter of law, Respondents rely upon dictum in *State ex. Rel. R.T.G., Inc. v. State* not contained in the syllabus. Only three Justices concurred in the opinion in *R.T.G. Id.* at 1011. The Syllabus announced a rule of law concerning the consideration of coal rights as part of the relevant parcel for purposes of a takings analysis. *Id.* at 1000. The discussion in the *R.T.G.* opinion of the statute of limitations is *obiter dictum*.

In addition, after *R.T.G.* was decided, the General Assembly amended R. C. 2305.09 to establish a four-year statute of limitations for a physical or regulatory taking of real property from the date of “accrual.” See R.C. 2305.09(E). The General Assembly has completely obliterated any precedential value to the *R.T.G.* dictum by amending R.C. 2305.09. By treating takings claims as a tort, the General Assembly has unmistakably recognized that takings claims for statute of limitations purposes are subject to tolling pursuant to established concepts in tort law of trespass and nuisance. *Sexton v. City of Mason* (2008), 117 Ohio St.3d 275, 279-280 (citing and quoting extensively *Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 626). Where trespasses are continuing, the limitations period (now codified in R.C. 2305.09) is tolled until the tortious conduct ceases. *Id.* at 275, 280, 284. In *Sexton*, this Court held that continuing trespasses “occur [] when there is some continuing or ongoing allegedly tortious activity attributable to the defendant.” *Id.* at 282. Relying on *Valley Ry. Co.* and appellate decisions, this Court reasoned that an important factor in determining if tortious activity is ongoing is whether the tortfeasor retains control over the property. *Id.* at 280-282. The Court also cited to *State v. Swartz* (2000), 88 Ohio St.3d 131, a decision which held that for criminal prosecution for unlawfully obstructing or impeding a passage of a stream, as long as the nuisance “...remains, and is within the control of the actor, the nuisance constitutes a continuing course of conduct tolling the limitations period.” *Id.* at 282-283.

The same principles of law must apply to the state as apply to private actors when private property is being seized from its rightful owner. No conceivable justification exists to apply a different analysis just because the state is the tortfeasor. Where a public entity continues to occupy, use and exert control over private property without paying just compensation, the limitations period in R.C. 2305.09 for a takings claim is tolled. Each day the public entity

occupies the property and exerts control over it without paying just compensation is an additional cause of action against it. *Cf., Valley Ry.*, 43 Ohio St. at 88. If anything, vindication of a landowner's right to just compensation for the unconstitutional seizure of his property is of greater importance than protecting the landowner from the same intrusion by a private actor. For this reason, the statute of limitations for a seizure of property without just compensation does not accrue until the public entity ceases to exercise control over the property.

Here, Relators have clearly alleged that Respondents have and continue to exercise dominion and control over their respective parcels for purposes of operating a recreational trail. *Compl.*, at ¶¶ 5, 36, 39. Respondents do not even dispute that they exercise dominion and control over the property at issue and are using it to operate a recreational trail. In fact, in their answer, they assert the affirmative defense of adverse possession, *see Answer* at Third and Tenth Affirmative Defense, which requires continuing possession. Moreover, in their Motion for Judgment on the Pleadings, Respondents could not make it any clearer that they claim continuous possession and control of the property at issue: "Respondent Board and the predecessor railroad companies who used the Railroad Corridor [within the pertinent sections of the Milan Canal Corridor] have been in exclusive possession and control of such Corridor for the past approximately 130 years." *Mot. for Judgment on the Pleadings*, at pg. 1. By admitting they exercise control and possession, Respondents have no basis for asserting a statute of limitations defense. Accordingly, Respondents cannot make a prima facie case supporting such a defense. In addition to the fact that Respondents are violating the S. Ct. Rules of Practice by seeking leave to amend, their Motion for Leave is baseless and should be denied.

## CONCLUSION

For all of the above reasons, Respondents' Motion for Leave should be denied. This Court's rules do not permit such an amendment. Moreover, Respondents continuing possession of and exertion of control over the Relators' property—without paying just compensation—tolls the applicable statute of limitations.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 20<sup>th</sup> day of April, 2009 via regular U.S. mail, postage prepaid, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and John D. Latchney, Tomino & Latchney, LPA, 803 East Washington Street, Suite 200, Medina, Ohio 44256, counsel for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks.



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