

THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, ex rel.)	CASE NO. 2009-0026
GERALD O.E. NICKOLI, et al.,)	
)	Original Action in Mandamus
Relators,)	
)	
v.)	
)	
ERIE METROPARKS, et al.,)	
)	
Respondents.)	

**RESPONDENTS' MEMORANDUM OPPOSING
RELATORS' MOTION FOR RECONSIDERATION**

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**RESPONDENTS' MEMORANDUM OPPOSING
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Relators' Motion for Reconsideration should be dismissed for two independent reasons:

First, it is simply a reargument of an issue raised by Relators in their Merit Briefs and rejected this Court, and hence a blatant violation of S.Ct.Prac.R. XI(2)(B); second, it is legally and factually unfounded.

I. The Motion For Reconsideration Is A Reargument Of An Issue Briefed And Decided In This Case, And Hence The Motion Is Improper Under S.Ct.Prac.R. XI(2)(B)

S.Ct.Prac.R. XI(2)(B) mandates that: "A motion for reconsideration * * * shall not constitute a reargument of the case, * * *" The Motion for Reconsideration violates this Rule.

In this original action, Relators sought a writ of mandamus to compel Respondents to commence appropriation proceedings. Respondents' Amended Answer raised as an affirmative defense the statute of limitations. The applicable statute is R.C. 2305.09(E), which provides that a four-year statute of limitation applies to any action "For relief on the grounds of a physical or regulatory taking of real property."

In their May 28, 2009 Merit Brief, Relators anticipated Respondents' statute of limitations argument by claiming "Relators had four years from the date of accrual with that date tolled for a continuing or ongoing take." Relators' Merit Brief at 33, fn. 10. Respondents' June 17, 2009 Merit Brief argued the applicability of the statute of limitations found in R.C. 2305.09(E) to the facts of this case. Respondents' Merit Brief at 27-30. That Brief also asserted that the continuing trespass theory discussed in cases such as *Sexton v. Mason*, 117 Ohio St. 3d 275, 2008 – Ohio – 858, 883 N.E.2d 1013, was not applicable to the facts of this case. Respondents' Merit Brief at 28. Relators' June 24, 2009 Reply Brief contended that because Respondents continue to occupy and possess the property at issue in this case, the continuous

trespass theory discussed in *Sexton v. Mason* is applicable and the statute of limitations has not run. Relators' Reply Brief at 4-5.

In a 6-1 decision, this Court held that Relators' action was barred by the statute of limitations found in R.C. 2305.09(E). *State, ex rel. Nickoli v. Erie MetroParks*, 2010 – Ohio – 606, ¶¶29-37. Relators' continuous trespass contention, referred to the *Nickoli* decision as the "continuous-violation doctrine", was considered and rejected by this Court. *Id.* at ¶¶31-37.

The Motion for Reconsideration is based primarily on the contention that this Court erred in failing to apply the continuous trespass/continuous violation doctrine to the facts of this case. That contention was raised by Relators in their merit briefs and rejected by this Court. The Motion for Reconsideration is simply a reargument of that contention, and such a reargument is not a proper grounds for a motion for reconsideration.¹

II. The Arguments Contained In The Motion For Reconsideration Are Legally And Factually Unfounded

A. Relators' State Law Continuous Trespass/Continuous Violation Doctrine Argument Is Unfounded

The Motion for Reconsideration constantly and erroneously claims that this Court's decision overruled 125 years of Ohio Supreme Court case law which allegedly established that **any** statute of limitations pertaining to injury to or invasion of real property rights continually accrues each day that the injury or invasion of such rights continues. The cases allegedly overruled by this Court are *Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 623, 4 N.E. 88, *State v. Swartz* (2000), 88 Ohio St.3d 131, 723 N.E.2d 1084 and *Sexton v. Mason*.

¹ That the Motion for Reconsideration is simply a reargument of various matters is also established by such incorrect assertions in that Motion that this Court "did not fully consider the federal continuous violation doctrine" --Motion for Reconsideration at 12 -- and that this Court's reliance on certain cases "is misplaced." *Id.* at 13.

The present case was a mandamus action seeking an order that Respondents institute appropriation actions with respect to various parcels of real estate. This case is controlled by the specific statute of limitations set forth in R.C. 2305.09(E), which, as mentioned above, creates a four-year statute of limitations on claims based on the physical or regulatory taking of real property. R.C. 2305.09(E) was enacted a mere six years ago, in 2004. Neither *Valley Ry. Co.*, *Swartz* nor *Sexton* involved the taking of property by a governmental agency, none of those cases involved R.C. 2305.09(E), none of those cases was even cited in this Court's majority decision, and obviously none of those cases was either expressly or implicitly overruled by that decision. The outcome of the present case was dictated by the express language of a recently enacted statute -- R.C. 2305.09(E) -- and by the undeniable fact that the take in this case occurred at the latest in 2003, when Respondents completed the Huron River Greenway (the "Greenway").

A cause of action accrues under R.C. 2305.09(E) when a government actor takes real estate. A taking of real estate by a government actor occurs when there is any direct encroachment upon such real estate which subjects it to a public use that excludes or restricts the dominion and control of the owner over it. *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102 (¶1 of the syllabus). This Court correctly found that the alleged taking at issue in this case occurred, at the latest, in 2003, well more than four years before this action was filed.² Applying the plain and simple wording of R.C. 2305.09(E) to this finding requires a holding that Relators' action is time-barred.

A tort action involving injury or damage to real estate is governed by the four-years statute of limitations set forth in R.C. 2305.09(D), and such action accrues for purposes of the statute of limitations when such injury or damage is first discovered, or through the exercise of

² Although not relevant to the Motion for Reconsideration, Respondents believe that the alleged take took place as early as 1995.

reasonable diligence such injury or damage should have been discovered. *Harris v. Liston* (1999), 86 Ohio St.3d 203, 714 N.E.2d 377 (¶¶1-2 of the syllabus). Assuming a discovery rule applies to an action, like the present case, seeking relief based on an alleged physical taking of real estate and therefore governed by R.C. 2305.09(E), such rule does not change the results of this case. Relators have not argued, because they cannot, that they first discovered that Respondents had constructed the Greenway on property they claim to own at some point in time after 2003. Instead, the Motion for Reconsideration claims that Ohio's continuous trespass/continuous violation doctrine should apply to the present action, and pursuant to that doctrine the statute of limitations set forth in R.C. 2305.09(E) reaccrues every day Respondents remain in possession of the Greenway. As this Court has properly determined, Relators' claim is unfounded.

With respect to Ohio continuous trespass/continuous violation doctrine, the Motion for Reconsideration discusses the three cases which Relators incorrectly assert were overruled by this Court's decision in the present case: *Valley Ry. Co. v. Frantz*, *State v. Swartz* and *Sexton v. Mason*. The plaintiff in *Valley Ry.* alleged that in 1874, defendant Valley Railway Company changed the course of the Cuyahoga River as it crossed Valley Railway's property. Plaintiff's property was adjacent to the Valley Railway property, and the Cuyahoga River, once it left Valley Railway's property, entered plaintiff's property.

Valley Railway's action caused "little damage for some time, as the bank [on plaintiff's property] was high and protected by small trees." *Valley Ry. Co. v. Frantz*, 43 Ohio St. at 624. However, "the bank and trees were slowly worn away by the stream of water, and the bed of the channel was changed on to the land of Frantz. As more and more damage was done, on complaint of Frantz, the officers of the railway company frequently promised Frantz to protect

the property from further damage; but nothing further was ever done by them, and Frantz commenced his action for damages.” *Id.*

This Court held that plaintiff’s claim was subject to the four-year statute of limitations for trespass, now found in R.C. 2305.09(A). *Id.* at 625. Although plaintiff’s lawsuit was filed more than four years after Valley Railway diverted the course of the Cuyahoga River on its property, this Court properly held that with respect to the damages caused plaintiff’s property **after** 1874 but within four years of the filing of plaintiff’s suit, plaintiff’s action was not time-barred. This Court reasoned that because Valley Railway continued to maintain the diversion after 1874 and continued to subject plaintiff’s property to a changed flow of water, Valley Railway’s conduct: “[M]ay be regarded as a continuing trespass or nuisance; and each **additional damage** thereby caused is caused by him and is an **additional cause of action**; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in [Valley Railway], [plaintiff] may bring his action” (emphasis added). *Id.* at 627.³

The defendant in *State v. Swartz* was charged with the crime of unlawfully obstructing and impeding the passage of a stream to the injury or prejudice of others. *State v. Swartz*, 88 Ohio St.3d at 132. The obstruction or impediment was caused by defendant’s 1992 construction on his own property of a bridge and culvert over the stream. *Id.* at 131. In 1998, a neighbor of defendant’s complained that defendant’s bridge and culvert caused “**continued damage** to [his] property” (emphasis added). *Id.* at 132. The criminal charge was then filed against defendant.

The two-year statute of limitations set forth in R.C. 2901.13(A)(1)(b) applied to such charge. *Id.* Defendant argued that the statute of limitations barred the prosecution, because he

³ *Valley Ry.* was a precursor to *Harris v. Liston*. The plaintiff in *Valley Ry.* in effect alleged that he first discovered the damage to his property caused by Valley Railway’s conduct after 1874 but within four years of when plaintiff filed suit. The reason such discovery occurred after 1874 was because the damage to the plaintiff’s property was not caused until after 1874.

had completed the construction of the bridge and culvert more than two years before the filing of the criminal charge. *Id.*

This Court rejected defendant's argument, relying in part on *Valley Railway Co. v. Franz*. This Court stated that: "[T]he continuing existence of the bridge and culvert created a **recurring** condition of flooding. The statute refers to both the action (of obstructing, impeding, or diverting the watercourse) and the damage (injury or prejudice of others). For the period of time that these damages **continued to occur**, defendant allegedly continued to maintain control over the bridge and culvert and allegedly continued to allow the bridge and culvert to cause damage to [his neighbor's] property" (emphasis added). *Id.* at 135. In other words, this Court permitted the prosecution of the criminal charge against defendant because it was based on damages which were caused by defendant's conduct and which occurred within the two-year period immediately preceding the filing of the criminal charge.

Sexton v. Mason, like *Valley Ry. Co.* and *Swartz*, involved conduct (the design and construction of a stormwater drainage system for a subdivision located on property adjacent to plaintiffs' property) by defendants on property owned or controlled by them. *Sexton v. Mason* at ¶4. Plaintiffs claimed that such conduct eventually caused water damage to their property. *Id.* at ¶¶5-11. More than four years after the completion of the stormwater drainage system, and more than four years after both defendants had relinquished any control over the property on which such system was located, plaintiffs filed their civil action.

This Court held that plaintiffs' claims were barred by the four-year statute of limitations found in R.C. 2305.09(D), the statute of limitations discussed in *Harris v. Liston*. In its decision this Court discussed its holdings in *Valley Ry.* and *Swartz* -- *Sexton* at ¶¶29-38 and 46-48 -- but did not in any way expand the rules created by those holdings. In fact, this Court held that the

statute of limitations began to run when the two defendants relinquished control over the property on which the stormwater drainage system was constructed, and since such relinquishment of control occurred more than four years before plaintiffs filed their suit, the suit was time-barred. *Sexton* at ¶55.

The present case seeks a writ of mandamus to compel Respondents to commence appropriation proceedings with respect to certain real estate which Relators claim they own and which Relators claim has been taken by Respondents. The present case is not a claim against Respondents for trespass or for negligently damaging Relators' real estate. Hence the present case is controlled by the statute of limitations set forth in R.C. 2305.09(E), and not by the trespass statute of limitations -- R.C. 2305.09(A) -- which controlled the action in *Valley Ry.*, not by the criminal statute of limitations -- R.C. 2901.13(A)(1)(b) -- at issue in *Swartz*, and not by the statute of limitations for tort actions involving damage to real estate -- R.C. 2305.09(D) -- which was involved in *Sexton*. Consequently, neither *Valley Ry.*, *Swartz* nor *Sexton* are applicable to the present case, and this Court's decision in this case does not overrule or affect the rules of law established in any of those cases.⁴

The issue in this case which Relators' reargue in their Motion for Reconsideration was whether this Court should apply the continuous trespass/continuous violation doctrine established by *Valley Ry.*, *Swartz* and *Sexton* to the present case, which is governed by R.C. 2305.09(E). That doctrine describes situations in which a party is not time-barred from prosecuting an action based on damages to real estate caused by activity that first occurred prior to the time period established by the statute of limitations applicable to that action, which activity continued and caused damages that occurred during such time period. Ohio's continuous

⁴ In fact, *Valley Ry.*, *Swartz* and *Sexton* each involved activity by a person on his own property which eventually caused damage to another person's property. That is not the factual background of the present case.

trespass/continuous violation doctrine does not permit a party to prosecute an action based on conduct **and** damages which occurred before the time period established by the applicable statute of limitations.

This Court correctly held in its decision herein that such rules were simply inapplicable to the present case. This case involves an alleged physical taking of real estate which was completed and which was clearly open and obvious to Relators no later than sometime in 2003. For purposes of R.C. 2305.09(E), the statute of limitation applicable to this action, any alleged continuing effects of the taking caused by Respondents' failure to relinquish possession and control of the Greenway after 2003 is not a new taking, but merely the present effects of a completed taking. *Ohio Midland, Inc. v. Ohio Dept. of Transp.* (C.A. 6, 2008), 286 Fed. Appx. 905, 912. Accord *Kuhnle Bros., Inc. v. Geauga County* (C.A. 6, 1997), 103 F.3d 516, 521 (for purposes of the applicable statute of limitations, any taking of property allegedly caused by the enactment of legislation occurs and is completed when the legislation was enacted, and not at some later date). This is an action seeking mandamus relief based on the alleged physical taking of real estate, not an action for alleged damages occasioned by such take after the take had occurred. The take was completed by 2003, if not sooner. Hence, this Court correctly ruled that Relators' action is time barred by R.C. 2305.09(E) and is not affected by Ohio's continuous trespass/continuous violation doctrine.

In cases pending in federal court, the federal courts have developed a federal continuing violation rule which is comparable to Ohio's continuous trespass/continuous violation doctrine. Two federal civil rights cases cited in the Motion for Reconsideration – *McNamara v. Rittman* (C.A.6, 2007), 473 F.3d 633 and *Hensley v. Columbus* (C.A.6, 2009), 557 F.3d 693 – alleging the taking without just compensation of groundwater demonstrate that neither the Ohio

continuing trespass/continuing violation doctrine nor the federal continuous violation rule apply to this case. The plaintiffs in *Rittman* claimed that the taking of their groundwater was caused by three water wells which the City of Rittman had drilled on property owned by the City. The drilling was completed in 1980. *McNamara*, 473 F.3d at 635. According to *Hensley*; “The *McNamara* plaintiffs claimed that both the initial drilling **and the continual operation of the wells** lowered their aquifer such that, were operations to stop, their aquifer would replenish” (emphasis added). *Hensley* at 697. In other words, *McNamara* involved a taking that may have occurred after 1980, the date the wells at issue in that case were completed. Although the court in *McNamara* discussed the federal continuing violations rule, it refused to determine whether such rule applied to the case before it. *McNamara* at 639-40. However, the court in *Hensley* claimed that the facts in *McNamara* were sufficient to invoke the continuous violation rule. *Hensley* at 697.

The plaintiffs in *Hensley* claimed that their groundwater was taken when the City of Columbus constructed a dry trench. The dry trench was completed in 1992, and plaintiffs’ groundwater was exhausted as a result and at the time of such construction. Because the groundwater was taken in 1992 when the dry trench was completed, and since no further activity on the part of Columbus was required to complete the dry trench, the federal continuous violation doctrine was inapplicable. *Hensley*, 557 F.3d at 697-98.

The present case is similar to *Hensley* and dissimilar to *McNamara*. In the present case, the take was fully completed by 2003, at the latest. No additional activity was required by Respondents after 2003 to complete the take. All activities by Respondents with respect to the real estate in question after 2003 were merely the effects of the completed take, and not new takes.

As this Court also correctly noted, application of Ohio's continuous trespass/continuous violation doctrine to the facts of this case "would eviscerate the statute of limitations [R.C. 2305.09(E)], which would be an untenable result." 2010 – Ohio – 606 at ¶35. The Motion for Reconsideration argues in footnote 2 on page 11 that this Court is wrong, because R.C. 2305.09(E), even if subject to Ohio's continuous trespass/continuous violation doctrine, would still apply to a temporary taking which had ended. However, R.C. 2305.09(E) does not merely apply to completed temporary takings: it applies to all takings. Adoption of Relators' argument would result in a complete re-writing by this Court of the plain and unambiguous language of R.C. 2305.09(E). Obviously, this Court should decline Relators' request to re-write legislation passed by the Ohio General Assembly.

Relators complain that as a result of this Court decision, they have been denied just compensation for a taking of their property. Motion for Reconsideration at 4. Assuming without admitting that Respondents did take Relators' property,⁵ Relators were not improperly deprived of just compensation. Ohio has a cause of action -- mandamus, to compel a government actor to commence appropriation proceedings to determine the amount of just compensation to be paid to the owner of property for a taking of that property. However, that cause of action, like every other cause of action in Ohio, is subject to a statute of limitations, in this case R.C. 2305.09(E). As this Court has noted: "Statutes of limitations are designed to assure an end to litigation and to establish a state of stability and repose. It must be assumed that when the General Assembly enacts a statute of limitations it is aware that, although a stale claim may be meritorious, the statute will operate without reference to merit and will cut off the claim." *Wylor v. Tripi* (1971), 25 Ohio St.2d 164, 171, 267 N.E.2d 419, overruled on other grounds by *Oliver v. Kaiser*

⁵ Respondents argued in their Merit Brief that Respondents do not own the real estate at issue herein.

Community Health Foundation (1983), 5 Ohio St.3d 111, 449 N.E.2d 438. Relators' failure to obtain just compensation is the result of their tardiness in filing this action.

B. Relators' Federal Continuous Violation Doctrine Argument Is Unfounded

In determining whether a particular statute of limitations bars a case brought in federal court, the federal courts have developed a continuous violation rule. Under that rule, a statute of limitations will not bar an action brought in federal court if the defendant engages in continuing wrongful conduct, if injury to the plaintiff is continuing, accumulating and occurs within the period of time established by the applicable statute of limitations, and if the defendant could, by ceasing its alleged illegal conduct, stop further injury to plaintiff. *Hensley v. Columbus*, 557 F.3d at 697; *Kuhnle Bros., Inc. v. Geauga County*, 103 F.3d at 522.⁶ The federal continuous violation rule appears to be substantially similar to Ohio's continuous trespass/continuous violation doctrine. For the same reasons that Ohio's continuous trespass/continuous violation doctrine is inapplicable to this case, the federal continuous violation doctrine is also inapplicable to this case.

The Motion for Reconsideration infers that the dismissal of Relators' claim on the grounds of a state statute of limitation is a denial of their state and federal constitutional rights to just compensation for a taking. Again, the Motion to Compel cites no authority for this obviously incorrect inference. Ohio provides a reasonable, certain and adequate procedure -- an action for a mandamus -- for seeking just compensation for an alleged taking. *Coles v. Granville*

⁶ On page 13 of the Motion for Reconsideration, Relators state: "Under the [federal] Sixth Circuit's continuous violations holdings and standard, this Court has denied the Relators' federal constitutional right to just compensation." The Motion to Dismiss cites no authority for the proposition that rules developed by federal courts for disposing of questions involving statutes of limitations in cases pending in federal court must be applied by a state court in disposing of a state law statute of limitations question.

(C.A.6, 2006), 448 F.3d 853, 860-65. The requirement that such a procedure be filed within a four-year period after the taking was completed violates no constitutional rights of Relators.

C. All Claims Of Relators Gerald O.E. Nickoli And Robin L.B. Nickoli Are Time-Barred

This Court's decision used 2003, the year the Greenway was open to the public, as the latest date for the take and therefore the start of the four-year statute of limitations period established by R.C. 2305.09(E). Realtors Gerald O.E. Nickoli and Robin L.B. Nickoli (hereafter these two Relators will be collectively referred to as the "Nickoli Relators") argue in the Motion for Reconsideration that the Greenway on half of their alleged property (the "Nickoli Property") has never been open to the public and therefore their claim for mandamus relief with respect to such half is not time-barred. The Nickoli Relators are wrong.

As described above, Ohio law states that a take occurs when there is a direct encroachment upon real estate by a government actor which subjects the real estate to a public use that excludes or restricts the dominion and control of the owner over such real estate. *Norwood v. Sheen*, 126 Ohio St. 482 (§1 of the syllabus). Even assuming the Greenway was never opened to the public on half of the Nickoli Property, it is clear that by 2003 Respondents had directly encroached upon all of the Nickoli Property for a public use – the construction of the Greenway – and had excluded the Nickoli Relators' domination and control over all of such Property.

The Nickoli Defendants do not dispute that by 2003 the Greenway had been constructed over all of the Nickoli Property, including that portion of such Property which contains the section of the Greenway which the Nickoli Relators claim was never opened to the public. With respect to such portion of the Nickoli Property, the Nickoli Relators admit that:

- Such portion is occupied and barricaded by Respondents. Affidavit (“Gerald Nickoli Affidavit”) of Relator Gerald O.E. Nickoli, Tab 1 of Relators’ Presentation of Evidence, ¶6, and Affidavit (“Robin Nickoli Affidavit”) of Relator Robin L.B. Nickoli, Tab 2 of Relators’ Presentation of Evidence, ¶6;
- By barricading such portion, the Respondents have precluded the Nickoli Relators from direct access to part of the Nickoli Property. Gerald Nickoli Affidavit, ¶6, Robin Nickoli Affidavit, ¶6.

The Nickoli Relators do not contend that such occupation and barricading of such portion of the Nickoli Property occurred after 2003. In fact, in paragraph 5 of the Relators’ Complaint which initiated this lawsuit, all of the Relators, including the Nickoli Relators, admit that since 1999 Respondents have “occupied, used, and possessed and *** otherwise exercised dominion and control” over all of the real estate at issue in this case, including all of the Nickoli Property.

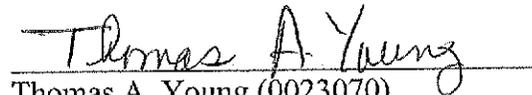
Finally, the Nickoli Relators have admitted that Respondents have taken possession of all of the Nickoli Property for the public purpose of “operating a recreational trail.” Gerald Nickoli Affidavit, ¶4; Robin Nickoli Affidavit, ¶4.

It is clear that the take of all of the Nickoli Property had occurred by 2003. Hence, the Nickoli Relators claims with respect to all of the Nickoli Property is time-barred.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Motion for Reconsideration be denied.

Respectfully submitted,



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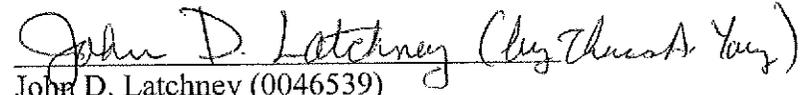
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of March, 2010, he served a copy of the foregoing “Respondents’ Memorandum Opposing Relators’ Motion for Reconsideration” on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus,

Ohio 43216-1008, counsel of record for Relators, by causing said copy to be mailed to his office, via ordinary United States first class mail, postage prepaid.



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