

IN THE SUPREME COURT OF OHIO

Ronald Von Stein, et al.,	*	On Appeal from the
		Crawford County Court of Appeals
Plaintiffs-Appellees,	*	Third Appellate District
		Case No. 3-13-18
and	*	
		Supreme Court
Herman Seibert, et al.,	*	Case No. 14-2179
Plaintiffs-Appellees,	*	
v.	*	
Donald Phenicie, et al.,	*	
Defendants-Appellants.	*	

APPELLEES' MEMORANDUM OPPOSING JURISDICTION

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I. THIS IS NOT A CASE OF GREAT PUBLIC AND GENERAL INTEREST

The Appellants, Donald Phenicie, E. Jane Phenicie, Trustee, and Doug Phenicie (collectively the "Phenicies") seek Supreme Court jurisdiction claiming that this case raises important legal questions of great public interest. The facts in the Record and the law discussed below show an insufficient basis to invoke this Court's jurisdiction. Simply stated, this case involves 1) the aggressive Phenicies increasing their agribusiness tenfold at the expense of their neighbors' farm productivity, 2) the Phenicies converting former "wetlands" by pumping the water from same onto their neighbors, 3) the Phenicies damming the outlet for said waters so that same impounded upon their neighbors' lands and 4) the Phenicies thus holding "hostage" the drainage of the neighboring farms. Court of Appeals Opinion (hereafter "App. Op.") at ¶49.

The drainage abuse by the Phenicies especially injured the Appellees, Herman Seibert and the Seibert Family Trust (collectively "Seibert"). This case raises no issues of universal application and is of interest only to those who believe that the trial court's fair and balanced drainage solution, affirmed in detail by the Court of Appeals, should be implemented and that the unreasonable and illegal acts of the Phenicies should be restrained and punished by judicial process.

Seeking this Court's jurisdiction, the Phenicies pose two Propositions of Law. **First**, the Phenicies suggest that expert testimony of flooding causation is required even where the flooding is the direct result of the Phenicies' pumping 132 acres of surface water onto their neighbors' higher farms simultaneously observed by Seibert, the Phenicies and their neighbors. The Phenicies incredibly claim that no expert flooding causation testimony was adduced at trial. This completely ignores *two days of expert*

drainage testimony on behalf of both of the parties which the trial court found overwhelming and which the Court of Appeals affirmed in its 47-page Opinion.

Second, the Phenicies propose that Seibert's request for prejudgment interest under R.C. 1343.03(A) was untimely. The Phenicies seek jurisdiction in this Court requesting that the time limitation for filing for prejudgment interest under R.C. 1343.03(C) be extended to motions filed pursuant to R.C. 1343.03(A). Briefed below are this Court's and other appellate decisions unanimously declining the extension the Phenicies request. Further, the Phenicies did not assert extension of the R.C. 1343.03(C) time limitation as a defense in the trial court and did not assert same as error in the Court of Appeals. As a result, the Phenicies are precluded from asserting such a time limitation as a basis for seeking jurisdiction in this Court.

II. STATEMENT OF THE CASE AND FACTS

A. Background and Relevant Facts

For over 70 years George Phenicie, respectively the father and grandfather of the Appellants Donald ("Don") and Doug Phenicie, and Herman Seibert and his father were friendly, neighboring farmers. The Phenicies' farm consisted of 78 acres lying north of and adjacent to the Seibert 100-acre parcel. George Phenicie and Herman Seibert "were the best of friends". Upon the death of George Phenicie, Don Phenicie inherited the 78-acre parcel and the Phenicies began the rapid acquisition of neighboring farmland so that by the time of trial they were farming 1,300 to 1,400 acres. Tr. p. 909.

In the course of this rapid expansion of their agribusiness, the Phenicies acquired the 35-acre parcel south of Seibert's 100-acre parcel thus sandwiching Seibert's parcel between theirs. This south 35-acre parcel acquired by the Phenicies is commonly

referred to throughout the litigation as the former "Pfleiderer wetland" or "wasteland". Tr. pp. 52-60 & 68 and Pls. Exs. 11, 11A, 15 & 15A.

In 2003 the Phenicies gave Seibert an "ultimatum" that they intended to "systematically tile" the former Pfleiderer wetland, together with an additional 97 to 98 acres to the west, and to pump the water from same onto Seibert's higher elevated, adjacent farm until it naturally drained from same through Phenicies' 78 acre parcel into the Lash Ditch and on to the Honey Creek. App. Op. {¶4}. Faced with the Phenicies' "ultimatum" that they were going to run the wetland water across his farm, Seibert agreed to the excavation of a ditch (referred to as the "Stevens Road Ditch") and a waterway across his farm to permit the Phenicies to drain and farm the former Pfleiderer wetland. Don Phenicie told Seibert "If you don't help me do it, I'll just run it across you." Tr. pp. 268:3-5, 269-270 & 351; App. Op. {¶77}.

Seibert understood, and the trial court and the Court of Appeals found from the evidence, the drainage agreement to provide **1)** that the Stevens Road Ditch would run down the center line of the boundary between the former Pfleiderer parcel and Seibert's farm (Tr. p. 164), **2)** that the Ditch would outlet at the east end of the Pfleiderer parcel into the waterway to be excavated across Seibert's farm and outletting across the Phenicies' north 78-acre parcel to the Lash Ditch and on to the Honey Creek (Tr. pp. 274, 295-298 & 425), **3)** that to prevent flooding of the adjacent farms the spoil excavated from each party's property would be embanked upon his side of the Ditch (Tr. pp. 164, 272-273, 280-281, 350-351, 376 & 418-419), and **4)** that Seibert and Phenicies would equally pay the cost of this excavation (Tr. pp. 86-97, 137, 274, 283, 295-298, 300-310, 330, 348, 425, 436-437 & 443 and Pls. Ex. 8, 11, 16 & 18-20). App. Op. {¶¶9 & 56}.

Upon the parties' reaching this drainage agreement, there occurred the following events relevant to the Phenicies' request for this Court's jurisdiction:

1. When the Stevens Road Ditch was excavated, Seibert was absent receiving cancer treatment. Tr. pp. 209-211, 213-214, 274-275 & 348-349 and App. Op. {¶4}. In Seibert's absence, the Phenicies violated the agreement by not outletting the Stevens Road Ditch at the northeast corner of the former Pfleiderer parcel, but turning same 90 degrees north for 200 feet and there outletting same on top of the Pfleiderer Maintenance Tile 919 (the "919 Tile") contrary to the design of said Tile. Tr. pp. 83-84, 86, 93-97, 137, 283, 286-287, 330 & 1137-1139 and App. Op. {¶21}.

2. This unauthorized northern extension of the Stevens Road Ditch was directed by the Phenicies to inject large volumes of water from the Stevens Road Ditch into the 919 Tile at "air vents" or "junction boxes", thereby overloading the 919 Tile and its tributary tile resulting in flooding of Seibert's and neighboring farms. Tr. pp. 77-84, 275, 298, 303, 422-423, 543, 545-546 & 554 and App. Op. {¶¶6, 7 & 9}.

3. When Seibert returned from his cancer treatment and discovered the northern extension to the Stevens Road Ditch injecting large quantities of wetland water into the 919 Tile, he objected to the Phenicies. Tr. pp. 274-275, 295-298, 303 & 385-386 and App. Op. {¶¶19-21}.

4. Seibert also discovered that the Phenicies breached the drainage agreement by embanking the spoil excavated from the entire ditch solely upon the Phenicie south side of the ditch, instead of embanking same on both sides of the ditch as agreed. Tr. pp. 273, 350-351, 376 & 418-419. App. Op. {¶¶7 & 21}.

5. When the Stevens Road Ditch and the waterway across the Seibert and north Phenicie farms was completed to the Lash Ditch, Seibert closed the "air vents" or "junction boxes" so that the ditch water would not flow into and overburden the 919 Tile. In retaliation the Phenicies backfilled the excavated connection of the Seibert waterway to the deepened Lash Ditch thereby damming and impounding the Stevens Road Ditch surface water upon the Seibert farm. Tr. pp. 97-115, 188-189, 193-194, 276-279, 307 & 352; Pls. Ex. 21 & 21D and App. Op. {¶¶9 & 10}.

6. The Phenicies' actions also prevented the neighboring Von Stein surface water from draining across the Pfleiderer parcel to the Lash Ditch as it had done historically. Tr. pp. 88, 91-92, 126-127, 136-137, 278-279, 302, 311-313, 352, 370-371, 376, 440, 481-482 & 484 and App. Op. {¶18}.

B. The Trial

When five (5) years of litigation could not correct and restrain the Phenicies' breach of the drainage agreement and their tortious interference with Seibert's farming, the matter proceeded to a four-day bench trial on February 11, 2013. During the trial the *expert drainage witnesses*, parties and neighboring landowners testified.

Seibert's expert drainage witness, Patrick ("Rick") Gosser, testified:

1. The pumping of Phenicies' Pfleiderer wetland was flooding Seibert's 100-acre parcel and, by damming same at the north end, *was creating a thirty (30) acre lake on Seibert's farm.* Tr. pp. 465, 481, 492 & 494-496.

2. The Court of Appeals summarized Gosser's testimony regarding causation of the flooding as follows:

"Gosser testified ... that diverting that volume of water [from the Stevens Road Ditch] into the 919 Tile was not good for the whole community.

Gosser explained that the air vents of the 919 Tile and the Lash Tile were not designed to take in the amount of overflow water being diverted into them by the Stevens Road Ditch and as a result of the excess water the effectiveness of the tiles was being compromised." App. Op. {¶27}. Tr. pp. 474-475 & 477-479.

3. Gosser described the Phenicie dam or "drop-off" which prevented the water impounded on the Seibert farm from flowing through the north Phenicie parcel to the Lash Ditch. App. Op. {¶28}. Gosser explained how the Phenicies' "barrier" or dam prevented an outlet for the Stevens Road Ditch. Tr. p. 489.

4. The Court of Appeals summarized Gosser's recommendations to cure the flooding as follows:

"In order to remedy the drainage issues, Gosser recommended creating an open surface drain through the low portion of Seibert's farm, connecting it to the existing surface drain [the Lash Ditch], and taking advantage of the 7 inches of fall on the Phenicies' property. * * * Gosser explained that opening up the surface drain will help alleviate the overburdened 919 Tile. * * * Gosser opined that his recommendation would provide a global solution benefiting all of the landowners in the watershed dependent on the 919 Tile." App. Op. {¶29}.

The Phenicies' expert drainage witness, Arthur Brate, testified:

1. The 919 Tile was never designed to have an overflow or ditch on top of it. Tr. p. 799.

2. Any backfilled dam or other drainage impediment should be removed:

Q. . . . [I]s it pretty clear to you that this Stevens Road Ditch oughta connect in a waterway all the way to the Lash [Ditch] and get that [impounded] water out of there?

A. Yeah. Normally, you know, *surface water*, if you can find an outlet that -- that's what you would try to do. So, yeah, without some surveys and things like this, I would think that type of thing [unimpeded waterway] makes sense. Tr. p. 791. (Emphasis added).

* * * * *

Q. . . . I'll show you Plaintiff's Exhibits 19 and 20 [where the witnesses] have identified these ponds or lake areasIf the [unimpeded Seibert]

waterway would help alleviate these lakes, wouldn't it be a good idea to open it up and let the water out?

A. Yeah. Any *surface improvements* that you could do would appear to be beneficial. Tr. pp. 791-792. (Emphasis added).

3. Concerning division of the excavated ditch spoil, Brate testified:

Q. Okay. So if Herman Seibert has asked for some soil, some of the spoil excavated from the Stevens Road Ditch, to be placed on the north side to try and prevent the [flood] water from coming north . . . that would not be an unreasonable request, would it?

A. No, that wouldn't be unreasonable. Tr. p. 812.

4. The Court of Appeals summarized Brate's causation testimony:

"Brate further opined that the Stevens Road Ditch should be connected to the improved Lash Ditch *surface drain* to take advantage of the additional elevation found north of the Seibert/Phenicie property line. He agreed with Gosser's opinion that creating a *surface drain* in the low areas in Seibert's fields would help adjoining landowners with the poor drainage." App. Op. {¶39}. (Emphasis added).

Herman Seibert testified:

. That he personally observed the Phenicies flood his farm by intentionally pumping their Pfleiderer parcel dry so they could plant crops thereon (Tr. pp. 363-364, 377 & 390-392 and App. Op. {¶¶11, 68 & 70}); that through the close of the trial evidence, he suffered crop losses exceeding \$200,000 caused solely by the Phenicies' pumping their Pfleiderer wetland on the south while damming the outlet on their northern parcel (Tr. pp. 355-392 and App. Op. {¶¶62-65}); and that on many occasions the Phenicies turned on their pumps and watched their wetlands water flood the Seibert farm *even while Seibert was simultaneously replanting same from prior Phenicie pumping and flooding*. Tr. pp. 402-404 & 588-589 and App. Op. {¶¶11, 68 & 70}.

Ronald ("Ron") Von Stein testified:

That he observed the Phenicies pumping the former Pfleiderer wetland dry while simultaneously flooding the Seibert parcel, *even when the Phenicies were not planting a crop in the former Pfleiderer wetland parcel, but taking the crop insurance instead.* Tr. pp. 638, 642, 646 & 660-661 and App. Op. {¶¶18 & 30}.

That concerning the Phenicie "dam", Ron Von Stein testified:

"Ron [Von Stein] related that Don [Phenicie] showed him the "dam" near the Seibert/Phenicie property line and implied that it was placed there because Seibert refused to pay his portion of the Lash Ditch improvement project to this son [Doug Phenicie]. Ron pleaded with Don and told him ... '[Y]ou're killing my crops to prove to Herman that [he] didn't pay your bill.' Tr. p. 626." App. Op. {¶31}.

Donald Phenicie acknowledged his misconduct, but could see no harm in same:

Q. Was it a neighborly thing to do to turn the pumps on your neighbor and flood him when he is trying to plant his corn?

A. I don't know how that could be a problem. Tr. p. 1102.

* * * * *

Q. So you made the effort by doing some pumping so you could take the insurance money?

A. Well, is that -- yes, if it is a wet area you --

Q. How much insurance money did you get [for the Pfleiderer parcel] for 2011?

A. I don't recall. Tr. p. 1103.

Based on said *expert* and lay drainage testimony, concerning the flooding causation the trial court found in its 17 page Decision and Judgment Entry¹, and the Court of Appeals affirmed, as follows:

¹ The Appellants state in their Memorandum that they have attached to same the trial court's Decision (Doc. No. R. 139) and Judgment Entry (Doc. No. R. 140). The Appellants neglected, however, to append said Decision and Judgment Entry to their Memorandum and the Supreme Court Clerk has advised that the Appellees are prohibited by Rule 7.03(B) from attaching a copy of said Decision and Judgment Entry to this Memorandum.

"The failure of the Defendants Phenicie to provide an adequate outlet when they tilled 132 acres of primarily wetland, so that it has flooded the dominant Seibert farm, was a breach of the Phenicie/Seibert drainage agreement, and has tortiously interfered with and injured Seibert's agribusiness and his property." Doc. No. 139 at 11. App. Op. {¶57}.

The trial court found that said flooding injured Seibert and his property and awarded Seibert \$200,000 compensatory damages, \$35,000 punitive damages and \$44,868.81 prejudgment interest. Doc. No. 140 at 1, Doc. No. 170 at 2 and App. Op. {¶42}.

After a detailed review of the evidence at trial, the Court of Appeals concluded:

". . . The testimony of ten witnesses, *including expert testimony* regarding the effectiveness of the Stevens Road Ditch, and numerous exhibits were presented for the trial court to consider. Testimony from several witnesses established that Seibert and neighboring landowners dependent upon the 919 Tile experienced increased flooding after the Phenicies attempted to improve the drainage of the Pfleiderer Farm in 2003. App. Op. {¶18}. (Emphasis added).

III. LAW AND ARGUMENT

- A. **Proposition of Law No. I - A plaintiff seeking to recover damages arising from flooding in a surface water controversy must produce expert testimony regarding the issue of causation where multiple causes of flooding have been offered and the dispute is so complex as to be beyond the knowledge of a layperson.**

The Phenicies posit that 1) expert flood causation testimony is required because 2) such causation is "so complex as to be beyond the knowledge of a layperson."

First, this Proposition does not warrant this Court's review as the above-cited references to the Record are replete with expert testimony *from both parties* concerning the primary cause of the flooding of the Seibert farm. The Record demonstrates, and the Court of Appeals confirmed, the ample expert evidence supporting the trial court's

conclusion that the Phenicies' acts and omissions were the deliberate, intentional cause of Seibert's flooding. App. Op. {¶¶18, 22-23 & 26-29}.

The Phenicies ignore the extensive testimony of Seibert's drainage expert Patrick Gosser on February 11, 2013. Tr. pp. 455-497 and App. Op. {¶¶27-29}. Mr. Gosser was the only drainage expert witness who had inspected, surveyed, field tested and reported the drainage conditions on the Seibert and the Phenicie farms. Tr. pp. 462-470. and App. Op. {¶13}. Mr. Gosser testified that the pumping of the Stevens Road Ditch water onto the Seibert farm where it was impounded by the "hump" or "dam" on the Phenicie parcel was the cause of the Seibert flooding. Mr. Gosser testified:

Q. Okay. For the overflow [the Seibert waterway] to function to its full capacity, would it be necessary to excavate from that overflow that's on Seibert property north up toward and through the Lash Ditch area up to the Honey Creek?

A. **If you wanted to drain the lake out on Seibert, that would be my recommendation.** Tr. p. 465. (Emphasis added).
* * * * *

Q. And when water flows down the side -- north on the waterway across Mr. Seibert's property and gets -- and runs into this barrier [the "dam"], what happens to it?

A. It's a matter that the barrier's high enough ... [s]o consequently, even though it only comes up it's 7/10ths higher out there, **it creates one big lake by the time it gets done.** Tr. p. 490. (Emphasis added).
* * * * *

Q. Showing you Plaintiff's Exhibit 19. In fact, do the flooded areas probably exceed 30 acres from your judgment or your experience?

A. If you're taking all of them into consideration, yes. Tr. pp. 495-496.

The Phenicies also ignore the causation testimony of their own drainage expert witness Arthur Brate. Tr. pp. 746-823 and App. Op. {¶39}. Brate confirmed Gosser's description of the "30 acre lake" impounded on Seibert's farm by Phenicies' flooding and damming as follows:

- Q. And, in fact, given the lay of the land there [on the Seibert farm] it wouldn't take much of a dam or elevation to impound a large area, would it?
- A. Correct.
- Q. Rick Gosser said, well, its impounding as much as 30 acres in some of the pictures [Exhibits] he saw. That sound reasonable to you or make sense?
- A. Oh, I think it's possible because there's a wide flat area . . . **So a little water ponded up is gonna spread out.** Tr. p. 816. (Emphasis added).

The Phenicies were compelled to acknowledge a number of cases in which this Court and Ohio appellate courts have held that expert testimony was not required. See *Longbottom v. Mercy Hosp. Clermont*, 12th Dist. Clermont Nos. CA2011-01-005, CA2011-01-006, 2012-Ohio-2148, 971 N.E.2d 379, ¶32, or this Court's conclusion in *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446; 2011-Ohio-6117; 958 N.E.2d 1235, ¶76, that "... expert evidence is not always required to prove causation.". Even the principal case upon which the Phenicies relied, *State ex rel. Post v. Speck*, 3d Dist. Mercer No. 10-2006-001, 2006-Ohio-6339, ¶61, held that ". . . the existence of flooding can certainly be proven through the testimony of the landowners and photographs."

Second, expert evidence is not required where the cause of the flooding is directly observed by lay witnesses. When Seibert, the Von Steins and expert drainage witness Patrick Gosser personally observed the Phenicies pumping and damming their water drained from the Pfleiderer wetland thereby creating a "30 acre lake" on Seibert's farm, there was nothing "so complex" that was not apparent by visual observation alone. App. Op. {¶¶7, 9-11, 30-32, 38 & 65}.

Even Don Phenicie confirmed that removing the dam and opening the waterway would be sufficient to alleviate the Seibert flooding when he testified:

"* * * and that [Seibert] waterway is going to carry more water than my pump is. **Just having that waterway will take care of more water than what I'm pumping [from the Pfleiderer wetland].**" Tr. p. 1127. (Emphasis added).

Applying the *McGlashan v. Spade Rockledge Corp.*, 62 Ohio St.2d 55, 402 N.E.2d 1196, syllabus (1980) "reasonable use" criteria, the trial court concluded that the deliberate, repeated flooding of the Seibert parcel by the Phenicies' egregious conduct, and their refusal to cooperate in curing same, was patently "unreasonable". Doc. No. 139 at pp. 9-10. The Court of Appeals agreed. App. Op. {¶¶47-52}.

In its lengthy review of the facts adduced at trial, the Court of Appeals found that the substantial, credible evidence of the direct cause of the Seibert crop loss was the Phenicie flooding of the Seibert farm. This conclusion by the trial court and the Court of Appeals was based not only on the expert testimony offered by both parties, but upon the direct, personal observations of Seibert and his neighbors. App. Op. {¶¶40-41}.

B. Proposition of Law No. II - Cotterman v. Cleveland Electric Illuminating Co., 34 Ohio St.3d 48 (1987) extends to motions for prejudgment interest filed under R.C. 1343.03(A), requiring such motions to be filed no more than 14 days beyond the entry of judgment.

This Proposition is meritless as neither this Court in *Cotterman, Id*, nor any Ohio appellate court established any specific time requirement for seeking prejudgment interest under R.C. 1343.03(A). Moreover, the Phenicies did not assert such a proposed time limitation as a defense to Seibert's R.C. 1343.03(A) motion for prejudgment interest in the trial court or as an Assignment of Error in the Court of Appeals.

As the Phenicies did not assert in the Court of Appeals their claim here that the *Cotterman, Id*, time limitation for filing motions for prejudgment interest under R.C. 1343.03(C) should be extended to those motions filed under R.C. 1343.03(A), they are precluded from asserting same as a basis for Supreme Court jurisdiction. *Republic Steel Corp. v. Board of Revision of Cuyahoga County* 1963), 175 Ohio St. 179, 192 NE2d 47;

Stores Realty Co. v. Cleveland (1975), 41 Ohio St.2d 41, 322 NE2d 629; *Snyder v. Stanford* (1968), 15 Ohio St.2d 31, 238 NE2d 563; *Rosenberry v. Chumney* (1960), 170 Ohio St. 48, 168 NE2d 285; and *State ex rel. Wasserman v. Fremont* (2014), 140 Ohio St.3d 471, 2014-Ohio-2962, {¶26}.

In *Republic Steel Corp., Id.*, this Court stated in its Syllabus:

Issues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on review.

In their Fifth Assignment of Error, the Phenicies did not assert that Seibert's motion for prejudgment interest under R.C. 1343.03(A) was untimely, but argued only that Seibert's claim for prejudgment interest under 1343.03(A) should be denied "because it did not breach a contract with Mr. Seibert that called for the payment of money." Phenicies' Merit Brief, at pp. 18-19. App. Op. {¶78}.

The rationale for not extending the *Cotterman, Id.* time limitation was explained in *Oakar v. Farmers Ins Co of Columbus*, 129 Ohio App.3d 277, 717 NE2d 778 (Ohio App. 8th Dist. 1998). There the Court of Appeals held:

Farmers also contends that the motion for prejudgment interest in this case was untimely. In support Farmers cites *Cotterman v. Cleveland Elec. Illum. Co.* (1987), 34 Ohio St.3d 48, 517 N.E.2d 536. Unlike the case at bar, in *Cotterman* the motion for prejudgment interest was made under R.C. 1343.03(C). Moreover, the motion was filed following a strikingly different set of events: (1) eighteen months after judgment on a jury verdict in favor of the party in trial court, (2) three months after the denial of a final appeal, and (3) three months after payment of the judgment. The court construed the terms "subsequent to the verdict or decision in the action" in R.C. 1343.03(C) and concluded that this condition was not satisfied by the belated motion because the action had already been terminated by payment before the motion was filed. *Id.* at 50, 517 N.E.2d at 539. 717 N.E.2d at 779.

* * * R.C. 1343.03(A) does not contain the phrase "subsequent to the verdict or decision in the action," which was construed and applied in *Cotterman*.

Cotterman does not apply, by its own terms, when the prejudgment interest award is sought under R.C. 1343.03(A) as in the case at bar. 517 N.E.2d at 780.

Where Seibert filed his R.C. 1343.03(A) motion for prejudgment interest within 20 days of the Court of Appeals' dismissal of the Phenicies' first appeal, 2) before the filing of Phenicies' instant appeal, and 3) before the Phenicies have undertaken to perform any of the judgment imposed upon them, the facts are in stark contrast to those in *Cotterman, Id.* Instead, the facts are very similar to those in *Royal Electric v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 652 NE2d 687 wherein this Court declined to establish a time limitation for seeking prejudgment interest under R.C. 1343.03(A).

Finally, the Phenicies acknowledge that many Ohio appellate courts have declined for various reasons to apply the time limitation of 1343.03(C) to cases involving that very statute. Where neither the legislature by statutory enactment, nor this Court by its decisions, has imposed any time limitation for motions for prejudgment interest under R.C. 1343.03(A), there is no basis for extending jurisdiction in this case.

C. Waiver and Estoppel

When post-judgment the Phenicies continued their egregious conduct of pumping and damming the Stevens Road Ditch surface water, Seibert sought an injunction to compel implementation of the trial court judgment. At hearing on said Motion on March 11, 2014, Doug and Don Phenicie testified that they would not comply with the trial court's judgment until same was affirmed by the Court of Appeals. Donald Phenicie testified as follows:

Q. * * * The question is very simple, the Court having heard all of the testimony, all of the facts, reviewed the exhibits and the law decided that this connection [of the new Seibert waterway to the deepened Lash Ditch] should be made. My question is, will you follow this Court's decision? Or, if it's affirmed by the Court of Appeals, will you follow that decision?

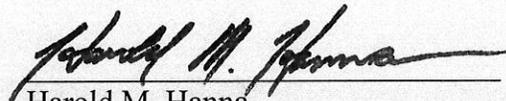
A. Yeah. If the Court of Appeals [affirms], that's why we got it into the appeals court. 3-11-14 testimony of Donald Phenicie, Tr. pp. 42-43.

Seibert submits that the Phenicies have thus waived their request for this Court's review and should be estopped from seeking same now.

IV. CONCLUSION

As the facts and the appellate authority demonstrate, this case is not unique and does not merit this Court's review. Instead of the Phenicies questioning when they should obtain "finality of judgment", which only their litigious tactics have delayed, the query should be "when will the prevailing victim finally be compensated and the trial court's well considered drainage solution implemented?"

Respectfully submitted,


Harold M. Hanna
Attorney for Appellees

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum Opposing Jurisdiction was served upon David C. Barrett, Jr. and Gregory R. Flax, Attorneys for Appellants, by emailing same to them on January 8, 2015.


Harold M. Hanna
Attorney for Appellees