

IN THE COURT OF CLAIMS OF OHIO

FIVE GUYS DEVELOPMENT, LLC

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2024-00724JD

Judge David E. Cain

DECISION

{¶1} Pursuant to Civ.R. 12(B)(6), Defendant, through counsel, moves this Court to dismiss Plaintiff’s Complaint for failure to state a claim upon which relief can be granted. The matter has been fully briefed.

{¶2} Because, after presuming all factual allegations in the Complaint are true, and after making all reasonable inferences in favor of Plaintiff, it cannot be found that Plaintiff’s Complaint states a claim upon which relief can be granted in this forum, the Court grants Defendant’s Civ.R. 12(B)(6) motion for reasons explained below.

I. Background and Procedural History

{¶3} This case arises from a dispute involving a parcel of real property located in Lake County, Ohio. According to Plaintiff, the real property is subject to an easement in gross under a 1940 Agreement between the former owner of the real property and Defendant. (Complaint, ¶ 6-8.)¹ According to Plaintiff, the real property also is the focus

¹ Plaintiff alleges:

On or about July 22, 1940, ODOT [Ohio Department of Transportation] entered into a “Special Agreement Waiver of Damages” (the “1940 Agreement”) with the then-owner of the Property, one Charles B. Hart.

.....

The 1940 Agreement contained an “easement in gross” under Ohio law, between ODOT and Hart, which allowed ODOT to use the Property as described in the 1940 Agreement until Hart conveyed the Property to a new owner.

of litigation in the Common Pleas Court of Lake County, Ohio, Probate Division. (Complaint, ¶ 25, 38.)

{¶4} Plaintiff asserts that it acquired the real property on December 30, 2005. (Complaint, ¶ 5.) Plaintiff further asserts that Defendant constructed “and/or” maintained a storm sewer on the property, which as alleged by Plaintiff, violated the 1940 Agreement by exceeding the pipe-diameter and length parameters described in the 1940 Agreement (Complaint, ¶ 10). Plaintiff also asserts that Defendant made additional modifications to the property, including but not limited to the construction and maintenance of stormwater retention ponds, without notice or permission to the property’s owners or to Plaintiff. (Complaint, ¶ 13.)

The language of the 1940 Agreement, and the intentions of its parties as expressed therein, confirm that the 1940 Agreement contained an “easement in gross” and not an “easement appurtenant.”

(Complaint at ¶ 6, 8, 9.) A review of the copy of the document appended to the Complaint shows that the Department of Highways, State of Ohio, entered in the 1940 Agreement.

An easement “is an incorporeal interest in land created by grant or prescription that entitles the owner of the easement to a limited use of the land in which the interest exists.” *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005-Ohio-3398, ¶ 24 (11th Dist.), citing *Alban v. R.K. Co.*, 15 Ohio St.2d 229, 231 (1968). The Eighth District Court of Appeals has discussed the difference between an easement in gross and an easement appurtenant as follows:

Easements may be appurtenant or “in gross.” An easement “in gross” conveys to another “a personal privilege to use the land” but that privilege expires “with the party to whom the privilege belongs.” *Id.* at ¶ 28, citing *Warren v. Brenner*, 89 Ohio App. 188, 195, 101 N.E.2d 157 (9th Dist.1950). In sum, an easement in gross is held by an individual, exists independently of any ownership of land, and is not transferrable to subsequent owners. *Merrill Lynch*, 9th Dist. Summit No. 24943 at ¶ 11. . . .

In contrast . . . are easements appurtenant. An easement appurtenant attaches to the property and requires a dominant estate and a servient estate. The dominant estate receives the benefit of the easement, while the servient estate is burdened by the easement. *Johnson v. New Direction IRA F.B.O King C. Lam*, 8th Dist. Cuyahoga No. 106628, 2018-Ohio-4608, ¶ 32, citing *Gateway Park* at ¶ 28. Essentially, the dominant estate acquires an easement to use a portion of property owned by the servient estate, which bears the burden of the use.

Acorn Dev., LLC v. The Sanson Co., 2022-Ohio-2576, ¶ 20-21 (8th Dist.). *Accord Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010-Ohio-1827, ¶ 11 (9th Dist.), citing *DeShon v. Parker*, 49 Ohio App.2d 366, 367 (9th Dist. 1974) (an easement in gross “is a right held by an individual, exists independent of any ownership of land, and is not transferrable to subsequent owners”). See generally *Black’s Law Dictionary* (12th Ed. 2024) (defining easement in gross as “[a]n easement benefitting a particular person and not a particular piece of land”).

{¶5} Plaintiff alleges that, on or about April 30, 2022, Defendant notified Plaintiff that it intended to appropriate an interest in the property, “ostensibly in connection with a planned improvement of U.S. Route 20.” (Complaint, ¶ 14.) According to Plaintiff, on October 10, 2022, Defendant filed a Petition to Appropriate Property and to Fix Compensation against Plaintiff in the Common Pleas Court of Lake County, Ohio, Probate Division. (Complaint, ¶ 23.) Later, according to Plaintiff, on September 10, 2024, Defendant filed an Amended Petition to Appropriate Property and Fix Compensation in the Probate Court Of Lake County, Ohio. (Complaint, ¶ 38.)

{¶6} On October 9, 2024, Plaintiff brought a Complaint against Defendant in this Court. Plaintiff presents six causes of action (which Plaintiff has labeled as “Counts”): (i) Violation of R.C. § 163.06(B), (ii) Trespass, (iii) Violation of R.C. § 163.59, (iv) Declaratory Judgment Pursuant to R.C. 2743.03 Relating to 1940 Agreement, (v) Nuisance, and (vi) Taking of Property Without Due Process of Law. Plaintiff demands (a) injunctive relief “in the form of an Order compelling [Defendant] to stay the Appropriation Action, and/or compelling the Court handling the Appropriation Action to stay such proceedings, until this Court has adjudicated and resolved this action, (b) declaratory relief, “in the form of a declaration that the Temporary Sewer Taking is not necessary, a declaration that the parties may be able to reach agreement on [Defendant’s] proposed acquisition of the Temporary Sewer Taking, and a declaration that [Defendant] may not proceed with the Appropriation Action until it has complied with R.C. § 163.59 in all respects,” (c) an award of compensatory damages in an amount to be determined at trial, (d) an award of punitive damages, in an amount to be determined at trial, (e) attorney fees and costs “incurred by Plaintiff and proximately caused by Defendant’s conduct,” and any other relief this Court deems just and proper.

{¶7} On November 8, 2024, Defendant, through counsel, moved this Court to dismiss Plaintiff’s Complaint for failure to state a claim upon which relief can be granted on grounds that Plaintiff’s Complaint seeks vague and unspecified damages for which no cause of action exists, that Plaintiff’s Complaint seeks untimely damages for trespass and nuisance, and that Plaintiff seeks damages for a “taking” which is already subject to a pending action elsewhere. Defendant maintains that Plaintiff’s Claims are improper and should be dismissed.

{¶8} Plaintiff opposes Defendant’s Civ.R. 12(B)(6) motion. Plaintiff urges that, under the Ohio Rules of Civil Procedure, as interpreted by Ohio case law, a plaintiff is not required to prove his or her case at the pleading stage. Plaintiff contends that its Complaint exceeds the minimal requirements of Ohio’s notice pleading standard, that its claims for trespass and nuisance are not time-barred, that its declaratory-judgment claim, that its “statutory claims” (i.e., claims asserting violations of R.C. 163.06(B) and 163.59) and that its “taking claim” are cognizable and proper in this Court. In the alternative, Plaintiff contends that, to the extent that this Court finds any merit in Defendant’s arguments concerning the sufficiency of Plaintiff’s Complaint under Ohio’s notice-pleading standards, this Court should grant leave to Plaintiff to amend the Complaint “to include different and/or supplemental allegations, sufficient to satisfy Ohio’s notice-pleading standard.”

{¶9} In reply, Defendant maintains that notice-pleading is not a defense to a poorly pled and untimely complaint, that no cause of action exists for a violation of R.C. 163.06(B) because the drainage easement is part of the “quick-take” for the highway, that no cause of action exists for violation of R.C. 163.59 after an appropriation action has begun, that a declaratory-judgment action for a 1940 Agreement is improper in this Court, that Plaintiff’s claim for a taking of property without due process of law is a recharacterized statutory-violation claim for which the remedy is the pending appropriation action pending in Lake County, Ohio, that “miscellaneous vague demands” for injunctive relief are insufficient, and that Plaintiff may not be awarded punitive damages or attorney fees.

II. Law and Analysis

A. Legal standard for dismissal under Civ.R. 12(B)(6).

{¶10} Under Civ.R. 12(B)(6) a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Civ.R. 12(B)(6). *Coleman v. Columbus State Community College*, 2015-Ohio-4685, ¶ 6 (10th Dist.). A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim “is procedural and tests the sufficiency of the complaint.” *Dunkle v. Ohio Dept. of Rehab. & Correction*, 2014-Ohio-3046, ¶ 7 (10th Dist.), citing *Volbers-Klarich v. Middletown Mgmt.*, 2010-Ohio-2057, ¶ 11. *Compare*

Dunkle at ¶ 6 (standard for dismissal under Civ.R. 12(B)(1) for lack of subject-matter jurisdiction).²

{¶11} Under Civ.R. 12(B)(6), when a court rules on a motion to dismiss, the court “must construe the complaint in the light most favorable to the plaintiff, presume all factual allegations in the complaint are true, and make all reasonable inferences in favor of the plaintiff.” *Coleman* at ¶ 6, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). A dismissal of a complaint for failure to state a claim “is proper when it appears, beyond doubt, that the plaintiff can prove no set of facts entitling him to relief.” *Coleman* at ¶ 6, citing *Celeste v Wiseco Piston*, 2003-Ohio-703, ¶ 12 (11th Dist.). “A court should grant a Civ.R. 12(B)(6) motion to dismiss based on the bar of a statute of limitations ‘only if the complaint conclusively demonstrates on its face that the action is barred by the statute of limitations.’” *Johnson v. Ohio Dept. of Rehab. & Correction*, 2022-Ohio-2155, ¶ 7 (10th Dist.), quoting *Glenn v. Ohio State Univ.*, 2018-Ohio-2610, ¶ 3 (10th Dist.), citing *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376 (1982), paragraph three of the syllabus.

{¶12} “A motion under Civ.R. 12(B)(6) is decided on the complaint and any documents appropriately attached.” *Mariner Fin., LLC v. Childs*, 2021-Ohio-3935, ¶ 8 (10th Dist.), citing *Cline v. Mtge. Electronic Registration Sys.*, 2013-Ohio-5706, ¶ 9 (10th Dist.). The Tenth District Court of Appeals has stated,

If a plaintiff attaches documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss

² In *Dunkle* the Tenth District Court of Appeals discussed the standard for dismissal for lack of subject-matter jurisdiction under Civ.R. 12(B)(1) as follows:

Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-861, 2008-Ohio-2299, ¶ 6. The standard for determining a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction is whether the complaint states any cause of action cognizable in the forum. *Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 10th Dist. No. 11AP-834, 2012-Ohio-2364, ¶ 8, 971 N.E.2d 448, citing *Crable v. Ohio Dept. of Youth Servs.*, 10th Dist. No. 09AP-191, 2010-Ohio-788, ¶ 8. A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus.

Dunkle v. Ohio Dept. of Rehab. & Correction, 2014-Ohio-3046, ¶ 6 (10th Dist.).

the case if they along with the complaint itself establish a failure to state a claim. *Adlaka v. Giannini*, 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34. To the extent the language in attached documents clearly forecloses a plaintiff's claims, the trial court may properly dismiss those claims under Civ.R. 12(B)(6). *Denlinger v. Columbus*, 10th Dist. No. 00AP-315, 2000 Ohio App. LEXIS 5679 (Dec. 7, 2000). "A motion to dismiss pursuant to Civ.R. 12(B)(6) should be granted in such cases 'only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover, or where the claim is predicated on some writing attached to the complaint pursuant to Civil Rule 10(D) and that writing presents an insuperable bar to relief.'" *Keenan v. Adecco Employment Servs., Inc.*, 3d Dist. No. 1-06-10, 2006 Ohio 3633, ¶ 9, quoting *Slife v. Kundtz Properties, Inc.*, 40 Ohio App.2d 179, 185-86, 318 N.E.2d 557 (8th Dist.1974).

Beard v. New York Life Ins. & Annuity Corp., 2013-Ohio-3700, ¶ 11 (10th Dist.).

B. Plaintiff's First Count (Violation of R.C. 163.06(B)), Third Count (Violation of R.C. 163.59), and Sixth Count (Constitutional Taking Without Due Process) fail to state claims upon which relief may be granted.

{¶13} "A trial court has subject matter jurisdiction over a case if it has the statutory or constitutional power to adjudicate the case." *Murray v. City of Columbus*, 2014-Ohio-2790, ¶ 12 (10th Dist.), quoting *Kormanik v. Cooper*, 2011-Ohio-5617, ¶ 23 (10th Dist.), citing *Pratts v. Hurley*, 2004-Ohio-1980, ¶ 11. Under Civ.R. 12(H)(3) "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The Eighth District Court of Appeals has stated:

Whenever a want of jurisdiction is suggested by a court's examination of the case or otherwise, the court has a duty to consider it, for the court is powerless to act in the case without jurisdiction. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70, 518 N.E.2d 941; *Wandling v. Ohio Dept. of Transp.* (1992), 78 Ohio App.3d 368, 371, 604 N.E.2d 825. Even

though not asserted, lack of subject matter jurisdiction may be raised *sua sponte*, by the court at any stage in the proceedings. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, 358 N.E.2d 536. Subject matter jurisdiction is the basis for mandatory *sua sponte* dismissal by the courts. *State ex rel. Lawrence Dev. Co. v. Weir* (1983), 11 Ohio App.3d 96, 97, 463 N.E.2d 398. Likewise, there was no requirement in this case that any of the parties raise the issue of whether the trial court lacked subject matter jurisdiction prior to examining the issue. The trial court had the obligation to determine its jurisdiction *sua sponte*, and if appropriate, dismiss the case.

Sherman v. Burkholder, 994 Ohio App. LEXIS 5658, at *3-4 (8th Dist. Dec. 15, 1994). See *Adams v. Cox*, 2010-Ohio-415, ¶ 19 (10th Dist.), citing *Sherman, supra*.

{¶14} This Court is a statutorily created court, which has limited jurisdiction and may exercise only such powers as are directly conferred by legislative action. *State ex rel. DeWine v. Court of Claims of Ohio*, 2011-Ohio-5283, ¶ 19. See R.C. 2743.02, 2743.03. The Tenth District Court of Appeal has discussed this Court's subject-matter jurisdiction under R.C. 2743.02, stating: "R.C. 2743.02(A)(1) establishes the subject-matter jurisdiction of the Court of Claims and states that the state 'consents to be sued, and have its liability determined, in the Court of Claims created in this chapter in accordance with the same rules of law applicable to suits between private parties.'" *Wiltz v. Accountancy Bd. of Ohio*, 2015-Ohio-2493, ¶ 16 (10th Dist.). The Supreme Court of Ohio has explained,

This court has previously stated that "R.C. 2743.02(A) does not create a new right of action against the state, but places the state upon the same level as any private party." *McCord v. Ohio Div. of Parks & Recreation* (1978), 54 Ohio St.2d 72, 74, 8 O.O.3d 77, 375 N.E.2d 50. Thus, suits against the state are inherently limited by the type of action asserted against it; if the cause of action is not cognizable as between private parties, then there can likewise be no state liability.

Wallace v. Ohio Department of Commerce, 2002-Ohio-4210, ¶ 37. *Accord Henneke v. Ohio Dept. of Ins.*, 2011-Ohio-5366, ¶ 8 (10th Dist.) ("[b]y its terms, R.C. 2743.02 limits a plaintiff in the Court of Claims to causes of action that she could pursue if the defendant

were a private party”). See *Howard v. Supreme Court of Ohio*, 2005-Ohio-2130, ¶ 15 (10th Dist.) (“[t]he Court of Claims . . . does not have jurisdiction to consider claims for relief premised upon violations of the Ohio or United States Constitutions. Constitutional claims are not actionable in the Court of Claims because a plaintiff is limited to causes of action that could be brought between private parties”); *Bleicher v. Univ. of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 306 (10th Dist.1992) (“[t]his court has consistently held that constitutional and Section 1983, Title 42, U.S.Code claims are not actionable in the Court of Claims”). But see *CPC Parts Delivery, L.L.C. v. Ohio Bur. of Worker’s Comp.*, 2024-Ohio-18, ¶ 30 (10th Dist.) (“where a constitutional claim is brought in the Court of Claims not as a private cause of action that seeks relief for the violation itself, but rather as an alternative basis for the same relief sought under other claims brought in the same suit over which the Court of Claims has jurisdiction, the Court of Claims retains subject-matter jurisdiction over the ancillary constitutional claim”).

{¶15} In *Ferriell v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-01196-AD, 2005-Ohio-6816, ¶ 7, this Court previously recognized that constitutional claims generally are not cognizable in this Court. In *Ferriell* this Court stated:

Generally claims arising out of the United States or Ohio Constitutions, are not cognizable in this court. However, a specific exception exists where the issue involves an uncompensated taking of property in alleged violation of Section 19, Article I of the Ohio Constitution. *Kermetz v. Cook-Johnson Realty Corp.* (1977), 54 Ohio App. 2d 220, 376 N.E.2d 1357; *Nacelle Land Mgt. Corp. v. Ohio Dept. of Natural Resources* (1989), 65 Ohio App. 3d 481, 584 N.E.2d 790. Plaintiff may file an uncompensated taking action in this court if the taking is instituted by DOT [Ohio Department of Transportation].”

Ferriell at ¶ 7.

{¶16} In the Sixth Count, as a private cause of action, Plaintiff alleges taking of real property without due process of law. As demonstrated by exhibits appended to the Complaint, however, Defendant has offered financial compensation for the property allegedly taken without due process of law (and which Defendant seeks to appropriate), Plaintiff has rejected Defendant’s offer of financial compensation, and the matter of

appropriation of the real property is now before the Common Pleas Court of Lake County, Ohio, Probate Division pursuant to R.C. Chapter 163.

{¶17} After presuming all factual allegations in the complaint are true, and making all reasonable inferences in favor of Plaintiff, it cannot be found that, in this instance, Plaintiff's constitutional claim of a taking without due process of law, as a private cause of action, is cognizable in this forum.

{¶18} In Plaintiff's First and Third Counts, Plaintiff alleges that Defendant violated R.C. 163.06(B) (a so-called "quick take" provision permitting an agency to take immediate possession of property after making a deposit of the assessed value of the property with the court) and 163.59 (policies for land acquisition). Importantly, however, Plaintiff has not identified any provision in R.C. Chapter 163 that confers statutory authority upon this Court to adjudicate claims based on alleged violations of R.C. Chapter 163. And a review of R.C. 163.01(D) discloses that, as used in R.C. 163.01 to 163.22, the term "court" "means the court of common pleas or the probate court of any county in which the property sought to be appropriated is located in whole or in part"—not the Court of Claims of Ohio.

{¶19} Notably, as acknowledged by Plaintiff in the Complaint at paragraph 47, and as noted by the Tenth District Court of Appeals, a "property owner's remedy for a public agency's illegal or unconstitutional appropriation is to commence a separate action sounding in criminal trespass and seeking injunctive relief." *City of Dublin v. RiverPark Group, LLC*, 2019-Ohio-1790, ¶ 18 (10th Dist.). This Court, however, lacks statutory jurisdiction over criminal matters and injunctive relief stemming from criminal matters. See *Troutman v. Ohio Dept. of Rehab. & Correction*, 2005-Ohio-334, ¶ 10 (10th Dist.) ("R.C. 2743.02 does not confer jurisdiction to the Court of Claims to consider criminal charges that should be adjudicated in courts of common pleas").

{¶20} After presuming all factual allegations in the Complaint are true, and making all reasonable inferences in favor of Plaintiff, it cannot be found that, in this instance, Plaintiff's claims of violations of R.C. 163.06(B) and 163.59, which are set forth in Plaintiff's First and Third Counts, respectively, state a claim upon which relief can be granted in this forum.

C. Plaintiff's Second Count (Civil Trespass) and Fifth Count (Nuisance) are conclusively barred by the applicable statute of limitations.

{¶21} Plaintiff's Second Count presents a claim of civil trespass. The elements of civil trespass "are (1) an unauthorized intentional act and (2) entry upon land in the possession of another." *Ogle v. Hocking Cty.*, 2014-Ohio-5422, ¶ 39 (4th Dist.), quoting *DiPasquale v. Costas*, 2010-Ohio-832, ¶ 102 (2d Dist.). R.C. 2305.09(A) establishes a four-year limitations period for a claim of trespass on real property. R.C. 2305.09(A); *Grenga v. Youngstown State Univ.*, 2011-Ohio-5621, ¶ 16 (10th Dist.) The Supreme Court of Ohio has, however, explained: "In construing the statute of limitations for actions for trespass upon real property, we have held that if a trespass is continuing rather than a single completed act, the limitations period is tolled." *State ex rel. Doner v. Zody*, 2011-Ohio-6117, ¶ 37, citing *Sexton v. Mason*, 2008-Ohio-858, ¶ 30-33; *Valley Ry. Co. v. Franz*, 43 Ohio St. 623 (1885). Compare *State ex rel. Doner* at paragraph two of the syllabus ("[w]hen an act carried out on the actor's own land causes continuing damage to another's property and the actor's conduct or retention of control is of a continuing nature, the statute of limitations is tolled") with *State ex rel. Nickoli v. Erie Metroparks*, 2010-Ohio-606, ¶ 32 (present effects of past violations do not trigger a continuing-violations exception and continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation); *Painesville Mini Storage, Inc. v. City of Painesville*, 2010-Ohio-920, ¶ 3.

{¶22} Plaintiff's Fifth Count presents a claim of nuisance. The Eighth District Court of Appeals has stated, "A private nuisance is 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.'" *Brown v. Cty. Commrs*, 87 Ohio App. 3d 704, 712, 622 N.E.2d 1153 (4th Dist.1993). In order for a private nuisance claim to be actionable, the invasion must be either intentional and unreasonable, or unintentional but caused by negligent, reckless, or abnormally dangerous conduct. *Id.*; see *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944), paragraph three of the syllabus." *Woods v. Sharkin*, 2022-Ohio-1949, ¶ 94 (8th Dist.).

{¶23} A permanent nuisance "is governed by a four year statute of limitations as set forth in R.C. 2305.09, and 'occurs when the defendant's tortious act has been fully accomplished but injury to the plaintiff's estate from that act persists in the absence of

further conduct by the defendant.” *Gibson v. Park Poultry, Inc.*, 2007-Ohio-4248, ¶ 10 (5th Dist.), quoting *Weir v. E. Ohio Gas Co.*, 2003-Ohio-1229, ¶ 18 (7th Dist.). “For a continuing nuisance, the statute of limitations is tolled, as ‘the defendant’s tortious activity is ongoing, perpetually creating fresh violations of the plaintiff’s property rights.’” *Gibson* at ¶ 10, quoting *Weir* at ¶ 18.

{¶24} The applicable statute of limitations for claims brought in the Court of Claims “is set forth in R.C. 2743.16(A), which provides, in pertinent part, that ‘civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.’” *Merlitti v. Univ. of Akron*, 2019-Ohio-4998, ¶ 14 (10th Dist.)

{¶25} In considering a motion to dismiss based upon the application of a statute of limitations, this Court “may grant the motion only when the complaint shows conclusively on its face that the action is time barred.” *Merlitti* at ¶ 15, citing *Lowery v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-869, ¶ 7 (10th Dist.). Thus, for this Court to dismiss Plaintiff’s claims of civil trespass and nuisance as untimely, it must appear conclusively from the Complaint and its accompanying attachments that Plaintiff’s claim of civil trespass and nuisance accrued more than two years before Plaintiff filed its Complaint.

{¶26} According to Exhibit 4 (which Plaintiff appended to the Complaint), by July 27, 2022, Plaintiff was aware of Defendant’s alleged civil trespass and permanent private nuisance since, in Exhibit 4, Plaintiff disputed that Defendant had valid easement rights to the area on the real property that had been utilized by Defendant for storm water discharge purposes and that, without easement rights, Defendant installed drainage pond improvements on the real property to retain untreated storm runoff. Plaintiff did not, however, file its Complaint in this case until October 9, 2024—more than two years after Plaintiff had knowledge of Defendant’s alleged trespass and permanent private nuisance.

{¶27} After presuming all factual allegations in the Complaint are true, and making all reasonable inferences in favor of Plaintiff, it appears conclusively from the Complaint and its accompanying attachments that Plaintiff’s claim of civil trespass and permanent private nuisance accrued more than two years before Plaintiff filed its Complaint in this

case. Plaintiff's claims of civil trespass and permanent private nuisance are therefore time-barred by R.C. 2743.16(A).

D. Plaintiff's Fourth Count (Declaratory-Judgment Claim) fails to state claim upon which relief may be granted.

{¶28} Plaintiff's Fourth Count seeks a declaratory judgment under R.C. 2743.03 relating to a 1940 Agreement entered into between a former owner of the real property and Defendant.

{¶29} In *Interim HealthCare of Columbus, Inc. v. State Dept. of Adm. Servs.*, 2008-Ohio-2286, ¶ 12-13 (10th Dist.), the Tenth District Court of Appeals discussed this Court's statutory jurisdiction over a declaratory-judgment claim, stating:

As a court of limited jurisdiction, the Court of Claims has jurisdiction over claims brought against the state as the result of the waiver of immunity contained in R.C. 2743.02. "R.C. 2743.02(A)(1) makes clear that the Court of Claims has jurisdiction to render judgment only as to those complaints which, prior to the enactment of the Court of Claims Act, were precluded by state immunity. Thus, where the state has previously consented to be sued, the Court of Claims lacks jurisdiction." *Stauffer v. Ohio Dept. of Transp.* (1989), 63 Ohio App.3d 248, 251. As a result, the Court of Claims generally lacks jurisdiction over declaratory judgment actions because, prior to the state's waiving immunity, parties were permitted to bring such actions against the state in the court of common pleas. *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 318, citing *Racing Guild of Ohio, Local 304 v. State Racing Comm.* (1986), 28 Ohio St.3d 317. The Court of Claims nonetheless has jurisdiction over declaratory judgment actions in limited circumstances.

Toward the end of allocating judicial resources wisely, R.C. 2743.03(A)(2) provides that when a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state arises out of the same circumstances giving rise to a civil action over which the Court of Claims otherwise would have jurisdiction, the Court of Claims has exclusive,

original jurisdiction to hear and determine that claim. See *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 87. This court construed R.C. 2743.03(A)(2) in *Upjohn Co. v. Ohio Dept. of Human Servs.* (1991), 77 Ohio App.3d 827, holding that claims for declaratory and injunctive relief properly may be brought before the Court of Claims “only if (1) they arise out of the same circumstances as plaintiffs’ claim for money damages, and (2) plaintiffs’ claim for money damages is permitted by the state’s waiver of immunity.” *Id.* at 834. Thus, when a party seeks a declaratory judgment in addition to monetary damages, the R.C. 2743.02 waiver of immunity permits the Court of Claims to determine the declaratory judgment action with the claim for money damages.

{¶30} Here, although Plaintiff’s claim for a declaratory judgment under R.C. 2743.03 arguably arises out of claims for money damages (for example, Plaintiff’s demand for “compensatory damages in an amount to be determined at trial”), none of Plaintiff’s claims for money damages, as discussed above, are permitted by the state’s waiver of immunity. Plaintiff’s claim for a declaratory judgment under R.C. 2743.03 therefore fails.

{¶31} Additionally, *even if* Plaintiff’s claim for a declaratory judgment under R.C. 2743.03 were proper, and after presuming all factual allegations in the Complaint are true, and making all reasonable inferences in favor of Plaintiff, speedy relief is not necessary to preserve the parties’ rights under the 1940 Agreement. As stated by the Tenth District Court of Appeals,

For a trial court to grant relief in declaratory judgment, a plaintiff must demonstrate that (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St. 2d 93, 97, 296 N.E.2d 261 (1973). “There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may be lost or impaired; or (2) in accordance with

R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy.” *Hill v. Croft*, 10th Dist. No. 05AP-424, 2005-Ohio-6885, ¶ 12, quoting *Halley v. Ohio Co.*, 107 Ohio App. 3d 518, 524, 669 N.E.2d 70 (8th Dist.1995).

Harris v. Ohio Dept. of Veterans Servs., 2018-Ohio-2165, ¶ 23 (10th Dist.).

{¶32} Here, given the pending litigation in the Common Pleas Court of Lake County, Ohio, Probate Division, any declaratory judgment by this Court will not terminate the uncertainty or controversy in this matter.

{¶33} In summary, after presuming all factual allegations in the Complaint are true, and making all reasonable inferences in favor of Plaintiff, Plaintiff’s Sixth Court seeking a declaratory judgment under R.C. 2743.03 fails to state a claim upon which relief may be granted.

III. Conclusion

{¶34} The Court GRANTS Defendant’s Civ.R. 12(B)(6) motion for reasons set forth above.

DAVID E. CAIN
Judge

[Cite as *Five Guys Dev., L.L.C. v. Ohio Dept. of Transp.*, 2025-Ohio-520.]

FIVE GUYS DEVELOPMENT, LLC

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2024-00724JD

Judge David E. Cain

JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶35} For reasons set forth in the Decision filed concurrently herewith, the “Motion of Defendant Ohio Department of Transportation To Dismiss. Civ.R. 12(B)(6)” filed on November 8, 2024, is GRANTED. Plaintiff’s Complaint is DISMISSED. Court costs are assessed against Plaintiff. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DAVID E. CAIN
Judge

Filed January 7, 2025
Sent to S.C. Reporter 2/18/25