IN THE SUPREME COURT OF OHIO

Peggy Sexton, et al.	] **Case Number: 2007-0305**
Appellants,	] **On appeal from the Warren County**
v.	] **Court of Appeals, Twelfth Appellate**
City of Mason, et al.	] **District**
Appellees.	]

MERIT BRIEF OF APPELLANTS PEGGY SEXTON AND LARRY SEXTON

James A. Whitaker (0000992) (COUNSEL OF RECORD)
Whitaker & Shade, LLC
226 Reading Road
Mason, Ohio 45040
(513) 398-1910
Fax. No. (513) 398-0181
jawhitaker@jwhitakerlaw.com

COUNSEL FOR APPELLANTS, PEGGY SEXTON AND LARRY SEXTON

Gary Becker (0012716) (COUNSEL OF RECORD)
Jessica S. Hylander (0077030)
Dinsmore & Shohl LLP
1900 Chemed Center
225 E. Fifth Street
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE, CITY OF MASON

B. Scott Jones (0070296) (COUNSEL OF RECORD)
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE, RISHON ENTERPRISES
Gary L. Herfel (0011680) (COUNSEL OF RECORD)
The Herfel Law Firm
100 East Rivercenter Boulevard, Suite 250
Covington, Kentucky 41011
COUNSEL FOR MCGILL SMITH PUNSHON, INC.

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

TABLE OF CONTENTS

PAGE

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

TABLE OF AUTHORITIES

PAGE

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

STATEMENT OF THE CASE AND FACTS

Appellants purchased their property, located at 4721 Cox Smith Road, in approximately 1988 and constructed a home on said property. Appellee Rishon Enterprises started construction of the Trailside Acres Subdivision, which is on property that runs adjacent to Appellants, in the late 1980's or early 1990s. Trailside Acres Subdivision contains six sections of residential homes, with the last phase completed in 1995.

During the development of the subdivision, Appellee Rishon Enterprises contracted with Appellee McGill Smith Punshon to design the storm water drainage system for the subdivision and with Defendant Don Thompson Excavating to perform excavation as determined by Rishon and McGill. Appellants experienced minor water problems since the construction of Trailside Acres began, and the water problems worsened with the development of the second phase in approximately 1992. Prior to the construction of Trailside Acres, Appellants' property did not experience flooding.

Appellants worked with Richard Fair, City Engineer for the City of Mason, for twelve years to address water issues on their property. Richard Fair visited Appellants' property several times. Appellants also wrote a letter to Scott Lahrmer, then the City Manager, putting him on notice of their concerns of flooding. Richard Fair has been in charge of storm water in the City of Mason for the duration of Appellants' water problems and has been aware of the Appellants' complaints for approximately fourteen to fifteen years. The City of Mason included in their Capital Improvement Projects the downstream erosion at Trailside Acres, in the amount of $135,000. Moreover, Richard

/HITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

Fair advised Appellant Peggy Sexton that Appellee City of Mason had made some changes to the existing pipes with regards to the retention pond. However, the date and scope of those changes is unclear.

Although the water problems continued to occur on Appellants' property, they took a severe turn on July 17, 2001. On that date, unprecedented damages of massive proportions were thrust upon them. Appellants and their daughter were trapped at their residence due to severe flooding. The local fire department responded to the residence, but because of the driveway flooding, it was unable to bring Appellants to safety. It was on this evening that the doors to Appellants' basement were pushed out of their frame as the result of a wall of water, allowing approximately three feet of water to enter the basement. Appellant's home was filling with water, but the fire department was unable to reach them due to the contemporaneous flooding of their driveway. Appellants, when building the bridge located on their property, exceeded the pipe size required by Warren County by a foot by installing a three foot instead of two foot pipe at the bridge.

Trailside Acres subdivision was built in the City of Mason. Appellee City of Mason, is responsible for and maintains the storm water systems within its jurisdiction, pursuant to law. Appellee Rishon Enterprises was the developer for the Trailside Acres Subdivision throughout the entire building process. Appellee McGill Smith Punshon was the engineering firm hired by Rishon to design and engineer the sewer and storm water systems for Trailside Acres and completed its work in 1994.

In approximately 2003, the ongoing discussions that had been taking place between Appellants and Appellee City of Mason broke down. Although Appellants had been seeing a very gradual increase in the amount of water and the rate of water flow in

/HITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

the ditch that only caused minor damage to their property, the catastrophic flooding that took place on July 17, 2001 was of a magnitude that had never been experienced before in the continuous progression of damages that had started when Trailside acres was begun, but did not arise to the level of full notice until that point.

On July 14, 2003, Appellants brought an action against Appellee City of Mason, alleging trespass under Ohio Rev. Code Ann. §2305.09 (2007) and an unconstitutional taking without compensation. On August 27, 2003, they filed an amended complaint with the same allegations against the City and adding an action sounding in trespass against Appellees, Rishon Enterprises and McGee Smith Punshon, and Defendant Don Thompson Excavating.

Appellees, Rishon Enterprises and the City of Mason, timely filed a Motion to Dismiss and/or Motion for Summary Judgment. On October 26, 2004, Appellee McGill Smith Punshon filed a Motion for Summary Judgment. Appellants timely responded to each motion. The Magistrate, on February 2, 2005, ruled in favor of Appellants and against all Appellees. This decision of the magistrate was upheld and confirmed by the trial court on May 13, 2005. Appellees, Rishon Enterprises and McGill Smith Punshon, each filed a Motion for Reconsideration. Appellee City of Mason filed a second Motion for Summary Judgment. On April 6, 2005, oral argument was held. On February 6, 2006, the trial court granted Appellees summary judgment by overturning its prior decision. Using the definition of continuing trespass in , the trial court found that Appellants suffered from a permanent trespass and that, therefore, R.C. 2305.09(D) applied, so that, according to the trial court, Appellants filed their Complaint against Rishon and McGee outside of the four-year limitations period. As to Appellee City of

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

Mason, the trial court found that it had exercised a governmental function in its oversight and approval of the storm water system and was entitled to sovereign immunity. The Trial Court further found that Appellants had not alleged in their complaint that Appellee City of Mason undertook to manage any storm water system on the development or that they did so negligently. Finally, it found that Appellants had filed their lawsuit outside the applicable six-year limitations period on the constitutional taking claims.

On February 22, 2006, Appellants filed a Notice of Appeal. Appellants timely submitted their appellate brief requesting that the Court of Appeals reverse the trial court's decision finding that Appellants suffered from a permanent trespass to which a four year statue of limitations applied, rather than a continuing trespass and that the Court of Appeals reverse the trial court's decision finding Appellants failed to allege Appellee City of Mason negligently managed the storm water system. The Court of Appeals filed its decision with the Warren County Clerk of Courts on January 8, 2007. That decision found against Appellants on both assignments of error, and now Appellants invoke the jurisdiction of the Supreme Court of Ohio.

ARGUMENT

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

A claim for continuous trespass based on continuous damages can be found in the case law, restatements and persuasive authority. The rule that continuous trespass may be supported by proof of continuing damages in order to toll the applicable four year statute of limitations can be found in *Boll v. Griffith*, 41 Ohio App. 3d 356, 535

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

N.E.2d 1375 (Ohio Ct. App. 1987); and *Wood v. American Aggregates Corp.*, 67 Ohio App.3d 41, 585 N.E.2d 970, 973 (Ohio Ct. App.1990). The rule for continuous trespass and permanent trespass finds its genesis in the case of *Valley Ry. Co. v. Franz*, 43 Ohio St. 623, 4 N.E. 88 (Ohio. 1885).

In *Franz* the Ohio Supreme Court discussed the concept of permanent trespass as follows: "When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass". *Id.* at 625. The court then went on to discuss the concept of continuing trespass as follows: continuous trespass should be viewed in light of the continuous damages that result from an actor's wrongful conduct. In *Franz*, the Court held as soon as an owner of land does an act on his land which affects the legal rights of another a permanent trespass has been born. *Id.* at 90. The *Franz* court went on to further hold, "But where the act of trespass is a permanent trespass, as the erection of buttresses to support a turnpike road, (as in *Holmes v. Wilson*, 10 Adol. & E. 503,) or the erection and maintenance of a permanent building, (as in *Thompson v. Gibson*, 7 Exch. 456,) it may be said to be a continuing trespass or nuisance". *Id.*

The issue that is presented to this court is to decide what the rule in Ohio should be with regards to whether a cause of action in continuous trespass sufficient to toll the four year statute of limitations should be viewed in terms of continuous conduct or continuous damages? Not only is the more rational and persuasive reasoning hold that it is the latter, but for purposes of public policy and common sense the rule in Ohio should

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

be that an action for continuous trespass should be based on whether plaintiff has suffered continuous damages.

Weir v. East Ohio Gas Co, Ohio App. 7 Dist.,2003 gives an excellent overview of the law in the area of permanent and continuous trespass. In *Weir* the plaintiff was challenging in one assignment of error that the lower court erred when it held plaintiff was barred from bringing suit in continuous trespass because he suffered a harm in the form of a permanent trespass starting in 1989 when defendant caused a leak of contamination onto plaintiff's property and subsequently signed a settlement agreement to clean it up and then allegedly never did resulting in contaminants from defendant's leak to remain on plaintiff's property. Plaintiff brought suit against defendant in 1999. After the plaintiff's claims against defendant which sounded in negligence and trespass were dismissed by the lower court, the plaintiff appealed. *Id.* However the Ohio Court of Appeals (Seventh District) found plaintiff suffered a permanent trespass and thus the four year statute of limitations barred his suit. *Id.*

In reaching its holding the *Weir* Court analyzed permanent versus continuous trespass. *Id.* The Court's rationale underlying its holding for deciding plaintiff's trespass claim was barred by the statute of limitations is because plaintiff suffered a permanent trespass caused by defendant outside of the four year statute of limitations. Ultimately the Court reasons that the law for continuous trespass is supported by proof of continuous conduct while also holding that continuous conduct is when the defendant, "retains control over the source of the trespass". *Id.* at 5. What this means is not made clear by the court or any Ohio courts, and yet the case law the court analyzes is even less than clear on whether that is the ultimate difference between permanent trespass

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

and continuous trespass.-or more specifically between ongoing conduct and conduct committed one time in being distinguished from on going damages. The distinction is at best dubious, and a law which provides much clearer guidance on continuous trespass would be to hold that continuous trespass may be supported by proof of continuous conduct. As a result of such a holding by the *Weir* Court, courts in Ohio may arbitrarily apply the law of continuous and permanent trespass differently because there is no to little distinction between a permanent trespass and continuous trespass when it is based on ongoing conduct which is not defined by Ohio Courts which will result in arbitrary application of the law of continuous trespass. The cases the Court analyzes include: *Davis v. Allen*, 2002 Ohio 193 (Ohio Ct. App. 2002); *Boll v. Griffith*, 41 Ohio App. 3d 356; *Hartland v. McCullough*, (July 14, 2000), 6th Dist. No. OT-99-058; and *Frisch v. Monfort Supply Co.*, (Nov. 21, 1997), 1st Dist. No. C-960522, 1997 Ohio App. LEXIS 5177.

In *Davis*, the First District found defendant City's actions in that case to be a continuous trespass. 2002 Ohio 193, [slip op] at 2. In *Davis*, a third party negligently dumped an excessive quantity of fill dirt on the City's property, which adjoins the plaintiff's property. *Id.* The dumping caused a landslide on the plaintiffs' property on May 15, 1995, which caused substantial damage. *Id.* Subsequently, the City supervised the removal of the debris from the plaintiff's property and the erection of a fence designed to prevent further landslides. *Id.* The City entered into a contract to demolish and haul away debris from the property, to remove debris from a damaged garage and retaining walls, to remove excessive fill dirt, and to grade and seed the property. *Id.*

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

The *Weir* court reasoned that *Boll* is analogous to *Davis*. *Weir*, 2003 Ohio 1229 at P26. In *Boll*, the court concluded appellant stated a cause of action in continuing trespass when appellee failed to remove heavy debris on his side of the parties' common wall after demolishing part of the wall. *Id (*quoting language from *Boll*, 41 Ohio App. 3d at 357-341). The court determined the appellee owed a duty to appellant to use due care in the removal of his structures attached to their common wall and that appellee breached that duty of due care in not completely removing remnants of debris affixed to that wall. The *Boll* court found the facts to fall within the rule of *Franz* despite appellee's contention that an alleged one-time mistake in the demolition of a structure does not constitute continuing trespass. *Id.* The court agreed with appellant that the constant weight of the debris, alleged to be gradually weakening the wall, was not distinguishable from the eroding force of flowing water in *Franz* for the purpose of the statute of limitations. *Id.*

There is no good legal justification for why a distinction should exist between a defendant's failure to act supporting proof under an ongoing wrongful conduct approach to continuous trespass and a claim for continuous trespass supported by proof of continuous damages. If *Boll* and *Davis* are similar in the fact that in those cases the defendant's failure to act constituted ongoing conduct then situations involving continuous damages are no different because often a failure to act follows after 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. *Franz*, 4 N.E. at 88. Thus, because damages follow a failure to act it should follow that continuous trespass should be based on continuous damages.

VHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

The Ohio Court of Appeals (Fourth District) explicated the doctrine of continuing trespass further in *Boll*, stating, "[A]s to [a] continuing trespass and continuing and permanent results, the four-year statute shall not apply, even though the initial step and successive steps of such wrongdoing occurred long prior to such four-year period, the trespass being of a continuing nature, so long as it was continued there was constantly arising a fresh wrong and fresh damage from such continuation of the act." *Boll*, 535 N.E.2d at 1375. The *Boll* court also states, "A court may not dismiss a complaint on statute-of-limitations grounds where the statute's bar is not clearly evident from the wording of the complaint. Id at 357."

In *Wood v. American Aggregates Corp.*, 67 Ohio App. 3d 41, 585 N.E.2d 970, 973 (Ohio Ct. App. 1990), the plaintiffs brought suit in 1988 and the quarry at issue had been constructed in 1973, with notice to plaintiffs of diminished water quality "shortly thereafter." The Court of Appeals (Tenth District) found that suit was timely brought, stating, "There is a genuine issue of fact concerning the issue of Appellants' damages after 1982 as a direct result of appellee's use of underground water." Id. Similarly, in the instant case, there is a genuine issue of fact concerning Appellants damages after four years from 1994 (the year the McGill completed its engineering services) and 1995 (the year Rishon's work was completed). Because the damages were continuous, so was the trespass, and Appellants' suit against McGill and Rishon is timely.

The United States Sixth Circuit Court of Appeals has also interpreted Ohio law in the area of what constitutes a continuing vs. a permanent trespass. *Nieman v. NLO, Inc.* (C.A. 6, 1997), 108 F.3d 1546. Under U.S. federalism, this is federal common law, to be applied in federal cases in the Sixth Circuit; however, it carries persuasive weight

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

in Ohio courts because it is a valid interpretation of Ohio law. The Sixth Circuit addresses *Franz's* requirement that the "force" at issue be continued. It states that the passage quoted above (*Franz* at 627), "properly should be interpreted to read 'such force, if so continued, is *deemed* continued by the act of such owner and actor.'" *Nieman* at 1556 (emphasis in the original). The Sixth Circuit also succinctly summarizes the Ohio law of continuing trespass by stating the Proposition of Law stated above: "[A] claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct" *Id.* at 1559. To reach this rule of law, the Sixth Circuit analyzes Ohio law and the Restatement (Second) of Torts, a synthesis of the common law of torts. Significantly, with regard to water seepage, the Restatement provides, "The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously . . . placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and . . . confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass." *Restatement (Second) of Torts*, § 161(1) (1965).

Thus, the weight of authority of those Districts of the Ohio Court of Appeals which have interpreted *Franz*, as well as the United States Sixth Circuit Court of Appeals and the Restatement (Second) of Torts, have declared that the fresh or continuous damages approach is the Ohio law of continuous trespass. Under this law, Appellants claim against Appellees is timely, under both the four-year limitations period of R.C. 2305.09(D), with regard to Appellees, Rishon and McGee. For this

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

reason, the decisions of the trial court holding that Appellants' action is barred by the statute of limitations must be reversed.

Moving on to policy issues: there are grave consequences for Ohioans who will be barred from bringing suit for a continuing trespass if this state adopts a continuing ongoing conduct approach to continuous trespass. Consider for a moment the plethora of situations which will arise whereby a tortfeasor who has committed a trespass leads a victim of that trespass to believe that the problem has been resolved in regards to flooding waters which trespass upon victim's property. Victim may be led to believe that the problem is getting resolved or will be resolved (similar to the Appellant's situation in the case at bar) and due to this belief does not bring suit within the four year period. Imagine now, the trial court denying Appellant's claim because the four year statute of limitation has passed. Victim's property has been decimated by water damage and the problem has not been fixed. At this point, a defendant in such a situation would certainly hope for the, "continuing conduct" approach as he has any number of arguments which would be made to support the proposition that his wrongful conduct occurred prior to the four year statute of limitations from passing. He may further claim that his attempts to resolve such conduct are not in any sense "wrongful" as he was attempting to alleviate, make right, help or resolve the situation. The result is that victim's property rights have been annihilated and tortfeasor has successfully destroyed rights and been enriched at victim's expense.

In addition to the grave injustice that results from such an approach to defining continuing trespass on the basis on continuing conduct we find that in Ohio, particularly in Warren County, there is in certain areas a great boom in residential and commercial

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

development. In takes little logic and reasoning to understand what effects a "continuing conduct" approach would have on homeowners who would be harmed substantially by adoption of the ongoing conduct approach to continuous trespass. The wrongful acts of developers who may care little to none about the property rights of those who are, "out of sight, out of mind" will successfully flout the law in their belief that they will get away with trespass.

Several scenarios can, have and will continue to materialize which highlight the injustice of Ohio if this Court adopts the continuous on-going conduct theory for continuous trespass. For example, consider homeowners who are led to believe a situation sounding in trespass is under control when the reality is that the situation if far from being under control-yet due this mistaken reasonable belief do not bring suit within the four year period of limitations for trespass?

Take for instance where a water sewage system for a newly developed community is negligently built by a less than respectable engineering firm and five miles away a homeowner suffers from flooding waters due to the engineer's negligence in designing that water sewage system. The homeowner initially discovers the harm due to the flooding waters and approaches the engineers. At this point the statute of limitations is running, the harm has been discovered by homeowner and the wrongful act of the engineers has fully concluded. Yet the engineering firm relying on the new rule in Ohio which uses the ongoing conduct theory of continuous trespass decides to wait out fixing the sewage system for four years and one day. During this period of four years the homeowner's area sees only minimal rain, perhaps they are in a draught, but then in year four the area is hit hard by heavy rains and homeowners house floods with

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

sewage. The homeowner was waiting based on the engineer's promise they would fix the water sewage system. The rule would indicate that homeowner has no recourse at all against the engineers. Under a continuous damages approach the situation is played out much differently-for example, each time homeowner suffers from damages due to flooding caused by engineer's negligence a fresh cause of action arises against the homeowner under a theory of continuous trespass.

This hypothetical provides a powerful example when water damages are involved. Water damage, obviously, will depend on how hard it rains. Hard rains result in more intense flooding. Thus a homeowner who suffers from a little flooding during the running of the statute of limitations because of defendant's wrongful conduct, may not notice a substantial flood until year five due to weather patterns. If the state adopts a continuing conduct approach to continuous trespass, the homeowner will have no cause of action against the actor who engaged in tortious conduct by negligently building a water sewage system in year one.

CONCLUSION

In conclusion this Honorable Court should hold that a claim for a continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct because homeowners will be protected by our courts from the wrongful acts of third parties and because there is no legal justification for recognizing a difference between a claim for continuous trespass which is supported by proof of a failure to act (conduct) and a claim for continuous trespass supported by proof of continuous damages.

VHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

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

Respectfully submitted,

By: _____
James A. Whitaker (0000992)
226 Reading Road
Mason, Ohio
Ph. (513) 398-1910
Fax. (513) 398-0181
jawhitaker@jwhitakerlaw.com

COUNSEL OF RECORD AND
COUNSEL FOR APPELLANTS,
PEGGY SEXTON AND LARRY
SEXTON

Certificate of Service

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

_____
James A. Whitaker (0000992)

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

Appendix, P. 1

IN THE SUPREME COURT OF OHIO

Peggy Sexton, et al.	**07-0305**
Appellants,	**On appeal from the Warren County Court of Appeals, Twelfth Appellate District**
v.	
City of Mason, et al.	
Appellees.	**Court of Appeals Case No. CA2006-02-026**

NOTICE OF APPEALOF APPELLANTS PEGGY SEXTON AND LARRY SEXTON

James A. Whitaker (0000992) (COUNSEL OF RECORD)
Whitaker & Shade, LLC
226 Reading Road
Mason, Ohio 45040
(513) 398-1910
Fax. No. (513) 398-0181
jawhitaker@jwhitakerlaw.com

COUNSEL FOR APPELLANTS, PEGGY SEXTON AND LARRY SEXTON

Gary Becker (0012716) (COUNSEL OF RECORD)
Jessica S. Hylander (0077030)
Dinsmore & Shohl LLP
1900 Chemed Center
225 E. Fifth Street
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE, CITY OF MASON

B. Scott Jones (0070296) (COUNSEL OF RECORD)
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE, RISHON ENTERPRISES

Gary L. Herfel (0011680) (COUNSEL OF RECORD)
The Herfel Law Firm
100 East Rivercenter Boulevard, Suite 250

Appendix, P. 2

Covington, Kentucky 41011

COUNSEL FOR MCGILL SMITH PUSHON, INC.

Notice of Appeal of Appellants Peggy Sexton and Larry Sexton

Appellants Peggy Sexton and Larry Sexton hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the of the Warren County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals case No. CA2006-02-026 on January 8, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

By: _____
James A. Whitaker (0000992)
226 Reading Road
Mason, Ohio
Ph. (513) 398-1910
Fax. (513) 398-0181
jawhitaker@jwhitakerlaw.com

COUNSEL OF RECORD AND
COUNSEL FOR APPELLANTS,
PEGGY SEXTON AND LARRY
SEXTON

Certificate of Service

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

_____
James A. Whitaker (0000992)

.KER & SHADE, LLC
ORNEYS AT LAW
3 READING ROAD
N, OHIO 45040
31 398-1910
513) 398-0181

Appendix, P. 3

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

PEGGY SEXTON, et al., :

Plaintiffs-Appellants, : CASE NO. CA2006-02-026

: OPINION
- vs - 1/8/2007
:

CITY OF MASON, et al., :

Defendants-Appellees. :

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 03CV61152

James A. Whitaker, 226 Reading Road, Mason, OH 45040, for plaintiffs-appellants

Gary Becker, Jessica S. Hylander, 1900 Chemed Center, 225 East Fifth Street, Cincinnati, OH 45202, for defendant-appellee, city of Mason

B. Scott Jones, 525 Vine Street, Suite 1700, Cincinnati, OH 45202, for defendant-appellee, Rishon Enterprises

The Herfel Law Firm, LLC, Gary L. Herfel, 100 East Rivercenter Boulevard, Suite 250, Covington, KY 41011, for defendants-appellees, McGill Smith Punshon, Inc.

YOUNG, J.

{¶1} Plaintiffs-appellants, Larry and Peggy Sexton, appeal a decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, the city of Mason, Rishon Enterprises, Inc., and McGill Smith Punshon, Inc.

{¶2} The Sextons moved into their house on Cox Smith Road in Union Township,

just outside the city limits of Mason, in 1988. The Sextons built a bridge over the small creek that runs through their property. At the time, defendant-appellee, Rishon Enterprises, Inc. ("Rishon"), owned the property adjacent to the Sextons'. Beginning in 1987 and ending in 1997, the property was developed into the Trailside Acres Subdivision. Defendant-appellee, McGill Smith Punshon, Inc. ("McGill"), an engineering company, designed the storm water system for the subdivision. McGill completed its services by 1994. Rishon's work on the subdivision ended in 1995.

{¶3} Prior to the development of the subdivision, the Sextons did not experience any flooding on their property. However, after the construction of the subdivision began, the Sextons started to experience water problems; the problems worsened in 1992-1993, and became so severe that the Sextons wrote a letter to the city in 1995. In the letter, the Sextons stated that (1) the creek, which used to be dry most of the summer, was now always running and frequently flooded; (2) during heavy rains, the creek would rise and spill over the roadway and bridge, making the bridge impassable; (3) the water problems threatened to flood their basement; (4) the flooding was eroding their land and killing trees on the bank; and (5) the water problems were caused by the construction of the subdivision. The Sextons discussed their water problems with the city for several years, but the discussions broke down in 2003.

{¶4} On July 17, 2001, during a particularly severe storm, the Sextons' basement was badly flooded. According to the Sextons, the water entered their basement with such force that the basement double doors were pushed completely out of their frames. Trapped in their house, the Sextons called 911. The fire department went to their house but was unable to reach them due to the flooding of their driveway.

{¶5} On July 14, 2003, the Sextons filed a complaint against the city and its engineering department alleging claims relating to the construction, development, and the

city's approval of the subdivision. On August 27, 2003, the Sextons filed an amended complaint adding Rishon and McGill as defendants. The city and Rishon each filed a motion to dismiss or, in the alternative, for summary judgment on the ground that the Sextons' action was barred by the four-year statute of limitations set forth in R.C. 2305.09. McGill moved for summary judgment on the same ground. Specifically, appellees argued that the Sextons' cause of action accrued in 1992 when they first became aware of the flooding problems. Since their complaint was not filed until 2003, well outside the four-year statute of limitations, it was time-barred.

{¶6} The magistrate denied all three motions. The magistrate found that the Sextons' complaint stated a cause of action for continuing trespass. As a result, the action could "be brought at any time prior to the expiration of the prescriptive period of 21 years, but recovery may be had only for damages sustained within four years prior to the filing of the action." The trial court subsequently overruled objections to the magistrate's decision. Unabated, Rison and McGill each filed a motion for reconsideration while the city filed a second motion for summary judgment.

{¶7} By decision filed on February 3, 2006, the trial court granted summary judgment in favor of all three appellees. With regard to Rishon and McGill, the trial court found that the Sextons suffered from a permanent trespass. As a result, their claims were barred by the four-year statute of limitations set forth in R.C. 2305.09. With regard to the city, the trial court found that (1) the Sextons did not allege in their complaint that the city undertook to manage the subdivision storm water system or did so negligently; (2) the city exercised a governmental function in its oversight and approval of the subdivision storm water system and was therefore entitled to sovereign immunity; and (3) the Sextons' constitutional taking claim was barred by the applicable six-year statute of limitations. This appeal follows.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN FINDING A PERMANENT TRESPASS TO WHICH A FOUR (4) YEAR STATUTE OF LIMITATIONS APPLIES."

{¶10} The Sextons argue that because the water problem causing the flooding on their property was a continuing trespass, the trial court erred when it used the four-year statute of limitations to grant summary judgment to Rishon and McGill. In finding that the Sextons suffered from a permanent trespass, rather than a continuing one, the trial court relied on the First Appellate District's decision in *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852. The Sextons argue that under Ohio law, a claim for continuing trespass may be supported by proof of continuing damages, rather than continuing conduct. The Sextons contend that, as a result, the trial court improperly relied on *Reith*, and erred in relying solely on the fact that Rishon and McGill no longer controlled the storm water system by 1995, rather than the damages the Sextons continue to suffer.

{¶11} Under R.C. 2305.09(A), there is a four-year statute of limitations for all trespass actions upon real property. In *Harris v. Liston*, 86 Ohio St.3d 203, 1999-Ohio-159, the Ohio Supreme Court held that "tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D)." Id. at 207. The four-year statute of limitations begins to run when damage to the property "is first discovered, or through the exercise of reasonable diligence it should have been discovered." Id. It follows that the Sextons' claims against Rishon and McGill are governed by the four-year statute of limitations set forth in R.C. 2305.09.

{¶12} The Sextons, however, argue that because the flooding caused by the construction of the subdivision constitutes a continuing trespass, the statute of limitations has not yet run.

{¶13} In *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, the Ohio Supreme Court discussed the concept of permanent trespass as follows: "When a man commits an act of

trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass." Id. at 625. The court then went on to discuss the concept of continuing trespass as follows:

{¶14} "And when the owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action or directs a force against or upon, or that affects, another's land, without such other's consent or permission, such owner and actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; *and such force, if so continued, is continued by the act of such owner and actor*, and it may 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 the former, the latter may bring his action." Id. at 627. (Emphasis added.)

{¶15} Applying the following concepts to the facts of the case, the supreme court then found that the property owner suffered from a continuing trespass as follows: "Valley Railway Company diverted the stream, and turned its course and current against and over the lands of Franz, and thereby caused the injury complained of. The company remained upon its own land, and cut the new channel, and *took control of the stream, and directed its course* when the same passed from its land and its control, *and has ever since so controlled and directed the stream that has caused the damage complained of.* The amended petition states a cause of action that is not barred by the statute of limitations provided for such cases." Id. at 628. (Emphasis added.)

{¶16} Thus, "[a] permanent trespass 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. In contrast, a continuing trespass results when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights." *Reith*, 2005-Ohio-4852 at ¶49. See, also, *Weir v. East Ohio Gas Co.*, Mahoning App. No. 01 CA 207, 2003-Ohio-1229; *Hartland v. McCullough Constr., Inc.* (July 14, 2000), Ottawa App. No. OT-99-058; and *Frisch v. The Monford Supply Co.* (Nov. 21, 1997), Hamilton App. No. C-960522.

{¶17} Based upon *Franz* and the foregoing definitions, we find that "a continuing trespass occurs when there is some continuing or ongoing tortious activity attributable to the defendant. Conversely, a permanent trespass occurs when the defendant's tortious act has been fully accomplished." *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App.3d 471, 2002-Ohio-4392, ¶27. "Thus, the determinative question centers upon the nature of the defendant's tortious conduct, not upon the nature of the damage caused by that conduct." Id. That is, a trespass under Ohio law is a continuing trespass only if the trespass itself, and not the ongoing injury or harm caused by a past, completed misdeed, is continuing. Ongoing conduct is the key to a continuing trespass. But see, contra, *Nieman v. NLO, Inc.* (C.A.6, 1997), 108 F.3d 1546 (a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct); and *Boll v. Griffith* (1987), 41 Ohio App.3d 356.

{¶18} After reviewing the record, we find that this case involves a permanent rather than a continuing trespass. The damage to the Sextons' property occurred when the subdivision, along with its allegedly improperly designed storm water system, was constructed. The record shows that McGill completed its engineering services by 1994. Rishon's work on the subdivision, in turn, ended in 1995. While the Sextons experienced a severe flooding on their property in July 2001, they have had flooding problems on their property ever since construction of the subdivision began. Their 1995 letter to the city

directly attributes their water problems to the construction of the subdivision. The tortious act was therefore completed in 1994 for McGill and in 1995 for Rishon, and there was no ongoing conduct by either McGill or Rishon even though damage to the Sextons' property continued. Since the Sextons' complaint against McGill and Rishon was not filed until 2003, well outside of the four-year statute of limitations, it was time-barred.

{¶19} We therefore hold that the trial court did not err by granting summary judgment in favor of McGill and Rishon on statute of limitations ground. The Sextons' first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED IN FINDING PLAINTIFFS/APPELLANTS FAILED TO ALLEGE DEFENDANT/APPELLEE CITY OF MASON NEGLIGENTLY MANAGED THE STORM WATER SYSTEM."

{¶22} In its decision granting summary judgment in favor of the city, the trial court found that:

{¶23} The Sextons "allege that the City of Mason and its Engineering Department negligently permitted the other parties Defendant to design and construct the development's storm water system in such a way that excess runoff flooded [the Sextons'] property. They also allege that Mason failed to remedy the problem, though it was asked to do so. [The Sextons] do not allege in their complaint that Mason undertook to manage any sewer system on the development, or that they did so negligently. Consequently, Mason's involvement with the subject development must be analyzed in light of its oversight or approval of the construction of a storm water system on the development. *** There is neither an allegation, nor a reference to any part of the record that supports the idea Mason maintained the 'storm sewer' system designed and installed by the other parties Defendant, or that it did so negligently." The trial court then went on to find that the city was entitled to sovereign

immunity.

{¶24} The Sextons argue that the trial court erred by finding they failed to plead that the city negligently managed the storm water system. The Sextons contend that in light of the overall liberal allowances accorded to pleadings under the Ohio Rules of Civil Procedure, their averments in their amended complaint sufficiently plead the city's negligence in maintaining the storm water system. The Sextons do not, "at this time, addres[s] the sovereign immunity or proprietary versus governmental function" of the city.

{¶25} Civ.R. 8(A) provides that a complaint must contain a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment for the relief to which the party claims to be entitled. A pleading setting forth a claim for relief "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, *** or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83.

{¶26} In their amended complaint, the Sextons alleged that Rishon and McGill were negligent in constructing the subdivision without an adequate storm water system, and that McGill was negligent in its drawings, design, and engineering of the subdivision. The Sextons also alleged that the city (1) was negligent in allowing the subdivision to be constructed without an adequate storm water system; (2) was negligent in releasing the bond of Rishon and McGill when it was aware that Rishon and McGill did not comply with the engineering and building specifications mandated by the city; (3) failed to rectify the problem caused by the water runoff from the subdivision after being informed of the problem; and (4) breached its promise to fix and correct the problem.

{¶27} According to the Sextons' amended complaint, because the city "has taken no

action to either repair the damage [to their] property [or] *** taken precautions to eliminate the same or similar actions in the future," and because the city "was placed on notice *** of the danger resulting from it negligently allowing unreasonable amounts of surface water to flow on, into, and across" their property, they have suffered damage to their property, and loss of enjoyment. The Sextons also alleged a constitutional taking claim based upon the "superimpose[ition]" by the city, Rishon, and McGill of "their drainage, storm sewer system (or lack thereof) upon the natural watercourse in a manner not consistent with [the Sextons'] riparian rights as an adjoining landowner."

{¶28} Upon reviewing the Sextons' amended complaint, we agree with the trial court that the Sextons did not directly allege that the city undertook to manage any storm water system on the subdivision, or that it did so negligently. Nor are there facts alleged to support any argument that the city maintained the storm water system designed and installed by the other parties, or that it did so negligently. The amended complaint did not place the city on notice that it would face a claim it undertook to manage and/or negligently maintained the subdivision's storm water system. We therefore hold that the Sextons failed to adequately allege under Civ.R. 8(A) that the city negligently managed the subdivision's storm water system. The Sextons' second assignment of error is accordingly overruled.

{¶29} Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.

Appendix, P. 12

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

PEGGY SEXTON, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2006-02-026
	:	JUDGMENT ENTRY
- vs -	:	
CITY OF MASON, et al.,	:	
Defendants-Appellees.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Stephen W. Powell, Presiding Judge

James E. Walsh, Judge

William W. Young, Judge

Appendix P. 13

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

PEGGY SEXTON, et al.	:	Case No. 03CV61152
Plaintiffs,	:	
-vs-	:	DECISION AND ENTRY
CITY OF MASON, et al.	:	
Defendants.	:	

Pending before the court are defendant City of Mason's second motion for summary judgment, a motion for reconsideration joined by all parties defendant, and a pleading filed by defendant McGill Smith Punshon, Inc., styled a "Supplemental Memorandum," that is in effect a separate motion for reconsideration based on a recently released appellate opinion. For the reasons that follow,

I. Facts

Plaintiffs have owned real property just outside the city limits of Mason, Ohio since 1988. A creek runs through the property. Adjacent to Plaintiffs' land, a new housing subdivision has been developed known as Trailside Acres. Development has been completed in stages, over a period of years. In the

course of the grading and excavation for the subdivision, natural waterflow has been changed so that Plaintiffs' property, which did not flood predevelopment, began to flood with increasing severity as development progressed. Plaintiffs complain of being unable to leave their property on one occasion because their bridge was underwater; of their basement flooding; and of continuing erosion to their land and treekill. They allege in their complaint that Defendants Rishon Enterprises, Don Thompson Excavating, and McGill Smith Punshon Intl. have negligently failed to provide for adequate water management in their development of the subdivision; that Defendants City of Mason and its Engineering Department negligently released the contractor's and developer's bond without ensuring that engineering and building specifications were complied with, and moreover took no action to fix the waterflow problem; that the parties Defendant have acted to interfere with Plaintiffs' riparian water rights; that the Defendants have "taken" Plaintiffs' property as governed by Article I, Section 19 of the Ohio Constitution; that Plaintiffs detrimentally relied on the City of Mason's promises to correct runoff problems; and that Defendant McGill Smith negligently designed the water management system for the subdivision.

The Defendants filed motions to dismiss and motions for summary judgment urging that Plaintiffs failed to file their action within the applicable statute of limitations. This issue was very thoroughly briefed by the parties over

a period of months. The Magistrate's Decision denying the motions was upheld by the Court on May 13, 2005. Subsequently, Defendants filed their motions for reconsideration and Defendant City of Mason filed another motion for summary judgment urging, among other things, sovereign immunity. Further discussion of the facts will be made as necessary below.

II. Motions for Reconsideration

The Court's denial of Defendants' motions for dismissal and summary judgment were interlocutory in nature, and the Court therefore has the discretion to entertain a motion for reconsideration.[1] In support of their June 14, 2005 motion, Defendants reiterate the same arguments that the assigned Magistrate, and the Court, considered at length in denying the motions on February 2, 2005, and on May 13, 2005. The June 14, 2005 motion for reconsideration is denied for the same reasons discussed in the Decision and the Entry already journalized in this action.

In support of its October 5, 2005 Supplemental Memorandum, which the Court will treat as a separate motion for reconsideration, Defendant McGill Smith refers to a recent decision by the First Appellate District in which it also appeared as a Defendant.[2] *Reith* does indeed support Defendant's position that the alleged tortious conduct constitutes a permanent trespass and not a

---

[1] Civ.R. 54(B); *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378; *Treciak v. Ohio Dept. of Commerce* (Jun. 8, 1999), Franklin App. No. 98AP-1019

[2] *Reith v. McGill Punshon, Inc.*, (Sep. 16, 2005), Hamilton App. No. C-040760

continuing one, and that therefore the four (4) year statute of limitations has run, barring Plaintiffs' claims. Although, *Reith* is not controlling authority on this Court, it does provide some guidance. In addition, *Reith* is not in conflict with any case out of the Twelfth Appellate District. The facts presented to the Court in *Reith* are identical to those presented by the case at bar. In *Reith* the Court stated;

> "We conclude that the distinction the Reiths attempt to make in this case between the earlier flooding and the later flooding, upon which much of their case rests, amounts to no distinction at all. The later flooding was more severe, but the undisputed facts indicate that all the flooding was caused by the same surface-water runoff." [3]

After a careful review of the facts presented in this case it does appear analogous to *Reith*, in that the allegations of the Plaintiff constitute a permanent trespass. Plaintiffs allege that the flooding that has been occurring was caused by the same surface water run-off that has been occurring for years. R.C. 2305.09(A) provides that there is a four (4) year statute of limitations for all trespass actions upon real property. Based upon the Court's ruling that this matter is a permanent trespass, it is subject to this four (4) year statute of

---

[3] *Reith v. McGill Punshon, Inc.*, (Sep. 16, 2005), Hamilton App. No. C-040760

limitations. The Ohio Supreme Court has held that R.C. 2305.09(D) and its four (4) year statute of limitations applies to cases where a party seeks compensation for damage to property.[4] The Court is sympathetic to the unfortunate situation presented by this case. However, the law does support the position of the Defendants on this issue. Accordingly, the statute of limitations has run and the defendant's motion for summary judgment is well-taken.

III. . Motion for Summary Judgment

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.[5] "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."[6] "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine

---

[4] *Harris vs. Liston* (1999), 86 Ohio St.3d 203

[5] *Ormet Primary Aluminum Corp. v. Employers' Ins. Of Wasau* (2000), 88 Ohio St.3d 292, 300

[6] *Welco Industries, Inc .v. Applied Cos.*(1993), 67 Ohio St.3d 344, 346

issue of material fact and that he is entitled to a judgment as a matter of law."[7] "After a proper summary judgment motion has been made, the nonmoving party must supply evidence that a material issue of fact exists, evidence of a possible inference is insufficient."[8]

In its second motion for summary judgment, the City of Mason urges that it is entitled to sovereign immunity for any alleged damages to Plaintiffs' yard, because any advice it provided Plaintiffs was provided as an exercise of its governmental function. Mason further argues that Plaintiffs were never justified in relying on any alleged promise that it would assist them in remedying their runoff problems. Mason asserts that Plaintiffs' taking claim is time barred, as well.

A. Sovereign Immunity

Plaintiffs allege that the City of Mason and its Engineering Department negligently permitted the other parties Defendant to design and construct the development's storm water system in such a way that excess runoff flooded Plaintiffs' property. They also allege that Mason failed to remedy the problem, though it was asked to do so. Plaintiffs do not allege in their complaint that Mason undertook to manage any sewer system on the development, or that they did so negligently. Consequently, Mason's involvement with the subject

---

[7] *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, paragraph 2 of the syllabus

[8] *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421

development must be analyzed in light of its oversight or approval of the construction of a storm water system on the development.

R.C. 2744.01(C)(2)(p) provides that the "provision or nonprovision of inspection services of all types, including but not limited to inspections in connection with building, zoning, sanitation, fire, plumbing and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits" is a governmental function. The "provision or nonprovision, planning or design, construction or reconstruction of. . . a sewer system" is also a governmental function,[9] but the "maintenance, destruction, operation, and upkeep of a sewer system" is a proprietary function.[10] Actions taken in connection with "flood control measures" are a governmental function.[11] There is neither an allegation, nor a reference to any part of the record that supports the idea Mason maintained the "storm sewer" system designed and installed by the other parties Defendant, or that it did so negligently. The Court concludes that Mason's involvement in this project was an exercise of a governmental, and not a proprietary function.

---

[9] R.C. 2744.01(C)(2)(l)
[10] R.C. 2744.01(G)(2)(d) It is not necessary to the analysis here whether the storm water system at issue constitutes a "sewer" system under the statute.
[11] R.C. 2744.01(C)(2)(r)

Exceptions to sovereign immunity for tort liability are provided in R.C. 2744.02(B), and none of them apply to Plaintiffs' claim for negligent approval of the storm water system on the development.

Plaintiffs assert that Mason made specific promises to them that it would remedy their flooding problem, although they lived outside the city limits. They allege that they relied on these promises to their detriment, and that Mason is now estopped from failing to take some action on their behalf. Mason urges that no specific promise was made on which Plaintiffs could have relied. The Court notes that the provision of flood control measures is a governmental function pursuant to R.C. 2744.01(C)(2)(r), and that therefore the City is immune from an estoppel claim. No exception to immunity applies pursuant to R.C. 2744.02(B), and as Plaintiffs' claim does not arise from a contract between them and the City, there is no other statutory provision that would take this matter outside the application of the Political Subdivision Tort Liability Act.[12]

Mason's motion for summary judgment is granted as to Plaintiffs' claims for negligent inspection or approval of the development's storm water system, and on Plaintiffs' claim for promissory estoppel.

B. Constitutional Taking Claim

Plaintiffs allege that Defendants' alteration of the natural surface water

[12] See R.C. 2744.09

runoff is inconsistent with their property rights, and in the case of Mason, constitutes a "taking" of their private property for a public use without compensation. The statute of limitations for this alleged constitutional taking claim is six years from the time the City of Mason issued its final decision allowing the alteration of natural waterflow.[13] Mason has introduced evidence showing that final decision was made at some point before all work installing the "earthwork changes and storm changes" was completed on October 27, 1995. Plaintiffs have introduced no evidence showing that Mason was still considering its approval of the development plans at any point after October 1995. This action was filed July 14, 2003, well beyond six years after Mason's approval of development plans for this subdivision.

Accordingly, Defendant Mason's motion for summary judgment is well taken and is granted as to all claims against it in Plaintiffs' complaint. Counsel for the Defendant shall prepare an appropriate judgment entry forthwith.

JUDGE JAMES HEATH

cc: James A. Whitaker, Esq.
B. Scott Jones, Esq.
Gary Herfel, Esq.
Jessica S. Hylander, Esq.
Todd Thompson, Pro Se

[13] *State ex rel. RTG v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716

Appendix, P. 22

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO
CIVIL DIVISION

PEGGY SEXTON, et al.	:	Case No. 03CV61152
Plaintiffs,	:	
-vs-	:	DECISION
CITY OF MASON, et al.	:	
Defendant.	:	

This matter came before the Court on the objections of three of the Defendants in this case to the Decision of the Magistrate. There are Motions for Summary Judgment/Motions to Dismiss pending. The magistrate's decisions provide that the Plaintiffs' complaint states a cause of action for a continuing trespass. Accordingly, the statute of limitations has yet to run. The Defendants have taken the position that this case does not state a cause of action for a continuing trespass but rather states a case for a permanent trespass. Under this theory, the permanent trespass is subject to a 4-year statute of limitations. However, as it relates to the City of Mason, the statute of limitations for permanent trespass would be 2-years.

Pursuant to Ohio Revised Code 2305.09(D), Court actions for injury or damage to real property are subject to a 4-year statute of limitations. However, Revised Code does provide a different statute for political subdivision, which is limited to 2 years. (Revised Code 2744.04(A)). The statute of limitations begins to run upon discovery or through the exercise of reasonable diligence, it had been discovered that there was damage to the property. *Harris vs. Liston (1999), 86 Ohio St.3d 203.* There is no dispute that the Plaintiffs first discovered or became aware of the water problems on their property in 1992. In addition, the Plaintiffs claim that they have had ongoing water problems since 1992. This dispute arises out of the Plaintiffs' claims that they have stated a cause of action for a continuous and ongoing trespass. The statute of limitations for a continuous or ongoing trespass would be 21-years.

It is clear from the information filed in this case that the determinative question in this matter is whether the Plaintiffs claim arises out of a permanent trespass or a continuing trespass. The Ohio Supreme Court has address the issue of continuing and permanent trespass. "When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injury him, he is liable at once for this one act and all of its effects; and the time of the statute of limitations runs from the time of such act of trespass." *Valley Ry. Co. vs. Franz (1885), 43 Ohio St. 623.* A permanent trespass occurs when a defendant's tortuous 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. Nieman vs. NLO, Inc. (C.A.6, 1997), 108 F.3d 1546. The Franz's Court also discussed the concept of continuing trespass. It held in part;

> "And when the owner of land rightly and lawfully does an act **entirely on his own land**, and by means of such act puts in action or directs a force, against or upon, or that affects, another's land, without such other's consent or permission, such owner and actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; and such force, if so continued, is continued by the act of such owner and actor, and it may 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 the former, the latter may bring his action."

Franz, supra at 627.

Accordingly, a continuing trespass occurs when the Defendant's tortuous activity is ongoing, perpetually creating fresh violations of the Plaintiff's property rights. Neiman vs. NLO, Inc. *supra*. The Defense relies heavily on a case out of the First District Court of Appeals of Frish vs. Monfort Supply Co. *(1997), Ohio App. LEXIS 5177 (1st Dist. C.A.).* In Frish, the Court was faced with a different set of facts than the instant case. The Frish case involved an aeration system that was improperly installed **in the plaintiff's home**. The Court held that because this tortuous act was completed at the time of installation, and there was no ongoing misconduct, the statute of limitations began to run at the time of installation, even though the damage to the property itself continued. Frish, supra. This case does not involve a water system that was improperly installed on the plaintiff's property. Rather the Plaintiffs are claiming that the negligence design of the Trailside Acre subdivision

has permitted water to fall across their property. Accordingly, it appears that the Plaintiffs claims are that when the Defendants performed an act entirely on their own land it put in action a force that effected Plaintiffs' land and a cause of action accrued. It is further claimed, however, that because of continue action and continued damages, it should be regarded as a continuing trespass. The factual allegations set forth by the Plaintiffs are the same type that has been **declared** by the Ohio Supreme Court to be a continuing trespass. *Franz, supra.* In this case, the Plaintiffs claim that the damage to their property occurred with the construction and design of the subdivision. The allegation of a tortuous act was completed at this time. Although there is no ongoing action on the part of the Defendants, allegations of the continuing problem alleged as a result of the initial tortuous act by that negligence is sufficient to demonstrate a continuing trespass. *Neiman vs. NLO, Inc., (1997) 108 F.3d 1546.*

In reviewing the complaint filed, it becomes clear that the Plaintiffs are stating a claim for a continuing trespass. Accordingly, the appropriate statute of limitations is 21-years. For the reasons set forth in the foregoing, the Defendants' Motions to Dismiss and Motions for Summary Judgment are not well taken.

JUDGE JAMES J. HEATH

cc: James A. Whitaker, Esq.
B. Scott Jones, Esq.
William M. Bristol, Esq.
Jessica S. Hylander, Esq.
Todd Thompson, Pro Se

Appendix, P. 26

IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

PEGGY SEXTON, et al.,	)	
	)	
Plaintiff,	)	**CASE NO. 03CV61152**
	)	
-vs-	)	
	)	
CITY OF MASON, et al.,	)	**MAGISTRATE'S DECISION**
	)	
Defendant.	)	

In the above-referenced action, Defendant Rishon Enterprises, Inc. moves to dismiss Plaintiffs' complaint, or alternatively, for summary judgment in its favor, and argues that Plaintiffs' action is barred by the statute of limitations, R.C. 2305.09. In consideration of the pending motion, the undersigned Magistrate has examined the pleadings, the deposition testimony of Peggy Sexton, the affidavit of Edward M. Frankel, and all exhibits properly referenced therein.

Plaintiffs constructed a single-family residence in 1988 on a 5.9-acre parcel located at 4721 Cox Smith Road, Union Township, Warren County, Ohio. A creek runs through this property. Adjacent to, or nearby Plaintiffs' property, Defendant Rishon Enterprises, Inc. began construction of Trailside Acres subdivision in the late 1980s or early 1990s. As early as 1992, Plaintiffs noticed that during periods of heavy rain the creek would rise and spill over the roadway and bridge. Plaintiffs attributed this problem to construction of Trailside Acres, specifically to Defendant Rishon's reduction in the size of retention pond situated on one of the Trailside Acre lots. Plaintiffs contacted both the City of Mason and a representative of Defendant Rishon in an attempt to alleviate the problem, to no avail. Defendant Rishon's work on the subdivision ended by November 17, 1995.

Plaintiffs have, since 1992 and up to the present, experienced flooding during periods of heavy rain. Plaintiffs contend that this flooding is eroding their land, destroying their bridge and killing their trees along the bank of the creek. On July 17, 2001, during a particularly severe rainstorm, Plaintiffs' basement was flooded and Plaintiffs were trapped on their property, necessitating assistance from the fire department.

Plaintiffs filed the instant action July 14, 2003, seeking compensation for damages to both real and personal property and for personal injury.

Defendant Rishon argues that R.C. 2305.09(D) requires that claims predicated on damage to real property be brought within four years after the cause accrues. As Plaintiffs were aware of

Appendix, P. 27

the flooding problem as early as 1992, Defendant argues that the four-year statue of limitations bars this action. Defendant relies upon *Harris v. Liston* (1999), 86 Ohio St.3d 203, wherein the Supreme Court of Ohio held that an action by a subdivision resident against the subdivision developer, for negligence in designing a "water management system," which resulted in standing water in the resident's yard, was time barred.

In contrast to *Harris*, the instant case, if Plaintiffs are to be believed, states a cause of action for a continuing *trespass* and the action may be brought at any time prior to the expiration of the prescriptive period of 21 years, but recovery may be had only for damages sustained within four years prior to the filing of the action. See *Valley Railway Co. v. Franz* (1885), 43 Ohio St. 623, at syllabus; *Nieman v. NLO, Inc.* (6th Cir. 1997), 108 F.3d 1546, 1554-60; *Hartland v. McCullogh Constr., Inc.* (July 14, 2000), Ottawa App. No. OT-99-058, unreported, 2000 Ohio App. LEXIS 3126 at *14; *Boll v. Griffith* (1987), 41 Ohio App.3d 356, 357; *Norwalk v. Blatz* (1906), 9 Ohio C.C. (n.s.) 417.[1]

Motion overruled.

MAGISTRATE ANDREW HASSELBACH

NOTICE TO PARTIES

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 of the Ohio Rules of Civil Procedure.

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

MAGISTRATE ANDREW HASSELBACH

C: Attorney James Whitaker
Attorney Jessica Hylander
Attorney Gary E. Becker
Attorney Brian Goldwasser
Attorney Gary F. Franke
Attorney Gary L. Herfel

[1] A continuing trespass happens when one party does something on its own property that causes reoccurring damage to the land of the second party's property. *Hartland, supra.*

Appendix, P. 28

IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

PEGGY SEXTON, et al.,	)	
	)	
Plaintiff,	)	**CASE NO. 03CV61152**
	)	
-vs-	)	
	)	
CITY OF MASON, et al.,	)	**MAGISTRATE'S DECISION**
	)	
Defendant.	)	

In the above-referenced action, Defendant McGill, Smith, Punshon, Inc. moves to dismiss Plaintiffs' complaint, or alternatively, for summary judgment in its favor, and argues that Plaintiffs' action is barred by the statute of limitations, R.C. 2305.09. In consideration of the pending motion, the undersigned Magistrate has examined the pleadings, the deposition testimony of Peggy Sexton, and the affidavits of Stephen C. Roat, Peggy Sexton, and Larry Sexton.

For reasons stated in this Magistrate's decision on Defendant Rishon Enterprises, Inc.'s motion for summary judgment, this Magistrate concludes that Plaintiffs' complaint states a cause of action for continuing trespass, in which McGill, Smith, Punshon, Inc. took part as the engineering firm employed by the developer. According, McGill, Smith, Punshon, Inc.'s motion is overruled.

MAGISTRATE ANDREW HASSELBACH

NOTICE TO PARTIES

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 of the Ohio Rules of Civil Procedure.

Appendix, P. 29

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

MAGISTRATE ANDREW HASSELBACH

C: Attorney James Whitaker
Attorney Jessica Hylander
Attorney Gary E. Becker
Attorney Brian Goldwasser
Attorney Gary F. Franke
Attorney Gary L. Herfel

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY _____ DEPUTY

Appendix, P. 30

IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

PEGGY SEXTON, et al.,	)	
	)	
Plaintiff,	)	**CASE NO. 03CV61152**
	)	
-vs-	)	
	)	
CITY OF MASON, et al.,	)	**MAGISTRATE'S DECISION**
	)	
Defendant.	)	

In the above-referenced action, Defendant City of Mason moves to dismiss Plaintiffs' complaint, or alternatively, for summary judgment in its favor, and argues that Plaintiffs' action is barred by the statute of limitations, R.C. 2305.09. In consideration of the pending motion, the undersigned Magistrate has examined the pleadings and the deposition testimony of Peggy Sexton.

For reasons stated in this Magistrate's decision on Defendant Rishon Enterprises, Inc.'s motion for summary judgment, this Magistrate concludes that Plaintiffs' complaint states a cause of action for continuing trespass, wherein the City of Mason aided, assisted or advised the developer in committing said trespass. See *Bamer v. Tiger, Inc.* (May 8, 1987), Muskingum App. No. CA-86-17, unreported, 1987 Ohio App. LEXIS 6961 at *5-6. Accordingly, the City of Mason's motion is overruled.

MAGISTRATE ANDREW HASSELBACH

NOTICE TO PARTIES

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 of the Ohio Rules of Civil Procedure.

Appendix, P. 31

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

MAGISTRATE ANDREW HASSELBACH

C: Attorney James Whitaker
Attorney Jessica Hylander
Attorney Gary E. Becker
Attorney Brian Goldwasser
Attorney Gary F. Franke
Attorney Gary L. Herfel

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY _____ DEPUTY