

IN THE OHIO SUPREME COURT

Board of Health of Cuyahoga
County, Ohio

Appellee,

vs

Augustus L. Harper , ET-AL

Appellant

) ON APPEAL
) FROM 8TH DISTRICT COURT OF APPEALS
)
) CASE NO.: CA-16-104611
)
)
)
)

MEMORANDUM IN SUPPORT OF JURISDICTION

APPELLANTS

Byron L. Harper, (Pro Se)
3700 Northfield Road, Ste 17
Highland Hills, OH 44122
(216) 780-2212

Augustus L. Harper, (Pro Se)
288 Bonds Parkway,
Berea, OH 44017
(440) 234-3065

Susan Buchanan,(Pro Se)
288 Bonds Parkway,
Berea, OH 44017
(440) 234-3065

Counsel for Appellee
Brendan Doyle(005785)
Assistant Prosecuting Attorney
8th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7795

Table of Cases and Authorities

Cases:

<i>Vangelos v. Hallios</i> , 8th Dist. No. 49464, 1985 WL 8418 (Nov. 7, 1985)...	page 5
<i>Pratts v. Hurley</i> , 102 Ohio St.3d 81, (2004-Ohio-1980)	page 6
<i>Horn v. Childers</i> , 116 Ohio App. 175, (1959)	page 6
<i>Blakemore v. Blakemore</i> , 5 Ohio St.3d 217, 219 (Ohio 1983)	page 7
<i>State v. Adams</i> (1980), 62 Ohio St.2d 151, 157 (Ohio 1980)	page 7
<i>AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.</i> , 50 Ohio St.3d 157, (1990)	page 7
<i>Miamisburg Motel v. Huntington Natl. Bank</i> , 88 Ohio App.3d 117 (1993)	page 7
<i>Buckeye Supply Co. v. Northeast Drilling Co.</i> , 24 Ohio App.3d 134(1985)	page 9
<i>State v. Morris</i> , 132 Ohio St.3d 337, (2012)	page 10,
<i>Nelson v. Adams USA, Inc.</i> , 529 US 46,(2000)	page 10
<i>Wells Fargo Bank v. Sowell</i> , 2015 Ohio 5134	page 11, 12
<i>Saber Healthcare Group, LLC v. Starkey</i> , 6th Dist. Huron No. H-09-022, 2010-Ohio-1778.	Page 13
<i>Delfino v. Paul Davies Chevrolet, Inc.</i> , 2 Ohio St.2d 282 (1965)	page 13

Statutes:

Ohio Revised Code § 3718.012	page 5
Ohio Administrative Code § 3701-29-02(J)	page 12

TABLE OF CONTENTS

STATEMENT OF FACTS AND THE CASE	Page 1
--	--------

<u>FIRST PROPOSITION OF LAW:</u>	Page 5
---	--------

The Trial Court Lacked Subject Matter Jurisdiction over replacement of Older Home Sewage Treatment Systems. The Trial Court's Journal Entries violate O.R.C § 3718.012, and are void; and Appellant's appeal should be treated as a motion to vacate a void Judgment.

<u>SECOND PROPOSITION OF LAW:</u>	Page 6
--	--------

O.R.C § 3718.012 provides automatic approval for Older Home Sewage Treatment Systems, prohibits mandatory replacement of said Systems and the Board of Health shall be required to give specific and detailed notice of any alleged Public Health Nuisance and allow Property Owners an opportunity to abate the alleged nuisance.

<u>THIRD PROPOSITION OF LAW:</u>	Page 9
---	--------

The Court shall give consideration or reconsideration to statutory requirements of O.R.C. § 3718.011 and admissions that clearly demonstrate that Plaintiff/Appellee knowingly made a false claim in their Complaint.

<u>FOURTH PROPOSITION OF LAW:</u>	Page 10
--	---------

Due Process requires consideration of Defendant's interests, before being subject to a judgment which may impact Defendant's interests.

<u>FIFTH PROPOSITION OF LAW:</u>	Page 10
---	---------

Summary Judgment Motions and subsequent requests for Reconsideration shall be given proper consideration when Appellee's failure to respond to discovery requests interferes with Defendant's preparation of his Summary Judgment Motion.

<u>SIXTH PROPOSITION OF LAW:</u>	Page 11
---	---------

Constructive or Equitable Owners can be subject to enforcement and Ohio Administrative Code 3701-29-02(J) allows the party responsible for maintaining the Septic System and/or property to be held liable.

CONCLUSION

Page 14

CERTIFICATE OF SERVICE

page 16

Statement of Facts and the Case

Appellants are appealing a Default Judgment ordering them to replace their Home Sewage Treatment System in violation of O.R.C §3718.012 and Summary Judgment entered against the remaining Defendant without considering standing conferred by Ohio Administrative Code 3701-29-02(J) or equitable ownership interests. Appellants assert that Appellee obtained the judgments by fraud and misstatement of the Law. The Court refused to reconsider its rulings despite Cuyahoga County's Sanitarian's admission that Appellant's Septic System was not missing pieces or parts as Appellee's single Public Health Nuisance alleges in paragraph 17 of their complaint.

On August 2, 2007, the Cuyahoga County Board of Health inspected the Home Sewage Treatment System (also referred to as "Septic System") located at 27950 Emery Road in Orange Village, Ohio. The unsatisfactory Site Evaluation (performed pursuant to Ohio Administrative Code 3701-29) was based upon the Septic System rules that were in existence in 2007. The Site Survey does not document any conditions which create a nuisance pursuant to O.R.C. § 3718.011. In 2013, Appellee filed suit claiming that Defendants were in violation of O.R.C § 3718.011(A)(1). Appellee did not give notice of or state any specific missing part or component causing a public health nuisance.

In early 2010, Byron Harper asked his Father and Step Mother to assist him in purchasing his home where he and his family resided since approximately 2005, because he was unable to secure financing on his own. Byron Harper put up the \$26,000 down payment, Augustus Harper and Susan Buchanan obtained a mortgage on the property for Byron Harper. Defendants completed the purchase in August 2010. Byron Harper has continued to make the monthly mortgage payment since September 2010.

Appellee sent several threatening letters demanding Defendants' replace their septic system without giving any notice of the specific condition causing the alleged Public Health

Nuisance. In September 2013, Appellee filed suit claiming that Defendants' Septic System was causing a public health nuisance and were in violation of O.R.C § 3718.011(A)(1). Appellee later admitted that they were not aware of any missing pieces or parts of the Septic System as alleged.

Plaintiff failed to serve Byron Harper with the complaint. Service was perfected against Augustus Harper and Susan Buchanan and was received by their 17 year old son. Unfortunately, their son failed to give the complaint to his parents. Consequently, they were unaware of the complaint until February 2014. At that time, all Defendants filed multiple objections to the Default Judgment and demonstrated a clear and unambiguous intent to defend against the complaint on the merits. Nonetheless, Judge Burnside granted Appellee's Default Judgment request.

During the Default Judgment hearing in February 2014, Byron Harper also complained that Plaintiff never provided Defendants any notice of the alleged defects. He moved the Court to dismiss this action without prejudice and allow the parties to work together to remedy the situation. Plaintiff objected and stated that the problem with the septic system was that "it was too old" and "it was installed in the 1950's". Appellee did not mention that the system was missing any, components, pieces or parts or that the system was alleged to violate O.R.C§3718.011(A)(1). Appellee did not produce any evidence for consideration as stated in the court order.

The Court granted Default Judgment against Augustus Harper and Susan Buchanan on March 4, 2014, without requiring Appellee to produce any evidence to support their claim; days before a scheduled pretrial hearing that Judge Burnside ordered Augustus Harper to attend on March 7, 2014. Despite Defendants' claim that they were never given notice of the alleged defect, no defect being disclosed to the Court, the Judge disregarded of all three Defendant's clear and multiple efforts and obvious intent to defend against Plaintiff's claims. Judge Burnside struck Defendant's objection from the record then granted Appellee's Default Judgment Motion. The Court ordered Appellants to replace their Home Sewage Treatment System and prohibited Byron

Harper from living in his home and Defendants from transferring ownership of the property until the system is replaced. Defendants wish to Quit Claim the property to Byron Harper (Defendant 3) but are prohibited from do so.

Judge Burnside admitted making the one inappropriate statement in her response to Defendant's Affidavit of Disqualification. Judge Burnside also told Byron Harper that she would treat, **"anything you write is as my dog wrote it"**. Byron Harper objected to the Judge's comments and bias and asked the Judge to recuse herself; he subsequently filed an Affidavit of Disqualification. It was denied. Defendants maintain that Judge Burnside's bias is the only possible explanation for an inexplicable and illegal order, refusal to reconsider or recognize Plaintiff's misstatement of the law or admission that the Septic System was not missing any components, pieces or parts, as alleged.

On July 8, 2015, Judge Burnside called Byron Harper unethical in a journal entry for quoting the relevant portion of O.R.C §3718.012. This journal entry clearly demonstrates that Judge Burnside was biased and aware of the law but choose to ignore it. Judge Burnside granted Appellee wide latitude but was unreasonable, exacting and demanding upon Pro Se Defendants. The Court granted Plaintiff leave to file for Summary Judgment and changed the schedule for Expert's Reports several months after Plaintiff's failure to produce the reports and failure to file a Summary Judgment Motion, further delaying the proceedings, without reason or justification. The court denied Defendant's request to accelerate the original schedule for Summary Judgment Motions and experts reports because of the mounting costs associated with this pending case. Judge Burnside also ignored Byron Harper's complaints regarding discovery and the great disadvantage this caused Defendant in his preparation of his Summary Judgment Motion.

Defendant's Summary Judgment Motion was denied because it did not have supporting evidence on record (because Appellee did not provide discovery in a timely manner). Appellee

then filed a Summary Judgment Motion and Appellant opposed their motion. Byron Harper's responses and admissions to Plaintiff's request for admissions and interrogatories were appended to Plaintiff's Summary Judgment Motion as Exhibit Q. Plaintiff's responses to Defendant's interrogatories and request for admissions were appended to Defendant's Motion Opposing Summary Judgment as Exhibit B. Byron Harper asked the court to reconsider denial of his Summary Judgment Motion and made direct reference to aforementioned exhibits and pointed specifically to Plaintiff's admission that they did not know of any missing parts or components of the Harper's septic system. These sworn responses also demonstrate Byron Harper's Equitable or Constructive Ownership and sole responsibility for maintenance and repair of the property. See Exhibit Q of Plaintiff's Summary Judgment Motion. These admissions clearly demonstrated that Byron Harper is not a "tenant" or "renter".

Appellee admits receiving copies of checks written by Byron Harper that are said to be Mortgage Payments. These checks were written approximately one year after the Court verified that the property was vacant. (The Court's Journal Entry from October 17, 2014, verified that Byron Harper and his family vacated the Property, as ordered.) Appellee attempts to re-characterize or change the nature of the payments. The memo line of the checks clearly indicates that they are Mortgage Payments. The Trial Court then ignored provisions of the Ohio Administrative Code conferring standing upon Byron Harper and ignored the partial performance exception to the Statute of Frauds and the general inapplicability of the statute of Frauds in granting Plaintiff's Motion for Summary Judgment.

ARGUMENT AND LAW

FIRST PROPOSITION OF LAW:

The Trial Court Lacked Subject Matter Jurisdiction over replacement of Older Home Sewage Treatment Systems. The Trial Court's Journal Entries violate O.R.C § 3718.012, and is void; and Appellant's appeal should be treated as a motion to vacate a void Judgment.

The trial court lacked subject matter jurisdiction over replacement of older Home Sewage Treatment Systems that were in use on September 17, 2010, pursuant to O.R.C § 3718.012. A primary issue in the instant appeal is whether the motion to vacate a void judgment should be, or must be, addressed by this Court. In substance, Appellant's first four Assignments of Error at the appellate level all relate to the validity of the trial Court's Judgment and request relief from the illegal order and should be construed as a Motion to Vacate a Void Judgment. The trial court clearly ignored the law. O.R.C§ 3718.012 states: "A SEWAGE TREATMENT SYSTEM THAT WAS IN OPERATION PRIOR TO THE EFFECTIVE DATE OF THIS SECTION SHALL NOT BE REQUIRED TO BE REPLACED WITH A NEW SEWAGE TREATMENT SYSTEM UNDER THIS CHAPTER OR RULES ADOPTED UNDER IT AND SHALL BE DEEMED APPROVED IF THE SYSTEM DOES NOT CAUSE A PUBLIC HEALTH NUISANCE OR, IF THE SYSTEM IS CAUSING A PUBLIC HEALTH NUISANCE AS PROVIDED IN SECTION [3718.011](#) OF THE REVISED CODE, REPAIRS ARE MADE TO THE SYSTEM THAT ELIMINATE THE PUBLIC HEALTH NUISANCE AS DETERMINED BY THE APPLICABLE BOARD OF HEALTH."

The text and plain meaning of the statute is clear and unambiguous. The trial court's order demanding replacement of the septic system violates O.R.C § 3718.012 and is void. "In the exercise of its inherent power to set aside void judgments, a court may treat a request to vacate a void judgment as a common law motion to vacate a void judgment, and the motion to vacate the void judgment is not subject to a time limitation." *Vangelos v. Hallios*, 8th Dist. No. 49464, 1985 WL 8418 (Nov. 7, 1985). This Court should view the request to address the merits of the appeal as

a common law motion to vacate the void ab initio judgment. It should not be construed as a discretionary appeal of the appellate court judgment.

Furthermore, "A party may collaterally attack a judgment that is void ab initio". *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶11; *Patton v. Diemer*, 35 Ohio St.3d, 518 N.E.2d, ¶ 1 of the syllabus; See *Ohio Pyro, Inc. v. Ohio Dept of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 25. In the instant case, the Courts order prevented Defendant's from Quit Claiming the property to their son, Byron Harper. All Defendants agree that Byron Harper is the true and equitable or constructive owner of the property and was evicted from the property by the illegal and void court order. Consequently, all Defendants seek to attack the validity of the void judgment. "If a court lacks subject-matter jurisdiction, its judgment is "null and void [and] is subject to collateral attack, not only by the parties thereto, but by others---that is, by whomever it might affect ** *." *Horn v. Childers*, 116 Ohio App. 175, 179, 187 N.E.2d 402 (4th Dist. 1959). Byron Harper is clearly and most directly affected by the void judgment. Consequently, he has standing to object to or request reconsideration of the void judgment and standing relative to the first four Assignments of Error presented to the Eighth District Court of Appeals. Appellee has misquoted O.R.C § 3718.02 and ignored or failed to rebut the applicability of O.R.C § 3718.012 to the instant case. The aforementioned statute does not afford the court the authority or jurisdiction to grant the specific relief requested by Appellee.

SECOND PROPOSITION OF LAW:

O.R.C § 3718.012 provides automatic approval for Older Home Sewage Treatment Systems, prohibits mandatory replacement of said Systems and the Board of Health shall be required to give specific and detailed notice of any alleged Public Health Nuisance and allow property owners an opportunity to abate the alleged nuisance.

The Trial Court abused its discretion by issuing a Default Judgment against Defendants. In *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (Ohio 1983) The Ohio Supreme Court stated: The term "abuse of discretion" was defined by this court in *State v. Adams* (1980), [62 Ohio St.2d 151, 157](#): "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Steiner v. Custer* (1940), [137 Ohio St. 448](#); *Conner v. Conner* (1959), [170 Ohio St. 85](#); *Chester Township v. Geauga Co. Budget Comm.* (1976), [48 Ohio St.2d 372](#)." The court's actions were not only illegal, they were unreasonable, arbitrary and unconscionable. "Abuse of discretion" has been described as including a ruling that lacks a "sound reasoning process." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, (1990).

Prior to the Court granting Plaintiff's Motion for Default Judgment, on two occasions, Appellants clearly demonstrated that they objected to the proposed Default Judgment and demonstrated a desire to defend against the Default Judgment on the merits. The Judge stated that Defendants failed to appear and that Default Judgment was appropriate. Defendants did appear. The Court disregarded Appellant's motions objecting to the Default Judgment. "A court filing is unnecessary to constitute an "appearance," but in the absence of an answer or other pleading a defendant must have otherwise manifested a clear intent to defend the lawsuit." See *Miamisburg Motel v. Huntington Natl. Bank*, 88 Ohio App.3d 117, 125; *Baines v. Harwood*, 87 Ohio App.3d 345, 347. Here, Appellants' deficient objection clearly was enough to demonstrate intent to defend against Plaintiff's Complaint.

The Court has applied the 2007 law to a statute which was not enacted until 2010 and changed the law substantially. Appellants have repeatedly argued that Plaintiff's complaint does not allege any specific facts which give rise to a public health nuisance pursuant to §3718.011 and ignores the fact that the septic tank evaluation occurred before this code section became effective

and that this code section created specific elements which must be present for declaration of a public health nuisance which Cuyahoga County Board of Health's 2007 Site Survey does not meet.

In fact, the complaint misstates the law and attempts to reference and combine two separate parts of the statute. Judge Burnside refused to reconsider her decision and ignored O.R.C §3718.012, Plaintiff's admission that the Septic System was not missing any components, pieces or parts was entered into the record and specifically reference questions 30, 33 & 38 of Exhibit B of Defendant's Opposition to Plaintiff's Summary Judgment Motion. The Court also ignores the notice requirement of §3718.011. At the Default Judgment hearing, the lack of notice of the alleged defect was specifically raised. Plaintiff's claims were disputed and Plaintiff simply stated that the septic system must be replaced because "it was old". As such Default Judgment was not supported by specific allegations or any facts in the complaint which constitute a public health nuisance pursuant to O.R.C. § 3718.011. In fact, Plaintiff's Prayer for Relief is in direct violation of O.R.C § 3718.012. Based upon the absence of specific allegations, Plaintiff's admissions, actual facts and lack of evidence combined with all Defendants objections, requests for reconsideration and desire to dispute the alleged public health nuisance demonstrate that the Trial Court's ruling was illegal, improper, unreasonable, and arbitrary.

Several times, in multiple filings before the Court, Plaintiff alleged differing grounds in support of their nuisance claim. However, Plaintiff has never sought to amend their Complaint. Plaintiff changed their argument and claimed that Defendant's Septic System was polluting the "Surface Waters of the State". Then Plaintiff argued that "Storm Sewer Water is Surface Water". The Court refused to recognize numerous Defense motions or requests for reconsideration, the mandate of §3718.012 and Plaintiff's failure to meet requirements of §3718.011.

Furthermore, Appellants have repeatedly argued that Plaintiff's complaint was insufficient on its face and requested relief that could not be granted because it was in violation of O.R.C§

3718.012. A default judgment on a complaint which fails to state a claim should not be upheld. *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134, 24 OBR 206, [493 N.E.2d 964](#); *American Bankers Ins. Co. v. Leist* (1962), 117 Ohio App. 20, 22 O.O.2d 455, 189 N.E.2d 456. Consequently, Appellants argue that the Trial Court abused its discretion and that the Default Judgment should be voided and the case dismissed with prejudice.

THIRD PROPOSITION OF LAW:

The Court shall give consideration or reconsideration to statutory requirements of O.R.C. § 3718.011 and facts that clearly demonstrate that Plaintiff knowingly made false allegations in their Complaint.

In *State v. Morris*, the Ohio Supreme Court held that De novo review is appropriate “where a trial court’s order is based on an erroneous standard or a misconstruction of the law”. Plaintiff’s Complaint fails to state a Public Health Nuisance pursuant to O.R.C § 3718.011. The elements of O.R.C § 3718.011 are quite specific. Plaintiff failed to give notice of the alleged violations to Defendants or an opportunity to correct the alleged offending condition, as required by statute. Plaintiff appended copies of letters sent to Defendants as an Exhibit to their April 29, 2015, brief. The letters simply demand system replacement in violation of O.R.C § 3718.012.

Plaintiff’s Sanitarians admitted that “PLAINTIFF IS NOT AWARE OF WHETHER DEFENDANT’S SYSTEM WAS MISSING COMPONENTS OR AND DID NOT OBSERVE EFFLUENT ON THE SURFACE OF THE GROUND, BUT PLAINTIFF’S DETERMINATION THAT DEFENDANTS SYSTEM WAS IN FAILURE WAS NOT BASED UPON THOSE FACTORS. RATHER IT WAS BASED ON THE DYE TEST...” The trial court refused to consider this admission which is proof that Plaintiff’s complaint was knowingly false.

Plaintiff’s Sanitarian were required by O.R.C§ 3718.011(A)(3) to observe and document the appearance of effluent on the surface of the ground or bleeding into surface water. The Site Evaluation from August 2, 2007, does not contain any such statement and Plaintiff’s Sanitarians

admit that they did not observe effluent on the surface of the ground. Furthermore, the effluent sample extracted from the storm sewer and was not subjected to any testing to determine the bacteria content.

FOURTH PROPOSITION OF LAW:

Due Process requires consideration of Defendant's interests, before being subject to a judgment which may impact Defendant's interests

In State v. Morris, 132 Ohio St.3d 337, (2012) the Ohio Supreme Court held that De novo review is appropriate "where a trial court's order is based on an erroneous standard or a misconstruction of the law". In 2000, the United States Supreme Court held, a Defendant is entitled to the "actual opportunity to Defend that due process affords every party against whom a claim is stated". See Nelson v. Adams USA, Inc., 529 US 46, 2000. Appellant Byron Harper was never afforded an actual opportunity to defend himself against Plaintiff's baseless allegations before being ousted from his home. He objected to the Default Judgment, informed the Court that Plaintiff failed to give notice of the alleged nuisance, answered the Complaint, and without any further proceedings on the merits of the case or an evidentiary hearing relating to the existence of a nuisance, the Court evicted Byron Harper and his family from their home. The Trial Court made it clear that Byron Harper was not subject to the default judgment; but made it clear and expressly stated that Byron Harper and his family would not be allowed to live in their home. Although Byron Harper was a named Defendant and answered the Plaintiff's complaint, his constructive or equitable ownership was not addressed until two years later. To date, Byron Harper continues to make monthly mortgage payments although he is prohibited from living in his home and is prohibited from having the deed transferred into his name. The facts of this case reveal that Byron Harper has unequivocally suffered a concrete injury in fact and a denial of due process.

FIFTH PROPOSITION OF LAW:

Summary Judgment Motions and subsequent requests for Reconsideration shall be given proper consideration when Appellee's failure to respond to discovery requests interferes with Defendant's preparation of his Summary Judgment Motion.

In *Wells Fargo Bank v. Sowell*, 2015 Ohio 5134, this Court held that Summary Judgment rulings should be de novo and the Appellate Court should apply the same standard as the trial court. Citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "We accord no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate."

In the instant case, the trial Court ordered a hearing on November 23, 2015, to resolve problems with discovery between the parties. Appellant received the requested discovery in December 2015, however his Summary Judgment Motion was due 2 months earlier. Defendant opposed Plaintiff's Summary Judgment Motion and appended Plaintiffs admissions and response to interrogatories as Exhibit B. Appellee also appended Byron Harper's admissions and responses as an Exhibit Q, to their Summary Judgment Motion. Before Plaintiff's Summary Judgment Motion was decided, Defendant then filed a Request for Reconsideration of his Summary Judgment Motion and made specific reference to items Plaintiff introduced and Plaintiff's Response to Interrogatories and admissions previously submitted to the Court as Exhibit B of Defendant's Opposition to Plaintiff's Summary Judgment Motion. As promised, Judge Burnside failed to give Byron Harper's reconsideration request proper consideration and denied it. Judge Burnside ignored Plaintiff's admission that the Septic System was not missing any pieces or parts which referred directly to Questions 30, 33 & 38 of Exhibit B of Defendant's Opposition to Plaintiff's Summary Judgment Motion. Nonetheless, this Judge issued Summary Judgment against Defendant.

SIXTH PROPOSITION OF LAW:

Constructive or Equitable Owners can be subject to enforcement and Ohio Administrative Code 3701-29-02(J) allows the party responsible for maintaining the Septic System and/or property to be held liable.

Defendant has previously and continues to argue that Judge Burnside was biased. Appellant asserts granting Plaintiff's Summary Judgment Motion against Defendant Byron Harper, citing a lack of standing was erroneous. Judge Burnside and the Appellate court failed to recognize Ohio Administrative Code 3701-29-02(J) which expressly states that ENFORCEMENT ACTION CAN BE TAKEN AGAINST "THE OWNER AND/OR RESPONSIBLE MANAGEMENT ENTITY AND/OR ANY PERSON PERFORMING A RELATED SERVICE OR ACTIVITY". Byron Harper was and continues to perform activities consistent with ownership and management of the property. The Cuyahoga County Board of Health seeks to use Ohio Administrative Code as an authority when it suits their purpose and ignores it when it does not benefit them. Ironically, the 2007 Site Survey applies the old rules from Ohio Administrative Code 3701-29-01. Assuming Defendant's system was creating a public health nuisance, Appellee properly named Byron Harper as a Defendant pursuant to O.A.C 3701-29-02(J). When Appellee's ignorance of the law and fraud was exposed they sought Summary Judgment against Byron Harper citing a lack of standing, to avoid losing the case on the merits. Sadly, this underscores and illustrates the Cuyahoga County Board of Health's lack of training and understanding of the Ohio Administrative Code and Chapter 3718 of the Ohio Revised Code.

As noted previously, In *Wells Fargo Bank v. Sowell* the Court held that Summary Judgment rulings should be de novo and the Appellate Court should apply the same standard as the trial court. Citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "We accord no deference to the trial court's decision and independently review the record to

determine whether summary judgment is appropriate.” Accordingly, Appellant asks this Court to review the facts and the law applied in this case.

Ohio Administrative Code 3701-29-02(J) should be applied; Exhibit Q of Plaintiff’s Summary Judgment Motion supports Byron Harper’s assertion that he has demonstrated that he is not only the equitable owner of the property, he is the person responsible for all aspects of the property including management, maintenance and repair of the Home Sewage Treatment System. The trial court and Appellate court ignored admissions and discovery materials that clearly demonstrate Byron Harper’s responsibility for and constructive ownership of the property. In fact, Byron Harper’s unequivocal acts demonstrate equitable ownership and were repeatedly established via copies of Byron Harper’s mortgage payments and admissions made to Plaintiff and items requested as part of the discovery process. Constructive ownership includes possession, payment, payments for improvements, indemnification, retaining Counsel for his parents and exclusive control of the property. Appellee ignores the fact that the statute of Frauds is not applicable in the instant case because there is no contractual dispute regarding the terms of purchase of the property between the parties of the agreement.

Partial performance is an equitable exception to the statute of frauds. See *Saber Healthcare Group, LLC v. Starkey*, 6th Dist. Huron No. H-09-022, 2010-Ohio-1778. If the Statute of Frauds is applicable, the equitable doctrine of partial performance is applied in situations where it would be inequitable to permit the statute of frauds to operate and where the acts done sufficiently establish the alleged agreement to provide a safeguard against fraud in lieu of the statutory requirements. See *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 286-287 (1965). Partial performance is sufficient to remove an agreement from the operation of the statute of frauds. The agreement “must consist of unequivocal acts by the party relying upon the agreement which are exclusively referable to the agreement.” *Id.* at 287. In the present case Byron Harper’s

possession, payment, payment for improvements, agreement on estimate for replacement of the septic system, indemnification of his parents, paying for Counsel for his parents and exclusive control of the property are each significant and unequivocal acts of ownership. It would be illogical for an individual choose to remain as a Defendant in an action unless he has an ownership interest in the property.

Finally, the Cuyahoga County Board of Health has pursued this action against Byron Harper and named him as a Defendant. After delaying review of this case for more than two years, it is unfair and unjust to allow Appellee to challenge Byron Harper's standing to prevent them from losing the case on the merits. Plaintiff and the trial court has attempted to use procedure as an end run around their unethical behavior and misuse of the law because Plaintiff procured a judgment via fraud; their actions are shown to be illegal and unethical. Consequently, Appellant asks for de novo review of the trial court's grant of Plaintiff's Summary Judgment Motion.

Conclusion

Based upon Judge Janet Burnside's bias, Appellee's own admissions and the foregoing reasons the Appellants ask this Court to Review the facts and afford Appellants the protection of the law pursuant to O.R.C Sections 3718.012 and 3718.011.

Humbly and respectfully submitted on this 1st Day of September, in the year of 2017,



Augustus L. Harper, (Pro Se)
288 Bonds Parkway
Berea, OH 44017



Susan Buchanan, (Pro Se)
288 Bonds Parkway
Berea, OH 44017



Byron L. Harper, (Pro Se)
3700 Northfield Road, Ste 17
Highland Hills, OH 44122
216-780-2212

Certificate of Service

A copy of the foregoing was served upon Augustus Harper and Susan Buchanan Personally or via email . A copy of the forgoing Brief was served upon Plaintiff/ Appellee's Counsel, Brendan Doyle via U.S. Mail to 8th Floor, 1200 Ontario Avenue, Cleveland, OH 44113 or Email. A copy was served upon Plaintiff/Appellee's Counsel Thomas P. O'Donnell via E-Mail and/or via U.S Mail to 55 Venture Dr. Parma Ohio.

Humbly and respectfully submitted on this ^{5th} ~~Kth~~ Day of September, in the year of 2017,

A handwritten signature in black ink, appearing to read 'Byron L. Harper', written over a horizontal line.

Byron L. Harper, (Pro Se)
3700 Northfield Road, Ste 17
Highland Hills, OH 44122