MEMORANDUM IN SUPPORT OF JURISDICTION

IN THE SUPREME COURT OF OHIO

City of Huron, Ohio c/o Todd A. Schrader, Law Director, Appellee v. Michael P. McCune Revised Declaration of Trust Sally J. McCune, Trustee, et, al. Appellant	)	ON APPEAL FROM THE ERIE COUNTY COURT OF APPEALS SIXTH APPELLATE DISTRICT . COURT OF APPEALS CASE NO. E-22-027

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MICHAEL P. MCCUNE REVISED DECLARATION OF TRUST, SALLY J. MCCUNE, TRUSTEE

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND WHY IT INVOLVES A SUBSTANTIAL CONSTUTIONAL QUESTION

A. THE APPELLATE COURT'S HOLDING REGARDING THE STATUTE OF LIMITATIONS ON QUIET TITLE CLAIMS COULD THROW OHIO INTO TITLE CHAOS

This case potentially could affect all persons who have ever owned or may own real estate in Ohio. That is because the Court of Appeals decision, if allowed to stand, could render the title of every Ohio landowner suspect, even decades after its purchase. The following two fundamental holdings of the Court's decision support this assertion:

1. The 21-year statute of limitations for the recovery of possession of or ***title to*** real estate set forth in R.C.§2305.04 ***runs against the party sued***, in this case Defendant Sally McCune, Trustee of the Michael P. McCune Declaration of Trust ("McCune"), rather than ***the party bringing the action***, here the City of Huron ("Huron"). Stated another way, according to the Court below, the 21-year limitations period is self-effectuating, putting the ***burden on the landowner to file suit within the proscribed period to protect his or her title, rather than on the adverse possession claimant to file within that timeframe to protect his or her claim.*** Under the facts of this case this means that McCune, as the title owner of the subject land along the Huron River known as "Water Lot 1", was automatically divested of title because ***she did not file suit*** within 21 years after Huron's predecessor in title to adjoining Lots 2-6's (the Showboat Restaurant) alleged adverse use of Water Lot 1 ended in 1993, or by 2014. Because she did not, Huron was not time-barred from maintaining its adverse possession claim, even though ***it failed to file this action*** until 2020, 27 years after the adverse use ended. Decision, ¶19-23

2. As Huron was in ***possession*** of the subject real estate when it filed this action in 2020, R.C.§2305.04's 21-year limitations period did not bar its quiet title claim under R.C.§5303.01 based on adverse possession, filed 27 years after the adverse use ended. Stated another way, so long as the adverse possession claimant has possession of the real estate when filing the action, he or she may file it any time after the adverse use ends, potentially even hundreds of years later. Decision, ¶24-26

If allowed to stand, these holdings could have tremendous ramifications on title certainty for Ohio landowners for generations to come.

However, to be fair, in determining whether this case merits jurisdictional review, it is important for this Court to understand the factual background against which the Appellate Court

made its holdings. Fortunately, that background is simple and undisputed. It may be summarized as follows:

- The alleged adverse possession of Water Lot 1 by Huron's predecessor in title to Water Lots 2-6, adjoining Water Lot 1 along the Huron River, the Showboat Restaurant, occurred from 1971 to 1993, a period of 22 years.

- No evidence of use or possession of Water Lot 1 was entered for the period from 1993 to 2013.

- In 2013, when the City wanted to purchase the adjoining Water Lots, Nos. 2-6 from the then-title owner, 10 North Main Street (the Showboat Restaurant's successor in title to Lots 2-6), it was informed by the title insurance company of McCune's title interest in Water Lot 1. Because of that interest, the title company refused to insure title in Water Lot 1. The title company even suggested to Huron that it file a quiet title action on Water Lot 1 at that point.

- Huron did not heed that advice, but rather proceeded to close the purchase, causing two Quitclaim Deeds to be filed; one specifically naming Water Lots 2-6 in the legal description, and the other containing a metes and bounds description to all the Water Lots (including Lot 1), running all the way out to the middle of the Huron River. Huron took possession of the Water Lots at that time.

- Over the course of the next year, fully aware of McCune interest in Lot 1, Huron nonetheless spent almost $1M in improvements to the seawall protecting all the Lots and, over the course of the next 6 years, proceeded to try to sell the Lots to a commercial developer under the name of "the Showboat Property".

- Not being able to sell the Showboat Property, Huron finally decided to try to clear title to Water Lot 1 in its name by filing this quiet title action in 2020.

- In its Complaint, Huron asserted two grounds for relief: 1) that Water Lot 1 was submerged land belonging to the State of Ohio, subject its rights to obtain a submerged lands lease to Huron as the owner of the adjoining Water Lots; and 2) adverse possession by the Showboat Restaurant, which possession ended in 1993.

From these facts, the potential fallout of the Appellate Court's rulings on title security for Ohio landowners is obvious.

For example, shifting the responsibility for filing suit within the 21-year time limitation under §2105.04 from an adverse possessor, ***who has abandoned his or her use for over 21 years,***

to the landowner in order to protect title, creates the risk that the adverse possessor could come back to claim title at any time, even hundreds of years later. Title would then be in limbo in perpetuity. Likewise, should the §2105.04 time-bar not apply to adverse possessors seeking to quiet title in their names under §5303.01, which contains no internal limitation period, then such claimants would be free to assert their claims at any time, without any limitation whatsoever. In other words, the Court of Appeals' holdings could well lead to title chaos in Ohio. With respect, it is hard to imagine a scenario which begs more for this Court's review.

B. THE APPELLATE COURT'S RULING CONFLICTS WITH THE EXPRESS LANGUAGE OF CIV. R. 56, AND THUS IS CONTRARY TO THIS COURT'S RULE-MAKING AUTHORITY UNDER OHIO CONSTITUION, ARTICLE IV, SECTION 5 AND OTHERWISE IS OF PUBLIC OR GREAT GENERAL INTEREST

In addition to the reason stated above, this case merits review for another reason which makes it one involving a substantial constitutional question, as well as of public or great general interest. That reason involves the Appellate Court's finding that summary judgment in favor of Huron on its adverse possession claim was proper, ***despite acknowledging that Huron itself introduced evidence conflicting with that claim***. That conflicting evidence was that introduced in support of Huron's submerged land claim. By doing so, the Court below carved out an important judicial exception not only not found in Rule 56, but against the Rule's clear and unmistakable language.

In this regard, the Appellate Court stated as follows:

> "**{41}** Here, we disagree that the city's arguments are mutually exclusive as they concern *McCune's* claim of ownership of Water Lot 1. Under either theory asserted by the city, McCune would be divested of any claim to Water Lot 1—either because the land is submerged or because it has been adversely possessed. To that end, any dispute over whether Water Lot 1 is submerged ***would be material only if the trial court had relied on the theory as the basis for its summary-judgment decision.*** It did not. It relied on the city's theory that McCune's claim to the property had long ago been

> extinguished by the Showboat Restaurant's exclusive possession and continuous, adverse, notorious, and open use of Water Lot 1 for a period exceeding 21 years. As such, ***the competing assertions concerning Water Lot 1's statues as submerged land is not a dispute of fact that is material to determining McCune's property interest.***" (Emphasis added)

Comparatively, Civ.R.56(C), which reads in part as follows:

> "(C) … Summary judgment ***shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*** … A summary judgment ***shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made*** …" (Emphasis added)

The disconnect between the Appellate Court's interpretation of the Rule and the express language of the Rule is apparent.

The Court of Appeals' ruling would judicially write-in to the Rule language to the effect that summary judgment should be rendered if the evidence ***as to that that claim*** demonstrates that there is no genuine issue of material fact. Of course, no such limitation of the evidence to be considered by a trial court in deciding summary judgment motion exists in the Rule, and such reasoning would completely eviscerate the "no genuine issue of material fact" language of the Rule.

Beyond the fact that the Court's ruling is inconsistent with the Rule however, is the fact that, if allowed to stand, it would change the entire dynamic of how plaintiffs approach presentation of their evidence. For example, if a plaintiff were free to provide proof in support of one claim which conflicted with that provided in support of another claim without any downside, not only would they do so at the summary judgment stage but also at the trial stage.

And if that were the case, the courts could well be overwhelmed with trials being conducted under the "throw all the mud possible against the wall hoping something might stick" philosophy. Further, trial judges would have to instruct juries not to consider ***all the evidence*** presented when determining any one of multiple claims, but only that ***evidence material to that claim.*** In doing so, it would need to dissect what evidence was material as to each claim and instruct the jury to ignore conflicting evidence material to another claim.

Obviously, this procedure could bring our judicial system to a grinding halt. More importantly, the reasoning undermines the spirit of the rules, and the very purpose of our judicial system, embodied in the language of Evid.R.102, stating; "The purpose of these rules is to provide procedures for the adjudication of causes ***to the end that the truth may be ascertained and proceedings justly determined***" (Emphasis added). McCune would daresay submit that a rule requiring the court and juries to determine whether evidence is true depends on the claim it is offered to support of would completely undermine the integrity of our judicial system.

The facts of this case illustrate this point perfectly. From the inception of this lawsuit, it was clear that Huron placed its best hope for success on its submerged land claim. Its' expert witness unequivocally testified that Water Lot 1 was submerged and failed to exist as dry land from the 1860's all the way through the present day. Further, Huron itself admitted the same on its application to ODNR for a Submerged Land Lease for the area constituting Water Lot 1.

Huron presented this evidence to the trial court in support of summary judgment on its submerged land claim. At the same time, Huron presented the evidence of the Showboat Restaurant's use of Water Lot 1 as a parking lot for 1971 to 1993. Clearly, if the Lot was under water as its expert claimed and Huron admitted, it could not possibly served as the Showboat Restaurant's parking lot. And without the proof of the Showboat's use, there was no basis upon

which to find adverse possession. Even so, the Appellate Court disregarded the submerged land claim proof, and held that Huron submitted sufficient evidence in support of adverse possession.

By ruling as it did, the Appellate Court essentially rewrote Civ.R.56, and usurped this Court's exclusive authority to establish rules for the governance of the courts of this State, granted under Article IV, Section 5 of Ohio's Constitution. Thus, this case involves a substantial constitutional question justifying this Court's acceptance of jurisdiction. Furthermore, the widespread consequences resulting if this decision were allowed to stand and serve as precedent for future court decisions, makes the issue one of public or great general interest, and one worthy of this Court's attention.

STATEMENT OF THE CASE AND FACTS

Huron filed this action to quiet title to Water Lot 1 in its name on August 4, 2020. Two causes of action were set forth to justify relief: 1) that Water Lot 1 constituted submerged land under Ohio law; and 2) adverse possession applied since its predecessor in title to adjoining Water Lots 2-6, the Showboat Restaurant, adversely possessed Water Lot 1 as part of its business operations on Lots 2-6 from 1971 until 1993. At the depositions of Christopher Dempsey, the City's expert engineer, and Trey Hardy, a Huron City councilman during the years in question and a lawyer, the following facts were established:

- Huron began looking into the possible purchase of Water Lots 2-6, which it referred to as "the Showboat Property", in 2010.
- By 2013, it reached an agreement on price with the then-owner of Water Lots 2-6, 10 North Main Street.
- A title search by a local title company revealed that title to Water Lot 1 was in McCune's name, and for that reason it refused to insure title to it.

- The title company advised Huron of this fact and suggested to Huron that it file a quiet title action against McCune as to Water Lot 1.
- Huron failed to heed that advice and instead decided to proceed to closing, causing two Quitclaim Deeds from 10 North Main Street to be prepared; one specifically naming Water Lots 2-6, and the other containing a metes and bounds description of all the water Lots, including Lot 1, all the way out to the middle of the Huron River.
- In its Application for a Shoreline Construction Permit to ODNR filed after the purchase, Huron represented that was the unquestioned owner of Water Lot 1, and that Water Lot 1 was dry land (as opposed it submerged land). After obtaining the Permit, in 2014 Huron proceeded to rebuild the seawall along all the Lots at a cost of almost $1M.
- For the next six years, Huron unsuccessfully tried to market "the Showboat Property" (including Water Lot 1), to a commercial developer.
- Not being able to sell the Property, Huron filed this quiet title action as to Water Lot 1 against McCune, who was unaware of her interest until that point.
- Following filing of this action, Huron filed an Application for a Submerged Land Lease with ODNR for the land over Water Lot 1, claiming it was submerged land, and hired Mr. Dempsey for the specific purpose of assisting it with that Application.
- Mr. Dempsey consistently testified that Water Lot 1 was completely submerged land and underwater from the 1860's to the present day.

Following discovery, each Party filed a motion for summary judgment. In support of its submerged land claim, Huron offered the Affidavit of Mr. Dempsey. The only evidence it offered in support of its adverse possession claim was the Affidavit of Mark Claus. In his Affidavit, Mr. Claus stated that his father operated the Showboat Restaurant on Water Lots 2-6 from 1971 until

1993, and that Water Lot 1 was used as a parking lot in connection with that business. No other proof of use of Water Lot 1 was presented until Huron bought Water Lots 2-6 in 2013.

All these facts were laid before the trial court on summary judgment. The court proceeded to grant summary judgment in Huron's favor on its adverse possession claim, and dismissed, without prejudice, Huron's submerged lands claim, despite the fact that Huron did not seek dismissal, and McCune asked for dismissal with prejudice as part of its summary judgment motion. McCune timely appealed to the Sixth District court of Appeals, which affirmed the trial court's ruling in its entirety.

ARGUMENT IN FAVOR OF PROPOSITION OF LAW NO.1: THE 21-YEAR LIMITATIONS PERIOD OF R.C.§2105.04 BARS QUIET TITLE CLAIMS BASED ON ADVERSE POSSESSION FILED OVER 21 YEARS AFTER THE ADVERSE USE HAS ENDED.

R.C.§2305.04 sets forth the Statute of Limitations for adverse possession action, and states as follows:

> "An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause accrued…"

In turn, according to Black's Law Dictionary, a cause of action "accrues" when an action may be maintained thereon. It would seem then that the latest date that Huron was required to bring its adverse possession claim was within 21 years after the Showboat Restaurant closed its doors on September 23, 1993, or by September 23, 2014.

Not so, said the Appellate Court, founding its ruling on two bases: 1) that the 21-year time bar of §2105.04 applied against McCune rather Huron (Decision, ¶19-23), and 2) that the §2105.04 time bar does not apply to quiet title claims brought under §5303.01. Decision, ¶24-26. In so ruling, it appears that the Court conflates actions to ***recover possession of real estate*** with actions to ***recover title to real estate.***

Of course, §2105.04 specifically refers to both such actions and creates a 21-year time bar for their filing. With respect, it seems that the Appellate Court went wayward because Huron had possession of Water Lot 1 when it filed this action in 2020, obviating the need for it to seek the relief of ***possession of*** Water Lot 1**.** On the other hand, at the time of the filing of this action, ***title to*** Water Lot 1 was in McCune's name, thereby creating the need for Huron to file this case.

As Huron was the party seeking relief in the way of a court order granting it title to Lot 1, it was incumbent on Huron to file its action for divestment of McCune's title and not on McCune to save her title. Any other result could lead to real estate titles being open to question indefinitely, certainly a result our Legislature never envisioned.

As to the Appellate Court's ruling that §5303.01 actions to quiet title are not subject to §2105.04's 21-year time bar, careful consideration of the language of the quiet title section, and its interplay with 2105.04 is necessary. Section 5303.01 reads as follows:

> "An action may be brought by a person in possession of real property … against any person ***who claims an interest adverse to him, for the purpose of determining such adverse interest*** …"

Clearly, the interest to be determined under the foregoing language may be either a ***possessory or a title interest***. Here, the interest sought to be determined by Huron is the ***title interest*** of McCune, since Huron already had ***possession*** of Water Lot 1. Thus, Sections 5303.01 and 2105.04 are completely compatible, with 2105.04 creating a 21-year time-bar for a person filing suit under 5303.01.

This analysis is consistent with the obvious intent of the Legislature in drafting the sections. Just as with Ohio's Declaratory Judgment Statute, §2721, §5303.01 is meant to be the effectuating statute, giving persons defined thereunder the right to seek redress in the courts. Like the Declaratory Judgment Statute, it does not, as the Appellate Court would have it, create a new

substantive right, but rather only protects rights already given by other statutes or common law by allowing access to Ohio's court system.

Once this point is understood, then it naturally follows that §2105.04 was meant to create a time bar by which persons seeking relief under §5303.01 must file their actions, otherwise the doors to the courthouse are closed. Thus, since Huron failed to bring its action under §5303.01 within the time limit provided in §2105.04, it adverse possession claim should have been dismissed.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 2: IN DETERMINING A MOTION FOR SUMMARY JUDGMENT AS TO A PARTICULAR CLAIM, A TRIAL COURT MUST CONSIDER ALL THE EVIDENCE PERMITTED UNDER CIV.R.56, WHETHER OR NOT THE EVIDENCE WAS SUBMITTED IN SUPPORT OF THAT CLAIM

In its decision, the Appellate Court compartmentalized the evidence which a trial court may consider on summary judgment, limiting it to that material to the particular claim on which judgment is sought. This reasoning opens the doors for plaintiffs such as Huron to obtain summary judgment on all claims imaginable, no matter how inconsistent the evidence. Clearly, a person cannot adversely possess by use of as a parking lot land that is completely under water.

Even the Appellate Court accepted this logic, but skirted around the problem by reasoning that Huron's hardline position and proof regarding its submerged land claim could not be considered by the trial court in deciding Huron's adverse possession claim. However, Rule 56's language is clear: in deciding summary judgment motion, the trial court must consider all the evidence permitted by the rule, without limitation.

The Appellate Court's reasoning is so fundamentally wrong it is tantamount to a substantive rewrite of the Rule. That being so, it in effect represents usurping this Court's exclusive

authority to create rules for the governance of the courts this State pursuant to Ohio Constitution Article IV, Section 5.

Not only is the Appellate Court's decision wrong in this regard, but it is also dangerous. Logically, it would lead plaintiffs to provide all their evidence in support of multiple claims, no matter how conflicting, without any concern whatsoever over how the conflicting evidence might affect the outcome. This would turn our judicial system's goal from being a search for "the truth" into a search is for "the truth material to the claim it is intended to support". This Court cannot allow the decision to stand.

CONCLUSION

With all due respect to the Court below, its decision represents an extremely dangerous precent should it be allowed to stand. No landowner in this State could rest easy at night knowing that title to his or her land was completely secure from adverse claims. This concern is akin to that faced by landowners victimized by governmental entities abusing the eminent domain process.

In addition, persons in this State finding themselves on the wrong side of a lawsuit would suddenly have thrust on them the dilemma in defending from all sides inconsistent claims, having to defeat each "truth" material to that claim. Respectfully, this Court cannot allow the decision of the Court below to ripen into precedent and risk the tremendous fallout which may result.

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This is to certify that a copy of the foregoing was sent by pre-paid U.S. first-class mail on this 6th day of April, 2023 as follows:

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