No. _____

IN THE
Supreme Court of the United States

SMITH LAND COMPANY, LLC, ET AL.,

Petitioners,

v.

SHAWN HERHOLD, ET AL.,

Respondents,

On Petition For A Writ of Certiorari
To The Court of Appeals For Summit County, Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state, which lacked stand-alone jurisdiction under the Clean Water Act, 33 U.S.C. 1344(g), at the time 0.014 of an acre was overfilled, can enforce a United States Army Corps of Engineers permit issued in April 2000 to fill isolated intrastate wetlands originating from a nonpoint source, or, does such enforcement violate the Sixth Amendment's Supremacy Clause and the Clean Water Act.

2. Whether the failure to give the property owner who filled the property, notice and an opportunity to be heard on the state's claim of overfill, violates the Fourteenth Amendment's Due Process Clause.

PARTIES TO THE PROCEEDING

The parties to the judgment from which review is sought are Smith Land Co., Inc. and Robert G. Smith.

Respondents are Shawn Herhold and Malavanh Herhold, nka, Malavanh Rassovong.

CORPORATE DISCLOSURE STATEMENT

Smith Land Company, LLC is an Ohio Corporation with no parent corporation or shares held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Smith Land Company and Robert G. Smith request this Court issue a writ of certiorari to review the judgment of Ohio's Ninth District Court of Appeals.

OPINIONS BELOW

The Ohio Supreme Court's Order declining to hear an appeal in Herhold v. Smith Land Co. is *10/15/2019 Case Announcements*, 2019-Ohio-4211**,** and is attached as Appendix (App.) A. The opinion of Ohio's Ninth District Court of Appeals, is published as Herhold v. Smith Land Company, LLC, 2019-Ohio-2418, CA 28915, and is attached as App. B. Summit County Court of Common Pleas Order, denying judgment notwithstanding the verdict is unpublished. It is attached here as App. C. The Summit County Court of Common Pleas judgment following retrial, is attached here as App. D. Ohio's Ninth District Court of Appeals opinion is published as Herhold v. Smith Land Company, LLC, 2016-Ohio-4939, CA 28032, and is attached as App. E. The Summit County Court of Common Pleas judgment granting a new trial is unpublished and is attached as App. F. The May 2014 Judgment of the Summit County Court of Common Pleas is unpublished. It is attached as App. G.

JURISDICTION

On October 15, 2019, the Ohio Supreme Court declined to hear an appeal from the judgment entered by Ohio's Ninth District Court of Appeals. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment's second clause provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1344 (a) provides in relevant part: "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

33 U.S.C. § 1344 (e)(1) provides: "In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit."

33 U.S.C. §1344 (g)(1), in relevant part provides: "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters … within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general … provide adequate authority to carry out the described program."

33 U.S.C. §1344 (s)(1) provides: "Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit

issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection."

33 U.S.C. §1344 (s)(2) provides in relevant part "Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

33 U.S.C. §1362 (7) defines "'navigable waters'" as "waters of the United States, including the territorial seas."

33 U.S.C. §1362 (12) defines "'a discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source."

33 U.S.C. §1362 (14) defines "'a point source'" in relevant part as "any discernible, confined, and discrete conveyance … from which pollutants are or may be discharged."

INTRODUCTION

On January 9, 2001, this Court limited the U.S. Army Corps of Engineers jurisdiction over isolated intrastate wetlands, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), ("SWANCC") as the U.S. Army Corps of Engineers had interpreted § 404(a) of the Clean Water Act to confer federal jurisdiction over an abandoned sand and gravel pit. This Court recognized there were significant constitutional questions raised by the application of the Army Corps regulations. This Court noted that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e. g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)." SWANCC, 531 U.S. at 172.

This was refreshing news to property owners seeking to use their property without having to pay for the right to fill isolated intermittent wetlands. However, it was short lived, as state's asserted jurisdiction over the isolated wetlands, even when there was no regulatory framework to do so. Certiorari is warranted in this case to reaffirm that the people can rely on this Court's decisions and the laws of the United States, as they are the supreme law of the land.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case arises from a dispute over the sale of one single family lot. Smith Land Company bought 10 acres of land in Fairlawn, Ohio intending to split it into single family lots. As part of the plat approval process the city required Smith Land Company to obtain a wetland delineation. The property was delineated as containing isolated wetlands based on plant life. Fairlawn required Smith Land Company to obtain a permit to fill some of the wetlands and to place a restriction of record on the plat stating that it contained jurisdictional waters of the United States. The plat was filed of record and included 10 acres of land with 9 building lots and Block A.

The lot respondents purchased was originally part of Block A. Fairlawn had permitted Smith Land Company to do a simple 3 lot split of Block A by metes and bounds description. Part of the lot was to be filled under the NWP which was obtained in April 2000 and which expired in February 2002. The SWANCC case was decided on January 9, 2001.

In February 2001 a contractor doing road work for Fairlawn dumped fill on the land which had been Block A. Based on the SWANCC decision and Ohio's lack of wetlands regulation Smith Land Company allowed overfill of 5 feet by 120 feet to remain on the north property line.

On July 17, 2001, Ohio enacted regulations governing the fill of isolated wetlands.

When Respondents offered to purchase the property as-is, in July of 2002, they were told the property contained fill and were given a property disclosure which stated that the property had been designated as a federal or state wetland. Respondents were also given 60 days to determine whether the property was suitable for their intended use.

In November 2003 the City of Fairlawn contacted the U.S. Army Corps of Engineers to ask if future owners of the 3 Block A lots must acquire authorization from the Army Corps to impact wetlands on their property. The Army Corps responded in February 2004, stating a recent site visit determined that this wetland system is surrounded by upland and does not present a significant nexus to a water of the United States and a Department of the Army permit was not required for impacts to this isolated wetland.

More than 4 years after the lot was filled and 2 and a half years after it was sold, Fairlawn informed Respondents it would not issue a building permit without Ohio EPA approval of the excess fill or the removal of the fill. Respondents testified that they were required to remove the overfill to get a building permit.

After the fill was removed, on October 24, 2005, the Ohio EPA issued a letter to Respondents which stated that Smith Land Company had failed to comply with the Army Corps permit and that the

unauthorized fill located on the property had been removed. Neither Fairlawn nor the Ohio EPA gave Smith Land Company notice or an opportunity to be heard regarding the claim that the lot was filled in violation of the USACE permit.

II. STATE COURT PROCEDURE

On May 9, 2008, Shawn and Malavanh Herhold, sued Smith Land Company, LLC and Robert Smith for breach of contract and fraud. The Herholds alleged in their complaint that Smith Land Company illegally filled the lot sold to them in violation of a United States Army Corps of Engineers permit.

At the first trial, in 2014, Lee Ann Robinette, Regulatory Project Manager, Army Corps of Engineers, testified there was no violation of the permit. Nevertheless, the jury found the Company and Smith breached the contract, committed fraud, and awarded punitive damages. App. G. On November 4, 2015, the trial court entered a final judgment granting Smith Land Company and Smith a new trial. App. F.

On July 13, 2016, Ohio's Ninth District Court of Appeals Appeals upheld the trial court's order of a new trial in *Herhold v. Smith Land Company, LLC*, 2016-Ohio-4939, CA 28032, App. E.

On July 18, 2017, a second trial was held. Lee Ann Robinette testified, that the purpose of her site visit in early 2004 was to determine if the land was jurisdictional waters of the U.S.. She stated that the

2001 SWANCC decision indicated that there must a surface connection for waters to be considered under federal jurisdiction. From January 2001 on, if it was determined land was isolated, the Army Corps lacked jurisdiction. Robinette further testified she was unaware of her office issuing any violation of the permit. App. A-14 ¶ 17.

The 2nd jury found Smith Land Company and Smith breached the contract, committed fraud, and awarded punitive damages. The trial court granted respondents judgment. App. A-44. The trial court also denied a motion for judgment notwithstanding the verdict and for a new trial. App. A-41. On December 29, 2017, Smith Land Company and Smith appealed.

The Court of Appeals affirmed the judgment below. The Court stated that Fairlawn determined the restriction on the plat ran with the land until removed. App. A-20. The Court further stated "Notably, block A, where the Property would ultimately be, was composed of wetlands that were not designated as 'to be filled.'" App. A-13. However, the Army Corps permit attached at App. H shows the Herhold lot having substantial fill. The Court also found that the plat map that designates the splitting of Block A includes what is labeled a "Note" which designates the lands delineated are jurisdictional waters of the United States. App. A-15. However, there was no recorded plat for the Block A split, rather there were 3 deeds filed of record with metes and bounds descriptions. See App. A-68 to A-70.

The Ohio Supreme Court declined to hear a discretionary appeal. App. A-4.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Raises Important Questions Under the Supremacy Clause Of The Sixth Amendment.

A. The decision below wrongly allowed the state to enforce a U.S. Army Corps of Engineers permit to fill isolated intrastate wetlands, after this court held in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) that the U.S. Army Corps of Engineers exceeded its statutory authority when it required a permit to fill isolated intrastate wetlands.

For many years, The U. S. Army Corps of Engineers (USACE) claimed authority, under the Clean Water Act, over property owners land when there was isolated intermittent puddling. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, (SWANCC), the U.S. Supreme Court enforced the Clean Water Act's limitation on jurisdiction. 531 U.S. 159 (2001). SWANCC is a consortium of suburban Chicago municipalities, which selected as a solid waste disposal site an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. The Army Corps asserted jurisdiction over the sand and gravel pit ponds. This Court refused to extend the Army Corps'

jurisdiction to such isolated waters. This Court held Clean Water Act jurisdiction was limited to waters that were or had been navigable or which could reasonably be so made.

The U.S. Army Corps of Engineers had exceeded its jurisdiction by regulating isolated intrastate waters, originating from a nonpoint source. The laws of the United States establish, in Section 404 of the Clean Water Act, a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. The Secretary of the Army may issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material. 33 U.S.C. § 1344.

The Clean Water Act provides "[t]he Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344 (a).

"Navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). A "point source" is defined as "any discernible, confined, and discrete conveyance… from which pollutants are or may be discharged."

The land on Brunsdorf Road in Fairlawn Ohio, is uplands and there is an absence of hydrological connection according to the Army Corps. App. H. There are no navigable waters. There is no point source. The U.S. Army Corps of Engineers exceeded its authority under the Clean

> Water Act. These facts were known by the state courts, however, they failed to recognize that the U.S. Army Corps of Engineers lacked jurisdiction over the land on Brunsdorf Road under the Clean Water Act.

Upon issuance of this Court's decision, on January 9, 2001, the SWANCC decision was the supreme law of the land. "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation, declared in the notable case of *Marbury v. Madison,* 5 U. S. 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The court in Cooper stated that "[t]he principles announced in that decision (Brown v. Board of Education) and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." 358 U.S. 1, 20-21. State courts must uphold the supreme law.

B. The decision below wrongly allowed the state to enforce a U.S. Army Corps of Engineers permit to fill isolated intrastate wetlands, when, at the time the permit was

issued and when the 0.014 acre of isolated intrastate wetlands were filled, the state had no permitting program under 33 U.S.C. 1344(g).

The Clean Water Act establishes a procedure for states to follow to administer a state program to enforce the Clean Water Act. 33 U.S.C. §1344 (g)(1).

The Clean Water Act is also a supreme law of the land. The second clause of the Sixth Amendment provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof… shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Ohio courts cannot allow the Ohio EPA or the City of Fairlawn to enforce a federal NWP when the state lacked a program to administer the Clean Water Act.

By the time the State of Ohio submitted a program to administer a state program enforcing the Clean Water Act, there was no longer a permit to enforce, as this Court had decided in the SWANCC limiting the Clean Water Act to waters that were or had been navigable or which could reasonably be so made. The State of Ohio could not enforce the U.S. Army Corps of Engineers NWP 26 retroactively.

II. The Decision Below Raises An Important Question Under The Due Process Clause As To Whether The Failure Of The State To Give A Property Owner Who Filled Property, Notice And An Opportunity To Be Heard On The State's Claim Of Overfill, Violates The Fourteenth Amendment's Due Process Clause.

Smith Land Company and Robert Smith, believed that the U.S. Supreme Court decision in SWANCC was the supreme law of the land; that the Army Corps could not regulate the isolated wetlands on Brunsdorf Road; and that the Army Corps had exceeded its authority under the Clean Water Act when it claimed jurisdiction over the isolated wetlands on Brunsdorf Road in 1999. And, if they were wrong, only the Army Corps of Engineers had the authority to enforce its permit.

On February 4, 2004, the Army Corps issued a letter, App. H, which stated that it had no jurisdiction over the isolated wetlands of the three residential lots on Brunsdorf Drive, in Fairlawn, Ohio. This was a jurisdictional determination by the Army Corps.

This Court has ruled on the meaning of such a jurisdictional determination letters with *United States Army Corps of Engineers v. Hawkes Co., Inc.,* 578 U.S. __, 136 S. Ct. 1807 (2016). The Court stated that the definitive nature of approved JDs also causes "direct and appreciable legal

consequences." 136 S. Ct. 1807, 1816. (Citations omitted.)

The Army Corps sent a copy of this letter to one of the attorneys representing Smith Land Company and Smith. Lee Ann Robinette, Regulatory Project Manager U.S. Army Corps of Engineers testified in the first trial that Smith abided by the permit issued in April 2000 as far as the U.S. Army Corps of Engineers was concerned and the project has never been notified of a violation.

Neither the Ohio EPA nor Fairlawn notified Smith Land Company or Smith that the Ohio EPA found a permit violation. Nor did they inform them the City and State were taking enforcement action for violation of the NWP.

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property… So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

Due process protections are built into the Clean Water Act and Ohio's EPA regulations. The CWA mandates notice and an opportunity to be heard if the Army Corps claims a permit violation and includes a right to appeal an adverse decision. 33 U.S.C.§ 1319. Ohio's Revised Code § 6111.06, provides similar protections.

State courts must uphold the supreme law of the land. Section I of the 14th Amendment, U.S. Constitution provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The U.S. Supreme Court held, in *Shelly v. Kraemer,* 334 U.S. 1, 7 (1948):

> That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Virginia v. Rives*, 100 U.S. 313, 318 (1880), this Court stated: It is doubtless true that a State may act

> through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.

Ohio's state courts failed to uphold the Army Corps of Engineers determination there was no violation of the permit it issued.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and vacate the lower courts' decisions.

Respectfully submitted,

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APPENDIX A

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

October 15, 2019

10/15/2019 Case Announcements,

2019-Ohio-4211.

Motions and Procedural Rulings

2019-1135. State v. McCormick.

Summit App. No. 29121, 2019-Ohio-2204. On motion for leave to file delayed appeal. Motion denied.

Kennedy, French, and Donnelly, JJ., dissent.

2019-1151. State v. Davenport.

Cuyahoga App. No. 106143, 2018-Ohio-2933.

On motion for leave to file delayed appeal.

Motion denied.

Fischer, J., dissents.

2019-1152. State v. Hodson.

Franklin App. No. 18AP-242. On motion for leave to file delayed appeal. Motion denied.

Fischer and Donnelly, JJ., dissent. French, J., not participating.

2019-1167. State v. Freeman.

Cuyahoga App. No. 106363, 2018-Ohio-2936.

On motion for leave to file delayed appeal.

Motion denied.

Donnelly, J., dissents. Stewart, J., not participating.

2019-1174. State v. Stefka.

Monroe App. No. 10 MO 7, 2012-Ohio-3004.

On motion for leave to file delayed appeal.

Motion denied.

Donnelly, J., dissents.

2019-1188. State v. Ross.

Ottawa App. No. OT-19-008. On motion for leave to file delayed appeal. Motion granted. Appellant shall file a memorandum in support of jurisdiction within 30 days.

French and DeWine, JJ., dissent.

APPEALS ACCEPTED FOR REVIEW

2019-0594. State v. Groce.

Franklin App. No. 18AP-51, 2019-Ohio-1007. Appeal accepted, cross-appeal accepted on proposition of law No. I, and cause held for the

decision in 2019-0651, *State v. Dent*, and 2019-0654, *State v. Walker*.

Kennedy, French, and Donnelly, JJ., would not accept the cross-appeal.

2019-0951. Corder v. Ohio Edison Co.

Harrison App. No. 18 HA 0002, 2019-Ohio-2639.

O'Connor, C.J., and Fischer and Donnelly, JJ., dissent.

2019-1123. Gerrity v. Chervenak.

Guernsey App. No. 18 CA 26, 2019-Ohio-2771.

O'Connor, C.J., and DeWine and Stewart, JJ., dissent.

APPEALS NOT ACCEPTED FOR REVIEW

2019-0668. Jones v. Wainwright.

Marion App. No. 9-18-28.

2019-0717. State v. Robinson-Bey.

Summit App. No. 28740, 2018-Ohio-5224.

2019-0891. State v. Luebrecht.

Putnam App. No. 12-18-02, 2019-Ohio-1573.

2019-1012. Heimberger v. Agnew.

Lake App. No. 2019-L-035, 2019-Ohio-1954.

2019-1015. State v. Suntoke.

Muskingum App. No. CT2018-0074, 2019-Ohio-2312.

2019-1016. Highland Hts. v. C.C.

Cuyahoga App. No. 107703, 2019-Ohio-2333.

2019-1019. State v. Bevins.

Hamilton App. No. C-190218. Appellee's motion to dismiss fails for want of four votes. O'Connor, C.J., would reject the appeal as moot and would grant the motion to dismiss. French, J., would grant the motion to dismiss. Stewart, J., would reject the appeal as moot and would deny the motion to dismiss. Fischer and DeWine, JJ., not participating.

2019-1025. King v. Ohio Dept. of Job & Family Servs.

Summit App. No. 29198, 2019-Ohio-2989.

2019-1026. State v. Nagy.

Cuyahoga App. No. 105935, 2018-Ohio-1513. Donnelly, J., dissents.

2019-1034. State v. Cobb.

Cuyahoga App. No. 106928, 2019-Ohio-2320.

Donnelly, J., dissents.

2019-1035. Kilburn v. Graham.

Monroe App. No. 18 MO 0022, 2019-Ohio-2695.

Kennedy, J., dissents.

2019-1036. Hunter v. Rhino Shield.

Franklin App. No. 18AP-244, 2019-Ohio-1422

French, J., not participating.

2019-1037. In re Estate of Weiner.

Montgomery App. No. 27278, 2019-Ohio-2354.

2019-1038. State v. Moore.

Trumbull App. No. 2018-T-0056, 2019-Ohio-2512.

2019-1040. In re Estate of Jenkins.

Cuyahoga App. No. 107343, 2019-Ohio-2112.

2019-1042. State v. Thomas.

Williams App. No. WM-18-005, 2019-Ohio-2654.

2019-1044. Trumbull Twp. Bd. of Trustees v. Rickard.

Ashtabula App. No. 2017-A-0048, 2019-Ohio-2502.

2019-1045. Paczewski v. Antero Resources Corp.

Monroe App. No. 18 MO 0016, 2019-Ohio-2641.

French, J., dissents and would accept the appeal on proposition of law No. I. Kennedy and Fischer, JJ., dissent.

2019-1047. Herhold v. Smith Land Co.

Summit App. No. 28915, 2019-Ohio-2418.

Kennedy, J., dissents.

2019-1057. State v. Reid.

Hamilton App. No. C-170697, 2019-Ohio-1542.

2019-1059. State v. Peffer.

Cuyahoga App. No. 108714.

Fischer, DeWine, and Stewart, JJ., dissent.

2019-1060. State v. Hager.

Licking App. No. 18-CA-102, 2019-Ohio-2552.

2019-1062. State v. Walston.

Butler App. No. CA2018-04-068, 2019-Ohio-1699.

2019-1063. State v. Blevins.

Pickaway App. No. 18CA2, 2019-Ohio-2744.

2019-1064. State v. Curtis.

Muskingum App. No. CT2019-0001, 2019-Ohio-2587.

2019-1065. Cleveland v. Dancy.

Cuyahoga App. No. 107241, 2019-Ohio-2433.

2019-1066. Lampela v. Put-In-Bay.

Ottawa App. No. OT-18-018, 2019-Ohio-2476.

2019-1068. State v. Dangerfield.

Hamilton App. No. C-180057.

Donnelly, J., dissents and would accept the appeal on proposition of law No. V and appoint counsel.

2019-1069. State v. Neil.

Franklin App. Nos. 18AP-609 and 18AP-610, 2019-Ohio-2529.

French, J., not participating.

2019-1073. State v. Carosiello.

Columbiana App. No. 18 CO 0018, 2019-Ohio-2705.

2019-1078. State v. Kinney.

Monroe App. No. 18 MO 0013, 2019-Ohio-2726.

2019-1079. State v. Peete.

Trumbull App. No. 2018-T-0094, 2019-Ohio-2513.

Donnelly, J., dissents and would appoint counsel.

2019-1082. Delaware Golf Club, L.L.C. v. Dornoch Estates Homeowners Assn., Inc.

Delaware App. No. 19 CAE 04 0027.

2019-1083. State v. Smith.

Montgomery App. No. 28083, 2019-Ohio-2467.

2019-1084. State v. Graffius.

Columbiana App. No. 18 CO 0008, 2019-Ohio-2714.

2019-1089. Lloyd v. Rogerson.

Wayne App. No. 18 AP 0024, 2019-Ohio-2606.

Appellant's motion for default judgment denied.

2019-1090. Lloyd v. Cleveland Clinic Found.

Cuyahoga App. No. 107214, 2019-Ohio-1885.

2019-1095. State v. Polizzi.

Lake App. Nos. 2018-L-063 and 2018-L-064, 2019-Ohio-2505.

Kennedy and DeWine, JJ., dissent.

2019-1096. IUOE, Local 20 v. Hamilton.

Butler App. No. CA2018-10-195, 2019-Ohio-2491.

Donnelly, J., dissents. Kennedy, J., not participating.

2019-1099. Columbus v. Cochran.
Franklin App. No. 18AP-748, 2019-Ohio-2583.

2019-1107. State v. Biven.
Licking App. No. 2018 CA 0082, 2019-Ohio-2551.

2019-1111. Horstman v. Fanning.
Putnam App. No. 12-18-14, 2019-Ohio-2483.

2019-1120. State v. McGowan.
Stark App. No. 2018CA00075, 2019 -Ohio-2554.

2019-1122. State v. Hall.

Trumbull App. No. 2017-T-0032, 2018-Ohio-1676.

2019-1127. State v. Sanders.
Cuyahoga App. No. 106744, 2019-Ohio-2566.
Fischer, J., dissents and would accept the appeal on proposition of law No. I. Stewart, J., not participating.

2019-1145. State v. Cody.
Cuyahoga App. Nos. 107595, 107607, and 107664, 2019-Ohio-2824.

2019-1146. State v. McNeal.
Montgomery App. No. 28123, 2019-Ohio-2941.

2019-1149. State v. Ellis.
Hamilton App. No. C-180331, 2019-Ohio-3164.

2019-1176. State v. Mills.

Summit App. No. 28954, 2019-Ohio-774.

2019-1186. State v. Gomez.

Lucas App. No. L-17-1130, 2019-Ohio-576.

Donnelly, J., dissents.

2019-1195. State v. Erker.

Cuyahoga App. No. 107790, 2019-Ohio-3185.

2019-1199. State v. Heard.

Cuyahoga App. No. 107777, 2019-Ohio-2920.

RECONSIDERATION OF PRIOR

DECISIONS

2019-0222. Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.

Mahoning App. No. 17 MA 0018, 2018-Ohio-

5391. Reported at 156 Ohio St.3d 1488, 2019-Ohio-3332, 129 N.E.3d 452. On motion for reconsideration. Motion granted. Appellant shall file its brief within seven days, and the case shall proceed in accordance with the Rules of Practice of the Supreme Court of Ohio.

O'Connor, C.J., and DeWine, J., dissent.

2019-0682. State v. Naff.

Miami App. No. 2018-CA-15, 2019-Ohio-1261. Reported at 156 Ohio St.3d 1476, 2019-Ohio-3148, 128 N.E.3d 233. On motion for reconsideration. Motion denied.

Donnelly, J., dissents.

2019-0716. Petruziello v. ARIS Teleradiology Professional Corp.

Cuyahoga App. No. 107432, 2019-Ohio-1347. Reported at 156 Ohio St.3d 1477, 2019-Ohio-

3148, 128 N.E.3d 239. On motion for reconsideration. Motion denied.

Kennedy, J., dissents.

2019-0733. State v. Davic.

Franklin App. No. 18AP-569, 2019-Ohio-1320.

Reported at 156 Ohio St.3d 1478, 2019-Ohio-3148, 128 N.E.3d 241. On motion for reconsideration. Motion denied.

2019-0791. State v. Shine-Johnson.

Franklin App. No. 17AP-194, 2018-Ohio-3347.

Reported at 156 Ohio St.3d 1476, 2019-Ohio-3148, 128 N.E.3d 238. On motion for reconsideration. Motion denied.

2019-0798. State v. Scofield.

Fairfield App. No. 18-CA-39, 2019-Ohio-375. Reported at 156 Ohio St.3d 1476, 2019-Ohio-3148, 128 N.E.3d 231. On motion for reconsideration. Motion denied. Appellant's emergency motion for stay pending appeal denied.

Donnelly, J., dissents and would grant the motion for reconsideration and appellant's motion for stay pending appeal.

APPENDIX B

STATE OF OHIO

COUNTY OF SUMMIT

IN THE COURT OF APPEALS C.A. No. 28915

NINTH JUDICIAL DISTRICT

SHAWN A. HERHOLD, et al.

Appellees

v.

THE SMITH LAND COMPANY, et al.

Appellants

APPEAL FROM JUDGMENT ENTERED IN

THE COURT OF COMMON PLEAS,

COUNTY OF SUMMIT OHIO

CASE No. CV2008 05 3634

DECISION AND JOURNAL ENTRY

Dated: June 19, 2019

CARR, Judge

{¶1} Defendants-Appellants Smith Land Company, LLC ("Smith Land") and Robert G. Smith appeal from the judgments of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This appeal stems from the sale of a vacant lot on Brunsdorf Road ("the Property") in *Fairlawn. In July 2002, then husband and wife*, Plaintiffs-Appellees Shawn Herhold and Malavanh Herhold, nka Rassavong (collectively "the Herholds") purchased the Property from Smith Land and its president and sole shareholder, Robert Smith (collectively, "the Defendants"). The deed for the Property was

recorded in September 2002. According to the Herholds, the Defendants represented to them that they would be able to build a home on the Property. Later, however, when the Herholds attempted to sell the Properly, they discovered that the City of Fairlawn would not issue a building permit for the Property absent permission from the Ohio Environmental Protection Agency ("Ohio EPA"). In order to satisfy Ohio EPA, the Herholds removed numerous truckloads of fill dirt from the north boundary of the Property in order to restore the wetlands that were previously there. Such action created a ditch and decreased the buildable surface area of the Property. After the alterations to the Property, the Herholds were unable to sell it.

{¶3} The Hcrholds brought suit against the Defendants, and others who are not relevant to this

appeal, for breach of contract, breach of the warranty of title, fraud, misrepresentation, and fraudulent concealment/inducement. The Herholds sought compensatory damages, punitive damages, interest, and attorney fees.

{¶4} Ultimately, the matter proceeded to a jury trial. The jury found in favor of the Herholds and awarded them $55,000 on their breach of contract claim, $65,000 on their fraud claims, and $35,000 in punitive damages. Additionally, the jury determined that the Herholds should be awarded their attorney fees. The Herholds were awarded $39,744 in attorney fees, $32,407.82 in prejudgment interest on their contract claim, and $36,854.91 in prejudgment interest on their fraud claims.

{¶5} The Defendants filed a motion for judgment notwithstanding the verdict, or in the alternate, a motion for new trial. In the end, a new trial was ordered on all of the Herholds' claims.[1]

{¶6} The Defendants then moved to reopen discovery, however, the request was denied. The matter proceeded to a second jury trial. The jury again found in favor of the Herholds. The Herholds were awarded $36,700 on the breach of contract claim, $26,485.07 in prejudgment interest on the breach of contract claim, $5,300 on the fraud claim, $3,341.66 in prejudgment interest on the fraud claim, $165,000 in punitive damages, and

1. A more detailed history of the case, including a discussion of the intervening appeals, can be found at *Herhold v. Smith Land Co., LLC,* 9th Dist. Summit No. 28032, 2016-Ohio-4939.

$48,062.55 in attorney fees. Subsequently, the Defendants filed a motion for judgment notwithstanding the verdict, or, in the alternate, a motion for a new trial. The trial court denied the motions.

{¶7} The Defendants have appealed, raising seven assignments of error, which will be addressed out of sequence to facilitate our analysis.

II.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AS A MATIER OF LAW IN DENYING SMITH LAND COMPANY AND ROBERT SMITH'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO CIV.[R.] 58 ON THE HERHOLDS['] BREACH OF CONTRACT

CLAIM.

{¶8} The Defendants assert in their fourth assignment of error that the trial court erred in denying their motion for directed verdict and for judgment notwithstanding the verdict on the Herholds' breach of contract claim.

> The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of

> the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions.

(Internal quotations and citations omitted.) *Jackovic v. Webb,* 9th Dist. Summit No. 26555, 2013-0hio-2520, 15. Both rulings are reviewed by this Court de novo. *Id.*

{¶9} "Generally, a breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages

as a result of the breach." (Internal quotations and citations omitted.) *Envision Waste Servs., LLC v. Cly. of Medina,* 9th Dist. Medina Nos. l5CA0104-M, 15CA0106-M 2017-0hio-351, ¶ 14.

Background

{¶10} The Herholds presented evidence supporting the following narrative. The Defendants did not present any witnesses on their behalf.

{¶11} Woodbury Estates, where the Property is located, was platted in November 1999. Smith Land was the proponent of the plat map and the owner of the land. The allotment originally contained 10 lots. They were numbered I through 9 and an additional lot was labeled as block A. Ultimately, block A would be later split into lots, one of which is the Property.

{¶12} Earlier in 1999, Smith Land, through a consultant, submitted a report delineating the wetlands in the land for verification by the United States Army Corps of Engineers. The report identified 5.54 acres of jurisdictional wetlands. Lee Robinette with the United States Army Corps of Engineers went out to the area to field verify the presence and location of wetlands. She then sent a verification letter to Smith Land's consultant.

{¶13} The plat was reviewed by the zoning and engineering departments of the City of Fairlawn. Before the plat was approved, the city engineer requested that certain restrictions be placed on the map. One of those restrictions stated that, "[t]he lands delineated on this plat as wetlands are jurisdictional waters of the United

States under the Federal Clean Water Act, and in order to fill any of the delineated wetlands, not shown on this plat as to be filled, a permit must be obtained from the U.S. Army Corps of Engineers." Once effective, those restrictions "run[] with the land" and "future development has to adhere to those restrictions." If at some point, someone desired to change or remove a restriction, that person would have to contact the planning commission and fill out an application to have the plat updated. No one has ever asked that any of the restrictions be removed. Christopher Randles with the Building and Zoning Commission for the City of Fairlawn was of the opinion that, until the restrictions are removed, they must be followed.

{¶14} Notably, block A, where the Property would ultimately be, was composed of wetlands

that were not designated as "to be filled[.]" Thus, Mr. Randles opined that if someone was going to put fill in block A, that person would need a permit. Lot 5, however, did contain the designation that a portion was "to be filled[.]" At one of the planning commission meetings in November 1999, Karen-Edwards Smith, Mr. Smith's wife, the vice-president of Smith Land, and also an attorney, appeared on behalf of Smith Land. Ms. Edwards-Smith told the commission that the lots will only appeal to certain individuals. Those people "would be ones that me interested in having a wetlands surrounding because the contracts that are signed as to purchasing these, as well as the plats, reflect that they do not have the right to go in and fill the wetlands without Army Corps of Engineers' permits." Ms. Smith told the commission that, "if the city does grant the lot splits as indicated that

no way are we making any representations of building ability of the land itself."

{¶15} In February 2000, Ms. Robinette's office received a report of a potential unauthorized wetland fill project on Smith Land's property. Employees of the United States Army Corps of Engineers visited the site and discovered that .5 acre of wetland had been filled. Under what was known as a Nationwide Permit or NWP number 26, any impact to wetlands over one-third of an acre and up to three acres required prior notification and mitigation planning. Mitigation planning involves the purchase and, thus preservation, of other wetlands so that there is not a net loss of wetlands. Smith Land did not notify the United States Army Corps of Engineers about the fill and did not mitigate for the impacted wetlands.

Accordingly, United States Army Corps of Engineers determined the project was not in compliance with NWP number 26.

{¶16} Subsequently, Smith Land applied to the United States Army Corps of Engineers to fill .945 acre of jurisdictional wetland and to mitigate the impact by purchasing 2 acres of wetlands elsewhere. In submitting the application, Smith Land included a map of the proposed fill that included the restriction about wetlands that was on the previous plat map. The proposed fill area included a portion of what would become the Property.

{¶17} In April 2000, Smith Land received a letter from the United States Army Corps of Engineers authorizing the work under NWP number 26. The permit was valid until February

11, 2002, unless activity commenced or was contracted to commence prior to that date, in which case Smith Land would have an additional 12 months to complete activity under the permit. The letter concluded by noting that "[a]ny impacts to the remaining 4.609 acres of jurisdictional wetlands on the subject property would require authorization from this office. Please be aware that the nationwide permit authorization does not obviate the requirement to obtain state or local assent required by law for the activity." The City of Fairlawn was never notified of a violation of the permit. Further, Ms. Robinette was unaware of her office issuing any violation of the permit but she also noted that she was unaware of the United States Army Corps of Engineers being asked to evaluate the

land as to whether there was a violation.

{¶18} Around that time, Smith Land also requested that the city planning commission split block A into three lots. The letter from the United States Army Corps of Engineers was referenced during the planning commission meeting and it and the attachments were considered by the commission. Block A was ultimately split into three lots, one of which became the Property.

{¶19} The plat map that designates the splitting of block A includes what is labeled a "Note" that specifies that "[t]he lands delineated on this plat as wetlands ate jurisdictional waters. of the United States under the Federal Clean Water Act and in order to fill any of the delineated wetlands, not shown on this plat as to be filled, a

permit must be obtained from the U.S. Army Corps of Engineers." In May 2000, a deed was issued from Smith Land to Smith Land to address the splitting of the lots of block A. That deed did not contain the notation concerning the wetlands that was on the plat map.

{¶20} In 2002, the Herholds were looking for a vacant lot upon which to build a home: Mr. Herhold first came across the Property and noticed that it was level and freshly graded with woods in the backyard. He observed that it appeared to have fresh dirt as "it was graded, so you could tell that it had just been recently worked up because it was like nice, flat, level." After showing the Property to Ms. Rassavong, Mr. Herhold met Mr. Smith at the Property.

{¶21} Mr. Smith told Mr. Herhold that Mr. Smith had purchased the land in the area and

divided it up into lots. Mr. Smith informed Mr. Herhold that Mr. Smith was building a house on a lot further down, lot 5, and the lot was very similar to the Property. Mr. Herhold said that Mr. Smith used lot 5 as an example of what Mr. Herhold would be able to do. Mr. Smith "was being very encouraging, *** he was showing [Mr. Herhold] the house he [was] doing just down the road, saying that it is a buildable lot." Mr. Smith did advise Mr. Herhold that he would need a little bit of extra stone for the foundation and that would cost about $5,000 extra as compared to an average house. Additionally, Mr. Smith told Mr. Herhold that there was some fill dirt on the Property that he had brought in and that "he was allowed to bring fill dirt in there." Mr. Smith indicated that there were wetlands at the back of the Property and showed Mr.

Herhold how far back the Property went into the wetlands. However, Mr. Smith did not tell them that the Property had been filled over wetlands.

{¶ 22} Thereafter, Mr. Herhold brought family members and his wife out to the Property several times. He estimated that he had been out to the Property at least 10 times at the point he made an offer. In making the offer, Mr. Herhold informed Mr. Smith that he "wanted to make sure that everything was okay with the piece of property, like [Mr. Smith] had said, that it was a buildable lot. *** [Mr. Herhold] wanted something in [the agreement] to state that it was a buildable lot, and [Mr. Smith] said that was not a problem." Ms. Rassavong added that, due to the visible wetlands in the back, they wanted some assurance that the Property was

buildable.

{¶23} The top of the "Real Estate Purchase Agreement" included a handwritten notation that the "Seller to provide documentation that lot is buildable with fill dirt." There is also an asterisk near the notation which states "See Addendum A[.]" The handwritten notation appears to be initialed by Mr. Smith and the Herholds. The Herholds understood that this notation meant that, with the fill dirt already on the Property, the lot was a buildable lot.

{¶24} The Real Estate Purchase Agreement also included an "'AS IS' Clause[,]" which was part of the form agreement. It stated:

> Buyer agrees and acknowledges that the property is being conveyed "AS IS" and that neither Seller, Broker, nor Agent

have made any representations or warranties, either expressed or implied, regarding the property including, but not limited to, soil conditions, environmental conditions, flooding or flood zone, availability of septic or sewer, availability or condition of well or city water, availability of public utilities, feasibility for construction, zoning, easements, surveying or boundaries, and deed restrictions. Buyer has the sole responsibility to inspect the property before signing this Agreement. Broker or Agent assume no liability for the condition of the property at any time before or after delivery of the deed.

This Agreement is contingent upon an inspection of the property for its suitability

for Buyer's intended purpose, including septic/sewer permits and preliminary title search, within sixty (60) days form the date of acceptance of this Agreement. Inspections to be performed by Buyer at Buyer's expense. If Buyer is not satisfied with the condition of the property then Buyer shall notify Seller within the inspection period and Seller may either correct the unsatisfactory condition or void this Agreement in which case all monies held in trust shall be returned *to* Buyer without further liability between Seller, Buyer, or Broker. If Buyer does not inspect, then the inspection is waived and Buyer takes the property in its present "AS IS" condition. After inspection and correction, if any, and delivery of deed Buyer accepts the property

> "AS IS". Buyer shall be responsible for the repair and restoration of any damage to the property which may be caused by the inspections.

{¶25} The Real Estate Purchase Agreement was signed by the Herholds and Mr. Smith, whose signature was followed by "Pres[,]" under which appeared "Smith Land Co. Inc." Mr. Herhold acknowledged that he did not have any inspections done nor did he contact the City of Fairlawn or Ohio EPA.

{¶26} The "Addendum to Sales Contract" provides that "[t]he subject site will be required to be engineered by a company such as Messmore Engineering or Summit Testing. As with sub lot 5 *** Messmore required a base of l's and 2's (stone) in the construction area under the

footer and basement floor. The fill used on sub lot 5 is approximately the same level of fill used on the subject lot." The addendum was signed by the Herholds and Mr. Smith on July 11, 2002.

{¶27} Mr. Smith also completed a disclosure form. That document lists "Smith Land" as the seller but it is signed by Mr. Smith and the Herholds. With respect to the question, "Arc you aware of any violation of either Federal or State Environmental Protection Agency rules or regulations?[,]" the "NO" box is checked. The disclosure form also reflects, inter alia, that the seller did not know of any flooding, drainage, or grading problems on the Property, did know that the Property was designated as a wetland by a federal or state governmental agency, did not know of any violations of local, state or federal laws, building codes and/or zoning ordinances

affecting the Property, and did not know of any excessive settling, slippage, sliding erosion, or other soil stability problems on the Property. The end of the form states "[t]he above information is true and correct to the best of my knowledge and, except as set forth herein, no material problems exist with respect to the property as of the date below. I further agree to notify Purchase[r] of any additional items which may become known to me prior to the recording of the deed." Mr. Herhold testified that he relied on the disclosure form when he made an offer on the Property.

{¶28} The Herholds purchased the Property for $55,000. Mr. Herhold averred that when he did so he believed that he purchased a buildable lot. Based on the representations made to him, Mr. Herhold believed that all he had to do to build on the lot

was to add some extra stone for the foundation as specified in the Addendum. The deed was filed September 4, 2002.

{¶29} Shortly after purchasing the Property, in November 2002, Mr. Herhold, who was in the United States Navy Reserve, was deployed to Japan for nearly a year. When Mr. Herhold returned almost a year later, the couple decided that, due to their circumstances, they should sell the Property.

{¶30} In 2003 Ms. Robinette was contacted by a law firm representing the City of Fairlawn to revisit the area containing the Property to re-verify the limits of United States Army Corps of Engineers jurisdiction over the wetlands. In 2004, Ms. Robinette visited the land to do so. She explained that a ruling had come out in January 2001 known as the

"SWANCC" decision. *See Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Engineers,* 531 U.S. 159 (2001). Ms. Robinette opined that that decision provided "that in order for a wetland to be considered a water of the United States, it had to have a physical connection, and it had to exhibit a connection, meaning a conveyance, to a surface water tributary system." Thus, from that date forward, any water determined to be isolated would be outside federal jurisdiction. When Ms. Robinette visited the land she discovered that the wetlands did not have such a connection and thus were isolated wetlands. Therefore, they were no longer, under federal jurisdiction. According to Ms. Robinette, federal jurisdiction ceased as of the date of her determination, which was February 4, 2004. Thus, she opined that prior to her finding in

2004, the United States Army Corps of Engineers retained jurisdiction over the area. However, following her determination there would be no need to obtain a permit from the United States Army Corps of Engineers to place fill in the area. At the point of her determination, jurisdiction over the isolated wetlands would be with Ohio EPA. Mr. Wilk agreed that Ohio EPA did not have jurisdiction over the isolated wetlands until 2004.

{¶31} In 2004, the Herholds listed the Property for sale. In September 2004, the Herholds received an offer of $61,900; however, that offer ultimately fell through. In December 2004, the Herholds received another offer to purchase the Property for $61,900. Before the sale closed, the Herholds discovered that the City of Fairlawn would not issue a building permit for the Property. Mr. Randles sent the prospective

buyer a letter dated April I, 2005. That letter informed the prospective buyer that any construction on the lots in block A may impact the wetlands. Therefore, Mr. Randles stated that it would be necessary to obtain permission from Ohio EPA for any such work. According to Mr. Randles, the city would not issue a building permit until the foregoing was accomplished. Thus, they were unable to complete the sale.

{¶32} Mr. Herhold then talked to the City of Fairlawn to figure out what precisely was the problem with the Property. Mr. Herhold talked to Mr. Randles and Mr. Wilk with Ohio EPA. Mr. Wilk came to understand that the United States Army Corps of Engineers had classified the area, which included the Property, as isolated and outside of federal jurisdiction. Mr. Wilk visited the Property and observed that, in looking at

the map that accompanied the federal permit, the fill on the Property surpassed the allowable amount by a "great margin." Mr. Wilk testified that Mr. Herhold's options were to either remove the fill dirt and reestablish the wetlands or to submit an after-the-fact-application to allow the fill dirt lo remain and to purchase mitigation. Mr. Wilk opined that mitigation would be very expensive.

{¶33} Mr. Herhold averred that, before he could get a building permit from the City of Fairlawn, he had to obtain permission from Ohio EPA. Mr. Randles indicated that it was the city's position that it would require anybody coming in for a building permit to obtain approval from either the Army Corps of Engineers or Ohio EPA and that the person would need

to have the soil tested to determine whether an engineered foundation would be necessary. Mr. Herhold averred that he was required to remove about forty dump trucks full of fill from the Property and plant vegetation in the area to reestablish the wetlands. He testified that it was not a buildable lot with the fill dirt because it was excessive fill. In removing the excessive fill, Mr. Herhold had to put a ditch along the north side of the Property. Making these alterations to the Property "made the lot very, very narrow" as the Herholds had to slope the area around the ditch which then "encroached heavily on the width of the property." In addition, Mr. Herhold had to get the land drilled and tested. That company estimated that it would cost $15,000 to $20,000 to put in a foundation at the Property.

{¶34} In October 2005, Mr. Wilk sent Mr. Herold a letter summarizing the situation and Mr. Herold's response to it. Mr. Wilk noted that the Property "failed to comply with the notification condition of the Army Corps of Engineers to properly fill a wetland. The wetlands on the property were filled by Smith Land Company over the allowable limits at the north property boundary." The letter noted that Mr. Herhold had opted to remove the fill dirt and reestablish the wetland and that Mr. Wilk had inspected the work and found that the fill had been removed. When asked what state laws would apply, Mr. Wilk indicated that R.C. 61I1.03 did, which he averred dealt with isolated wetlands and was enacted in 1982. Nonetheless, Mr. Wilk indicated that his

actions involving the Herholds were not enforcement actions by Ohio EPA and instead his job at the time was "to help the Herholds out to meet the conditions as required by the City of Fairlawn so they c[ould] proceed with the building permit." {¶35} During the sale process; Mr. Smith never told Mr. Herhold that it would be necessary to make those alterations to the Property, nor did Mr. Smith ever tell him there was unauthorized fill on the Property. Mr. Herhold indicated that had he known there was unauthorized fill on the Property he would not have purchased it. Mr. Herhold opined that the Property is no longer "a desirable piece of land" and "nobody wants to purchase [the Property] now." Mr. Hcrhold stated that they have not had any offers even after offering the Property

in the thirty thousand dollar range. Nonetheless, he testified that the City of Fairlawn now would. issue a building permit if they applied for one because of the alterations Mr. Herhold made.

Breach of Contract Claim

{¶36} The Herholds claimed that Mr. Smith and Smith Land breached the contract by failing to disclose the unauthorized fill and by representing that the Property was buildable in the condition the Herholds received it when it was not.

{¶ 37} Viewing the evidence in a light most favorable *to* the Herholds, we conclude there was evidence from which a jury could find that Mr. Smith and Smith Land breached the contract. The Hcrholds were aware that the Property contained wetlands and fill dirt.

Partly because of that, Mr. Herhold informed Mr. Smith that he "wanted to make sure that everything was okay with the piece of property, like [Mr. Smith] had said, that it was a buildable lot. *** [Mr. Herhold] wanted something in [the agreement] to state that it was a buildable lot, and [Mr. Smith] said that was not a problem." At the top of the page of the contract labeled "Real Estate Purchase Agreement[,]" there is a handwritten notation that states "Seller to provide documentation that lot is buildable with fill dirt." Mr. Herhold testified that "they[,]" presumably referring to Mr. Smith and/or Smith Land, wrote that into the agreement. There is also an asterisk near the notation which states "See Addendum A[.]" The handwritten notation appears to be initialed by Mr. Smith and the

Herholds. The Herholds testified without objection that they understood that this notation meant that, with the fill dirt already on the Property, the lot was a buildable lot. The "Addendum to Sales Contract" provides that "[t]he subject site will be required to be engineered by a company such as Messmore Engineering or Summit Testing. As with sub lot 5 *** Messmore required a base of l's and 2's (stone) in the construction area under the footer and basement floor. The fill used on sub lot 5 is approximately the same level of fill used on the subject lot." The addendum was signed by the Herholds and Mr. Smith.

{¶38} When the Herholds went to sell the Property they came to discover that a building permit would not be issued by the City of

Fairlawn for the Property absent permission from Ohio EPA. In working with Ohio EPA, the Herholds came to understand that there was excess fill dirt placed on the Property by Smith Land and that they would have to remove that excess fill dirt in order to satisfy Ohio EPA.

{¶39} Given the foregoing, along with the other circumstances discussed in great detail above, the trier of fact could conclude that Mr. Smith and Smith Land breached the contract by failing to sell the Herholds a buildable lot. There was evidence to. support the notion that the City of Fairlawn would not grant the Herholds a building permit for the Property in the condition it was sold to them. Thus, a reasonable trier of fact could conclude that the lot was not buildable as sold.

{¶40} In arguing that there was no

breach of contract, the Defendants additionally point to the "AS IS" provision in the contract which also provides for inspections by the purchasers. However, the Defendants have failed to cite any case law to support their contention. *See* App.R. 16(A)(7). Instead, in a conclusory fashion, they maintain that the Herholds' damages were caused by their failure to inspect the Property. They develop no argument explaining why the "AS IS" clause and provision for inspections should trump the handwritten notation at the top concerning buildability of the Property which was initialed by Mr. Smith and the Herholds. *See* App.R. 16(A)(7). Thus, we cannot say that the Defendants met their burden on appeal on this issue.

{¶41} The Defendants additionally contend that there was no breach of contract because, upon acceptance of the deed, the contract merged into the deed.

{¶42} "The doctrine of merger by deed holds that whenever a deed is delivered and accepted without qualification pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only." (Internal quotations and citations omitted.) *Brostek v. O'Connell,* 9th Dist. Lorain No. 10CA009779, 2010-Ohio-4544, 10. This Court has previously categorized it as an affirmative defense. *See Zanko v. Kapcar,* 9th Dist. Summit No. 20825, 2002-Ohio"2329, ¶ 3, fn.l. Accordingly the Defendants bore the

burden of establishing the elements of their affirmative defense. *Glenmoore Builders, Inc. v. Smith Family Trust,* 9th Dist. Summit No. 24299, 2009-Ohio-3174, ¶ 40. Notably, the Defendants have not pointed to any place in the record where they elicited evidence that the Herholds accepted the deed without qualification; in fact, they have not even pointed to the deed itself. *See* App.R. 16(A)(7). Instead, they have merely stated in a conclusory fashion that "[t]he Herholds accepted the deed to the property • • • without qualification pursuant to the purchase agreement for the real property."

{¶43} Additionally, wc note "[t]here are • • • two exceptions to the doctrine of merger. The doctrine will not apply if elements of fraud or mistake exist, or if the prior agreement is collateral to and independent of the main purpose

of the transaction." *Zilka v. Cent.* S. *Ltd.*, 9th Dist. Lorain No. 99CA007482, 2000 WL 988765, *6 (July 19, 2000). Given, the extremely limited argument made by the Defendants on this issue, and that the jury found for the Herholds on their fraud claim, a finding that is affirmed below, we cannot say that the Defendants have demonstrated an entitlement to judgment on the breach of contract claim based upon the doctrine of merger by deed. *See Hiland v. B.M Invests.,* 2d Dist. Miami No. 93 CA 3, 1993 WL 462410, *3-4 (Nov. 9, 1993).

{¶44} Finally, the Defendants argue that Mr. Smith was not a party to the contract and the Herholds failed to present evidence to pierce the corporate veil. Thus, the Defendants assert that Mr. Smith could not be held individually liable.

{¶45} Because we conclude that, when viewing the evidence in a light most favorable to the Herholds, it would be possible for a trier of fact to conclude the Mr. Smith signed the contract in his individual capacity, we see no reason to examine whether there was sufficient evidence concerning piercing the corporate veil.

{¶46} "Generally, a party signing a contract as a corporate officer is not individually liable." *Spicer v. James,* 21 Ohio App.3d 222, 223 (2d Dist. 1985); *see also Marhofer v. Baur,* 101 Ohio App.3d 194, 196 (9th Dist.1995) ("An officer of a corporation is not personally liable on contracts *** for which his corporate principal is liable, unless he intentionally or inadvertently binds himself as an individual.") (Internal quotations and citations omitted.). "However, if a corporate officer executes

an agreement in a way that indicates personal liability, then that officer is personally liable regardless of his intention. Whether a corporate officer is personally liable upon a contract depends upon the form of the promise and the form of the signature." (Internal citation omitted.) *Spicer* at 223. Generally, a corporate officer is individually liable on a breach of contract claim when he or she personally signs a contract in his or her individual capacity. *Ayad v. Radio One, Inc.,* 8th Dist. Cuyahoga No. 88031, 2007-Ohio-2493, ¶ 56, citing *Spicer* at 223; *see also Big H, Inc.* v. *Watson,* 1st Dist. Hamilton No. C-050424, 2006-Ohio-4031, ¶ 7. ("It is undisputed law that when an agent signs a contract as an individual without adding the name of the principal, the agent is personally bound by the contract. Similarly, a corporate officer is responsible for clearly

identifying the corporation for which the officer is signing, or the officer is exposed to individual liability.").

{¶47} Here, the contract at issue was composed of three pages, each with their own signature page. The first page was entitled "Real Estate Purchase Agreement[.]" That page is signed by Mr. Smith and his signature is followed by "Pres" and underneath that appears "Smith Land Co, Inc." The second page is a page of disclosures that lists the seller as "Smith Land" and appears to only be signed by Mr. Smith in his individual capacity. The third page is the addendum to the sales contract and also appears to only be signed by Mr. Smith in his individual capacity.

{¶48} Thus, there is ambiguity as to whether the entire sales agreement was signed by

Mr. Smith in only his capacity as an officer of Smith Land or whether he was signing as an individual. We note again that Mr. Smith did not take the stand to clarify the ambiguity in the contract.

{¶49} Under these circumstances, we conclude that, when the evidence is viewed in a light most favorable to the Herholds, a reasonable trier of fact could find Mr. Smith individually liable under the contract. And because of that, it is not necessary *to* examine whether there was evidence supporting piercing the corporate veil. *See Marhofer,* 101 Ohio App.3d at 198 ("In the absence of facts that justify piercing the corporate veil, an officer is not personally liable on a contract that he has only signed in his corporate capacity.")

{¶50} In light of the foregoing, the Defendants' fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING SMITH LAND COMPANY'S AND ROBERT SMITH'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO CIV.[R.] 58 ON THE FRAUD /FRAUDULENT CONCEALMENT CLAIM.

{¶51} The Defendants argue in their fifth assignment of error that the trial court erred in denying their motion for directed verdict and judgment notwithstanding the verdict on the

Herholds' fraud claim.

{¶52} The Herholds argued that the Defendants committed fraud by failing to disclose the unauthorized fill on the Property and by misrepresenting that the Property was buildable.

{¶53} The elements of a fraud claim are as follows:

> 1) a representation, or in a situation where there was a duty to disclose, a concealment of fact; 2) which fact is material to the transaction; 3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; 4) with the intent of misleading another into

> relying upon it; 5) justifiable reliance on the misrepresentation; and 6) a resulting injury proximately caused by the reliance.

(Citation omitted.) *Petroskey* v. *Martin,* 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, ¶17.

{¶54} Given all of the evidence discussed in detail above, and the arguments made on appeal, we conclude that sufficient evidence was presented to overcome the motion for directed verdict and judgment notwithstanding the verdict. As mentioned previously, there was a provision at the top of the Real Estate Purchase Agreement that the Herholds insisted be included because they wanted assurances that the Property was buildable. The Herholds understood the provision to mean that the Defendants were assuring the Herholds that

the Property was buildable with the fill dirt that was on it at the time of the sale, Mr. Smith was aware of the Herholds' concern and agreed to add the provision to the top of the agreement. While Mr. Smith disclosed that the Property contained wetlands and that there was fill dirt on the Property, he never told the Herholds that any of the fill dirt was unauthorized. Evidence was presented that the City of Fairlawn would only issue approval for a building permit after permission from Ohio EPA was granted. A letter from Ohio EPA to Mr. Herhold was discussed at trial and indicates that the wetlands were filled by Smith Land over the allowable limits. To remedy the condition, the Herholds opted to remove the excess fill.

{¶55} The Defendants argue on appeal that they were entitled to a directed verdict and/or judgment notwithstanding the verdict on the fraud claim because the Defendants owed no duty, separate from the contract, to the Herholds. They also assert that a party cannot predicate fraud upon future performance. The Defendants have failed to demonstrate that they made either of these arguments in their motion for directed verdict or motion for judgment notwithstanding the verdict, nor can this Court locate a place in those motions where those arguments were made. *See* App.R. 16(A)(7). "This Court has held on multiple occasions that [a]rguments that were not raised in the trial court cannot be raised for the first time on appeal." (Internal quotations and

citation omitted.) *Huntington Natl. Bank* v. *Anderson,* 9th Dist. Lorain No. 17CA011223, 2018- 0hio-3936, ¶20.

{¶56} The Defendants additionally raise several other issues in a disjointed argument that it is somewhat difficult to follow. They point to *Wilfong* v. *Petrone,* 9th Dist. Summit No. 26317, 2013-0hio-2434, ¶ 11, for its discussion of patent versus latent defects. However, they then assert that there was no defect at all at the time of sale, despite the evidence to the contrary discussed above. While the Defendants might disagree with the weight of that evidence, in reviewing a ruling on a motion for directed verdict or judgment notwithstanding the verdict, we must view the evidence in a light most favorable to the Herholds. *See Jackovic,* 2013-0hio- 2520, at ¶15.

{¶57} In that same paragraph, the Defendants also argue that the Herholds should have inspected the Property but fail to provide any discussion explaining why that should defeat the fraud claim under the circumstances before us. *See* App.R. 6(A)(7).

{¶58} Moreover, the Defendants argue that the Herholds failed to establish that the Defendants knew there was unauthorized fill on the lot or that the Property was not buildable as sold. The record discloses that the original plat map for the subdivision included a restriction that "[t]he lands delineated on this plat as wetlands are jurisdictional waters of the United States under the Federal Clean Water Act and in order to fill any of the delineated wetlands, not shown on this plat as to be filled, a permit must be obtained from the U.S. Army Corps of Engineers."

The map indicated that block A, a portion of which would become the Property, contained jurisdictional wetlands that were not to be filled. There was testimony that that restriction ran with the land and would be enforced by the City of Fairlawn until the restriction was removed. There was also testimony that no one ever sought to have the restriction removed. When block A was split, the plat map also contained the same language in the aforementioned restriction in a note on the map. Smith Land did apply to the United States Army Corps of Engineers to fill a portion of the jurisdictional wetland, which included portions of block A, including a portion of the Property. That application was approved. Thus, it would be reasonable to presume that the Defendants had knowledge of where and how much fill they were authorized to place on the

Property.

{¶59} There was testimony that, prior *to* the sale of the Property, Mr. Smith told Mr. Herhold that there was some fill dirt on the Property that he had brought in and that "he was allowed to bring fill dirt in there." There was also evidence that Ohio EPA concluded that the fill on the Property failed to comply with the permit from the United States Army Corps of Engineers in that there was excessive fill dirt on the Property at the north property boundary that was placed there by Smith Land. There was no evidence that anyone aside from the Defendants placed fill on the Property. Mr. Wilk described the fill on the Property as surpassing the allowable amount by a "great margin." Mr. Wilk testified that he went out and viewed the Property, and, using the map that delineated where the fill could be placed, he

stated "it was obvious" that the fill continued outside the prescribed boundaries. In fact, Mr. Herhold testified that he had to remove about 40 dump trucks full of fill from the Property. From that evidence, a trier of fact could conclude that the Defendants had knowledge of the excess fill dirt and because of that could also conclude that Defendants knew the Property was not buildable as sold.

{¶60} Finally, the Defendants argue that they could never have known that Ohio EPA was going to enforce a law that did not exist at the time the Property sold. The Defendants appear to be referring to testimony by Mr. Wilk about R.C.6111.03, which Mr. Wilk cited in his testimony. That statute discusses the numerous water pollution control powers of the director of environmental protection. *See* R.C. 6111.03. Mr.

Wilk testified that that statue went into effect in 1982 while the Defendants claim that it did not go into effect until 2003, after the sale. This Court's review of the history of the statute reveals that the statute dates back to even before 1982. Accordingly, the Defendants' argument is without merit.

{¶61} Given the arguments raised on appeal, the Defendants' fifth assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT FAILED TO FIND AS A MATTER OF LAW THAT THE USACE PERMIT ISSUED TO SMITH LAND COMPANY[] WAS NOT VIOLATED AND THAT THE U.S. SUPREME COURT DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. ARMY CORPS[.] OF ENGINEERS,*

531 U.S. 159 (2001) WAS THE SUPREME LAW OF THE LAND AS OF THE DATE OF THAT DECISION.

{¶62} The Defendants argue in their first assignment of error that the trial court erred in failing to find as a matter of law that the United States Army Corps of Engineers permit was not violated and that the decision in *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers,* 531 U.S. 159 (2001), was the supreme law of the land. While the Defendants spend a great deal of time discussing the aforementioned case, what they believe its implications are for this matter, and the general import of a United States Supreme Court decision, they fail to identify where in the record they asked the trial court to make such a ruling or where in the record

the trial court failed to make the ruling they now challenge. *See* Loc.R. 7(F) ("If a party fails to include a reference to a part of the record that is necessary to the court's review, the court may disregard the assignment of error or argument."); App.R. 16(A)(7). Accordingly, this Court is not even certain which ruling of the trial court this assignment of error is challenging. While the Defendants, in a footnote, reference a page in the transcript from the first trial, they have not explained why a statement from the trial court from the first trial should be reviewed in deciding an appeal from the second trial. *See* App.R. 16(A)(7).

{¶ 63} Given the foregoing, the Defendants' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN ALLOWING ED WILK, OHIO EPA, TO TESTIFY, TO ASSERT ENFORCEMENT AUTHORITY OVER THE USACE PERMIT, AND TO ASSERT AN UNCONSTITUTIONAL RETROACTIVE ENFORCEMENT OF R.[C.] 6111.03.

{¶64} The Defendants argue in their second assignment of error that the trial court erred in allowing Mr. Wilk to testify. They note that they objected to his testimony at trial based upon relevancy. However, in their brief, the Defendants have not developed an argument articulating why Mr. Wilk's testimony was not relevant. *See* App.R.

16(A)(7). The Defendants fail to cite to the pertinent evidentiary rule and also fail to explain how the evidence they reference was irrelevant. In addition, the Defendants assert that Mr. Wilk's testimony misled the jury as he testified to an inaccurate effective date of R.C. 6111.03, thereby evidencing a retroactive enforcement of R.C. 6111.03. This argument has already been addressed. Further, they allege that Mr. Wilk never provided them notice of an enforcement action under R.C. 6111.03 and thereby his testimony also demonstrated a violation of their due process rights. We note that the Defendants have not pointed to a place in the record wbere they objected to the testimony based upon these issues or concerns. *See* Loc.R. 7(F). Nor have the Defendants

explained how these issues would relate to the relevancy of Mr. Wilk's testimony. *See* App.R. 16(A)(7). Thus, we cannot conclude that the Defendants met their burden to demonstrate error with respect to this assignment of error. *See Wiegand v. Fabrizi Trucking & Paving Co.,* 9th Dist. Medina No. 16CA0015-M, 2017-Ohio-363, 35 ("The Wiegands spend most of their argument detailing why they believe that the witnesses were incorrect instead of explaining why their testimony was inadmissible.").

{¶65} In light of the foregoing, we overrule the Defendants' second assignment of error.

ASSIGNMENT OF ERROR Ill

THE TRIAL COURT ERRED WHEN IT DENIED

DEFENDANTS['] REQUEST TO REOPEN DISCOVERY FOR THE PURPOSE OF DEPOSING ED WILK.

{¶66} The Defendants argue in their third assignment of error that the trial court erred when it denied their request to reopen discovery to depose Mr. Wilk and subpoena him to bring the entire contents of his file for the Property.

{¶67} "A trial court has the inherent authority to control its docket and to decide discovery matters." *In re Estate of Durkin,* 9th Dist. Summit No. 28861, 2018-Ohlo-2283, ¶ 17. Accordingly, "[t]his Court will not reverse a trial court's decision concerning the regulation of its discovery proceedings absent an abuse of discretion." *Roberts v. Roberts,* 9th Dist. Summit No. 28509, 2017-Ohio-8473, ¶ 10.

{¶68} In the motion to reopen discovery, which was made subsequent to the first trial, the

Defendants claimed that Mr. Wilk failed to comply with the Herholds' subpoena in the first trial as he did not bring all relevant documents to trial. However, the Defendants also pointed out in their motion that they later made a public records request for the file and received an electronic copy of the file from Ohio EPA. They maintained that some of the newly obtained documents contradicted Mr. Wilk's testimony at the first trial and, because he failed to bring those documents to the first trial, they were unable to cross-examine him about them.

{¶69} In ruling on the motion, the trial court noted that the Defendants did not issue the subpoena they assert was not followed and that the Defendants now had the documents. Further, the trial court observed that the Defendants would have the ability to subpoena Mr. Wilk to

appear at the trial or would be able to cross-examine him at trial if the Herholds subpoenaed him,

{¶70} We cannot say that the Defendants have demonstrated that the trial court abused its discretion in denying the motion to reopen discovery. The trial court's ruling is not unreasonable, arbitrary, or unconscionable. *See Blakemore v. Blakemore,* 5 Ohio St.3d 217,219 (1983), We note that the complaint was filed in 2008 and the first trial did not begin until 2014, Thus, it appears that the parties had ample time to conduct discovery. The record reflects that a notice of deposition was filed even as late as November 2013. Moreover, the Defendants had Mr. Wilk's file prior to the second trial and thus had the ability to cross-examine him about the issues they raised in their motion. The

Defendants have not asserted that they were prevented from cross-examining Mr. Wilk about any issue they raised in their motion.

{¶71} The Defendants' third assignment of error is overruled.

ASSIGNMENT OF ERROR VI

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT AWARDED PUNITIVE DAMAGES.

{¶72} The Defendants assert in their sixth assignment of error that the trial court erred when it awarded punitive damages.

{¶73} In a conclusory fashion, the Defendants assert there was "no showing of fraud, let alone 'malice or aggravated or egregious fraud' as required by R.C. []2315.21

(C)(l)." However, they have not otherwise developed an argument on this issue, It is the Defendants' burden on appeal to demonstrate error. *See In re Estate of Durkin,* 2018-Ohio-2283, at 9 ("It is an appellant's duty to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record; it is not the function of this Court to construct a foundation for his claims.").

{¶74} Additionally, the Defendants assert that the punitive damages award of $165,000 was far in excess of two times the fraud award, which was $5,300, and that such an award is prohibited by R.C. 2315.2l(D)(2)(a).

{¶75} R..C. 2315.2l(D)(2)(a) provides that "[t]he court shall not enter judgment for punitive or exemplary damages in excess of two

times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section." However, this punitive damages cap only became effective Ap1il 7, 2005. *Northpoint Props. v. Charter One Bank,* 8th Dist. Cuyahoga No. 100210, 2014-0hio-1430, 74. Courts have generally appeared to be unwilling to apply R.C. 2315.21 retroactively. *See id.* "Thus, a court cannot apply it to causes of action that arose before the statute's effective date even if some of the conduct giving rise to the cause of action occurred after the effective date." *Blair v. McDonagh,* 177 Ohio App.3d 262, 2008-0hio-3698, (1st Dist.) ¶ 67.

{¶76} Here the sale of the Property took place in 2002, and thus the representations as to buildability and fill dirt were made at that time

as well. However, it was not until as late as early 2005 that the Herholds discovered that the City of Fairlawn would not issue a prospective buyer a building permit for the Property. In fact, the prospective buyer received a letter from Mr. Randles dated April 1, 2005, explaining that construction would impact the wetlands and that the prospective buyer would need to receive permission from Ohio EPA for such activity. Given the foregoing, there appears to be evidence that almost all of the conduct at issue occurred prior to the effective date of the statute. Prior to the effective date of the current version of R.C. 2315.21(D)(2)(a), there was no cap on punitive damages. *See id.* at 69. Accordingly, the Defendants have not demonstrated that the trial court erred in failing to apply the punitive damages cap in the statute.

{¶77} The Defendants' sixth assignment of error is overruled.

ASSIGNMENT OF ERROR VII

THE TRIAL COURT ERRED WHEN IT DENIED SMITH LAND COMPANY AND ROBERT SMITH A NEW TRIAL PURSUANT TO CIV.[R.] 59.

{¶78} The Defendants argue in their seventh assignment of error that the trial court erred in denying their motion for new trial pursuant to Civ.R. 59. In their motion for new trial, the Defendants relied upon Civ.R. 59(A)(I) and (A)(8).

{¶79} "Depending upon the basis of the motion for a new trial, this Court will review a trial court's decision to grant or deny the motion under either a de novo or an abuse of

discretion standard of review." (Internal quotations and citations omitted.) *Marquez* v. *Jackson,* 9th Dist. Lorain No. 16CA01I049, 2018-Ohio-346, ¶ 11. "If the stated grounds for a new trial involve[] a question of law, the de novo standard of review applies. If the basis for a new trial involves the determination of an issue left to the trial court's discretion, the abuse of discretion standard applies." (Internal quotations and citations omitted.) *Id.*

{¶80} Civ.R. 59(A) provides in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: (1) Irregularity in the proceedings of the

> court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> ***
>
> (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial[.]
>
> Civ.R. 59(A)(1)

{¶81} The Defendants make several arguments as to why they are entitled to relief under Civ.R. 59(A)(1).

{¶82} First, they assert that the Herholds and Herholds' counsel were repeatedly allowed to refer to the fill dirt as excessive and/or illegal.

While the Defendants mention the use of the phrase "excessive" fill, the focus of their argument is on the use of the word "illegal," because of the connotations that accompany that word. However, the Defendants have not pointed to anywhere in the transcript where the phrase "illegal" fill was actually used by the Herholds or the Herholds' counsel. *See* App.R. 16(A)(7). In their brief, the Defendants have pointed to places in the transcript where the words excess, excessive, and unauthorized fill appear, but not to anywhere the word illegal is used in terms of fill dirt. Thus, even assuming use of such word was improper, the Defendants have not demonstrated that the word was used.

{¶83} The Defendants also again challenge the testimony of Mr. Wilk asserting that they were

never given any notice that Ohio EPA was taking administrative action against them and that they had no way to know that Ohio EPA would enforce a statute that was not enacted at the time the Property sold. This Court has addressed the issue with the statute (R.C. 6111.03) supra, and that contention has no merit. With respect to the Defendants' argument concerning notice of administrative action, the Defendants have not pointed to anywhere in the record that evidences that any action, administrative or otherwise, was actually taken by Ohio EPA against the Defendants concerning the Property. Nor have the Defendants explained why Mr. Wilk's testimony entitled them to a new trial. *See* App.R. 16(A)(7).

{¶84} Additionally, the Defendants point to several objections they raised during the trial and comments made by the trial court in response.

The Defendants challenge a portion of the following comments made by the trial court after it overruled an objection by the Defendants. The trial court stated:

> [T]he record should reflect that the defendant has a continuing objection to all references to mortgages. Ladies and gentlemen, at the end of the trial, I'm going to instruct you on how you would compute damages if you've found liability against the defendant, because the defendants are liable. So my instruction to you would be that when you look at those jury instructions, those jury instructions will tell you - guide you through deliberations.
>
> It may very well be that there could be a situation where you find as a juror where

> the plaintiff believes certain items of damage were proved, but you find they are not part of the damages. Do you understand what I'm saying? What I'm trying to say is, is that the fact that I'm allowing this evidence does not mean that you have to make a finding that way, because you would base your finding on the instructions. You got me on that?

{¶85} The trial court then asked whether that explanation was satisfactory to the parties and both sides responded affirmatively. In light of the Defendants' acquiescence, they have not demonstrated the trial court erred in denying their motion for new trial on that basis.

{¶86} Defendants also point to a comment by the trial court made while sustaining one of the Defendants' objections. The trial court told

the jury to disregard the last comment as the trial court found it irrelevant. The trial court then said "[i]t is not part of the damages [the Herholds] [are] going to recover." While such a statement could be viewed as improperly opining that the Herholds would recover damages, the Defendants did not object to the comment by the trial court or move to have it stricken. Thus, as above, the Defendants have not demonstrated that the comment warranted a new trial.

{¶87} The Defendants also challenge the trial court allowing leading questions, allowing Mr. Wilk to illustrate the fill on a document he was not familiar with, and in disallowing a jury view of the Property. However, the Defendants have not explained how these comments

prejudiced them in such a way as to warrant a new trial. *See* App.R. 16(A)(7). We note that a trial court has discretion to allow leading questions under certain circumstances, *see State v. Liddle,* 9th Dist. Summit No. 23287, 2007-Ohio-1820, ¶ 30, citing Evid.R. 611(C), and also has discretion in determining whether to grant a jury view. *See Barker v. Geotech Servs.,* 9th Dist. Summit No. 22742, 2006-Ohio-3814, ¶ 4.

{¶88} Given the foregoing, we cannot say that the trial court erred in denying the Defendants' motion for new trial pursuant to Civ.R. 59(A)(l).

Civ.R. 59 (A)(8)

{¶89} As noted above, Civ.R. 59(A)(8) deals with a motion for new trial based upon "[n]ewly discovered evidence, material for the party

applying, which with reasonable diligence he could not have discovered and produced at trial[.]" Civ.R. 59(A)(8).

{¶90} The Defendants argued below and on appeal that, subsequent to the trial, they discovered evidence that the fill dirt from the Property was not properly removed as claimed by Mr. Wilk. Mr. Smith had a conversation with an engineer, who indicated that there might be historical photos of the Property available. The Defendants claimed that the historical photos that were found were from April 9, 2005 (before the fill dirt was removed) and February 28, 2006 (after the fill dirt was removed). The Defendants argue that the photos demonstrate that the fill dirt was not removed from the Property and, instead, was spread on the Property and an adjoining lot. The Defendants' motion was

accompanied by an affidavit by Mr. Smith, an affidavit by the engineer, and photos.

{¶91} "[B]efore a new trial may be granted on the basis of newly discovered evidence, the evidence (1) must be such as will probably change the result if a new trial is granted, (2) must have been discovered since the trial, (3) must be such as could not in the exercise of due diligence have been discovered before the trial, (4) must be material to theissues, (5) must not be merely cumulative to former evidence, and (6) must not merely impeach or contradict the former evidence." (Internal quotations and citations omitted.) *Cooper v. Nadeau,* 9th Dist. Wayne No. 09CA0032, 2010-0hio-2150, ¶14. Even assuming the Defendants satisfied the other elements, the Defendants have not explained why this newly discovered evidence could not have been

discovered before trial, particularly given the age of the photos that they claim are newly discovered.

{¶92} Thus, we cannot say that the trial court erred in denying the Defendants' motion for a new trial based upon newly discovered evidence.

{¶93} Defendants' seventh assignment of error is overruled.

III.

{¶94} The Defendants' assignments of error are overruled. The outstanding motion to take judicial notice of a filing in a separate proceeding is denied. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to maim a notation of the mailing in the docket, pursuant to App.R. 30,

Costs taxed to Appellants.

DONNA CARR

FOR THE COURT

SCHAFER, P.J.

TEODOSIO, J

APPEARANCES

Warner Mendenhall, Attorney at Law, for Appellants

Thomas A. Skidmore, Attorney at Law, for Appellees

APPENDIX C

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

CASE NO. CV 2008-05-3634 ORDER

JUDGE JAMES L. KIMBLER

SHAWN A. HERHOLD, et al.

Plaintiffs,

-vs-

SMITH LAND COMPANY, LLC, et al.

Defendants,

This matter came before the Court upon Defendants Smith Land Company and Robert G. Smith's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, Plaintiffs' Response, and Defendants' Reply.

Upon due consideration, the Court finds such motion not well taken, and hereby DENIES the same.

IT IS SO ORDERED.

JUDGE JAMES L. KIMBLER
Sitting by Assignment
#17JA1119
Pursuant to Art. IV, Sec. 6
Ohio Constitution

CC: ATTORNEY THOMAS A. SKIDMORE
ATTORNEY WARNER MENDENHALL
ATTORNEY KAREN L. EDWARDS-SMITH

APPENDIX D

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

CASE NO. CV 2008-05-3634

JUDGE JAMES L. KIMBLER

FINAL JUDGMENT ENTRY

(Final and Appealable)

SHAWN A. HERHOLD, et al.

Plaintiffs,

-vs-

SMITH LAND COMPANY, LLC, et al.

Defendants,

This matter came on for hearing September 18, 2017 on the Plaintiffs' Motion for Attorney Fees and Prejudgment Interest filed July 28, 2017.

The Motion for Attorney Fees is based upon the Jury Verdict filed July 25, 2017, finding that Counsel for the Plaintiffs is entitled to an award of Attorney Fees. The Pre-Judgment Interest is based in part on a contractual claim pursuant to R.C. 1343.03(A) and in part on a fraud claim pursuant to R.C. l343.03(C).

ATTORNEY FEES

I have reviewed the case law provided by the Plaintiffs' counsel and factors to consider set-forth in Cambridge Co., Ltd. -vs.- Testa, Inc., 9th Dist. No. 23925, 2008-Ohio-l 056. I have reviewed the following Exhibits submitted by the Plaintiff:

- Exhibit I - Affidavit of Attorney Thomas A. Skidmore, Esq.

- Exhibit I (A) - Itemization of Time and Expenses submitted by Attorney Thomas A. Skidmore, Esq.
- Exhibit 3 -Judgment Entry filed January 22, 2015

In the Judgment Entry filed January 22, 2015, Judge Richard Reinbold found that the legal issues in this matter were complex and required counsel to become well versed in a number of different areas from environmental law, (both federal and state) to bankruptcy law to public administration law to real estate law. Judge Reinbold found that this case was labor intensive and required a high level of skill. My finding is consistent in that I also find that the legal issues were complex and that the case which culminated in trial was labor intensive.

I find the experience, reputation and

ability of Attorney Skidmore substantiates the hourly rate(s) as set forth in Exhibit 1 and Exhibit 1(A) and that said hourly rates are appropriate for the Summit County area.

Defense counsel has had an opportunity to review Plaintiffs Exhibit 1 and Exhibit I A and concedes that if the attorney's fees are awarded the hourly rate is reasonable and necessary. Defense counsel argues though that attorney's fees should not be awarded for both trials or the appeal which followed Judge Parkers ruling which overturned the Jury Verdict from the first trial and granted the Defendants a new trial.

I find that the attorney's fees submitted by Plaintiffs' counsel in the above-entitled action are both reasonable and necessary, however I find the attorney's fees beginning of the first day

of trial on May 12, 2014, running through the granting of the Motion for New Trial and the subsequent Appeal filed by the Plaintiffs, to be excluded from consideration and this award. According to Exhibit 1(A) - the excluded period would run from May 12, 2014 until September 14, 2016.

THEREFORE, consistent with the finding of the Jury to award the Plaintiff their attorney fees, I hereby award Thomas A. Skidmore/Thomas A. Skidmore Co., L.P.A. Forty-Eight Thousand Sixty-Two Dollars and Fifty-Five Cents ($48,062.55).

PREJUDGMENT INTEREST

The Plaintiff has further moved the Court to award prejudgment interest on the jury award of $37,700 for Breach of Contract, the jury award

of $5,000.00 for Fraud and upon the award for punitive damages in the amount of $165,000.00.

Pursuant to the finding of Judge Richard D. Reinbold and consistent as set forth herein in the breach of contract action, prejudgment interest is mandatory and the determination of the starting date upon which the calculation should begin. See *Zeck v. Sokol,* 9th Dist. No. 07CA0030-M, 2008-Ohio- 727. "The award of prejudgment interest is compensation to the Plaintiff for a period of time between the accrual of the claim and judgment." *Royal Elec. Corp. v. Ohio State University,* 73 Ohio St. 3d 110 (1995). "Each case involved different facts and it is the job of the ... court to determine the appropriate date based on the evidence before it." *Hutchenson v. State Auto Ins. Co.,* 9th Dist. No. 2063666, 2002 WL 121202, (Jan. 20, 2002). See also *R.C. 1343.03.*

Judge Richard D. Reinbold found that the accrual of the Plaintiffs' claims arose July 7, 2002 under the case law as cited above. With this finding, I agree. The prejudgment interest shall run from the period forward under the breach of contact claim consistent with the attached Schedule A in the amount of Twenty-Six Thousand Four Hundred Eighty-Five Dollars and Seven Cents ($26,485.07) on the jury's award on the Plaintiffs breach of contract claim. In addition, the prejudgment interest on the jury's award on the Plaintiffs fraud claim as set forth in the attached Schedule A in the amount of $3,341.66 which is calculated from July 7, 2002.

The Court hereby finds that prejudgment interest is not appropriate to award to the jury's verdict on punitive damages. Therefore, the Plaintiff is not entitled to prejudgment interest on

the jury's verdict on punitive damages.

THEREFORE, this Court Grants Final Judgment and awards to the Plaintiffs, Shawn Herhold and Malavanh Herhold aka Malavanh Rassovong as against the Defendants Smith Land Company, LLC and Robert Smith jointly and severally as follows:

1. The sum of THIRTY-SIX THOUSAND SEVEN HUNDRED DOLLARS AND NO CENTS ($36,700.00) on the Breach of Contract claim and Jury Verdict and Award filed July 24, 2017;

2. The sum of TWENTY-SIX THOUSAND FOUR HUNDRED AND EIGHTY-FIVE DOLLARS AND SEVEN CENTS ($26,485.07) in Prejudgment Interest on the Breach of Contract claim and Jury Verdict and Award;

3. The sum of FIVE THOUSAND THREE

HUNDRED DOLLARS AND NO CENTS ($5,300.00) on the Fraud claim and Jury Verdict and Award filed July 24, 2017;

4. The sum of THREE THOUSAND THREE HUNDRED AND FORTY- ONE DOLLARS AND SIXTY-SIX CENTS ($3,341.66) in Prejudgment Interest on the Fraud claims and Jury Verdict and Award;

5. The ONE HUNDRED AND SIXTY-FIVE THOUSAND DOLLARS AND NO CENTS ($165,000.00) on the Punitive Damage claim and Jury Verdict and Award filed July 25, 2017;

6. The sum of FORTY-EIGHT THOUSAND SIXTY-TWO DOLLARS AND FIFTY-FIVE CENTS ($48,062.55) for attorney fees to Thomas A. Skidmore, Esq. and Thomas A. Skidmore Co., LP.A. pursuant to the Jury Verdict and Award

filed July 25, 2017.

7. Statutory Interest shall run from the filing date hereof;

8. The costs are to be taxed to the Defendants, Smith Land Company, LLC and Robert Smith.

IT IS SO ORDERED.

This is a Final Appealable Order and there is no just cause for delay.

Judge James Kimbler

Sitting by Assignment

#17JA1119

Pursuant to Art. IV, Sec. 6 Ohio Constitution Pursuant to Civ. R. 58(B), the Clerk of Courts shall serve upon all parties otice of this Judgment and its date of entry upon the Journal.

Judge James Kimbler

Sitting by Assignment #17JA1119

Pursuant to Art. IV, Sec. Ohio Constitution

APPENDIX E

STATE OF OHIO

COUNTY OF SUMMIT

IN THE COURT OF APPEALS C.A. No. 28032

NINTH JUDICIAL DISTRICT

SHAWN A. HERHOLD, et al.

Appellees

v.

THE SMITH LAND COMPANY, et al.

Appellants

APPEAL FROM JUDGMENT ENTERED IN THE

COURT OF COMMON PLEAS,

COUNTY OF SUMMIT OHIO

CASE No. CV2008 05 3634

DECISION AND JOURNAL ENTRY

Dated: July 13, 2016

SCHAFER, Judge

{¶1} Plaintiff-Appellants, Shawn Herhold and Malavanh Herhold (collectively "the Herholds"), appeal from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This appeal stems from the sale of certain property on Brunsdorf Road in Fairlawn, In July 2002, the Herholds purchased the property from Defendant-Appellees, Smith Land Company, LLC ("Smith Land") and its president, Robert Smith (collectively, "the Defendants"), According to the Herholds, the Defendants represented to them that they would be able to build a home on the property, Following their purchase, however, the Herholds discovered that the property suffered from a material

defect and was not suitable for building, The Herholds brought suit against the Defendants for breach of contract, breach of the warranty of title, fraud, misrepresentation, and fraudulent concealment/inducement. They alleged that the Defendants failed to disclose the fact that the property "was comprised of substantial wetlands and illegal fill which severely restricted [its] use and purpose • • • ." The Herholds sought compensatory damages, punitive damages, interest, and attorney fees.

{¶3} Following an unsuccessful motion to dismiss the Herholds' complaint for failure to state a claim, the Defendants filed their answer and, subsequently, a motion for summary judgment. The court denied the motion for summary judgment and set the matter for trial. The trial was delayed for some

time, however, due to the occurrence of several events. First, Smith Land filed for bankruptcy and the Herholds had to obtain relief from the automatic bankruptcy stay in federal court. Second, the Defendants' counsel withdrew and, once they obtained new counsel, he filed a motion to disqualify the Herholds' counsel. Third, after the court denied the motion to disqualify, the Defendants appealed from the denial; the result of which was a dismissal for lack of a final, appealable order. *See Herhold, et al. v. Smith Land Company, LLC, et al.,* 9th Dist. Summit No. 27174 (Jan. 6, 2014). Following the resolution of all of the foregoing issues, the matter went to trial. At trial, the Herholds dismissed their claim against the Defendants for breach of warranty of title.

{¶4} The jury found in favor of the Herholds and awarded them $55,000 on their breach of contract claim, $65,000 on their fraud claims, and

$35,000 in punitive damages. Additionally, the jury determined that the Herholds should be awarded their attorney fees. On May 20, 2014, the trial court issued a journal entry, memorializing the jury's verdict and setting the matter for a hearing on the amount of attorney fees to be awarded. The Herholds then filed a motion for prejudgment interest. Before either issue was resolved, however, the Defendants appealed from the jury's award. This Court once again dismissed the attempted appeal for lack of a final, appealable order. *See Herhold, et al.* v. *Smith Land Company, et al.,* 9th Dist. Summit No. 27404 (June 26, 2014).

{¶5} Following this Court's dismissal, the Ohio Supreme Court assigned a visiting judge to the case. The visiting judge held a hearing on the amount of attorney fees to be awarded as well as on the issue of prejudgment interest. On January 22,

2015, the visiting judge awarded the Herholds $39,744 in attorney fees, $32,407.82 in prejudgment interest on their contract claim, and $36,854.91 in prejudgment interest on their fraud claims. The visiting judge then stepped aside, and the original trial judge returned to preside over the matter.

{¶6} On February 19, 2015, the Defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial. The Herholds sought to strike the motion on the basis of timeliness, but the trial court determined that the motion was timely. The Herholds then filed a brief in opposition to the motion, and the Defendants filed a reply.

{¶7} Before the trial judge could rule on the Defendants' motion, Mr. Smith filed an affidavit of disqualification with the Ohio Supreme Court, seeking to remove her from the case. The Defendants'

counsel then filed a motion to withdraw from representation because Mr. Smith had filed the affidavit without consulting him. The Supreme Court ultimately denied the affidavit of disqualification, but the trial judge nevertheless recused herself from the case. The matter was reassigned to another judge, who also recused herself, and a third, who likewise recused herself.

{¶8} On September 21, 2015, the fourth trial judge issued an order on the Defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court granted judgment notwithstanding the verdict to Mr. Smith on the issue of whether he was individually liable for a breach of contract. Because the Herholds did not present evidence that would have allowed them to pierce the corporate veil, the court determined, it entered judgement in Mt. Smith's favor on their

breach of contract claim. The court refused, however, to enter a judgment notwithstanding the verdict in favor of: (1) Smith Land on the breach of contract claim, or (2) the Defendants on the fraud claims.

{¶9} As to the Defendants' alternative request for a new trial, the court announced that it "anticipated ruling" in the Defendants' favor. The court wrote that the jury's damage award appeared to be excessive and contrary to law because: (1) it awarded damages on two claims even though the jury instructions alleged identical conduct in support of each claim; and (2) the jury instructions inadequately defined the measure of the damages. The court further wrote that a new trial was warranted because the instructions presupposed certain matters had been decided and "unduly emphasized [the Herholds'] theory of the case." Nevertheless, the court did not grant the Defendants' motion in its September 21st

ruling. Because the court acknowledged that it had "founded its conclusion on grounds not asserted by [the Defendants]" in their motion, it set the matter for further hearing. The court ruled that, pursuant to Civ.R. 59(D), a hearing would be held for the purpose of allowing the Herholds an opportunity to be heard on the court's "anticipated ruling."

{¶10} On October 1, 2015, the court held a hearing to address the issue of its "anticipated ruling" on the Defendants' request for a new trial. Following the hearing, the Herholds moved for a new trial on the issue of Mr. Smith's individual liability on their breach of contract claim. On November 4, 2015, the court granted the Herholds' request for a new trial on the issue of Mr. Smith's individual liability. Further, it granted the Defendants' request for a new trial on all of the Herholds' other claims. In doing so, the court "affirm[ed] and incorporate[d]

*** the reasoning from its September 21st order ***."

{¶11} The Herholds now appeal from the trial court's judgment and raise three assignments of error for our review. For ease of analysis, we rearrange the assignments of error.

II.

ASSIGNMENT OF ERROR III

THAT SMITH AND SMITH LAND COMPANY'S MOTION FOR JNOV AND NEW TRIAL WAS NOT TIMELY FILED AND THEREFORE THE LOWER COURTS GRANTING SMITH JUDGMENT NOTWITHSTANDING THE VERDICT AND BOTH SMITH AND SMITH LAND A NEW TRIAL IS IN ERROR.

{¶12} In their third assignment of error, the Herholds argue that the trial court erred by

considering the Defendants' motion for judgment notwithstanding the verdict because it was untimely. We disagree.

{¶13} Civ.R. 50(B) governs motions for judgment notwithstanding the verdict. The rule provides, in relevant part, that

> [w]hether or not a motion to direct a verdict has been made or overruled and not later than twenty-eight days[2] after entry of judgment, a party may serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion ***.

Civ.R. 50(B). The Herholds argue that the trial court erred by granting the Defendants' motion for judgment notwithstanding the verdict because the Defendants filed their motion more than 28 days after

the court entered its judgment in this matter. According to the Herholds, the judgment in this matter was entered on May 20, 2014.

{¶14} The trial court's May 20, 2014 journal entry memorialized the jury's verdict in this matter. That entry was not a final judgment, however, because the trial court still had to resolve the outstanding issues of attorney fees and prejudgment interest. *See* Civ.R. 54(A) ("' Judgment' *** includes a decree and any order from which an appeal lies as provided in [R.C.] 2505.02 * * *."); *Herhold, et al. v. Smith Land Company, et al.,* 9th Dist. Summit No. 27404 (June 26, 2014) (dismissing appeal because court had yet to issue a final judgment). The court resolved those issues and entered its judgment on January 22, 2015. The final judgment in this matter, therefore, was entered on that date. The Defendants then filed their motion for

judgment notwithstanding the verdict on February 19, 2015. Because the Defendants filed their motion within 28 days of the entry of judgment, their motion was not untimely, and the trial court did not err by considering it. The Herholds' third assignment of error is overruled.

ASSIGNMENT OF ERROR I

THAT THE LOWER COURT ERRED AS A MATTER OF LAW WHEN, ON ITS OWN INITIATIVE, MORE THAN FOURTEEN DAYS AFTER ENTRY OF JUDGMENT ORDERED A NEW TRIAL IN VIOLATION OF RULE 59(D) OF THE OHIO RULES OF CIVIL PROCEDURE.

{¶15} In their first assignment of error, the Herholds argue that the trial court erred when it granted the Defendants a new trial, on its own initiative, beyond Civ.R. 59(D)'s prescribed time limit. We do not agree that the court's ruling was untimely.

{¶16} Civ.R. 59(D) provides for the granting

of a new trial "[o]n initiative of court." The rule provides as follows:

> Not later than twenty-eight days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.
>
> The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

Under Civ.R. 6(B), a trial court "may not extend the time for taking any action under * • • Civ.R. 59(D) • • •, except to the extent and under the conditions stated in [that rule]."

{¶17} In their appellate brief, the Herholds rely upon a former version of Civ.R. 59(D). The former version of the rule contained a 14-day time limit. Much like Civ.R. 50(B), the rule was amended, effective July 1, 2013, to increase the prescribed time limit to 28 days. The amendment applied to all actions then pending, "except to the extent that [its] application in a particular action * * • would not be feasible or would work injustice • • • ." Civ.R. 86(JJ). Because the Herholds filed this action in 2008, it was pending when the amendment to Civ.R. 59(D) went into effect.

{¶18} In ruling on the Herholds' motion to strike the Defendants' motion for judgment notwithstanding the verdict or, alternatively, a new trial, the trial court employed the amended versions of both Civ.R. 50(B) and Civ.R. 59(D). Relevant to this assignment of error, the court found that "a motion for new trial

• • • can be made either before or after a final, appealable order, but no later than 28 days after the final, appealable order." The Herholds never argued that the 28-day time limit should not apply because it "would not be feasible or would work injustice." *Id.* Moreover, on appeal, they rely upon the amended version of Civ.R. 50(B) in support of their third assignment of error. That assignment of error concerns the portion of the Defendants' motion that requested judgment notwithstanding the verdict. The Herholds have not explained why this Court should apply two different versions of the Civil Rules to the same motion. *See* App.R. l6(A)(7). Because this suit was pending when the amendment to Civ.R. 59(D) went into effect and the Herholds have not argued that it was error for the lower court to rely on the amended version of the rule, we likewise rely on it in addressing the Herholds' argument.

{"¶19} Civ.R. 59(D) consists of two paragraphs. The first paragraph addresses a court's ability to order a new trial, on its own initiative, when no one has moved for a new trial within the prescribed time limit. *See Stackhouse* v. *Logangate Property Mgt.,* 172 Ohio App.3d 65, 2007-Ohio-3171, ¶ 31-32 (7th Dist.); *Cleveland* v. *8409 Euclid Ave., Inc.,* 8th Dist. Cuyahoga Nos. 46555, 46630, 46739 & 46740, 1984 WL 4505, *3-4 (Mar. 2, 1984). In those instances, a trial court only has 28 days to order a new trial "for any reason for which it might have granted a new trial on motion of a party." Civ.R. 59(D). *See also CitiBank* v. *Abu-Niaaj,* 2d Dist. Green No. 2011 CA 45, 2012-Ohio-2099, ¶ 13. The second paragraph of Civ.R. 59(D) addresses a court's ability to order a new trial when (I) a timely motion has been filed, but (2) the court intends to grant the new trial "for a reason not stated in the party's motion." Civ.R. 59(D). In

those instances, the rule does not place a time limit on the court's ruling. *See Stackhouse* at **'1[** 32; *see also Kelly* v. *Moore,* 376 F.3d 481,481 (5th Cir.2004) (interpreting the federal version of the rule).

{¶20} As previously noted, the Defendants' filed their motion for judgment notwithstanding the verdict or, alternatively, a new trial within 28 days of the entry of judgment in this matter. Their motion indicates that it was served upon the Herholds that same day, and the Herholds have not disputed service. Therefore, the Defendants' motion was timely filed under Civ.R. 59. *See* Civ.R. 59(8). Because their motion was timely filed, the second paragraph of Civ.R. 59(D) applied to the court's ruling, and it was not subject to the 28-day time limit contained in the first paragraph of the rule. *See* Civ.R. 59(D); *Stackhouse* at ¶ 32-33. *See also Kelly* at 481. We, therefore, reject the Herholds' argument that the

trial court issued a ruling beyond Civ.R. 59(D)'s prescribed time limit. The Herholds' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THAT THE LOWER COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED A NEW TRIAL TO SMITH LAND AND SMITH[.]

{¶21} In their second assignment of error, the Herholds argue that the trial court erred by granting the Defendants' motion for new trial. Because the trial court based its decision on items that are not a part of the record, this Court must presume regularity and affirm the trial court's decision.

{¶22} "[A]n appellate court's review is restricted to the record provided by the appellant to

the court. Accordingly, the appellant assumes the duty to ensure that the record, or the portions necessary for review on appeal, is filed with the appellate court." (Internal citations and quotations omitted.) *Bank of Am., NA. v. Wiggins,* 9th Dist. Wayne No. 14AP0033, 2015-Ohio- 4012, ¶ 13. *Accord Lunato v. Stevens Painton Corp.,* 9th Dist. Lorain No. 08CA009318, 2008- Ohio-3206, ¶ 11 ("This Court has repeatedly held that it is the duty of the appellant to ensure that the record on appeal is complete."). "When the record is incomplete, this Court must presume regularity in the trial court's proceedings and affirm its decision." *Helms v. Gains,* 9th Dist. Summit No. 27616, 2015-0hio-4000, ¶4.

{¶23} The trial court here ordered a new trial because it concluded that,

> upon review of the jury's verdicts, its answers to interrogatories, the manner in which the jury was instructed, the phrasing of the jury interrogatories, and the damages awarded, * * * the jury's verdicts and damage awards and the resulting judgment were contrary to law, and not sustained by the weight of the evidence.

The court wrote that the jury's damage awards appeared to be duplicative because the jury instructions did not differentiate between the conduct in support of the breach of contract claim and the conduct in support of the fraud claims. The court further wrote that the instructions "unduly emphasized [the Herholds'] theory of the case" and were "misleading" and grammatically unsound. Additionally, the court found fault with the instructions insofar as they defined the

different measures of damages because it found the instructions to be incomplete in several respects. The court ultimately concluded that the jury was not properly instructed and that a new trial was "required under the circumstances."

{¶24} Upon review, the record does not contain any of the trial exhibits or a copy of the jury instructions that the court read to the jury. On April 29, 2014, both parties filed proposed jury instructions. Neither the parties, nor the court, however, ever filed the finalized jury instructions that were read to the jury at trial. When the Defendants filed their motion for judgment notwithstanding the verdict or, alternatively, a new trial, they had an expedited transcript prepared and filed that transcript in the lower court. The transcript they filed, however, does not include the jury instructions,

and the Herholds never had a separate transcript prepared. The record, as filed, only contains the transcript of the testimony given at trial. It does not contain any discussions regarding the jury instructions, the instructions themselves, or the exhibits.

{¶25} We note that, in setting forth its "anticipated ruling" on the Defendants' motion, the trial judge quoted from the jury instructions. The judge did not elaborate as to how he secured the instructions, given that no one filed them and given that he was not the judge who presided over the trial in this matter. Even assuming that the instructions upon which he relied were, in fact, the same instructions given to the jury, however, this Court cannot rely on the quoted portions of the instructions to reach a decision in this matter. The trial judge did not quote the

instructions in their entirety and took issue with them, in part, because he found them to be incomplete. Without the complete instructions, as read to the jury at trial, this Court cannot determine whether the trial court erred in reaching its ruling.

{¶26} This Court is not without sympathy for the Herholds. They waited six years for this matter to go to trial and then discovered, another 16 months later, that the fourth trial judge in this matter was vacating the unanimous jury verdicts in their favor. Because the Herholds are the appellants here, however, it was their burden to ensure that the record was complete and contained all of the portions necessary for review on appeal." *Wiggins,* 20I5-Ohio-40I2, at ¶ 13. Accord-Lunato, 2008-Ohio-3206, at ¶ 11. Without the portions of the record necessary to

review the trial court's ruling in this matter, this Court has no choice but to "presume regularity in the trial court's proceedings and affirm its decision." *Helms,* 2015-Ohio-4000, at ¶ 4. Accordingly, the Herholds' second assignment of error is overruled on that basis.

III.

{¶27} The Herholds' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of

this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

JULIE A. SCHAFER

FOR THE COURT

MOORE, P.J.

WHITMORE, J

APPENDIX F

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

CASE NO. CV 2008-05-3634

JUDGE TOM PARKER

FINAL JUDGMENT ENTRY

(Final and Appealable)

SHAWN A. HERHOLD, et al.

Plaintiffs,

-vs-

SMITH LAND COMPANY, LLC, et al.

Defendants,

In an order dated September 21, 2015, the court indicated that it intended to grant judgment notwithstanding the verdict on

plaintiffs' breach of contract claim against Defendant Robert G. Smith and to grant defendants' motion for a new trial on the remaining claims involved in this lawsuit. Because the court was considering ordering a new trial on grounds not stated in defendants' motion, the court gave notice of a hearing on October 1, 2015 in conformance with Civil Rule 59(D).

On October 1, 2015, the court conducted a hearing at which counsel for both plaintiffs and defendants were present. Both attorneys stated their arguments on the record related to the court's September 21, 2015 order.

On October 19, 2015, plaintiffs, Shawn A. Herhold and Malavanh Herhold, also filed a

written response to the court's order. In their response, plaintiffs requested the court to reconsider its decision to grant a new trial in this case. Plaintiffs cited, in part, the lengthy and difficult history between the parties to this action and his desire to reach a conclusion of this case. Plaintiffs also moved, in accordance with Civil Rule 59(C)(2), for a new trial on the breach of contract claim against Defendant Robert G. Smith, urging the court not to enter judgment notwithstanding the verdict as to that claim.

On October 29, 2015, defendants, Robert G. Smith and The Smith Land Company. filed a response joining in plaintiffs' request for a new trial. However, defendants requested that the court grant a new trial on all of the claims, not merely on the claim upon which the court had

indicated that it intended to grant judgment notwithstanding the verdict.

Upon due consideration of the facts and procedural history of this case, the arguments presented at the October 1st hearing, plaintiffs' response to the court's order, defendants · response, Civil Rule 59 and other applicable law, the court hereby orders as follows:

I. The court hereby DENIES, in part, and GRANTS, in part, plaintiffs' motion to reconsider. Because the court is granting plaintiffs' request for a new trial on the breach of contract claim against Defendant Robert G. Smith, it will not enter final judgment notwithstanding the verdict as to that claim;

2. The court hereby GRANTS plaintiffs' request

for a new trial as to the breach of contract claim against Defendant Robert G. Smith;

3. The court affirms and incorporates herein the reasoning from its September 21" order and hereby GRANTS defendants' motion for a new trial on the other claims asserted by the parties to this lawsuit; and

4. The court hereby schedules a status conference to take place on **December 9, 2015 at 8:30 a.m.** for the purpose of scheduling.a new trial date. However, if any party has appealed the court's decision, the case will be stayed and the December 9th status conference will not go forward.

IT IS SO ORDERED.

This is a final appealable order, with no just cause for delay.

Tom Parker

JUDGE TOM PARKER

Pursuant to Civ.R. 58(8), the Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry on the Journal.

Tom Parker
JUDGE TOM PARKER

Attorney Thomas A. Skidmore
Attorney Bradley S. LeBoeuf

CR:KAS

08-363402

APPENDIX G

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

CASE NO. CV 2008-05-3634

JUDGE CALLAHAN

JUDGMENT ENTRY

SHAWN A. HERHOLD, et al.

Plaintiffs,

-vs-

SMITH LAND COMPANY, LLC, et al.

Defendants,

This matter came before the Court for a Jury Trial on Plaintiffs' Complaint on May 12, 2014. Plaintiffs' Complaint contained six causes of actions: breach of contract (Count 1), breach of warranty of title (Count 2), fraud (Count 3),

misrepresentation (Count 4), fraudulent concealment/inducement (Count 5), and negligence (Count 6). The named Defendants included Smith Land Company, Inc., Robert G. Smith, Lawyer's Title Insurance Corporation, Sherri Costanza, and Stouffer Realty.

Plaintiffs dismissed, without prejudice, Defendants Sherri Costanza and Stoufer Realty on December 30, 2008. Additionally, Plaintiffs dismissed, without prejudice, Defendant Lawyer's Title Insurance Corporation on September 9, 2009 regarding Count 6 of the Complaint. Lastly, Plaintiffs orally dismissed, without prejudice, Count 2, breach of warranty of title, on May 15, 2014, during the jury trial. For purposes of the jury trial, the only remaining Defendants were Smith Land Company, Inc. and Robert G. Smith

as to Plaintiffs' claims of breach of contract (Count 1), fraud (Count 3), misrepresentation (Count 4), and fraudulent concealment/inducement (Count 5).

Defense counsel orally moved on May 12, 2014, prior to the jury trial beginning, to bifurcate the punitive damages from the compensatory damages as to the fraud claims. Defendants' oral motion for bifurcation was granted and the jury trial proceeded against Defendants Smith Land Company, Inc. and Robert G. Smith as to the issues of liability and compensatory damages for the breach of contract and fraud claims.

The Jury was sworn and impaneled on May 12, 2014. The Jury returned a general verdict on May 16, 2014 in favor of Plaintiffs Shawn and Malavanh Herhold and against Defendants Smith

Land Company, Inc. and Robert G. Smith as to the breach of contract and fraud claims. The Jury awarded Plaintiffs Shawn and Malavanh Herhold $120,000.00 in total compensatory damages. This compensatory damages award represented $55,000.00 for the breach of contract claim and $65,000.00 for the fraud claims.

In light of the Jury's compensatory damage award as to the fraud claims, the Jury returned on May 19, 2014 for the second phase of the trial regarding the issue of punitive damages and attorney fees. The Jury returned a general verdict on May 19, 2014 in favor of Plaintiffs Shawn and Malavanh Herhold and against Defendants Smith Land Company, Inc. and Robert G. Smith as to punitive damages and attorney fees. The Jury awarded Plaintiffs Shawn and Malavanh Herhold

$35,000.00 in punitive damages and attorney fees in an amount to be determined by the Court in a future hearing.

The Jury having returned its verdict in favor of Plaintiffs Shawn and Malavanh Herbold in the amount of $120,000.00 for compensatory damages, $35,000.00 for punitive damages, and attorney fees, the Court hereby adopts the verdict of the Jury and finds the issues in this case in favor of Plaintiffs Shawn and Malavanh Herhold and against Defendants Smith Land Company, Inc. and Robert G. Smith and awards $120,000.00 for compensatory damages, $35,000.00 for punitive damages, and attorney fees to Plaintiffs.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is rendered in

favor of Plaintiffs Shawn and Malavanh Herbold and against Defendants Smith Land Company, Inc. and Robert G. Smith. Plaintiffs Shawn and Malavanh Herbold are awarded $120,000.00 for compensatory damages, $35,000.00 for punitive damages, and attorney fees in an amount to be determined pending a future hearing. Costs taxed to Defendants Smith Land Company, Inc. and Robert G. Smith.

IT IS FURTHER ORDERED, ADJUDGE AND DECREED that an **evidentiary hearing** regarding the reasonableness of Plaintiffs' attorney fees will be held on **May 30, 2014 at 10:30 a.m.** Counsel is ordered to be prepared to proceed with live testimony and

other evidentiary support as to the reasonableness of the attorney fees at the hearing.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Attorney Thomas A. Skidmore

Attorney Warner Mendenhall

APPENDIX H

DEPARTMENT OF THE ARMY

HUNTINGTON DISTRICT, CORPS OF ENGINEERS

502 EIGHTH STREET

HUNTINGTON , WEST VIRGINIA 25701 ·2070

April 14, 2000

Operations and Readiness

Division Regulatory Branch

UN Trib Pigeon Creek 199900682

Ms. Karen Smith Smith Land Company
2891 Hudson-Aurora Road
Hudson, Ohio 44236

Dear Ms. Smith: ·

I refer to a letter received on March 2, 2000,

submitted by the Flickinger Group on behalf of the Smith Land Company, requesting authorization to place fill or dredged material into 0.945 acre of jurisdictional wetland. The proposed fill area is located above the headwaters of an unnamed tributary to Pigeon Creek in the City of Fairlawn, Summit County, Ohio. The proposed project involves the construction of a residential, single-family housing development on the 10-acre parcel. To mitigate for impacts to jurisdictional wetlands, the Smith Land Company proposes to purchase 2 acres of wetlands at the Cleveland Museum of Natural History Singer Bog in lieu fee program in the City of Green, Summit County and Jackson Township, Stark County, Ohio.

It has been determined that your work meets the criteria for Nationwide Permit (NWP)

Number 26 under the December 13, 1996 Federal Register, Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits (61 FR 65874). The Ohio Environmental Protection Agency issued 401 Water Quality Certification for this Nationwide Permit.

This verification is valid until February 11, 2002. If you have commenced or are under contract to commence this activity prior to the above date, you will have twelve additional months from the above date to complete the activity under the present terms and conditions of this nationwide permit.

In view of the above, your project is permitted subject to the terms and conditions of the enclosed material. It is your responsibility to

ensure that your work conforms to all of the environmental management conditions listed within the enclosed material. Upon completion of the work. the attached certification must be signed and returned to this office.

Any impacts to the remaining 4.609 acres of jurisdictional wetlands on the subject property would require authorization from this office. Please be aware that the nationwide permit authorization does not obviate the requirement to obtain state or local assent required by law-for the activity. ff you-have any

questions concerning the above, please contact Lee-A. Marcum at 304-529-5210.

Sincerely,

James M. Richmond

Chief, North Permit Section

Enclosures

Copy furnished:

Eric.Flickinger

Flickinger Wetland Services Group,

Inc. 7000 South Edgerton Road Suite

106

Cleveland, Ohio 44141

APPENDIX I

QUIT CLAIM DEED

Smith Land Co., Inc., an Ohio Corporation, for valuable consideration paid, grants, to the Smith Land Co. whose tax mailing address is 2891 Hudson Aurora Road, Hudson, Ohio 44236, the following property: Legal description is attached as Exhibit "A".

Prior Instrument Reference:

PM# PPN:

Witness my hand this 11th day of May, 2000.

Debra J. Simon	Robert G. Smith
Witness	Smith Land Co., Inc By Robert G. Smith, Pres.
Jennifer L. Unrue	
Witness	

State of Ohio } SS

County of Summit}

The foregoing instrument was acknowledged before me this 11th day of May, 2000 by Robert G. Smith, President of Smith Land Co., Inc. on behalf of the Corporation.

In Testimony Whereof I have I have hereunto set my hand and official seal, at Akron, Ohio this 11th day of May, 2000.

Jennifer L. Unrue Notary Public

This instrument prepared by

Attorney Karen Edwards-

Smith

CITY OF FAIRLAWN ZONING INSPECTOR

As approved by the

Fairlawn Planning Commission

This 13th day of April, 2000

L. V. Triola

Lawrence V. Triola

Building Zoning Inspector

TRANSFERRED IN COMPLIANCE

WITH SEC 319.202 REV. CODE

JAMES B. MCCARTHY, COUNTY AUDITOR

GBC DESIGN, INC.

245 S. Frank Boulevard, Akron, Ohio 44313

Phone 330-836-0228

Email gbc@gbcdesign.com

April 7,2000

LEGAL DESCRIPTION

THE SMITH LAND COMPANY, INC. WOODBURY ESTATES, BLOCK "A" PARCEL C

Situated in the City of Fairlawn, County of Summit, State of Ohio and known as being part of Original Lot 14 formerly Copley Township and also known as being part of Block "A" of Woodbury Estates as Recorded in Rec. #54363296 of the Summit County Records and more fully described as follows;

Beginning at a 2" pipe found at the northeasterly

comer of said Block "A";

Thence S 00° 30' 48" E along the easterly line of said Block "A" a distance of 223.84 feet to a 5/8" capped rebar (GBC Design, Inc.) to be set at the True Place of Beginning for the parcel of land herein described;

Thence continuing S 00° 30' 48" E along the easterly line of said Block "A" a distance of 111.92 feet to a 5/8" capped rebar (GBC Design, Inc.) found;

Thence S 89° 29' 12" W along the southerly line of said Block "A" a distance of 298.70 feet to a 5/8" capped rebar (GBC Design, Inc.) found;

Thence N 00° 30' 48" W along the westerly line of said Block "A" a distance of 20.21 feet to a 1" rebar found;

Thence N 16° 11' 11" E Block "A", a distance of 95. 75 feet to a 5/8" capped rebar (GBC Design, Inc.) to be set;

Thence N 89° 29' 12" E a distance of 271.18 feet to the True Place of Beginning and containing 0.7385 acres of land, more or less as surveyed in April, 2000 by Louis J. Giffels Registered Surveyor No. 7790 with GBC Design, Inc. but subject to all legal highways
and any restrictions, reservations or easements of record.

_____

Louis J. Giffels

Louis J. Giffels Reg No.7790

APPENDIX J

DEPARTMENT OF THE ARMY

HUNTINGTON DISTRICT,

CORPS OF ENGINEERS 502 EIGHTH STREET

HUNTINGTON, WEST VIRGINIA 25701-2070

February 4, 2004

Operations and Readiness Division Regulatory

Branch Un Trib Pigeon Creek- 199900682-2

Laybourne & Goldsmith

ATIN: Richard L. Goldsmith, Jr. Key Building ·

Suite 900
Akron, Ohio 44308-3880

Dear Mr. Goldsmith:

I refer to your correspondence received November 24, 2003 inquiring if the future owners of three recently platted residential lots (Parcels A-C) owned by Smith Land Company would have to acquire authorization from the U.S. Anny Corps of Engineers to impact wetlands on their property. The property in question is located east of Brunsdorph Drive in the City of Fairlawn, Summit County, Ohio.

By correspondence dated November 4, 1999 it was determined that 5.554 acres of jurisdictional wetland was present within the 10 acre Brunsdorph Drive project area. By letter dated April 14, 2000 Smith Land Company was authorized to place fill or dredged material into 0.945 acre of jurisdictional wetland to facilitate the construction of nine residential building lots. A total of 4.61 acres of jurisdictional wetland was recorded on the plat map

as, "jurisdictional waters of the United States under the Federal Clean Water Act and in order to fill any of the delineated wetlands, not shown on this plat as to be filled, a permit must be obtained from the U.S. Army Corps of Engineers".

The Corps of Engineers authority to regulate waters of the United States is based on the definitions and limits of jurisdiction contained in 33 CFR 328. Navigable waters, their tributaries and adjacent wetlands are waters of the United States subject to the provisions of Section 404 of the Clean Water Act. The wetland limits were determined based on the presence of wetland hydrologic conditions, hydric soils and hydrophytic plant communities as described in the delineation report dated April 6, 1999.

During a recent site investigation conducted on January 12, 2004 by a member of my staff, it was

determined that this wetland system is surrounded by upland and does not present a significant nexus to a water of the United States.

Base on the absence of a hydrological connection or adjacency to a water of the United States, the remaining 4.61 acres of wetland is determined to be an isolated water of the United States. Isolated waters are only regulated under Section 404 of the Clean Water Act when the use, degradation or destruction of which could affect interstate or foreign commerce.

A Department of the Army permit is not required for impacts to this isolated wetland. However, you should contact the Ohio Environmental Protection Agency, Division of Surface Water at 614-644-2001, to determine state permit requirements for isolated wetlands.

If you have any questions concerning the

above, please contact Ms. Lee A. Pittman at 304-399-5210.

Rebecca A. Rutherford

Chief, North Regulatory Section

Copy Furnished:

Mr. Randy Bournique

Ohio Environmental Protection Agency Division of Surface Water

P.O. Box 1049 Columbus, Ohio 43215

Mr. Scott Haley

867 Moe Dr. Suite G Akron, Ohio 44310

Mr. Tom

Skidmore 1

Cascade Plaza

Akron, Ohio 44308