

**IN THE COMMON PLEAS COURT OF
OTTAWA COUNTY, OHIO**

Baycliffs Homeowner's Association, Inc.,	:	Case No. 04-CVH-202
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	:	
Plaintiff,	:	Judge Charles F. Kurfess
	:	
	:	
v.	:	<u>JUDGMENT ENTRY</u>
	:	
	:	
Johnson's Island Property Owner's Association, et. al.	:	
	:	
	:	
Defendants.	:	
	:	

* * * * *

{¶1} This cause comes before the Court upon Plaintiff's Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, Third Motion to Show Cause Why JIPOA Should Not be Held in Contempt and Motion for Sanctions, filed July 21, 2006. Memorandum of Defendant Johnson's Island Property Owner's Association ("JIPOA") in Opposition to Motion for Temporary Restraining Order was filed August 4, 2006. Plaintiff's Supplemental Brief was filed August 9, 2006. A hearing in which evidence related to Plaintiff's Motion was held August 11, 2006. This Court, *sua sponte*, requested that the parties submit

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briefs addressing the language “guests, invitees, and licensees” within this Court’s Decision and Judgment Entry of May 26, 2006 (“Judgment Entry”). Defendant JIPOA’s Memorandum Regarding the Terms “Guests, Invitees, and Licensees” and Plaintiff’s Second Supplemental Brief were filed August 25, 2006.

{¶2} The issues before this Court are (1) whether an injunction should issue prohibiting JIPOA from interfering with the right of Plaintiff Baycliffs Homeowners Association’s (“BHOA”) “guests, invitees, or licensees” to unrestricted access to Johnson’s Island; (2) whether JIPOA may impose a toll upon any “guests, invitees, and licensees” of BHOA members;¹ and (3) whether JIPOA is in contempt of the prior orders of this Court.

{¶3} This Court has thoroughly considered the evidence, exhibits and testimony of the hearing of August 11, 2006. Based on the foregoing, this Court finds that BHOA members and lot owners have an easement appurtenant granting it certain rights of access over and across Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Further, the language “guests, invitees, or licensees” is not ambiguous and need not be further defined. This Court also finds that JIPOA may not impose a toll upon any “guests, invitees, and licensees” of BHOA members and this includes, but is not limited to, garage sales, yard sales or other activities sponsored by BHOA members. Although BHOA is not entitled to a Temporary Restraining Order or Preliminary Injunction, it is entitled to a Permanent Injunction. Finally, this Court finds that JIPOA is in contempt for failure to comply with the previous orders of this Court which clearly state that “BHOA’s easement rights extend to their guests, invitees, and

¹ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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licensees,”² and that “the charging of a toll as a condition of entry is an unreasonable interference with Plaintiff’s easement.”³

{¶4} As a result of JIPOA’s contempt, it is fined \$2,500.00. JIPOA must also reimburse \$2.00 to each named individual that paid a toll to attend the garage sales. As well, this Court finds that Plaintiff is entitled to an award of attorneys fees.

I. BACKGROUND

{¶5} This Court’s Judgment Entry of May 26, 2006, established in pertinent part that: (1) “Plaintiff was granted an easement over * * * Gaydos Drive[], * * * the Causeway and * * * Confederate Drive and Memorial Shoreway Drive[];”⁴ and (2) “Defendant’s imposition of a toll as a condition of obtaining access to Baycliffs Subdivision and Johnson’s Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff’s use of that easement.”⁵

{¶6} In its Judgment Entry of May 26, 2006, this Court also determined that “BHOA’s easement rights extend to their guests, invitees, and licensees,”⁶ and that “the charging of a toll as a condition of entry is an unreasonable interference with Plaintiff’s easement.”⁷

{¶7} This matter is before the Court as a result of the July 15, 2006, garage sales on Johnson’s Island. On this date, numerous members of both BHOA and JIPOA participated in this community-wide garage sale. Although communication took place between BHOA and JIPOA concerning access by those who would be visiting the island for the purpose of attending

² Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

³ Decision & Judgment Entry at 15, ¶31 (May 26, 2006).

⁴ Decision & Judgment Entry at 25, ¶56 (May 26, 2006).

⁵ Decision & Judgment Entry at 26, ¶56 (May 26, 2006).

⁶ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

⁷ Decision & Judgment Entry at 15, ¶31 (May 26, 2006).

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the garage sales, it was not understood that JIPOA intended to charge a toll to those visitors who could not name a BHOA member whose garage sale they intended to visit.⁸ Only those who could identify a BHOA member by name were permitted to pass without charge. BHOA objects to this procedure as interfering with its easement rights and asserts that this Court has already decided the issue of toll-free access.

{¶8} Plaintiff asserts that JIPOA violated this Court’s orders when it charged visitors responding to a general advertisement of garage sales, a toll. It is undisputed that JIPOA charged those visitors who were responding to the garage sale if they did not indicate that they were invited by a specific BHOA member. Defendant asserted in its brief that “Island visitors who merely responded to a general notice of a garage sale on the Island between the hours of 8:00am and 1:00pm do not constitute ‘guests, invitees, or licensees’ within the scope of the Court’s Order.”⁹

{¶9} As a result of JIPOA’s conduct, BHOA filed its Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, Third Motion to Show Cause Why JIPOA Should Not be Held in Contempt and Motion for Sanctions. BHOA is seeking an order prohibiting further interference with its established easement rights, including the right of its “guests, invitees, or licensees,” to pass without being charged a toll. As well, BHOA is seeking an order from this Court holding JIPOA in contempt of the previous orders of this Court and asks that JIPOA be sanctioned.

⁸ On that day, representatives of JIPOA operated the tollgate. JIPOA had rejected BHOA’s offer to have someone at the tollgate to admit guests or invitees.

⁹ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 6.

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II. ANALYSIS

{¶10} At the outset, this Court must determine whether the deed granting BHOA members/lot owners an easement appurtenant is ambiguous and then whether the language of its holding that BHOA's easement rights extend by "necessary implication" to BHOA's "guests, invitees, and licensees," is ambiguous and must be further defined.¹⁰ Only then, can this Court determine: (A) whether an injunction should issue prohibiting JIPOA from interfering with the right of BHOA's "guests, invitees, and licensees" to unrestricted access to Johnson's Island; (B) whether JIPOA may impose a toll upon any "guests, invitees, and licensees" of BHOA members; and (C) whether JIPOA is in contempt of the prior orders of this Court.

A. The Deed and the Easement Granted to BHOA Members/Lot Owners is Not Ambiguous and Need Not be Further Defined

{¶11} Holding that "BHOA's easement rights extend to their guests, invitees, and licensees," this Court relied on *Madej v. Alkop, Inc.*,¹¹ in which the Sixth Appellate Court affirmed the decision of this Court holding that "'by necessary implication' the lot owner's use, access and enjoyment shall extend to their guests, invitees, and licensees." In *Madej*, the trial court rejected appellant's argument that the subdivision plat does not extend the right to use dock space to appellee's guests, invitees and licensees.¹² The trial court held that appellee's rights to their respective dock spaces were set forth in their deeds, not in the plat.¹³ Here, Each BHOA member/lot owner acquired certain rights of way and easements by virtue of a deed which

¹⁰ Decision & Judgment Entry at 11, ¶21 (May 26, 2006). See *Madej v. Alkop, Inc.*, 6th Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787.

¹¹ *Madej v. Alkop, Inc.*, 6th Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787.

¹² *Madej v. Alkop, Inc.*, 6th Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787.

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accorded them rights of access over and across several private roads from the nearest public-access road, Bayshore Road, from the developer of Baycliffs subdivision and Declarant of BHOA, Baycliffs Corp.¹⁴ Baycliffs Corp. acquired these certain rights of access from Johnson's Island, Inc.,¹⁵ which received these rights by warranty deed from Ms. Dorothy Gaydos Saunders.¹⁶

{¶12} Defendant argues that the *Madej* Court “did not analyze the contents of the individual deeds leading to that conclusion, nor did it expound upon the reasoning for its conclusion that such a right extended to the appellees’ guests, invitees and licensees, beyond that it was by ‘necessary implication.’”¹⁷ In *Hollosoy v. Gershkowitz*,¹⁸ the Ninth Appellate Court held, “it is accepted law that the extent of an easement created by conveyance is fixed by the terms of the grant and the circumstances surrounding the transaction.”¹⁹ Thus, Defendant argues that “[i]n light of the changing dynamics introduced by the Court’s most recent Order, the Court should construe ‘guests, invitees, or licensees’ as contemplated by the historical intent of the parties and as narrowly as possible, so that each membership may continue to benefit from proceeds collected via the Tollgate which are indisputably used for the ongoing maintenance and repair of the Causeway and other Island roads.”²⁰ However, in *Hollosoy*, the Appellate Court dealt with the relocation of an easement, and not the use of the easement.²¹ While the *Hollosoy*

¹³ *Madej v. Alkop, Inc.*, 6th Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787.

¹⁴ Amended Complaint, at ¶ 8.

¹⁵ Vol. 366, Pg. 821-823, Ottawa County Records (Quitclaim Deed).

¹⁶ Vol. 225, Page 717 of Ottawa County Records (Warranty Deed). See Amended Complaint, at ¶ 5 (Exhibit 4).

¹⁷ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 7-8.

¹⁸ *Hollosoy v. Gershkowitz* (1950), 88 Ohio App. 198, 98 N.E.2d 314.

¹⁹ See *Henson v. Stine* (1943), 74 Ohio App. 221.

²⁰ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 5-6.

²¹ *Hollosoy v. Gershkowitz* (1950), 88 Ohio App. 198, 98 N.E.2d 314.

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rationale is also persuasive in cases involving the dimensions of an easement,²² it has no application upon the scope and use of an easement by BHOA member/lot owners and their “guests, invitees, or licensees.”

{¶13} Although Defendant argues that this Court “should interpret the deeds held by BHOA members in light of the circumstances surrounding the creation of the easement to ascertain the intent of the parties; and [] where a deed is ambiguous, the construction given the instrument by the parties themselves is the true construction unless the contrary is clearly shown,” it does not assert that the deed is ambiguous.²³

{¶14} The cardinal rule in the construction of deeds is that the parties’ intention at the time of the execution of the instrument controls.²⁴ A deed’s language is conclusively presumed to express the parties’ intention absent uncertainty in the language employed.²⁵ If the language used is clear and unambiguous, extrinsic oral evidence may not be resorted to for purposes of defining and determining the mutual understanding of the parties.²⁶

{¶15} Thus, the words and phrases within the deed must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the deed is consistent with the apparent object and plain intent may be determined.²⁷ Exclusions must be interpreted as applying only to that clearly intended

²² See *Munchmeyer v. Burfield*, 4th Dist. No. 95CA7, 1996 Ohio App. LEXIS 1363.

²³ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 8-9.

²⁴ *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 86, 214 N.E.2d 106, 110-111; *Vale v. Stephens* (1927), 25 Ohio App. 523, 526, 159 N.E. 114, 115.

²⁵ *37 Robinwood Assoc. v. Health Industries, Inc.* (1988), 47 Ohio App.3d 156, 157, 547 N.E.2d 1019, 1020-1021.

²⁶ *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 86, 214 N.E.2d 106, 110-111; *Vale v. Stephens* (1927), 25 Ohio App. 523, 526, 159 N.E. 114, 115.

²⁷ See *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St. 2d 166, 436 N.E.2d 1347.

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exclusion.²⁸ Applying these principles, this Court finds that the language of the deed is not ambiguous. A court cannot create an ambiguity when the plain and ordinary meaning of the language is clear.²⁹

{¶16} As such, JIPOA's emphasis upon the "historical intent of the parties" is disingenuous because it consciously disregards this Court's Judgment Entry of May 26, 2006.

B. "Guests, Invitees, and Licensees," Need Not be Further Defined

{¶17} Defendant argues that "BHOA's most recent Motion typifies how the Court's Order may be misconstrued and expanded to the point of futility," because "it is unclear which type or category of 'invitee' or 'licensee' the Court intended to include within the scope of its Order."³⁰ As an example, Defendant points to BHOA's claim that the garage sale attendees were "business invitees," asserting that this Court's Order does not mention "business invitees."³¹ Defendant suggests that perhaps the Court did not do so because "the Island already had a procedure in place to provide access to those individuals requiring access to the Island for business purposes."³² Defendant also claims that "[w]ith regard to 'guests, invitees, and

²⁸ See *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102; *Moorman v. Prudential Ins. Co.* (1983) 4 Ohio St. 3d 20, 22, 445 N.E.2d 1122, 1124.

²⁹ See *Karabin v. State Auto Mut. Ins. Co.* (1984), 10 Ohio St. 3d 163, 167, 462 N.E.2d 403, 406; *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St. 2d 166, 167-168, 436 N.E.2d 1347, 1348.

³⁰ Defendant Johnson's Island Property Owner's Association's Memorandum Regarding the Terms, "Guests, Invitees and Licensees" as Used in the Court's May 31, 2006 Order, at 10.

³¹ Defendant Johnson's Island Property Owner's Association's Memorandum Regarding the Terms, "Guests, Invitees and Licensees" as Used in the Court's May 31, 2006 Order, at 10.

³² Defendant Johnson's Island Property Owner's Association's Memorandum Regarding the Terms, "Guests, Invitees and Licensees" as Used in the Court's May 31, 2006 Order, at 10-11.

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licensees' of the typical Island resident, a concrete definition will be hard for the Court to fashion."³³ This Court disagrees and finds Defendant's assertions to be disingenuous.

{¶18} In *Hughes v. Dewey*,³⁴ the plaintiff broke her arm while attending a garage sale. The Eighth Appellate Court held that a premises owner owed a duty to exercise ordinary or reasonable care for the protection of his invitees. The Appellate Court further found that Hughes was a business invitee of the Deweys since her presence was in response to their advertisements.

{¶19} In *Englehardt v. Minor*,³⁵ the Ohio Supreme Court held that in considering the duty of the owner of premises to persons who may enter thereon, the law classifies such persons as trespassers, licensees and invitees. The Court stated that "Invitees are those who are invited to come upon the premises, either expressly or impliedly. Inasmuch as the plaintiff in this case came upon the defendant's premises for the mutual benefit of both of them, he was clearly an invitee of the defendant."³⁶

{¶20} In *Aptosos v. Johnson's Island Property Owner's Association*,³⁷ the Sixth Appellate Court initially noted that "the scope of the legal duty for property owners as to those persons entering their property varies depending on the status of such person, *i.e.*, whether the person is an invitee, a licensee, or a trespasser." In this case, the Court observed, "it is

³³ Defendant Johnson's Island Property Owner's Association's Memorandum Regarding the Terms, "Guests, Invitees and Licensees" as Used in the Court's May 31, 2006 Order, at 11.

³⁴ *Hughes v. Dewey*, 8th Dist. No. 49883, 1985 Ohio App. LEXIS 9639.

³⁵ *Englehardt v. Minor* (1939), 136 Ohio St. 73, 23 N.E.2d 829, 1939 Ohio LEXIS 230.

³⁶ 29 Ohio Jurisprudence, 464, Section 60.

³⁷ *Aptosos v. Johnson's Island Property Owner's Association*, 6th Dist. No. OT-02-005, 2003 Ohio 66, 2003 Ohio App. LEXIS 60.

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undisputed that appellants were bicycling onto Johnson's Island to see if their friend, Harold Clagg, was at home, and therefore qualify as licensees."³⁸

{¶21} Moreover, the definition of guests, invitees and licensees is not complicated and can easily be ascertained. Black's Law Dictionary defines "invitee" as one who enters on the land of another (1) "by invitation, express or implied;" (2) "his entry is connected with the owner's business or with a activity the owner conducts or permits to be conducted on his land" and (3) "there is mutuality of benefit to the owner."³⁹ An "invitee" is also a person who is on property of another for the economic benefit of owner or for the economic benefit of both parties. A "licensee" is defined as "[a] person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the processor."⁴⁰ Black's Law Dictionary also goes on to define "licensee by invitation" and "licensee by permission." A "licensee by invitation" is defined as "[a] person who goes upon the lands of another with the express or implied invitation to transact his business with the owner or occupant or do some act to his advantage or to the mutual advantage of the licensee and the owner or occupant."⁴¹ A "licensee by permission," is "[o]ne who, for his own convenience, curiosity, or entertainment, goes upon the premises of another by the owner's or occupant's permission or sufferance."⁴²

{¶22} Finally, a "trespasser" is defined as "[o]ne who intentionally and without consent or privilege enters another's property. One who enters upon property of another without any

³⁸ *Englehardt v. Minor* (1939), 136 Ohio St. 73, 23 N.E.2d 829, 1939 Ohio LEXIS 230. See *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68, 28 Ohio B. 165, 502 N.E.2d 611.

³⁹ Black's Law Dictionary (6 Ed. 1990) 827.

⁴⁰ Black's Law Dictionary (6 Ed. 1990) 921.

⁴¹ Black's Law Dictionary (6 Ed. 1990) 921.

⁴² Black's Law Dictionary (6 Ed. 1990) 921.

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right, lawful authority, or express or implied invitation, permission, or license, not in the performance of any duties to owner, but merely for his own purpose, pleasure, or convenience.”⁴³

{¶23} Those individuals attending the garage sales on Johnson’s Island were clearly not “trespassers” and if they were attending in response to an advertisement, then they were clearly business invitees. A “business invitee” is still an “invitee.” As well, under slightly different circumstances, the same individuals could be considered “licensees,” whether “licensees by invitation,” or “licensees by permission.”

{¶24} Defendant complains that “[i]f BHOA were [sic] able to provide free access to any individual who responded to an advertisement of general circulation, it would render the Court’s Order that JIPOA has a right to own and operate a tollgate to collect monies for the maintenance of certain roads, a nullity.”⁴⁴ This complaint of Defendant is without merit simply because there is a change in when they can charge and for what purpose.

{¶25} Whether or not the operation of a tollgate will continue to be feasible in light of this Court’s clarification of the rights of access afforded BHOA and its guests, invitees and licensees remains to be determined. Had the original grantor not conveyed to BHOA member/lot owners, an easement across Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive, fewer people would have been excluded from paying a toll. But having resolved this issue, the sole dispute between the parties is the extent of each parties’ obligation to contribute to the maintenance, repair and improvement of Gaydos Drive, the Causeway,

⁴³ Black’s Law Dictionary (6 Ed. 1990) 1504.

⁴⁴ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 11.

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Confederate Drive and Memorial Shoreway Drive. However, that issue is not before this Court at this time.

C. Plaintiff is Not Entitled to a Temporary Restraining Order

{¶26} Plaintiff’s request for a temporary restraining order dissolved after fourteen days from the date it was filed. Civil Rule 65(A) restricts the duration of a temporary restraining order to fourteen days unless within such time the court, for good cause shown, extends the order for an additional fourteen days. This Court did not do so, nor was it asked to do so. As well, the party against whom the order is directed can consent to the extension of such temporary restraining order for a longer period.⁴⁵ There is no evidence suggesting that JIPOA has consented to an extension of the temporary restraining order.

D. Plaintiff is Not Entitled to a Preliminary Injunction

{¶27} Civ.R. 65(C) provides that “No * * * preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.” Plaintiffs did not post a bond.

{¶28} Although several Ohio courts have held that as a matter of law, courts are vested with the discretion to allow an injunction to issue with either a “nominal” bond or no bond,⁴⁶

⁴⁵ Civ.R. 65(A). See *Atwood v. Judge* (1977), 63 Ohio App. 2d 94, 409 N.E.2d 1022, 1977 Ohio App. LEXIS 7135.

⁴⁶ *Colquett v. Byrd*, (MC 1979), 59 Ohio Misc. 45, 392 N.E.2d 1328.

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pursuant to Civ.R. 65(C), no application was made to this Court for a “nominal” bond or no bond. As such, no preliminary injunction is operative until a bond is posted.

{¶29} However, the purpose of a preliminary injunction is to preserve a status quo between the parties, pending a trial on the merits.⁴⁷ This Court held in its Judgment Entry filed May 26, 2006, that “Plaintiff was granted an easement over the platted road of Cold Harbor Subdivision (Gaydos Drive), the southerly extension of Gaydos Drive, a triangular piece of the property previously owned by Defendants Charles Gaydos, Gregory Gaydos, and Yonko Gaydos (“Gaydos Defendants”),⁴⁸ the Causeway and the platted roads of the Bay Haven Subdivision (Confederate Drive and Memorial Shoreway Drive);”⁴⁹ and that “Defendant’s imposition of a toll as a condition of obtaining access to Baycliffs Subdivision and Johnson’s Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff’s use of that easement.”⁵⁰ As well, this Court held that “BHOA’s easement rights extend to their guests, invitees, and licensees.”⁵¹

{¶30} Based on this Court’s determination that Plaintiff has a legally enforceable, non-exclusive right of way and easement over and across Gaydos Drive, the Causeway and Confederate Drive and Memorial Shoreway Drive on Johnson’s Island, there is no status quo that needs to be preserved in anticipation of this Court’s ruling. Instead, Plaintiff seeks to prevent

⁴⁷ See, *Consun Food Industries, Inc. v. Fowkes*, (1991), 81 Ohio App.3d 63, 69, 610 N.E.2d 463, 467.

⁴⁸ On February 22, 2006, Plaintiff’s Motion for Leave to File an Amended Complaint was filed, requesting that it be permitted to add a new party Defendant, Jeff G. Campbell, to replace the Defendants. The property owned by the Defendants was sold to Jeff G. Campbell.

⁴⁹ Decision & Judgment Entry at 25, ¶56 (May 26, 2006).

⁵⁰ Decision & Judgment Entry at 25, ¶56 (May 26, 2006).

⁵¹ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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further violations of this Court's order and not to redress a past wrong. As such, a preliminary injunction is not proper since this Court has already ruled on this matter.

E. Plaintiff is Entitled to a Permanent Injunction

{¶31} Plaintiff also seeks a permanent injunction preventing JIPOA from charging any of its guests, invitees, or licensees a toll to access to the Baycliffs subdivision on Johnson's Island.

{¶32} A court has the discretion to order a permanent injunction only when an adequate remedy at law fails to exist.⁵² Further, the trial court has the inherent power to modify or vacate a permanent injunction at any time if the party enjoined demonstrates that the conditions upon which the injunction was issued have materially changed.⁵³

{¶33} A permanent injunction is an equitable remedy that will be granted only where the act sought to be enjoined will cause immediate and irreparable injury to the complaining party and there is no adequate remedy at law.⁵⁴ Observing that "[t]he purpose of an injunction is to prevent a future injury, not to redress past wrongs," the Sixth Appellate Court in *Lemley v. Stevenson*,⁵⁵ stressed that "[t]he law holds a high regard for an individual's right to own property and treats harshly those who infringe upon that right."⁵⁶ Thus, a permanent injunction is an

⁵² See *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 133 N.E.2d 595, syllabus; *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496.

⁵³ *State ex rel. Bosch v. Denny's Place* (1954), 98 Ohio App. 351, 357, 129 N.E.2d 532; *Johnson v. Preston, Dir. of Hwys.* (1967), 12 Ohio St.2d 100, 104, 233 N.E.2d 132; *Newark v. Prince*, 5th Dist. No. CA-3084, 1985 Ohio App. LEXIS 6037; *Del Layne, Inc. v. Davis*, 2nd Dist. No. 82-CA-34, 1983 Ohio App. LEXIS 12701. See *In re Skrha* (1994), 98 Ohio App.3d 487, 497, 648 N.E.2d 908.

⁵⁴ *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, 136, 661 N.E.2d 237; *Strah v. Lake Cty. Humane Soc.* (1993), 90 Ohio App. 3d 822, 831, 631 N.E.2d 165.

⁵⁵ *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, 136, 661 N.E.2d 237.

⁵⁶ *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, 136, 661 N.E.2d 237

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appropriate remedy for a landowner to seek in order to force an adjoining property owner to remove an encroachment.⁵⁷

{¶34} An essential element of injunctive relief involves a balancing process designed to weigh the equities between the parties.⁵⁸ Pursuant to the balancing analysis, the trial court is required “to consider and weigh the relative conveniences and comparative injuries to the parties which would result from the granting or refusal of injunctive relief.”⁵⁹ However, it is not necessary to balance the equities and “put relative hardship into the reckoning in cases where the defendant had acted willfully, and the hardship likely to result if injunction were granted was of his own making.”⁶⁰

{¶35} The decision whether to grant or deny a permanent injunction rests within the sound discretion of the court and depends upon the facts and circumstances present in each individual case.⁶¹ Here, this Court’s Judgment Entry of May 26, 2006, clearly sets forth that “BHOA’s easement rights extend to their guests, invitees, and licensees.”⁶² Further, this Court held that “Defendant’s imposition of a toll as a condition of obtaining access to Baycliffs Subdivision and Johnson’s Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff’s use of that easement.” Finally, there was testimony that JIPOA’s trustees discussed this Court’s Judgment Entry of May 26, 2006, but chose to implement a procedure by which it would charge anyone who could not name a specific BHOA member.

⁵⁷ *Miller v. City of West Carrollton* (1993), 91 Ohio App. 3d 291, 296, 632 N.E.2d 582.

⁵⁸ *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.* (1994), 93 Ohio App. 3d 407, 418, 638 N.E.2d 1056.

⁵⁹ *Miller v. City of West Carrollton* (1993), 91 Ohio App. 3d 291, 296, 632 N.E.2d 582.

⁶⁰ *Miller v. City of West Carrollton* (1993), 91 Ohio App. 3d 291, 298, 632 N.E.2d 582. See, also, *Caldwell v. Goldberg* (1975), 43 Ohio St. 2d 48, 330 N.E.2d 694 (refusing to apply the balancing test when affirming the grant of a permanent injunction).

⁶¹ *Garono v. State* (1988), 37 Ohio St. 3d 171, 173, 524 N.E.2d 496; Lemley, 104 Ohio App. 3d at 136.

⁶² Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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Regardless of JIPOA's intent, such a procedure, even if developed in conjunction with counsel was reckless and reflects a deliberate disregard of the orders of this Court.

{¶36} Plaintiffs have presented by “clear and convincing evidence that immediate and irreparable injury, loss or damage will result to the applicant and that no adequate remedy at law exists.”⁶³ As such, a permanent injunction is proper since an adequate remedy at law has not been shown. Defendants are enjoined from charging a toll to any of BHOA's guests, invitees, and licensees.

F. Defendant is in Contempt of the Prior Orders of this Court

{¶37} Plaintiff asks this Court to hold Defendant in contempt for failing to comply with the Order of this Court which provides that “BHOA's easement rights extend to their guests, invitees, and licensees,”⁶⁴ and that “Defendant's imposition of a toll as a condition of obtaining access to Baycliffs Subdivision and Johnson's Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff's use of that easement.”⁶⁵

{¶38} The burden of proof in a civil contempt proceeding is clear and convincing evidence.⁶⁶ “Clear and convincing evidence is that which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.”⁶⁷ There are three elements in a civil contempt: (1) a prior order of the court; (2) proper notice to the alleged

⁶³ *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St. 2d 51, 378 N.E.2d 145; *Levine v. Beckman* (1988), 48 Ohio App. 3d 24, 548 N.E.2d 267. See *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, 136, 661 N.E.2d 237.

⁶⁴ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

⁶⁵ Decision & Judgment Entry at 26, ¶56 (May 26, 2006).

⁶⁶ *Brown v. Executive 200, Inc.* (1980), 64 Ohio St. 2d 250, 416 N.E.2d 610, 1980 Ohio LEXIS 873.

⁶⁷ *Armco, Inc. v. United Steel Workers of America, AFL-CIO-CLC*, 5th Dist. No. 00-CA-95, 2001 Ohio App. LEXIS 2982; *In re: Ayer* (May 21, 1997), 1st Dist. No. C-960488.

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contemnor; and (3) failure to abide by the court order.⁶⁸ Here, it is undisputed that a prior order of the Court existed, that JIPOA had notice of the order and that it failed to abide by the Court order.

{¶39} JIPOA asserts in its brief that “[e]ven if the Court finds that individuals who responded to BHOA’s advertisement constitute ‘guests, invitees and licensees’ as contemplated by the Court’s Order * * * there is absolutely no evidence that JIPOA knowingly violated or outright ignored the Court’s Order.”⁶⁹

{¶40} But in *McComb v. Jacksonville Paper Co.*,⁷⁰ the United States Supreme Court held that intent is not an element of civil contempt: The absence of willfulness does not relieve from civil contempt * * * An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. And in *Windham Bank v. Tomaszczyk*,⁷¹ the Ohio Supreme Court held that “[t]he purpose of civil contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice.” The Court emphasized that “* * * the purpose of sanctions in a case of civil contempt is to coerce the contemnor in order to obtain compliance with the lawful orders of the court. * * *”⁷² As a result, the Court held that “proof of intent is not required in civil contempt.” Similarly, in *Pugh v. Pugh*,⁷³ the Ohio Supreme Court has ruled that proof of a purposeful, willing or intentional

⁶⁸ *Armco, Inc. v. United Steel Workers of America, AFL-CIO-CLC*, 5th Dist. No. 00-CA-95, 2001 Ohio App. LEXIS 2982. See *Rossen v. Rossen* (1964), 2 Ohio App. 2d 381, 208 N.E.2d 764.

⁶⁹ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 11.

⁷⁰ *McComb v. Jacksonville Paper Co.* (1949), 336 U.S. 187, 93 L. Ed. 599, 69 S. Ct. 497

⁷¹ *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St. 2d 55, 271 N.E.2d 815, syllabus 3.

⁷² *State v. United Steelworkers of America* (1961) 172 Ohio St. 75, 83, 173 N.E.2d 331, 1961 Ohio LEXIS 697, citing *Second National Bank of Sandusky v. Becker* (1900), 62 Ohio St. 289; 56 N.E. 1025; 1900 Ohio LEXIS 218.

⁷³ *Pugh v. Pugh* (1984), 15 Ohio St. 3d 136, 140, 472 N.E.2d 1085. *Pedone v. Pedone* (1983), 11 Ohio App. 3d 164, 165, 463 N.E.2d 656.

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violation of a court order is not a prerequisite for a finding of civil contempt. In fact, the contemnor may even have acted innocently and still be guilty of civil contempt.⁷⁴

{¶41} Thus, this Court finds that Plaintiff has proved by clear and convincing evidence that JIPOA was in contempt of this Court's Judgment Entry of May 26, 2006, when it charged a toll to visitors who "merely responded to a general notice of a garage sale."⁷⁵

{¶42} The purpose of sanctions imposed for civil contempt is to coerce compliance with the underlying order or to compensate the complainant for loss sustained by the contemnor's disobedience. Punishment for civil contempt may, therefore, be either: (1) remedial or compensatory in the form of a fine to compensate the complainant for the contemnor's past disobedience; or (2) coercive and prospective, *i.e.*, designed to aid the complainant by bringing the defendant into compliance with the order, and conditional, wherein confinement may be terminated by the contemnor's adherence to the court's order.⁷⁶

{¶43} Plaintiff asks that "JIPOA and its Trustees be sanctioned on the record in open court at the next hearing date for their flagrant violation of this Court's Order of May 26, 2006."⁷⁷ Plaintiff also asks that this Court order "JIPOA to issue and mail separate checks, refunding the \$2 toll paid on July 15, 2006, to each and every person listed on the exhibits to the affidavits of Joan Sturgill, Robert Sturgill and David A. Miller * * * together with a letter of

⁷⁴ *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St. 2d 55, 271 N.E.2d 815, syllabus 3.

⁷⁵ Defendant Johnson's Island Property Owner's Association's Memorandum Regarding the Terms, "Guests, Invitees and Licensees" as Used in the Court's May 31, 2006 Order, at 6.

⁷⁶ *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610.

⁷⁷ Plaintiff's Brief in Support, at 9. (Note: Pages not numbered).

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apology for demanding the toll from invited guests of island residents.”⁷⁸ Finally, Plaintiff asks for attorneys’ fees and other relief to which it is entitled to at law.

{¶44} Based on the evidence, exhibits and testimony of the hearing of August 11, 2006, this Court finds JIPOA willfully disregarded this Court’s Judgment Entry of May 26, 2006. In its brief, JIPOA claims that the “trustees discussed the Order at length and considered several options that would comply with both of the Court’s holdings – that it could own and operate a toll gate and to provide free access to BHOA’s guests, invitees and licensees.”⁷⁹ However, there was conflicting testimony as to whether JIPOA had sought the advice of counsel before establishing that it would charging a toll on July 15, 2006, to visitors responding to the advertised sales, but who were unable to name a specific BHOA member. The Ohio Supreme Court in *State v. DeHass*,⁸⁰ held that “[t]he trial court has broad discretion to determine the credibility of witnesses and the weight to be given the evidence.” In *Ostendorf-Morris Co. v. Slyman*,⁸¹ the Ninth Appellate Court held that “[e]valuating evidence and assessing credibility are primarily for the trier of fact.” Here, this Court found credible the evidence and testimony suggesting that JIPOA’s trustees did not seek the advice of counsel. But if the trustees did obtain any advice from counsel that suggested that they were within their rights to charge visitors to the garage sales a toll if those visitors could not specifically name a BHOA member, such advice was reckless and constitutes a willful disregard of this Court’s Judgment Entry of May 26, 2006.

⁷⁸ Plaintiff’s Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, Third Motion to Show Cause Why JIPOA Should Not be Held in Contempt and Motion for Sanctions, at 2 (Note: pages not numbered).

⁷⁹ Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 12.

⁸⁰ *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

⁸¹ *Ostendorf-Morris Co. v. Slyman* (1982), 6 Ohio App.3d 46, 47, 452 N.E.2d 1343, 1345.

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{¶45} This Court finds that the requested sanctions are insufficient to coerce compliance with this Court's order. As such, this Court finds that a fine in the amount of \$2,500.00 is hopefully adequate to bring JIPOA into compliance with the order and should be sufficiently coercive and prospective. JIPOA shall reimburse those persons who can be identified from the affidavits appended to the exhibits to Plaintiff's Motions as having paid the \$2.00 toll to visit the garage sales on Johnson's Island on July 15, 2006.

{¶46} Reimbursement of the \$2.00 toll shall be implemented as follows: (1) within ten days of this Judgment Entry, Plaintiff shall provide Defendant with a list of names and addresses of those individuals set forth in said affidavits; (2) within ten days thereafter, Defendant shall provide to Plaintiff checks in the amount of \$2.00 payable to each of said individuals, together with a brief note explaining they were erroneously charged the toll on July 15, 2006, and a stamped, addressed envelope for each; (3) within five days thereafter, Plaintiff shall mail said reimbursements and notify the Court that reimbursement has been accomplished; and (4) Defendant shall pay to Plaintiff the sum of \$300.00 to reimburse it for its efforts in accomplishing the reimbursement.

G. Defendant is Entitled to an Award of Attorneys' Fees

{¶47} Contempt sanctions are largely a matter of discretion.⁸² Given the court's wide discretion in imposing contempt citations, it follows that the courts are given fairly wide discretion in fashioning appropriate remedies and punishments.⁸³ Reasonable attorney fees and

⁸² *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App. 3d 287, 588 N.E.2d 233.

⁸³ *Tradesmen Int'l v. Kahoe*, 8th Dist. No. 74420, 2000 Ohio App. LEXIS 1062.

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costs of litigation may be included as part of the sanction against one who is found guilty of civil contempt.⁸⁴

{¶48} While R.C. 2705.05 sets forth sanctions for indirect contempt, due to their inherent contempt authority, Ohio courts may impose sanctions “without regard” to statutory penalties.⁸⁵ The Ohio Supreme Court remarked in *City of Cincinnati v. District Council 51*,⁸⁶ “It is highly doubtful that the General Assembly may properly limit the power of a court to punish for contempt.” In *McDaniel v. McDaniel*,⁸⁷ the Eighth Appellate Court noted, “a court may, pursuant to its inherent powers, punish a contemptuous refusal to comply with its orders, without regard to the statutory penalties.” Thus, this Court has the authority, in the exercise of its discretion, to assess attorney fees against defendants. Therefore, this Court finds that an award of attorney fees is appropriate, the amount to be set at hearing.

III. CONCLUSION

{¶49} Based on the foregoing, this Court concludes that the deed conveyed to BHOA members and lot owners an easement appurtenant, granting it certain rights of access over and across Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Further, this Court concludes that the language within its Judgment Entry, holding that “BHOA’s easement rights extend to their guests, invitees, and licensees” is not ambiguous and need not be further defined.⁸⁸ As such this Court concludes that JIPOA may not impose a toll upon any

⁸⁴ *State ex rel. Fraternal Order of Police, v. Dayton* (1977), 49 Ohio St. 2d 219. See *Tradesmen Int'l v. Kahoe*, 8th Dist. No. 74420, 2000 Ohio App. LEXIS 1062.

⁸⁵ See *Olmsted Township v. Riolo* (1988), 49 Ohio App.3d 114, 550 N.E.2d 507.

⁸⁶ *City of Cincinnati v. Dist. Council 51*, 299 N.E.2d 686, 694 (Ohio 1973).

⁸⁷ *McDaniel v. McDaniel* (1991), 74 Ohio App.3d 577, 599 N.E.2d 758, 759.

⁸⁸ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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“guests, invitees, and licensees” of BHOA members and lot owners and this includes, but is not limited to, garage sales sponsored by BHOA members and lot owners.⁸⁹ Nevertheless, this Court concluded that Plaintiff is not entitled to a Temporary Restraining Order because it dissolved fourteen days from the date it was filed. This Court also concluded that a preliminary injunction was inappropriate because this Court has already ruled on this issue. There is no status quo that needs to be preserved in anticipation of this Court’s ruling. However, because Plaintiff seeks to prevent further violations of this Court’s Order, a permanent injunction is appropriate.

{¶50} Finally, this Court concludes that JIPOA is in contempt for failure to comply with the previous orders of this Court which clearly state that “BHOA’s easement rights extend to their guests, invitees, and licensees,”⁹⁰ and that “the charging of a toll as a condition of entry is an unreasonable interference with Plaintiff’s easement.”⁹¹ JIPOA’s claim that the definition of “guests, invitees and licensees” is not “crystal clear” is disingenuous.⁹² JIPOA’s interpretation of this Court’s request that the parties submit briefs on the issue of “guests, invitees, and licensees” should not be construed as suggesting that this Court believes that its order is not clear.⁹³ Instead, it is JIPOA’s deliberate ignorance of the plain and ordinary meaning of “guests, invitees, and licensees” that has propelled this particular issue before the Court.⁹⁴

{¶51} As a result of JIPOA’s contempt, this Court concludes that the imposition of a \$2,500.00 fine, restitution of the \$2.00 toll to each named individual that paid a toll to attend the garage sales, and an award of attorneys’ fees to BHOA is necessary to coerce compliance with

⁸⁹ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

⁹⁰ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

⁹¹ Decision & Judgment Entry at 15, ¶31 (May 26, 2006).

⁹² Defendant Johnson’s Island Property Owner’s Association’s Memorandum Regarding the Terms, “Guests, Invitees and Licensees” as Used in the Court’s May 31, 2006 Order, at 12.

⁹³ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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this Court's order. Payment of the fine and restitution of the toll must be made within 30 days of the date this Judgment Entry is filed.

{¶52} Thus, this Court finds Plaintiff's Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, Third Motion to Show Cause Why JIPOA Should Not be Held in Contempt and Motion for Sanctions to be appropriate in part. Accordingly,

{¶53} IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, Third Motion to Show Cause Why JIPOA Should Not be Held in Contempt and Motion for Sanctions is GRANTED in part and DENIED in part;

{¶54} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the language within this Court's prior orders, holding that "BHOA's easement rights extend to their guests, invitees or licensees" is not ambiguous and need not be further defined;

{¶55} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's request for a Temporary Restraining Order is DENIED;

{¶56} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's request for a Preliminary Injunction is DENIED;

{¶57} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's request for a Permanent Injunction is GRANTED, and Defendant is ORDERED to comply with this Court's Judgment Entry of May 26, 2006, enjoining Defendant from charging a toll to any of BHOA's guests, invitees, and licensees;

⁹⁴ Decision & Judgment Entry at 11, ¶21 (May 26, 2006).

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{¶58} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that JIPOA is in contempt of the prior orders of this Court;

{¶59} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that JIPOA is fined \$2,500.00. JIPOA must also reimburse \$2.00 to each named individual that paid a toll to attend the garage sales. These conditions must be satisfied within 30 days of the date this Judgment Entry is filed.

{¶60} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that costs of this proceeding is to be paid by Defendant JIPOA, for which amount, judgment is granted Ottawa County against Defendant and for which execution is awarded;

{¶61} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is entitled to reasonable attorneys fees in an amount to be determined at a hearing scheduled for Monday, October 23, 2006, at 1:00 p.m.;

{¶62} Clerk of Courts shall send copies of this Judgment Entry to all parties of record or their counsel by regular U.S. Mail, “forthwith.”⁹⁵

OCTOBER 11, 2006

CHARLES F. KURFESS, JUDGE

⁹⁵ *Seeger v. For Women, Inc.* 110 Ohio St.3d 451, 2006-Ohio-4855 (“The Civil Rules * * * require immediate service, and the clerk violates his duties by failing to attempt prompt service.”) Black’s Law Dictionary defines “forthwith” as “[i]mmediate; without delay.” Black’s Law Dictionary (8th Ed. 2004) 680.

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CERTIFICATE OF SERVICE

A copy of the foregoing "Judgment Entry" was delivered by regular mail, this 11th day of October, 2006, to the following:

Steven M. Ott
Kimberly M. Sutter
55 Public Square
Suite 1250
Cleveland, OH 44113-1901
Attorney for Plaintiff

Gerald P. Ferguson
Gina R. Russo
Vorys, Sater, Seymour & Pease, L.L.P.
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Attorneys for Defendants Johnson's Island Property Owners Association, B.K. Halblaub and Harold R. Clagg

Duffield E. Milkie
Buckingham, Lucal, McGookey & Zeiher, Co., L.P.A.
414 Wayne Street
Sandusky, OH 44870
Attorney for Defendants Johnson's Island Property Owners Association, B.K. Halblaub and Harold R. Clagg

OCTOBER 11, 2006

JOAN MONNETT, CLERK OF COURTS
/DEPUTY CLERK

Note: If there is a party and/or attorney not listed above, but is reflected on the Clerk's Docket as not excused, the Clerk's Office will add them to this page.