

IN THE SUPREME COURT OF OHIO

GORDON PROCTOR, Director
Ohio Department of Transportation

Appellee

v.

KATHY KARDASSILARIS, et al.

&

RICHARD L. BLANK, et al.

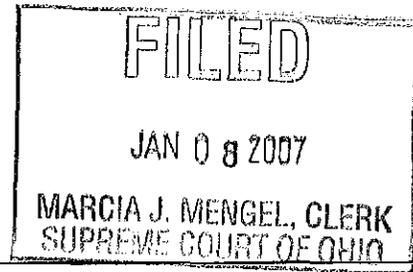
Appellants

CONSOLIDATED CASES

06-1242 (*Kardassilaris*) &

06-1243 (*Blank*)

**ON APPEAL FROM THE TRUMBULL
COUNTY ELEVENTH DISTRICT
COURT OF APPEALS**



APPELLANTS' CONSOLIDATED MERIT BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF FACTS..... 1
II. ARGUMENT..... 4

PROPOSITION OF LAW: THE SUBJECT JURISDICTION FOR AN INVERSE CONDEMNATION COUNTERCLAIM IN MANDAMUS FOR THE SEIZURE OF ADDITIONAL PROPERTY RIGHTS FROM A LANDOWNER DURING THE PENDENCY OF THE LANDOWNER’S APPROPRIATION CASE IS GOVERNED BY ARTICLE IV §5(B) OF THE OHIO CONSTITUTION AND THE OHIO RULES OF CIVIL PROCEDURE RULES 13(A) AND 13(B) 4

III. SUMMARY..... 11

CERTIFICATE OF SERVICE..... 12

APPENDIXES:

- a) Kardassilaris Ohio Supreme Court Notice of Appeal dated June 28, 2006
- b) Kardassilaris Court of Appeals Opinion & Judgment Entry dated May 15, 2006
- c) Kardassilaris Common Pleas Court Judgment Entry dated February 9, 2005
- d) Blank Ohio Supreme Court Notice of Appeal dated June 28, 2006
- e) Blank Court of Appeals Opinion & Judgment Entry dated May 15, 2006
- f) Blank Common Pleas Court Judgment Entry dated February 9, 2005
- g) Article I §19 of the Ohio Constitution
- h) O.R.C. §5501.22
- i) O.R.C.P. Rules 13(A)(B)
- j) O.R.C.P. Rule 1(A) and 1(B)

AUTHORITIES

Andreo v. Perrysburg (1988) 47 Ohio App. 3d 51
quoting Mansfield v. Balliett (1902), 65 O.S. 451..... 4

Baltimore Ravens Inc. v. Self-Insuring Emp. Evaluation Bd.
(2002) 94 Ohio St. 3d 449 5

Graley v. Satazatham (1976) 74 O.O. 2d 316 8

Hiatt v. S. Health Facilities, Inc. (1994) 68 Ohio App. 3d 326 7

Norwood v. Sheen (1993), 126 O.S. 482 4

Rockey v. 84 Lumber Co. et al. (1993), 66 Ohio St. 3d 221 7

Sarkies v. ODOT, (1979) 58 Ohio St. 2d 66 10

Sayre v. U.S. (1967), 282 F. Supp. 175 (ND Ohio)..... 4

Smilack v. Bowers (1958) 167 Ohio St. 216, 218-219 5

State ex rel. Braman v. Masheter, (1966) 5 Ohio St. 2d 197..... 10

State ex rel. Curtis v. DeCorps (1938) 83 Ohio St. 61 5

State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County
(1967) 9 Ohio St. 2d 159, 164 5

State ex rel. Jaster v. Ct. of Common Pleas, (1936) 132 Ohio St. 93,98	10
State ex rel. v. Livingston Court Apts. v. City of Columbus (1998), 130 Ohio App. 3d 730	4
Wray v. Goeglein, et al., (1998) 98-LW-5707 (4th)	8, 9
Wilson v. Cincinnati, (1961) 172 Ohio St. 303	10
 Civil Rule 1(A) and 1(B)	7, 11
Modern Courts Amendment to Ohio Constitution Article IV §5(B) adopted May 7, 1968	7-11
O.R.C. §5501.22	5-7, 10-11
O.R.C.P. Rule 1(A), 1(B)	9
O.R.C.P. Rules 13(A)(B)	4-8, 10-11

I. STATEMENT OF FACTS

Appellee, Gordon Proctor Director Ohio Department of Transportation, filed separate appropriation actions in the Trumbull County Common Pleas Court against Kathy Kardassilaris, et al. [Case No. 06-1242] and Richard L. Blank, et al. [Case No. 06-1243]. [R-1 both cases]¹ Both property owners filed an answer. [Blank R-7; Kardassilaris R-8]

In Kardassilaris the Appellee appropriated a fee simple parcel (36WD) across the frontage of the landowners' properties for road widening on State Route 5 in Cortland, Ohio together with two temporary easements designated 36T and 36T-1. The properties were used as a grocery market and an adjoining residential dwelling. [Kardassilaris R-1]

In Blank the Appellee appropriated a permanent sewer easement through the owners' property and a temporary easement designated as parcels 34-S and 34-T. The Blank properties were used for a restaurant and various commercial shops fronting on State Route 5 in Cortland, Ohio.

During the occupation of the appropriated parcels of land the Appellee went outside the boundaries of the appropriated parcels. Appellee also took additional rights and caused damage to the owners' properties that exceeded the rights taken in its pending appropriation actions.

During the course of proceedings both Appellants moved the trial court for leave to file instant a counterclaim for a writ of mandamus to compel the Appellee to appropriate the additional property rights seized by Appellee on the same project that occurred after the filing of the answer and during the construction of the highway.

¹ References in each case refer to the trial court record unless otherwise noted.

[Kardassilaris R-25; Blank R-28] The trial courts granted leaves to Appellants, in both cases, to file counterclaims. [Kardassilaris R-27; Blank R-30]

The counterclaims of both Appellants requested the trial courts to issue a writ of mandamus directed to Appellee, its agents or officers, compelling and commanding Appellee to appropriate the additional property rights taken by the Appellee Director.

[Kardassilaris R-26; Blank R-29]

In Kardassilaris the Appellants described the additional rights taken as follows:

- a. The storm sewer that drains landowners' parking lot was obstructed by ODOT, its employees and agents, causing water to backup into landowners' parking lot with flooding of the commercial lot;
- b. ODOT disconnected the electricity to landowners' outdoor electric sign preventing its illumination for a period of approximately six (6) weeks;
- c. ODOT, during construction, disturbed water lines leading into landowners' property causing water to back up and flood the landowners' commercial building and requiring the replacement of a backflow preventer valve.
- d. Appellee, its employees and agents, expanded their temporary taking outside the area described in its petition to appropriate by driving and parking its vehicles and construction equipment on landowners' property and storing materials on landowners' property outside the area appropriated.
- e. Appellee, its employees and agents removed survey pins of the owner designating the front corners of the landowners' property without replacing them. [Kardassilaris R-26]

The additional rights taken in the Blank case were described in the Counterclaim in the following manner:

- a. Occupied, operated, stored and parked heavy construction equipment upon the parking lots and drives of Blanks' real estate; impairing access to their building;
- b. Dragged mud, gouged and roughed up Blanks' parking lots and put rocks, cracks, gouges and depressions in the blacktop portions of their parking lot;
- c. Cracked and broke out a portion of a concrete pad and damaged a pillar in the front of their commercial building located at 192 S. High Street;
- d. Used heavy mechanical shovels to pound out shale rock in close proximity to Blanks' restaurant building creating extreme vibration and lack of lateral support causing a permanent vertical crack in the south wall of the concrete block masonry of the restaurant building;
- e. Broke through a sewer line to the restaurant building on Blanks' real estate causing sewage to back up into the restaurant and made improper repairs thereto;
- f. Broke through gas lines servicing the premises;
- g. Broke a storm sewer line and failed to repair the pipes properly; and
- h. Blocked access to the only rear door of Blanks' restaurant building where deliveries are received.
- i. Used landowners' real estate outside the boundaries of the parcels taken by ODOT to park heavy machinery and equipment.

In both cases Appellants requested in their counterclaims that the value of the additional rights seized and any damages be determined by the juries in the pending appropriation cases. Appellee filed motions to dismiss the Appellants' counterclaim for writs of mandamus. [Kardassilaris R-28; Blank R-31]

The trial court granted the Appellee's motion to dismiss and Appellants timely appealed to the Eleventh District Court of Appeals. [Kardassilaris R-36; Blank R-40]

On appeal the Appellate Court affirmed the trial courts' decisions in both cases.

[Kardassilaris App. Ct. R-18; Blank App. Ct. R-15]

II. ARGUMENT

PROPOSITION OF LAW: THE SUBJECT JURISDICTION FOR AN INVERSE CONDEMNATION COUNTERCLAIM IN MANDAMUS FOR THE SEIZURE OF ADDITIONAL PROPERTY RIGHTS FROM A LANDOWNER DURING THE PENDENCY OF THE LANDOWNER'S APPROPRIATION CASE IS GOVERNED BY ARTICLE IV §5(B) OF THE OHIO CONSTITUTION AND THE OHIO RULES OF CIVIL PROCEDURE RULES 13(A) AND 13(B).

State ex rel. v. Livingston Court Apts. v. City of Columbus (1998), 130 Ohio App. 3d 730 held that a property owner has a right to obtain relief by mandamus for the confiscation of property rights by public agencies. The appellate court ruled that a writ of mandamus rather than a negligence action was the appropriate remedy for the taking of the owner's property resulting from the city's failure to properly maintain and repair a city's sewer system that caused flooding of townhouse basements.

In Sayre v. U.S. (1967), 282 F. Supp. 175 (ND Ohio) the Federal Court determined, that without being absolutely taken, a taking of private property occurs where the action by the government involves a direct interference with or disturbance of property rights. Any direct encroachment upon land that excludes or restricts the dominion and control of the owner constitutes a taking. Norwood v. Sheen (1993), 126 O.S. 482 Stated more simply any material interference with private property rights constitutes a taking under Ohio law. Andreo v. Perrysburg (1988) 47 Ohio App. 3d 51 *quoting* Mansfield v. Balliett (1902), 65 O.S. 451.

All of the rights taken that are set forth in Appellants' counterclaims for mandamus in these consolidated cases are material interferences or disturbances of private property rights by Appellee. The proper relief chosen by the Appellants in this case was to file a counterclaim for

mandamus action pursuant to the compulsory or permissive rules of O.R.C.P. Rules 13(A) or 13(B) regarding counterclaims.

The lower Appellate Court in affirming the trial courts' dismissal of the counterclaims held that O.R.C. §5501.22 is a substantive statute that controls subject jurisdiction rather than the Rules of Civil Procedure. O.R.C. §5501.22 reads in pertinent part as follows:

“The Director of Transportation shall not be suable whether as a sole defendant or jointly with other defendants in any court outside Franklin County except...by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated....” [Emphasis Added]

The statute states that the Director of Transportation shall not be “suable” in any court outside Franklin County. It does not say that he shall not be “counter-suable” in a pending action in another county in an appropriation action brought by him particularly where the parties are the same, and the subject matter involves the same real estate in rem. Appellants posit that §5501.22 was designed to require original suits to be brought against the Director in Franklin County; that “countersuits”, not being referred to in the statute, are excluded and, contrary to the lower courts’ ruling, are not substantively controlled by the statute.

This Supreme Court, in construing legislative intent, has long recognized and employed the canon “*expressio unius est exclusio alterius*” as an aid to statutory construction. Baltimore Rovens Inc. v. Self-Insuring Emp. Evaluation Bd. (2002) 94 Ohio St. 3d 449; State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County (1967) 9 Ohio St. 2d 159, 164; Smilack v. Bowers (1958) 167 Ohio St. 216, 218-219; State ex rel. Curtis v. DeCorps (1938) 83 Ohio St. 61.

Appellants posit that if the legislature had intended to require a countersuit to be filed in Franklin County, where the Director was already involved with the same party and subject matter, it would have worded the statute to say that the Director shall not be “suable or countersuable” in any Court outside Franklin County. It did not include the word countersuable therefore countersuits, which are not original actions against the Director, are excluded and therefore are mandated by O.R.C.P. Rule 13(A) or permitted under O.R.C.P. Rule 13(B) to be filed in any case where the Director has filed suit *in personam* or *in rem*.

Although original actions are required to be filed in Franklin County pursuant to O.R.C. §5501.22, counterclaims, having been excluded, fall within mandatory O.R.C.P. Rule 13(A) and permissive O.R.C.P. Rule 13(B), which provide in pertinent part as follows:

“(A) Compulsory counterclaims

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(B) Permissive counterclaims

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”
[Emphasis Added]

In the case at bar Appellants’ counterclaim against Appellee arises out of the transaction or occurrence that is the subject matter of Appellee’s eminent domain claim. It involves the

same parties; the same property; the same road construction that affected the property at the same time that Appellee exercised its rights under its original complaint and petition for appropriation. Appellants contend that Appellee expanded the property rights taken in addition to those rights expressed in its complaint and that the value of those additional property rights taken should be included and required to be assessed by a jury in the pending litigation. As such O.R.C.P. Rule 13(A) mandates that the claim against Appellee be filed as a counterclaim in the pending appropriation action and not in a separate lawsuit or in another jurisdiction under O.R.C. §5501.22 as interpreted by the lower courts.

In Rockey v. 84 Lumber Co. et al. (1993), 66 Ohio St. 3d 221 the Ohio Supreme Court determined that the Rules of Civil Procedure are the law of the State with regard to practice and procedure. In fact this Supreme Court went even further to say that the civil rules that were promulgated pursuant to Section 5(B) Article IV of the Ohio Constitution must even control over subsequently enacted inconsistent statutes purporting to govern procedural matters. In that case the court declared O.R.C. §2309.01 invalid to the extent that it conflicted with O.R.C.P. Rule 8(A).

Also, in Hiatt v. S. Health Facilities, Inc. (1994) 68 Ohio App. 3d 326 the court struck down O.R.C. §2307.42 as regulating a procedural matter in a manner inconsistent with O.R.C.P. Rule 11 and declared the statute invalid under the *Modern Courts Amendment of 1968* to Ohio Constitution Article IV §5(B). This ruling is consistent with Civil Rule 1(A), which provides:

“These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity....”

O.R.C.P. Rule 1(B) reads:

“(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all

other impediments to the expeditious administration of justice.”
[Emphasis added]

Likewise, in Graley v. Satazatham (1976) 74 O.O. 2d 316 a lower trial court determined that the Ohio Rules of Civil Procedure prevailed over conflicting requirements of the Medical Practice Act regarding pleading procedure.

Appellants contend that there is no logical or practical reason to conduct two separate lawsuits in two separate counties on the Appellee’s complaint for appropriation and the Appellants’ counterclaim for damages where the trial court already has jurisdiction of the same parties, the identical same property that arises out of the same transaction or occurrence that is the subject matter of the Appellee’s claim. On the contrary, combining the complaint and counterclaim conserves legal resources, and promotes judicial economy.

The disdain, even by the Courts, of requiring a landowner to proceed with two separate lawsuits over the same property with the same parties, including the Appellee Director, while the Court already has jurisdiction over the property in rem is to be noted in the decision of the Fourth District Court of Appeals of Meigs County entitled Wray v. Goeglein, et al., (1998) 98-LW-5707 (4th).

In that case the parties and the court followed the cases that preceded the *Modern Courts Amendment* and did not address the mandatory requirements of O.R.C.P. Rule 13(A) but the Appellate Court in ruling noted the trial court’s concern on pages 3 and 4 of its decision, which reads:

“I don’t particularly like the statutory scheme of things because I think it results in things being tried over, and over and over again.”

“...because the way the statutes are written, as far as the counterclaim is concerned, I don’t have jurisdiction to hear it.”

“...they can sue out of mandamus as an inverse condemnation proceeding. It has to be brought in Franklin County. I don’t particularly like it. In fact I dislike it, but that is not the issue...I can understand why the statutory scheme is the way it is.”

“...I don’t particularly like it. I don’t care for it. I don’t care for it at all. But as I said, that is not my place to make those decisions. That is the State legislature’s place.” [Emphasis Added]

The Fourth Appellate Court in the Goeglein case then followed suit and said:

“We, like the trial court, do not necessarily find the result of the case at bar to be the most efficient use of the judicial system. We must, however, follow the statutory scheme.” [Emphasis Added]

Obviously, the trial court and the appellate court in Goeglein, as well as the lower court in this case, predicated their entire decision on the statute or “statutory scheme” and early case references with no reference or consideration given to the rules of statutory construction by a) interpreting the word *suable* as pertaining to initial suits and not counterclaims; and b) applying the *Modern Courts Amendment to Ohio Constitution Article IV §5(B) adopted May 7, 1968*, or the Ohio Rules of Civil Procedure enacted July 1, 1970, which Appellants maintain takes the issue out of the “statutory scheme” and places the case of an inverse condemnation counterclaim for mandamus directly under the Ohio Civil Rules of Procedure.

O.R.C.P. Rule 1(A) adopted pursuant to Article IV §5(B) provides in pertinent part:

“These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity. [Emphasis Added]

There are four Ohio Supreme Court cases in Ohio that support the contention that the Director of Transportation pursuant to O.R.C. §5501.02 cannot be sued in any court outside of Franklin County except by a property owner to prevent the taking of property without due process of law, in which case the suit may be brought in the county where such property is

situated. Three of the four Supreme Court cases **precede** the *Modern Courts Amendment of the Ohio Constitution Article IV §5(B) adopted May 7, 1968*. See, State ex rel. Jaster v. Ct. of Common Pleas, (1936) 132 Ohio St. 93,98; Wilson v. Cincinnati, (1961) 172 Ohio St. 303; and State ex rel. Braman v. Masheter, (1966) 5 Ohio St. 2d 197. The fourth case of Sarkies v. ODOT, (1979) 58 Ohio St. 2d 66, which although it was decided after the *Modern Courts Amendment of Ohio Constitution Article IV §5(B)*, **did not involve a mandatory or permissive counterclaim** under O.R.C.P. Rules 13(A) or 13(B) but was an initial complaint brought against the Director of Transportation in Trumbull County.

Appellants maintain that Rule 13(A) makes it mandatory that where an appropriation case is pending outside of Franklin County against a property owner by the Director of Transportation the property owner is mandated by rule to file as a counterclaim **any claim** which he or she has against the Director where it arises out of the same transaction or occurrence that is the subject matter of the Director's complaint and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Appellants maintain that in cases where the owner has a counterclaim, as opposed to the filing of an original complaint, Rule 13(A)'s mandatory requirements control and not O.R.C. §5501.22 that requires the Director to be sued in Franklin County on original complaints against him.

O.R.C. §5501.22 needs to be interpreted by this Ohio Supreme Court in light of the *Modern Courts Amendment Article IV §5(B)* and O.R.C.P. Rules 13(A) and 13(B) as an exception to O.R.C. §5501.22 where a landowner has a viable "countersuit" in an appropriation case involving the same property, same parties and arises out of the taking of property by the Director.

Such a logical exception to O.R.C. §5501.22 still gives credence and recognition to “suable” complaints filed against the Director but recognizes that “counter-suable” claims, which are not specifically referred to in the statute, are excepted and therefore allows the practical and sensible application of O.R.C.P. Rules 13(A) and 13(B).

This interpretation is consistent with the very reason that O.R.C.P. Rules 13(A) and 13(B) were adopted. Such an interpretation would negate the concerns of the Goeglein Common Pleas Court and Appellate Court of “things being tried over, and over, and over again.” The savings of judicial resources as well as multiple costs and inconvenience of bifurcated litigation for hundreds of litigants across the State of Ohio is in the balance of this issue.

III. SUMMARY

1. The lower trial and Appellate Court’s erred in interpreting the word “suable” in O.R.C. §5501.22 to be a substantive statute applicable to “countersuits” instead of limiting the applications to initial original lawsuits brought against the Director. The statute interpreted pursuant to the canon of statutory construction *expressio unius est exclusio alterius* specifically excludes countersuits.

2. O.R.C.P. Rule 13(A) states a pleading “shall state a counterclaim” any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim.

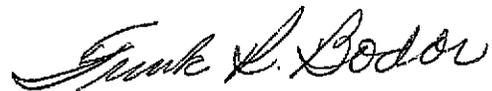
3. In addition Civil Rule 1(A)(B), adopted by the Ohio Supreme Court on July 1, 1970 pursuant to the *Modern Courts Amendment of Article IV §5(B)* expressly mandate that civil rules shall “prescribe the procedure to be followed in all courts of this State in the exercise of civil jurisdiction” except where they would be inapplicable in the appropriation of property for which there is no controlling provision. The rules also provide that they be “construed and

applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.”

4. It is a waste of judicial time, jury time, costs and attorney fees to bifurcate the issues in this type of proceeding to involve duplicate courts and juries where a trial court already has jurisdiction over the same parties, in the same county, the same property in rem, and it arises out of the transaction or occurrence that is the subject matter of the Appellee Director’s claim.

The judgment of the trial courts and Appellate Court should be overruled in both consolidated cases and remanded to reinstate the Counterclaims filed by the Appellants.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANTS’ CONSOLIDATED MERIT BRIEF was served upon L. Martin Cordero, Assistant Attorney General, 150 E. Gay Street-17th Floor, Columbus, Ohio 43215-3130; Richard J. Makowski, 615 W. Superior Avenue—11th Floor, Cleveland, Ohio 44113 via U.S. mail this _____ day of January 2007.



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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF APPEAL was sent by ordinary U.S. mail to counsel for Appellee, L. Martin Cordero, Assistant Attorney General, 150 E. Gay Street—17th Floor, Columbus, OH 43215-3130; and Richard J. Makowski, Assistant Attorney General, 615 W. Superior Avenue—11th Floor, Cleveland, OH 44113 on June 28, 2006.

Frank R. Bodor

FRANK R. BODOR (0005387)

Attorney for Appellants

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

MAY 15 2008

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

GORDON PROCTOR, DIRECTOR, OHIO
DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

- vs -

KATHY KARDASSILARIS, et al.,

Defendants-Appellants.

OPINION

CASE NO. 2005-T-0026

Civil Appeal from the Court of Common Pleas, Case No. 01 CV 1987.

Judgment: Affirmed.

Jim Petro, Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, OH 43215-3428, *L. Martin Cordero*, Assistant Attorney General, 150 East Gay Street, 17th Floor, Columbus, OH 43215-3130, and *Richard J. Makowski*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Plaintiff-Appellee).

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44483 (For Defendants-Appellants).

DONALD R. FORD, P.J.

{¶1} Appellants, Kathy and Panagiotis Kardassilaris, appeal from the February 9, 2005 judgment entry of the Trumbull County Court of Common Pleas dismissing their counterclaim for writ of mandamus due to lack of subject matter jurisdiction.

{¶2} Appellee, Gordon Proctor, Director of the Ohio Department of Transportation, filed a petition to appropriate property owned by appellants, as well as two temporary

easements, and to fix compensation on October 4, 2001. In his petition, appellee alleged that it was necessary to appropriate property owned by appellants, specifically parcels 36-WD, 36-T, and 36-T1, for the purpose of highway improvement to State Route 5 ("SR 5"), on South High Street, in the city of Cortland. Appellants own a commercial grocery store and residence on South High Street. According to the petition, parcel 36-WD was for a right of way in fee simple, next to an existing permanent highway easement, for a total area of .167 acres (the existing easement was .163 acres, thus the total taking was .004 acres). Parcel 36-T and 36-T1 were for temporary easements necessary for the improvement project, which were an area of .028 and 0.20, for a total of .048 acres. Pursuant to R.C. 163.06, appellee deposited \$1,425 with the clerk of courts, for the amount determined to be the fair market value of the property and any damages that may occur to the residue.

{¶3} Appellants filed their answer on October 26, 2001. On October 30, 2001, the trial court dispersed the original amount, \$1,425, deposited by appellee, to appellants.

{¶4} According to appellee's notice of date of take, appellee or his agents physically entered appellants' property for purposes of construction of the highway improvement project on January 6, 2003.

{¶5} On August 20, 2004, appellants filed a motion for leave to file a claim for writ of mandamus to compel appellee to appropriate additional property seized during construction. The trial court granted the motion on August 26, 2004, and appellants filed a claim for writ of mandamus the same day. In their claim, appellants alleged that appellee broadened its occupation of appellants' property, outside and beyond the limits of the easements which appellee had specified in his plans. Specifically, they alleged an additional taking occurred during construction when appellee obstructed a storm sewer

that drained appellants' commercial parking lot, causing flooding; disconnected the electricity to their commercial sign, preventing illumination for approximately six weeks; disturbed water lines leading into the commercial building, causing flooding; expanded his temporary taking when his employees drove, operated, and parked equipment on appellants' property, as well as stored materials on their land; and removed survey pins on their property. Appellants requested that the value of the additional rights seized and any damages be determined by the jury in the pending appropriation case.

{¶6} On September 13, 2004, pursuant to Civ.R. 12(B)(1), appellee filed a motion to dismiss appellants' petition for a writ of mandamus due to lack of subject matter jurisdiction. Pursuant to Civ.R. 54(B), the trial court granted appellee's motion on February 9, 2005, and stayed the case pending appeal. It is from this judgment that appellants appeal, raising the following sole assignment of error:

{¶7} "The trial court abused its discretion and committed prejudicial error in dismissing appellants' counterclaim for a writ of mandamus to require [appellee] to appropriate additional property rights seized during the pendency of the appropriation case."

{¶8} Initially, we note that the correct standard of review when a trial court grants a Civ.R. 12(B)(1) motion to dismiss is "whether the plaintiff has alleged any cause of action which the court has authority to decide." *Bd. of Trustees of Painesville Twp. v. Painesville* (June 26, 1998), 11th Dist. No. 97-L-090, 1998 Ohio App. LEXIS 2942, at 9-10, quoting *Manholt v. Maplewood Joint Vocational School Dist. Bd. of Edn.* (Aug. 21, 1992), 11th Dist. No. 91-P-2410, 1992 Ohio App. LEXIS 4282, at 4. "As for the standard to be applied in appellate review of Civ.R. 12(B)(1) dismissals, this court noted in *Manholt* that when the trial court dismisses the complaint, but does not make any determinations with

regard to disputed factual issues, our review is limited to a determination of whether the trial court's application of the law was correct." *Id.* at 10.

{¶9} In their assignment, appellants posit one issue for review: whether "the subject jurisdiction for an inverse condemnation counterclaim in mandamus for the seizure of additional property rights from a landowner during the pendency of the landowner's appropriation case is governed by Article IV, [Section] 5(B) of the Ohio Constitution and the Ohio Rules of Civil Procedure which abrogates and supercedes [sic] [R.C.] 5501.22."

{¶10} In addition, appellants argue two sub-issues. The first sub-issue is whether the seizure of additional property rights constitutes a taking that requires appropriation and additional compensation. Appellants' second sub-issue is whether Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional seized property in the pending appropriation case in Trumbull County and not in Franklin County pursuant to R.C. 5501.22.

{¶11} With respect to appellants' first sub-issue, we note that the jurisdictional issue is dispositive of this case. Hence, we will not get to the merits of this sub-issue.

{¶12} We will address appellants' second sub-issue concomitantly with their main issue since the issues are essentially the same. Appellants argue that Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional property seized in the pending appropriation case, not in Franklin County as mandated by R.C. 5501.22.

{¶13} R.C. 5501.22 provides that: "[t]he director of transportation shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county except in actions brought *** by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated ***."

{¶14} Appellants argue that R.C. 5501.22 is not controlling due to the passage of the Modern Courts Amendment. Section 5(B), Article IV, of the Ohio Constitution contains part of the Modern Courts Amendment of 1968, and provides in part that, “[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules *shall not abridge, enlarge, or modify any substantive right.* (***) All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Hartsock v. Chrysler Corp.* (1989), 44 Ohio St.3d 171, 173. (Emphasis added.)

{¶15} Regarding the Modern Courts Amendment, the Supreme Court of Ohio stated in *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 281, that:

{¶16} “[t]his constitutional amendment recognizes that where conflicts arise between the Civil Rules or Appellate Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law. *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86; *State v. Hughes* (1975), 41 Ohio St.2d 208; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86 (subject matter jurisdiction of a municipal court contrasted with venue); *Krause v. State* (1972), 31 Ohio St.2d 132, 145.”

{¶17} “Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits ***.” *BCL Enterprises, Inc. v. Ohio Dept. of Liquor Control* (1997), 77 Ohio St.3d 467, 469, citing *Morrison*, supra, paragraph one of the syllabus. “[I]t defines the competency of a court to render a valid judgment in a particular action.” *Morrison* at 87. It is well established that subject matter jurisdiction is *substantive* law, not procedural. *Akron v. Gay* (1976), 47 Ohio St.2d 164, 165-166. (Emphasis added.)

{¶18} Appellants cite three cases in support of their argument that the Rules of Civil Procedure should prevail over R.C. 5501.22: *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, *Hiatt v. S. Health Facilities, Inc.* (1994), 68 Ohio App.3d 236, and *Graley v.*

Satazatham (1976), 74 O.O. 2d 316. However, even in their argument, appellants point out that all three cases denote that the Rules of Civil Procedure prevail over conflicting statutes *on matters regarding procedure*.

{¶19} Thus, we conclude that R.C. 5501.22, being substantive, controls over the Rules of Civil Procedure. Therefore, R.C. 5501.22 confers exclusive jurisdiction to courts in Franklin County over suits involving the director of the Ohio Department of Transportation, unless it falls within one of the limited exceptions.

{¶20} We must now determine if the mandamus action on appeal is one that falls within the exception under R.C. 5501.22, which would permit appellants to file their claim in Trumbull county; i.e., the county where the "the property is situated."

{¶21} As we stated in the foregoing analysis, R.C. 5501.22 prohibits any suit against the director of transportation in any court outside Franklin County "except in actions brought *** by a property owner to *prevent* the taking of property without due process of law *** [.]" In the case sub judice, the record on appeal makes it abundantly clear that at the time of appellants' filing of their mandamus action, the alleged "taking" had already occurred. The highway improvement project was complete. Any additional "seizure" that may have ensued during the construction of the project, could not now be prevented. As such, appellants' mandamus action does not fall within the limited exception of R.C. 5501.22.

{¶22} Appellants argue that three of the cases cited by appellee at trial in support of his position that R.C. 5501.22 gives the trial court jurisdiction to prevent a taking of property and not for a completed taking of property, preceded the Modern Courts

Amendment of 1968.¹ However, appellee correctly points out that "this court found *Wilson* and *Braman* controlling in the matter just six months ago in [*State ex rel. Turkovich v. Proctor*, 11th Dist. No. 2004-T-0081, 2004-Ohio-6699]." Indeed, in *Turkovich*, we agreed with the reasoning in *Wilson and Braman*, and stated that; "once the taking of the property has been completed without the filing of an appropriation action, the violation of due process has also technically been completed." *Id.* at ¶20.

{¶23} Based on the foregoing analysis, we conclude that the Trumbull County Court of Common Pleas does not have subject matter jurisdiction to adjudicate appellants' mandamus action. As such, appellants' assignment of error is without merit and the judgment of the Trumbull County Court of Common Pleas is affirmed.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

RECEIVED

MAY 16 2006

ATTY. FRANK BODOR

1. The three cases cited by appellee at trial were: *State ex rel. Jaster v. Ct. of Common Pleas of Jefferson Cty.* (1936), 132 Ohio St. 93; *Wilson v. Cincinnati* (1961), 172 Ohio St. 303; and *State ex rel. Braman v. Masheter* (1966), 5 Ohio St.2d 197.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

GORDON PROCTOR, DIRECTOR, OHIO
DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

- vs -

KATHY KARDASSILARIS, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2005-T-0026

For the reasons stated in the opinion of this court, appellants' assignment of error is without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

FOR THE COURT

FILED
COURT OF APPEALS

MAY 15 2006

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS,
TRUMBULL COUNTY, OHIO

GORDON PROCTOR, DIRECTOR
OHIO DEPARTMENT
OF TRANSPORTATION

CASE # 01 CV 1987

PLAINTIFF

JUDGMENT ENTRY

V.

KATHY KARDASSILARIS, ET. AL.

DEFENDANTS

This matter came before the court pursuant to a hearing on January 7, 2005. After review of the relevant arguments and evidence presented, the court finds that Plaintiff's motion to dismiss Defendants and Plaintiff-Relators' claim for writ of mandamus due to lack of jurisdiction is well taken and hereby grants same. The court finds no just cause for delay and stays the rest of the case pending appeal.

2/7/05

DATE

W. Wyatt McKay
JUDGE W. WYATT MCKAY

2/9/05
Copies Sent:
J Thorne
J Cordero
F Bodor
Warren Dwr.
D Hines
J Earnhart
State of Ohio Et Al

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE
COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD
OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH-
WITH BY ORDINARY MAIL

JUDGE

2005 FEB -9 P 1:32

TRUMBULL COUNTY
CLERK OF COURTS

06-1243

IN THE SUPREME COURT OF OHIO

GORDON PROCTOR,
 DIRECTOR OHIO DEPARTMENT
 OF TRANSPORTATION)
)
)
 Appellee)
)
 v.)
)
 RICHARD L. BLANK, et al.)
)
)
 Appellants)
)

ON APPEAL FROM THE TRUMBULL
 COUNTY COURT OF APPEALS 11TH
 APPELLATE DISTRICT
)
)
)
 COURT OF APPEALS CASE NO.
 2005-T-0027

NOTICE OF APPEAL OF APPELLANTS

Appellants, by and through counsel, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2005-T-0027 on May 15, 2006.

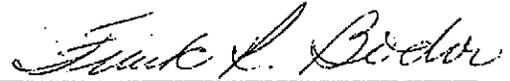
This case raises a substantial constitutional question and is of public and great general interest.

Respectfully Submitted,
Frank R. Bodor
 FRANK R. BODOR (0005387)
 157 Porter Street NE
 Warren, OH 44483
 Phone: (330) 399-2233
 Facsimile: (330) 399-5165
 Attorney for Appellants

FILED
 JUN 28 2006
 MARCIA J. MENGEL, CLERK
 SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF APPEAL was sent by ordinary U.S. mail to counsel for Appellee, L. Martin Cordero, Assistant Attorney General, 150 E. Gay Street—17th Floor, Columbus, OH 43215-3130; Richard J. Makowski, Assistant Attorney General, 615 W. Superior Avenue—11th Floor, Cleveland, Ohio 44113 on June 28, 2006.



FRANK R. BODOR (0005387)
Attorney for Appellants

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

MAY 15 2006

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

GORDON PROCTOR, DIRECTOR, OHIO :
DEPARTMENT OF TRANSPORTATION, :

OPINION

Plaintiff-Appellee, :

CASE NO. 2005-T-0027

- vs -

RICHARD L. BLANK, et al., :

Defendants-Appellants. :

Civil Appeal from the Court of Common Pleas, Case No. 01 CV 2422.

Judgment: Affirmed.

Jim Petro, Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, OH 43215-3428, *L. Martin Cordero*, Assistant Attorney General, 150 East Gay Street, 17th Floor, Columbus, OH 43215-3130, and *Richard J. Makowski*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Plaintiff-Appellee).

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44483 (For Defendants-Appellants).

DONALD R. FORD, P.J.

{¶1} Appellants, Richard L. and June L. Blank, appeal from the February 9, 2005 judgment entry of the Trumbull County Court of Common Pleas dismissing their counterclaim for writ of mandamus due to lack of subject matter jurisdiction.

{¶2} Appellee, Gordon Proctor, Director of the Ohio Department of Transportation, filed a petition to appropriate property owned by appellants, as well as a temporary

easement, and to fix compensation on December 3, 2001. In his petition, appellee alleged that it was necessary to appropriate property owned by appellants, specifically parcels 34-S and 34-T, for the purpose of highway improvement to State Route 5 ("SR 5"), on South High Street, in the city of Cortland. Appellants own commercial property, a florist shop and a restaurant, on South High Street. According to the petition, parcel 34-S was for a permanent sewer easement, for a total area of .048 acres. Parcel 34-T was for a temporary easement necessary for the improvement project, for a total area of .076 acres. Pursuant to R.C. 163.06, appellee deposited \$4,650 with the clerk of courts, for the amount determined to be the fair market value of the property and any damages that may occur to the residue.

{¶3} Appellants filed their answer on January 2, 2002. On April 15, 2003, the trial court dispersed the original amount, \$4,650, deposited by appellee, to appellants.

{¶4} According to appellee's notice of date of take, appellee or his agents physically entered appellants' property for purposes of construction of the highway improvement project on April 29, 2002.

{¶5} On August 20, 2004, appellants filed a motion for leave to file a claim for writ of mandamus to compel appellee to appropriate additional property seized during construction. The trial court granted the motion on August 26, 2004, and appellants filed a claim for writ of mandamus the same day. In their claim, appellants alleged that appellee broadened its occupation of appellants' property, outside and beyond the limits of the easements which appellee had specified in his plans. Specifically, they alleged an additional taking occurred during construction when appellee occupied, stored, and parked heavy equipment on their parking lots, obstructing their access to the lots; caused damage to the parking lots, a concrete pad, and a south wall in the restaurant; damaged sewer and

gas lines to the property; damaged a storm sewer line; and blocked their access to the rear door of the restaurant. Appellants requested that the value of the additional rights seized and any damages be determined by the jury in the pending appropriation case.

{¶6} On September 13, 2004, pursuant to Civ.R. 12(B)(1), appellee filed a motion to dismiss appellants' petition for a writ of mandamus due to lack of subject matter jurisdiction. Pursuant to Civ.R. 54(B), the trial court granted appellee's motion on February 9, 2005, and stayed the case pending appeal. It is from this judgment that appellants appeal, raising the following sole assignment of error:

{¶7} "The trial court abused its discretion and committed prejudicial error in dismissing appellants' counterclaim for a writ of mandamus to require [appellee] to appropriate additional property rights seized during the pendency of the appropriation case."

{¶8} Initially, we note that the correct standard of review when a trial court grants a Civ.R. 12(B)(1) motion to dismiss is "whether the plaintiff has alleged any cause of action which the court has authority to decide." *Bd. of Trustees of Painesville Twp. v. Painesville* (June 26, 1998), 11th Dist. No. 97-L-090, 1998 Ohio App. LEXIS 2942, at 9-10, quoting *Manholt v. Maplewood Joint Vocational School Dist. Bd. of Edn.* (Aug. 21, 1992), 11th Dist. No. 91-P-2410, 1992 Ohio App. LEXIS 4282, at 4. "As for the standard to be applied in appellate review of Civ.R. 12(B)(1) dismissals, this court noted in *Manholt* that when the trial court dismisses the complaint, but does not make any determinations with regard to disputed factual issues, our review is limited to a determination of whether the trial court's application of the law was correct." *Id.* at 10.

{¶9} In their assignment, appellants posit one issue for review: whether "the subject jurisdiction for an inverse condemnation counterclaim in mandamus for the seizure

of additional property rights from a landowner during the pendency of the landowner's appropriation case is governed by Article IV, [Section] 5(B) of the Ohio Constitution and the Ohio Rules of Civil Procedure which abrogates and supercedes [sic] [R.C.] 5501.22."

{¶10} In addition, appellants argue two sub-issues. The first sub-issue is whether the seizure of additional property rights constitutes a taking that requires appropriation and additional compensation. Appellants' second sub-issue is whether Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional seized property in the pending appropriation case in Trumbull County and not in Franklin County pursuant to R.C. 5501.22.

{¶11} With respect to appellants' first sub-issue, we note that the jurisdictional issue is dispositive of this case. Hence, we will not get to the merits of this sub-issue.

{¶12} We will address appellants' second sub-issue concomitantly with their main issue since the issues are essentially the same. Appellants argue that Civ.R. 13(A) requires landowners to file their counterclaim for mandamus for additional property seized in the pending appropriation case, not in Franklin County as mandated by R.C. 5501.22.

{¶13} R.C. 5501.22 provides that: "[t]he director of transportation shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county except in actions brought *** by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated ***."

{¶14} Appellants argue that R.C. 5501.22 is not controlling due to the passage of the Modern Courts Amendment. Section 5(B), Article IV, of the Ohio Constitution contains part of the Modern Courts Amendment of 1968, and provides in part that, "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state,

which rules *shall not abridge, enlarge, or modify any substantive right.* (***) All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Hartsock v. Chrysler Corp.* (1989), 44 Ohio St.3d 171, 173. (Emphasis added.)

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{¶16} "[t]his constitutional amendment recognizes that where conflicts arise between the Civil Rules or Appellate Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law. *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86; *State v. Hughes* (1975), 41 Ohio St.2d 208; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86 (subject matter jurisdiction of a municipal court contrasted with venue); *Krause v. State* (1972), 31 Ohio St.2d 132, 145."

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{¶19} Thus, we conclude that R.C. 5501.22, being substantive, controls over the Rules of Civil Procedure. Therefore, R.C. 5501.22 confers exclusive jurisdiction to courts in Franklin County over suits involving the director of the Ohio Department of Transportation, unless it falls within one of the limited exceptions.

{¶20} We must now determine if the mandamus action on appeal is one that falls within the exception under R.C. 5501.22, which would permit appellants to file their claim in Trumbull county; i.e., the county where the "the property is situated."

{¶21} As we stated in the foregoing analysis, R.C. 5501.22 prohibits any suit against the director of transportation in any court outside Franklin County "except in actions brought *** by a property owner to *prevent* the taking of property without due process of law *** [.]". In the case sub judice, the record on appeal makes it abundantly clear that at the time of appellants' filing of their mandamus action, the alleged "taking" had already occurred. The highway improvement project was complete. Any additional "seizure" that may have ensued during the construction of the project, could not now be prevented. As such, appellants' mandamus action does not fall within the limited exception of R.C. 5501.22.

{¶22} Appellants argue that three of the cases cited by appellee at trial in support of his position that R.C. 5501.22 gives the trial court jurisdiction to prevent a taking of property and not for a completed taking of property, preceded the Modern Courts Amendment of 1968.¹ However, appellee correctly points out that "this court found *Wilson* and *Braman* controlling in the matter just six months ago in [*State ex rel. Turkovich v. Proctor*, 11th Dist. No. 2004-T-0081, 2004-Ohio-6699]." Indeed, in *Turkovich*, we agreed

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with the reasoning in *Wilson and Braman*, and stated that, "once the taking of the property has been completed without the filing of an appropriation action, the violation of due process has also technically been completed." *Id.* at ¶20.

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WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

RECEIVED

MAY 16 2006

ATTY. FRANK BODOR

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

GORDON PROCTOR, DIRECTOR, OHIO
DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

- vs -

RICHARD L. BLANK, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2005-T-0027

For the reasons stated in the opinion of this court, appellants' assignment of error is without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Donald R. Ford
PRESIDING JUDGE DONALD R. FORD

FOR THE COURT

FILED
COURT OF APPEALS
MAY 15 2006
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS,
TRUMBULL COUNTY, OHIO

GORDON PROCTOR, DIRECTOR
OHIO DEPARTMENT
OF TRANSPORTATION

CASE # 01 CV 2422

PLAINTIFF

JUDGMENT ENTRY

V.

RICHARD BLANK, ET. AL.

DEFENDANTS

This matter came before the court pursuant to a hearing on January 7, 2005. After review of the relevant arguments and evidence presented, the court finds that Plaintiff's motion to dismiss Defendants and Plaintiff-Relators' claim for writ of mandamus due to lack of jurisdiction is well taken and hereby grants same. The court finds no just cause for delay and stays the rest of the case pending appeal.

2/7/05

DATE

JUDGE W. WYATT MCKAY

TRUMBULL COUNTY
COURTS
2005 FEB - 9 P 1:32

2/9/05
Copies Sent:
J Cordaro
F Bodor
D Hanco
J Carnhart
G Proctor

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE
COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD
OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH-
WITH BY ORDINARY MAIL

JUDGE

W. Wyatt McKay

ARTICLE II: LEGISLATIVE

by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.
(1851)

§15 NO IMPRISONMENT FOR DEBT.

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.
(1851)

§16 REDRESS FOR INJURY; DUE PROCESS.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.
(1851, am. 1912)

§17 NO HEREDITARY PRIVILEGES.

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.
(1851)

§18 SUSPENSION OF LAWS.

No power of suspending laws shall ever be exercised, except by the General Assembly.
(1851)



§19 EMINENT DOMAIN.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.
(1851)

§19A DAMAGES FOR WRONGFUL DEATH.

The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.
(1912)

§20 POWERS RESERVED TO THE PEOPLE.

This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.
(1851)

ARTICLE II: LEGISLATIVE

§1 IN WHOM POWER VESTED.

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.
(1851, am. 1912, 1918, 1953)

§1A INITIATIVE AND REFERENDUM TO AMEND CONSTITUTION.

The first aforesated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner

§ 5501.22. Actions against director.

The director of transportation shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside Franklin county except in actions brought by a railroad company under section 4957.30 of the Revised Code, or by a property owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property is situated, or in any action otherwise specifically provided for in Chapters 5501., 5503., 5511., 5512./D, 5513., 5515., 5516., 5517., 5519., 5521., 5523., 5525., 5527., 5528., 5529., 5531., 5533., and 5535. of the Revised Code.

HISTORY: GC § 1178-9; 121 v 455; Bureau of Code Revision RC § 5501.18, 10-1-53; RC § 5501.22, 135 v H 200. Eff 9-28-73.

À Chapter 5512. is now repealed. This refers to former Chapter 5512., Highway Construction Projects. The sections in this chapter were repealed in 1957 and 1976. A new chapter with the same number was enacted in HB 210 (147 v -) and is not analogous to former Chapter 5512.

Not analogous to former RC § 5501.22, amended and renumbered RC § 5501.25 in 135 v H 200, eff 9-28-73.

RULE 13. Counterclaim and Cross-Claim

★ (A) **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

★ (B) **Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(C) **Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(D) **Counterclaim against this state.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against this state, a political subdivision or an officer in his representative capacity or agent of either.

(E) **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleadings.

(F) **Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(G) **Cross-claim against co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(H) **Joinder of additional parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 19, Rule 19.1, and Rule 20. Such persons shall be served pursuant to Rule 4 through Rule 4.6.

(I) **Separate trials; separate judgments.** If the court orders separate trials as provided in Rule 42(B), judgment on a counterclaim or cross-claim may be rendered in

OHIO RULES OF CIVIL PROCEDURE

TITLE I. SCOPE OF RULES--ONE FORM OF ACTION

RULE 1. Scope of Rules: Applicability; Construction; Exceptions

* (A) **Applicability.** These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

* (B) **Construction.** These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) **Exceptions.** These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1975.]