

In the
Supreme Court of Ohio

GORDON PROCTOR, Director,	:	Case No. 2006-1242
Ohio Department of Transportation,	:	Case No. 2006-1243
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Trumbull County
	:	Court of Appeals,
KATHY KARDASSILARIS, <i>et al.</i> ,	:	Eleventh Appellate District
	:	
Defendants-Appellants,	:	Court of Appeals Case
	:	No. 2005-T-0026
and	:	No. 2005-T-0027
	:	
RICHARD L. BLANK, <i>et al.</i> ,	:	
	:	
Defendants-Appellants.	:	

**MERIT BRIEF OF PLAINTIFF-APPELLEE DIRECTOR,
OHIO DEPARTMENT OF TRANSPORTATION**

MARC DANN (0039425)
Attorney General of Ohio

ELISE PORTER* (0055548)
Acting Solicitor General
**Counsel of Record*
MICHAEL L. STOKES (0064792)
Assistant Solicitor
L. MARTIN CORDERO (0065509)
RICHARD J. MAKOWSKI (0006892)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eport@ag.state.oh.us

FRANK R. BODOR (0005387)*
Attorney at Law
**Counsel of Record*
157 Porter Street, NE
Warren, Ohio 44483
330-399-2233
330-399-5165 fax

Counsel for Defendants-Appellants,
Kardassilaris and Blank

Counsel for Plaintiff-Appellee,
Director, Ohio Department of Transportation

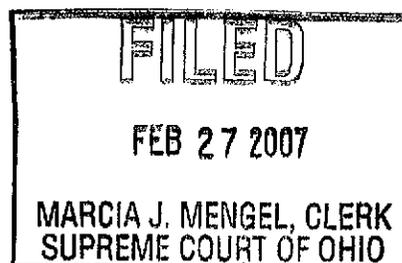


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INTRODUCTION

Appellants Kathy and Panagiotis Kardassilaris and Richard and June Blank seek money from the Director of Transportation for property damage they claim to have suffered during the construction of a highway project. Normally, the provisions of R.C. 5501.22 restricting the jurisdiction of these suits to Franklin County would be unquestioned. But because the Director's appropriation suits were still pending in Trumbull County, Appellants sought to bring their property damage claims there. Portraying their construction-related claims as appropriations of additional property rights, Appellants filed mandamus counterclaims, seeking to compel the Director to appropriate those "additional rights" along with the land he originally sued to acquire.

R.C. 5501.22 states that, apart from certain exceptions not implicated here, the Director is not suable in any court outside Franklin County. Applying the statute's plain language, the trial court dismissed Appellants' counterclaims. On appeal, Appellants contended that the Modern Courts Amendment abrogated R.C. 5501.22, making Civil Rule 13 trump the inconsistent statute. But the Court of Appeals for the Eleventh District disagreed, holding that R.C. 5501.22 is substantive law unaffected by the Amendment.

The appeals court's ruling was compelled not only by the language of R.C. 5501.22 but also by the larger doctrine of sovereign immunity. If no statute authorized it, the Director of Transportation could not be sued at all. And while the Director, like other state department heads, routinely resorts to eighty-eight common pleas courts to further his department's mission, doing so does not impair his immunity from counterclaims, as Civil Rule 13(D) confirms. Accordingly, this Court should affirm the decisions below.

STATEMENT OF THE CASE AND FACTS

In 2001 the Director of Transportation filed suits against neighbors Kardassilaris and Blank to appropriate land for upgrading State Route 5. Kardassilaris T-1; Blank T-1.¹ The following year ODOT's contractor entered each property and constructed the planned highway improvements. Kardassilaris T-32; Blank T-26. In August 2004 the owners filed mandamus counterclaims seeking to compel the Director to appropriate "additional property taken" by the contractor during construction. Kardassilaris T-26; Blank T-29.

None of the facts alleged in support of the property owners' counterclaims relate to the property the Director originally sued to appropriate. Instead, their claims arose from construction-related activities. Kardassilaris claimed that the contractor flooded the parking lot, disconnected power, disturbed water lines, used areas outside of designated locations, and removed survey pins. Blank claimed that the contractor parked equipment that blocked access, damaged the parking lot, damaged a support pillar, caused a crack in a wall, broke a sewer line, broke a gas line, and used areas outside of designated locations. Appellant Br. at 2-3.

The Director moved to dismiss the counterclaims because jurisdiction over them was exclusively vested in courts of Franklin County by R.C. 5501.22, which assigns jurisdiction of actions against him, and by R.C. 2743.02 and 2743.03, which puts claims for money damages against the state within the exclusive jurisdiction of the Court of Claims. Kardassilaris T-28; Blank T-31. The trial and appeals courts agreed. Kardassilaris T-35, A-18; Blank T-39, A-15. This Court declined jurisdiction, see *10/4/2006 Case Announcements*, 2006-Ohio-5083, but then granted Appellants' reconsideration motion and agreed to hear the case. See *11/29/2006 Case Announcements*, 2006-Ohio-6171.

¹ The trial court record is designated by T-x; the appellate court record is designated by A-x.

ARGUMENT

Appellee's Proposition of Law:

The statute giving courts in Franklin County exclusive jurisdiction over suits against the Director of Transportation is substantive law unaffected by the Modern Courts Amendment, and Civil Rule 13 does not enlarge that jurisdiction for counterclaims.

- A. Because it gives courts in Franklin County exclusive jurisdiction over suits against the Director of Transportation, R.C. 5501.22 is a matter of substantive law unaffected by conflicting rules of civil procedure.**

The statute governing suits against the Director of Transportation, R.C. 5501.22, dates back nearly eighty years. In 1928, when it came into effect as § 1187 of the General Code, it read:

“The director shall not be suable * * * in any court outside of Franklin county in any action not otherwise specifically provided for in this act, * * * and 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 attempted to be taken is situated.”

State ex rel. Jaster v. Court of Common Pleas (1936), 132 Ohio St. 93, 97. Applying this statute in its original and succeeding versions, this Court has repeatedly held that ““all actions * * * against the Director * * * must be brought in the courts of Franklin County, wherein is lodged exclusive jurisdiction over causes against him.”” *Sarkies v. State* (1979), 58 Ohio St.2d 166, 168, quoting *Jaster*, 132 Ohio St. at 98. See also *State ex rel. Braman v. Masheter* (1966), 5 Ohio St.2d 197, 198; *Wilson v. Cincinnati* (1961), 172 Ohio St. 303, 305.

The Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution, allows the creation of rules of civil procedure but also says those “rules shall not “abridge, enlarge, or modify any substantive right.” Accordingly, if a rule of civil procedure and a statute conflict with regard to a substantive right, the statute will control. See *In re McBride*, 110 Ohio St.3d 19, 2006-Ohio-3454 ¶ 13; *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 284 n.11.

This Court has defined “substantive,” as used in Section 5(B), Article IV, to mean ““that body of law which creates, defines, and regulates the rights of the parties.”” *McBride*, 110 Ohio

St.3d 19, 2006-Ohio-3454 ¶ 13, quoting *Krause v. State* (1972), 31 Ohio St.2d 132, 145. Statutes regulating jurisdiction are substantive. See *Akron v. Gay* (1976), 47 Ohio St.2d 164, 165-66. And this Court has held that the jurisdictional limit in R.C. 5501.22, in particular, “is an absolute right conferred by statute” on the Director. *State ex rel. Braman v. Masheter* (1966), 5 Ohio St.2d 197, 198.

Because R.C. 5501.22 regulates jurisdiction in “all actions against the Director,” any procedural rule that conflicts with it must yield, as the appeals court decided in this case.

B. Being a limited waiver of the state’s sovereign immunity, R.C. 5501.22 bars any suits to which the state has not expressly consented.

Appellants now agree that R.C. 5501.22 allows original suits against the Director of Transportation in Franklin County only. Appellant Br. at 5-6. Recognizing their argument to the court of appeals is untenable, Appellants no longer maintain that the Modern Courts Amendment makes the civil rule on counterclaims trump the statute. Instead, they now sidestep the issue by arguing that, although R.C. 5501.22 limits where the Director is originally suable, it says nothing about countersuits, thereby leaving the field open for Civil Rule 13 to apply.² But this new argument is based on a faulty understanding of the statute’s purpose and effect.

R.C. 5501.22 and its predecessors did not limit what otherwise would have been a wide-open right to sue the Director in any county: rather, they gave courts in Franklin County jurisdiction to hear suits that otherwise would be barred by sovereign immunity. Accordingly, even if the term “suable” does not encompass counter-suits, as Appellants contend, their argument fails, because any legal action against the Director is barred by sovereign immunity unless R.C. 5501.22 expressly allows it.

² Appellants did not make this argument in the courts below, so this Court may deem it to be waived. See *State ex rel. Gibson v. Industrial Comm’n of Ohio* (1988), 39 Ohio St.3d 319, 320.

1. But for the legislature's enactment of General Code § 1187 and its successors, the state's sovereign immunity would have barred any suit against the Director of Transportation.

The common law principle of sovereign immunity has always barred suits against the state and its departments unless the state expressly consented to them. Even after the 1912 amendment to Section 16, Article I of the Ohio Constitution allowing "suits against the state in such courts and in such manner, as may be provided by law," the underlying doctrine of sovereign immunity remained intact. Soon after the amendment's enactment, this Court held: "A state is not subject to suit in its own courts without its express consent" and "statutory authority is required as a prerequisite to the bringing of suits against the state." *Raudabaugh v. State* (1917), 96 Ohio St. 513, syllabus 1 and 2.

Against this backdrop the 1927 General Assembly enacted General Code § 1187 to allow courts in Franklin County to hear all suits against the Director of the state highway department, permitting suits in other counties only "as specifically provided" by law. But for this statute and its successors, the Director would not have been suable anywhere, because the principle of sovereign immunity would have precluded any suit against him.

In its 1961 decision in *Wilson v. Cincinnati*, 172 Ohio St. 303, this Court explicitly drew a connection between the statute, subject matter jurisdiction, and sovereign immunity. The facts of the case are instructive. In what now would be called an inverse condemnation action, Wilson sued Cincinnati and the Ohio Department of Highways to recover compensation for property used by the government that Wilson claimed to own. After a preliminary ruling that Wilson did, in fact, still own the property, the court allowed the matter to go to trial as an appropriation proceeding. Arguing that the local common pleas court had no jurisdiction by virtue of R.C. 5501.18 (now R.C. 5501.22), the Director moved to dismiss. *Id.* at 304.

Addressing the statute and the Director’s jurisdictional argument, this Court began its analysis with the “fundamental principle” that “a state can be sued only with its consent.” *Id.* And while Section 16, Article I of the Ohio Constitution authorized “the enactment of legislation to provide for actions against the state,” the Court noted, the constitutional provision was “not self-executing” and did “not in and of itself authorize actions against the state.” *Id.* at 304-05. Having laid this foundation the Court then turned to the statute, which it described as “defining and limiting the jurisdiction of the courts in relation to actions against the Director of Highways,”³ holding that (apart from specific statutory exceptions) “all actions against the Director of Highways must be brought in Franklin County.” *Id.* at 305. Concluding that any other court would lack “jurisdiction of the cause,” *id.* at 305-06, the Court reversed and ordered the Director to be dismissed from the suit.

As the *Wilson* Court’s analysis shows, sovereign immunity bars any actions against the Director to which the state has not consented, and R.C. 5501.22 is the statute by which the state has given consent to suits against the Director. Accordingly, sovereign immunity must bar any action against the Director that is outside the scope of this statute.

2. Sovereign immunity bars suits to which the state has not expressly and specifically consented.

In *Raudabaugh*, this Court was careful to note that “express consent” is necessary to abrogate sovereign immunity. 96 Ohio St. 513, syllabus 1. In the years following, it remained “a fundamental principle of the common law in Ohio that sovereign immunity applied whenever the state was sued without its express consent.” *Manning v. Ohio State Library Bd.* (1991), 62 Ohio St.3d 24, 29. Even after passage of the Court of Claims Act, as the *Manning* Court noted, unless

³ *Wilson*’s description of the statute as “defining and limiting” jurisdiction corresponds to the definition of substantive law as that which “creates, defines, and regulates the rights of the parties.” *McBride*, 110 Ohio St.3d 19, 2006-Ohio-3454 ¶ 13.

the state had “specifically consented to be sued, an aggrieved party was (and still is) precluded from bringing suit.” *Id.* at 29-30. Therefore, unless the state has *expressly* and *specifically* consented to an action, sovereign immunity will bar it.

3. The state has not expressly consented to counterclaims against the Director of Transportation in any court outside Franklin County.

R.C. 5501.22 says the Director “shall not be suable * * * in any court outside Franklin county.” Seeking to manufacture a loophole big enough for their actions in Trumbull County, Appellants note that the statute says nothing about countersuits. They go on to argue that, “if the legislature had intended to require a countersuit to be filed in Franklin County, it would have worded the statute to say that the Director shall not be “suable or countersuable in any Court outside Franklin County.” Appellant Br. at 6. This argument necessarily implies that all legal actions against the Director are allowed unless the state takes some affirmative action to prohibit them. But as *Raudabaugh*, *Wilson* and *Manning* show, the rule is exactly the opposite. Sovereign immunity prohibits any legal action against the Director unless the state has expressly and specifically consented to it. Therefore, even if (as Appellants contend) the legislature intentionally omitted countersuits from R.C. 5501.22, the effect of that omission would be to bar the countersuits, not to allow them.

Nor can Civil Rule 13 be construed as express consent to suit. Appellants suggest that, by reading R.C. 5501.22 to exclude countersuits, the statute can be harmonized with the Rule’s compulsory and permissive counterclaim provisions. Appellant Br. at 10-11. But Civil Rule 13(D), which specifically addresses counterclaims against the state, forecloses that argument. It reads: “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.”

Contrary to Appellants' suggestion, then, the mandatory counterclaim provisions of Civil Rule 13(A) do not and cannot enlarge the jurisdiction allowed by R.C. 5501.22. The "limits now fixed by law" when the Civil Rules were adopted, and to which Civil Rule 13(D) refer, put "all actions against the director of the state highway department" within the "exclusive jurisdiction" of the "courts of Franklin county." *State ex rel. Jaster v. Court of Common Pleas* (1936), 132 Ohio St. 93, 98. R.C. 5501.22 does not expressly permit counterclaims against the Director outside Franklin County, and Civil Rule 13(D) specifically precludes Appellants' effort to "interpret" the statute more broadly.

4. Consent to a countersuit cannot be implied from the Director's appropriation suit in Trumbull County.

Ohio's requirement of "express consent" to suit is paralleled by federal law. There, as the U. S. Supreme Court has explained, a waiver of sovereign immunity "must be unequivocally expressed in statutory text" and "will not be implied." *Lane v. Pena* (1996), 518 U.S. 187, 192. Accordingly, federal courts have long held that government does not waive its sovereign immunity to counterclaims merely by filing suit. See *United States v. Forma* (2nd Cir. 1994), 42 F.3d 759, 764; *Narramore v. United States* (Fed. Cir. 1992), 960 F.2d 1048, 1050-51 (eminent domain); *United States v. Los Angeles* (9th Cir. 1979), 595 F.2d 1386, 1389.

The Director of Transportation files hundreds of lawsuits each year to acquire property for highway projects. An appropriation suit must be filed in the county where the property is situated. R.C. 5519.01. If an implied waiver of sovereign immunity to counterclaims were to occur whenever an appropriation case is filed, then Civil Rule 13(B) could require the Director to litigate any claims defendant landowners might happen to have against the state. This result would negate the legislature's decision to limit the scope of appropriation cases to an "inquiry and assessment" of compensation and damages for the taking, as defined by the Director's

resolution and finding that authorized the suit. See *Masheter v. Blaisdell* (1972), 30 Ohio St.2d 8, 10-11; R.C. 163.08; 163.14; 5519.01.

The Staff Note to Civil Rule 13(D) demonstrates, however, that no such result was intended. Rather, as the Note explains, “Rule 13(D) is simply a cautionary rule indicating that the state, by filing an action, in no way waives its sovereign immunity as far as counterclaim liability is concerned.”

C. The statute making the Director “suable” in Franklin County unambiguously encompasses countersuits; if it did not, the Director could not be countersued at all.

Even if the state’s sovereign immunity did not negate Appellants’ creative reading of R.C. 5501.22, their proffered interpretation of the statute would still fail.

To begin with, Appellants have not shown the word “suable” is ambiguous. When analyzing statutes, this Court begins with three principles. First, it “must apply a statute as it is written when its meaning is unambiguous and definite.” *Portage Cty. Bd. of Commr's v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954 ¶ 52. Second, terms undefined by statute “are to be accorded their common, everyday meaning.” *MP Star Financial, Inc. v. Cleveland State Univ.*, 107 Ohio St.3d 176, 2005-Ohio-6183 ¶ 8. Third, a linguistically possible alternative reading is not enough to make a statute ambiguous. Rather, “when confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095 ¶11 (internal citations omitted). And when sovereign immunity is at issue, federal law suggests a fourth principle, as well: a statute waiving immunity “will be strictly construed, in terms of its scope, in favor of the sovereign,” so any claimed ambiguity must be construed in favor of immunity. *Lane v. Pena* (1996), 518 U.S. 187, 192.

The American Heritage Dictionary (4th Ed. 2000) defines “suable” as: “Subject to suit in a court of law.” The word “suit,” in turn, is defined as: “A court proceeding to recover a right or claim.” These definitions plainly include countersuits as well as original lawsuits, because a person not suable could not be subject to *any* court proceeding. This Court expressed a similar understanding, describing “suable” as encompassing “*all actions* against the director of the state highway department.” *State ex rel. Jaster v. Court of Common Pleas* (1936), 132 Ohio St. 93, 98 (emphasis added).

The General Assembly’s principal enactment in the area of sovereign immunity, the Court of Claims Act, shows that the legislature, too, views countersuits as being within the broader category of lawsuits. R.C. 2743.02(A)(1) reads: “The state hereby waives its immunity from liability * * * and consents to be sued, and have its liability determined, in the court of claims created in this chapter.” Later in the chapter, R.C. 2743.03(E)(1) says: “A party who files a counterclaim against the state * * * in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims.” If counterclaims were not included within the state’s general consent “to be sued,” then R.C. 2743.03(E)(1) would not be necessary, because sovereign immunity would bar them outright.

Ignoring this Court’s principles, Appellants resort to a maxim of statutory construction to manufacture ambiguity where none exists. Remarkably, the only legal authority Appellants use to support their proffered interpretation of the word “suable” is the maxim *expressio unius est exclusio alterius*. Appellant Br. at 5. But that maxim applies “‘only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.’” *State ex rel.*

Curtis v. DeCorps (1938), 134 Ohio St. 295, 299-300, quoting *Ford v. United States* (1927), 273 U.S. 593, 611. Applying the maxim to R.C. 5501.22, moreover, actually undercuts Appellants' argument, because the statute itemizes its exceptions and "counterclaims" are absent from the list.

Even if there were a distinction between suits and countersuits that operated to exclude counterclaims from the statutory limitation on where the Director is "suable," it would not help Appellants' cause. Section 16, Article I of the Ohio Constitution allows the legislature to establish procedures for "[s]uits * * * against the state." If countersuits are not a subset of suits, then they are necessarily outside the scope of this constitutional provision, and therefore outside the ambit of any permissible waiver of sovereign immunity.

D. Jurisdictional limits in a statutory waiver of sovereign immunity take precedence over concerns for judicial economy, which in any event would not be served by allowing Appellants' claims to proceed.

It might be more convenient to litigate claims against the state wherever they arise, but the General Assembly has chosen to centralize them in Franklin County. For cases involving the Director of Transportation, R.C. 5501.22 accomplishes this task. For state agencies generally, the Court of Claims Act includes specific jurisdictional limits. The state, acting through its various departments, routinely files suit in each of Ohio's eighty-eight counties. But it does not have to litigate counterclaims against it in all those jurisdictions. Rather, by enacting R.C. 2743.03(E)(1), the legislature required removal of all counterclaims to the Court of Claims. If concerns for judicial economy were paramount, the legislature would not have imposed this requirement.

Moreover, judicial economy would not be served by hearing Appellants' counterclaims. Contrary to Appellants' assertions, their counterclaims are not compulsory. To be compulsory, a counterclaim must (1) exist at the time opposing party served the pleading setting forth its claim and (2) arise from the transaction or occurrence this is the subject matter of the opposing party's

claim. See *Rettig Ent., Inc. v. Koehler* (1994), 68 Ohio St.3d 274, 277. Appellants' claims fail both prongs of this test.

The Director filed petitions to appropriate Appellants' property in October and December 2001. Kardassilaris T-1; Blank T-1. His contractor entered the Kardassilaris and Blank properties for construction purposes in January 2003 and April 2002, respectively. Kardassilaris T-32; Blank T-26. Appellants claim additional money for construction-related activity. Appellant Br. at 2-3. But none of their claims could have existed when they were served with the initial pleadings more than a year before construction began.

Nor do Appellants' claims arise from the same "transaction or occurrence" as the appropriation petitions. The subject of an appropriation petition is limited to the property rights described in the Director's resolution and finding. See *Masheter v. Blaisdell* (1972), 30 Ohio St.2d 8, 10-11; R.C. 5519.01. The gist of Appellants' mandamus claims, by contrast, is that the state's construction activities "appropriated" property *not* described in the petitions. Appellant Br. at 2-3. Consequently, these claims cannot have arisen from the same transaction or occurrence as ODOT's petitions.

Nor would a separate trial of Appellants' claims involve the "substantial duplication of effort and time" that might give rise to a compulsory counterclaim. *Rettig*, 68 Ohio St.3d at 278 (internal citations omitted). The jury in an appropriation case acts as a body of "inquiry and assessment" to determine "compensation for the property appropriated and damages, if any, to the residue" due to its severance from the part taken. R.C. 163.14; 3 OJI § 301.01. The action is in rem,⁴ and there is no burden of proof. *Martin v. Columbus* (1920), 101 Ohio St. 1, syllabus 1,

⁴ Because the action is in rem, in personam claims by or against the owners of the res are by definition outside its scope. See *Silver Creek Drain Dist. v. Extrusions Div., Inc.* (Mich.), 663 N.W.2d 436, 443, cert. den. 540 U.S. 1107 (2004).

2. Appellants' claims, by contrast, sound in trespass and negligence. They are in personam actions, see *State v. Penrod* (Fourth Dist. 1992), 81 Ohio App.3d 654, 660, in which Appellants would bear the burden of proof. See *Abraham v. BP Oil & Exploration Co.* (Tenth Dist.), 149 Ohio App.3d 471, 2002-Ohio-4392 ¶¶ 14-15, 30. Even if Appellants initially showed a taking in their mandamus action, a jury still would have to decide who trespassed on Appellants' property and what physical damage resulted. These matters differ substantially from the subjects of an appropriation trial.

E. Counterclaims are clearly inapplicable to appropriation cases.

Civil Rule 1(C)(2) anticipates that some procedural rules might be clearly inapplicable to appropriation cases. The statutory procedures set forth in Chapter 163 of the Revised Code show that the rule on counterclaims falls within that category.

R.C. 163.08 permits only answers, not counterclaims. When the Director appropriates property for a free public road, R.C. 163.08 further limits the answer's content by prohibiting any challenge to the Director's right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation.

In cases where such challenges are prohibited, R.C. 163.09 (C) requires the court to "fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury." As with the limitations placed on answers, this statutory language evidences a legislative purpose "to cause this type of case to proceed through the courts as quickly and expeditiously as possible." *Masheter v. Bemua* (Tenth Dist. 1970), 24 Ohio App.2d 7, 10. A rule opening appropriation cases to litigation of counterclaims would be "clearly inapplicable" to this legislative design.

F. R.C. 2743.03 restricts jurisdiction over tort claims against the state for money damages to the Court of Claims.

As an alternative ground for dismissal, the Director argued that the allegations contained in the “counterclaims” amount to tort-type conduct for which money damages could be sought in the Court of Claims only. See *Boggs v. State* (1983), 8 Ohio St. 3d 15, 16-17; R.C. 2743.03. Although not specified by either court below, this statute supports their conclusion that Appellants’ claims cannot be raised in Trumbull County.

CONCLUSION

The partial waiver of sovereign immunity in R.C. 5501.22 restricts Appellants’ claims to the courts of Franklin County. For the above reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



ELISE PORTER* (0055548)
Acting Solicitor General

**Counsel of Record*

MICHAEL L. STOKES (0064792)
Assistant Solicitor

L. MARTIN CORDERO (0065509)

RICHARD J. MAKOWSKI (0006892)

Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for Plaintiff-Appellee,
Director, Ohio Department of Transportation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief Of Plaintiff-Appellee Director, Ohio Department Of Transportation* was served by U.S. mail this 27th day of February, 2007, upon the following counsel:

Frank R. Bodor
157 Porter Street, NE
Warren, Ohio 44483

Counsel for Defendants-Appellants,
Kardassilaris and Blank



ELISE PORTER
Acting Solicitor General