IN THE SUPREME COURT OF OHIO

GORDON PROCTOR, Director **Ohio Department of Transportation** Plaintiff-Appellee v. **KATHY KARDASSILARIS, et al.** Defendant-Appellants *and* **RICHARD L. BLANK, et al.** Defendant-Appellants	))))))))))))))))))	**CASE NO. 2006-1242** **CASE NO. 2006-1243** ON APPEAL FROM THE TRUMBULL COUNTY COURT OF APPEALS ELEVENTH APPELLATE DISTRICT COURT OF APPEAL CASE NO. 2005-T-0026 NO. 2005-T-0027

APPELLANTS' MERIT REPLY BRIEF

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FILED
MAR 16 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE & FACTS 1

II. REPLY ARGUMENT TO APPELLEE'S MERIT BRIEF 1

PROPOSITION OF LAW NO. 1: 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) 1

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Baltimore Ravens Inc. v. Self-Insuring Emp. Evaluation Bd. (2002)
94 Ohio St. 3d 449 2

J. P. Sand & Gravel Co. v. State (1976)
51 Ohio App. 2d 83 ..... 2, 3, 4, 5

Kermetz v. Cook-Johnson Realty Corp. (1977)
54 Ohio App. 2d 220 ..... 4, 5

Smilack v. Bowers (1958)
167 Ohio St. 216, 218-219 2

State ex rel. Curtis v. DeCorps (1938)
83 Ohio St. 61 2

State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County (1979)
9 Ohio St. 2d 159, 164 2

Constitutional Provisions, Statutes & Rules

Modern Courts Amendment to Ohio Constitution Article IV §5(B)
adopted May 7, 1968 ..... 1, 6

Ohio Constitution Article I §19 ..... 2, 6

O.R.C. Chapter 163 ..... 2, 3, 4, 5

O.R.C. §163.01(A) 3

O.R.C. §163.01(B) 3

O.R.C. Chapter 5519 ..... 2, 3, 4, 5

O.R.C. §5501.22 ..... 1, 2, 5

O.R.C.P. Rules 13(A)(B) 1, 6, 7

I. STATEMENT OF THE CASE & FACTS

The statement of the case and facts have already been set forth on page 2 of Appellants' Merit Brief filed February 27, 2007.

II. REPLY ARGUMENT TO APPELLEE'S MERIT BRIEF

Proposition of Law No. 1: 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).

The Appellee brings attention to the fact that O.R.C. §5501.22 dates back nearly eighty years and provides that the Director shall not be "suable" in any Court outside Franklin County except to prevent the taking of property without due process of law.

The precise question that is being put to this Court is whether the word "suable" used by the legislature includes the word "countersuable" and if so does it preclude a property owner from bringing a countersuit for a writ of mandamus mandated by O.R.C.P. Rule 13(A) and permissively allowed by Rule 13(B).

Appellants contend that it does not preclude a countersuit in mandamus to an existing appropriation case because §5501.22 makes no reference to a countersuit. It only states that the Director shall not be "suable" in any court outside Franklin County 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.

In the interpretation of O.R.C. §5501.22 this Court may apply the canon of statutory construction *"expressio unius est exclusio alterius,"* which this Court has long recognized and

employed in other cases.[1] Since the legislature expressed only the word "suable" it meant to exclude the word "countersuable" and therefore countersuits are not included in the statute.

Appellee attempts to refute this argument, on page 4 of his brief, by saying that even if the term "suable" does not encompass countersuits Appellants' argument fails because any legal action against the Director is barred by sovereign immunity unless O.R.C. §5501.22 expressly allows it. In other words, Appellee is saying that the only way subject jurisdiction can be conferred in this case by consent of the sovereign State is pursuant to §5501.22 and under no other statute or law. This is not true and Appellee's contention is refuted by the case of J. P. Sand & Gravel Co. v. State (1976) 51 Ohio App. 2d 8, which holding provides an exception to sovereign immunity where private property is taken for a public purpose contrary to Article I §19 of the Ohio Constitution.

In the case at bar Appellants seek a writ of mandamus against Appellee Director for the taking of additional private property rights in Trumbull County not included in the original appropriation case.

In the J. P. Sand & Gravel Co. case, supra, the Franklin County Court of Appeals held at page 88 as follows:

> "Section 19, Article I of the Ohio Constitution requires that whenever private property is taken for a public purpose, its owner is entitled to compensation. R. C. Chapters 163 and 5519 were enacted by the legislature to implement Section 19, Article I of the Ohio Constitution. These chapters of law, providing for the manner and method of the appropriation of property by the state of Ohio and for a jury determination of the compensation to be paid to the landholder, predate the passage of the Court of Claims Act.

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[1]Baltimore Ravens 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

Judge Troop, in his decision denying jurisdiction in the action herein, stated as follows:

> 'A review of the R. C. Chapter 163 and Chapter 5519 leads to the inevitable conclusion that the General Assembly has, pursuant to Section 16 [19], Article I of the Constitution, provided the law under which and the court in which to sue the state in appropriation actions. Under the law, appropriation actions can be brought only in Common Pleas or Probate Court***.'
>
> We are in agreement with Judge Troop and the application of that stated principle of law to this case. Clearly R. C. Chapters 163 and 5519 provide a method by which damages may be recoverable from the state of Ohio for the taking of private property. Strictly, the doctrine of sovereign immunity would have prevented the private citizen from seeking redress against the state of Ohio where private property was taken. However, these stated chapters of Ohio law have waived sovereign immunity to the extent that damages are recoverable in the courts of law where there has been a taking of private property." [Emphasis Added]

O.R.C. §163.01(A) defines a "public agency" appropriating private property rights as "any governmental corporation, unit, organization, officer authorized by law to appropriate property in the courts of this state." This includes the State of Ohio, which brought these very proceedings under O.R.C. Chapter 163 now before this Supreme Court.

O.R.C. §163.01(B) defines "Court" as:

> "including the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part." [Emphasis added]

The additional property rights for which the counterclaim for writ of mandamus is sought for appropriation in this case is located in Trumbull County.

Appellant property owners maintain that Chapters 163 and 5519, as stated in the J. P. Sand case, waived sovereign immunity by their very terms and have clearly designated that in cases involving the taking of private property O.R.C. §163.01(B) designates the subject

jurisdiction to be in the common pleas and the probate court of the county in which the property to be appropriated is located and not exclusively Franklin County.

In Kermetz v. Cook-Johnson Realty Corp. (1977) 54 Ohio App. 2d 220 this same Franklin County Court of Appeals, which determined the J. P. Sand & Gravel case, at page 222 of its opinion noted that this case gave it the opportunity to clarify and or amplify what it previously held in the J. P. Sand & Gravel case. The precise holding of the Court, which is found at page 227 of the Kermetz case, merits quoting:

> "We hereby hold that it is the more appropriate, and better reasoned, conclusion to permit actions to be brought against the state in the Court of Claims where there has been a "taking" of private property. Further, we hold that such an action may be brought in such court whether the "taking" is either of the permanent, or of the tortious, or "*pro tanto*" type taking. In the instance of bringing such an action in the Court of Claims, the property owner would be considered to have voluntarily waived the right to a jury to assess his damages, as granted by Section 19, Article I of the Ohio Constitution, and by R. C. Chapter 163 and 5519.
>
> Additionally, we hold that the property owner, who alleges that the state has taken his property, may, in the alternative, still bring an original action in mandamus in the courts having this original action jurisdiction. This alternative procedure would require the property owner to show the existence of the clear legal duty of the state official to act in the first instance and, if so show, would permit the property owner to have the damages for the taking assessed by a jury in the appropriation proceeding in the Common Pleas Court, in accordance with the Constitution an the statutory enactments. We have concluded that mandamus should be available if sought by the property owner, in that an action in the Court of Claims seeking damages for a "taking" of real property would not avail the owner of an assessment of value by a jury and, therefore, would not, in this regard, afford a remedy in the ordinary course of the law." [Emphasis Added]

If the counterclaim for the writ of mandamus is allowed for the taking of the additional property rights in this case the property rights and damages for the taking must be decided by a Trumbull County jury because §163(B) gives subject jurisdiction to the common pleas or probate court where the appropriated property is located and not Franklin County.

Appellee predicates its position solely on O.R.C. §5501.22. Appellee fails to address O.R.C. Chapter 163 and O.R.C. Chapter 5519, which have waived sovereign immunity to the extent that damages are recoverable where private property is taken.

The J. P. Sand & Gravel and Kermetz cases clearly:

1) Refute Appellee's contention that O.R.C. §5501.22 confers exclusive subject matter jurisdiction to the Courts for the taking of private property;

2) Refute Appellee's contention that the State has not expressly consented to counterclaims against the Director of Transportation outside of Franklin County;

3) Refute Appellee's contention that a countersuit cannot be implied from the Director's appropriation suit in Trumbull County;

4) Refute Appellee's contention that counterclaims are clearly inapplicable to appropriation cases;

5) Refute Appellee's contention that O.R.C. §5501.22 sets jurisdictional limits on the statutory waiver of sovereign immunity that takes place over judicial economy; and

6) Refute Appellee's position that O.R.C. §5501.22 making the Director suable in Franklin County unambiguously encompasses countersuits.

Appellee Director also contends that Appellants' claims for the taking of property rights are not *in rem* but are personam actions sounding in trespass and negligence. The Appellee is also mistaken as to this contention.

This is refuted in the Kermetz decision by the Franklin County Court of Appeals. In its decision the Court discusses numerous case decisions involving various types of takings similar to those described in this Appellants' counterclaims and at page 227 states:

> "Thus, in many cases that may be cited, the courts have allowed an original action in mandamus against municipalities, as well as the state highway director, on the theory that there had been an appropriation or a "taking," when indeed the acts of the governmental entity, whether negligently or non-negligently, had occasioned what otherwise could be considered a trespass, encroachment, nuisance or other tort against the land holdings of a private individual. So, in effect, the courts have for a number of years permitted actions against the state through its departmental directors by way of an action in mandamus seeking damages in appropriation, where in practicality the act of the state had been tantamount to a tortious act."

In other words, the Court recognized that even if the "taking" sounded as though they were tortious the courts have historically treated the acts as a taking for which an action in mandamus seeking damages is considered appropriate.

In conclusion Appellants maintain that:

1) O.R.C. §5501.22 refers to original suits and specifically excludes countersuits against the Director of Transportation to be required to be filed in Franklin County. This section is interpreted by application of the rules of statutory construction *"expressio unius est exclusio alterius."*

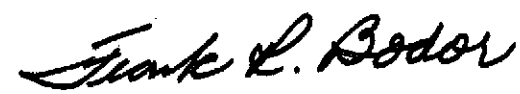
2) Article I §19, O.R.C. Chapters 163 and 5519 grant subject jurisdiction to the common pleas and probate courts of the County where the property sought to be appropriated is located.

3) These statutes combined with the *Modern Courts Amendment Article IV §5(B) of the Ohio Constitution* and the Ohio Rules of Civil Procedure Rules 13(A) and 13(B) grant subject jurisdiction as well as procedural jurisdiction for a property owner to file a counterclaim for a writ of mandamus in a pending appropriation case to require the Director to appropriate additional rights not included in the Director's original action.

4) The filing of a counterclaim in a pending appropriation case in a County where the Director is already a named Plaintiff involving the same property and the same Defendant or Defendants promotes judicial economy, avoids duplication of cases, saves attorney fees and expenses for the parties and is the very reason for the existence of O.R.C.P. Rule 13(A) and 13(B).

The decision of the Court of Appeals and trial court should be reversed and remanded to the common pleas court for reinstatement of Defendant-Appellants' counterclaim for writs of mandamus in both cases.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANTS' REPLY BRIEF was by U.S. mail this 15TH day of March 2007, served upon the following:

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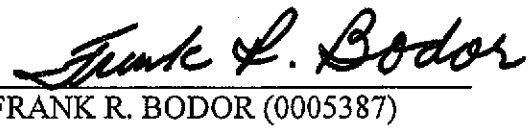

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