

MOTION TO DISMISS UNDER S.Ct.Prac.R. X(5)

Respondent, the Director of the Ohio Department of Transportation (hereafter "ODOT,") hereby moves this Court for an Order dismissing Relators' Complaint for Writ of Mandamus for lack of subject matter jurisdiction and for failure to state a claim upon which the extraordinary writ of mandamus should be granted as relief. The DiGiacobbes' "mandamus" request is merely a disguised claim for money damages for which the Court of Claims has exclusive, original jurisdiction. Therefore, this Court lacks jurisdiction to hear it, as set forth more fully below; and the facts as alleged do not present an actionable claim in mandamus.

I. Procedural Posture

This original action in mandamus was filed on January 14th, 2008, seeking a writ in mandamus that ODOT be ordered to file an appropriation action in the Trumbull County Common Pleas Court under R.C. Chapter 163 to obtain a jury determination of compensation for an alleged uncompensated taking of private property. At the same time, ODOT's statutory appropriation action to acquire a small portion of Relators' Trumbull County commercial property, filed in 2001, sat untried (and still pending unresolved) on the docket of the Trumbull County Common Pleas Court. That action, which should have proceeded to trial in a relatively short time after an answer was filed, remains in a delay mode while the Relators now seek to obtain an order to expand the issues to be tried in that case by obtaining an order to appropriate "additional property interests" based on a single event flooding of their property which occurred several years after the highway improvement was built, but which Relators attribute to negligence in the design of the highway surface water drainage system.

In three other appropriation cases filed by ODOT for this highway project, the attempt to litigate compensation for "additional property takings" was made in the form of counterclaims

filed in the Common Pleas cases. Those cases were dismissed for lack of subject matter jurisdiction controlled by R.C. 5501.22 and the dismissals were affirmed by the Eleventh Appellate District. See, *Proctor v. Blank* (11th Dist.), 2006-Ohio-2386; *Proctor v. Kardassilaris* (11th Dist.), 2006-Ohio-2385; *Proctor v. Davenport* (11th Dist.) 2006-Ohio-5501. This Court accepted jurisdiction over an appeal in the *Blank* and *Kardassilaris* cases, but affirmed the rulings that claims for writs of mandamus to appropriate additional property interests could not be brought before the appropriating court in Trumbull County within ODOT's cases¹. *Proctor v. Kardassilaris*, 115 Ohio St.3d, 2007-Ohio-4838. The DiGiacobbes, however, chose not to take the counterclaim route, but rather to directly file their mandamus case before this Court, alleging negligence in the design of the drainage system resulting in property damages, seeking a writ of mandamus for ODOT to file an additional appropriation case in Trumbull County and ultimately seeking money damages to be determined by a Trumbull County jury at trial of ODOT's 2001 appropriation case with this new appropriation to be consolidated.

II. Pertinent Allegations of Fact

In order to improve State Route 5 in Trumbull County, ODOT needed to acquire some property from the DiGiacobbes. (Complaint at ¶1) Unable to reach an agreement for purchase with them, ODOT filed a partial appropriation action on October 4th, 2001. (Complaint at ¶1) Shortly thereafter, and during the pendency of that case, ODOT entered the DiGiacobbes' property under its quick-take authority of R.C. 163.06 on April 29th, 2002 to build the highway improvement. (Complaint at ¶2) The DiGiacobbes assert that in September, 2004, long after the

¹ Two months after this Court rejected the counterclaim argument, those owners, represented by the same counsel herein, filed original actions in mandamus in this Court reciting the exact same claims previously raised, but couched as "additional property rights taken." See, *State ex rel. Blank v. Beasley, Director of ODOT*, Ohio Supreme Court Case No. 2007-2217; *State ex rel. Kardassilaris v. Beasley, Director of ODOT*, Ohio Supreme Court Case No. 2007-2220. Those matters are currently awaiting decision on ODOT's respective Motions to Dismiss for lack of proper affidavit and Motions for Leave to Amend Complaints filed by the landowners respectively.

highway work was done, they experienced “a huge deluge of water, which collected on the highway and cascaded off the highway surface onto [their] land.” (Complaint at ¶3)

The DiGiacobbes complain that this water entered their building and damaged the walls, floors, and woodwork. (Complaint at ¶4) The DiGiacobbes assert that as a result of the damage, they made their own repairs and undertook remedial measures to intercept the water received from the highway. (Complaint at ¶5) The DiGiacobbes contend that the “deluge” allegedly resulting from ODOT’s design and reconstruction of SR 5 “is a taking of private property rights for which they are entitled to compensation, pursuant to Article I §19 of the Ohio Constitution, for damages caused by the taking.” (Complaint at ¶6) A careful analysis of the DiGiacobbes’ claim, however, reveals that this is simply an action against the State of Ohio for money damages for an alleged defective design of a public highway improvement. The remedy which is available to the DiGiacobbes for this claim is an action for money damages brought in the Court of Claims which holds exclusive and original jurisdiction over such claim.

III. Law and Argument

The DiGiacobbes’ Complaint for Writ of Mandamus seeks to force ODOT to institute an action in Trumbull County “to appropriate the additional property rights taken and damages caused,” then to join that eventual action with a seven year old, still pending statutory appropriation filed by ODOT. But DiGiacobbes do not allege and the reality is that ODOT did not take any of their property for public use beyond that identified in the petition filed in 2001 in the Trumbull County Common Pleas Court. The alleged negligent conduct which DiGiacobbes cast as a public “taking” is not shown to be a public use of their building and the remedy available for such injurious conduct is governed by the Court of Claims Act. The DiGiacobbes seek to avoid the exclusive jurisdiction of the Court of Claims (and the express two year statute

of limitations on claims brought before that Court) by calling the “design and reconstruction” related damage claim as a “taking” of property. Saying it does not make it so and such creative pleading cannot confer subject matter jurisdiction when it is already assigned to a different tribunal. This Court should not accept DiGiacobbes offer to lead them down a clouded path of exercising subject matter over original mandamus actions when the actual claim belongs in another court.

A. The DiGiacobbes’ Complaint does not allege a “taking” for public use.

It is has long been held that “any direct encroachment upon land, *which subjects it to a public use* that excludes or restricts the dominion and control of the owner over it, is a taking of his property for which he is guaranteed a right of compensation by Section 10 of the Bill of Rights.” (Emphasis Added.) *Railroad Co. v. Commrs. of Hancock County* (1900), 63 Ohio St. 23, as syllabus 3. However, the public did not benefit from the single event of flooding alleged in this action. The allegations in the DiGiacobbes’ Complaint raise an issue of negligent design and reconstruction, rather than a taking.

The DiGiacobbes provide a memorandum which cites several cases to encourage this Court to view their allegations as “takings” for which mandamus is necessary. Respondent will address those arguments in demonstrating that this motion should be granted for the reason that while the cases relied on by Relators do recognize that a physical encroachment or material interference with private property may be a “taking;” they also recognize that such the taking must be for a *public use* before the government will be ordered to pursue an action to determine appropriation public compensation.

In *Norwood v. Sheen* (1933), 126 Ohio St. 482, the City of Norwood took over a privately constructed sewage and drainage system when roads within a private subdivision were dedicated

for public street purposes. *Id.* at 485-86. For several years thereafter, the owner experienced repeated sewage flooding and pollution on their land until Norwood made certain proper connections. *Id.* at 484, 490. While this Court found that a temporary appropriation of real property had occurred, there was “ample evidence in the record” that showed sewage disposal and drainage was a public function. (“...sewage from about twenty residences in the Nead subdivision was discharged directly into a small water course crossing the property at Cypress avenue, and that the city [of Norwood] accepted this subdivision without improper sewage having first been remedied.”) *Id.* at 490. In the case at bar, DiGiacobbe does not allege that the water overflow, however brief, was for a public use or otherwise part of a larger system of water diversion.

In *Masley v. Lorain* (1976), 48 Ohio St.3d 334, this Court determined that a landowner had stated a claim for appropriation arising from the repeated and frequent flooding of their property. However, unlike the case with DiGiacobbe, in *Masley*, there was no dispute that the city was using the landowner’s property for public use. “In the present case, it is stipulated that the city’s use of Martin Run Creek *as part of its storm sewer system* resulted in greater amounts of water being drained from other city lands and case upon plaintiffs, parcels, flooding them during heavy rains.” (Emphasis Added.) *Id.* at 336. This Court rejected the city’s claim that the case was about the reasonable *public use* to increase volume and flow from an upstream landowner. “The correct principle of these cases in that a municipal corporation may make reasonable use of a natural watercourse to draining surface water, and will not be liable for incidental damages which may be considered *dammum absque injuria*. It is also not liable for increased flow caused simply by improvement of lots and streets...” *Id.* at 340. In finding that a claim for

appropriation was made, this Court recognized the continual flooding of lower land *was part of the storm sewer system*. *Id.*

The DiGiacobbes do not allege that frequent or repeated flooding of their building, do not allege that flooding of their property is necessary for operation of the highway drainage system as designed for the roadway improvement, and do not allege that this single flood event that damaged their property was part of the properly anticipated, normal operation of ODOT's surface water collection system for the highway. To the contrary: they allege that ODOT negligently designed and reconstructed the highway causing this single flooding event. Indeed, since the DiGiacobbes point to just a single flood event within two years following construction of the improvements, it appears that the claimed "deluge" was an exception to an otherwise reasonable and functional surface water drainage system designed in conjunction with the highway improvement. Indeed, the fact that only a single flood event occurred within some years following construction points more easily to a situation that the flood was caused by an unusual rain event which was not and cannot be anticipated or controlled by ODOT than to a conclusion that the flow of water occurred as the result of negligence of ODOT in designing the drainage system, yet alone the occurrence of a taking of private property for public use.

In *Lucas v. Carney* (1958), 167 Ohio St. 416, the county used land it owned to construct a county garage, which resulted in replacing porous grass and vegetation with heavily compacted clay, subsoil, rock, and debris. The county's property became impervious to water causing it to be ejected upon the neighboring lands after every rain and upon the melting of ice and snow. *Id.* at 418. The county attempted unsuccessfully to "retain and divert the repeated and excessive flow of surface water from the county's land or to prevent the washing of clay, rocks, and other debris onto the land of [owner]." *Id.* at 419. While this Court affirmed that a pro tanto taking had

been alleged, it noted that the landowners acknowledged the county had *properly* acted in the performance of their public functions in operating the garage. *Id.* at 424.

The DiGiacobbes do not allege that any of ODOT's actions related to the design, planning or construction of the drainage system resulted in their property being subjected to *proper public use*. Rather, the DiGiacobbes assume this Court will leap to the conclusion that a one time flooding of their building, which caused damage to the interior, was designed as part of the overall surface water drainage system for the highway and is sufficient to constitute a taking for public use; or that the flooding would have become a frequent or repeated event so as to bring the matter under the holdings of *Masley* and *Lucas*. See, *Accurate Die Casting Co. v. Cleveland* (8th Dist. 1981), 2 Ohio App.3d 386, 391 ("The potential of plaintiff's property to flood at intervals of 'not substantially more than ten years,' however, does not constitute the frequent flooding required by the decisions of the Supreme Court [in] *Masley v. Lorain* [and] *Lucas v. Carney*.") Simply because the DiGiacobbes say that water collected from the highway, diverted onto their property and into their building, does not make out a taking for public use. Relators' conclusory allegations do not make it so, and this Court is not bound to assume the truth of such *conclusory* allegations, particularly in light of their claims of negligent design and construction.

This Court recognized the distinction between claims of negligent liability and a pro tanto taking in *Norwood v. Sheen*, *supra*, when it noted that "...the petition, while it alleges control and maintenance, does not allege negligence on the part of the city of Norwood. Negligence will not be presumed." *Norwood v. Sheen*, at 486. If occurrence of negligence cannot be presumed in a taking claim, it should not be ignored either. In the case at bar, the DiGiacobbes specifically allege ODOT's "*actions in designing and reconstructing* the highway caused the highway waters to be case and diverted onto the lands of the Relators creating damages to their real estate..."

(Emphasis Added.) (Complaint at ¶7) This Complaint demonstrates the DiGiacobbes intention to turn an express negligence claim into a taking action despite the absence of any allegation or basis for an allegation of public use. Takings jurisprudence in Ohio does not support Relators' attempt to turn every government act which impacts private property into an actionable takings claim.

Many other cases affirm the need for a nexus between the claimed taking and public use. *Mansfield v. Balliett* (1902), 65 Ohio St. 451 (construction and maintenance of city sewage pipes resulted drainage into a natural water course through owner's land); *Barberton v. Miksch*, (1934), 128 Ohio St. 169 (construction and maintenance of city reservoir resulted in percolating water); *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203 (construction of overpass across railroad tracks results in loss of ability to develop access to abutting public roadway); *State ex rel. Livingston Court Apts. v. Columbus* (10th Dist. 1998), 130 Ohio App.3d 730 (city's decision to ignore the effects of the illegal connections did not relieved it of its duty to maintain and operate the sewer system, which results in inevitable, recurring and inundating condition with every heavy rainfall).

ODOT is not claiming that the DiGiacobbes should be prevented from having their claims resolved by judicial process. Rather, in the absence of any nexus between the claimed injury and public use, the correct remedy for redress of alleged improper "design and reconstruction" by the state resides with the Court of Claims, which was created to hear all actions that would otherwise have to be dismissed because the state had not waived sovereign immunity. *Manning v. Ohio State Library Bd.* (1991), 62 St.3d 24, 30.

B. Court of Claims has exclusive, original jurisdiction over the DiGiacobbes' Complaint.

"At times, creative pleading may obscure the conceptual line between damages for loss sustained and claims for specific form of relief. Thus, we must look to the nature

of the relief itself, because how [claimants] choose to characterize or phrase their claims is not dispositive of where the action is properly commenced.” (Citations omitted.) *Zeleank v. Indus. Comm.* (10th Dist.), 148 Ohio App.3d 589, 2002-Ohio-3887, at ¶15.

DiGiacobbes’ allegations of damage arise from a single “deluge” of water resulting from the “design and reconstruction” of the highway improvement project. Rather than seek direct monetary relief in the Court of Claims, the DiGiacobbes have attached a mandamus label to their claims as a means of avoiding the relevant two year statute of limitations and the inconvenience of litigating in Columbus. Instead they request this matter be ultimately presented to a jury in Trumbull County Common Pleas Court, and combined with a seven year old pending statutory appropriation action for this highway project. This type of forum maneuvering has previously been attempted by other litigants and flatly rejected.

“A major purpose of the Court of Claims Act was to centralize the filing and adjudication of all claims against the state. The Court of Claims was created to become the sole trial-level adjudicator of claims against the state, with the narrow exception that specific types of suits that the state subjected itself prior to 1975 could be tried elsewhere as if the defendant was a private party. To permit the court of common pleas to have jurisdiction over claims such as the one herein would contravene this purpose. For example, any party wishing to avoid the Court of Claims, for whatever reason, would simply have to attach a prayer for declaratory relief onto his request for monetary damages or injunctive relief. This type of ‘forum-shopping’ is not what was envisioned when the Court of Claims was established; rather, the exceptions to its exclusive jurisdiction should be strict and narrow.” (Emphasis Added.) *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 87-88.

In the present case, the DiGiacobbes’ have chosen to portray all their damages from a single flooding event, and the inferred cost of their voluntary remedial measures, as “additional property rights taken and damages caused” by ODOT. However, the DiGiacobbes’ are doing precisely what was warned against in *Friedman*, supra, namely, tacking on an equitable relief claim as a means to an ultimate request for monetary damages in order to avoid the jurisdiction of the Court of Claims.

In *Rosendale v. ODOT* (2006), Franklin Co. Case No. 06CVH-04-4827, a property owner alleged that his property was damaged during construction of a nearby road project and filed a writ of mandamus seeking that ODOT institute proceedings to either appropriate his property or compensate the owner for damages caused to structures on his property. In granting ODOT's motion to dismiss, the trial court noted that "[the owner] does not seek the return of specific property, or the performance of some specific act upon the subject property in order to repair damage that has already occurred. [The owner] does seek an award of money equal to the property's value before the project." *Id.* Although in the present case the DiGiacobbes does not make an explicit demand for money, they also do not seek an order to repair any damages that have already occurred or the redesign of the highway. Instead, they seek a mandamus action, whose sole purpose is to ultimately get in front of jury to plead for an award of money for their alleged damages and cost for remedial measures. While the claims for money damages were more obvious in *Rosendale*, the outcome in this case should be no different – dismissal of the landowner's claims since the Court of Claims has exclusive, original jurisdiction over such controversies.

In *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d, 447, 2005-Ohio-5124, this Court drew a connection between camouflaged claims for money damages and claims that survive the exclusive, original jurisdiction of the Court of Claims. Cases where "money damages were specifically requested or implicated for alleged injuries that had already occurred," are within the jurisdiction of the Court of Claims. (emphasis added.) *Id.* at ¶24, citing *Boggs*, *infra*, *Friedman*, *supra*, *Zelenak*, *supra*, *Morning View Care Ctr.-Fulton v. Ohio Dept. of Job & Family Servs.*, (10th Dist), 158 Ohio App.3d 689, 2004-Ohio-5436. In *Blackwell*, *supra*, a declaratory judgment claim had intertwined with additional claims for money damages. The litigation was joined by

intervenor boards of elections. In rejecting the state's argument that jurisdiction should be with the Court of Claims, this Court found that "the claims of the boards of election did not contain any claim that could be reasonably construed to be a claim for money damages." *Id.* at ¶23.

In the present case, the DiGiacobbes have alleged that "the encroaching waters from the highway caused considerable damage to the roller skating rink floors and warping and unevenness to the wooden floors and destruction of the carpeting and damage to walls, floors, and woodwork." (Complaint at ¶4) Moreover, they ultimately seek "that the value of such additional rights and damages be determined by a jury." (Complaint at Prayer for Relief at ¶2) Consequently, their allegations fit squarely within *Blackwell*, *supra*, for actions where the alleged injuries have already occurred and the prayer for relief could reasonably be construed as a claim for money damages. Therefore, even if the allegations of ODOT's conduct would rise to public use, the DiGiacobbes' requested relief in this Court would nevertheless be improper as their allegations implicate claims for money damages for injuries that have already occurred.

The DiGiacobbes' seek to avoid the exclusive jurisdiction of the Court of Claims by piecemeal, first by pursuing a mandamus regarding "design and reconstruction" with this Court, and then a monetary award in a future Trumbull County "takings" case in front of a jury. This Court should reject their attempt to undermine the legislative intent to centralize the filing and adjudication of all damage claims against the state.

C. Dismissal of the DiGiacobbes' Complaint is proper.

Although this Court has jurisdiction over original actions in mandamus, it has also recognized that the Modern Courts Amendment, cannot supersede statutes that establish subject matter jurisdiction. *Kardassilaris*, *supra* at ¶17-19. Claims for money damages against the state in actions in contract or tort are clearly within the exclusive, original jurisdiction of the Court of

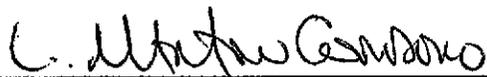
Claims. *Boggs v. State* (1983), 8 Ohio St. 3d 15. Allowing DiGiacobbes' negligence claims to proceed in this Court would divest the Court of Claims of its exclusive, original jurisdiction. This Court should resist the creation of the trap door to open all Ohio common pleas courts to becoming courts of claim simply because a complaint couches a damage claim as "additional property rights taken and damages caused."

IV. Conclusion

DiGiacobbes' claims do not allege a "taking" for public use, or any other relief which can survive jurisdictional scrutiny. The Court of Claims has exclusive, original jurisdiction to hear "design and reconstruction" related damage claims. The DiGiacobbes' attempt to cloak their negligence claims as "takings" should be rejected and this Court should dismiss the Complaint for Writ of Mandamus.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio


L. MARTIN CORDERO* (0065509)

**Counsel of Record*
Associate Assistant Attorney General
150 East Gay Street, 17th Floor
Columbus, Ohio 43215-3130
614-466-3036
614-466-1756 (fax)

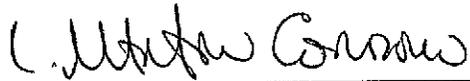
FEDELE DESANTIS (0007024)
Associate Assistant Attorney General
State Office Building - 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899
(216) 787-3030
(216) 787-3480 (fax)

Counsel for Respondent,
Director, Ohio Department of Transportation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion Of Respondent Under S.Ct.Prac.R. X(5)To Dismiss Original Complaint Of Relator For A Writ Of Mandamus* was served by U.S. mail this 27th day of February, 2008, upon the following counsel:

FRANK R. BODOR
Attorney at Law
157 Porter Street, NE
Warren, Ohio 44483
330-399-2233
330-399-5165 fax
Counsel for Relators DiGiacobbe



L. MARTIN CORDERO* (0065509)
**Counsel of Record*