

In the  
**Supreme Court of Ohio**

NEW 52 PROJECT, INC.,

Plaintiff-Appellee,

v.

GORDON PROCTOR, DIRECTOR, OHIO  
DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Case No. 2008-**08**-**0574**

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:  
:  
: On Appeal from the  
: Franklin County  
: Court of Appeals,  
: Tenth Appellate District  
:  
: Court of Appeals Case  
: No. 07-APE-06-0487  
:

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT  
DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION**

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**FILED**

MAR 24 2008

CLERK OF COURT  
SUPREME COURT OF OHIO

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## INTRODUCTION

This case threatens the ability of the Ohio Department of Transportation (“ODOT”) to maintain the perpetual easements that underlie the state highway system.

Ohio has the seventh-largest highway system in the nation. Nearly two-thirds of this system consists of two-lane routes outside of cities. And much of this rural highway system is based on rights-of-way acquired by easement, consistent with the traditional doctrine described in *Ziegler v. Ohio Water Service Co.* (1969), 18 Ohio St. 2d 101, 103.

Until now, ODOT did not have to worry about inadvertently losing its easement rights. The General Assembly enacted laws specifying how the Director of ODOT may abandon or vacate any part of the state highway system. R.C. 5511.01; R.C. 5511.07; R.C. 5529.01. This statutory scheme requires positive action and a decision by the Director before abandonment can occur. In this case, however, the Tenth District wrongly determined that a highway easement could also be lost by mere inaction—through common law abandonment by nonuse for twenty-one years. *New 52 Project, Inc. v. Proctor* (10th Dist., Feb. 7, 2008), 2008-Ohio-465, ¶¶ 23-24 (“Op.”).

The negative consequences of this decision are substantial. ODOT uses highway rights-of-way for many purposes beyond highway pavement, such as lateral support, drainage and runoff control, and maintenance. Because these less-intensive uses are not always readily apparent, they might give rise to lawsuits like this one. And since R.C. 5501.22 restricts the jurisdiction of suits against the Director to courts in Franklin County, appeals of those suits would be heard only by the Tenth District, which produced the erroneous decision in question—meaning that this Court should correct the lower court’s error now before waiting for the error to compound itself.

For these reasons and others described below, the Court should review this case and reverse the appeals court's decision.

### **STATEMENT OF THE CASE AND FACTS**

In 1959, the state highway department acquired a perpetual highway easement over land that New 52 Project, Inc. ("New 52") now claims to own. Op. ¶ 5. In 2006, New 52 filed this suit against ODOT seeking a declaration that ODOT had abandoned this easement or that the easement had been extinguished by operation of law. Op. ¶¶ 6-7.

To support its claim, New 52 alleged the easement had once been used as the main route of U.S. 52 but that, beginning in 1984 or 1985, "the highway was rerouted so it did not traverse the easement at issue." Op. ¶ 6. New 52 further alleged that since then "the easement held by defendant or a major portion thereof has ceased to be used as an exit or for any other highway purposes for a period exceeding the statutory period of twenty-one years." Op. ¶ 6.

ODOT moved to dismiss, arguing the complaint failed to state a claim because (1) adverse possession does not lie against the State and (2) a state highway easement cannot be abandoned through nonuse, but only through the procedures set forth in R.C. 5511.01. Op. ¶ 8. In response, New 52 argued that the State had abandoned through nonuse and that R.C. 5511.01 did not apply because the land, by virtue of disuse, was no longer a highway. Op. ¶ 9.

The trial court dismissed the complaint, reasoning that New 52 had no common law cause of action because R.C. 5511.01 sets forth the exclusive procedures for abandonment. Op. ¶ 10. Because the complaint did not allege that ODOT had complied with those procedures, the trial court concluded that New 52 failed to state a claim for relief. Op. ¶ 11.

On appeal, the Tenth District agreed that R.C. 5511.01 provided a mechanism to abandon a highway, but it disagreed that the statutory mechanism was exclusive. Op. ¶ 23. Noting that the statute "neither expressly repeals nor incorporates any aspect of the common law cause of action

for abandonment of a highway easement,” the appeals court concluded that a common law claim remained available to the fee owner. Op. ¶¶ 23-24. Accordingly, the court concluded that New 52’s complaint sufficiently pleaded facts stating a claim for relief and reversed and remanded the case for further proceedings. Op. ¶ 24-25.

ODOT appeals the Tenth District’s judgment.

### **THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

**A. The decision below will impede the Director’s “general supervision of all roads comprising the state highway system.”**

By statute, the Director of Transportation is given “general supervision of all roads comprising the state highway system.” Measured by center-line miles, this system is made up of more than 19,000 miles of interstate, federal, and state highways, consisting of nearly 49,000 miles of traffic lanes, 85% of which are outside of urban areas. Historically, the property owners abutting rural highways retained fee title to the highway right-of-way. *Ohio Bell Tel. Co. v. Watson Co.* (1925), 112 Ohio St. 385, syllabus 1. Former R.C. 5501.111, enacted in 1955, gave the Director authority to acquire fee simple title to highway property, but a significant part of the system mileage acquired before then (and some acquired since then) is held by perpetual highway easement.

As part of his supervision of the state highway system, the Director has statutory discretion to abandon or vacate highway property. To inform the Director’s discretion, and to ensure the public’s interest in its roads is protected, R.C. 5511.01 and R.C. 5511.07 provide for notice and public involvement. This procedure would be negated if a single, self-interested owner could use a court to compel ODOT to relinquish a right-of-way over his property.

But the Tenth District’s decision does not just undermine these statutory procedures: It also arrogates to the courts the power to decide what is or is not a highway use—a decision that

the General Assembly intended to leave to the Director and his engineers. ODOT uses rights-of-way for many purposes other than paved travel lanes. Each highway, for example, has a drainage system to capture and control storm-water runoff. Rights-of-way might also be used to stabilize slopes above or below the road surface, for lateral support, for the side-fall of plowed snow, for sight distance, for maintenance access, and even for scenic view. These uses might not be readily apparent, but they are nonetheless critical to the highway system's proper functioning.

New 52's pleading underscores a further problem that might arise if the courts tread into this arena reserved by the General Assembly to the Director. New 52 alleged that "the easement held by defendant *or a major portion thereof* has ceased to be used as an exit or for any other highway purposes." Op. ¶ 6 (emphasis added). This allegation raises a host of questions: Should nonuse of a "major portion" be enough to work an abandonment of the whole easement? If so, what constitutes "major"? If not, is some sort of partition required? Who decides where the partition should be, and how? Highway-engineering expertise is needed to answer these questions—which is precisely why the General Assembly committed them to ODOT, not the courts.

When a highway is rebuilt or relocated, rights-of-way once used for vehicle travel may now be used for other purposes, including passive uses such as storm-water detention and drainage. Until now, the decision whether a highway right-of-way is still useful for the state highway system has been entrusted, by statute, to the Director of Transportation. But the Tenth District's decision, if allowed to stand, means that the judiciary will be able to decide whether a highway easement is still being "used" intensively enough to prevent abandonment. With thousands of miles of rights-of-way potentially at issue, the consequences of this judicial incursion into highway administration are significant. And those effects cannot be remedied unless this Court

reverses, because such cases will necessarily arise in Franklin County and will be controlled by the Tenth District's decision in this case.

**B. The Tenth District's ruling directly conflicts with this Court's *Bigler* decision, which held that the court of common pleas does not have jurisdiction to quiet the title to a township road.**

The decision below is also of great significance because it squarely conflicts with a decision of this Court governing the vacatur or abandonment of roadways. In *Bigler v. Township of York* (1993), 66 Ohio St. 3d 98, this Court held that a common pleas court lacked jurisdiction to quiet title to a township road because a statute, R.C. 5553.042, provided the exclusive mechanism for vacating the road. That statute gives a board of county commissioners discretion to vacate a township road, upon petition, if it finds the road has been abandoned and unused for twenty-one years. *Id.* at 100.

The Court in *Bigler* emphasized that “upon determining that an abandonment has occurred, along with finding nonuse for a period of twenty-one years, the board of county commissioners ‘may’—and is not obligated to—order the road vacated.” *Id.* at 100. Such administrative discretion was needed because “[c]onveying a public road into the hands of private ownership” requires a balancing of public and private interests that “is not possible in a quiet title action.” *Id.* This balancing might dictate keeping a right-of-way in public hands even if the road in question had been abandoned and unused for twenty-one years. *Id.* at 101. The ability to make that decision, however, would be lost if a quiet title action were available. *Id.* Accordingly, the Court concluded that a common pleas court could not have jurisdiction to quiet the title to a township road. *Id.*

Just as R.C. 5553.042 gives a board of county commissioners the discretion to vacate a township road, R.C. 5511.01 and R.C. 5511.07 give the Director of Transportation discretion to abandon or vacate part of a state highway. The Director has that discretion for the same reasons

as the county commissioners in *Bigler*: because the decision to vacate a road, even if unused, “involves the careful weighing of widely diverse interests and public-policy considerations.” *Id.*

Nonetheless, the Tenth District decided that *Bigler* could not control because, unlike R.C. 5553.042, the state-highway abandonment statute does not provide a way for servient owners to raise claims by petition. Op. ¶ 23. Apparently the Tenth District believed that the statutory petition mechanism in *Bigler* was the functional equivalent of a common law abandonment claim, and therefore displaced it. *Id.* But that reasoning is belied by *Bigler*, which held that a board of county commissioners has exclusive jurisdiction precisely because it could decide to keep roadway rights-of-way in public hands even on facts that would require a court to rule it abandoned. 66 Ohio St. 3d at 101.

Under R.C. 5553.042 and *Bigler*, a petitioner cannot assert a superior right to township road property and have it adjudicated. Instead, the petition is simply a way to ask the government, in its discretion, to relinquish the road. But no statute is needed to confer that privilege. The people of the State always have the right to petition their government for the redress of grievances. ODOT itself has an internal procedure for considering requests to vacate highway easements. ODOT Office of Real Estate, Property Management, § 7404, available at <http://www.dot.state.oh.us/real>. And while the Director might decide to keep control of a highway easement that would be “abandoned” at common law, his power is no greater than the county commissioners’ discretion upheld in *Bigler*.

The Tenth District’s decision appears to rest on a misconceived notion of fairness. If a highway easement has not been used for twenty-one years, the appeals court seems to have supposed, why should not the owner of the servient estate be able to extinguish it? What the court failed to recognize, however, is that the State fully compensated New 52’s predecessor-in-

title for the burden that the perpetual highway easement imposed on the property. See *State ex rel. Fogle v. Richley* (1978), 55 Ohio St. 2d 142, 146. Since adequate consideration was given, New 52 has no more right to demand clear title than to demand a re-appropriation of the property for which its predecessor was already paid.

By departing from the reasoning of *Bigler*, the Tenth District's decision puts the cart before the horse. The township roads that *Bigler* addressed are the minor capillaries of Ohio's road system: They often are narrow, thinly paved, and little traveled. Roads within the state highway system, by contrast, are the major arteries. Yet the decision below inverts this order. It means that, under *Bigler*, the rights-of-way that underlie small township roads cannot be judicially abandoned, but that major state highways *can* be. This nonsensical result cannot stand. *Bigler* controls this case, and the Tenth District had no basis to depart from it.

## ARGUMENT

### **Appellant's Proposition of Law No. 1:**

*Because the decision to relinquish a public right-of-way—even one that has been unused for twenty-one years—involves a careful balancing of public and private interests, a court of common pleas does not have jurisdiction to adjudicate whether a state highway easement has been forfeited. Bigler v. Township of York (1993), 66 Ohio St. 3d 98, approved and followed.*

Even if a township road has been abandoned and unused by the public for twenty-one years, the decision whether to let the abutting landowners regain control of the property is committed, by statute, to the discretion of the county commissioners. *Bigler v. Township of York* (1993), 66 Ohio St.3d 98; R.C. 5553.042. That is because the disposition of public road right-of-way is not just a contest between two claimants; rather, the decision “to vacate a township road involves the careful weighing of widely diverse interests and public-policy considerations.”

*Id.* at 100. These considerations might lead the commissioners to keep a right-of-way intact even if the road had not been used for twenty-one years.

*Bigler's* reasoning applies to the right-of-way at issue here. Neither of the Tenth District's two reasons for distinguishing *Bigler* is correct. First, the appeals court said the state-highway abandonment statute did not expressly repeal the common law cause of action. Op. ¶ 23. But neither did the township-road statute at issue in *Bigler*. Second, the court said the state-highway abandonment statute "does not concern servient estate owners' claims." *Id.* But the petition procedure in R.C. 5553.042 addressed in *Bigler* did not concern such "claims" either. It did not give a servient owner the right to have a claim adjudicated or enforced, because, like the Director under R.C. 5511.01 and R.C. 5511.07, the county commissioners did not have any obligation to vacate a township road no matter how long it has been unused or abandoned. The Tenth District's reasons for not following *Bigler* are therefore illusory.

Furthermore, the servient estate's owner or predecessor in title was already compensated for the perpetual highway easement. Allowing the owner later to force abandonment of the property is no different, in principle, than allowing him to force it to be appropriated again if the use of it changes. This Court rejected that idea in *State ex rel. Fogle v. Richley* (1978), 55 Ohio St.2d 142, 146.

**Appellant's Proposition of Law No. 2:**

*A court of common pleas does not have jurisdiction to decide whether a state highway easement has been abandoned because R.C. Title 55 gives the Director of Transportation exclusive authority to abandon or vacate portions of the state highway system.*

New 52 seeks "abandonment" of a perpetual highway easement held by the state. Op. ¶ 7. The abandonment of a state highway is governed by R.C. 5511.01, which says the Director of Transportation "may, upon giving notice and holding a hearing, abandon a highway on the state

highway system or part thereof.” If the Director decides to do so, “the abandoned highway shall revert to a county or township road or municipal street.” *Id.*

Alternatively, New 52 seeks a declaration that the State’s easement had been extinguished or forfeited, effectively quieting title in it. Op. ¶¶ 7, 24. The procedure for vacating state highway property the Director “finds no longer necessary for the purposes of a public highway” is set forth by R.C. 5511.07, which provides for a finding by the Director, notice by publication and by service on abutting landowners, and a hearing of claims. Service must also be made on the Director of Natural Resources, who is charged by statute with identifying abandoned or unmaintained highway property that is suitable for recreational use. R.C. 1519.03.

These statutes give the Director the discretionary power to abandon or vacate state highway property and also regulate his exercise of that discretion. At common law, “abandonment is proved by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement.” *West Park Shopping Center, Inc. v. Masheter* (1966), 6 Ohio St. 2d 142, 144. Here, however, the means by which the Director may express an intention to abandon, and the acts he must take to effectuate that intention, are spelled out by enacted law.

These statutes ensure the right to use public highway property is not lost by inadvertence. Similar concerns animated *Houck v. Board of Park Comm’rs*, 116 Ohio St. 3d 148, 2007-Ohio-5586, which held that adverse possession does not lie against the state and its political subdivisions partly because of the difficulty inherent in actively controlling and managing thousands of acres of property spread out over hundreds of miles. *Id.* at ¶ 27. If the law does not allow a claim of title based on an abutter’s adverse use of public property, by the same token it should not allow an abutter’s claim to quiet title based on the public’s nonuse of property.

Application of common law abandonment doctrine to state highway easements would negate legislative intent in other ways as well. R.C. 5511.01 and 5511.07 each provide for notice and public involvement that a lawsuit between two parties would not provide. The rights and interests of the public would not, and could not, be considered by a common pleas court in deciding the merits of an abandonment claim. Nor could the court decide whether the highway easement should be used for recreational or trail purposes, as R.C. 5511.07 and R.C. 1519.03 empower the Director of Natural Resources to do. If an administrative decision to vacate part of a state highway is being considered, the Director must consider claims for damage resulting from the vacation. R.C. 5511.07. If the claims are too great, the Director can change course, because there is no final determination until all the damage awards have been accepted or deposited in court. *Id.* But if a single abutter could force abandonment, the Director could not avoid other damage claims. Conversely, if the Director wanted to avoid damage claims entirely, he could do so by simply closing the highway to public use for twenty-one years, thereby “abandoning” it without cost.

By enacting R.C. 5511.01 and R.C. 5511.07, the legislature not only gave the Director discretion to abandon or vacate state highway property but also specified the procedures to be used in exercising that discretion. Both procedures and discretion would be lost if common law abandonment applied to state highway easements.

These statutes share a historical root. General Code § 1202, enacted by the General Assembly in 1927, authorized the director of highways to “alter, widen, straighten, re-align or relocate any road or highway on the state highway system” and, in the process, if “there is any portion of the existing road or highway which he deems not needed for highway purposes he may vacate and abandon such portion.” 1927 H.B. No. 67, 112 Ohio Laws 430, 440. The same

act specified that the director would take title to highway property “by easement deed.” *Id.* As this enactment shows, even if a highway right-of-way was acquired by easement, the General Assembly gave the director discretionary authority to vacate and abandon the easement if he deemed it “not needed for highway purposes.” This grant of discretionary authority is inconsistent with common law abandonment.

### CONCLUSION

For the above reasons, the Court should review this case and reverse the decision of the court below.

Respectfully submitted,

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*\*Counsel of Record*

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Director, Ohio Department of  
Transportation

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant Director, Ohio Department of Transportation, was served by U.S. mail this 24th day of March 2008 upon the following counsel:

David Reid Dillon  
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Ironton, Ohio 43160

Counsel for Plaintiff-Appellee  
New 52 Project, Inc.



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William P. Marshall  
Solicitor General

# **EXHIBIT 1**

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2008 FEB -7 PM 12:18  
CLEVELAND, OHIO

New 52 Project, Inc., :

Plaintiff-Appellant, :

v. :

Gordon Proctor, Director of the Ohio  
Department of Transportation, :

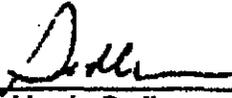
Defendant-Appellee. :

No. 07AP-487  
(C.P.C. No. 06CVH11-14899)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 7, 2008, appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellee.

SADLER, BRYANT, and KLATT, JJ.

By   
Judge Lisa L. Sadler

# **EXHIBIT 2**

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 FEB - 7 PM 12: 18  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

New 52 Project, Inc.,

Plaintiff-Appellant,

v.

Gordon Proctor, Director of the Ohio  
Department of Transportation,

Defendant-Appellee.

No. 07AP-487  
(C.P.C. No. 06CVH11-14899)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on February 7, 2008

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*David Reid Dillon*, for appellant.

*Marc Dann*, Attorney General, and *Frederick C. Schoch*, for  
appellee.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

(¶1) Plaintiff-appellant, New 52 Project, Inc. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted the motion of defendant-appellee, Gordon Proctor, Director of the Ohio Department of Transportation ("appellee"), to dismiss appellant's complaint pursuant to Civ.R. 12(B)(6).

{¶2} Appellant advances one assignment of error for our review:

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS WHEN THE COMPLAINT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

{¶3} Civ.R. 12(B)(6) authorizes a defendant to assert by motion that the plaintiff's complaint fails to state a claim upon which relief may be granted. Such a motion tests the sufficiency of the complaint. *State ex rel. Hanson v. Guemsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. Therefore, a court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12(B)(6) motion to dismiss. *Singleton v. Adjutant Gen. of Ohio*, Franklin App. No. 02AP-971, 2003-Ohio-1838, ¶18.

{¶4} In addition, a court must presume that all factual allegations in the complaint are true and must draw all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. However, "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." *Phelps v. Office of Attorney Gen.*, Franklin App. No. 06AP-751, 2007-Ohio-14, ¶4, quoting *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128. Our review is de novo. *Krukrubo v. Fifth Third Bank*, Franklin App. No. 07AP-270, 2007-Ohio-7007, ¶11, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5.

{¶5} We begin with an examination of appellant's complaint, filed November 13, 2006. Therein, appellant alleges that it is the fee owner of real property that is the servient estate with respect to an easement that appellee has held since January 2, 1959.

Appellant attached to the complaint, as Exhibit A, a copy of the recorded document evidencing conveyance to appellee of the easement at issue. The document, entitled, "Easement for Highway Purposes," provides that appellant's predecessor-in-title, in exchange for consideration paid, would "grant, bargain, sell, convey and release to [appellee] \* \* \* a perpetual easement and right of way for public highway and road purposes in, upon and over the lands hereinafter described \* \* \*." (Exh. A.)

{¶6} Appellant alleges that appellee used the easement "for highway purposes for some years, being used as the main route of U.S. 52 for ingress to and egress from Chesapeake, Ohio." (Complaint, ¶5.) Appellant further alleges, "Beginning approximately 1984 or 1985, the highway was rerouted and the previous highway became an exit ramp and was rerouted so it did not traverse the easement at issue here but instead deadended into First Street and thence connected with Third Street in Chesapeake (also County Road 1)." (Id. at ¶6.) Finally, the complaint states, "From and after that time, the easement held by defendant or a major portion thereof has ceased to be used as an exit or for any other highway purposes for a period exceeding the statutory period of twenty-one years and by the terms of the original conveyance or by law should be held to be extinguished and plaintiffs seized of the entire, unencumbered freehold." (Id. at ¶7.)

{¶7} Appellant prays for a declaration that appellee has abandoned the easement or that the easement has been extinguished, and that appellant is the sole owner of the real property, free from the easement.

{¶8} On December 21, 2006, appellee filed its motion to dismiss. Therein, it argued that appellant's complaint failed to state a claim upon which relief may be granted because: (1) the complaint is based upon a claim of adverse possession, which does not lie against the state; and (2) the complaint is based upon a claim of abandonment, which cannot occur through mere nonuse, but only through adherence to the procedures found in R.C. 5511.01.

{¶9} Appellant responded, arguing that its complaint does not advance a claim for adverse possession, but that it does state a valid claim that appellee has abandoned the easement through nonuse thereof, and that the easement is therefore extinguished. Appellant argued that R.C. 5511.01 is inapplicable because that statute only deals with abandonment of highways, and the land in question is no longer a highway, having not been used as a highway for over 20 years.

{¶10} In granting the motion to dismiss, the trial court reasoned that even if appellee has not used the subject easement for highway purposes since 1984 or 1985, because the original easement was for highway purposes, the easement remains a "highway" for purposes of R.C. 5511.01. The court determined that appellant has no common law cause of action for abandonment, citing the case of *Bigler v. York* (1993), 66 Ohio St.3d 98, 609 N.E.2d 529, in which the Supreme Court of Ohio held that a statute that prescribes procedures for abandonment of a township road provides the exclusive manner by which a township road may be abandoned.

{¶11} R.C. 5511.01 provides, in pertinent part:

The director [of the Ohio Department of Transportation] may, upon giving appropriate notice and offering the opportunity for

public involvement and comment, abandon a highway on the state highway system or part of such a highway which the director determines is of minor importance or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering that action shall be filed in the office of the director, and the director shall certify the action to the board of the county in which the highway or portion of the highway so abandoned is situated.

The trial court went on to conclude that because the complaint does not allege that appellee's director has complied with the procedures for abandonment of a highway under R.C. 5511.01, it fails to state a claim for abandonment of the easement.

{¶12} On appeal, appellant again argues that statutory procedures for governmental abandonment of a highway are inapplicable because this case does not involve a highway; rather, it concerns a public easement. Appellant argues that the rule applicable herein is set forth in the case of *Lawrence RR. Co. v. Williams* (1878), 35 Ohio St. 168. There, the Supreme Court of Ohio explained that when the public holds a highway easement, "The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance." *Id.* at 171-172.

{¶13} Appellant also directs our attention to the case of *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639, in which the Supreme Court of Ohio held that, notwithstanding then-existing Ohio statutes that prescribed abandonment procedures, a public entity's nonuse of a highway easement could work an abandonment thereof, if such nonuse continued for at least 21 years. The court stated, "we hold that where non-user [sic] by the public, of a street within a city is relied upon as

proving an abandonment of it, such non-user [sic] must be shown to have continued for a period of twenty-one years." *Id.* at 548. Appellant further cites the earlier case of *Fox v. Hart* (1842), 11 Ohio 414, in which the Supreme Court of Ohio held that the public right to a highway may be lost by nonuse.

{¶14} Finally, appellant cites our own case of *Burdge v. Bd. of Cty. Commrs.* (1982), 7 Ohio App.3d 356, 7 OBR 454, 455 N.E.2d 1055. In that case, the trial court found that a county road had been abandoned and quieted title in the abutting landowners on that basis. Citing *Kelly Nail & Iron*, *supra*, this court held that "abandonment by nonuse is a valid legal doctrine which may be proven in a factually proper case." *Id.* at 356. We rejected the county commissioners' and township's argument that R.C. 5553.042, et seq., which delineates the procedure to be followed for vacation of a county road, precludes an action to declare an abandonment through nonuse for at least 21 years.

{¶15} In response to appellant's arguments, appellee argues that the Supreme Court of Ohio rejected the rationale espoused in appellant's cases when it decided *Bigler*, the case upon which the trial court relied.<sup>1</sup> In *Bigler*, the plaintiffs sought to quiet title to land comprising a township road. The Supreme Court of Ohio rejected the plaintiffs' argument that the township lost all rights to the road through nonuse for 21 years, because R.C. 5553.042 provides that a township loses all rights to any road "which has been abandoned and not used for a period of twenty-one years, after formal proceedings

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<sup>1</sup> We agree with appellee's argument that *Bigler* implicitly overruled our holding in *Burdge* because both of those cases involved the same issue and the same statute.

for vacation as provided in sections 5553.04 to 5553.11 of the Revised Code have been taken." In other words, the court enforced both requirements for abandonment contained in the statute: (1) nonuse for 21 years, by which the General Assembly incorporated the common law into the statute, and (2) formal vacation proceedings under R.C. 5553.04 to 5553.11, which vest discretion in the county commissioners whether to ultimately vacate the road and pass the title in fee to the abutting landowners. Appellee maintains that, under the rationale espoused in *Bigler*, R.C. 5511.01 is the exclusive method by which appellee may abandon a highway.

(¶16) Appellee also argues that appellant's abandonment claim is essentially equivalent to a claim for adverse possession, which generally does not lie against the state. *Houck v. Bd. of Park Commrs.*, 116 Ohio St.3d 148, 2007-Ohio-5586, 876 N.E.2d 1210, ¶18. Appellee does not offer, and we are unable to find, any support for the notion that a servient estate owner's claim for abandonment of an easement is the functional equivalent of a claim for adverse possession. Moreover, the elements of each claim are substantively different. Abandonment focuses on the acts and omissions of the dominant estate-holder and requires that the owner of the servient estate prove both nonuse and an affirmative intent to abandon the easement. *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457, 674 N.E.2d 741. Adverse possession, on the other hand, focuses on the acts of the one claiming prescriptive ownership, and requires proof of exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus. Therefore,

we reject appellee's argument in this regard, and focus solely on its contention that R.C. 5511.01 precludes appellant's claim.

{¶17} Appellant argues that the *Bigler* case is not dispositive because the statute in *Bigler* incorporated the common law rule that public easements no longer in use will revert to the adjoining landowners; and it did not bar abutting landowners from asserting their exclusive rights to land no longer used as a public road. Appellant argues that here, because R.C. 5511.01 provides no mechanism for servient estate owners to call a public entity to account for its nonuse of a highway easement, and provides no reversion to the servient estate owner, the common law rule should be applied when invoked.

{¶18} Thus, we must endeavor to reconcile *Bigler*, in which the Supreme Court of Ohio held that "R.C. 5553.042 provides the exclusive remedy for abutting landowners who desire a township road to be vacated," with *Kelly Nail & Iron*, in which the court held that even where statutes prescribe procedures for a public entity to formally vacate a road, if the public entity has made no use of a road easement for 21 years, then an abutting landowner may bring a claim for abandonment.

{¶19} After *Kelly Nail & Iron*, the Supreme Court of Ohio has continued to develop the concept of a common-law action for forfeiture of an easement through abandonment. "An abandonment is proved by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement." *W. Park Shopping Ctr. v. Masheter* (1966), 6 Ohio St.2d 142, 144, 35 O.O.2d 216, 216 N.E.2d 761; see, also, *Wyatt v. Ohio Dept. of Transp.* (1993), 87 Ohio App.3d 1, 5, 621 N.E.2d 822.

{¶20} It is true that unlike the statute at issue in *Bigler*, the statute invoked here -- R.C. 5511.01 -- provides only for the Ohio Department of Transportation to initiate proceedings to abandon a highway easement, and mandates that any abandoned highway reverts to a county or township road or municipal street. The statute provides no mechanism by which an owner of a servient estate may claim an abandonment of a public highway easement and may quiet the title in himself on that basis. Accordingly, we must determine whether the landowner's common-law right survived the enactment of R.C. 5511.01,<sup>2</sup> or whether R.C. 5511.01 limited or eliminated the common law right.

{¶21} "In Ohio, 'not every statute is to be read as an abrogation of the common law. "Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*" ' " (Emphasis sic.) *Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, 815 N.E.2d 658, ¶11, quoting *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096, quoting *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 7 Ohio L. Rep. 408, 90 N.E. 146, paragraph three of the syllabus.

{¶22} "Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force. There is no repeal of the common law by mere implication."

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<sup>2</sup> The statute was first enacted prior to 1953.

(Citations omitted.) *Carrel v. Allied Prods. Corp.* (1997), 78 Ohio St.3d 284, 287, 677 N.E.2d 795. "The rule of strict construction refuses to extend the law by implication or inference and recognizes nothing that is not expressed." *Id.* at 288, citing *Iron City Produce Co. v. Am. Ry. Express Co.* (1926), 22 Ohio App. 165, 153 N.E. 316.

{¶23} By its plain language, R.C. 5511.01 provides a mechanism by which the director of the Ohio Department of Transportation may initiate proceedings to formally abandon a highway, whether or not that highway traverses an easement; but it says nothing at all about claims by servient estate owners asserting that the department has abandoned a highway easement through nonuse. The statute neither expressly repeals nor incorporates any aspect of the common law cause of action for abandonment of a highway easement. Given that R.C. 5511.01 does not concern servient estate owners' claims, and with no explicit statement that the statutory provisions in R.C. Chapter 5511 are the exclusive means by which a public entity may abandon or vacate a highway easement, we cannot infer that the General Assembly intended to repeal the common law action for forfeiture of a highway easement based upon abandonment through nonuse. See *id.*, at 287-288.

{¶24} For these reasons, we hold that R.C. 5511.01 did not abrogate or limit the common law right of the fee owner of the servient estate to bring an action seeking a declaration that a public highway easement has been forfeited through abandonment. Accordingly, the trial court erred when it determined that no common law cause of action for abandonment is available. Appellant's complaint states that appellee has not used its highway easement, or a portion thereof, for more than 21 years; and that appellee, years

ago, constructed a new roadway to replace that which formerly traversed the easement; and prays for a declaration that appellee has forfeited the easement by abandonment. In light of all of the foregoing, appellant's complaint states a claim upon which relief may be granted.

{¶25} Accordingly, appellant's sole assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings.

*Judgment reversed; cause remanded.*

BRYANT and KLATT, JJ., concur.

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